

**POLICE**



**KERALA**

**DEPARTMENT**

**No.U6-111285/2020/PHQ**

Kerala Police Headquarters,  
Thiruvananthapuram

Dated: 02.10.2020

**CIRCULAR: 39/2020**

Sub: NDPS Cases – investigation – informant/complainant and the investigating officer can be the same person - directions for the conduct of a fair investigation - reg.

Ref: 1. Judgment dated 16-08-2018 of the Hon'ble Supreme Court of India in the case Mohan Lal Vs. State of Punjab [Criminal Appeal No.1880 of 2011]

2. Circular No.32/2018 dated 15-11-2018 of the State Police Chief.

3. Judgment dated 11-02-2019 of the Hon'ble Supreme Court of India in the case Varinder Kumar Vs The State of Himachal Pradesh [Criminal Appeal Nos. 2450-2451 of 2010]

4. Judgment dated 31-08-2020 of the Hon'ble Supreme Court of India in the case Mukesh Singh Vs. State (Narcotic Branch of Delhi)[SLP(Criminal) Diary No.39528/2018].

5. CoB Message of even No. dated 07-09-2020 from this office.

Hon'ble Supreme Court vide judgment 1st cited had taken the view that in case the investigation in an NDPS case is conducted by the police officer who himself is the complainant, the trial is vitiated and the accused is entitled to acquittal. Circular 2nd cited was issued by the State Police Chief on the basis of the said dictum. Later, in the case Varinder Kumar v. State of Himachal Pradesh, vide judgment 3rd cited, the apex court held that the decision of the Court in Mohan Lal's Case shall be applicable prospectively,

meaning thereby, all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal's Case shall continue to be governed by individual facts of the case. Now, Hon'ble Supreme Court vide judgment 5th cited had overruled the dictum in the Mohan Lal's Case and laid down the law on the point as below:-

*" I. That the observations of this Court in the cases of Bhagwan Singh v.State of Rajasthan (1976) 1 SCC 15; Megha Singh v. State of Haryana (1996)11 SCC 709; and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam(2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;*

*II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this*

*Court in the case of Mohan Lal v. State of Punjab (2018) 17 SCC 627 and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."*

Hon'ble Court held that the question of bias will have to be decided on the facts of each case.

NDPS Act is a Special Act with the special purpose and with special provisions including Section 68 which provides that no officer acting in exercise of powers vested in him under any provision of the NDPS Act or any rule or order made there under shall be compelled to say from where he got any information as to the commission of any offence. Therefore, considering the NDPS Act being a special Act with special procedure to be followed under Chapter V, it was held that there is no specific bar against conducting the investigation by the informant himself and in view of the safeguard provided under the Act itself, namely, Section 58, it was further held that there cannot be any general proposition of law to be laid down that in every case where the informant is the investigator, the trial is vitiated and the accused is entitled to acquittal. Similarly, even with respect to offences under the IPC, Hon'ble court observed that there is no specific bar against the informant/complainant investigating the case. Only in a case where the accused has been able to establish and prove the bias and/or unfair investigation by the informant-cum investigator and the case of the prosecution is merely based upon the deposition of the informant-cum-investigator, meaning thereby prosecution does not rely upon other witnesses, more particularly the independent witnesses, in that case, where

the complainant himself had conducted the investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record. Therefore, the matter has to be decided on a case to case basis without any universal generalisation. It is not proper to lay down a broad and unqualified proposition that in every case where the police officer who registered the case by lodging the first information, conducts the investigation that itself had caused prejudice to the accused and thereby it vitiates the entire prosecution case and the accused is entitled to acquittal.

**In view of the above restatement of the legal position by the apex court, Circular 2nd cited is amended and revised guidelines are issued as below:-**

**01.** The prosecution in many of the NDPS cases fails on account of defective investigation. The reason for faulty investigation starts right from the stage of registering FIR to maintenance of case diary, search and seizure of articles/contrabands and documents. It is the duty of the investigating agencies to investigate fairly and thoroughly and collect all evidences by strictly adhering to the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) during investigation of case, while ensuring vigorous and meaningful follow up during prosecution of such cases. **Some of the main reasons for acquittal in NDPS cases are found to be-**

(i). Contraband in a huge quantity is stated to be seized and sealed on the spot by the I.O. However, during the course of trial the seizure is proved to be of lesser quantity and not in consonance with the seizure memo.

- (ii). Places, from where the recoveries/seizures are made/effected are not proved because of contradictions by the witnesses in their deposition during the course of trial.
- (iii). Recovery and seizure from the accused is not proved because of contradictions in the statement of witnesses, they turning hostile etc. during the course of trial.
- (iv). Mandatory provisions, as laid down in Chapter V of the Act, particularly Sec. 42, 43, 50, 52-A, 55 and 57 are not complied with. There is an intentional and deliberate breach of Sec 55 by the Investigating Officer.
- (v). Personal search of the accused is not proved as the Gazetted Officers conducting the search are neither cited as witness nor examined during the course of trial.
- (vi). No entries are made in the *thondi* register about the seizures, samples taken for re-sealing etc. in order to prove the safe custody of the seized contraband.
- (vii). No witness including the police witnesses are examined during the course of trial or lesser number of witnesses are examined or deferred witnesses are not produced by the prosecution or the Police witnesses often don't support the story of the prosecution.
- (viii). Investigating Officers often fail to explain the contradiction which emerges from the facts of the case and the testimony of witnesses during the course of trial.

A large number of offenders in NDPS cases are acquitted due to non-compliance of mandatory provisions in the NDPS Act and the prescribed procedure. Hence all officers entrusted with the investigation/prosecution in

NDPS cases are instructed to strictly adhere to the mandatory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985.

**02.** NDPS cases provide for reverse burden of proof under sections 35 and 54 of the NDPS Act. Hence if the investigation itself is unfair, such reverse burden of proof on the accused which requires him to demonstrate prejudice will vest arbitrary powers in the police. This may also lead to false implication and victimization of innocents.

**03. In order to make the investigation impartial and fair under the NDPS Act, it is directed that,-**

- (i). The Detecting Officer/Informant Police Officer (eligible rank) can be the investigating officer. In that case, care may be taken to observe all the requirements of a fair investigation, eg., a fair investigation can be ensured by including more independent witnesses. So also the prosecution case should not be based solely upon the deposition of the informant-cum-investigator.
- (ii). The seized contraband article (thondy) and samples in sealed packets should be produced before the concerned Courts in prescribed form (151A Form) along with the accused to be remanded.
- (iii). The samples packets for chemical / FSL analysis should be sent to the lab on a forwarding note (duly filled) through the concerned Court within 72 hours of the registration of the case. Earlier it is better.
- (iv). The procedures of the search, seizure sampling and reporting during investigation of cases under NDPS Act will be strictly complied with as per

the provisions of Sections 42, 43, 50, 52, 55 and 57 and also as per the directions in Circular Nos.21/89, 16/99 and 17/2001 issued from PHQ.

(v). Necessary instructions shall be issued so as to ensure that the directions in the judgment 4th cited are strictly complied with, in future.

(vi). The date of effect of the judgment 4th cited (*Mukesh Singh* verdict) is 31-08-2020. With effect from 31-08-2020, the legal position prior to the pronouncement of the judgment dated 16-08-2018 in *Mohanlal's Case* stands restored.

(vii). During the period of operation of the *Mohanlal* judgment, that is, from 16-08-2018 to 30-08-2020, the instructions issued vide reference 2nd cited still holds good.

**04. The following infirmities in investigating NDPS cases shall also be urgently rectified by the officers concerned:**

**(i). Non-compliance u/s 42(2) NDPS Act**

Section 42(2) of the NDPS Act requires that an officer who takes down any information in writing under sub-section (1), or records grounds for his belief under the proviso thereto, shall, within seventy two hours send a copy thereof to his immediate superior. This statutory requirement is not being followed in most cases, instead of sending the copy of the information reduced into writing, the officer sends a report informing his superior officer that he is proceeding to the spot.

**(ii). Non-compliance u/s 50 NDPS Act.**

As per section 50, if the person to be searched requires the presence of the Magistrate or the empowered gazetted officer, the officer

shall take such person to the Magistrate or the empowered gazetted officer. But in almost all cases, it is reported that when the person to be searched is informed of this right, the officer takes steps to bring the presence of the Magistrate or the Gazetted Officer at the spot instead of taking the person to be searched to these officers as per legal requirement.

**(iii). Non-compliance u/s 52A NDPS Act**

Hon'ble Supreme Court vide judgment dated 28-01-2016 in the case Union of India Vs. Mohanlal [Crl. Appeal No.652 of 2012] lays down the procedure for the disposal of the seized narcotic drugs, psychotropic substances and conveyances and directed the compliance of section 52A. The said judgment also lays down the procedure of drawing the sample, disposal of drugs etc. It is reported vide reference 2nd cited that the procedure laid down in the judgment is not adhered to in drawing sample, disposing drugs etc.

**(iv). Partial compliance of section 57 NDPS Act**

Section 57 of the NDPS Act mandates the submission of a full report, whereas some officers file only a brief report.

The instructions issued vide Circular 2nd cited stands modified to the above extent with effect from 31-08-2020.

All Officers are hereby directed to comply with the judgment of the Hon'ble Supreme Court 4th cited immediately and DPCs are directed to



brief all the field officers. The immediate superior officers and controlling officers should ensure that all the above instructions are strictly followed. Any laxity in this regard will be viewed seriously.

*Mr. 2/10/2020*  
**Loknath Behera IPS**  
DGP & State Police Chief

- To : 1. All SHOs, All SDPOs, All DySsP CB, All SsP CB, All DPCs.  
2. All Officers in List A & B for information and urgent necessary action.  
3. Director FSL, Legal Advisor, DD SPMC, CAs to all Officers in PHQ and DD, PR for information & n/a

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**CoB TELE PHQ**  
Sir,  
Copy received for CoB transmission except local delivery.  
02 OCT 2020  
Time *1425* Sign *[Signature]*