

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Criminal Appeal No.46-SB of 2005 (O&M)

Date of Decision: 27.08.2019

Krishan Lal

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present:- Mr. Krishan Singh, Advocate for the appellant/accused.

Mr. Rahul Mohan, Deputy Advocate General, Haryana
for the respondent/State.

MAHABIR SINGH SINDHU, J.

Present appeal has been preferred against the impugned judgment and order dated 09.12.2004 & 10.12.2004, respectively, passed by learned Additional Sessions Judge, Jagadhri (*hereinafter referred as 'trial Court'*), vide which, appellant has been convicted for the commission of an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*for short 'the Act'*) and sentenced him to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹ 1000/- with a default clause to further undergo rigorous imprisonment for one month.

Brief facts of the prosecution case are that on 11.12.2002, Sub-Inspector Desraj, C.I.A. Staff, Yamuna Nagar (PW-6) received a secret information that appellant is indulged in sale of *Ganja* from his house, located in Raipur Colony, Yamuna Nagar. The information was reduced into writing (Ex.PA & Ex.PB) and an intimation was sent through Constable Anil Kumar to PW-1 Excise & Taxation Officer (E.T.O.), Sales

Tax Office, Jagadhri as no senior police officer was available due to their official duty at Kurukshetra. A raiding party was constituted by PW-6 S.I. Des Raj and two independent witnesses, namely, Jai Narain and Om Parkash were called to join the same and they reached at the house of the appellant, where he was present. PW-6 S.I. Des Raj informed the appellant about the information received against him and in the meanwhile, PW-1 also reached there. Appellant was served with a notice (Ex.PC) under Section 50 of the Act to seek his option for search before a Magistrate or a Gazetted Officer and he opted to be search before a Gazetted Officer. Since PW-1, being a Gazetted Officer, was already present, therefore, search of appellant's house was conducted by PW-6. Consequent upon search, a plastic bag containing 5 Kgs. *Ganja* was recovered from a corner of the room of the house of appellant. Out of which, two samples of 250 grams. each were separated for chemical examination and the samples along with the remaining contraband were sealed separately with seal impression 'DR' and after its use, the seal was handed over to independent witness-Jai Narain. All three parcels were taken into possession by PW-6, vide recovery memo (Ex.PD) and a ruqa (Ex.PE) was also sent to the Police Station Sadar, Yamuna Nagar, on the basis of which, a formal FIR No.166 dated 11.12.2002 (Ex.PF), under Section 20(b) of the Act was registered at Police Station Sadar, Yamuna Nagar. Rough Site Plan (Ex.PL) of the place of recovery was prepared and thereafter, appellant along with case property was produced before PW-5 S.I./SHO Mohinder Singh, who after verification of the case property, affixed his seal with the impression 'MS' on all three parcels. Case property was deposited with the in-charge

Malkhana by PW-5 SHO himself and out of two sample parcels, one was sent to Forensic Science Laboratory (FSL), Madhuban for chemical examination. Thereafter, report under Section 173 of the Code of Criminal Procedure (Cr.P.C.) submitted before the Court on 11.02.2003 and copy of the same was supplied to the appellant in terms of Section 207 Cr.P.C. on 19.02.2003. FSL report (Ex.PH) was received on 03.09.2003 with the result of sample as *Ganja (Cannabis)*. Learned trial Court, after taking into consideration all documents available with the challan as well as report of FSL, reached at the conclusion that *prima facie* offence under Section 20(b) of the Act was made out against the appellant and thus, was charge-sheeted accordingly, to which, he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined 06 witnesses, which are as under:-

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| <i>PW-1</i> | : | <i>Sh. Nagesh Gupta, ETO, Y. Nagar.</i> |
| <i>PW-2</i> | : | <i>H.C. Balinder Singh (MHC) recorded formal FIR (Ex.PF); received three parcels, along with sample seal, bearing seal impressions of 'DR' & 'MS' and sent one parcel to FSL, Madhuban.</i> |
| <i>PW-3</i> | : | <i>EHC Ved Singh handed over the parcel to FSL, Madhuban on 23.12.2002 and tendered his affidavit (Ex.PG).</i> |
| <i>PW-4</i> | : | <i>ASI Ramesh Chander, Member of the raiding party.</i> |
| <i>PW-5</i> | : | <i>S.I. Mohinder Singh, the then SHO Police Station Sadar, Yamuna Nagar.</i> |
| <i>PW-6</i> | : | <i>I.O./S.I. Des Raj</i> |

Constable Anil Kumar given up being unnecessary by learned A.P.P. on 27.02.2004 and thereafter, two independent witnesses, namely, Jai

Narain and Om Parkash were also given up on 13.05.2004 having been won over by the accused.

Prosecution also produced the following documentary evidence in support of their case:-

<i>Ex.P-1</i>	:	<i>Bag containing Ganja</i>
<i>Ex.PA</i>	:	<i>Information for Search Warrant u/s 42 (2), NDPS Act</i>
<i>Ex.PB</i>	:	<i>Intimation u/s 42 (2), NDPS Act</i>
<i>Ex.PC</i>	:	<i>Notice u/s 50, NDPS Act</i>
<i>Ex.PD</i>	:	<i>Recovery Memo</i>
<i>Ex.PE</i>	:	<i>Ruqa</i>
<i>Ex.PF</i>	:	<i>F.I.R.</i>
<i>Ex.PG</i>	:	<i>Affidavit of E.H.C. Ved Singh</i>
<i>Ex.PH</i>	:	<i>Report of F.S.L.</i>
<i>Ex.PJ</i>	:	<i>Search Memo of S.I. Des Raj (PW-6) etc.</i>
<i>Ex.PK</i>	:	<i>Sample Seal</i>
<i>Ex.PL</i>	:	<i>Rough Site Plan</i>

The entire incriminating material was put to the appellant under Section 313 Cr.P.C., but he denied the same and claimed innocence on account of his false implication.

In defence, appellant chose not to lead any evidence.

Learned trial Court, after taking into consideration the entire material available on record, came to the conclusion that prosecution has proved the charge against the appellant and held him guilty under Section 20 of the Act and sentenced in the terms as mentioned above in the opening para of this order.

It is contended on behalf of the appellant that impugned judgment of conviction and order of sentence are not legally sustainable and raised the following points:-

- (i) there is breach of sub-section 2 of Section 42 of the Act inasmuch as the secret information along with the belief, recorded by PW-6, was never intimated to his superior;*
- (ii) both the independent witnesses i.e. Jai Narain and Om Parkash, who were joined with the raiding party, have not been examined. Even the seal bearing impression 'DR', after use, was allegedly handed over to independent witness-Jai Narain, therefore, on account of his non-examination, the whole prosecution case becomes doubtful;*
- (iii) Constable Anil Kumar, who handed over the communications (Ex.PA and Ex.PB) under Section 42 of the Act to PW-1 ETO, has not been examined.*
- (iv) there is an unexplained delay of 12 days while sending the sample to FSL.*

On the other hand, learned State Counsel has vehemently opposed the contentions made on behalf of the appellant and prayed for dismissal of the appeal while submitting that recovery was effected from the house of appellant in the presence of a Gazetted Officer (PW-1) and on the basis of ruqa, an FIR was registered on the same day and intimation of the same was sent to the Superintendent of Police, therefore, there was sufficient compliance of Section 42 of the Act. Further submitted that charge against the appellant has been duly proved beyond reasonable doubt and mere non-examination of the independent witnesses as well as Constable Anil Kumar will not help the appellant in any manner. Seals of sample remained intact till the deposit of the contraband with the FSL, therefore, mere delay in sending the sample is also

not fatal to the prosecution case.

Heard learned Counsel for the parties and perused the paper-book.

PW-1, *inter alia*, deposed that on 11.12.2002 at about 6:00 PM, when he was present at his residence, one Constable Anil Kumar came to him along with two letters (Ex.PA and Ex.PB) about the secret information received against the appellant. This witness accompanied said Constable to Raipur Colony, Yamuna Nagar, where police party headed by PW-6 met him and two public witnesses, namely, Jai Narain and Om Parkash were also present there. Thereafter, they reached at the house of appellant and he was very much present there. PW-1 disclosed his identity to the appellant and a notice (Ex.PC) under Section 50 of the Act was served upon him for seeking option regarding the search in his presence being a Gazetted Officer or before any Magistrate. Appellant exercised the option to be searched before a Gazetted Officer and consequently, his house was searched, leading to recovery of 5 Kgs. *Ganja* in a bag lying in the corner of a room of the house. Two samples (250 grams each) were drawn from the contraband for chemical analysis. Samples along with remaining contraband were converted into separate parcel and were sealed with the impression 'DR' and after its use, seal was handed over to public witness-Jai Narain. All three parcels were taken into possession vide recovery memo (Ex.PD), which were attested by him.

During cross-examination, this witness stated that he cannot tell as to who brought the bag containing *Ganja* outside from the house of accused. He further stated that notice was served to the appellant outside his house.

PW-4 ASI Ramesh Chander, *inter alia*, stated that a telephonic call

was given to Jai Narain as well as Om Parkash and a message was also conveyed to both of them for reaching at the spot. Again stated that they were asked to reach at CIA office and they duly reached there at 5:30 PM. He further stated that seal bearing impression 'DR' was handed over to Jai Narain at the spot.

During cross-examination, this witness stated that many persons from the locality gathered on the spot and on verification with respect to the antecedents of the appellant, none disclosed anything about him.

PW-5 S.I. Mohinder Singh stated that on 11.12.2002 at about 10:00 PM, when he was posted as SHO, Police Station Sadar, Yamuna Nagar, PW-6 SI Des Raj produced the appellant along with case property and other witnesses before him. After verification of the facts of the case, he affixed his seal bearing impression 'MS' on all the parcels and case property was deposited with Malkhana In-charge.

PW-6 S.I. Des Raj narrated the sequence leading to the recovery of the alleged contraband from the appellant, but he has not uttered even a word that after use of the seal bearing impression 'DR' to whom it was handed over?

As per prosecution case itself, the recovery of alleged contraband i.e. 5 Kg. *Ganja* was effected on the basis of a search conducted by PW-6 S.I. Des Raj from a bag, found in the residential house of the appellant on 11.12.2002 at about 07:00 PM i.e. after sunset, therefore, provisions of Section 42 of the Act are very much attracted and on the date of recovery, the same was in the following terms:-

“ 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 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 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.

Perusal of sub-section 2 of Section 42, reproduced above, clearly reveals that 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. Thus, under the above provision, the legislative safeguards were accorded with an intent to thwart the prosecution of innocent person(s) with bad faith.

It transpires that while taking a cue from proviso to sub-section 1 of Section 42 of the Act, PW-6 recorded DDR No.4 dated 11.12.2002 at 5:30 PM (Ex.PA) in the *Roznamcha* of CIA-II, Yamuna Nagar, purported to disclose his belief that he has received a secret information regarding the concealment of *Ganja* by the accused in his house and the information was believed to be reliable. Further recorded that in case the recourse to proceedings under Section 41 of the Act for obtaining the search warrants of the accused is

initiated, he may escape and even destroy the evidence as well. Also recorded that Court was closed, therefore, without obtaining the search warrants, he proceeds to conduct the search and investigation in the matter. The information was sent through Constable Anil Kumar to PW-1 for information.

Again, PW-6 by incorporating the same DDR number, time and place i.e. DDR No.4 dated 11.12.2002 at 5:30 PM in the *Roznamcha* of CIA-II, Yamuna Nagar (Ex.PB) sent another information purported to be under Section 42(2) of the Act to PW-1 through Constable Anil Kumar while detailing the above facts of secret information mentioned in Ex.PA as well as verification by two independent witnesses. He recorded that although the information was required to be sent to his superior officers, but he is aware that they have gone to Kurukshetra for some duty, therefore, the information is being sent to PW-1.

There is no material on record either by way of any document(s) or in the testimony of PW-6 to substantiate that all or any of his superior officers had gone to Kurukshetra for the official duty at the relevant point of time. Even otherwise, merely that a superior officer is away for some official purpose or duty, it does not mean that PW-6 would be absolved from his obligation to comply with the mandatory provisions of sub-section 2 of Section 42 of the Act. Thus, there is a complete failure on the part of PW-6 to prove that he made any effort to send the required information to his superior officer at the relevant point of time.

Facts of the present case clearly reveal that there is total non-compliance of the safeguards, provided to the appellant, while not forwarding

the information to the quarter concerned by PW-6 in terms of sub-section 2 of Section 42 and thus, have resulted into a great prejudice, which is fatal for prosecution case. Mere sending of a ruqa and registration of FIR are not the compliance of the mandatory provisions. Reference in this regard can be made to judgment of the Hon'ble Supreme Court, reported as **(2016) 14 SCC 358**, '**Darshan Singh Versus State of Haryana**', pertaining to similar controversy. In the above case also, on the basis of a secret information, search was conducted in the presence of Assistant Excise and Taxation Officer, Panipat and prosecution claim that FIR was registered and thereafter, an information was sent to the Superintendent of Police and thus, there was a compliance of Section 42 of the Act. The Hon'ble Supreme Court, after relying upon the Constitution Bench judgment of '**Karnail Singh Versus State of Haryana**', **2009 (8) SCC 539** while setting aside the conviction, held as under:-

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

13. Having given our thoughtful consideration to the submission advanced at the hands of the 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 authorization for similar purposes by the officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc. Sub-section (1) of Section 42 of the NDPS Act lays down that the empowered officer if he has a prior information given by any person, should necessarily take it down in writing, and where he has reason to believe from his personal knowledge, that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building, etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The two separate procedures noticed above are exclusive of one another. Compliance of one, would not infer the compliance of the other. In the circumstances contemplated under Section 42 of the NDPS Act the mandate of the procedure contemplated therein will have to be followed separately, in the manner interpreted by this Court in Karnail Singh's case (supra) and the same will not be assumed, merely because the Station House Officer concerned had registered a first information report, which was also dispatched to the Superintendent of Police, in compliance with the provisions of the Criminal Procedure Code.

14. *In the above view of the matter, it is not possible for us to accept the submission of the learned counsel for the respondent-State that the registration of the first information report at the hands of the Station House Officer, Police Station Shahar, Panipat and its communication to the Superintendent of Police, Panipat would constitute sufficient compliance of the mandate of Section 42 of the NDPS Act.”*

Moreover, as per the prosecution case itself, two independent

witnesses, namely, Jai Narain and Om Parkash were joined from the very beginning to conduct the raid at the house of appellant for recovery of the alleged contraband on the basis of secret information. It is mentioned in the ruqa (Ex.PE) that seal bearing impression 'DR' after use was handed over to one of the independent witnesses, namely, Jai Narain. Record reveals that both these witnesses were joined during the investigation of the case and their names also duly find mentioned in the list of prosecution witnesses, but they have been given up by learned trial Court merely on the asking of the police on the premise that both have been won over at the hands of the appellant. It is not discernible as to on what basis and without recording the testimony of both the above independent witnesses, learned A.P.P. came to the conclusion that they have been won over by the appellant. In the opinion of this Court, the course adopted by learned trial Court while permitting to give up both the independent witnesses on the sweet-will of the police is not appreciated at all. Thus, giving up of both the independent witnesses at the instance of the police without recording their examination-in-chief is a very strong circumstance to draw an adverse inference against the prosecution case. As noticed above, due to non-examination of Jai Narain, the factum of handing over the seal bearing impression 'DR' after its use at the time of recovery of alleged contraband by PW-6 remains not proved and makes the prosecution case doubtful. Still further, the alleged contraband was deposited with PW-2 HC Balinder Singh (MHC) by PW-5 SHO on the date of its recovery i.e. 11.12.2002, but the sample was sent to FSL on 23.12.2002 i.e. after an unexplained delay of 12 days. Even Constable Anil Kumar, who handed over both the communications

(Ex.PA and Ex.PB), purported to be sent under Section 42 of the Act to PW-1, has also not been examined by the prosecution for the reasons best known to them.

Therefore, taking into consideration the non-compliance of Section 42(2) of the Act; giving up of both the independent witnesses; failure to prove the handing over of the seal bearing impression 'DR' after its use to independent witness-Jai Narain; delay of 12 days in sending the sample to FSL and non-examination of Constable Anil Kumar have made the prosecution case wholly doubtful and by no stretch of imagination, it could be construed that charge against the appellant has been proved beyond reasonable doubt.

In view of above, this Court has no option except to allow the present appeal and set aside the impugned judgment of conviction and order of sentence dated 09.12.2004 and 10.12.2004, respectively, passed by learned Additional Sessions Judge, Jagadhri and acquit the appellant from the charge under Section 20 of the Act.

Ordered accordingly.

Appellant is stated to be on bail, therefore, his bail bonds as well as surety bonds stand discharged.

August 27, 2019
Gagan

(MAHABIR SINGH SINDHU)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether Reportable</i>	<i>Yes</i>