

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-A-1187 of 2019 (OM)
Date of Decision: 30.9.2019

State of Haryana

.....Applicant

Vs.

Rajesh Kumar and another

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: - Ms. Palika Monga, DAG, Haryana.

HARNARESH SINGH GILL, J.

CRM-19527-2019

This application is filed under Section 5 of Limitation Act, 1963 seeking condonation of delay of 224 days in filing the application under Section 378 (3) Cr.P.C. seeking leave to appeal.

For the reasons mentioned in the application, which is supported by an affidavit, the same is allowed. Delay of 224 days in filing the application under Section 378 (3) Cr.P.C., is condoned.

CRM-A-1187 of 2019

1. This application has been filed by the State under Section 378(3) Cr.P.C. for grant of leave to appeal against the judgment dated 25.5.2018 passed by the learned Additional Sessions Judge, Sirsa, vide which respondents Rajesh Kumar and Jagdeep Kumar, were acquitted of the charges under Sections 22-B and 27-A of Narcotic Drugs and

dated 10.2.2012, registered at Police Station City, Dabwali.

2. The FIR in question was registered against the applicants on the basis of recovery of narcotic medicines stored in the house of Rajesh Kumar (respondent No. 1), who was having a chemist shop in the name of Rajesh Medicos at Dabwali.

3. During search on 10.2.2012, conducted by SI Rattan Singh along with police party headed by DCO Ram Sheoran, in the presence of respondent No. 1 Rajesh Kumar, 24 types of drugs were recovered out of which, 17 types of drugs fell under the NDPS Act containing Codine Phosphate (2157 bottles), alprozolam (1,31,600 tablets), diphenoxylate (3,10,000 tablets), dextropropoxyphene (approximately 34,000 capsules) and nitrazepm (12,000 capsules). Accordingly, 34 samples were prepared and converted into sealed parcels and sealed with seal bearing impression 'RS' and further investigation was conducted. After completion of investigation, the case property was deposited with the MHC and the respondents were put in the lockup.

4. During investigation, respondent No. 1 had suffered a disclosure statement disclosing the names of the medical agencies from where he had purchased the narcotic substance. Accordingly, search of different medical agencies was conducted. On 13.2.2002, respondent No. 1 led the police to the medical agency owned by respondent No. 2-Jagdeep Kumar from where he had purchased the capsules in question. During investigation, respondent No. 2-Jagdeep Kumar had also suffered a disclosure statement that the contraband was sold by him to respondent No. 1 and pursuant to the said disclosure statement, respondent No. 2 led the police party to his shop where the contraband was sold by him to respondent

No. 1-Rajesh Kumar. Accordingly, the FIR in question was registered. After completion of requisite formalities, challan was presented against the respondents.

5. Charges were framed against the respondents under Sections 22-B and 27-A of the NDPS Act to which they pleaded not guilty and claimed trial.

6. The prosecution had examined as many as 12 witnesses.

7. In the statement recorded under Section 313 Cr.P.C., the respondents denied the prosecution case and pleaded false implication.

8. In defence, the respondents had examined Anil Kumar Gupta, Handwriting and Finger Print Expert as DW-1, MHC Munish Kumar as DW-2 and Suraj Bhan as DW-3.

9. After hearing the learned State counsel as well as counsel for the respondents, the trial Court, vide impugned judgment dated 25.5.2018 acquitted the respondents of the charges framed against them.

10. Aggrieved against the said judgment, the present application seeking leave to appeal has been filed by the State.

11. It has been argued by the learned Deputy Advocate General that the contraband had been recovered from the house of the respondents and PW-1 DCO Raman Kumar had deposed regarding the recovery having been effected from the house of respondent No. 1 and that similarly on the basis of the testimony of PW-2 SI Rattan Singh, who had conducted the investigation, the guilt on the part of the respondents stood established.

12. We have heard the learned State counsel at length and do not find any illegality or perversity in the judgment passed by the trial Court. In the present case, it is admitted that a secret information was received which

was not reduced into writing and, thus, the copies of the same were not sent to the higher officers. Thus, the mandate of Sub Section 2 of Section 42 of the Act has not been complied with.

13. The trial Court has relied upon the judgments of the Supreme Court in para 20 and 21 of the judgment which read as under:-

*“20. In **State of Punjab vs. Baldev Singh, 1999(3) RCR (Crl.) 545** following conclusions were arrived at by the two Judges Bench of Hon'ble Supreme Court:-*

“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.

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.

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 Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

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 Cr.P.C. Namely Sections 100 and 165 Cr.P.C and if there is no strict compliance with the provisions of Cr.P.C. 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.”

21. The three Judge Bench judgment of Hon'ble Supreme Court has held in Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat 2000 (1) RCR (Criminal), 611 that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused.”

14. The trial Court has rightly appreciated the fact that respondent No. 1 was having a valid licence and medical bills. Licence and bills were proved on record by way of Ex. D-29 to Ex. D-31 and Ex. D-19 to Ex. D-28 respectively. Even no independent witness had been introduced by the prosecution.

15. Moreover, it is not the case of the prosecution that respondent No. 1 was selling the medicine from his residence. Even if there is violation

compliance of the provisions of NDPS Act has not been done. Search and seizure before an independent witness had not been conducted.

16. As far as respondent No. 2-Jagdeep Kumar is concerned, no recovery, whatsoever, had been effected from him except the disclosure statement of the co-accused i.e. respondent No. 1-Rajesh Kumar.

17. Learned State counsel has failed to point out any material illegality or perversity in the impugned judgment of acquittal. Nothing has been shown as to the misreading and misinterpretation of the evidence by the learned trial Court, while passing the impugned judgment. Thus, we do not find any reason to interfere with the well reasoned judgment passed by the trial Court.

18. Consequently, the application seeking leave to appeal is dismissed. Leave to appeal is declined.

(HARNARESH SINGH GILL)
JUDGE

(AJAY TEWARI)
JUDGE

September 30, 2019

Gurpreet

Whether speaking /reasoned : Yes

Whether Reportable : Yes