

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

Reserved on: 27.08.2015

Date of decision: 01.09.2015

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CRL.A. 1555/2011

THOMAS KARKETTA

..... Appellant

Through: Mr.Ajit Sharma, Adv.

versus

STATE THR. NARCOTICS CONTROL BUREAU

..... Respondent

Through: Ms. Alpana Pandey, APP for
the State with SI P.K. Jha and
SI Chandra Shekhar, PS Hazrat
Nizamuddin

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. Thomas Karketta stands convicted under Section 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act (For Short 'NDPS Act'), for being in possession of 61.49 kg ganja by judgment dated 5/9/2011, passed by ASJ/ Special Judge- NDPS/South and South-East, Saket Court Complex, New Delhi in Session Case no. 51 A/2009 arising out of FIR no. 333/2009 (PS H. Nizamuddin).

2. By order dated 8/9/2011, he has been sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of rupees 1 lac. and in default of payment of fine to further suffer Simple Imprisonment for 6 months.

3. The aforesaid judgment and order of conviction is under challenge in the present appeal.

4. The appellant was arrested from near ISBT, Sarai Kale Khan, near IGL pump and was found to be in possession of four bags containing a total of 61.49 kg ganja.

5. The prosecution case is that, while HC Som Pal Singh (PW.1), Ct. Gurvinder Singh (PW.3), SI Shivraj Bisht (PW.4) and Ct. Prakash (PW.6) were on patrolling duty on 6/8/2009, they were informed at about 5:30 PM by a Secret Informer that one person is sitting near ISBT, Sarai Kale Khan, with contraband and if raid is conducted immediately, he could be apprehended. The aforesaid information was communicated by SI Shivraj Bisht (PW.4) to the ACP, Operation Cell, where after direction was given to undertake the raid. The further case of the prosecution is that a request was made to 4 passersby to join the raid but they refused and disappeared without disclosing their identities and particulars.

6. The appellant was found sitting on two red coloured bags. He was holding the strings of other two bags in his hands. He was apprehended and was told about the information which the Police party had about him. He was made aware of his legal rights to be search in the presence of a Gazetted Officers or a Magistrate by way of a written notice under Section 50 of the NDPS Act (Ex.PW.1/A; Carbon copy Ex. PW.3/A), but the appellant refused to exercise such option. The refusal was taken down in the hand writing of the appellant (Ex.PW1/B). The appellant was also offered to search the

members of the raiding team before he was searched, but that to be was refused.

7. The four bags contained, in all, 61.49 kg ganja. SI Shivraj Bisht (PW.4) drew out samples of ganja from each of the four bags and gave serial numbers to the same. They were packed in separate cloth pullandas and were also sealed affixing the seal of SSB. FSL form was also prepared on the spot, on which also the same seal was affixed. The seal, after its use was given to HC Som Pal Singh (PW.1).

8. SI Shivraj Bisht (PW.4), prepared a rukka and sent the same to PS Hazarat Nizamuddin through Ct. Gurvinder Singh (PW.3). He was also entrusted with the sealed pullandas, FSL form and seizure memo for being given to the SHO.

9. Charge-sheet was filed against the appellant on 29/10/2009, where upon cognizance was taken under Section 20(b) (ii) (c) of the NDPS Act.

10. The prosecution has relied upon 10 witnesses who were examined on its behalf to bring home the charges against the appellant.

11. The appellant assails the judgment and order of conviction on the following grounds:

- a. The secret information which was received by PW.4 was not reduced in writing as per the mandatory requirement of the

Section 42 of the NDPS Act, thereby vitiating the entire prosecution edifice

- b. There has been a delay of one and half months in sending the sealed samples to FSL which is in-violation of the standing instruction no. 1/88 dated 15/3/88 of the NCB namely that the samples must be dispatched to the laboratory within 72 hours of the seizure to avoid any legal objection
- c. The FSL form was not sent along with sample to the FSL, giving rise to strong suspicion of tampering with sample; and
- d. Lastly, non joining of any public or independent witness to the search, seizure and arrest and thereby raising doubts about the veracity of the search and seizure proceedings.

12. In order to appreciate the contention of appellant, the testimony of PW.4 requires to be examined.

13. SI Shivraj Bisht (PW.4) has testified that on 6/8/2009, while he along with PWs. 1, 3 and 6 were on patrolling duty at Maharani Bagh bus stop, an information was provided by a spy about an accused with contraband sitting near IGL, CNG pump, near Sarai Kale Khan bus stand and in case raid is conducted immediately, he could be apprehended. The aforesaid information was given to the ACP, Operation Cell, South East District where upon he was given instructions to conduct the raid. His request to four public persons to become witnesses in the search and seizure proceedings was refused. After complying with the provisions of under Section 50 of the NDPS Act, the appellant was searched. The four bags, of which the appellant was in possession of, contained ganja. The contraband recovered

weighed 61.49 kg. Random sampling was done and separate pullandas were prepared which were sealed with the seal of SSB. The FSL form was also filled up, sealed and the seal was handed over to HC Som Pal Singh (PW.1).

14. In his cross examination, PW.4 as stated that he had not reduced the secret information into writing separately. On the day when the raid was made, the IGL CNG pump was closed. However, there was normal traffic on the road. PW4 admits that he did not request any person from near Sarai Kale Khan bus stand to join the raiding party, as there was no public available at that time.

15. PWs. 1, 3 and 6 who were the members of the raiding team have supported the prosecution version and have spoken about the appellant having been apprehended, after the compliance of Section 50 of the NDPS Act.

16. All the aforesaid witnesses have denied the suggestions that nothing was recovered from the possession of the appellant and that all proceedings was conducted in the police station.

17. Inspector Suresh Kaushik (PW.3), has stated that on 6/8/2009, he deposited the pullandas and FSL form at malkhana.

18. Ct. Sanjiv Kumar (PW.9) has stated that on 25/9/2009 while he was posted at PS H. Nizamuddin, he had taken four sealed Pullandas form the malkhana to the FSL, Rohini. All the four sample Pullandas were bearing the seals of SSB and SK. He had obtained the acknowledgment of the same from the FSL Rohini. He has denied the

suggestion that the sample Pullandas were found to have been tampered with while the same were in his custody.

19. It has been pointed out that by the Ld. Counsel of the appellant, that the deposition of PW.9 clearly demonstrates that only four sealed sample pullandas were send to FSL, Rohini, and not the FSL form along with the same. It was submitted that in the laboratory, at the time of testing, verification of the seal on the samples is done by matching it with the seal on the FSL form. The FSL form, thus is an important safe guard to avoid any suspicion and the same not having been sent to the laboratory along with the sealed samples raises serious doubts about the samples being tampered with.

20. In this connection, the FSL report (Ex.PW.5/A) is perused. The report clearly states, after giving the description of the parcels that the seals on the four parcels marked as S1 to S4 were intact and tallied with the specimen seals as per the forwarding letter (FSL form). Thus one of the arguments on behalf of the appellant viz. the FSL form was not sent along with the sealed samples to the FSL is incorrect. It can safely be presumed that PW.9 inadvertently missed in stating about the FSL forms also being sent to the FSL along with sealed samples.

21. Now, to the issue of compliance of the provision of Section 42 of the NDPS Act. Section 42 of the NDPS Act reads as here under-

Section-42. Power of entry, search, seizure and arrest without warrant or authorization.- (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) Detail 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.

22. In *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat*: (2000) 2 SCC 513, a three judge bench of Supreme Court held that compliance with the Section 42 of NDPS Act is mandatory and failure to take down the information in writing and forthwith send the report to the immediate Official Superior would cause prejudice to the accused. However in *Sajan Abraham vs. State of Kerala*: (2001) 6 SCC 692, which was also decided by a three Judge bench, it was held that Section 42 of NDPS Act was not mandatory and substantial compliance was sufficient.

23. In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act, a reference was made to the Constitution Bench in *Karnail Singh vs. State of Haryana*: (2009) 8 SCC 539, which finally resolved the dispute by listing the actual effect of the two decisions referred to above:

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513: 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] 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.

(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.”

24. Admittedly, the present case hinges on the secret information having been provided by a spy to PW.4. There is no averment in the testimony of PW.4 regarding such secret information having been reduced in writing and sent to the Superior Officer. There is no DD entry regarding such secret information having been received by PW.4. As has been decided in *Karnail Singh vs. State of Haryana* (supra), the mandatory requirement is of writing down the information received and sending a copy thereof to the Superior Officer, preceding the search and seizure by the officer, which could only be relaxed in special circumstances involving emergent situations, when compliance of such requirement could be postponed by a reasonable period, i.e. after the search and seizure.

Total non compliance with requirement of Section 42 of NDPS Act has been held to be impermissible. It has been reiterated a number of times by the Supreme Court that the consequences of non compliance of Section 42 of NDPS Act are grave. The stringent provisions of the NDPS Act cast a duty upon the prosecution to strictly follow the procedure and comply with all its safe guards.

25. The Supreme Court in Sukhdev Singh vs. State of Haryana:(2013) 2 SCC 212; has observed :

“The provisions of Section 42 of NDPS Act 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 in the writing and send the said information to his superior officers, but could do it later and preferably prior to the recovery. Compliance of Section 42 of NDPS Act is mandatory and there cannot be an escape from it strict compliance”.

26. Though there has been delay of one and half months in sending the sample to FSL, which is in violation of the standing instructions of the NCB, nonetheless there is nothing on record to suggest or to come to the opinion that while the sealed samples were kept in the malkhana, they were tampered with. From the deposition of the witnesses, it becomes very clear that the samples were sent to the FSL, Rohini in proper and in untampered condition. It is normally

expected, that there should not be any delay in dispatching the sample to the laboratory to avoid any suspicion, but in every instance of delay in such dispatch, the prosecution case cannot be thrown overboard.

27. The last limb of the argument on behalf of the appellant is that there are only police witnesses and no serious effort was made for joining public witnesses. It has been submitted that ISBT is a crowded area and there could have been many willing persons to become a witness to the search, seizure and later arrest of the appellant. In this context, reference is made to testimony given by PW.3, wherein it has been admitted that no public witness was asked to join such proceedings. Similarly PW.4 has also admitted that no public person was requested to witness the search. However such statement was qualified by saying that no one was available at the time of search.

28. ASI Mahesh Singh (PW.5) has affirmed that the place where the appellant was arrested was a busy and crowded place. The submission therefore is that in the absence of any notice under Section 100 (8) of Cr. P.C. having been issued by the police, it could safely be presumed that no serious effort was made to make public person join the investigation.

29. Though in *Ajmer Singh vs. State of Haryana*:(2010) 3 SCC 746, the Supreme Court has held that joining of public persons is not an inviolable rule and there could not be any acquittal merely because no independent person was produced; nonetheless the requirement of

independent persons joining the investigation and deposing before the Trial Court was not undermined wholly.

30. This Court finds that in most of the NDPS cases investigated by the police, there is a routine statement that persons who are asked to join the investigations declined to become witnesses. In the case in hand, this Court is not convinced that any sincere effort was made by the raiding party to associate public witnesses. The names and addresses of such persons have also not been noted. From the deposition of the witnesses also, it is hardly established that anybody was asked to join the proceedings. This failure on the part of the police, by itself, may not have been sufficient for discarding the prosecution case all together but from the conspectus of the totality of circumstances namely: (i) Complete non compliance of Section 42 of the NDPS Act; (ii) Arrest having been affected at a busy public place; (iii) The appellant being in possession of four bags containing 61.49 kg of ganja, which is a huge quantity and which cannot be easily transported; (iv) No statement with regard to the origin and source of such contraband and from which place was such contraband being carried by the appellant and to which destination, and (v) Delay of one and half months in dispatching the seized sample to the FSL, the non-joining of public persons has assumed great significance.

31. Thus, to tie the strings together, there has not been even a delayed compliance of the provisions of Section 42 of NDPS Act, which is a mandatory safeguard engrafted in this statute and despite the recovery of contraband being of huge quantity and that also from a

public place, no serious effort has been made by the police for joining the investigation.

32. Based on the above findings, it is difficult to uphold the conviction. For the reasons afore-recorded, the appeal is allowed and the appellant is directed to be released forthwith from custody, if not wanted in any other case.

33. Trial Court record to be returned.

34. Two copies of the judgment be sent to the Superintendent of the concerned jail for record as well as compliance.

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1. In view of the appeal having been allowed, this application has become infructuous.
2. This application is disposed of accordingly.

ASHUTOSH KUMAR, J

SEPTEMBER 01, 2015

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