

MUKESH SINGH V. STATE (NARCOTIC BRANCH OF DELHI): A VERDICT *PER INCURIAM*

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ABSTRACT

On 31 August 2020, a Constitution Bench of the Hon'ble Supreme Court held that even if the informant or the officer who conducted search and seizure acts as the investigating officer in a case concerned with offences under the Narcotics Drugs and Psychotropic Substances Act, 1985, the proceeding cannot be said to be vitiated. While deciding so, the Hon'ble Court has not taken any notice of several grounds including statutory provisions which essentially make the verdict an unjustified one. The Court has endeavoured to draw a comparison between the certain offences under the Indian Penal Code, 1860 and the NDPS Act to justify reverse burden placed on the accused. However, it has not appreciated the fact that Section 35(2) of the Act places an onerous burden on the accused, i.e. it has to prove its case beyond reasonable doubts, unlike in the cases of reverse burden under the IPC (e.g. Section 304B) where the burden can be released by the accused only on the basis of preponderance of probabilities. Further, it has not considered, in a proper manner, the effect of such a view on the implementation of Section 58 of the NDPS Act. The judgment has utterly failed to appreciate, on the touchstone of doctrine of proportionality, the pragmatic procedural repercussions on the accused and the difficulties that the defence will be forced to face while proving its innocence. In consequence, the decision has substantially disregarded the fundamental rule of criminal justice system, i.e. 'the presumption of innocence' of the accused. Above all, an analogy between Section 157, Cr.P.C. and the provisions of NDPS is superfluous as the former comes with necessary safeguards, but the latter is denied of the same due to applicability of Section 68 of the NDPS Act. Ergo, with all respect for the majesty of the Hon'ble Court, the authors seek to establish the factors which necessarily makes the judgment a per incuriam one.

Keywords: NDPS; reverse burden; per incuriam; doctrine of proportionality; procedural fairness; standard of proof.

A. EXORDIUM

A Constitution Bench of the Hon'ble Supreme Court of India, while answering a reference, has recently held¹⁸⁶⁵ that even if an informant acts as the investigating officer in a case concerning offences under the Narcotic Drugs and Psychotropic Substances Act, 1985¹⁸⁶⁶ (hereinafter referred as 'NDPS Act'), it cannot be said that the trial is vitiated. There are manifold reasons as to why the judgment rendered by the Apex Court is not a good law. The criterions are discussed below which essentially qualify the verdict to be *per incuriam*.

B. THE EFFECT OF SECTION 58 OF NDPS ACT BECOMES REDUNDANT

The Section 58(1) provides for the punishment for vexatious entry, search, seizure or arrest. It says if a person empowered under Section 42 or 43 or 44 of the Act, without any reasonable ground of suspicion enters or searches, or causes to be entered or searched, any building, conveyance or place;¹⁸⁶⁷ or vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any narcotic drug or psychotropic substance or other article liable to be confiscated under this Act, or of seizing any document or other article liable to be seized under section 42, section 43 or section 44;¹⁸⁶⁸ or vexatiously and unnecessarily detains, searches or arrests any person¹⁸⁶⁹ shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. It is pertinent to note that the investigating officer can file the police report against the accused indicting him for the offences committed or he has to file the same against the officer empowered under Section 42 or 43 or 44 for his vexatious actions.

However, if the rulings of the judgment are implemented then the person who carries out functions under the aforesaid Sections will also be empowered to investigate the case. It means that person will be required to file a police report against himself if his actions are found to be vexatious or unnecessary. It is neither acceptable nor expected that a person will indict himself for wrong committed by him.

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¹⁸⁶⁵ Mukesh Singh v. State (Narcotic Branch of Delhi), Special Leave Petition (Criminal) Diary No.39528/2018.

¹⁸⁶⁶ Act No. 61 of 1985.

¹⁸⁶⁷ Section 58(1)(a).

¹⁸⁶⁸ Section 58(1)(b).

¹⁸⁶⁹ Section 58(1)(c).

The Hon'ble Constitution Bench goes on to justify that if any person empowered under Sections 42, 43 or 44 of the NDPS Act acts vexatiously or maliciously, such an offence is required to be investigated by the "officer in charge of a police station" other than the officer who exercised the power of entry, search, seizure or arrest under Sections 42, 43, or 44 as naturally in such a case he would be a proposed accused and therefore he cannot be permitted to investigate and to be a judge in his own cause. However, the Court fails to explain the procedure that will be followed to investigate the same. If the person empowered under the aforesaid Sections proceeds with the investigation and files the police report against the accused while he might have exercised his power under those Sections maliciously, there is no procedure as to how the investigation will be done against such officer. There is every possibility that the person will conceal every such evidence which will incriminate him for the offence under Section 58. Though the Hon'ble Court has categorically held that in such cases the officer in charge of police station other than that officer will investigate the matter, nevertheless, it is quite impossible to know which case deserves investigation by an independent officer, without conducting the investigation itself.

C. THE COURT HAS MISPLACED THE ANALOGY FOR REVERSE BURDEN

The Counsel for the petitioner had advanced the argument for need of greater circumspection as there is reverse burden in case of offences committed under the NDPS Act. While rejecting the contention, the Court held that the concept of reverse burden is not unique to special laws like NDPS Act and the Prevention of Corruption Act,¹⁸⁷⁰ rather the same is also available under Section 304B of the Indian Penal Code, 1860¹⁸⁷¹ (hereinafter referred as 'IPC'). However, this analogy is blatantly erroneous.

Section 304B, IPC does not itself provide a reverse burden on the accused. Section 113B of the Indian Evidence Act, 1872¹⁸⁷² prescribes that when there is a question whether a person has committed the dowry death of woman and it is shown that soon before her death she had been subjected to cruelty by such person in connection with any demand for dowry, then the Court shall presume that such person had caused the dowry death.

It is apposite to note that the nature of reverse burden in the case of offences under Section 304B, IPC and under the NDPS Act is completely distinct from one another. Under Section 35(1), NDPS Act, in any prosecution for an offence under the Act which requires a culpable

¹⁸⁷⁰ Act No. 49 of 1988.

¹⁸⁷¹ Act No. 45 of 1860.

¹⁸⁷² Act No. 1 of 1872.

mental state of the accused, the Court shall presume the existence of such mental state. Though, the accused still shall have the opportunity to prove that he had no such mental state with respect to the indictment, howbeit, Section 35(2) comes as a major hindrance in doing so. It provides that for the purpose of the Section, a fact is said to be proven only when Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by preponderance of probability. It means the accused has to prove the absence of his culpable mental state beyond a reasonable doubt, unlike in the case of reverse burden under 113B, the Evidence Act where the reverse burden on the accused can be released on the basis of a lesser standard of proof, *i.e.* preponderance of probability.

D. THE DOCTRINE OF PROPORTIONALITY HAS NOT BEEN COMPLIED WITH

The presumption of innocence is a human right.¹⁸⁷³ When there is a provision for reverse burden is inserted in a statute, utmost circumspection must be shown towards its practical enforcement. It can be lucidly expressed by citing the excerpts from an article titled “**The Presumption of Innocence and Reverse Burdens: A Balancing Duty**”.¹⁸⁷⁴

“In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice – where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.”

It is pertinent to mention that while upholding Section 35 and 54 of the NDPS Act, the Hon’ble Apex Court had observed that the doctrine of proportionality must be taken into consideration while adjudging the validity of a provision prescribing reverse burden on the accused.¹⁸⁷⁵ The Court had cited the case *Sheldrake v. Director of Public Prosecutions*¹⁸⁷⁶ to buttress its reasoning. The relevant observations may be reproduced as “*the substance and*

¹⁸⁷³ Narender Singh v. State of Andhra Pradesh, (2004) 10 SCC 699; Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294; Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC 70.

¹⁸⁷⁴ [2007] C.L.J. (March Part) 142.

¹⁸⁷⁵ State of Punjab v. Noor Aga, (2008) 16 SCC 417.

¹⁸⁷⁶ (2005) 1 All ER 237.

effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.”

From the above observations it may be concluded that the Court has given due importance to the difficulties those may arise on the way of prosecution while proving its case. However, the Court should not have been oblivious to the fact that Section 35(2) of the Act places a higher standard of proof for the accused to prove its innocence, *i.e.* beyond reasonable doubt. In case the investigating officer is the same who had seized the substances, then the accused is deprived of his right of procedural fairness. The procedural safeguards must be proportionate to the standard of proof. In these circumstances, it becomes an onerous task for the defence to prove its innocence. It would be a travesty of justice if procedures are allowed to be bypassed as there is a requirement of the highest degree of proof to get the accused absolved of the charges.

Further, Section 54 of the Act provides for presumption of guilt against the accused once possession of illicit article is established. It is to be noted that in many cases search is conducted even without the presence of the nearest Gazetted Officer or Magistrate.¹⁸⁷⁷ It has also been held that search and seizure before Magistrate is not mandatory in all cases.¹⁸⁷⁸ In such cases, there are ample possibilities that the officer who conducted the search shall be the sole seizure witness. If that officer is allowed to investigate the matter, he will definitely have a stake in the case. It would be difficult for the accused to disprove the alleged possession, as the investigating officer is hardly expected to depose in favour of the accused.

E. COMPARISON BETWEEN SECTION 157 OF CR.P.C. AND THE PROVISIONS OF NDPS IS GRATUITOUS

In the para 6.8. of the verdict, the Court has opined that under Section 157, Cr.P.C., an officer may proceed to investigation if he receives any information or has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate. Hence, the Court draws the conclusion that the Code also allows the informant to act as the

¹⁸⁷⁷ Section 50(5).

¹⁸⁷⁸ Innocent Uzoma v. State, Criminal Appeal No. 139 of 2017 (Delhi High Court).

investigator under the Section and therefore, it held that it would not be illegal if the same is done in case of offences under the NDPS Act. However, the Hon'ble Court has failed to take into consideration the safeguards provided under that particular Section, *i.e.* such officer is required to send a report to a Magistrate empowered to take cognizance of such offence and there are also certain safeguards provided under Section 158 and 159 to that effect. So, the officer is required to mention his 'reason to suspect' in the report. However, the express provision under Section 68 of the NDPS Act gives a right to the officers to not to disclose their sources of information or in other words, they cannot be compelled to say from where they got information regarding such offences, before proceeding for search or seizure.

Therefore, any comparison between Section 157, Cr.P.C. and the provisions of NDPS Act is uncalled for and should be avoided, in the failure of which the entire proceeding is likely to cause prejudice to the parties concerned, particularly to the accused.

F. THERE IS NO JUSTIFICATION FOR ELUDING FROM EXPRESS STATUTORY PROVISIONS

The application of the maxim *expressum facit cessare tacitum*, which means when there is an express mention of certain provisions, then which is not mentioned is excluded. In this context, one must recall the words of Lord Reid in *Atkinson v. United States of America Government*.¹⁸⁷⁹ He held that Court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice and is not plainly against the intention of Parliament. However, in this case the Court has exceeded its jurisdiction while allowing informant to conduct investigation, as it is not only against the interests of the accused persons, rather it is an express violation of the intention of the legislature.

G. DENOUEMENT

The Hon'ble Court has held that the mere fact that informant and investigating officer are the same does not vitiate the case, however, it has not taken into consideration the principle of presumption of innocence of accused and the higher degree of standard of proof that is required to prove innocence. Though, it is a matter of fact as to whether the trial of a case is vitiated, still, the Court is under an obligation to provide the due assurance to accused persons that procedural safeguards will be complied without any diversion. It has to ensure that justice is not only done, rather it also must be seen to have been done.

¹⁸⁷⁹ [1971] A.C. 197.