Varinder Kumar vs The State Of Himachal Pradesh on 11 February, 2019

Equivalent citations: AIRONLINE 2019 SC 570, (2019) 107 ALLCRIC 40, (2019) 195 ALLINDCAS 139, (2019) 1 ALLCRILR 753, (2019) 1 CRILR(RAJ) 208, (2019) 1 CRIMES 128, (2019) 1 KER LT 615, (2019) 1 RECCRIR 1003, (2019) 1 UC 437, (2019) 2 PAT LJR 136, (2019) 3 SCALE 50, (2019) 73 OCR 946, 2019 CRILR(SC MAH GUJ) 208, 2019 CRILR(SC&MP) 208

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Bench: K.M. Joseph, Navin Sinha, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL Nos. 2450-2451 OF 2010

VARINDER KUMAR ....APPELLANT(S)

VERSUS

STATE OF HIMACHAL PRADESH ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

The appellant assails the order reversing his acquittal and convicting him under Section 20(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"), sentencing him for 20 years, along with fine of Rs.2 lacs, with a default stipulation.

2. The appellant is stated to have been apprehended on 31.03.1995 carrying "charas" on his scooter, in two gunny bags, with varying quantities. The Trial Court acquitted the appellant on grounds of non-compliance with Section 100(4) of the Code of Criminal Procedure, with regard to independent witnesses. Further, there had been non-compliance with Sections 50, 52 and 57 of the NDPS Act, and that the seal prepared at the time of seizure and handed over to PW-5, Naresh Kumar had not been produced in the court.

3. The High Court, reversing the acquittal held that the seals prepared at the time of seizure, and also at the time of deposit in the Malkhana had been produced and marked as Exhibits PH and PK. The chemical examiners report confirmed the seized material as "charas". The seizure of the contraband being from gunny bags, Section 50 of the NDPS Act had no application. Merely because the two independent witnesses were not from the same locality, would not ipso facto amount to violation of Section 100(4), Cr.P.C.

4. Shri Dhruv Pall, learned counsel for the appellant submitted that the appellant had been falsely implicated because he had lodged a complaint against the C.I.D., for improper investigation in the case relating to his father's death. PW-5, Naresh Kumar, the independent witness, had turned hostile and did not support the prosecution case with regard to search and seizure. The second independent witness Jeevan Kumar, was withheld by the prosecution without any explanation. In the facts of the case, the absence of independent witnesses from the same locality as required by Section 100(4) Cr.P.C. assumes importance. PW-10 Sub-Inspector Prem Singh, being the informant himself, was also the Investigating Officer, and which alone vitiates the conviction irrespective of all other issues. Strong reliance was placed on a recent decision of this Court in Mohan Lal vs. State of Punjab, AIR 2018 SC 3853.

5. Shri Abhinav Mukerji, learned counsel appearing for the State, opposing the appeal submitted that the order of the High Court being well reasoned and considered merits no interference. The appellant has a previous history of convictions under the NDPS Act. The ground that PW-10 being the informant could not have been the investigating officer also, had not been raised at any stage. The order of conviction therefore may not be tested on a ground to which the High Court had no occasion to apply its mind. It has also not been pleaded in the appeal.

6. We have considered the respective submissions. PW-10 is stated to have received secret information at 2.45 P.M. on 31.03.1995. He immediately reduced it into writing and sent the same to PW-8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla. At 3.05 P.M. PW-7, Head Constable Surender Kumar stopped PW-5, Naresh Kumar and another independent witness, Jeevan Kumar travelling together, whereafter the appellant was apprehended at 3.30 P.M. with two Gunny Bags on his Scooter which contained varying quantities of 'charas'. PW-8, Shri Jaipal Singh, Dy.S.P., C.I.D., Shimla who had arrived by then gave notice to the appellant and obtained his consent for carrying out the search. Two samples of 25 gms. each were taken from the two Gunny Bags and sealed with the seal 'S', and given to PW-5. PW-2, Jaswinder Singh the Malkhana Head Constable resealed it with the seal 'P'. The conclusion of the Trial Court that the seal had not been produced in the Court is therefore perverse in view of the two specimen seal impressions having been marked as Exhibits PH and PK. It is not the case of the appellant that the seals were found tampered in any manner.

7. Section 50 of NDPS Act patently has no application since the recovery was not from the person of the appellant but the gunny bags carried on the scooter. PW-5 the independent witness who had signed the search and seizure documents but turned hostile, was duly confronted under Section 145 of the Evidence Act, 1872 with his earlier statements to the contrary under Section 161 Cr.P.C. and did not deny his signatures. The order sheet dated 08.11.1995 of the Trial Court reveals that independent witness Jeevan Kumar was present on that date to depose, but was bound down on

objection from the defence side that he be examined on another date along with other witnesses. It is therefore very reasonable to conclude that the witness did not appear subsequently because he may have been won over by the appellant. There is no material to conclude that the witness was withheld or suppressed by the prosecution with any ulterior motive. There is no material for us to conclude that PW□5 and the other independent witness Jeevan Kumar were not respectable persons. Given the very short span of time in which events took place it is not possible to hold any violation of Section 100(4) Cr.P.C. In any event, no prejudice on that account has been demonstrated. Sections 52 and 57 of NDPS Act being directory in nature is of no avail to the appellant.

8. The appellant took a defence under Section 313 Cr.P.C. of false implication but failed to produce any evidence with regard to the complaint lodged by him against the C.I.D. department, a fact noticed by the Trial Court itself. We therefore find no reason to come to any different conclusion than that arrived at by the High Court.

9. The only issue surviving for consideration is with regard to the prosecution being vitiated because PW□10 was the informant as also the Investigating Officer, in view of Mohan Lal (supra). The ground not having been raised at any earlier stage quite obviously, the prosecution never had a chance to contest the same. It has not even been pleaded in the appeal. Nonetheless in view of the reliance placed, we shall examine the issue.

10. In Mohan Lal (supra) our attention had been invited to the divergent views being taken on the issue with regard to the informant and the investigating officer being the same person in criminal prosecutions, and the varying conclusions arrived at in respect of the same. The facts in Mohan Lal (supra), were indeed extremely telling in so far as the defaults on part of the prosecution was concerned. In that back ground it was held that the issue could not be left to be decided on the facts of a case, impinging on the right of a fair trial to an accused under Article 21 of the Constitution of India, observing as follows:

> "25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore 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. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

11. The paramount consideration being to interpret the law so that it operates fairly, the facts of that case did not show any need to visualise what all exceptions must be carved out and provided for. The

attention of the Court was also not invited to the need for considering the carving out of exceptions.

12. Individual rights of the accused are undoubtedly important. But equally important is the societal interest for bringing the offender to book and for the system to send the right message to all in the society —be it the law□abiding citizen or the potential offender. 'Human rights' are not only of the accused but, extent apart, also of the victim, the symbolic member of the society as the potential victim and the society as a whole.

13. Law has to cater to wide variety of situations as appear in society. Law being dynamic, the certainty of the legislation appears rigid at times whenever a circumstance (set of facts) appears which is not catered for explicitly. Expediency then dictates that the higher judiciary, while interpreting the law, considers such exception(s) as are called for without disturbing the pith and substance and the original intention of the legislature. This is required primarily for the reason to help strike a balance between competing forces – justice being the end – and also because the process of fresh legislation could take a long time, which would mean failure of justice, and with it erosion of public confidence and trust in the justice delivery system.

14. The principle of fair trial now informs and energises many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing circumstances, and endeavouring to meet the exigencies of the situation – peculiar at times – and related to the nature of crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavour of the higher courts, while interpreting the law, is to strike the right balance.

15. Societal interest therefore mandates that the law laid down in Mohan Lal (supra) cannot be allowed to become a spring board by an accused for being catapulted to acquittal, irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was nebulous. Criminal jurisprudence mandates balancing the rights of the accused and the prosecution. If the facts in Mohan Lal (supra) were telling with regard to the prosecution, the facts in the present case are equally telling with regard to the accused. There is a history of previous convictions of the appellant also. We cannot be oblivious of the fact that while the law stood nebulous, charge sheets have been submitted, trials in progress or concluded, and appeals pending all of which will necessarily be impacted.

16. In Sonu alias Amar vs. State of Haryana, (2017) 8 SCC 570, it was observed as follows:

> "37..... A large number of trials have been held during the period between 4.8.2005 and 18.9.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anwar P.V. vs. P.K. Basheer, (2014) 10 SCC 473 has to be retrospective in operation unless the judicial tool of "prospective overruling" is applied.

However, retrospective application of the judgment is not in the interest of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on

the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage.

Attempts will be made to reopen cases which have become final."

17. That subsequent events noticed, may require revisiting of an earlier decision, to save actions already taken was considered in Harsh Dhingra vs. State of Haryana and Others, (2001) 9 SCC 550, observing as follows:

> "6. Further, when the decision of the High Court in S.R. Dass case [(1999)3 SCC 362] had held the field for nearly a decade and the Government, HUDA and the parties to whom the allotments have been made have acted upon and adjusted their affairs in terms of the said decision, to disturb that state of affairs on the basis that now certain other rigorous principles are declared to be applied in Anil Sabharwal case [(1997) 2 Punj LR7] would be setting the rules of the game after the game is over, by which several parties have altered their position to their disadvantage. Therefore, we think that in the larger public interest and to avoid the discrimination which this Court had noticed in the order dated 5.12.1997 [(1998) 8 SCC 373] the decision of the High Court in Anil Sabharwal case should be made effective from a prospective date and in this case from the date on which interim order had been passed on 23.4.1996. Therefore, it would be appropriate to fix that date as the date from which the judgment of the High Court would become effective. If this course is adopted, various anomalies pointed out in respect of different parties referred to above and other instances which we have not adverted to will be ironed out and the creases smoothened so that discrimination is avoided.
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> 7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation.

By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty□bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation. These principles are enunciated by this Court in Baburam vs. C.C. Jacob, (1999) 3 SCC 362 and Ashok Kumar Gupta vs. State of U.P., (1997) 5 SCC 201."

18. The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni□directional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in

prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case.

19. The present appeals lack merit and are therefore dismissed.

.....CJI.

[RANJAN GOGOI] .....J. [NAVIN SINHA] .....J. [K.M. JOSEPH]
NEW DELHI FEBRUARY 11, 2019.