

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.645 of 2015**

Arising Out of PS.Case No. -3 Year- 2012 Thana -GOVERNMENT OFFICIAL COMP. District-
PATNA

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Manohar Rai @ Manohar Roy, son of Shri Tileshwar Roy, resident of House No. 140, Circle No. 106, Diwan Mohalla - Patna City, P.S. Khajekala, District - Patna

.... Appellant/s

Versus

1. The State of Bihar
2. The Union of India through Intelligence officer, Narcotics Control Bureau, Patna

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ganga Prasad Bimal-Amicus Curiae
Mr. Vijay Kumar Sinha-Advocate
Mr. Arvind Kumar Srivastava-Advocate
Mr. Satyendra Kumar Bhatnagar-Advocate
Mr. Pramendra Kumar Singh-Advocate
Mr. Rabindra Kumar-Advocate
Mr. Anant Kumar-Advocate

For the Union of India : Mr. Anjani Kumar Sharan-A.S.G.
Mr. Manoj Kumar Singh-C.G.C.

For the State : Mr. S.A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 22-06-2017

Sole appellant Manohar Rai @ Manohar Roy has been found guilty for an offence punishable under Section 20(B) of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for five years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo imprisonment for six months additionally with a further direction to set off the period undergone during course of trial in terms of Section 428 of the Cr.P.C. vide judgment of conviction dated 21.09.2015 (wrongly been mentioned at first page of



judgment as 21.11.2015) and order of sentence dated 23.09.2015 passed by the Additional Sessions Judge-VII-cum-Special Judge, N.D.P.S., Patna in Special Case No.17 of 2012.

2. It happens to be a case of the prosecution exposed through PW-4, namely, Debashis Chaudhary, official of Narcotic Control Bureau that he received confidential information on 24.07.2012 regarding storage of Narcotic substance by the appellant/accused Manohar Rai at his place, which was noted down and passed over to his immediate superior officer, Superintendent of Police under whose direction, a raiding party was constituted under his leadership comprising apart from himself, Vikash Kumar, Superintendent, Manoj Shanker, Vijay Bahadur, Rohit Srivastava, Gyan Prakash, Sumit Arya, Miss Chanda, R. C. Hembram, A.S. Ghosh, Manoj Kumar Yadav, Ramjee Chaturvedi along with drivers Anil Kumar Ghosh and Bhola Nath Dinda and reached at the office of Deputy Superintendent of Police (Town), Manoj Kumar, who, on their request provided a team headed by S.I. Krishna Nand and accordingly, the house of Manohar Rai was cordoned. To facilitate the activity of search and seizure, Rajeev Ray as well as Mukesh Ray and independent persons were called upon to witness the same.

It has further been alleged that after knocking the door, Manohar Rai himself had opened the door, who on query, disclosed



his identity. The prosecution party disclosed their identity as well as purpose for which they have cordoned his house with a further disclosure that for the purpose of search, gazetted officer (S.P.) is also in the raiding party before whom search could be made including his personal search, but Manohar Rai did not show any kind of inclination. Moreover, nothing was recovered from his personal possession. During course of house search, a polythene bag containing 12.800gm. of Ganja was seized from closed verandah located at upper floor of the house, which was tested positive kit examination having along with the raiding party whereupon, two samples each containing 25 grams was prepared, sealed and in likewise manner, the remaining part of the Ganja. Accordingly, accused Manohar Rai was taken into custody. His statement under Section 67 of the N.D.P.S. Act was recorded and further, was remanded to the custody. On the other hand, the sample was sent to chemical examination. After completing the preliminary investigation, complaint was filed at the behest of PW-4, Debashis Chaudhary.

3. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence. Moreover, specific suggestion has been given to PW-5 that recovery of Ganja was made from the house of Sudama Ray. In order to save aforesaid



Sudama Ray, appellant/ accused has been apprehended and the recovery has been shown against him. However, neither any DW nor any chit of paper has been adduced on behalf of defence.

4. In order to substantiate its case, prosecution had examined altogether eight PWs, out of whom, PW-1 Miss Chanda, PW-2 Gyan Prakash, PW-3 Krishnanand, PW-4 Debashis Chaudhary, PW-5 Sumit Arya, PW-6 Vijay Bahadur, PW-7 Rajeev Rai and PW-8 Mukesh Rai. Side by side had also exhibited, Exhibit-1 notice under Section 50 of the N.D.P.S. Act, Exhibit-2 search-cum-seizure list, Exhibit-2/1 signature of witness Gyan Prakash (PW-2), Exhibit-2/2 signature of Sumit Arya (PW-5), Exhibit-3 copy of notice received by appellant under Section 67 of the N.D.P.S. Act, Exhibit-3/1 notice under Section 67 of the N.D.P.S. Act against Mukesh Rai, Exhibit-3/2 copy received under Section 67 of the N.D.P.S. Act against Rajeev Rai, Exhibit-4 statement of appellant Manohar Rai under Section 67 of the N.D.P.S. Act, Exhibit-4/1 statement of Mukesh Rai under Section 67 of the N.D.P.S. Act, Exhibit-4/2 statement of Rajeev Rai under Section 67 of N.D.P.S. Act, Exhibit-5 Test Memo prepared by NCB, Exhibit-6 arrest memo, Exhibit-7 personal search report relating to Manohar Rai (appellant), Exhibit-8 order dated 13.07.2015 under Section 52A of N.D.P.S. Act, Exhibit-9 certificate provided under Sub-section 3 of Section 52(A) of the N.D.P.S. Act including



photographs by Judicial Magistrate Krishna Gopal dated 16.07.2015, Exhibit-10 F.S.L. Report.

5. While assailing the judgment of conviction and sentence, manifold argument has been raised on behalf of appellant. The first and foremost argument happens to be that although witnesses have stated with regard to presence of Vikash Kumar, Superintendent of Police being one of the member of raiding party, who has not been examined nor the prosecution had furnished any kind of explanation. Examination of Vikash Kumar was very much pertinent in the facts and circumstances of the case as there happens to be initial version of the prosecution that after noting down the confidential information received by Debashis Chaudhary, the same was communicated to just superior officer and at whose end, he was directed to constitute a raiding party which ultimately came in action whereby and whereunder alleged recovery has been made. No information which, as per prosecution was noted down has been made an exhibit nor there happens to be any kind of documentary evidence to suggest that the same was ever communicated to superior officials. That being so, there happens to be complete violation of Section 42(3) of the N.D.P.S. Act.

6. It has also been submitted that material exhibit has not been produced on behalf of prosecution nor the sample during



course of trial. It has further been submitted that though Exhibit-9 has been brought up on record, a certificate provided under Sub-section-3 of Section 52(A) of the N.D.P.S. Act, but same was to be carried out in terms of Sub-section-2 of Section 52(A) of the N.D.P.S. Act and further, in terms of Sub-section 4 of Section 52(A) of the N.D.P.S. Act, samples would have been produced before the Court. Having failed on that very score, the finding recorded by the learned lower Court is found duly eclipsed whereupon would not survive.

7. Apart from this, challenging the oral evidence, it has been submitted that all the material witnesses have deposed in parrot like manner which suggest victimization of the appellant at their end. So, in sum and substance, it has been submitted that prosecution utterly failed to substantiate the same and in likewise manner, the learned lower Court also acted in mechanical way whereupon the judgment of conviction impugned did not justify its prevalence.

8. On the other hand, the learned counsel for the Central Government has refuted the submission made on behalf of appellant and submitted that whatever grounds have been raised on behalf of appellant, that has got no legal identity in the background of the fact that there happens to be admission by way of suggestion at the end of the appellant while cross-examining PW-5 with regard to recovery of Narcotic substance (Ganja), though it has been suggested



that it was not from the possession of appellant rather from the house of Sudama Rai. In the aforesaid background, it was incumbent upon the appellant to have substantiated such plea. Because of the fact that recovery of narcotic substance has been admitted. So, the prosecution has only to substantiate that it was recovered from the possession of the appellant. It has further been submitted that non-compliance of mandatory provision of law will not come in between on account of peculiar facts and circumstances of the case, as neither recovery is denied, nor the search and seizure. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is fit to be confirmed.

9. After going through the evidence available on the record, it is evident that learned counsel for the Central Government is correct in his submission that while cross-examining PW-5 at Para-11, it has been suggested by the appellant in following way “it is not a fact that seized ganja was recovered from the house of Sudama Ray. It is not a fact that nothing was recovered from the house of Manohar Rai (appellant) and in order to save Sudama Ray, Manohar Rai has been falsely implicated.” So by this suggestion, there happens to be an admission at the end of the appellant regarding seizure of ganja and for that, an explanation has been offered at his end that it was not his possession rather from the possession of Sudama Ray.



10. There happens to be basic principle of law, he who asserts is to substantiate. That happens to be basic principle of Evidence Act. Though the obligation lies upon the prosecution, but in case there happens to be an admission at the end of an accused, then in that event, that has got an additional support lending to the prosecution case. As stated above, only PW-5 has been suggested in such manner, contrary to it, neither in statement recorded under Section 313 Cr.P.C., nor while suggesting other PWs including complainant PW-4, such kind of suggestion has been given. In the aforesaid background, one has to see its impact, during course of appreciation of the material available on the record.

11. In *State of Punjab vs. Balbir Singh reported in (1994) 3 SCC 299*, it has been held:-

“15. In K.L. Subhayya v. State of Karnataka (1979)2 SCC 115: this Court considering the scope of Section 54 in the Mysore Excise Act whereunder the officer was required to 'record the grounds of his belief' and the failure to do so was held to be rendering the entire search without jurisdiction and thus vitiated the conviction. Commenting on the failure to do so, it was observed as under: (SCC p. 117, para 4)

"This, therefore, renders the entire search without jurisdiction and as a logical corollary,



vitiates the conviction. We feel that both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment."

The very fact that sub-section (2) of Section 42 requires that where a.7. Officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior, itself is a strong indication of the mandate that the officer should record his reasons for his belief as required under the proviso and also that the information received should be reduced to writing so that it can be verified whether there were sufficient reasons for belief. In Presidential Election 1974 (1974) 2 SCC 33, Re, this Court observed as under: (SCC p. 49, para 13)

"In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention



of the Legislature by carefully attending the whole scope of the provision to be construed. 'The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.'*"

In Govind Lal Chaggan Lal Patel v. Agriculture Produce Market Committee(1975) 2 SCC 482, it was observed thus : (SCC pp. 487-488, para 13)

"Thus, the governing factor is the meaning and intent of the Legislature, which should be gathered not merely from the words used by the Legislature but from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstance that the Legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to



expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature."

The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

12. Coming on this very score, it is evident that all the witnesses have consistently deposed that the confidential information was noted down by PW-4/ complainant/ Debashis Chaudhary, who passed it over to his superior officer and after getting an order, raiding party was constituted consisting apart from others, Vikas Kumar, the Superintendent. That means to say, the activity of the prosecution



happens to be in terms of Sub-section-2 of Section 41 of the N.D.P.S. Act and as per Sub-section-3 of Section 41 of the Act, the activity having pursued thereunder have got a colour of an activity having under Section 42 of the Act and so, in terms of Sub-section-2 of Section 42 of the Act, there should have been an effort at the end of the prosecution to inform the superior officials within 72 hours. Had there been examination of Vikash Kumar, then in that event, the matter would have been different and in likewise manner, the aforesaid eventualities have properly been explained by way of filing of copy of the information having noted down and in likewise manner, the copy of the order having at the end of Vikash Kumar. Non-examination of Vikash Kumar and in likewise manner, having absence of the relevant document as indicated above, clearly mandate that prosecution has filed to comply the mandatory provisions of law.

13. In ***Kishan Chand v. State of Haryana reported in 2013 CRI.L.J. 723 (SC)***, it has been held:-

“16. 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.

17. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnail Singh (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of [Abdul Rashid Ibrahim Mansuri v. State of Gujarat](#) [(2000) 2 SCC 513], a three Judge Bench of the Court had held that compliance of [Section 42](#) of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan



Abraham (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, 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 Court in paragraph 35 of the judgment held 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.

(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.



18. Following the above judgment, a Bench of this Court in the case of *Rajinder Singh (supra)* took the view that total non-compliance of the provisions of sub-Sections (1) and (2) of [Section 42](#) of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.

19. The provisions like [Section 42](#) or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of *Karnail Singh (supra)* carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in *Vijaysinh Chandubha Jadeja*, the theory of “substantial compliance” would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The



safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of [Section 50](#) of the Act. While discharging the onus of [Section 50](#) of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of [Section 50](#) of the Act. Non-compliance with the provisions of [Section 50](#) of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.

21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the



strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.”

14. In *Sukhdev Singh v. State of Haryana* reported in *2013 CRI.L.J. 841 (SC)*, it has been held:-

“13. Now, the question that arises for consideration is as to at what stage and by what time the authorized officer should comply with the requirements of Section 42 of the Act and report the matter to his superior officer. For this



purpose, we must refer to Section 42 of the NDPS

Act at his stage :

"Section 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 VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

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(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.

14. "Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorization as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer inconsonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words 'forthwith' stood amended by the words 'within 72 hours'. In other words,



whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. In the case of Basheer @ N.P. Basheer v. State of Kerala [(2004) 3 SCC 609] wherein this Court was concerned with the Amending Act 9 of 2001 of the NDPS Act, the Court took the view that application of the Amending Act, where the



trial had been concluded and appeal was pending on the date of its commencement and where the accused had been tried and convicted, would not apply. The contention that trials were not held in accordance with law was not sustainable for the reason that there could be direct and deleterious consequences of applying the amending provisions of the Act to trials which had concluded in which appeals were filed prior to the date of Amending Act coming into force. This would certainly defeat the first object of avoiding delay in such trials. Another Bench of this Court in the case of Jawahar Singh @ Bhagat Ji. v. State of GNCT of Delhi [(2009) 6 SCC 490], while dealing with the amendments of Section 21 of the NDPS Act, the Court took the view that amendments made by Act 9 of 2001 could not be given retrospective effect as if it was so given, it would warrant a retrial which is not the object of the Act. The Court held as under :

"9. It is now beyond any doubt or dispute that the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of



conviction, there was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending Act, in our considered opinion, would not arise.

10. It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only.

15. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.



16. Still, reference can be made to the judgment of this Court in the case of *Ravinder Singh v. State of Himachal Pradesh* [(2009) 14 SCC 201], wherein this Court was dealing with the question as to what would be the law applicable for imposition of a sentence irrespective of when the trial was concluded with reference to Article 21 of the Act and provision of the Punjab Excise Act, 1914 as applicable and amended by H.P. Act 8 of 1995 where punishment was enhanced and minimum sentenced was provided. The Court held that it is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial'.

17. Even in the case of *Hari Ram v. State of Rajasthan & Ors.* [(2009) 13SCC 211], this Court stated with reference to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act of 2006) that the relevant date for applicability of the Act so as the age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial.

18. In the present case, the occurrence was of 4th



February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 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 into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

19. This question is no more res integra and stands fully answered by the Constitution Bench judgment of this Court in Karnail Singh v. State of Haryana [(2009) 8 SCC 539]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of Abdul Rashid Ibrahim Mansuri v. State of



Gujarat [(2000) 2 SCC 513] and Sajan Abraham (supra) and held 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.

(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.”

15. Now, coming to the score of Exhibit-8 and 9, before that, it looks pertinent to look into **Section 52(A) of the N.D.P.S. Act**, which reads as follows:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.

Substituted by Act 16 of 2014, S.17, for sub-S.(1)(w.e.f. 1-5-2014). [\(1\)](#) The Central Government may, having regard to the



hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) *Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such Substituted by Act 16 of 2014, S.17, for “narcotic drug or psychotropic substance” and “narcotic drugs or psychotropic substances”, respectively (w.e.f. 1-5-2014). narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or*



psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of [\(a\)](#) certifying the correctness of the inventory so prepared; or

[\(b\)](#) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

[\(c\)](#) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

[\(3\)](#) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

[\(4\)](#) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and



certified by the Magistrate, as primary evidence in respect of such offence].

16. The purpose for introduction of Section 52(A) of the Act happens to be to allow destruction of the seized narcotics even during continuation of trial, retaining its sample, so that it would not cost the State Exchequer for providing proper space with regard to storage of the seized article till the trial reaches in its finality, to ward off any kind of possibility in siphoning the seized articles, which will adversely affect upon the society in case allowed to consume, more particularly by the youngsters. However, is found duly guarded by way of introduction of Sub-section-4 so far admissibility of evidence is concerned whereunder inventory, photographs of narcotic drugs, psychotropic substance etc. and for that, list of samples drawn under Sub-section 2 duly certified by the Magistrate would be treated as a primary evidence. From the record, it is evident that Magistrate has not been examined nor the witnesses before whom, the whole exercise in tune of Section 52(A) of the N.D.P.S. Act was done. Though during course of trial, Exhibit-8 and 9 have been placed, but it does not happen to be in strict compliance of Rule-4, because of the fact that the photographs, which has been made an exhibit is not of the narcotic substance, rather it happens to be the photographs of a boy showing script as 'representative' samples which happens to be Exhibit-9. The intention of the legislature happens to be that article has to be



photographs and not the bag, because of the fact that bag will not disclose its contents. Even if, for argument sake, Exhibit-9 is accepted, even then, this should have been with regard to sample having drawn in terms of Sub-section-2 of Section 52(A) of the Act and for that, same should have been produced before the Court to substantiate and further, the said production would have satisfied the ingredients of primary evidence relating to the seized ganja in terms of Sub-section 4 of Section 52(A) of the Act. That being so, Exhibit-9 is not going to give any sort of privilege in favour of prosecution so far admissibility of the evidence is concerned encircling the accused/ appellant for the offences for which, he has been alleged.

17. In ***Vijay Jain v. State of Madhya Pradesh reported in (2013) 14 SCC 527***, it has been held:-

“9. Para 96 of the judgment of this Court in Noor Aga Case on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of



establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”.

Thus, in para 96 of the judgment in Noor Aga Case this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court’s judgment in Jitendra Case, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produced the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act



particularly when the panch witnesses have turned hostile. Again, in Ashok this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non production and this Court held that there was therefore, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

18. Now, coming to the ocular evidence, it is apparent that PW-7 and PW-8, the seizure list witnesses had halfheartedly supported the case of the prosecution, more particularly, the PW-7 while PW-8 refused. It is further evident that during course of statement recorded under Section 313 Cr.P.C., the appellant had clearly disowned the allegation relating to recovery and in likewise manner, while cross-examining the remaining witnesses.

19. Be that as it may, because of the fact that the obligation having cast upon the shoulder of the prosecution has not been properly discharged on account thereof, whatever suggestion has been by way of Para-11 of PW-5, will not exonerate the prosecution. In likewise manner, the statement having recorded under Section 67 of the Act will not give any sort of bonanza to the prosecution, moreover the same did not implicit. That being so, the trial suffers from inherent infirmities as well as legal lacuna whereupon the



judgment of conviction and sentence would not survive.

20. Consequent thereupon, same is set aside. Appeal is allowed. Appellant is under custody. Hence, is directed to be released forth with if not wanted in any other case. The first page and last page of the judgment should be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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