

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decided on: January 16, 2018

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CRL.L.P. 234/2016

STATE (NCT OF DELHI)

..... Petitioner

Represented by: Mr. Hirein Sharma, APP for
the State.

versus

VIRENDER SINGH

..... Respondent

Represented by: Mr. Kundan Kumar and Mr.
Prashant, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

Crl. M.A. No. 7163/2016 (Delay)

1. For the reasons stated in the application, delay of 43 days in filing the leave to appeal petition is condoned.
2. Application is disposed of.

CRL.L.P. 234/2016

1. Aggrieved by the order dated 6th November, 2015, whereby the learned Additional Sessions Judge acquitted the respondent for the offence punishable under Section 20 (b)(ii)(C) of Narcotics Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'), the State has preferred the present leave petition.
2. Learned APP for the State submits that the learned Additional Sessions Judge erred in overlooking the fact that Section 42 of the NDPS Act was substantially complied with in terms of DD entry No.3 in the roznamcha as deposed by Inspector Vivek Pathak (PW-18). Mere procedural defect under Section 42 of the NDPS Act cannot be a ground for

rejecting the prosecution case out rightly. It is further urged that delayed compliance with satisfactory explanation would be acceptable compliance of Section 42 of the NDPS Act and the same has been explained in the deposition of HC Subhash (PW-5), HC Harender Singh (PW-6) and SI Paramjeet Singh (PW-16) to the effect that it was an emergency situation and the raid was to be conducted at a short notice. It is further submitted that the learned Additional Sessions Judge erred in ignoring the fact that since the respondent was in transit when he was stopped and searched by the raiding team, Section 43 of the NDPS Act would be applicable which does not require reasons to be recorded. Furthermore learned Additional Sessions Judge failed to appreciate that in case of seizure made under Section 42 NDPS Act between sunset and sunrise, the requirement of the proviso thereto has to be complied with. However, there is no such proviso in Section 43 of the NDPS Act therefore, if a search is conducted in a public place or in transit the officer is not required to record his satisfaction as contemplated by the proviso to Section 42 NDPS Act, for searching a vehicle between sunset and sunrise.

3. Briefly stated the case of the prosecution is that on 19th February, 2011 around 4.30 AM one secret informer came to Narcotic Cell and informed SI Paramjeet Singh that one Virender, who used to supply ganja, along with one Anil and Kamal, who invest money for procuring ganja from Orissa by oil tankers of Mathura Refinery, will come in a Tavera vehicle No. DL 3C AJ 9573 with ganja and will go to the house of Anil while passing through Yamuna Bank, Metro Depot between 5.30 AM to 6.00 AM. The aforesaid information was recorded vide DD No.3 (Ex. PW-4/A). Consequently a raiding team was constituted consisting of SI Paramjeet

Singh, HC Subhash and HC Harender Singh. The raiding team along with the secret informer took position near the spot. At about 5.40 AM they saw one Tavera car coming from Akshardham Mandir side. They stopped the vehicle and one person was found sitting in the car whose name was disclosed as Virender. Notice under Section 50 NDPS Act was served upon him. The refusal was endorsed by Virender himself on the aforesaid notice. SI Paramjeet Singh searched the vehicle and found seven parcels from the backside of the car. Out of seven parcels in four parcels 35 packets each inside colourful plastic bag/katta was found totaling to 140 packets and ganja were found inside the same. On weighing it was found that each packet contained 1 kg of ganja. In the 5th, 6th and 7th parcel 20 kg, 22 kg and 27 kg respectively of ganja was found. Thus, total ganja recovered was 209 kg. The vehicle bearing No. DL 3C AJ 9573 was seized vide memo Ex.PW-5/C. Virender was arrested vide arrest memo Ex.PW-5/D. On the raid so conducted, FIR No. 41/2011 (Ex.PW-1/A) was registered at PS Crime Branch under Section 20/25 NDPS Act.

4. Learned Additional Sessions Judge placed reliance on the records pertaining to sunset and sunrise as brought by DW-3 Balram Soni, Scientific Assistant, Metrological Department vide Ex.DW-3/A on 19th February, 2011 noting that the sun rose at 6.57 AM. Learned Additional Sessions Judge thus held that the requirement under Section 42 of the NDPS Act was ignored, and granted the benefit to the respondent for non-compliance of mandatory provision of Section 42 NDPS Act.

5. Section 42 and 43 of the NDPS Act provide as under:

“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,—

- (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 controller 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.*

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.”*

6. Admittedly the case of the prosecution is that a prior information was received thus this was not a case of chance recovery and on a prior information a raid was conducted. The recovery has been made from a private vehicle and not a public conveyance. Thus, Section 43 of the NDPS Act has no application to the facts of the case. The recovery having been made before sun rise from a private vehicle and an earlier information having been received and recorded, the prosecution was bound to comply with the mandatory provision of Section 42 NDPS Act. Admittedly the information was recorded vide DD No.3 on 19th February, 2011 exhibited vide Ex.PW-4/A. There is no documentary evidence to prove that this was conveyed to the senior officers. Though Inspector Vivek Pathak (PW-18) who was a member of the raiding team stated that he had given the information to his senior officers and got the orders from the ACP concerned, however neither the transmission of the said intimation is noted nor there is a document to this effect nor the concerned ACP examined as witness. Thus, there was non-compliance of Section 42 of the NDPS Act.

7. Resolving the conflict in the two decisions of the 3 Judge Bench of the Supreme Court reported as (2000) 2 SCC 513 Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat and (2001) 6 SCC 692 Sajan Abraham Vs. State of Kerala, the Constitution Bench of Supreme Court in the decision

reported as (2009) 8 SCC 539 Karnail Singh Vs. State of Haryana laid down the legal position under Section 42 of the NDPS Act succinctly as under:

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajjan Abraham [(2001) 6 SCC 692] 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.”

8. Considering the evidence of the prosecution and the defence led it is apparent from the testimony of Insp. Vivek Pathak a member raiding that he has not been able to prove substantial compliance of Section 42 of the NDPS Act. Thus, the impugned judgment acquitting the respondent cannot be held to be a perverse judgment warranting interference. Leave to appeal petition is dismissed.

(MUKTA GUPTA)
JUDGE

JANUARY 16, 2018
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