

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A.77/2010**

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Reserved on: 11th April, 2012

Decided on: 10th July, 2012

VINAY KUMAR & ANR.

..... Appellants

Through: Mr. K.T.S. Tulsi, Sr. Advocate with
Ms. Priyanka Aggarwal and Mr.
Shakeel Ahmed, Advocates

versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP for State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

Crl. M.A. NO. 2787/2010 (additional grounds)

Application is dismissed as not pressed.

CRL.A.77/2010 and Crl. M.B. Nos. 88/2010, 1585/2010 and 1960/2011

1. The present appeal is directed against the judgment dated 16th November, 2009 passed by the learned Addl. Sessions Judge convicting the Appellant for offence punishable under Section 21 of Narcotic Drugs and Psychotropic Substances Act (in short the NDPS Act). Vide order dated 23rd November, 2009 the Appellant was sentenced to undergo Rigorous Imprisonment for ten years and a fine of Rs. One lakh and in default of payment of fine to further undergo Simple Imprisonment for one year.

2. Learned counsel for the Petitioner contends that the impugned judgment is based upon conjectures and surmises and bad in law. The learned Trial Court has ignored the factual matrix of the case while

passing the impugned judgment. The mandatory provisions of NDPS Act have not been complied with in the present case. There is a total non-compliance of Section 42 of the Act as according to DD No. 16 the information with regard to delivery of contraband was received at 2:00 pm whereas the delivery was to be made at 6 pm and the recovery is alleged to have been made around 7 p.m., yet the information was not taken down in writing nor the copy of the same was sent to the superior officials. Furthermore, Ex.PW5/A a report under Section 57 of the Act was sent on the next date. Reliance is placed on *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat*, (2002) 2 SCC 513 to contend that non-recording of information has in fact deprived the Appellant as well as the Court of material to ascertain the true facts. It is further stated that a report under Section 57 cannot fulfill the requirement of Section 42(2) NDPS Act. Learned counsel has contended that in the instant case the contraband of about 4.025 kg. of smack is seized on 22nd December, 2006 and the sample for testing to the FSL has been sent on 24th January, 2007. Thus there is an unexplained delay of one month two days in sending the samples for examination to FSL. Reliance in this regard is placed on *Rishidev @ Omkar Singh vs. State of Delhi Admn.*, MANU/DE/0783/2008. Relying upon *Parveen Singh @ Kalia vs. State of NCT of Delhi*, 2011(121)DRJ 166 it is contended that in the instant case, the notice under Section 50 NDPS case is materially defected in as much as it merely gives an option to the Appellants to get themselves searched before a Magistrate or a Gazetted Officer. It does not, as required by law, inform the Appellants of their legal right to be searched in presence of a Magistrate or a Gazetted Officer. Learned Counsel states that in the instant case the learned Trial Court has completely ignored the mandatory procedural

safeguards/provisions as contemplated under the NDPS Act. Thus, the impugned judgment is liable to be set aside.

3. Per contra learned APP for the State contends that there is no illegality in the impugned judgment and all the provisions of the NDPS Act have been adequately complied with. Learned APP states that the recovery of the contraband is from bags which the Appellants were carrying and thus the search was not from their person. Compliance of Section 50 and 42 in such a case where the recovery of contraband is from a bag or a briefcase or polythene which is carried by the accused persons is not mandatory. Reliance is placed on *Karnail Singh vs. State of Haryana*, (2009) 8 SCC 539. The provisions contemplated under Section 57 of the Act are directory in nature and not mandatory therefore non-compliance of this Section will not vitiate the trial. The contention of learned counsel for the Appellants that there was a delay in sending the sample for examination holds no ground as the delay has been sufficiently explained in the present case. Reliance in this regard is placed upon *Hardip Singh vs. State of Punjab* (2008) 8 SCC 55, *State of Punjab vs. Lakhwinder Singh and Anr.* (2010) 4 SCC 402. Thus, the present appeal has no merit and is liable to be dismissed.

4. I have heard learned counsels for the parties and perused the record.

5. PW3 Head Constable Balraj Singh deposed that on 22nd December, 2006 he was posted at Special Cell, Southern Range. At around 2 p.m. a secret informer came in his office and informed him that two persons namely Vinay and Tejinder resident of Amritsar, Punjab supply heroine in Delhi and they would come near PVR Cinema at around 6 p.m. to supply the heroin to a Nigerian and if a raid is conducted, they may be apprehended. It is further deposed that this secret information was shared with SI Satender Sangwan

and he produced the secret informer before him. SI Satender Sangwan got satisfied himself and produced the secret informer before Insp. Devender Singh. Insp. Devender Singh after satisfying himself on talking to the informer, conveyed this information to the ACP. The ACP directed to take action immediately. SI Satender Sangwan formed a raiding party under the supervision of Inspector Devender Singh. The raiding party comprised of himself(H.C. Balraj) Insp. Rakesh Sangwan, SI Sri Kishan, SI Biney Kumar, ASI Mohd. Mobin, ASI Rakesh, H.C. Naresh, HC Joginder, Const. Naresh, Const. Rajesh, Const. Yashpal, Const. Rishipal and Const. Jagat. This witness has stated that they alongwith the secret informer left for the place of information at about 3:15 p.m. on the way, SI Satender Sangwan requested 5-6 passerby to join the raiding party while informing them about the secret information but none agreed. At about 4:15 p.m. they reached near PVR, Vikaspuri Insp. Devender Singh requested 4-5 passerby to join the raiding party informing about the secret information but none agreed. At around 6:35 p.m. two persons came there, one was aged about 60 years and was a sikh, while the other was aged about 40 year and was a non-sikh. The sikh was holding a black colour bag in his right hand while the other person was holding a black colour bag on his shoulder. Both of them sat on a bench near PVR Vikaspuri. At about 7 p.m. both of them started going towards service lane. When they reached PVR, at that point of time, the secret informer informed them that they were the same persons about whom he had given the information. Both the above said person started going towards the service lane and SI Satender Sangwan apprised them with the help of members of raiding party. SI Satender Sangwan informed both the accused persons about the secret information received by police against them. SI

Satender Sangwan and Inspector Devender Singh appraised them about their legal rights. SI Satender Sangwan served separate notices under Section 50 on both the accused persons. Both the persons refused to get their search conducted before a gazetted officer or Magistrate for their search and they also refused to take search of police officials before giving their search to them. SI Satender Sangwan then conducted the search of accused Vinay. On checking the bag, the said bag was found containing some clothes and one polythene of white and yellow colour containing cream colour powder. On checking, by its smell and also checking with field testing kit it was found to be heroin. The said powder was weighed and it was found to be 5.24 kilograms. Two samples of 50 gms each were drawn from the recovered heroin. The remaining recovered heroin was sealed in the same polythene bag in which it was initially recovered. The samples mentioned above were also separately sealed. The said samples were given Marks S1 and S2 whereas the remaining recovered heroin was given mark A. The said parcels were sealed with the seals of SS and DSN. SI Satender Sangwan then conducted the search of the bag of the accused Tejender Singh. The said bag was found to contain some clothes and a polythene bag of white and blue colour and the said polythene was containing cream colour powder and on testing with the help of field testing kit as well as by smelling, it was found to be heroin. The said heroin was also weighed and it was found to be 4.25 kilograms. Two samples of 50 gms each were separated from the recovered heroin and the same were converted into pulandas and the same were given marks S3 and S4. The remaining recovered heroin was also converted into a parcel while putting the same in the same polythene bag in which it was recovered from the bag and it was given mark B. Parcels mark B, S3 and S4

were sealed with the seal of SS and DSN. All the above mentioned parcels were seized vide seizure memos Ex.PW3/C. Recovery memo Ex.PW3/C regarding recovery from Vinay and memo Ex.PW3/D was prepared regarding seizure of parcel in respect of accused Tejinder Singh. CFSL forms in duplicate were filled regarding the recovery from both the accused persons and the seals of SS and DSN were affixed on form CFSL. Both the above mentioned seals were handed over to him after its use.

6. PW4 Inspector Devender Singh has deposed that on 22.12.2006 he was present in the office of Special Cell. On that day at about 2 pm SI Satender Sangwan came to his office along with secret informer. SI Satender informed him that a secret informer has informed HC Balraj Singh that two persons namely Vinay and Tajender R/o of Amritsar, Punjab who are involved in supply of smack would come near PVR cinema, Vikas Puri at about 6 pm for supplying the smack to a Nigerian national. He had a talk with secret informer and after satisfying himself with regard to the secret information he told ACP Shri Rishipal about the secret information. ACP then asked him to take necessary action. SI Satinder Sangwan recorded the secret information vide DD No. 16. Copy of DD No. 16 was sent to ACP through him. SI Satender Sangwan organized a raiding party under his supervision consisting of Inspector R. K. Sangwan SI Srikishan, SI Vinay Kumar, ASI Mohd. Mobin Khan, ASI Rakesh, HC Naresh, HC Balraj, Ct. Yashpal, Ct. Jagat and Satish and other police officers. On the way at Maharani Bagh Bus stand SI Satender asked 5/6 passerby to join the raiding party after telling them the secret information but none agreed. They reached at PVR Vikas Puri and there he asked 4-5 passerby to join at Mcdonald restaurant but they refused to join the raiding party. He then

briefed the members of raiding party and deployed them at different places near PVR. At about 6.35 PM both the accused persons namely Vinay and Tajender came there and sat down at the bench near gate of PVR cinema and started waiting. They were having bags. Secret informer pointed out towards accused persons, Vinay and Tajender Singh. At about 7.00 p.m. both the accused persons started going towards service road. Members of raiding team apprehended both the accused persons whose names they came to know as Vinay Kumar and Tajender Singh, who are present in the Court and witness correctly identifies them. This witness has deposed that he informed both the accused persons that they were having information that the accused persons were having smack. He also informed both the accused persons that they have legal right to call Magistrate/ Gazetted officer so that their search could be conducted in their presence. He also told them that they could take search of members of the raiding team. SI Satender Sangwan also informed the accused persons about their legal rights. Notice under Section 50 NDPS was given to both the accused persons separately by SI Satender Sangwan. Copy of notice under Section 50 NDPS Act given to Tajender Singh was Ex.PW 4/A. Notice under Section 50 NDPS Act given to accused Vinay Kumar was Ex.PW4/B. Both the accused persons Tajender Singh and Vinay Kumar refused to get their search conducted before any Magistrate/ Gazetted officer.

7. As per the directions SI Satender conducted personal search of accused Vinay Kumar as well as his bag. From the bag of accused Vinay some clothes and one polythene bag of white, red, yellow and green colour, on the bag Mayur shopping bag was written. Polythene bag was checked and cream colour powder and granules were found. It was checked by

smelling as well as by field testing kit and found to be smack. The smack including polythene bag was weighed and its weight was found to be 5 kg 24 grams. Two samples of 50 grams were separated from the recovered smack. These were kept in two transparent polythene bags and converted into pulanda with the cloth. Sample pulandas were marked as S1 and S2 and these were sealed with the seals of SS. He also put his seal of DSN on both the pulandas of sample. Remaining smack was also seized in a pulanda with polythene and it was marked as A. It was also sealed with the seal of SS and his seal of DSN. Forms CFSL were filled up and both had put their seal on the FSL form. All the three pulanda marked S1, S2 and A, were taken into possession vide memo Ex.PW3/C.

8. Thereafter SI Sangwan took the search of accused Tajender Singh and from his black colour bag, some clothes, and a polythene bag of white and blue colour on which DB woolen shawl was written were recovered. Polythene bag was checked which contained cream colour powder/ granules. The same was checked by smelling and with field testing kit. The substance was found smack. It was weighed and its weight was 4 kg 25 grams with polythene. Two samples of 50 grams each were separated from the recovered smack. These were kept in two transparent polythene bags and converted into pulandas with the cloth. Sample pulandas were marked as S3 and S4 and these were sealed with the seal of SS. SI Satender Sangwan also put his seal of DSN on both the pulandas of sample. Remaining smack was also seized in a pulanda with polythene and it was marked B. It was also sealed with the seal of SS and DSN. Form CFSL were filled up and they both had put their seal on the CFSL form. All the three pulandas mark S3, S4 and B, were taken into possession vide memo Ex.PW3/D. After using the seal

Inspector Devender Singh and SI Sangwan handed over their seals to HC Balraj.

9. PW7 Inspector Satender Sangwan also deposed on the same lines. A perusal of the testimonies of the witnesses clearly proves the facts of the case. I also do not find any merit in the contention of the learned counsel for the Appellant that the secret information reduced in writing Ex. PW 7/A does not satisfy the requirement of clause 2 of Section 42 as admittedly the copy of the same was not sent to the immediate superior. In the present case, the recovery was from an open place, i.e. a public road and thus there was no necessity of compliance with Section 42 of the NDPS Act. In the facts of the present case Section 43 of the NDPS Act is applicable. Further from the statements of the witnesses it is evident that the secret information was brought to the notice to ACP Rishipal before the raid was conducted and further copy of DD No. 16 was sent to the ACP. Hon'ble Supreme Court in *Karnail Singh vs. State of Haryana*, (2009) 8 SCC 539 has held:

“33. *Abdul Rashid* has been decided on 1.2.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

34. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy

makers about it. Now for the last two decades police investigation has gone through a sea-change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will, disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

35. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of Section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any

delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be

decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

10. As regard the contention of learned counsel for the petitioner relating to compliance of section 50 is concerned, it is relevant to note that in the present case the recovery of contraband is from the polythene carried by the appellants and not from their personal search. It is only in cases of personal search that Section 50 of the Act is required to be complied with. In *Jarnail Singh vs. State of Punjab*, (2011) 1 SCC (Cri) 1191 it is observed:

“13. This apart, it is accepted that the narcotic/opium, i.e., 1 kg. and 750 grams was recovered from the bag (thaili) which was being carried by the Appellant. In such circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. This Court in the case of *Kalema Tumba v. State of Maharashtra* (1999) 8 SCC 257 discussed the provisions pertaining to 'personal search' under Section 50 of the NDPS Act and held as follows;

...if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person.

Similarly, in the case of *Megh Singh v. State of Punjab* (2003) 8 SCC 666, this Court observed that;

A bare reading of Section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises.

The scope and ambit of Section 50 was also examined by this Court in the case of *State of Himachal Pradesh v. Pawan*

Kumar (2005) 4 SCC 350. In paragraphs 10 and 11, this Court observed as follows:

10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a

human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, athaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

11. Reliance placed on *Praveen Singh @ Kalia* (supra) is misconceived as in that case the recovery of contraband was from the right side pocket of the appellant therein which is covered under the purview of personal search. The facts of *Praveen Singh @ Kalia* are not applicable to the present case.

12. It is relevant to note that the delay in sending the sample for examination has been sufficiently explained in the present case. PW2, MHCM has deposed that the samples were not tampered with till the time they remained in his custody. The CFSL also records that at the time of receiving samples the seals were intact. Furthermore PW8 and PW10 have categorically stated that the samples were sent for examination only after getting the priority letter. Thus the delay has been sufficiently explained by the prosecution. The Hon'ble Supreme Court in *Hardip Singh vs. State of Punjab*, 2008 (8) SCC 557 observed:

"16. So far as the question of delay in sending the samples of opium to the Forensic Science Laboratory (FSL) is concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence

led in the trial. PW5 has categorically stated and asserted about the recovery of opium from the possession of the appellant, which fact is also corroborated by a higher officer, namely, S.S. Mann, DSP who was also examined at length during the trial. The said recovery was effected in the presence of the said SS Mann, DSP, as senior police officer, who also put his seal on the said parcels of opium.”

13. Thus in view of the law laid down and facts of the present case there is no non-compliance of statutory provisions. Further there is no evidence to show that the samples were tampered with. The seals were found intact at the time of examination by the chemical examiner and the said fact having been recorded in his report. The delay in sending the sample for examination is of no consequence. Hence, the prosecution in the present case has established its case beyond reasonable doubt against the Appellants. The recovery of contraband is proved and the provisions of the Act are completely complied with. Thus I find no merit in the present appeal. The appeal and applications are dismissed. The appellants are on bail. Their personal bond and surety bond are cancelled. The Appellants will undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

JULY 10, 2012
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