

**IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA
AT CHANDIGARH**

(I) CRM-M- 999 -2020 (O&M)

Gurpreet SinghPetitioner

Versus

State of PunjabRespondent

(II) CRM-M- 16249-2020 (O&M)

Jatinder Singh @ KakaPetitioner

Versus

State of PunjabRespondent

Date of Decision : 05.01.2021

CORAM : Hon'ble Mr. Justice Gurvinder Singh Gill

Present: Mr. B.S. Jattana, Advocate, counsel for Petitioner Gurpreet
Mr. L.S. Sekhon, Advocate, counsel for Petitioner Jatinder
Mr. A.S. Sandhu, Addl. Advocate, General, Punjab for State.

(Proceedings conducted through video conferencing)

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Gurvinder Singh Gill, J.

1. This order shall dispose off the above mentioned two petitions filed on behalf of Gurpreet Singh and Jatinder Singh @ Kaka seeking grant of regular bail as both of them arise out of the same FIR i.e. FIR No. 112 dated 30.04.2019, registered at Police Station: Sardulgarh, District Mansa, under Section 22 of the NDPS Act, 1985 (hereinafter referred to as 'the Act').

2. The case of prosecution is that on 30.04.2019, when ASI Dalel Singh along with other police officials was present at Bus Stand Sardulewala in connection with patrolling and checking of suspicious persons, then he received secret information at about 11.35 AM to the effect that Gurpreet Singh, Gaggu Singh and Ramesh Kumar had stored intoxicating tablets in the house of Gaggu Singh and that it is Jatinder and Vinod Kumar who supply the said tablets to them. The information was further to the effect that in case a raid is conducted at the house of Gaggu Singh then the aforesaid persons could be caught red-handed.
3. ASI Dalel Singh immediately sent the aforesaid information to SHO, Police Station, Sardulgarh, on the basis of which the instant FIR came to be lodged. ASI also made a request therein for deputing another Investigating Officer. Thereafter, the said Dalel Singh along with other police officials conducted a raid at the house of Gaggu Singh where Gaggu Singh, Gurpreet Singh, Jatinder and Ramesh Kumar were found present and a recovery of 22,000 tablets of 'Alprsafe' was effected. Upon chemical examination, the same were found to contain 'alprazolam' which is listed at serial No. 30 in the List of Psychotropic Substances.
4. The learned counsel for the applicants/petitioners have vehemently argued that since it is a case registered pursuant to receipt of secret information pertaining to storage of contraband in a building, the same was required to be immediately taken down in writing and was required to be conveyed to the officer immediately superior to the person who received the secret information and the same not having been done resulted in violation of mandatory provisions of Section 42 of the Act and as such, the entire recovery stood vitiated and consequently, the petitioners deserve to be

released on bail. The petitioners place reliance upon 2016(1) RCR(Criminal) 333 Darshan Singh vs. State of Haryana to hammer forth the aforesaid submission wherein it has been held that lodging of FIR or communication of a copy of FIR to superior officers does not amount to compliance of Section 42 of the Act.

5. Sh. A.S. Sandhu, learned Additional Advocate General, Punjab, on the other hand has opposed the petitions while submitting that since intimation by way of a “*ruqa*” was sent to SHO before ASI Dalel Singh proceeded for conducting a raid at the house of Jagga Singh, the same would duly satisfy the requirements of Section 42 of the Act pertaining to taking down the information in writing and conveying the same to superior officer. The learned State counsel, while pressing into service a judgement of Constitution Bench of Hon’ble Supreme Court in a case reported as 2009(8) SCC 539 Karnail Singh vs. State of Haryana has submitted that non-compliance of section 42 of the Act, if any, would not *ipso-facto* vitiate the trial if no prejudice had been caused to the accused. It has further been submitted that since it is a case of recovery of 'commercial quantity' of contraband wherein the petitioners were caught red-handed, no case for grant of bail is made out.
6. I have considered rival submissions addressed before this Court. The statement of objects and reasons of the Narcotic Drugs And Psychotropic Substances Act makes it clear that the underlying object was to provide for stringent provisions to curb the menace of drugs by providing penalties sufficiently deterrent to meet the challenge of well organised gangs which indulge into drugs trafficking and smuggling. However, at the same time certain checks in procedure to be adopted for exercising control and

regulation have also been provided to ensure that stringent provisions are not misused, given the fact that offences under the Act attract harsh penalties. Since punishments prescribed in Chapter IV in some cases are a minimum of 10 years imprisonment apart from a minimum fine of ₹ 1 lac, a balance must be struck between the need of the law on one hand and the protection of citizens from oppression and injustice on the other. Chapter IV of the Act deals with offences and penalties whereas Chapter V of the Act deals with procedure. Section 41 of the Act relates to power to issue warrant and authorization. Section 42 of the Act relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 of the Act relates to power of seizure and arrest in public place. Since the counsel for petitioners have mainly argued on the question of non-compliance of Section 42 of the Act, it is apposite to bear in mind the provisions of Section 42 of the Act which are reproduced hereinunder:

“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 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 further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

- (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

7. A perusal of the aforesaid provisions does show that a secret information pertaining to concealment of a contraband in a building, conveyance or in a enclosed place is required to be taken down in writing and to be sent within 72 hours to an officer immediately superior to the one who has received such secret information.

8. Since the counsel for the petitioners place much reliance on judgement rendered in Darshan Singh's case(supra), the factual position as noticed by the trial court in Darshan Singh's case(supra) reproduced in para 8 of the said judgement needs to be borne in mind, which reads as under:

"26. In the present case, no doubt the report of the arrest of the accused and the seize has not been sent to the Police Station, but in the present case immediately after effecting the recovery, the ruqua was sent to the Police Station and on the basis of the same formal FIR Ex.PB/1 was recorded at 5.15 p.m. and Ex.PB1 further proves that the copy of the said FIR was sent through special messenger, which was received by

the then Chief Judicial Magistrate, Panipat at 8.45 p.m. on the same day and the copy was also sent to the S.P., Panipat. Thus, it stands proved that about the arrest and seizure of the accused, the information was received by the superior officer, as such there is compliance of Section 57 of the Act."

9. Hon'ble Apex Court in Darshan Singh's case(supra), while noticing the aforesaid factual position and the law laid down in Karnail Singh's case(supra) held as follows:

- "9. A perusal of Paragraph 26 extracted above reveals that **immediately after conducting the raid**, the concerned Station House Officer, Police Station Shahar, Panipat, registered a first information report, which was subsequently dispatched to the Superintendent of Police, Panipat on the same day, i.e. to the officer superior to the officer, who had conducted the raid (on receipt of secret information). According to the learned counsel for the respondent-State since first information report was sent to the superior officer, non-compliance of Section 42 had not caused any prejudice to the appellant, and therefore, he could claim no benefit under Section 42.
10. 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.
11. 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 issue 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.

12. 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."

(emphasis supplied)

10. Having perused the judgement rendered in Darshan Singh's case, this Court is, however, unable to accept the contention of the petitioner, based on Darshan Singh's case, pertaining to non-compliance of Section 42 of the Act. The reasons compelling this Court to do so are delineated below:

- (i) the factual position in Darshan Singh's case was quite different inasmuch as no intimation whatsoever was ever sent by the Investigating Officer who had effected recovery conducting raid before conducting raid and it was only after recovery was effected that intimation was sent by way of "ruqa" to the police station for registration of FIR, whereas in the instant case, the intimation as regards secret information, in the shape of 'ruqa', had actually been sent to SHO immediately upon receipt of information by the police officer who received it i.e. by ASI Dalel Singh, much before he proceeded to effect recovery. It was thereafter that ASI Dalel Singh proceeded to the nominated place for conducting a raid. No doubt, FIR was lodged on the

basis of 'ruqa' sent by ASI Dalel Singh, but the 'ruqa' preceded the raid and thus secret information already stood conveyed to superior officer.

(ii) In Karnail Singh's case(supra), the Constitution Bench held as under:

“15. Under Section 42(2) as it stood prior to amendment 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 would adversely affect the prosecution case and 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, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. **The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.**” (emphasis supplied)

In construing any facts to find, whether the prosecution has complied with the mandate of any provision, a pragmatic approach is required having due regard to the purpose for which such enactment was made. The Courts, however, while construing such provisions strictly should not interpret them so

literally so as to render their compliance impracticable. The Constitution Bench in Karnail Singh's case (supra) drew a conclusion that conveying of secret information should normally precede entry, search and seizure by the officer and that delay, if any, in communication such information to superior officer, if sufficiently explained, can be accepted while considering compliance of Section 42 of the Act. In other words, under normal circumstances, sending beforehand such written information was underlined without there being any qualification as regards the form in which such written information is required to be sent. Thus, the essence lies in sending information beforehand and in writing, whatever the form of such written information be. The petitioner can't be said to be prejudiced in any manner on account of such prior secret information having been sent in the shape of '*ruqa*' and not by way of a separate document. Rather, in such circumstances it would look absurd to send another document to the SHO pertaining to the information when one document in the nature of '*ruqa*' had already been sent. The factual position of the instant case, when examined in light of ratio of Constitution Bench in Karnail Singh's case(supra) would lead to one and only one conclusion that there has been due compliance of Section 42 of the Act before the recovery was effected inasmuch as the '*ruqa*' sent before conducting raid did contain particulars of secret information.

(iii) The judgement in Darshan Singh’s case came to be delivered in respect of a case pertaining to a period when Section 42 of the Act had not been amended. The provision of Section 42 of the Act before the amendment in 2001 were significantly different than the amended provisions which provide for a period of 72 hours for communicating the secret information as against the earlier requirement of sending the information “*forthwith*”. The relevant provisions in Section 42 of the Act after amendments in 2001 and as it stood earlier are reproduced below:

Sub-section (2) of Section 42 of NDPS Act as it stood before amendment in 2001.	Sub-section (2) of Section 42 of NDPS Act as replaced by Act 9 of 2001.
(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 <u>forthwith</u> send a copy thereof to his immediate official superior.	(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 <u>within seventy two hours</u> send a copy thereof to his immediate official superior.

It is, thus, evident that in the pre-amendment era the law pertaining to communication of secret information was much more stringent than in the post-amendment period. Omission to transmit secret information ‘*immediately*’ upon its receipt would constitute violation whereas upon amendment the said requirement was diluted to some extent inasmuch as a period of 72 hours for doing the same has been provided. It was, thus, in view of extraordinary stringent provisions of un-amended Section 42 of the Act, that it was held by Hon’ble Supreme Court that

lodging of FIR after effecting recovery and sending reports to senior officers thereafter, would not constitute compliance of Section 42 of the Act. The position in the instant case, as already stated above, is that the information already stood conveyed before the raid was conducted inasmuch as 'ruqa' which contained the secret information had already been sent to the superior officer i.e. the SHO, Sardulgarh. In such circumstances, insisting upon sending information regarding secret information separately would rather be a pedantic approach particularly when such information has already been conveyed before a raid is conducted. In view of the distinct factual position in the instant case and the fact that there has been a substantial change in the statutory requirement as well, the judgement in Darshan Singh's case(supra), relied upon by counsel for the petitioners would not be of much advantage to the petitioners.

11. Thus, for the foregoing reasons, the petitioners cannot avail of any advantage on the basis of the cited judgement which is clearly distinguishable on facts.
12. Additionally, the recovered quantity of contraband which falls in the category of 'commercial quantity' would attract fetters imposed by section 37 of the Act in the matter of grant of bail. Hon'ble Apex Court in a recent judgement i.e. 2020(1) RCR(Criminal) 818 State of Kerala vs. Rajesh Kumar has reiterated the legal position as regards the limitations imposed by Section 37 of the Act and has further held that a liberal approach in matters of bail in offences under NDPS Act is uncalled for. There is

nothing on record at this stage from which it could be inferred that the petitioners are not guilty of the offence in question. Both the petitions are found to be sans merit and are hereby dismissed.

05.01.2021
(*kamal*)

(GURVINDER SINGH GILL)
JUDGE

Whether reasoned / speaking? **Yes / No**

Whether reportable? **Yes / No**