

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH.**

**CRA-S-888-SB of 2004**

**Date of decision : 06.08.2015**

**Sewa Singh**

**..... Appellant**

**Versus**

**State of Haryana**

**..... Respondent**

**CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH**

Present: Mr. Sandeep Kotla, Advocate  
Ld. counsel for the appellant.

Mr. Chetan Sharma, Advocate  
learned AAG, Haryana.

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- 1. Whether Reporters of local papers may be allowed to see the judgement?Yes**
- 2. To be referred to the Reporters or not?Yes**
- 3. Whether the judgement should be reported in the Digest?Yes**

**DARSHAN SINGH,J**

1. The present appeal has been preferred against the judgment of conviction dated 26.02.2004, vide which appellant-accused Sewa Ram was held guilty and convicted for the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as 'Act') and the order on the quantum of

sentence of the even dated, vide which the appellant was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. One lac, in default of payment of fine he was ordered to further undergo rigorous imprisonment for a period of two and half years.

2. The brief facts of the prosecution case are that on 20.09.2000, ASI Sukhbir Singh PW-5 along with other police employees was present on the bridge of canal near thermal power house in connection with patrolling and nakabandi. He received a secret information that appellant Sewa Singh is habitual of selling 'sulfa' and within no time he will be coming towards Madlauda for that purpose. On this, ASI Sukhbir Singh and his companions became alert and started keeping a watch on the people passing through that place. In the meanwhile, the accused came on the bridge from the kucha passage on the southern side and on seeing the police party, he immediately turned back and started walking towards Panipat. On suspicion, he was apprehended by PW-5 Sukhbir Singh with the help of his companions.

3. Suspecting the intoxicant drug in his possession, the Investigating Officer served a notice under Section 50 of the Act. The appellant opted his search in the present of Magistrate or a Gazetted Officer. The Investigating Officer

called PW-4 Ram Mehar, Naib Tehildar on the spot and on his directions he carried out the search of the bag of the appellant. A packet wrapped in a polythene paper was recovered from the said bag, which was found containing Charas. On weighing, the said Charas came to be 2 kg. 100 gms of Charas was separated as sample. The separate parcels of the sample and remainder Charas were prepared and were sealed by the Investigating Officer with his seal bearing impression 'SS'. Ram Mehar, Naib Tehildar also affixed his seal bearing impression 'RS'. The parcels of the case property were taken into possession vide memo Ex.PE. He sent the written information Ex.PG to the Police Station. On the basis of which the formal FIR Ex.PG/1 was registered. The Investigating Officer completed the formalities of investigation at the spot.

4. On return to police station, he produced the accused, case property and the witnesses before PW-6 Dalbir Singh, SHO of Police Station Madlauda. He verified the facts and affixed his seal bearing impression 'DS' on both the sealed parcels. On his direction, the case property was deposited with the M.H.C of the Police Station. The sample was sent to F.S.L, Madhuban for examination and was found to be of Charas. After completion of the necessary formalities, the report under Section 173 Cr.P.C was

presented in the Court.

5. After compliance of the provisions of Section 207 Cr.P.C. the appellant was charge sheeted for the offence punishable under Section 20 of the Act by the learned trial Court vide order dated 14.03.2001, to which the appellant pleaded not guilty and claimed trial.

6. In order to prove its case, prosecution examined as many as six witnesses in all.

7. When examined under Section 313 Cr.P.C, the accused pleaded false implication and innocence.

8. In the defence evidence, the appellant examined MHC Rajbir Singh as DW-1. He has produced register No. containing entry no. 1714 with respect to the present case and produced the copy of the said entry Ex.DE. DW-2 Fateh Singh has deposed that the accused was a candidate for the post of Sarpanch during the elections held on 16.03.2000, but he had withdrawn his candidature. The winning candidate Kayam Singh nourished a grievance against him and got him falsely implicated.

9. On appreciating the evidence on record and the contentions raised by learned counsel for the parties, learned trial Court held guilty and convicted the appellant for the offence punishable under Section 20 of the Act and he was awarded the sentence as mentioned in the upper

part of the judgment.

10. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

11. I have heard Mr.Sandeep Kotla, learned counsel for the appellant, Mr. Chetan Sharma, learned Assistant Advocate General, Haryana and have meticulously gone through the record of the case.

12. Initiating the arguments, learned counsel for the appellant contended that the place of recovery was a thoroughfare. Even a Dhaba was situated near the place of recovery. But, no independent witness has been associated and the case of the prosecution is based only on the official witnesses. Thus, the non-joining of the independent witness renders the prosecution version doubtful.

13. He further contended that there are some material contradictions in the statements of the official witnesses.

14. He finally contended that even as per the admitted version of the prosecution, the recovery is alleged to have been effected on the basis of a secret information. But, the Investigating Officer has not reduced into writing the said secret information nor any information was sent to the superior police officers. So, there is a total violation of

Section 42 of the Act, which vitiate the whole trial. To support his contentions, he relied upon cases **Manoj Kumar Vs. State of Haryana 2014(2) R.C.R (Criminal) 811, Sukhdev Singh Vs. State of Haryana 2013(2) R.C.R (Criminal) 232, Peeraswami Vs. State NCT of Delhi, 2007(4) R.C.R (Criminal) 339 and Kaku Singh and others Vs. State of Punjab 2008(3) R.C.R (Criminal) 37**. Thus, he pleaded that the conviction of the appellant is illegal.

15. On the other hand, learned State counsel contended that the Investigating Officer has tried to associate the independent witnesses, but they were not ready to join. So, he was not at fault. He further contended that at the time of receiving the secret information, the Investigating Officer was out of the police station. It was a case of emergency and the Investigating Officer has no time to reduce the secret information into writing. But, after recovery, he has incorporated the entire secret information in the written information Ex.PG, which was sent to the police station i.e. to the SHO of the Police Station, a superior police officer and the copies of the FIR was also forwarded to the senior police officers. So, there is no noncompliance of Section 42 of the Act. He further contended that the prosecution witnesses have given the consistent version with respect to the recovery of the contraband from the

possession of the accused. Thus, he contended that there is no legal infirmity in the conviction of the appellant recorded by the learned trial Court.

16. I have duly considered the aforesaid contentions.

17. This fact is not disputed that the place of recovery was a thoroughfare. But, it could not be stated that the Investigating Officer has not made any effort to associate public witnesses during the investigation of the case. PW-4 Ram Mehar, Naib Tehsildar has categorically deposed in the cross-examination that in his presence, the Investigating Officer has tried to join the independent witnesses, but they declined. PW-5 ASI Sukhbir Singh, the Investigating Officer of the case has also deposed that he has tried to join the independent witnesses from the passersby, but they declined. Thus, in view of the aforesaid, it comes out that the Investigating Officer has tried to associate the public man in the investigation, but they had declined to oblige. It is a fact of common knowledge that now a days, the public man avoid to take the trouble to be the part of the police investigation, obviously due to various reasons. They do not want themselves to be subjected to the trouble to attend the Court. They also do not want to earn the wrath of the accused. So, they generally avoid to join the police investigations. The hon'ble Supreme Court in case **Akmal**

**Ahmad Vs. State of Delhi 1999(2) RCR (Criminal) 265,** has laid down that evidence of search or seizure made by the police will not become vitiated solely for the reasons that the same was not supported by any independent witness. The same ratio of law has been laid down by the Hon'ble Apex Court in cases **State of NCT of Delhi Vs. Sunil (2000) 1 Supreme Court cases 748, Rohtash Vs. State of Haryana, 2013(3) RCR (Criminal) 355, M.Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, 2004(1) RCR (Criminal) 160 and Ravinderan @ John Vs. Superintendent of Customs, 2007 (3) RCR (Criminal) 80.** Thus, the non-joining of independent witness is no ground to discredit the prosecution version.

18. Moreover, in the instant case, the search and seizure has been conducted under the supervision of PW-4 Ram Mehar, Naib Tehsildar. He is Revenue Officer and can not be stated to be under the influence of the police. So, there is no reason as to why he should not be considered as an independent witness. PW-4 Ram Mehar has fully corroborated the testimony of PW-5 ASI Sukhbir Singh, the Investigating Officer of the case with respect to the search and seizure of the contraband.

19. Learned counsel for the appellant has not been able to point out any material contradiction in the

statements of the prosecution witnesses. So, the testimonies of the prosecution witnesses is consistent and cogent.

20. Learned counsel for the appellant has vehemently pleaded that the Investigating Officer has totally violated the provisions of Section 42 of the Act and the entire prosecution is vitiated. PW-5 ASI Sukhbir Singh has admitted in the cross-examination that after secret information, no intimation was sent to the police station, but he waited for the accused. Ex.PG is the Ruqa (written information) on the basis of which, this case has been registered. This ruqa has been addressed to the SHO Police Station, Madlauda. The Investigating Officer in this case was ASI Sukhbir Singh posted as Incharge Police Post, Thermal. So, the Investigating officer was subordinate to the SHO Police Station Madlauda. SHO Police Station Madlauda was the immediate superior officer of the Investigating Officer. The ruqa Ex.PG has been addressed to the SHO, Police Station Madlauda, wherein the entire substance of the secret information has been incorporated and was sent to the SHO, Police Station Madlauda immediately after recovery for the registration of the case.

21. Section 42 of the Act reads as under:-

**“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 V A 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 V A 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 subsection (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.

22. As per Section 42 sub-section (2), the Investigating Officer is required to send the information in writing to his immediate superior officer within 72 hours.

23. The Constitution Bench of the Hon'ble Apex Court in case **Karnail Singh Vs. State of Haryana 2009(5) R.C.R (Criminal) 515** while interpreting Section 42 of the Act has laid down as under:

“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.”

24. As per Clause (b) reproduced above, if the information has been received by the officer when he was not in the police station and was on move either on patrol duty or otherwise and received the secret information for immediate action and any delay would have resulted in the goods or the evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given by him, in that situation, he can take the

action as per clauses (a) to (d) of Section 42 sub-section (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the officer superior. Clause (d) further laid down that the total non-compliance of the requirements of sub-sections (1) or (2) of Section 42 is impermissible but delayed compliance with satisfactory explanation will be acceptable compliance of Section 42 of the Act.

25. A Division Bench of this Court in case **Jarnail Singh s/o Jawara Ram Vs. State of Haryana 2013(2) RCR (Criminal) 580**, after taking into consideration the ratio of law laid down in cases **Abdul Rashid Ibrahim Mansuri Vs. State of Gujrat 2001(1) R.C.R (Criminal) 611**, **Sajan Abraham Vs. State of Kerala 2001(3) R.C.R (Criminal) 808**, **Karnail Singh Vs. State of Haryana (supra)** and **Kishan Chand Vs. State of Haryana 2013(2) R.C.R (Criminal) 67** has laid down as under:-

“52. We fail to understand as to how the judgment (supra) applies to the facts and circumstances of this case to accord benefit of doubt to the appellant, especially when there was no non-compliance of Section 42 of the Act. Even, independent witness, PW-9 (Billu Ram Chowkidar) was associated in the recovery proceedings. Even, PW-12, a gazetted Officer of Haryana Government was associated at the time of recovery. The information about the recovery was sent to the police station, where formal FIR Ex.P1 was

lodged regarding the recovery in question and the copy of the FIR Ex.P1 was sent to the Illaqa Magistrate, as also, to the higher police officers, as can be seen from the testimony of PW-1 (Dharam Pal Constable), which could not be shattered during cross-examination.

26. It was further laid down that:-

“54. Section 42 of the Act can be divided into two parts, first if the power of entry, search, seizure and arrest without warrant or authorisation, as contemplated under sub-section (1) of the said Section. Second is reiterating any information in writing under sub-section (1) of the Act.

55. It may be mentioned here that sub-section 2 was amended by the Parliament vide Act No. 9 of 2001 w.e.f. 02.10.2001. In the case in hand the information was received by PW-8 (Sandeep Singh SHO) on 29.01.2000 and he immediately, reached the place of recovery. If, he had not reached the place of recovery immediately after the receipt of information, and if, he had consumed time in obtaining the search warrant, in that event, the appellant could escape from the place of recovery.

56. So, keeping in view the facts and circumstances of this case, PW-8 pondered it apt to enter and search the place of recovery without obtaining search warrant. The whole purpose of the secret information would have been disconcerted, if he had not acted upon this information immediately after receipt, thereof.

57. Section 42 (1) (d) of the Act empowered PW-8 (Sandeep Singh SHO) to search the place of recovery and arrest the appellant, as obtaining of search warrant would have afforded opportunity to the appellant for concealment of the contraband, as also,

for his escape. The information, as already held about this recovery was sent by PW-8 (Sandeep Singh SHO) to the Illaqa Magistrate, as also to the higher police officers. So, no benefit of Kishan Chand's judgment (supra) can be accorded to the appellant.

27. It was further laid down that:-

“62. In the case in hand, as already observed, compliance of Section 42 of the Act stood made by the Investigating Officer by sending ruqa Ex.P4 to the police station, where formal FIR Ex.P1 was recorded whose copies were sent to the Illaqa Magistrate, as also, to the higher police officers.

63. Indeed, PW-8 (Sandeep Singh SHO) during cross-examination testified that after receiving secret information, he did not send this information in writing to the police station, nor he sent it to higher police officials of police. Indeed, PW-8 (Sandeep Singh SHO) could not literally understand question put to him in the cross-examination and, if he had understood the question literally, then he would have said that compliance of Section 42 (1) (2) of the Act had been made, which indeed had been made in this case, as he sent ruqa Ex.P4 to police station, where formal FIR Ex.P1 was recorded and copies, thereof, were sent to the Illaqa Magistrate, as also to the higher police officials.”

28. In a latest judgment titled as **Gurdev Kaur Vs. State of Punjab 2014(1) DC (Narcotics) 573**, Hon’ble Apex Court also after taking note of cases **Karnail Singh Vs. State of Haryana** (supra) and **Sajan Abraham Vs. State of Kerala** (supra), has laid down as under:-

“We may point out, at this stage, that the matter

was referred to the larger Bench. That was the sole reason that in the special leave petition filed by the appellant leave was granted, i.e. in view of the fact that the compliance of Section 42 of the NDPS Act is mandatory or not had been referred to by larger Bench. The Constitution Bench has since decided the issue in ***Karnail Singh v. State of Haryana 2009(8) SCC 539***. Not only the judgment in Sajjan Abraham case (supra) is explained, it is specifically held by the Constitution Bench that in special circumstances involving emergent situations (when the officer is on the move) and recording of information is not practical prior to search and seizure and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer may be postponed by a reasonable period which may even be after the search, entry and seizure. It is further held that whether there is adequate or substantial compliance of the provisions of Section 42 of the Act or not is a question of fact to be decided in each case. It was further held that non-compliance of Section 42 may not vitiate the trial if it does not cause any prejudice to the accused.

In the present case as mentioned above, the seizure was from the open area when the officers concerned were on the move and not in their office when they received information and immediately the information was given to DSP Sushil Kumar who immediately had come to the spot. Therefore, it is clear that there was a substantial compliance of provisions of Section 42 of the Act.”

29. In the instant case also, at the time of receiving the secret information, the Investigating Officer was on move

and was out of the police station. It has been categorically mentioned in the written information that the accused-appellant will just now go towards Madlauda for selling the Charas. So, the secret information was emergent in nature and it would not have been practicable for the Investigating Officer to record the same in writing and sent the same to the immediate superior officer. But, immediately after the recovery i.e. well within 72 hours, he incorporated the entire substance of the secret information in the written information Ex.PG and sent the same to the SHO of Police Station Madlauda his immediate superior officer. Even, the FIR Ex.PG/1 was registered on the basis of said written information. The FIR Ex.PG/1 shows that the copy thereof was forwarded immediately to the superior police officers on the same day i.e. 20.09.2000 through a special constable. Thus, it can not be stated that there is a total violation of Section 42 of the Act. Rather, it is clear that there was substantial compliance of Section 42 of the Act.

30. Moreover, in the instant case, the contraband was not concealed in any building, conveyance or enclosed place. Rather, the accused-appellant having the '*thaila*' containing the contraband in his hand was apprehended at public place. In case **N.C.T of Delhi Vs. Malvinder Singh 2007(3) R.C.R (Criminal) 602**, the Hon'ble Apex Court has

laid down that Provisions of Section 42 of the Act is not applicable even though recovery of contraband was effected on receipt information by Police at a public place.

31. Thus, keeping in view my aforesaid discussion, the prosecution has been able to establish beyond shadow of reasonable doubt that appellant was found in conscious possession of 2 kg of Charas. Thus, there was no illegality or impropriety in the impugned judgment of conviction and order of sentence and the same are hereby upheld and affirmed.

32. Resultantly, the present appeal has no merits and the same is hereby dismissed. The accused-appellant is on bail. His bail stand cancelled. He shall surrender within 15 days from the date of this judgment before the learned Chief Judicial Magistrate, Panipat, who shall send him to jail to undergo the remaining part of his sentence. If, he fails to surrender, the learned Chief Judicial Magistrate, Panipat, shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence.

**August 06, 2015**

**s.khan**

**( DARSHAN SINGH )  
JUDGE**