

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.911 of 2016

Arising Out of PS.Case No. -265 Year- 2013 Thana -NAWADA District- NAWADA

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Raju Ranjan Kumar, son of Sri Ramanuj Sharma, Resident of Village- Mahmadpur,
P.O.- Kajisaray, P.S.- Kako, District- Jehanabad.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 1050 of 2016

Arising Out of PS.Case No. -265 Year- 2013 Thana -NAWADA District- NAWADA

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Raj Kumar Paswan, son of Batohi Paswan, Resident of Village- Sardarganj, P.S.-
Dalsingsarai, District- Samastipur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 1131 of 2016

Arising Out of PS.Case No. -265 Year- 2013 Thana -NAWADA District- NAWADA

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Ranjit Paswan, S/O Late Govind Paswan, Resident of Village – Kuari, P.S. –
Tajpur, District – Samastipur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.911 of 2016)

For the Appellant : Mr. Md. Imteyaz Ahmad, Advocate.

For the Respondent : Mr. Sujit Kumar Singh, APP.

(In CR. APP (SJ) No.1050 of 2016)

For the Appellant : Mr. Bhavesh Kumar, Advocate.

For the Respondent : Mr. Sujit Kumar Singh, APP.

(In CR. APP (SJ) No.1131 of 2016)

For the Appellant : Mr. Binod Kumar, Advocate.

For the Respondent : Mr. Shivesh Chandra Mishra, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR



CAV JUDGMENT

Date: 31-01-2018

All the aforesaid criminal appeals have been heard together and are being disposed off by this common judgment.

2. The appellants have been convicted under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 by judgment dated 16.09.2016 by the learned Sessions Judge, Nawada in Special Case No. 3 of 2013 and by order dated 20.09.2016, they have been sentenced to undergo R.I. for 10 years, to pay a fine of Rs. 1 lakh and in default of payment of fine to further suffer R.I. for one year.

3. The appellants are alleged to have been found in possession of 550 kilograms of Ganja which allegedly was being transported on a truck bearing number BR06-GA-2089 on 15.05.2013.

4. The prosecution case was initiated on the self-statement of Vijay Kumar Gupta (P.W. 6) who was the then officer-in-charge of Nawada Town Police Station whereby it has been alleged that on 15.05.2013 while patrolling along with his police team he found a truck coming from Rajauli side at about 10:00 P.M. which, even on being signaled to stop, did not slow down and moved ahead. Necessary information was provided to the next police barrier where the truck was intercepted. The appellants



were found to be occupying the vehicle. They could not give any reason for not stopping at the signal. The vehicle was searched and it was found that it contained a chamber from where, 21 sacks of Ganja were recovered. Information about the aforesaid recovery was sent through wireless to the S.D.P.O. Sadar and the police station also was informed for bringing measurement kit and items for sealing the aforesaid consignment of narcotics. It was averred by P.W. 6 in the FIR that after sometime, a team from the police station reached and shortly thereafter, the S.D.P.O. Sadar also reached the place where the vehicle was parked. In front of them and especially before Sanjay Kumar and Abhinandan Prasad Singh who have been examined as P.Ws. 9 and 5 respectively, the narcotic was seized and a seizure list was prepared. A copy of the seizure list was given to the appellants. The seizure list was also countersigned and certified by the S.D.P.O. Sadar. In his presence, all the bags were sealed. The appellants were arrested and thereafter taken into custody. On the basis of the aforesaid self-statement a case vide Nawada Town P.S. Case No. 265 of 2013 dated 16.05.2013 was instituted for the offences under Sections 8 and 20 of the N.D.P.S. Act.

4. The police after investigation submitted charge sheet whereupon cognizance was taken and the case was committed



to the Special Court for trial. The trial court after examining ten witnesses on behalf of the prosecution and one witness on behalf of the defence and after going through oral as well as documentary evidence, convicted and sentenced the appellants as aforesaid.

5. The major contentions on behalf of the appellants are that the provision of Section 42 of the N.D.P.S. Act, 1985 has been violated and that there was enormous delay in sending the sample to the F.S.L. as well as that the samples were not drawn at the place of seizure and therefore the entire prosecution case got vitiated.

In order to appreciate the contentions of the appellants as well as to test the correctness of the judgment, it would be necessary first to go through the deposition of P.W. 6 who is the informant of this case.

6. Vijay Kumar Gupta (P.W. 6) has deposed that on 15.05.2013 he was posted as officer-in-charge of Nawada Town Police Station. On the same day, while patrolling the area, he spotted a truck coming from the Rajauli side which was signalled to stop. The truck, however, bypassing such signal went ahead but it was intercepted at the next barrier. The appellants were found to be occupying the said vehicle. From inside the chamber of the truck, 21 plastic bags were recovered and on opening the same it



was found to contain separate packets of yellow colour. On opening them, they were found to be containing Ganja. Immediately thereafter, it has been deposed, that the S.D.P.O., Nawada was informed on mobile telephone and the police station was informed for sending the balance. At the place of occurrence, the S.D.P.O. viz. Shahryar Akhtar also arrived. The narcotics was weighed and it was found to be 550 kilograms. Thereafter a seizure list was prepared which was countersigned by the S.D.P.O. On the aforesaid seizure list, Sanjay Kumar and Abhinandan Prasad Singh (P.Ws. 5 and 9) also put their signature. It has been stated by the prosecution witnesses that both the aforesaid witnesses to the seizure were members to the police team and they were made to sign the seizure list because of absence of any independent witnesses at the place of occurrence.

In his cross-examination, P.W. 6 has stated that at the Sadbhawna Chowk, the weight of the seized narcotics was taken but no chart of the weights was made at the place of occurrence. None of the packets contained the name of anybody and at the time of recovery, no paper was found which could indicate anything about the ownership of the seized narcotic. None of the accused persons were made to give their statement before any magistrate. The police team remained at the place of occurrence for about one



hour and many vehicles had crossed through that place during that time. With respect to taking the weight of each packets, P.W. 6 has stated that the number of packets kept in each bag was not noted down anywhere. Which packet contained what weight of narcotic has also not been noted. However he has deposed that the Ganja was taken out from the packets and thereafter it was weighed but, in the next breadth, P.W. 6 has clearly stated that all packets were not opened and from each of the plastic bags, only two packets were taken out. A total of 42 packets therefore were taken out from the 21 bags which were not sealed separately. None of the packets individually were sealed. It has been deposed by the P.W. 6 that the 42 packets which were checked, no samples were drawn from them. The seized narcotic was taken from the place of occurrence to Malkhana. Thereafter nothing was done by him as the charge of investigation was handed over to one Sudhakar Kumar who has been examined as P.W. 8 in the case. He had also not noted down as to whether he had asked the driver of the truck about the ownership of the truck.

7. Sudhakar Kumar, who is the I.O. of this case has been examined at the trial as P.W. 8. He has deposed that the investigation of the case was handed over to him by P.W. 6 on 16.05.2013. After taking over the charge, he had examined P.W. 6



and had also visited the place of occurrence on 16.05.2013. During the course of investigation he had examined other members of the raiding team. He has clearly stated that the seized narcotics was kept by him in the Malkhana of Nawada town and the seized truck was also kept in the premises of the police station. The total Ganja was 550 kilograms and it was kept in 21 packets. It has further been deposed by him that on 28.01.2014, he had obtained the permission of the District & Sessions Judge, Nawada for sending the sealed sample of the narcotics to the CFSL, Patna and had sent the same to the CFSL on 03.02.2014. Another sealed sample, by order dated 28.01.2014, was sent to Chemical Laboratory Custom House, Kolkata. However the Kolkata laboratory refused to accept the same which fact was indicated by him in the case diary but no report was sent by him in that regard to the District & Sessions Judge, Nawada. In cross-examination, it has been stated by him that the seized articles were given to him after the investigation was handed over to him but in the case diary it has not been written that the seized narcotic was also given to him under his charge. During the investigation, he did not count the packets of the Ganja and did not even take its weight. The weight of the Ganja was taken in his absence and not in his presence. At the time when the Ganja was given to him, it was kept in the premises of the police station. No



mark was put by him on the aforesaid seized narcotic. Though he had counted the main bags numbering 21 but did not count the number of packets which were kept in each of those 21 bags. All the packets were found to be sealed by him. However there was no red lac seal over the same. The seized narcotic was kept in the Malkhana in his presence which fact was stated by him in the case diary. He has further clarified in his cross-examination that the seized Ganja was stored in the Malkhana at his instance. He visited the Malkhana for about 4 – 5 times but he is not the in-charge of the aforesaid Malkhana. The in-charge of the Malkhana at the relevant time was the then officer-in-charge of the town police station.

8. What is of relevance here is that in his cross-examination he has stated that samples were not drawn from all the packets and in rest of the packets the seal of the officer-in-charge remained. The bags containing the seized narcotic were kept in Malkhana on floor and last time those were seen by him only at the time of taking out the sample. No attempt was made by him to get the statements of the accused persons recorded before the Gazetted Officer.

9. From the deposition of the aforesaid two witnesses, the learned counsel for the appellants has pointed out that the



provision of Section 42 of the N.D.P.S. Act has been completely bypassed and the mandatory requirements have not been complied with.

Section 42 of the N.D.P.S. Act (hereinafter called the 'Act') reads as follows:

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 illegality acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such



building, conveyance or place;

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

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

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that 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.



10. From the records, it appears that the information regarding search and seizure were not written down and forwarded to the superior police officer as mandated under Sections 42(2) of the Act.

In *Karnail Singh vs. State of Haryana (2009) 3 SCC 539* where the Constitution Bench was looking at the conflicting opinions regarding the scope and applicability of Section 42 of the Act regarding search, seizure and arrest without warrant or authorization, delivered in *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat (2000) 2 SCC 539* and *Sajan Abraham vs. State of Kerala (2001) 6 SCC 692*, it was held as follows:

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.

11. It has been argued that in the present case, there has not been any compliance much less substantial compliance to the provisions contained in Section 42 (1) and (2) of the Act.

12. The learned counsel for the State has however tried to repel the contention of the appellants and has submitted that the requirement of law has not only been substantially followed but no prejudice has also been caused to the appellants. Admittedly, on telephonically being informed, the superior police officer viz. the S.D.P.O. arrived at the time of seizure and he is also said to have countersigned the seizure list. Thus for all practical purposes, the intent of the legislature in providing for Section 42 (1) and (2) of the Act has been fulfilled. The reason for requiring written communication to the superior police officer in case of any arrest, search or seizure is to prevent any frivolous or vindictive search, seizure and arrest. When a superior police officer was informed



telephonically and in whose presence the seizure was made, it would not be in the mouth of the appellants to contend that there has been a violation of the provision of Section 42 of the Act.

13. The requirement of the Act is writing down all the information and dispatching the same within 72 hours to the superior police officers. No doubt, the S.D.P.O. who is a superior police officer was telephonically informed and on such information he also came to the place where the seizure was being made but this would not suffice. If seizure is made before a superior police officer, he becomes a part of the team seizing the same and if the information is not reduced into writing and sent to the police officer, there is no guarantee that the procedure has been properly complied with and the dangers inherent in non-compliance of the same subsists. This Court also takes note of the fact that the aforesaid S.D.P.O. has not been examined at the trial and therefore there is no material available before this Court to ascertain the correctness of the fact that the seizure was made in his presence. Merely finding his signature on the seizure list would not cure the defect and the requirement of Section 42 (2) of the Act cannot be said to have been complied with; which is an incurable defect.

14. In *Darshan Singh vs. State of Haryana (2017) 1 Supreme 743*, a question had arisen as to whether in a case



effecting the recovery, the report was sent to the police station on the basis of which a formal FIR was recorded and the same sent through special messenger to the Chief Judicial Magistrate of the concerned district, can be deemed to be the compliance of the provision of Section 42 of the Act on the ground that the information about the arrest and seizure has already been received by the superior police officer. The Supreme Court in the aforesaid case held as follows:

10. The solitary question that arises for our consideration in the instant appeal, is whether the registration of the first information report, narrating the factual position as has already been described at the beginning of this order as also, the communication of the first information report to the Superintendent of Police, Panipat would constitute an effective compliance of the provisions contained in Section 42 of the NDPS Act.

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 authorization 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 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.

16. Thus the manner in which the provisions of Section 42 of the Act are required to be complied with have not been done in the present case. The S.D.P.O. may be a superior police officer but the information regarding the arrest and seizure has neither been reduced in writing in the manner as interpreted by the Supreme Court in Karnail Singh's case (*supra*) and the aforesaid S.D.P.O. has not even been examined at the trial.

17. In such circumstances, I am of the view that Section 42 of the Act was not complied with at all.

18. From the deposition of the aforesaid two witnesses, it further appears that the samples were not drawn from the seized narcotic at the time of search and at the place where the narcotic was seized.

In *Noor Agha vs. State of Punjab (2008) 16 SCC 417*, the Supreme Court has held that the guidelines/standing orders issued by the Narcotic Control Bureau regarding sampling of the seized article must be followed and complete disregard shown to the aforesaid guidelines would render the prosecution vitiated. It is obligatory on the part of the subordinate authorities to comply with the guidelines issued by the Bureau. The standing order in that regard cannot be blatantly flouted and substantial compliance



therewith must be insisted upon so that the sanctity of physical evidence in such cases remains intact.

19. In *Kuldeep Singh vs. State of Punjab (2010) SCC 219*, the non-collection of samples at the initial stage of seizure was held to be a defect which could not have been cured in the manner in which it was done in that case.

20. From the deposition of P.W. 8, it further appears that the samples were drawn much later and the order to send it to the CFSL was obtained on 28.01.2014 which was received in the CFSL on 03.02.2014. No explanation has been offered by the prosecution for such delay in drawing the sample and in sending the same to the CFSL. This Court has also taken notice of the fact that in the CFSL report, the column with regard to the mode in which the parcel was found to be packed on receipt and description of seal has been left blank. Thus it is not certain as to what had happened to the seized narcotic in the meanwhile i.e. from the date of seizure to the drawing of samples and it being sent to the CFSL.

21. There is another defect in the procedure followed by the police in arresting the appellants and seizing the narcotics. P.Ws. 6 and 8 both have stated that at the time of the search and the seizure, many vehicles were plying on the road but curiously two of the members of the raiding team only have been made witnesses to



the seizure.

22. There are discrepant statements of the witnesses during the course of trial with respect to the weight of the total narcotics seized and the way in which the entire consignment was weighed.

23. For the reasons aforesaid, it is difficult to sustain the conviction of the appellants in the present case and these appeals, perforce, succeed.

24. The judgment and order of conviction dated 16.09.2016 by the learned Sessions Judge, Nawada in Special Case No. 3 of 2013 and the order of sentence dated 20.09.2016 are hereby set aside.

25. The appellants who are in custody are directed to be released forthwith, if not required in any other case.

26. A copy of the judgment be communicated to the superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

KKSINHA/-

AFR/NAFR	AFR
CAV DATE	24.01.2018
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