

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1154 OF 2004**

The State of Maharashtra) ..Appellant

V/s.

1 Suabai Narhari Babar)
Age about 55 years,)
R/o Shirpur, Tal Malshiras,)
Dist:- Solapur)

2 Jalindar Appasaheb Dhere)
Age about 47 years, Occ: Advocate)
R/o Sangola, Dist:- Solapur)

3 Shivdas Mahadeorao Barase)
Age about 34 years, Occ : Agri)
R/o Ardhapur, Dist: Nanded)

4 Deoji Bapurao Kanude)
Age about 22 years, Occ: Driver)
R/o Ardhapur, Dist: Nanded)

5 Savairam Polisa Gugold)
Age about 30 years, Occ Agri)
R/o Sampalli Tanda, Tal Dichapalli,)
Dist: Nijamabad.)

6 Motiram Fulsingh Badawat)
Age about 25 years, Occ: Agri)
R/o Sampalli Tanda, Tal Dichapalli)
Dist Nijamabad)

..Respondents
(Ori Accused nos.1 to 6)

Ms. Anamika Malhotra, APP for State

**CORAM : K.R.SHRIRAM, J.
DATED : 18th DECEMBER 2020**

ORAL JUDGMENT :

1 This is an appeal impugning an order and judgment dated 15-5-2004 passed by Learned Additional Sessions Judge Cum – Special Judge for NDPS Act, Pandharpur, acquitting all the accused of offence punishable under Section 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substance Act 1985 (NDPS Act).

2 Apart from the failure of the prosecution on merits, the Trial Court has also observed that the prosecution has not complied with the mandatory provisions of Section 42 of the NDPS Act. Section 42 of the NDPS Act reads as under:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

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

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

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason

to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder; such power shall be exercised by an officer not below the rank of sub-inspector.

Provided 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.”

3 The Learned APP in all fairness stated that the findings of the Trial Court in Paragraphs 25 and 26 of the impugned judgment are correct. The Learned APP handed over to the court the judgment of the Apex Court in ***Dalel Singh Vs. State of Haryana***¹ in which, the court has quoted paragraph 12 of the judgment rendered by Constitution Bench of Apex Court in ***Karnail Singh Vs. State of Haryana***², in which it is stated “..... total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section.” In this case, it is not even the prosecution’s case that there was a compliance albeit a bit later. The

¹(2010) 1 SCC 149

²2009 (10) SCALE 255

court has correctly observed that there was total non compliance.

4 PW.-12 – Sharad Ramrao Thonge Patil is the Investigating Officer, who has deposed that when he was at Akluj he had received information that accused no.1- Subabai Babar had brought and kept some bags containing ganja in a tin shed opposite her house in Ganesh Nagar, Shirpur. PW.-12 has further stated that they had gone to the police station, Akluj and entered this information in the station diary. PW.-12 has thereafter deposed how he arranged for two panchas and a person to weigh the ganja that they may collect after the raid. Under Section 42, the concerned officer, if he has reason to believe from personal knowledge or any information received that any narcotic drugs or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed, he shall take down the same in writing. There is no evidence that the information received was reduced in writing by PW-12. Section 42(2) of the NDPS Act further provides, 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 forthwith send a copy thereof to his immediate official superior. This has also not been done and accepted so because there is no evidence that PW-12 reduce to writing the information that he had received about accused no.1 that she has brought and kept some bags containing ganja in the tin shed opposite her house in Ganesh Nagar, Shirpur. PW.-12 further deposed that on entering the information in the station diary he had made a telephone call to S.P., Solapur and

communicated to him the information. Entering the information in station diary and communicating to the immediate official is not strict compliance of mandatory provisions of Section 42 of NDPS Act. Section 42 (2) requires PW-12 to send the copy of the information that he has reduced in writing, which has not been complied with. Bombay High Court in ***Gangaram Rama Gundkar & Anr. Vs. The State of Maharashtra***³ has held that the provisions of Section 42 are mandatory and non-compliance is fatal to prosecution. In that case, the prosecution submitted that Investigating Officer sent wireless message to immediate official superior in respect of the information entered by him in the station diary for showing compliance of Section 42(2) of the Act. The court held that even that was not sufficient compliance with the mandatory provisions of Section 42(2) of the Act and a wireless message would be on the same footing as an oral information. Bombay High Court in ***Sayed Yusuf Syed Noor Vs. State of Maharashtra***⁴ was considering the situation identical to the case at hand. In the said case also, diary entry was made and information to immediate official superior, namely S. P. was given on telephone only. In paragraphs 6, 7, 8 and 9 the court has held as under :-

6. Section 42(1) of the NDPS Act, inter alia, postulates the concerned officer, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, in respect of which an offence punishable under Chapter IV has been committed, he may enter such premises, conduct search and effect seizure and arrest without warrant or authorisation. Section 42(2) stipulates 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 forthwith send a copy thereof to his immediate official superior. Section 42 has been held to be mandatory (See State of Punjab v. Balbir Singh 1994 (3) SCC 99.

³ 2002 ALL MR (cRI) 1356

⁴ 2016 (1) Bom.C.R. (Cri) 270

7 Turning to the facts of the present case, looking from any angle, i.e., whether the officer concerned, for the purposes of Section 42(1) of the NDPS Act, was SDPO, Shri Shekhar, or it was Police Inspector, PW. 6 Raut, clearly there has been total noncompliance of Section 42. It deserves to be noticed that SDPO, Shri Shekhar was not examined as a witness by the prosecution. Further, as already noticed, the information to immediate official superior, namely, SP, was given on telephone only. According to PW. 6, no record of any such information was prepared or kept, or if it was so prepared, it was not produced by the prosecution for the reasons best known to it. Exhibit 28 though records that intimation in writing was given to superiors, no such writing has been produced. This very document, in fact, notices that SDPO Shekhar was dealing with the matter. It was at his direction that the police party went to the residence of the appellant. He is stated to have told PW. 6 to inform his immediate superior, namely, SP, who is said to have been informed on telephone, as per the testimony of PW. 6, and in writing, as per Exhibit 28, though none was produced. In fact, there has been non-compliance both of Sub-section (2) and Sub-section (1) of Section 42 of the NDPS Act. On the facts of the present case, Exhibit 28 cannot be pressed into service to show compliance of Section 42(1) of the NDPS Act. It is only a document recording and showing departure of the police party from the Police Station. It does not record the reason of belief contemplated by Section 42(1) of the NDPS Act. Alternatively, assuming that the officer to whom the information was given about the appellant selling narcotic drug at his residence was PW. 6, in that eventuality, he was required to record reasons to believe and was required to send a copy thereof to the immediate official superior in terms of Section 42(2) of the NDPS Act. In fact, PW. 6 does not even claim to be an officer to whom such information was given. According to PW. 6, SDPO told him that he should inform about the receipt of information to SP, which he informed to SP on telephone. On these facts, we find no substance in the contention of the learned Additional Public Prosecutor that since information was given to PW. 6 by SDPO Shekhar, on the facts and circumstances of the case it was neither necessary to comply with Section 42 of the NDPS Act, nor there has been substantial compliance thereof. Section 42 of the NDPS Act is mandatory. The object of the 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), and to that extent, they are mandatory. Consequently, the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial. [See Balbir Singh's case (supra)].

8 Reference may also be made to the two decisions on which reliance has been placed by the learned Counsel for the appellant. The first of such decisions is that of Mahinder Kumar v. State, Panaji, Goa, 1999

*SCC (Cri) 79, where the Supreme Court held that since the officer had, admittedly, not recorded the grounds of his belief at any stage of the investigation subsequent to his realising that the accused persons were in possession of Charas and did not forward a copy of the grounds to his superior officer, as required by Section 42(2) of the NDPS Act because he had not made any record under the proviso to Section 42(1), as such the prosecution had to fail. The second is a Division Bench decision of this Court in *Lamin Bojang v. State of Maharashtra*, 1997 Cri. LJ 513, holding that forwarding of the information under Section 42(2) of the NDPS Act was mandatory and the written documentary information is to be forwarded to the superior officer and not oral information and that the provisions had to be strictly complied with, and the question whether the prejudice is caused to the accused or not is entirely extraneous.*

9 In view of our aforesaid conclusion about the non-compliance of Section 42 of the NDPS Act, the trial of the appellant stands vitiated and, consequently, the conviction and sentence of the appellant is set aside. In this view, we direct forthwith release of the appellant, if not wanted in some other case. In case he has paid fine, the same shall be refunded to him.”

The court has held that the officer should not only reduce information received to writing but also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1) and to that extent, they are mandatory. Failure to comply with these requirements would affect the prosecution's case and vitiate the trial. Prosecution has filed station diary in the instant case at Exhibit 47. Diary entered only states that P.W.-12 has received information that accused no.1 is selling ganja from the tin shed in front of her house at Gandhi Nagar, Shirur. The reasons for belief etc. are not noted down. Even the entire address of accused no.1 is not mentioned. In ***Gangaram Rama Gundkar*** (*Supra*) the court observed that such entry in the station diary was also not in compliance with provisions of Section 42.

5 Since this mandatory provision of Section 42 of the NDPS Act has not

been followed in the instant case, the trial itself is vitiated. In view of this, I am not dealing with the demerits in the prosecution's case having considered the evidence or non compliance of Section 55 of NDPS Act which, Learned APP states in fairness has not been complied with. Of course, Section 55 is not mandatory but non compliance is a significant lacuna, which also affects the prosecution's case.

6 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

7 Appeal dismissed.

(K.R. SHRIRAM, J.)