

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRA No.S-1140-SB of 2005

Date of decision : February 4, 2015

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Kala Ram

.....Appellant

Versus

State of Punjab

.....Respondent

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CORAM: HON'BLE MS. JUSTICE RITU BAHRI

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Present: Ms. Smriti Dhir, Advocate for the appellant.

Mr. D.S Virk, DAG, Punjab.

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1. *Whether Reporters of Local Newspapers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

RITU BAHRI, J

This criminal appeal has been filed against the judgment dated 23.4.2005 passed by the Judge, Special Court, Kapurthala, whereby the appellant-accused has been convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.30,000/-. In default of payment of fine, the accused-convict was directed to further undergo imprisonment for a period of four months.

The prosecution story, in brief, is that on 4.2.2004, ASI, Darshan Singh along with Head Constable Raghbir Singh and some

other police officials was present at the Bus Stand, Kapurthala in connection with patrolling. He received a secret information and the informer told that he and one of his friends were standing at D.C Chowk, Kapurthala. Then a young man got down from a bus coming from Jalandhar. He was carrying a plastic polythene bag in his right hand containing something heavy and was waiting for some person at D.C Chowk, Kapurthala and if a raid was conducted, narcotic substance in huge quantity could be recovered. On the basis of secret information, ruqa was sent to the police station, on the basis of which, formal FIR was recorded. The ASI sent a telephone message to the CIA Staff, Kapurthala for deputing some Gazetted Officer or a Magistrate to the spot. Charanjit Singh met the police party per chance and he was also joined in the police party. Then the ASI along with some other police officials had reached at the D.C Chowk, Kapurthala and apprehended that person who was carrying something heavy in his right hand which was wrapped in the polythene bag. On enquiry, he disclosed his name as Kala Ram son of Birpal Singh, resident of Village Rattanpur, Police Station Nohar District Hanumangarh (Rajasthan). In the meantime, Bhajan Singh, DSP (D), Kapurthala reached at the spot along with his gunmen and the accused reposed confidence in him for conducting his search. Head Constable Rajeshwar, Photographer, CIA Staff, Kapurthala was called and he reached at the spot and he took the photographs. On the direction of the DSP, the ASI conducted the search of the appellant-accused and recovered the polythene bag from his

possession, which was found to contain two kgs. of opium. Two samples of 10 grams each were taken out and converted into separate parcels. Remaining opium was converted into parcel. All the parcels were sealed with the seals of the ASI bearing impressions DS and that of the DSP bearing impressions BS. After the completion of the investigation, the appellant-accused was challaned and necessary documents were supplied to him free of cost. He was charged under Section 18 of the NDPS Act, to which he pleaded not guilty and claimed trial.

To prove its case, prosecution examined PW-1 HC Gurmit Singh, PW-2 DSP Bhajan Singh, PW-3 ASI Darshan Singh, PW-4, HC Rajeshwar Dutt, PW-5 Constable Surinder Singh and PW-6, SI Satnam Singh.

Statement of the accused was recorded under Section 313 Cr.P.C, wherein all the incriminating evidence appearing against him was put to him, however, he denied the same.

The trial Court after going through the entire evidence led by the prosecution, convicted and sentenced the appellant-accused in the aforesaid terms.

Heard counsel for the parties.

Counsel for the petitioner has argued that necessary procedure as per Section 42 of the NDPS Act has not been followed in this case. He has referred to the judgment in the case of **Kishan Chand vs. State of Haryana, 2013(2) RCR (Criminal) 67**, where on account of non compliance of Section 42, conviction was set

aside. Section 42 of the Act is reproduced herein:-

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 of 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 personal 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.

The object of Section 42 of the Act is that before an Officer proceeds to make an entry with regard to the search and seizure necessary information should be written down and a copy thereof be sent to the Superior Officer. The Supreme Court in ***Kishan Chand's case (Supra)*** has made reference to the judgment in the case of ***Sajan Abraham vs. State of Kerala, 2001(3) RCR (Criminal) 808***, wherein it is held that the provisions of Section 42 were not mandatory and substantial compliance was sufficient. If there is total non compliance of the provisions of Section 42 of the Act, it 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 was explained or not will be a question of fact in each case. The guidelines laid down in the case of ***Sajan Abraham's case (Supra)*** in paragraph 35 of the judgment were 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(1) 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.

In the present case after receiving the secret information a ruqa was sent to the police station and the ASI sent a telephonic message for deputing Gazetted Officer or a Magistrate to the spot. As per the information, the young man was waiting for some person. After sending the ruqa to the police, he was apprehended and after getting his consent memo, search was conducted. Hence the necessary compliance of Section 42 by sending a ruqa to the police station was made. No prejudice has been caused to the accused as the ruqa has been sent before the search. This argument of the counsel for the petitioner is liable to be rejected.

A perusal of the judgement further shows that all the other

proceedings with regard to the preparation of the sample affixing seal and getting the report from the chemical examiner has been followed as per the Rules of the NDPS Act. The sample had reached the office of Chemical Examiner with seals intact along with the specimen seals impression. This fact has been certified by the Chemical Examiner. No recovery was effected from the personal search of the accused. Hence, there was no need to comply with Section 50 of the Act.

Prosecution had joined one Charanjit Singh as independent witness but he was given up having won over by the accused. Non-joining of the independent witness in the present case does not make the prosecution version doubtful as there is no prejudice caused to the petitioner in the procedure followed by the prosecution.

Having examined the impugned judgment, no illegality, much less irregularity has been found therein warranting interference by this Court. Accordingly, it is upheld. However, a lenient view can be taken on the quantum of sentence of the petitioner.

The recovery in the present case is 2 Kgs. of opium and as per notification of the NDPS Act specifying small quantity and commercial quantity, quantity above 2.5 Kgs is commercial quantity. In the present case, recovered quantity is less than commercial quantity. As per the custody certificate, he has undergone total custody including remission 2 years 5 months and 2 days. Thus the petitioner has been facing a criminal trial for almost 14 years and

after being released on 13.7.2006, he has not misused the concession of bail. The sentence awarded to the appellant-accused is reduced to the period already undergone by him.

With the above modification, the petition is disposed of.

February 4, 2015
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(**RITU BAHRI**)
JUDGE