

**IN THE HIGH COURT FOR THE STATES OF PUNJAB &
HARYANA, AT CHANDIGARH**

Criminal Appeal-D - 385-DB of 2010
Date of Decision: April 24, 2015

Sahib Singh

--- Appellant

Versus

State of Punjab

---Respondent

**CORAM :HON'BLE MR. JUSTICE T.P.S. MANN.
HON'BLE MR. JUSTICE MAHAVIR S. CHAUHAN.**

Present: Shri S.S. Randhawa, Advocate for the appellant
Shri S.S. Dhaliwal, Additional Advocate General, Punjab
for the respondent-State.

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1. *Whether Reporters of local papers may be allowed to see the Judgment? Yes/No*
 2. *To be referred to the Reporter or not? Yes/No*
 3. *Whether the judgment should be reported in the Digest? Yes/No*

MAHAVIR S. CHAUHAN, J.

Is delayed compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act') acceptable?, is the question which confronts this Court in this Criminal Appeal brought by convict Sahib Singh (here-in-after referred to as 'the appellant') to assail judgment of conviction and order of sentence dated March 26, 2010 whereby learned Judge, Special Court, Patiala (here-in-after referred to as 'the trial court') has convicted and sentenced him to rigorous imprisonment for a term of fourteen years and fine amounting to Rs. 2,00,000/- and in default of payment of fine to further rigorous imprisonment for a term of one year under Section 18 of the Act.

Factual Matrix:

02. Syntax of events culminating into the instant appeal, put as concisely as one may, indicates that on February 13, 2008, while present at Bus Stand, Samana in the company of a police contingent, ASI Bhinder Singh (PW1) (here-in-after referred to as 'the investigating officer') received a secret information that with the money provided by his accomplice Kuldip Singh, appellant Sahib Singh was bringing opium from Rajasthan in a truck bearing registration No. HR 37 A 4515 and if a picket was laid at T-point on the main road of village Asarpur, opium was likely to be recovered. Wasting no time, investigating officer telephonically informed Deputy Superintendent of Police, Samana; joined PW Gurbachan Singh as a public witness; accompanied by the police party, reached T-point on the main road of village Asarpur; and laid a picket there. After a while, viz. at or around 02.00 p.m. on February 13, 2008, the truck bearing registration No. HR 37 A 4515 came there. On being beaconsed to stop, the appellant, who was on the wheel of the truck, stopped the truck; alighted therefrom; and on being asked by the investigating officer, disclosed his name as Sahib Singh. Investigating officer told the appellant that the plastic bag lying behind driver's seat of the truck in his possession was suspected to carry some contraband and was liable to be examined but he (the appellant) had a right to have search of the bag conducted by him or by a gazetted officer or a Magistrate. Appellant opted to have the truck frisked in the presence of a gazetted officer. Investigating officer recorded memorandum of dissent, Exhibit PA, and at or around 02.30 p.m. requested on phone Dy. S.P. Manjit Singh Brar (a gazetted officer) to reach the spot. On being so requested, Dy. S.P. Manjit Singh Brar (PW5) reached the spot and after being apprised of

the facts of the case by the investigating officer, disclosed his identity before the appellant and asked the appellant if he wanted frisking of the truck to be conducted by him or by some other gazetted officer. Appellant opted to get the truck frisked by him. Memorandum of consent, Exhibit PB, was recorded in this regard. On being so directed by Dy. S.P. Manjit Singh Brar (PW5), investigating officer frisked the bag in the presence of witnesses and found it to contain opium wrapped in a polythene paper; separated two samples of ten grams each from it; and put the samples so separated in a parcel. Remainder, which weighed 24 kilograms and 800 grams, was also made into a separate parcel. Investigating officer sealed the parcels containing samples and the remainder, with his seal bearing impression "BS"; prepared a sample seal, Exhibit P1; handed over the seal, after use, to ASI Devinder Singh (PW7); took in police possession the sealed sample parcels, sealed parcel of remainder, Exhibit P3, as also the truck and its registration certificate, vide memorandum, Exhibit PC; arrested the appellant vide memorandum, Exhibit PG; frisked appellant's person vide memorandum, Exhibit PF; sent intimation (Ruqa), Exhibit PD, to the police station-whereupon a formal First Information Report (FIR, for short), Exhibit PD/1, was recorded by ASI Jagdish Kumar; recorded statements of witnesses; prepared rough site plan, Exhibit PE, of the place of recovery; and on return to the police station produced the appellant and the case property before SI Deepak Rai, the Station House Officer, who verified the facts, affixed his own seal bearing impression 'DR' on the parcels of samples and the remainder, as also on sample seal form, Exhibit P1, and deposited the case property with MHC Ajit Singh (PW2). On that very day, i.e. February 13, 2008, investigating officer withdrew the case property

from Police Malkhana and the appellant from police lock up and produced them, alongwith inventory, Exhibit PK, before learned Sub Divisional Judicial Magistrate, Samana who, found the seals on the case property and representative samples to be intact; vide his order, Exhibit PK/1, certified the inventory, Exhibit PK, to be 'true and correct'; and directed deposit of the case property in Judicial Malkhana. Accused Kuldip Singh was arrested on February 14, 2008 vide memorandum, Exhibit PM. One sample parcel was sent to Chemical Examiner through Constable Debu Ram (PW3) and a report, Exhibit PL, confirming that the contents of sample parcel were opium, was received from the Chemical Examiner. On application, Exhibit PN, Registering Authority, Ambala made an endorsement, Exhibit PN/1, to the effect that the truck bearing registration No. HR 37A 4515 was registered in the appellant's name. On conclusion of investigation, a report in terms of sub-section (2) of Section 173 of the Code of Criminal Procedure, 1973 (here-in-after referred to as 'the Code') was presented before the learned trial court.

03. After hearing the prosecutor and the defence, learned trial court found a prima facie case triable under Section 18 of the Act to be made out and charged the accused thereunder. Accused pleaded not guilty to the charge and claimed to be tried.

04. To prove the charge against the accused, prosecution examined investigating officer, ASI Bhinder Singh (PW1) who re-asserted on oath the entire prosecution version; Dy. S.P. Manjit Singh Brar (PW5), who had supervised the proceedings leading to recovery of the contraband; ASI Devinder Singh (PW7) who had witnessed recovery of contraband from possession of the appellant, SI Deepak Rai (PW6), the then Station House

Officer before whom the appellant and case property were produced immediately after recovery of the contraband; HC Ajit Singh (PW2), the Moharrir Head Constable who had kept the case property in safe custody; Constable Debu Ram (PW3), who had taken a representative sample to Chemical Examiner; Constable Shish Pal (PW4), who had deposited the case property in Judicial Malkhana; and Rakesh Kumar (PW8) who proved on record endorsement, Exhibit PN/1, according to which truck bearing registration No. HR 37A 4515 was registered in the appellant's name.

05. All the incriminating circumstances appearing in the prosecution evidence when put to the accused in their examination under Section 313 of the Code, were denied as incorrect and plea of innocence and false implication was reiterated by them.

06. Accused examined HC Bhomma Singh (DW1), HC Rachhpal Singh (DW2) and Gurbachan Singh (DW3) in their defence.

07. On appreciation of evidence in the light of submissions made at the bar, learned trial court found that the prosecution could not establish Kuldeep Singh's complicity in the commission of the crime but was able to prove appellant's guilt beyond reasonable doubt and, accordingly, vide judgment dated March 26, 2010, acquitted Kuldeep Singh but convicted and sentenced the appellant as here-in-before stated.

08. We have heard learned counsel for the parties and, with their able assistance, have also appraised the record.

Compliance of Section 42 of the Act:

09. Learned counsel for the appellant has argued, in the first instance, that investigating officer did not reduce the secret information into writing and did not send such information to his immediate official superior

as mandated by Section 42 of the Act even though he had sufficient time to do so between receipt of secret information and recovery of the contraband and was just one hundred yards away from the Police Station when the secret information is stated to have been received by him. Reference in this regard has been made to the deposition of ASI Bhinder Singh (PW1) and it is pointed out that he has admitted that he did not reduce the secret information into writing and did not go to CIA Staff Building to record the information in the Daily Diary Register (commonly called DDR). Learned counsel has intensely argued that non compliance of mandatory provisions of Section 42 of the Act vitiates the recovery and entitles the appellant to acquittal. To bolster the contention, learned counsel relies upon **Rajender Singh versus State of Haryana, (2011) 8 SCC 130** and **Kishan Chand versus State of Haryana, 2013(2) RCR(Criminal) 67.**

10. The contention, in our considered opinion, is fallacious and deserves to be rejected. It is well settled that total non-compliance with requirements of sub-sections (1) and (2) of Section 42 of the Act is impermissible, while delayed compliance with satisfactory explanation about the delay may be acceptable compliance thereof. In enacting Section 42 of the Act intention of the legislature, no doubt, was to provide for procedural safeguards against false implication but, at the same time, it never intended the provision to be literally interpreted to mean that the information received by the investigating officer must be taken down in writing and transmitted to the superior official even though it may allow the culprit to escape and the contraband and evidence being destroyed or removed and thereby forfeit the very purpose of bringing the Act on the statute book. Compliance with the requirements of sub-sections (1) and (2)

of Section 42 of the Act as regards taking down the information received in writing and sending a copy thereof to the official superior, should normally precede the entry, search and seizure by the empowered officer but in special circumstances involving emergency situations, recording of the information in writing and sending a copy thereof to the official superior may be postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

11. It may be relevant to point out here that in **Abdul Rashid Ibrahim Mansuri versus State of Gujarat, 2000(1) RCR(Criminal) 611** a three-judge Bench of Hon'ble Supreme Court ruled that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and its immediate transmission to immediate official superior of the empowered officer would cause prejudice to the accused. However, after decision of **Abdul Rashid Ibrahim Mansuri versus State of Gujarat** (supra) on February 01, 2000, Section 42 of the Act has been amended with effect from October 02, 2001 and the time for transmission of report by the empowered officer to his immediate official superior has been specified to be within 72 hours of writing down the information. This amendment further brings out intention of the Legislature that the spirit and not the letter of law has to be followed, and, in our considered view, it is aimed at upholding the object of the Act.

12. In **Rajender Singh versus State of Haryana** (supra) the trial court, to convict the appellant therein had, inter alia, observed that it was clear from the evidence of PWs 5 and 6 that the provisions of Section 42 of the Act had been complied with as the secret information received by PW-6 had been recorded by him in a 'Ruqa' which had been sent to the Police

Station for registration of an FIR and that he had also informed PW-5 on wireless about the information received by him on which the latter had reached the place of search and seizure. However, a Two-Judge Bench of Hon'ble Supreme Court, while reiterating that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced, set aside the conviction by observing, "We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non compliance with the provisions of Section 42(2) of the Act which vitiates the conviction."

13. In *Kishan Chand versus State of Haryana* (supra) PW7, Kaptan Singh, the investigating officer, in his statement before the learned trial court, while referring to the story of the prosecution, did not state in his examination-in-chief that he had made the report immediately upon receiving the secret information and had informed his senior officers and in his cross-examination by the defence, he had admitted, "...the distance between the place of secret information and the place of recovery is about 1 kilometre. Secret information was not reduced into the writing so no copy of the same was sent to the higher officer." Learned trial court in its judgment recorded that admittedly the secret information was received against the accused but the investigation officer did not reduce the secret

information into writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the learned trial court observed that if the investigating officer did not reduce into writing the secret information and send the same to the superior officer, then in the light of the given circumstances, it could not be said that any prejudice was caused to the accused. However, a Two-Judge Bench of Hon'ble Supreme Court repelled the finding saying, "We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub- Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance."

14. In **Sajan Abraham versus State of Kerala, 2001(3) RCR (Criminal) 808** PW3, a Head Constable got information at about 7 p.m. that the appellant therein was selling injectable narcotic drugs near the Blue Tronics Junction, Palluruthy. When he proceeded for Pilluruthy Police Station to give this information to his immediate superior Sub Inspector of

Police (PW5), he found PW5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW3 to PW5. Thereafter, PW5, along with his police party and PW3, immediately proceeded towards the place where the appellant was standing. It was argued on behalf of the appellant that prosecution had violated mandatory provisions of the Act, namely, Section 42, Section 50 and Section 57, hence conviction and sentence were liable to be set aside. A Three-Judge Bench of the Hon'ble Supreme Court, however, rejected the argument and observed as under:

“6. With regard to Section 42, the submission is that PW5 has not recorded the information given by PW3 with respect to the appellant's involvement before proceeding to arrest him in this case. This constitutes violation of Section 42 of the Act. It is true under Section 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, he is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door to remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW5 after receiving the said information has to communicate it to his immediate superior which constitute violation of Section 42. In construing any facts to find, whether prosecution has complied with the mandate of any provisions which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such persons escapes from the

clutches of law. The court however while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out.

7. In the present case, PW3 the Head Constable got information with reference to the appellant only at about 7 p.m. that the person is selling injectable Narcotic drugs near the Blue Tronics Junction, Palluruthy. When he proceeded for Pilluruthy Police Station to give this information to his immediate superior S.I. of Police PW5, he found PW5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW3 to PW5. Thereafter, PW5 along with his police party and PW3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW5 could have recorded the information given by PW3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable ? Had they not acted immediately, appellant would have escaped. On these facts, we do not find any inference could be drawn that there has been any violation of Section 42 of the Act."

15. To resolve the issue arising out of the above two conflicting decisions, the matter was placed before a Constitution Bench (comprising five Hon'ble Judges) of Hon'ble Supreme Court of India, in **Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : 2009 SCW 5265**. While laying down the principles about compliance of sub-sections (1) and (2) of Section 42 of the Act, Hon'ble Supreme Court held as under:

"15. Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or

whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 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.

16. 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.

17. 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."

16. It is needless to state that judgment in **Karnail Singh v. State of Haryana**(supra) having been delivered by a Five-Judge Bench has to be followed in view of the principle which says that once a decision of a larger Bench has been delivered it is that decision which mandatorily has to be applied, as reiterated in **Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129.**

17. Reverting to the case on hand, investigating officer, ASI Bhinder Singh, while appearing as PW1 has revealed that when he received the secret information on February 13, 2008, he was not present in the police station and, instead, was present at Bus Stand, Samana for patrolling and checking bad elements and was told by the informer that the appellant was coming (towards T-point on main road of village Asarpur) with huge quantity of opium in a truck bearing registration No. HR 37A 4515 and could be apprehended and huge quantity of the contraband recovered if a picket was forthwith laid at T-point on main road of village Asarpur.

Wasting no time, investigating officer telephonically informed Deputy

Superintendent of Police, Samana; joined PW Gurbachan Singh as a public witness; accompanied by the police party, reached T-point on the main road of village Asarpur; and laid a picket there. Within no time, viz. at or around 02.00 p.m., the truck bearing registration No. HR 37 A 4515 came there. On being beaconsed to stop, the appellant, who was on the wheel of the truck, stopped the truck; alighted therefrom; and on being asked by the investigating officer, disclosed his name as Sahib Singh. Vide memorandum of dissent, Exhibit PA, appellant refused to let the truck frisked by the investigating officer. At or around 02.30 p.m. investigating officer requested on phone Dy. S.P. Manjit Singh Brar. Appellant, vide Memorandum of consent, Exhibit PB, consented to search of the vehicle in the presence of Dy. S.P. Manjit Singh Brar and, ultimately opium weighing 25 kilograms was recovered, vide memorandum, Exhibit PC, from a bag kept behind driver's seat in the driver's cabin of the truck. Investigating officer then recorded the intimation slip (Ruqa), Exhibit PD, at 05.40 p.m. and immediately thereafter transmitted it to the quarters concerned. He also sent a report, Exhibit PH, to Deputy Superintendent of Police, Samana in compliance of Section 57 of the Act.

18. ASI Devinder Singh (PW7) has revealed in his cross examination that village Asarpur is about nine kilometers away from the spot where secret information was received and the place where the picket was laid was a busy road. Village Asarpur, a toll plaza, Patiala-Samana Road, a college, and Bus Stop, Dhaintal were nearby. It has also come in the cross examination of ASI Bhinder Singh (PW1) that the picket was laid by laying wooden logs on the road. The circumstances enumerated by the witnesses are such that literal compliance with Section 42 of the Act, viz.

reducing the secret information into writing and despatching it to the superior officer(s) before setting out for the disclosed place, was bound to result in escape of the appellant and disappearance and/or destruction/removal of the contraband and the evidence. Thus, in our considered opinion, Section 42 of the Act was sufficiently complied with by recording the secret information in the form of Ruqa, Exhibit PH, and sending it to the quarters concerned after recovery of the contraband had been effected.

Doubt about weighment of the contraband:

19. Learned counsel representing the appellant has attempted to make capital out of a statement made by ASI Bhinder Singh (PW1) in his cross examination that there was no document or statement available in the judicial file to show that contents of the plastic bag and the samples were weighed by using a spring balance (commonly called 'Chuha Kanda') and that there was no entry in any document or DDR that he was carrying a spring balance.

20. The effort, in our well-thought view, is inane and directionless because it is not the requirement of law that mention of each and every article carried or used by the investigating officer should be made in the DDR or elsewhere. Strangely, defence stopped short of suggesting to ASI Bhinder Singh (PW1) that spring balance and/or routine weighing scales were not used to weigh the contraband and samples and chose not to cross examine any further PW5, Dy. S.P. Manjit Singh Brar when he emphatically stated that a spring balance was used to weigh the bulk while samples were weighed by using the routine small scales.

Evidence of Gurbachan Singh (DW3):

21. Learned counsel for the appellant has very heavily relied upon evidence of Gurbachan Singh (DW3) to contend that he was cited as a public witness by the prosecution and was stated to have witnessed the proceedings leading to recovery of the contraband from possession of the appellant but was not examined as a witness of prosecution for fear of truth being revealed by him which he ultimately divulged while appearing as a witness of defence by saying that no proceedings were carried out and no contraband was recovered from appellant's possession in his presence. It is also pointed out that statement of Gurbachan Singh (DW3) that ASI Bhinder Singh was known to him for more than five or six years as he had engaged him as a mason demolishes statement of ASI Bhinder Singh (PW1) that this witness was not known to him and strengthens defence version that he was falsely introduced as a witness.

22. Part of the statement of Gurbachan Singh (DW3) pertaining to his assertion that he had worked as mason for ASI Bhinder Singh (PW1) cannot be taken cognizance of because ASI Bhinder Singh (PW1) was not confronted with such a plea. As regards the remaining statement of this witness it needs to be highlighted that in his cross examination he has admitted his thumb-marks on memoranda, Exhibits PA, PB, PC, PF, and PG, which evidently were recorded on the spot of recovery. Further, by stating that when he put his thumb-marks these documents were blank, he has exhibited his vulnerability to influence and pressure and a weak disposition and has, thereby, rendered his deposition not worthy of credit and unreliable. Therefore, no benefit can be allowed to the appellant of what has been stated by this witness.

Improbability of prosecution story:

23. Towards the end, learned counsel for the appellant has pointed out that it has come in the evidence of ASI Bhinder Singh (PW1) and ASI Devinder Singh (PW7) that the truck in question was loaded at Bhilwara on February 11, 2008 and had crossed Excise and Taxation Barrier, Khanauri on February 12, 2008 which is just 25/30 kilometers away from the place where the truck is shown to have been intercepted. Learned counsel has argued that the truck was checked at the Excise and Taxation Barrier and had there been any contraband there in the truck it would have been discovered at that barrier and, even otherwise, it is quite unbelievable that after having crossed the barrier at Khanauri on February 12, 2008 the truck would take a day's time to traverse a distance of 25/30 kilometers to reach village Asarpur on February 13, 2008. These circumstances, according to learned counsel render case of the prosecution highly improbable and strengthen defence plea that the appellant has been falsely implicated in this case.

24. The contention, however, lacks substance. Officials of Excise and Taxation Department were not expected to check the contents of the bags loaded in the truck because their only concern is to check evasion of tax, if any. Even otherwise, the bag containing the contraband was not there in the hind portion of the truck and it, instead, was kept behind driver's seat in the driver's cabin and that being so even if it is assumed that the bags loaded in the hind portion of the truck were thoroughly checked at the Excise and Taxation Barrier, the bag containing the contraband could not be noticed by the officers manning the barrier.

25. As regards the contention that it is improbable and unbelievable that the truck in question would have taken a day to traverse a distance of 25/30 kilometers to reach the spot where it is stated to have been intercepted, suffice it to say that as per defence plea as put to ASI Bhinder Singh (PW1) and reiterated by the appellant in his statement under Section 313 of the Code, the truck had gone out of order after crossing the Khanauri Barrier and its alternator was got repaired at Patran. This circumstance explains the time that intervened arrival of the truck at Khanauri Barrier and its interception at village Asarpur.

Quantum of sentence:

26. Left with no other option, learned counsel for the appellant has submitted that the appellant deserves leniency in the matter of quantum of sentence because he is sole bread winner for his family; has been facing the agony of a tough investigation and a protracted trial since the day of his arrest on February 13, 2008; has been in custody throughout; and there is no criminal history before and after the instant case.

27. Nothing more has been urged.

Conclusion:

28. In view of all what has been said and discussed in the preceding paragraphs, finding of conviction recorded by the learned trial court cannot be interfered with but the appellant deserves leniency as regards quantum of sentence. Therefore, while maintaining the judgment of conviction, substantive sentence awarded to the appellant is reduced to rigorous imprisonment for ten years. Sentence of fine and default clause are, however, maintained.

29. With above modification in the order on quantum of sentence, the

appeal fails and is dismissed.

[T.P.S. Mann]
Judge

[Mahavir S. Chauhan]
Judge

April 24, 2015
adhikari