

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.281 of 1992

Arising Out of PS.Case No. 174 Year- 1990 Thana -Chandi District- NALANDA (BIHARSHARIFF)

- =====
1. Narayan Mahto son of Munshi Mahto, deceased
 2. Naresh Mahto son of Narayan Mahto both residents of village-Akair, PS. Chandi, Distt-Nalanda

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Rajendra Prasad, Sr. Advocate
Mr. Pramod Kumar, Advocate
Mr. Ritesh Kumar, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 14-08-2015

Challenge in this appeal is judgment of conviction dated 19.11.1992 whereby and whereunder appellants Narayan Mahto and Naresh Mahto have been found guilty for an offence punishable under Sections 20(b) (i) of the NDPS Act and order of sentence dated 21.11.1992 whereby both of them have been sentenced to undergo RI for four years as well as fined Rs. 5000/- in default thereof, to undergo SI for one year additionally, independently, in connection with Sessions Trial No. 156/1992/06/1991 passed by 6th Additional Sessions Judge, Nalanda at Biharsharif.

2. Ramakant Sharma (PW 3) had recorded his self statement disclosing therein that as per direction of Officer Incharge, he along with other police personnel proceeded to apprehend suspect of Hilsa PS Case No. 130/1990, namely, Narayan Mahto and Naresh



Mahto of village, Akair. When they reached at the village, they were informed that these two accused persons are also engaged in dealing with narcotic substance and further, if raid is conducted instantaneously, the narcotic substance will be recovered. Accordingly, they conducted raid and from a room located at upper floor, a polythin was found on the bed, after opening of the same 2 Kilograms of Ganja was found. Both the accused were found having concealed themselves beneath the bed who were apprehended. During interrogation, it has also been submitted that they have not explained recovery of Ganja satisfactorily. Therefore, being in possession of Ganja in contravention to the law attracts prosecution and on account of which self statement has been furnished.

3. On the basis of aforesaid self statement, Hilsa PS Case No. 174/1990 was registered and investigation commenced and after completing the same, charge-sheet was submitted whereupon trial commenced and concluded in a manner, subject matter of the instant appeal.

4. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is of complete denial as well as victimization at the end of police.

5. In order to substantiate its case, the prosecution had examined altogether 8 PWs out of whom, PW-1 Rajendra Prasad,



PW-2, Balbrind Prasad, PW-3, Ramakant Sharma, PW-4, Chandradeo Singh, PW-5, Shiv Naresh Ram, PW-6, Mohan Sharma, PW-7, Venkatesh Sharma, PW-8, Kusheshwar Sharma as well as also exhibited Ext-1 series, signature of respective witnesses over seizure list, Ext-2, seizure list, Ext-3, signature of accused Narayan Mahto over seizure list, Ext-4, Fard-e-beyan, Ext-5 Examination report. Seized material has also been produced as material exhibit-I. Defence had also examined two DWs, namely, DW-1, Bijendra Prasad, DW-2, Nawal Paswan. Although by way of examination of these witnesses, prosecution had tried to impress upon the court that there was recovery of narcotic substance from the house of these two appellants so kept unauthorizedly and for that, instant prosecution has rightly been lodged but after going through the evidences of PWs, it is evident that there happens to be complete absence of adoration of mandatory provisions of law.

6. PW 3 is the informant who had deposed regarding conduction of raid as well as recovery of two Kilograms of Ganja from the house of these two appellants and is further supported by PW-4 on the point of raid as well as recovery. However, after going through the evidences of PWs-3 and 4, it is apparent that they have not averred that after seizure of the Ganja sampling was made containing seal and signature. It is also apparent from the evidence of



PW-3 that there happens to be complete absence of disclosure that after apprehension of accused along with seizure of narcotic substance superior officers were informed in compliance of Section 42(2) of the NDPS Act, which at the relevant time suggest immediate information instead of within 72 hours, introduced after amendment. Furthermore, from the evidence of PW-5, an Excise Department employee who has been produced by the prosecution as an expert it is evident that seized article was produced before him in an opened envelope without having case number and only on physical verification, he opined it to be Ganja. Neither PW 3 had stated that being an informant, he had sent the Ganja for examination to PW-5 nor PW-6, who claimed to be an Investigating Officer had deposed that the aforesaid Ganja was sent to an expert or an employee of Excise Department for examination and report. Furthermore, from the evidence of PW-5, it is evident that the envelop was plain and did not contain the case number. After having conjoint reading of evidences of all the three witnesses, i.e. PWs. 3, 5 and 6, it is apparent that presentation of Ganja before PW-5 relating to present case has become mysterious event which, the prosecution ought to have explained. Because of the fact that prosecution could not be able to place cogent and reliable evidence on this score, that the material exhibit which was produced before PW-5 was the case property of present case and on account thereof, the

report whatever may be will not bind.

7. The effect of non compliance of mandatory provision of law, more particularly, Section 42 (2) of the NDPS Act in the background of previous one as well as the present one, after amendment has been before the Hon'ble Apex Court and after deep consideration it has been held in *Sukhdeo Singh v. State of Haryana* as reported in **2013 AIR SC 953** :-

13. Now, the question that arises for consideration is as to at what stage and by what time the authorized officer should comply with the requirements of Section 42 of the Act and report the matter to his superior officer. For this purpose, we must refer to Section 42 of the NDPS Act at his stage :

“Section 42—Power of entry, search, seizure and arrest without warrant or authorisation—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and

sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

14. Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorization as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words “forthwith” stood amended by the words within 72 hours”. In other words, whatever ambiguity or leverage was provided for under the unamended



provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. In the case of *Basheer @ N.P. Basheer v. State of Kerala* [(2004) 3 SCC 609: (AIR 2004 SC 2757)] wherein this Court was concerned with the Amending Act 9 of 2001 of the NDPS Act, the Court took the view of that application of the Amending Act, where the trial had been concluded and appeal was pending on the date of its commencement and where the accused had been tried and convicted, would not apply. The contention that trials were not held in accordance with law was not sustainable for the reason that there could be direct and deleterious consequences of applying the amending provisions of the Act to trials which had concluded in which appeals were filed prior to the date of Amending Act coming into force. This would certainly defeat the first object of avoiding delay in such, trials. Another Bench of this Court in the case of *Jawahar Singh alias Bhagat Ji v. State of GNCT of Delhi* ((2009)6 SCC 490): (AIR 2009 SC 2391) while dealing with the amendments of Section 21 of the NDPS Act, the Court took the view that amendments made by Act 9 of 2001 could not be given retrospective effect as if it was so given, it would warrant a retrial which is not the object of the Act. The Court held as under:-

“9. It is now beyond any doubt or dispute that

the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of conviction, there was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending Act, in our considered opinion, would not arise.

10. It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only.”

15. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.

16. Still, reference can be made to the judgment of this Court in the case of *Ravinder Singh v. State of Himachal Pradesh* [(2009) 14 SCC 201: (AIR 2010 SC 199)], wherein this Court was dealing with the question as to what would be the law applicable for imposition of a sentence irrespective of when the trial was concluded with reference to Article 21 of the Act and provision of the Punjab Excise Act, 1914 as applicable and amended by H.P. Act 8 of 1995 where punishment was enhanced and minimum sentenced was provided. The Court held that it is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial”.

17. Even in the case of *Hari Ram v. State of Rajasthan & Ors.* [(2009) 13 SCC 211: (AIR 2011 SC (Cri) 2053)], this Court stated with reference to the

provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act of 2006) that the relevant date for applicability of the Act so as the age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial.

18. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

19. This question is no more res integra and stands fully answered by the Constitution Bench judgment of this Court in Karnail Singh v. State of Haryana [(2009) 8 SCC 539: (2009 AIR SCW 5265)]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513: (AIR 2000 SC 821)] and Sajan Abraham (supra) and held as under:-

“35. In conclusion, what is to be noticed is that 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 Sections 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 (10) of Section 42] from any person had to record it in writing in the register concerned 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 with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with 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 of 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.”

20. Having referred to the above settled principle of law, we are unable to accept the contention raised on behalf of the State and have to grant our approval to the submission made on behalf of the appellant.

8. Consequent thereupon, the instant appeal is found to have a substance and on account thereof, the judgment of conviction and sentence inflicted by the learned lower court, is hereby set aside. The appeal is allowed.

9. Since appellants are on bail, they are discharged from its liability.

(Aditya Kumar Trivedi, J)

Patna High Court
August 14th 2015
Perwez/AFR

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