

In the High Court of Punjab and Haryana at Chandigarh

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Criminal Appeal No.S-799-SB of 2004

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Date of decision:11.2.2016

Hardeep Singh

...Appellant

v.

State of Haryana

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

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Present: Mr. G.S. Sandhu, Advocate for the appellant.

Mr. Himmat Singh, Deputy Advocate General, Haryana for
the respondent-State.

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Inderjit Singh, J.

This criminal appeal has been filed by Hardeep Singh-appellant challenging the impugned judgment of conviction and order of sentence dated 1.4.2004/3.4.2004 passed by learned Judge, Special Court, Karnal, whereby he has been held guilty and convicted for the offence under Section 15(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'). He has been sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹5,000/- and in default of payment of fine to further undergo rigorous imprisonment for four months for the offence under Section 15(b) of the Act.

The brief facts of the prosecution case are that on 6.12.2011,

ASI Varinder Singh of CIA-II, Karnal along with other police officials was present at Bus Stand, Dachar, in connection with detection of crime. In the meanwhile, ASI Varinder Singh received a secret information that accused Hardeep Singh used to sell poppy straw at his house situated in the eastern side of the village and on that day he was selling the poppy straw at his residence. On this information, ASI Varinder Singh sent 'Ruqa' Ex.PA to the police station and conducted raid at the house of the accused after joining Joga Singh son of Asa Singh and Joga Singh son of Santokh Singh, but they refused to give any statement in the Court and agreed to accompany the raiding party. Accused Hardeep Singh found present at his house dragging two plastic bags into his house, who on seeing the police party left the bags there and tried to run away but he was apprehended. Offer regarding search was made to him. He opted for his search in the presence of a Magistrate. The public witnesses were freed at the spot. Thereafter, ASI Varinder Singh along with accused, two bags and witnesses came to the Tehsil Office, Nissing and produced them before Shri Lehna Singh, Naib Tehsildar. Then the search was made as per rules. 200 Grams of poppy straw was separated as sample from each of the bags and the remaining poppy husk on weighment came to be 19.800 Kgs. of each bag, which was put in those very bags. The parcels of the samples as well as remainder poppy husk were sealed with the seal of 'VS' and taken into police possession vide memo Ex.PE. On return to the Police Station, the case property and witnesses were produced before SI Bhagat Ram, the then SHO of Police Station Nissing, who also verified the facts of the case from the

accused and witnesses and affixed his seal bearing impression 'BS' on the samples and remainder parcels and on his direction the case property was deposited in intact condition with the MHC. The sample in question was sent to FSL, Madhuban for analysis which was found to be poppy husk and the report Ex.PF of the FSL was received. The accused was arrested. The statements of witnesses were recorded. After necessary investigation, the challan was presented in the Court.

On presentation of challan, the trial Court finding *prima facie* case against the accused-appellant framed charge for the offence under Sections 15 of the Act, to which the accused pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW-1 SI Bhagat Ram, the then SHO, Police Station Nissing, before whom the case property etc. was produced for verification. PW-2 MHC Mohinder Singh is a formal witness. PW-3 EHC Dilbagh Singh, deposed regarding sending of special report which was handed over to him by SI Bhagat Ram for handing over the same to the Illaqa Magistrate, SP, DSP etc. and he handed over the same accordingly well in time. He also took sample parcels from MHC Mohinder Singh for handing over the same in the office of FSL, which he handed over. PW-4 Lehna Singh, Naib Tehsildar, Nissing has supported the prosecution version. PW-5 HC Parmal Singh is the recovery witness, who was with the police party. He also deposed as per prosecution version. PW-6 ASI Varinder Singh is the Investigating Officer of this case, who deposed regarding conducting the investigation of this case.

At the close of prosecution evidence, the accused was examined under Section 313 Cr.P.C. and was confronted with the evidence of the prosecution, but he denied the correctness of the evidence and pleaded himself as innocent. He also stated that he has been falsely implicated by the Police due to enmity.

In defence, he examined DW-1 Joga Singh and DW-2 Hardeep Singh son of Udham Singh.

After going through the evidence on record, the learned Judge, Special Court, Karnal, vide its impugned judgment dated 1.4.2004 and order dated 3.4.2004 convicted and sentenced the accused-appellant for the offence as mentioned above. Aggrieved against the impugned judgment and order, the present appeal has been filed.

At the time of arguments, learned counsel for the appellant mainly argued on one point that the compliance of Section 42 of the Act is mandatory and in the present case no compliance under Section 42 of the Act has been made.

On the other hand, learned State counsel argued that the compliance under Section 42 of the Act has been made and it has been duly discussed in the judgment by the learned Judge, Special Court. He argued that the PWs have consistently deposed regarding prosecution version and there is nothing on the record to show that the accused has been falsely implicated.

After hearing learned counsel for the appellant and the learned State counsel and going through the record, I find that admittedly in the

present case, the Investigating Officer has received a secret information against the accused on the basis of which 'Ruqa' was sent to the Police Station and then the FIR was registered on the basis of said 'Ruqa'. Admittedly, special reports were sent to the senior officers. A perusal of the evidence on record nowhere shows that the secret information was recorded separately and then the report was sent under Section 42 of the Act to the Senior Officers before conducting raid at the house of the accused. In the latest judgment of the Hon'ble Supreme Court in Darshan Singh v. State of Haryana, 2016(1) Law Herald (P&H) 225 (SC), after discussing the judgment of the Constitutional Bench in Karnail Singh v. State of Haryana, 2010 (2) Law Herald (SC) 991, it has been held as under:-

“11. Having given our thoughtful consideration to the submission advanced at the hands of learned counsel for the respondent, we are of the view that the mandate contained in Section 42(1) of the NDPS Act, requiring the recording in writing, the details pertaining to the receipt of secret information, as also, the communication of the same to the superior officer are separate and distinct from the procedure stipulated under the provisions of the Criminal Procedure Code. Sub-section 1 of Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the first Class or any Magistrate of second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any

offence punishable under Chapter IV. Sub-section (2) of Section 41 refers to issue of authorisation for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of Section 42 of the NDPS Act lays down, that the empowered officer, if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance of one, would not infer the compliance of the other. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in **Karnail Singh's case** (supra) and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code.

12. In the above view of the matter, it is not possible for us to accept the submission of the learned counsel for the respondent-State, that the registration of the first information report at the hands of the Station House Officer, Police Station Shahar, Panipat and its communication to the Superintendent of Police, Panipat would constitute sufficient compliance of the mandate of Section 42 of the NDPS Act.

13. In aforesaid view of the matter, we are satisfied that Section 42 of the NDPS Act was not complied with at all, insofar as the present controversy is concerned. Thus viewed with conclusion (d) recorded in Paragraph 35 of the judgment rendered in **Karnail Singh's** case (supra), would fully apply to the facts and circumstances of the present case, and we are left with no other option, but to set aside the conviction and the sentence of imprisonment of the accused-appellant Darshan Singh. Ordered accordingly. The appeal stands allowed.”

In aforesaid judgment passed by the Hon'ble Supreme Court, it is held that registration of First Information Report by SHO and communicating the same to Superintendent of Police would not constitute compliance of the provisions of Section 42 of the Act. The finding given by the trial Court that the sending of 'Ruqa' to Police Station and recording of FIR and then sending the special report to the senior officers amounts to compliance is against the law. There is no dispute regarding the legal position that the provisions of Section 42 of the Act are mandatory. In some of the

circumstances the compliance can be made by the Investigating officer after conducting the raid, if there are chances of the accused to fled away etc. as held in Karnail Singh v. State of Haryana (supra), which is as under:-

“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 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.” ... (emphasis is ours)”

Therefore, from the above, I find that the mandatory provisions of Section 42 of the Act have not been complied with in the present case.

Further more, the version of the prosecution itself also creates doubt that the two PWs had been joined before conducting the raid and it was stated that both these PWs have made statements that they will not give the evidence before the Court and they were also freed at the spot and were not taken even upto the Naib Tehsildar. Then there is no purpose for joining the independent witness, if they were not to give the evidence in the Court or they had not witnessed the recovery.

So, from the above discussions, I find that the impugned judgment passed by the learned trial Court is not as per law and is liable to be set aside.

Resultantly, finding merit in this appeal, the same is allowed, the impugned judgment of conviction and order of sentence passed by the learned Judge, Special Court, Karnal, is set aside and the appellant is acquitted of the charge as framed against him. The sentence of

imprisonment of the appellant was suspended and he was released on bail by this Court. As he is on bail, therefore, his bail bonds and surety bonds shall stand discharged.

February 11, 2016.

(Inderjit Singh)
Judge

hsp

NOTE: Whether to be referred to the Reporter or not:Yes