

No. U6-133920/2018/PHQ

Police Headquarters, Kerala

Thiruvananthapuram - 695010

Dated: 15/11/2018

Circular No. 32/2018

Sub: NDPS Cases – Investigation – Informant/complainant and the Investigating Officer cannot be the same person - directions for the conduct of a fair investigation – Instructions issued - reg.

- Read: 1) Judgment dated 16-08-2018 of the Hon'ble Supreme Court of India in the case *Mohan Lal Vs. State of Punjab* [Crl. Appeal No.1880 of 2011].
2) Letter No. 25/18/AGPVTk dated 26/09/2018 of the Additional Public Prosecutor, Special Court (NDPS Act Cases), Vatakara.

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.

02. Some of the main reasons for acquittal in NDPS cases are found to be:-

- 1) The person, who recovers the contraband from the accused, lodges the FIR and investigates the same.
- 2) 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.
- 3) Places, from where the recoveries/seizures are made/effectuated are not proved because of contradictions by the witnesses in their respective depositions during the course of trial.
- 4) 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.
- 5) 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.
- 6) 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.
- 7) 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.

- 8) 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.
- 9) 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.

03. 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.

04. Hon'ble Supreme Court vide reference 1st cited had held that fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. NDPS cases provide for reverse burden of proof. 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. **The Court held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also.**

05. If the complainant is a Police Officer, he cannot be the Investigating Officer. This is so, because, in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and corroborating, the previous information recorded under Ss. 154 or 155 Cr.P.C. and previous statement of the witness, being a Police Officer, complaint recorded, under S.161 Cr.P.C. enjoined in S. 145 and 157 of the Indian Evidence Act and proviso of S.162 Cr.P.C. Accordingly, the apex court upheld the judgment of the Kerala High Court in the case Naushad Vs. State of Kerala [2000(1) KLT 785] and overruled the judgment of the Kerala High Court in the case Kader Vs. State of Kerala [2001 Cr.L.J. 4044]. It was also held by the Court that the investigating Officer should have been a senior Officer than the detecting Officer.

06. In order to make the investigation impartial and fair under the NDPS Act which provides for a reverse burden of proof u/s 35 and 54 of the NDPS Act, it is directed that:-

- 1) The detecting Officer/informant should not be the Investigating Officer.
- 2) The Investigating Officer should be an Officer superior to the detecting Officer.
- 3) 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.
- 4) The samples packets for chemical / FSL analysis should be sent to the lab on a forwarding note (duly filled) through the Court concerned within 72 hours of the registration of the case.
- 5) The procedures of the search, seizure, sampling and reporting during investigation of cases under NDPS Act should 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.
- 6) All DPCs are directed to verify such charge sheet filed in NDPS cases and entrust the same to the immediate superior Officer to the detecting Officer with a direction to conduct further investigation of the case U/s 173 (8) Cr. PC with the leave of the Court.
- 7) In similar cases under investigation, direction may be issued to the immediate superior Officer for further investigation of the cases, immediately.
- 8) Necessary instructions shall be issued so as to ensure that the directions in the judgment 1st cited are strictly complied with, in future.

07. The following infirmities in the investigation of NDPS cases are also reported by the Addl. Public Prosecutor, Special Court (NDPS Cases), Vatakara, vide reference 2nd cited, which shall be urgently rectified by the Officers concerned:

a. 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.

b. 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.

c. Non-compliance u/s. 52 A NDPS Act

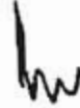
Hon'ble Supreme Court vide judgment dated 28/01/2016 in the case *Union of India Vs. Mohanlal* [Crl. Appeal No.652 of 2012] lays down the procedure for the disposal of the seized narcotic drugs, psychotropic substances and conveyances and directed the compliance of Sec 52A. The said judgment also lays 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.

d. 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.

08. At present there are a number of cases under the NDPS Act for the seizure of Narcotics which are pending trial in various courts. In these U.T. cases, if charges have not been framed by the Courts, then a prayer should be made by a competent Officer nominated by the DPC concerned or the Crime Branch SP concerned by moving a petition to conduct further investigation u/s. 173 (8) CrPC. This Officer shall not be the Officer who has seized the narcotics. After getting the leave or permission from the Court, the nominated Officer will re-investigate the entire case and file the Final Report (FR) in the court. If the case is under investigation, being investigated by the same Officer who had seized the narcotics, then the DPC concerned will immediately change the Officer as directed in this circular and the change Inv. Officer will conduct the investigation from the beginning. The Officer seizing the Narcotics only becomes a witness in the case.

09. All Officers are hereby directed to comply with the judgment of the Hon'ble Supreme Court 1st 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.



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Director General of Police &
State Police Chief, Kerala.

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NB: Malayalam version follows.