

HIGH COURT OF CHHATTISGARH AT BILASPUR**Criminal Appeal No. 750 of 2009**

Ranjit Pandey, aged about 35 years, S/o. Jagdish Pandey, R/o. Village-Matiyari,
P.S. Seepat, District – Bilaspur (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through : Station House Officer, P.S. - Seepat, Bilaspur,
District – Bilaspur (C.G.).

---- Respondent

For Appellant : Mr. Shrawan Kumar Chandel, Advocate
For State/Respondent : Mr. Sameer Behar, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

02.05.2017

1. This appeal is against the judgment of conviction and sentence dated 22.09.2009, passed by the learned Special Judge (The Narcotic Drugs & Psychotropic Substances Act, 1985), Bilaspur, in Special Criminal Case No.13/2009, whereby the appellant has been convicted under Section 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "*the N.D.P.S. Act*") and sentenced to undergo R.I. for 10 years and fine of Rs.1,00,000/-, in default of payment of fine amount, additional R.I. for 3 years.
2. As per the case of the prosecution on 25.06.2009 an information was received at Police Station – Seepat that at village Matiyari, the appellant – Ranjit Pandey has kept cannabis for sale in his house. On receipt of

information, the same was recorded in Rojnamchasanha and also information was reduced in writing which was sent to the Deputy Superintendent of Police, Bilaspur. Subsequently, information was also sent and reduced in writing that in case, compliance of Section 42 (2) of N.D.P.S. Act is done by the time, the accused may flee away, as such, it was reduced in writing and thereafter, the raid was conducted. After reaching the spot, the notice was given to the appellant U/s. 50 of N.D.P.S. Act that he can get himself examined by any Magistrate or Gazetted Officer. Having giving consent by the accused that he is ready to get himself searched by the police officer, Panchanama was prepared and search was made. On search, no incriminating narcotics was found in person from the appellant.

(ii). Thereafter, the house of the appellant- Rajnit Pandey was searched. On having searched, from the house of the appellant, in three bags, cannabis were recovered, on interrogation the appellant admitted that two bags belonged to him and one was stated to be that of Dukalha. Therefore, the seizure of two bags cannabis were made from the appellant and one from other co-accused. Initially after the seizure of the cannabis, it was confirmed to be a cannabis by physical verification and smell, rubbing and by burning. Having prima-facie found that the goods were cannabis, one shop keeper Chhunnilal was called with his beam balance. Physical verification of beam balance was made and having found it correct, the weighment of entire cannabis which was seized were made.

(iii). Out of three bags, from one bag 30 kg and 100 gram, from second bag 28 kg and 900 gram and from the third bag 19 kg and 100 gram cannabis were recovered and 100-100 gram samples were taken out from each bags, thereby, three samples were taken out to sent it for FSL. The said packets were sealed and from the appellant total 58.800 k.g. of cannabis were recovered. The seized material was sent through police constable to Malkhana, which was also recorded in Rojnamchasanha and entire proceeding was reported to the SDOP, Bilaspur and the appellant was arrested and FIR was registered. After the entire proceeding, the information was sent by radio message to the higher officer. Subsequently, the samples were taken out and were sent to FSL for conformation of the fact whether they are cannabis or not? Having received the FSL report in positive that samples were cannabis, charge-sheet was filed.

3. During the course of trial, the appellants/accused abjured their guilt and claimed to be tried. The prosecution on their behalf examined Nivas Yadav as (P.W.-1) and Mohit Ram as (P.W.-2) who were the seizure witnesses. One Anil Kumar Gandharva was examined as (P.W.-3) who was the Kotwar, Chunni Lal as (P.W.-4) who was grossery shop owner who had sent the beam balance, Philip Kujur as (P.W.-5) who had carried the information to the SDOP Office at Bilaspur from Seepat, Ramji Lal Rathore as (P.W.-6) who received the information at SDOP Office, Vipin Patel as (P.W.-7) who was Constable at Police Station- Seepat who had deposited the sample packets of the cannabis for FSL at Raipur. Further Kiritram Jogi (P.W.-8) was examined who was the Head Constable at Police Station – Seepat and Santosh Kumar Yadav,

A.S.I. as (P.W.-9), who was the Investigating Officer. The learned trial Court after examining the evidence on record convicted the accused/appellant, therefore, the instant appeal.

4. Mr. Shrawan Kumar Chandel, learned counsel for the appellant would submit that entire conviction is bad in law as the Court below failed to notice the fact that there has been non-compliance of Section 42 (2) of N.D.P.S. Act, which would be fatal. He further submits that the possession of the cannabis from the exclusive possession of the appellant was also not proved. The counsel placed his reliance in case of State of Punjab Vs. Balbir Singh, reported in AIR 1994 SC 1872 and 2008 (3) C.G.L.J. 55 (SC), Directorate of Revenue & Another Vs. Mohammed Nisar Holia, and would submit that in cases of non-compliance of Section 42, the conviction can not be sustained. He further submits that on the sole ground, the conviction and sentence awarded to the appellant are required to be set-aside.
5. *Per contra*, Mr, Sameer Behar, learned Panel Lawyer for the State opposed the arguments advanced by learned counsel for the appellant and supported the order of the Court below and would submit that the order is well merited which do not call for any interference.
6. I have heard learned counsel for the parties at length, perused the documents and statements on record.
7. Perused the case file and the order, the evidence and the documents exhibited. Investigating Officer, Santosh Kumar Yadav in this case was examined as (P.W.-9). It is stated that on information received from the informer that at village - Matiyari,

the appellant has kept cannabis in his house on 25.06.2009, it was recorded in the Mukhbir Panchnama by Ex.P/1. The document Ex.P/1 is with respect to the fact of information received about presence of cannabis and the same appears to have been sent by communication Ex.P/19. The said information was further received by the SDOP Office by Ex.P/20 on 25.06.2009. In the document Ex.P/20 the seal of receipt of the information received is endorsed. It also purports that it was received through one Philip Kujur. Subsequent statement would show that thereafter the officer had reasoned to believe that to make a raid, enter into search in the house of the accused, authorization can not be obtained within a short span, which may led to concealment of evidence or facility for escape of the offender, the same was reduced in writing by Ex.P/3 in compliance of section 42 (1) of N.D.P.S. Act. The document Ex.P/3 also records that such information was sent to SDOP/CSP, who was the higher officer in compliance of Section 42 (2) of N.D.P.S. Act.

8. In the context of this, Section 42 of N.D.P.S. Act is relevant, which is extracted as below :

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 personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to

believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector :

Provided further 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.

9. Reading of the Section would show that Section 42 is sub-divided into two parts, first part purports that information when received from the informer to be recorded and it was recorded in the instant case in compliance of sub-section (1) of Section 42 by Ex.P-19 and also was recorded in the Rojnamchasanha Ex.P/26. The said information was sent by Ex.P/20, which is corroborated by the Ramjilal Rathore (P.W.-6). The second part of Section 42 of NDPS Act reads that when search is to be carried out without the authorization, the reasons for it that accused may flee away or may destroy the evidence is to be reduced in writing and further

sent to the higher officials within 72 hours as per Section 42 (2) of N.D.P.S. Act.

10. Now further the fact whether such compliance of Section 42 (2) of N.D.P.S. Act by Ex.P/3, which is an statement of fact of grounds of belief for making search on urgency was sent to the higher officials or not, in respect of this, the Investigating Officer (P.W.-9) on his statement at Para-30, categorically stated that he had not sent the information to the higher officials about search and seizure as required under Section 42 (2) of the NDPS Act.
11. Philip Kujur (P.W.-5), had only carried the information of Section 42 (1) has stated that he had only carried the information to the informer about initial Panchnama and he did not carry the information of Section 42 (2) of NDPS Act. Ramjilal Rathore (P.W.-6) has also corroborated the fact who received the information at SDOP Office that he did not receive the information with respect to search and warrant as contemplated U/s. 42 (2) of N.D.P.S. Act. Therefore, that admission of Investigating Officer (P.W.-9) and the recipient of the SDOP (P.W.-6) have corroborated each other the fact that neither the information was sent in compliance of Section 42 (2) of N.D.P.S. Act nor any information was received at the SDOP Office i.e. higher officer. Therefore, the non-compliance of Section 42 (2) of N.D.P.S. Act is established.
12. In respect of non-compliance of Section 42 (2) of N.D.P.S. Act, the consideration came up in case of ***State of Rajasthan v. Jagraj Singh***¹, wherein it was held that Section 42 is in two parts. The scheme of Section 42 indicates that authorisation officer may

¹(2016) 11 SCC 687

carry out search between sunrise and sunset without warrant or authorisation. The scheme further indicates that in the event search has to be made in between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of the offender which grounds of his belief have to be recorded. Further sub-section (2) of Section 42 mandates that the said compliance has to be sent to the higher officials.

13. Further, in case of ***State of Rajasthan v. Babu Lal***² the Hon'ble Supreme Court has held that in order to prove the compliance of Section 42(2), the document is required to be proved about the receipt of communication and it has to be placed on record. Therefore, considering the facts in it's totality in the instant case non-compliance of Section 42(2) of N.D.P.S. Act is established
14. Further perusal of the documents would show that as per Ex.P/9, the cannabis were said to have been recovered from the house of Ranjit Pandey, the appellant. The seizure memo Ex.P/13 & Ex.P/14 speaks of the same fact. Ex.P/15, which is a map of the house, wherein it is recorded that cannabis were recovered from the house of Tirath, who is not an accused.
15. Anil Kumar Gandharv, Kotwar (P.W.-3) has not supported the case of the prosecution. Likewise, the seizure witness Nivas Yadav (P.W.-1) and Mohit Ram (P.W.-2) have also not supported the case of the prosecution. Therefore, in respect of place of seizure, doubt has been created as according to the prosecution itself, it is

²(2009) 14 SCC 215

stated that it was seized from the house of the appellant, whereas, the map, Ex.P/15 says that the cannabis was seized from the house of one Tirath. The same remains unexplained.

16. The N.D.P.S. Act prescribes stringent punishment. A balance, thus, must be struck in regard to the mode and manner in which the statutory requirements are to be complied with vis-a-vis the place of search and seizure. The statute mandate that prosecution must prove the compliance of said provisions, here in this case, the evidence so led by the prosecution, admission itself lead to prove that procedure has not been complied with and primarily it appears that there is non-compliance of Section 42 (2) of N.D.P.S. Act exists. Considering the same I am of the opinion that in absence of compliance of Section 42 of N.D.P.S. Act, the conviction can not be sustained.
17. In view of the aforesaid analysis and conclusion, the judgment of conviction and order of sentence passed by the learned trial Court is set aside. The appeal is accordingly allowed. The appellant is acquitted of the charge leveled against him by the trial Court. The appellant is reported to be in jail, he be set at liberty forthwith, if not required in any other case.

Sd/-
(Goutam Bhaduri)
JUDGE