

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRA-D-393-DB-2015

Reserved on : 21.08.2019

Date of decision : 27.08.2019

Sukhdev Singh

... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mrs.Shubhra Singh, Legal Aid Counsel
for the appellant.

Mr.Gaurav Garg Dhuriwala, Sr.DAG, Punjab.

RAJIV SHARMA, J.

This appeal is instituted against the judgment and order dated 28.01.2015 rendered by the learned Judge, Special Court (A), Gurdaspur, in Sessions Case no.108 of 2012, whereby appellant, who was charged with and tried for offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") has been convicted thereunder and sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs.1,25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two and half years.

2. The case of the prosecution in a nutshell is that on 26.07.2012, SI/SHO Sohan Lal along with other police officials were going towards village Chack Aujla in connection with patrolling duty. When the police party reached near bridge canal, village Baje Chack, the Investigating

Officer received a secret information that Sukhdev Singh alias Sonu used to sell intoxicant substance in large quantity and he was coming from village Auja side. Recovery could be effected if Naka was laid. One clean shaven man holding a glazed envelop in his right hand was seen coming from Auja by pass side. He tried to run away. He was apprehended. The Investigating Officer told him that he suspected that he was in possession of some intoxicant substance. He also apprised him of his legal right to be searched from the gazetted officer. He prepared his non-consent memo. He informed the DSP Sh.Navjot Singh. DSP Navjot Singh reached the spot within 20 minutes. He introduced himself to the accused. He apprised the accused of his legal right to get searched from him or gazetted officer. Accused gave his consent. DSP prepared the consent memo. The Investigating Officer made search of the accused. Intoxicant powder was recovered from the glazed envelope. The Investigating Officer took out two samples of 10/10 grams. Rest was weighed. It came to 2 kg. 100 grams. The Investigating Officer put the two samples and bulk into three separate plastic containers. He sealed the same with his seal impression SL. DSP also sealed the same with his seal impression NS. The case property was taken into possession. The Investigating Officer prepared ruqa and sent it through PHC Gurjinder Singh, on the basis of which formal FIR was registered. Rough site plan was prepared. The sample was sent to the Chemical Examiner. The report was received. Challan was put up after completing all the codal formalities.

3. The prosecution examined a number of witnesses. Statement of appellant was recorded under Section 313 Cr.P.C. Appellant also examined four witnesses in support of his case. The appellant was convicted and sentenced, as noticed hereinabove. Hence this appeal.

4. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Learned counsel appearing on behalf of the State has supported the prosecution case.

6. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

7. PW-1 Inspector Sohan Lal deposed that on 26.07.2012 he was posted at Police Station Tibber. He received secret information that Sukhdev Singh alias Sonu used to sell intoxicant substance in large quantity. He was coming from village Aujla side. Recovery could be effected if *nakabandi* was erected. Naka was laid. One clean shaven man holding a glazed envelop in his right hand was seen coming from Aujla by pass side. He tried to run away. He was over powered. He told him that he suspected that he was in possession of some intoxicant substance. He also apprised him of his legal right to be searched by him or gazetted officer or Magistrate. He expressed his intention to be searched by the gazetted officer. He prepared his non-consent memo Ex.PA. He informed DSP Sh.Navjot Singh. He reached the spot within 20 minutes. He introduced himself to the accused. He apprised him of his legal right to be searched from him or gazetted officer. Accused gave his consent. Consent memo Ex.PB was prepared by DSP. On the direction of DSP, he searched the accused. From the glazed envelop, intoxicant powder was recovered. He took out two samples of 10/10 grams. Rest was weighed. The bulk came to 2 kg. 100 grams. The sealing proceedings were completed. He and DSP put their seals on the samples and bulk. He sent ruqa Ex.PF on the basis of

which formal FIR Ex.PG was registered. He also prepared rough site plan Ex.PJ. He kept the case property intact in double lock. Accused was put behind the bar. Next day he produced accused before the Illaqa Magistrate. He also moved application for verification of the case property. Illaqa Magistrate passed the order Ex.PN. Inventory list is Ex.PM. He deposited the bulk container and one sample in judicial malkhana. One sample was kept in double lock intact. He took out the sample out of double lock on 01.08.2012. He handed over the same to PHC Tarsem Singh. He deposited the same in the office of Chemical Examiner, Kharar. In his cross-examination, he admitted that whenever the case property was deposited in the police station, entry was required to be made in the DDR register and register no.19. He also admitted that there was no number of the register no.19, i.e. malkhana number on case property, i.e. MO-1 and MO-2. He also admitted that case property MO-1 and MO-2 did not bear the signature of the Judicial Magistrate. He further deposed in the cross-examination that no Magistrate was called on the spot before conducting the search. He had prepared consent and non-consent memo and recovery memo before the arrival of the FIR. Efforts were made to join independent witness but none agreed. The FSL form was prepared on 28.07.2012. He also admitted that original form no.29 was not on record.

8. PW-2 PHC Tarsem Singh had led his evidence by filing affidavit Ex.PW2/A. According to the contents of affidavit, SHO Sohan Lal had handed over to him sample parcel of 10 grams duly sealed with seal impression SL and NS. He had taken out it from the double lock vide road no.86/12 for depositing the same in the office of Chemical Examiner, Kharar. He deposited the same on the same day, i.e. 01.08.2012.

9. PW-4 ASI Surjit Raj had also corroborated statement of PW-1 SI Sohan Lal regarding the manner the accused was apprehended and codal formalities were completed on the spot. In his cross-examination, he admitted that no information was given to any higher officer regarding recovery of contraband from the accused. Volunteered special reports were forwarded. When the DSP reached the spot, accused was already arrested. No writing work was done by the DSP at the spot. He did not know where they were standing when the secret information was received. No writing work was done by the Investigating Officer.

10. PW-5 DSP Navjot Singh deposed that he received information on telephone from SI Sohan Lal on 26.07.2012 regarding apprehension of accused. He was requested to reach at the spot. He along with staff reached at the spot after about 15 minutes. He disclosed his identity to accused. He told him that he had suspicion that accused was in possession of contraband material. He wanted to search him. He apprised the accused of his legal right to be searched before any other gazetted officer or Magistrate. Accused reposed faith in him. He prepared consent memo Ex.PB. He directed SI Sohan Lal to conduct personal search of accused. On search of accused, one polythene packet was recovered from his right hand. The Investigating Officer opened the packet. He found the intoxicant powder in it. The Investigating Officer completed the formalities on the spot. In his cross-examination, he categorically deposed that the Investigating Officer did not reduce the secret information into writing. He received the call by wireless. He never apprised the accused that he was a gazetted officer. Accused was not apprised of his legal right of nature of search or meaning of gazetted officer of various departments or Magistrate. The Investigating

Officer was carrying the weighing machine which was traditional.

11. DW-2 Baljit Singh deposed that he was a Member Panchayat of village Aujla. On 26.07.2012 he was present in his house. The mother of accused sent message with a request to come to her house as two police officials had come to her house. At about 6.00/6.30 A.M. he went to the house of accused Sukhdev Singh. Sarpanch, Member Panchayat and other members of Panchayat were present. Two officials were present in civil dress. They told that SSP, Gurdaspur had called Sukhdev Singh. When they asked them to produce him at their own. In the meantime, two police vehicles came there. The house of Sukhdev Singh was searched. Police party forcibly took away Sukhdev Singh. In his cross-examination, he deposed that house of accused was at a distance of 3 killa from his house. He was on visiting terms with the accused being co-villager.

12. DW-3 Ramesh Lal also deposed that he was Sarpanch of village Aujla. On 26.07.2012 he was present in his house. The mother of accused called him to her house. Police reached the house of accused. The police party forcibly took away Sukhdev Singh. In his cross-examination, he deposed that he was elected Sarpanch in the year 2007. Police came to the house of accused at about 6.00 A.M. He was on visiting terms with the accused.

13. DW-4 Satnam Singh deposed that he was Member Panchayat of village Aujla. According to him, police had reached the house of Sukhdev Singh and taken away Sukhdev Singh forcibly.

14. DW-5 Sarabjit Kaur is mother of the accused. She deposed that on 26.07.2012 she was present in house along with her family. Two police officials came to her house. They had come to take away Sukhdev Singh

with them. She sent message to the respectables of village. Panchayat Members reached her house. Police took away Sukhdev Singh forcibly.

15. The Chemical Examiner's report is Ex.PO. According to it, sample contained dextropropoxyphene.

16. According to the prosecution case, PW-1 Inspector Sohan Lal received secret information that accused was coming with contraband. He was noticed. He tried to run away. He was over powered. PW-1 Sohan Lal apprised him of his legal right to be searched by him or gazetted officer or Magistrate. He prepared his non-consent memo. Thereafter PW-5 DSP Navjot Singh was informed. He came to the spot. He apprised the accused of his legal right to be searched by other gazetted officer or Magistrate. Accused reposed faith in him. Search was carried out. Contraband was recovered from the packet. Procedure of sealing samples and bulk was completed on the spot.

17. Since the police officer had received the secret information, it was required to be reduced in writing as per Section 42 of the NDPS Act. It has come in the statement of PW-4 ASI Surjit Raj that no writing was done by the Investigating Officer about the secret information. No information was given to the higher officers regarding recovery of contraband from the accused. PW-5 DSP Navjot Singh has also admitted that when he reached, the Investigating Officer had received secret information. He did not reduce the secret information into writing.

18. PW-1 SI Sohan Lal in his cross-examination admitted that original form no.29 was not available on record. He had not recorded the secret information nor sent it to the higher officers.

19. There is violation of mandatory provisions of Section 42 of the

NDPS Act. Section 42 of the NDPS Act requires recording of reasons of belief and for taking down of information received in writing and the same is to be sent to the superior officers. There is no evidence that information was reduced into writing and superior officer was informed.

20. Their Lordships of the Hon'ble Supreme Court in ***State of Punjab vs. Balbir Singh, (1994) 3 Supreme Court Cases 299*** have held as under:-

“(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or 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 a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

21. The Division Bench of Bombay High Court in ***Lamin Bojang vs. State of Maharashtra, 1997 CrL.J.513*** has held that information which is to be sent is information prior to the raid. FIR lodged after the raid and though countersigned by superior official would not be compliance of requirement of Section 42(2). The Division Bench has held as under:-

“12. Mr. Nalawade next urged that the requirements contained in Section 42(2) have been satisfied inasmuch as there is evidence to indicate that FIR was countersigned by the immediate superior official, PI Chaugule. We regret that we have to reject this submission also. A careful reading of Sections 42(1) and 42(2) would show that the information which is to be sent under Section 42(2) is the information, prior to the raid or that information in pursuance of which, a raid is to be carried out. The FIR admittedly was lodged after the raid had been conducted and the recovery panchnama had been prepared. We cannot persuade ourselves to accept that countersigning of the FIR by PI Chaugule PW 6 would satisfy the requirements enjoined by Section 42(1) r/w. Section 42(2) of NDPS Act. We accordingly, repel this submission of Mr. Nalawade also.”

22. Their Lordships of the Hon'ble Supreme Court in ***Sukhdev Singh vs. State of Haryana, (2013) 2 Supreme Court Cases 212*** have underlined the objects and purpose of ensuring strict compliance of Section 42. Their Lordships have held that Section 42 is mandatory which ought to be construed and complied with strictly. The compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably prior to recovery. Their Lordships have held as under:-

“15. Section 42 can be divided into two different parts: first is the power of entry, search, seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section; second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Subsection (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 word ‘forthwith’ stood amended by the words ‘within seventy two 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 seventy two 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.

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18. 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.

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21. 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.

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28. Before we part with this file, we consider it the duty of the Court to direct the Directors General of Police concerned of all the States to issue appropriate instructions directing the investigating officers to duly

comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of Karnail Singh.”

23. Their Lordships of the Hon'ble Supreme Court in ***Darshan Singh vs. State of Haryana, (2016) 14 Supreme Court Cases 358*** have held that Section 42(1) 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. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated under Section 42(1) and Section 42(2) will have to be followed separately, in the manner interpreted by the Supreme Court in Karnail Singh, (2009) 8 SCC 539. Their Lordships have held as under:-

“13. 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 issuance of authorisation 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 the Criminal Procedure Code.”

24. Their Lordships of the Hon'ble Supreme Court in ***State of Rajasthan vs. Jagraj Singh alias Hansa, (2016) 11 Supreme Court Cases,***

687 have explained the true scope of Section 42 of the NDPS Act as under:-

“9. Whether the High Court committed error in acquitting the accused is the issue which needs to be considered in this appeal. Whether there were sufficient material to support the findings of the High Court regarding non-compliance of [Section 42\(1\)](#) and [Section 42 \(2\)](#) and whether [Section 43](#) was applicable in the present case are the other issues which need to be answered. Whether recovery as claimed by the prosecution is supported from the evidence on record and material and samples were properly sealed are other related issues.

10. [The NDPS Act](#) was enacted to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. This Court had occasion to consider the provisions of [NDPS Act](#) in large number of cases. This Court has noted that 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. This Court in [State Of Punjab vs Balbir Singh](#), 1994 (3) SCC 299, in paragraph 15 has made the following observations:

“15.....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.”

11. To the similar effect are the observations of this Court in [Saiyad Mohd. Saiyad Umar Saiyed vs. The State Of Gujarat](#). The following was stated in paragraph 6 of the said judgment:

“6. It is to be noted that under the [NDPS Act](#) punishment for contravention of its provisions can extend to rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years and also to fine which shall not be less than Rupees one lakh but which may extend to Rupees two lakhs, and the court is empowered to impose a fine exceeding Rupees two lakhs for reasons to be recorded in its judgment. [Section 54](#) of the NDPS Act shifts the onus of proving his innocence upon the accused; it states that in trials under the [NDPS Act](#) it may be presumed, unless and until the contrary is proved, that an accused has committed an offence under it in respect of the articles covered by it "for the possession of which he fails to account satisfactorily". Having regard to the grave consequences that may entail the possession of illicit articles under the [NDPS Act](#), namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable, the legislature has enacted the safeguard contained in [Section 50](#). To obviate any doubt as to the

possession by the accused of illicit articles under the [NDPS Act](#), the accused is authorised to require the search for such possession to be conducted in the presence of a Gazetted Officer or a Magistrate.”

12. In the present case, [Section 42](#) is relevant which is extracted as below:

“ 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 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 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 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 subsection (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.”

13. *The High Court has come to the conclusion that there is breach of mandatory provisions of [Section 42\(1\)](#) and [Section 42\(2\)](#) and further [Section 43](#) which was relied by the Special Judge for holding that there was no necessity to comply [Section 42](#) is not applicable. We thus proceed to first examine the question as to whether there is breach of provisions of [Section 42\(1\)](#) and [Section 42 \(2\)](#). The breach of [Section 42](#) has been found in two parts. The first part is that there is difference between the secret information recorded in Exh. P-14 and Exh. P-21 and the information sent to Circle Officer, Nohar by Exh. P-15. It is useful to refer to the findings of the High Court in the above context, which is quoted below:*

“ From the above examination, it is not found that Exh. P-14 the information which is stated to be received from the informer under [Section 42\(2\)](#) of Act or Exh. P-21, the information given by the informer which is stated to be recorded in the Rozanamacha, copy whereof has been sent to C.O. Nohar, who was the then Senior Officer, rather, Exh. P-15, the letter which was sent, it is not the copy of Exh. P-14, but it is the separate memo prepared of their own. From the above examination, it is not found in the present case that [section 42 \(2\)](#) of Act, 1985 is complied with.”

14. *What [Section 42\(2\)](#) requires is that where an officer takes down an information in writing under sub-Section (1) he shall sent a copy thereof to his immediate officer senior . The communication Exh. P-15 which was sent to Circle Officer, Nohar was not as per the information recorded in Exh. P 14 and Exh. P 21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of [Section 42\(2\)](#).*

15. Another aspect of non-compliance of [Section 42\(1\)](#) proviso, which has been found by the High Court needs to be adverted to [Section 42 \(1\)](#) indicates that any authorised officer can carry out search between sun rise and sun set without warrant or authorisation. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of [Section 42](#) or Sub-section (2) of [Section 42](#) was ever recorded by Station House Officer who proceeded to carry on search. Station House Officer has appeared as PD-11 and in his statement also he has not come with any case that as required by the proviso to Sub-section (1), he recorded his grounds of belief anywhere. The High Court after considering the entire evidence has made following observations :

“Shishupal Singh PD-11 by whom search has been conducted, on reaching at the place of occurrence by him no reasons to believe have been recorded before conducting the search of jeep bearing HR 24 4057 under [Section 42\(1\)](#), nor any reasons in regard to not obtaining the search warrant have been recorded. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso to [Section 42\(1\)](#). Since reasons to believe have not been recorded, therefore, under [Section 42\(2\)](#) it is not found on record that copy thereof has been sent to the senior officials. Shishupal Singh could be the best

witness in this regard, who has not stated any fact in his statement regarding compliance with proviso to [Section 42\(1\)](#) and [Section 42\(2\)](#), sending of copy of reasons to believe recorded by him to his senior officials.”

16. In this context, it is relevant to note that before the Special Judge also the breach of [Section 42\(1\)](#) and [42\(2\)](#) was contended on behalf of the defence. In paragraph 12 of the judgment Special Judge noted the above arguments of defence. However, the arguments based on non-compliance of [Section 42 \(2\)](#) were brushed aside by observing that discrepancy in Exh. P- 14 and Exh. P-15 is totally due to clerical mistake and there was compliance with [Section 42\(2\)](#). The Special Judge coming to compliance with proviso to [Section 42\(1\)](#) held that vehicle searched was being used to transport passengers as has been clearly stated by its owner Veera Ram, hence, as per the explanation to [Section 43](#) of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether [Section 43](#) was attracted in the present case which obviated the requirement of [Section 42\(1\)](#) proviso.

17. [Section 43](#) of the Act is 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 V A 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"

18. Explanation to [Section 43](#) defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. [The Motor Vehicles Act, 1939](#) and thereafter the [Motor Vehicles Act, 1988](#) were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the [Motor Vehicles Act, 1988](#), no vehicle can be used for transporting passengers.

19. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there

was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, does not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle.

20. *The following observations were made by the High Court:*

“Kartara Ram is produced as PD-5, who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle , whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the

fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle”

21. There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that “..... I had given this jeep to Kartara Ram resident of who is my relative to run it for transporting passengers” Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to [Section 43](#). Hence, [Section 43](#) was clearly not attracted and provisions of [Section 42\(1\)](#) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

22. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of [Section 42](#). When search is conducted after recording information under [Section 42\(1\)](#), the provisions of [Section 42](#) has to be complied with. This

Court in *Directorate Of Revenue vs Mohammed Nisar Holia*, (2008) 2 SCC 370, had occasion to consider *Sections 41, 42, and 43* explanation. The following was stated in paragraph 14:

“14. *Section 43*, on plain reading of the Act, may not attract the rigours of *Section 42* thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of *Section 42*, need not be complied with, only because the place whereat search is to be made is a public place. If *Section 43* is to be treated as an exception to *Section 42*, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of *Section 165* of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance.”

23. Thus the present is not a case where *Section 43* can be said to have been attracted, hence, non-compliance of *Section 42(1)* proviso and *Section 42(2)* had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of *Section 42(1)* and *42 (2)*, whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court

in State of Punjab Vs. Balbir Singh (1994) 3 SCC 299. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the [NDPS Act](#). [Sections 41, 42, 43](#) and other relevant provisions came up for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:

“8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of [Sections 41](#) and [42](#). Under [Section 42](#), the empowered officer even without a warrant issued as provided under [Section 41](#) will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of [Section 42](#) further lays down that when such officer takes down any information in writing or records grounds for this belief under

the proviso, he shall forthwith send a copy thereof to his immediate official superior.”

24. After referring large number of cases, this Court recorded conclusion in paragraph 25 which is to the following effect:

“25. The question considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the [NDPS Act](#) makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of [CrPC](#) and when such search is completed at that stage [Section 50](#) of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the [NDPS Act](#). If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the [NDPS Act](#).

(2-A) Under [Section 41\(1\)](#) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the

Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in [Sections 41\(2\)](#) and [42\(1\)](#) can act under the provisions of the [NDPS Act](#). If such arrest or search is made under the provisions of the [NDPS Act](#) by anyone other than such officers, the same would be illegal.

(2-B) Under [Section 41\(2\)](#) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under [Section 42\(1\)](#) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or 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 a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to [Section 42\(1\)](#) if such officer has

to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under [Section 42\(2\)](#) such empowered officer who takes down any information in writing or records the grounds under proviso to [Section 42\(1\)](#) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of [CrPC](#) fails to strictly comply with the provisions of [Sections 100](#) and [165 CrPC](#) including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under [Section 41\(2\)](#) of the Act carries out a search, he would be doing so under the provisions of [CrPC](#) namely [Sections 100](#) and [165 CrPC](#) and if there is no strict compliance with the provisions of

CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the

appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

25. A three Judges Bench in *Saiyad Mohd. Saiyad Umar Saiyed vs. The State Of Gujarat*(supra) after elaborate consideration of provisions of the *NDPS Act* including *section 50* had endorsed the judgment of this court in *Balbir Singh's case* (supra).

26. A Constitution Bench of this Court in *State of Punjab Vs. Baldev Singh*, had occasion to consider the provisions of the *NDPS Act* and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in *Balbir Singh's case* has found approval by three Judges Bench in *Saiyad Mohd. Saiyad Umar Saiyed vs. The State Of Gujarat* (supra) and a discordant note was struck by two Judges Bench in *State of Himachal Pradesh Vs. Pirthi Chand* and another. The Constitution Bench approved the view of this Court in *Balbir Singh's case* that there is an obligation on authorised officer under *section 50* to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of *Section 50* it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non- compliance of *Section 50* is also true with regard to non-compliance of *Section 42* of the Act.

27. In *Beckodan Abdul Rahiman vs State Of Kerala*, this Court had occasion to consider both *Section 42* and *Section 50*. In the above case there was non compliance of *Section 42* (2) as well as *Section 50*. It was also noticed that a Constitution Bench in *State of Punjab Vs. Baldev Singh* (supra) has already laid down that provisions of *Section 42* and *50* are mandatory and their

non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:

“5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses are not shown to have complied with the mandate of sub-section (2) of [Section 42](#) of the Act. Similarly the provisions of [Section 50](#) have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate.

6. We are of the firm opinion that the provisions of sub-section (2) of [Section 42](#) and the mandate of [Section 50](#) were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted.”

28. It is also relevant to note another Constitution Bench judgment of this Court in Karnail Singh Vs. State of Haryana, 2009 (8) SCC 539, where this Court had again occasion to consider the provisions of [Sections 42](#) and [50](#). The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paragraphs 1 to 3 of the judgment which are to the following effect:

“1) In the case of [Abdul Rashid Ibrahim Mansuri vs. State of Gujarat](#), (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of [Section 42](#) of the Narcotic Drugs and [Psychotropic Substances Act](#), 1985 (hereinafter referred to as "[NDPS Act](#)") is mandatory and failure to take down the information in writing

and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of [Sajan Abraham vs. State of Kerala](#), (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that [Section 42](#) was not mandatory and substantial compliance was sufficient.

2) In view of the conflicting opinions regarding the scope and applicability of [Section 42](#) of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

3) The statement of objects and reasons of the [NDPS Act](#) makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over.”

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of [Sections 42](#) and [50](#) is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of [Section 42](#). The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of [Section 42 \(1\)](#) proviso even an arguments based on substantial

compliance is raised there is total non-compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance of Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.

30. In view of what has been stated above, it is not necessary for us to enter into the other reasons given by the High Court for setting aside the conviction order. The High Court has given the sufficient reasons and grounds for setting aside the conviction order in which we do not find any infirmity so as to interfere in this appeal.”

25. We have gone through the non-consent memo Ex.PA. PW-1 SI Sohan Lal had given the options to the accused to be searched by him or Gazetted Officer or Magistrate. Similarly, PW-5 DSP Navjot Singh had also given option to the accused that he had legal right to be searched from him (DSP) or any other Gazetted Officer or Magistrate. In his cross-examination, he categorically admitted that he never apprised the accused that he was a Gazetted Officer. He was also never apprised the nature of search or meaning of Gazetted Officer of various departments of Magistrate. Investigating Officer was required to give only two options to the appellant whether he wanted to get his personal search conducted before a Magistrate or a gazetted officer. He could not ask for third option to be searched by him. Section 50 of the NDPS Act is mandatory.

26. Their Lordships of the Hon'ble Supreme Court in ***State of Rajasthan v. Parmanand and another, (2014) 5 SCC 345***, have held that

there is a need for individual communication to each accused and independent consent by each accused under Section 50 of the Act. Their Lordships have also held that Section 50 does not provide for third option. Their Lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their Lordships have held as under:

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand’s bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh case, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did

not sign.

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19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50 (1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50 (1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold

that the High Court's view is perverse. The appeal is, therefore, dismissed."

27. According to PW-1 SI Sohan Lal, he was carrying computerized weighing scale. However, PW-5 DSP Navjot Singh deposed that he was carrying traditional weighing scale. There are material contradictions in the statements of official witnesses as notices hereinabove.

28. Accordingly the appeal is allowed and judgment and order dated 28.01.2015 are set aside. The appellant is acquitted. The appellant is in custody. He be released forthwith if not wanted in any other case.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SINDHU)
JUDGE

August 27, 2019.
Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No