

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Criminal Appeal No.169-SB-2011 (O&M)

Date of Decision: May 29, 2018

Jagga Singh

...Appellant

VERSUS

The State of Punjab

....Respondent

CORAM : HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present:- Mr. S.P.S..Sidhu, Advocate for the Appellant.

Mr. Luvinder Sofat, Asstt. Advocate General, Punjab.

SUDIP AHLUWALIA, J.

This appeal is directed against the Judgment of conviction and Order of sentence dated 8.1.2011 passed by the Ld. Judge, Special Court, Amritsar in Session Case No.87/8.4.2008 arising out of FIR No.58 dated 18.3.2008 of Police Station Jandiala Guru, District Amritsar, under Section 21 of the Narcotic Drugs & Psychotropic Substances Act (in short “NDPS Act”), 1985.

2. Vide the impugned Judgment, the Trial Judge had convicted the Appellant of the offences u/ss 21 & 29 of the NDPS Act, and sentenced him to undergo R.I. for a period of ten years each and to pay a fine of Rs.One Lac each, in default whereof, he was directed to further undergo R.I. for a period of one year each.

3. The factual background of the case according to the prosecution side is that on 18.03.2008, Inspector Balbir Singh of Special Narcotic Cell, Amritsar while in his office, received Secret Information that renowned international Smuggler of Heroin, Arms and Ammunition namely Balkar Singh and his nephew Jagga Singh and their accomplice Kulbir Singh, resident of village Bagguwala, District Ferozepur were standing near Fast Food 'T' Point, G.T. Road, Jandiala Guru, on account of big deal of Heroin in Accent Car No.PB-02Q-9797 and if raid is conducted they can be apprehended with large quantity of Heroin. He brought this information to the notice of Sh. Tulsi Ram, SSP, Special Narcotic Cell, Punjab, Amritsar and on their direction, constituted a Police Party consisting of SI Harvinder Pal Singh, ASI Nirmal Singh, ASI Ashok Kumar, ASI Satnam Singh and others, and went in two vehicles and when the Police Party reached near Fast Food Restaurant, they saw an Accent Car colour Silver, parked at 'T' Point having its face towards Tarn Taran side and on seeing the Police Party, two persons came down from the Car and tried to run towards Tarn Taran side. But with the help of officials on suspicion both of them were apprehended and their whereabouts were asked. They were carrying hand bags in their hands. Out of them, one disclosed his name as Balkar Singh alias Bara son of Channan Singh resident of Baghuwala, P.S. Mallanwala, and second Jagga Singh son of Kashmir Singh resident of Baghuwala PS Mallan, while the third person was apprehended sitting on Driver seat of the said car and he disclosed his name as Kulbir Singh alias Keeru son of Kartar Singh resident of village Karmuwala. The officer disclosed his identity to

the accused one by one that he is Sub Inspector Balbir Singh, posted at Special Narcotic Cell, and he suspected that they were possessing some narcotic or psychotropic substance in their person or in the car, and that they had a legal right to be searched in the presence of any Gazetted Officer or Magistrate, and he further apprised them one by one that he can arrange for the Gazetted Officer or Magistrate at the time of making their search. All the aforesaid accused, desired for the presence of any Gazetted Officer at the time of making their search and he recorded the non consent memos of Kulbir Singh, Balkar Singh and Jagga Singh which were attested by SI Harvinderpal Singh, ASI Nirmal Singh and accused signed/thumb marked the same. Then, he requested DSP Rajpal Singh, a Gazetted Officer of Special Narcotic Cell, to reach at the spot. In the meantime, one public witness Bhagwant Singh son of Harinder Singh was also joined. The complainant then briefed DSP Rajpal Singh about the facts of the case and got introduced the independent witness and apprised him about the facts. DSP Rajpal Singh gave his introduction to the aforesaid accused one by one that he is DSP Rajpal Singh a Gazetted Police Officer and further apprised that he was having suspicion that they were in possession of some narcotics in their car or in their hand bags, and that they have their legal right for their search to be conducted in the presence of any Gazetted Officer or Magistrate. All the aforesaid accused, reposed confidence with DSP, vide Consent Memos, which were attested by the aforesaid police officials and signed/thumb marked by the accused.

4. Thereafter on the direction of DSP, the complainant conducted search

of accused Balkar Singh, which led to the recovery of two packets of Heroin from the hand bag of black colour placed under the clothes which was weighed and found to be one Kilogram each. It was having seals of triangular shape with B52 described on it. 2/2 samples of 5 grams each were separated from each packet of Heroin recovered and were made into separate parcels by putting the same into small plastic containers and the remaining each having 990/990 grams were separately made into parcels and were separately sealed by him with his seal bearing impression, B.S., and DSP Rajpal Singh affixed his seal R.S. The specimen seal impressions of both the seals were separately prepared and same were taken into possession vide separate Memo.

5. Then, on further direction of the DSP, the complainant conducted search of accused Jagga Singh alias Jagga which led to the recovery of two packets of Heroin from the hand bag of blue colour placed under the clothes which was weighed and found to be one Kilogram each. It was having seals of triangular shape with B52 described on it. 2/2 samples of 5 grams each were separated from each packet of Heroin recovered and made into separate parcels by putting the same into small plastic containers and the remaining each having 990/990 grams were separately sealed and made into parcels. The above said six parcels were separately sealed by him with his seal bearing impression B.S. and DSP Rajpal Singh affixed his seal R.S. The specimen seal impression of both the seals were separately prepared and same were taken into possession vide separate Memo.

6. Thereafter, on further direction of DSP Rajpal Singh, the search of

accused Kulbir Singh was conducted but nothing incriminating was recovered from his personal search. Then, they conducted the search of Car No.PB-02-AQ-9797 and from under the seat of Driver one packet of Heroin was recovered wrapped in polythene bag. Out of the same, two samples of 5 grams each were separated and converted into parcels and were sealed with his seal BS and DSP Rajpal Singh sealed with his seal as RS. Specimen seals of both the seals were separated. From the personal search of accused Kulbir Singh Rs.300/-, from accused Jagga Singh Rs.1080/- and one Mobile phone, and from accused Balkar Singh, Rs.1100/- and one Mobile phone of Nokia were recovered which were taken into possession vide separate Memos. The aforesaid Car No.PB-02-AQ-9797 was taken also into possession vide separate Memo. Hand bags were also taken into possession. Ruqa was drafted and sent to the Police Station, on the basis whereof formal FIR was registered against the accused. Rough site plan of the place of recovery was prepared and the accused were arrested. Intimation of their arrest was given to their nearest. The case was investigated.

7. Five witnesses were examined from the prosecution side. PW-1 was Balbir Singh Investigating Officer, PW-2 was DSP Rajpal Singh, a Gazetted Officer, in whose presence search was conducted, PW-3 was SI Surinder Singh, who was SHO in Police Station and case property was deposited with him, PW-4 was Harwinder Pal Singh, who supported the version of Investigating Officer and examined as recovery witness and PW-5 Satnam Singh was a formal witness, who took the samples to Chemical Examiner.

8. The contentions raised on behalf of the Appellant in seeking to assail the judgment of conviction and sentence are three fold. These happen to be -

- (i) That no compliance of the provisions of Section 42 of the NDPS Act was made in the present case at any stage inasmuch as the substance of the Secret Information was neither reduced into writing nor intimated to the immediate superior of the complainant;
- (ii) That no independent witness has been examined from the prosecution side; and
- (iii) That the delay of seven days in sending the samples to the office of Chemical Examiner is also fatal to the prosecution case.

9. In relation to the first contention regarding non-compliance of the provisions of Section 42 of the NDPS Act, it has been highlighted on behalf of the Appellant that PW-1 Inspector Balbir Singh in his cross-examination had admitted that he had not reduced the secret information received by him with his senior into writing, although he had otherwise stated that he shared the said information with his seniors.

10. Now in this regard, the Appellant's side has placed reliance on the decision of Supreme Court in '**Rajender Singh Vs. State of Haryana**' 2011 (3) RCR (Criminal) 856 in which the appeal preferred by the convict for the similar offence under the NDPS Act was allowed in view of the fact that the provisions of Sub-Sections (1) and (2) of Section 42 had not been complied with. The relevant extracts from the aforesaid decision of the Apex Court are set out as below -

“5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of [Section 42](#) is impermissible

but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. We have gone through the evidence of PW-6 Kuldip Singh. He clearly admitted in his cross-examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of [Section 42\(2\)](#) of the Act which vitiates the conviction.

6. Mr. Dalal, the learned counsel for the respondent-State has, however, referred to paragraph 34 of the judgment of the Constitution Bench in which general observations have been made with regard to the provisions of [Section 41](#) (1) and [42\(2\)](#) with respect to the latest electronic technology and the possibility that the said provisions may not be entirely applicable in such a situation. Concededly the present case does not fall in this category. In any case the principles settled by the Constitution Bench are in paragraph 35 and have already been re-produced by us hereinabove. Likewise, the dispatch of a wireless message to PW-6 does not amount to compliance with [Section 42\(2\)](#) of the Act as held by this Court in [State of Karnataka vs. Dondusa Namasa Baddi, 2010\(4\) R.C.R.\(Criminal\) 367 : 2010\(5\) Recent Apex Judgments \(R.A.J.\) 333 : \(2010\) 12 SCC 495.](#)”

11. In addition, the Appellant's side has also relied upon a Larger Bench decision of the Supreme Court in '**Karnail Singh Vs. State of Haryana'** **2009(5) RCR (Criminal) 515** wherein it was held -

“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 :

(d) While total non-compliance of requirements of sub-sections (1) and (2) of [section 42](#) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of [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 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.”

12. From the State side however, it has been contended that the aforesaid decision of the Supreme Court was passed in a case in which the contraband had been recovered from the Shed of the convict/Appellant which was otherwise used for storing fodder in his Farm House. As such according to the State, recovery in the case cited by the Appellant's side was effected from an enclosed stationery place, which clearly falls in the category of a 'building' or a place. Ld. State counsel has further highlighted that according to Section 42(1), the authorized officer conducting the search and seizure

can do so between 'sunrise and sunset', for which purpose he can -

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

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

13. Hence the contention of the State is that the applicability of the provisions of Section 42 would arise only where the recovery is from a fixed place like a building or a stationery conveyance which is not to be confused with the separate provisions of Section 43 of the NDPS Act, which provides as follows -

“[43. Power of seizure and arrest in public place.- Any officer of any of the departments mentioned in section 42 may -

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act 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;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.]”

14. It is therefore, the contention from the State side that if the recovery is effected from any 'public place' or when the contraband is 'in transit' the above provisions of Section 43 alone would be applicable, which does not require a similar compliance by way of reducing any prior secret information into writing, as in case of the provisions of Section 42. In support of this contention, the State has cited the decision of the Apex Court in '**State of Haryana vs. Jarnail Singh and others'** 2004(2) R.C.R. (Criminal) 960 wherein the Respondents' conviction by the Trial Court which had been set aside by the High Court, in a case where the recovery had been made from a moving Tanker, which was compelled to be stopped by the Police Personnel, was restored with the following observations -

“8. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act for searching the vehicle between sunset and the sunrise.

9. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such

*being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in **M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449 : 2004(1) RCR (Crl.) 160 (SC)** that where a search is conducted by a gazetted officer himself acting under Section 41 of the Narcotic Drugs and Psychotropic Substances Act, it was not necessary to comply with the requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act.*

10. We, therefore, hold that in the facts of this case Section 50 of the Narcotic Drugs and Psychotropic Substances Act was not applicable since the contraband was recovered on search of a vehicle and there was no personal search involved. The requirement of the proviso to Section 42 was also not required to be complied with since the recovery was made at a public place and was, therefore, governed by Section 43 of the Act which did not lay down any such requirement. Additionally, since the Superintendent of Police was a member of the search party and was exercising his authority under Section 41 of the Narcotic Drugs and Psychotropic Substances Act, the proviso to Section 42 were not attracted. (Emphasis added)

15. In addition, the State has also cited the decision of Supreme Court in '**Bahadur Singh Vs. State of Haryana' 2010(2) RCR (Criminal) 586** wherein the SLP preferred by the convict was dismissed by the Apex Court, which observed inter-alia -

“12. It cannot but be noticed that with the advancement of technology and the availability of high speed exchange of

information, some of the provisions of the Narcotic Drugs And Psychotropic Substances Act, including Section 42, have to be read in the changed context. Apart from the views expressed in Sajan Abraham's case (supra) that the delay caused in complying with the provisions of Section 42 could result in the escape of the offender or even removal of the contraband, there would be substantial compliance, if the information received were subsequently sent to the superior officer. In the instant case, as soon as the investigating officer reached the spot, he sent a wireless message to the Deputy Superintendent of Police, Kurukshetra, who was his immediate higher officer and subsequent to recovery of the contraband, a Ruqa containing all the facts and circumstances of the case was also sent to the Police Station from the spot from where the recovery was made on the basis whereof the First Information Report was registered and copies thereof were sent to the Ilaka Magistrate and also 12 to the higher police officers. As was held by the High Court, there was, therefore, substantial compliance with the provisions of Section 42 of the Narcotic Drugs And Psychotropic Substances Act and no prejudice was shown to have been caused to the accused on account of non-reduction of secret information into writing and non-sending of the same to the higher officer immediately thereafter." (Emphasis added)

16. It has been further highlighted that in the present case, the search and seizure had been conducted in presence of and on direction of PW-2 who was DSP Rajpal Singh, and who by virtue of his rank and designation himself happens to be a Gazetted Officer, on account of which there was no applicability of the requirements under Section 42(2) of the NDPS Act in view of Supreme Court's decision in '**M. Prabhulal v. Assistant Director, Direcorate of Revenue Intelligence' 2004(1) RCR (Criminal) 160** wherein it was held inter-alia -

“14. Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the Narcotic Drugs And Psychotropic Substances Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41 (2) only a Gazetted Officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a Peon, a Sepoy or a Constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted Officer has also all the powers of Section 42 including power of seizure. Section 42 provides for procedure and power of entry, search seizure and arrest without warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section 2 of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing under sub-section (1) or ground recorded for the belief under proviso thereto, is required to be sent by the officer to his immediate official superior. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act

*or authorize his subordinate on the terms stated in the Section. Under subsection (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of subsection (2) of Section 42 that it applies to officer contemplated by subsection (1) thereof and to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such Gazetted Officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed on him can also be seen from Section 50 of the Narcotic Drugs and Psychotropic Substances Act which gives a right to a person about to be searched to ask for being searched in presence of a Gazetted Officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted Officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in **State of Punjab v. Balbir Singh, 1994 (1) RCR (Criminal) 736 (SC) : (1994) 3 SCC 299, Abdul Rashid Ibrahim Mansuri v. State of Gujarat, 2000 (1) RCR (Criminal) 611 (SC) : (2000) 2 SCC 513 and Beckodan Abdul Rahiman v. State of Kerala, 2002 (2) RCR (Criminal) 385 (SC) : (2002) 4 SCC 229,** on the aspects under consideration are neither relevant nor applicable.*

15. In view of our conclusion that Section 42(2) is not applicable when search seizure etc. is conducted by a Gazetted Officer under Section 41(2) and (3), the further contention of Mr. Jain that an attempt was made by the respondent to fill up lacuna to show compliance of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act as a result of observations made in the order granting bail to the appellants as noticed hereinbefore becomes inconsequential and, therefore, it is not necessary to examine it.”

17. The appellant's side has however, countered the State's contention by citing the decision of Apex Court in '**State of Rajasthan Vs. Jag Raj Singh @ Hansa**' **2016(3) R.C.R. (Criminal) 539** in which the acquittal of the Respondent was upheld in a case where the contraband was found in a private Jeep which was not used to carry passengers, and which had been intercepted by the Police, so in the view of Supreme Court, it was not a 'public vehicle' within the meaning of explanation to Section 43 on account of which, compliance of the provisions of Section 42 had to be made.

18. In the opinion of this Court however, there is a contradiction between the above decision and that in the earlier decision in **State of Haryana v. Jarnail Singh (supra)**, but the said decision was neither referred to nor discussed in the subsequent one, which is therefore, clearly *per incuriam*. At any rate, the other decision relied on by the State to the effect that no prejudice could have been caused to the convict due to the apparent strict non-compliance of Section 42(2) of the NDPS Act, and that in any case there was no requirement to make such compliance when the search and seizure had been made in presence of and on direction of a Gazetted Officer

himself, in the opinion of this Court, this particular contention seeking to assail the impugned judgment is not convincing.

19. Non-examination of the only private witness namely Bhagwant Singh in the given circumstances would also not appear to be fatal to the prosecution case, since there is no major contradiction in the statements given by the five witnesses actually examined, to raise any doubt regarding credibility of the prosecution case as a whole.

20. Finally, the contention that the delay of seven days in sending the sample for chemical examination inasmuch as the seizure was made on 18.3.2008 and the samples were sent a week later on 25.3.2008 is also not convincing. In '**Hardeep Singh Vs. State of Punjab**' 2008(4) RCR (Criminal) 97 there had been a delay of as many as 40 days to the office of Chemical Examiner, and it was held by the Supreme Court that such delay could not have caused any prejudice to the Appellant. This Court also finds no reason to hold that the ratio of this decision of the Apex Court is not applicable in the present case where the apparent delay is limited to just about a week.

21. For the aforesaid reasons, this Court finds no grounds to interfere with the impugned judgment of conviction passed by the Ld. Trial Court. Dismissed.

May 29, 2018
AS

(SUDIP AHLUWALIA)
JUDGE

1. Whether speaking/ reasoned : Yes/ No
2. Whether reportable : Yes/ No