

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

CRM-M- 23012 of 2021 (O&M)
Date of Decision:-10.08.2021

Balkar Singh @ Gandhi Petitioner

Versus

State of Punjab Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Vijay Lath, Advocate for the petitioner.

Mr. Ajay Pal Singh Gill, DAG, Punjab,
assisted by ASI Sohan Singh.

(proceedings conducted through video conferencing)

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GURVINDER SINGH GILL, J.

1. The petitioner seeks his release on regular bail in respect of FIR No. 0011 dated 23.01.2021, registered at Police Station City Morinda, District Rupnagar, Punjab for offences punishable under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, in short, being referred to as '*the Act*') and under Section 427 of IPC.
2. As per case of prosecution, on 23/01/2021, when ASI Balbir Singh was present along with other police officials at bypass near T-Point Panjkoha, Morinda, then at about 1:30 PM, a secret information was received to the

effect that Kamaljit Singh @ Don and Balkar Singh (petitioner) were coming in a car bearing registration No. HR-26-BT-8306 along with huge quantity of intoxicant powder. Pursuant to receipt of said information, barricading was raised and at about 1:50 PM, a white coloured car bearing registration No. HR-26-BT-8306 was noticed and was signalled to stop. However, the driver of the said vehicle tried to reverse the same and hit against a police vehicle on the side due to which the police vehicle sustained huge damage. It is alleged that while the driver of the car ran away from the spot, the person sitting on the passenger seat was nabbed who disclosed his name as Balkar Singh. It is further alleged that the said person before his apprehension took out a transparent polythene bag from a pocket of his jacket and threw the same on ground. Balkar Singh disclosed the name of the person who had escaped as Kamaljit Singh and that they had brought intoxicant powder from Amritsar so as to sell the same in Morinda. He further disclosed that Kamaljit was carrying a large quantity of intoxicant with him when he ran away. The police officials present at the spot did not open the bag thrown by the accused and sent a request to send a competent police officer at the spot. S.I. Sukhwinder Singh reached the spot and search of the bag was effected in his presence which led to recovery of 110 grams of intoxicant powder which was later found to be 'Diphenoxylate hydrochloride'.

3. The learned counsel for petitioner has submitted that the petitioner has falsely been implicated in the instant case and that infact it is a case where an accident had taken place between a police vehicle and BMW car bearing registration No. HR-26-BT-8306 and the petitioner had supported the driver of BMW, whereas the police in order to save the driver of the police vehicle

from any departmental action or any civil or criminal liability had planted false case against the petitioner and driver of BMW car to pressurise them. The learned counsel in order to make out a case for grant of regular bail to petitioner, has raised the following submissions:

- (i) that there is absolute non-compliance of Section 50 of the Act;
- (ii) that the petitioner cannot be attributed conscious possession of the contraband allegedly recovered;
- (iii) that the allegedly recovered contraband would not fall in the category of 'commercial quantity' as active ingredients of the recovered contraband were found to be barely 3.42% as per report of a person (Annexure P-5);
- (iv) that there is non-compliance of Section 42 of the Act and that in view of a recent judgement of Hon'ble Supreme Court i.e. 2021(2) RCR 892 Boota Singh vs. State of Haryana, the petitioner deserves to be released on bail.

4. Opposing the petition, the learned State counsel has submitted that since it is not a case of personal search, Section 50 of the Act would not be attracted in the instant case. The learned State counsel, while repelling the contention of the petitioner as regards non-compliance of Section 42 of the Act, presses into service a judgement of Constitution Bench of Hon'ble Supreme Court in a case reported as 2009(8) SCC 539 Karnail Singh v. State of Haryana, wherein it has been held 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 been submitted that it is a case of recovery of 'commercial quantity' of contraband wherein the petitioner was caught red-handed. It has further been submitted that there is no reason at this stage to doubt the case

of the prosecution as the police officials had apprehended the accused in discharge of their official duties and had no axe to grind against the petitioner. It has, thus, been submitted that the petition deserves dismissal.

5. I have considered rival submissions addressed before this Court.
6. It will be appropriate to first of all consider the contention of the petitioner as regards non-compliance of Section 50 of the Act. Section 50 of the Act would have application where personal search is to be effected and not of any vehicle or bag or building. Hon'ble the Supreme Court, while discussing the scope of application of Section 50 of the Act, in State of Himachal Pradesh vs. Pawan Kumar 2005(4) SCC 350, held as follows:

“11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a hold all, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act.

12. An incriminating article can be kept concealed in the body or clothings or coverings in different manner or in the footwear. While making a search of such type of articles, which have been kept so concealed, it will certainly come within the ambit of the word "search of person". One of the tests, which can be applied is, where in the process of search the human body comes into contact or shall have to be touched by the person carrying out the search, it will be search of a person. Some indication of this

is provided by sub-section (4) of Section 50 of the Act, which provides that no female shall be searched by anyone excepting a female. The legislature has consciously made this provision as while conducting search of a female, her body may come in contact or may need to be touched and, therefore, it should be done only by a female. In the case of a bag, briefcase or any such article or container, etc., they would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. They can be easily and in no time placed away from the body of the carrier. In order to make a search of such type of objects, the body of the carrier will not come in contact of the person conducting the search. Such objects cannot be said to be inextricably connected with the person, namely, the body of the human being. Inextricable means incapable of being disentangled or untied or forming a maze or tangle from which it is impossible to get free.”

7. The judgement in *Pawan Kumar's case*(supra) has recently been followed by Hon'ble Supreme Court in 2020(10) RCR 740 Rajesh Dhiman vs. State of Himachal Pradesh. The relevant extract from *Rajesh Dhiman's case* (supra) reads as under:

“22. The appellants' claim that the High Court erred in not considering noncompliance with Section 50 of the NDPS Act at the stage of appeal, is also premised upon a mistaken understanding of the law. As held in State of Himachal Pradesh v. Pawan Kumar (2005) 4 SCC 350., the safeguards for search of a person would not extend to his bag or other article being carried by them. Given how the narcotics have been discovered from a backpack, as per both the prosecution and defence versions, there arises no need to examine compliance with Section 50 of NDPS Act.”

8. In the instant case, the accused had thrown away a packet on ground which was found to contain contraband. Since the packet was recovered from ground and not from personal search of the accused, Section 50 of the Act would have no application.

9. Further, the contention of the petitioner that he cannot be attributed conscious possession will not carry any weight inasmuch as it is the specific case of the prosecution that the accused had himself thrown away the packet upon noticing the police. No doubt, the recovery was not effected from person of the petitioner but since there was none else at the spot and the police officials had seen the petitioner throwing away the packet after taking out the same from a pocket of his jacket, it goes without saying that it is the petitioner who had domain over the said packet thrown by him on the ground. In these circumstances the petitioner cannot feign ignorance about the contents of the said packet and, thus, conscious possession of the recovered contraband can safely be attributed to him.
10. As regards the contention of the petitioner that it is only the active ingredient (3.42% as per FSL report) of the recovered contraband for which, at best, he can be held liable and not for the entire mass which includes neutral substance as well, the said issue is no longer *res-integra* and has now been authoritatively settled by Hon'ble Supreme Court in 2020(2) RCR(Criminal) 523 Hira Singh and another VS Union of India, wherein a specific reference made as regards abovesaid issue has been answered as under:

“In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances;

11. The aforesaid judgement leaves no room to doubt that the entire recovered quantity is to be reckoned for determining as to whether the same falls in “commercial quantity” or not. In the instant case, the recovered quantity is 110 grams of Diphenoxylate Hydrochloride, which being more than 100 grams would fall in category of 'commercial quantity'.
12. In order to consider the contention of petitioner as regards non-compliance of Section 42 of the Act, it is apposite to bear in mind the provisions of Section 42 of the Act, which read 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 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 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. A perusal of Section 42 of the Act, as reproduced above, would show that it has been laid therein as to under what circumstances, a search can be effected of any building conveyance or place without warrant and as regards the procedure to be followed for doing so and also as to of what rank an officer is competent to conduct such search, seizure and arrest. The questions which would be relevant in the instant case as regards compliance of Section 42 of the Act act may be crystalised as follows:

- (i) whether in the given facts of the case it can be said that there has been non-compliance of provisions of Section 42 of the Act?
- (ii) whether non-compliance, if any of Section 42 of the Act, would *ipso-facto* result in extending benefit to the accused particularly at the stage of considering grant of bail?

14. While considering question no. (i), it needs to be borne in mind that it is a case where secret information received by ASI Balbir Singh at 1:30 PM and

immediately thereafter barricading was held and within 20 minutes i.e. at 1.50 PM, the police party was able to apprehend the accused. The aforesaid short interval between the receipt of secret information and application of accused would necessarily show that in case there had been any delay on part of the police party, the same would have afforded a chance to the accused to get away without being intercepted. It was thereafter, pursuant to a search having been conducted, that an intimation in the shape of the “*ruqa*” was sent to the police station.

15. A perusal of the judgement of Hon'ble Supreme Court i.e. 2021(2) RCR 892 Boota Singh vs. State of Haryana, would show that it has been held therein that in a case of recovery of contraband from a private vehicle parked on public road where there is non-recording of secret information, the same would amount to non-compliance of Section 42 of the Act. Although, in the instant case, the prosecution would contend that since it is a case of the recovery of contraband from ground in an open place, Section 42 of the Act will not have any application but keeping in view the fact that the said recovery was effected pursuant to receipt of secret information and going by the ratio of Boota Singh's case (supra), Section 42 of the Act can be said to be attracted despite the fact that the recovery was effected from a open public place since the vehicle in which the accused was travelling was a private vehicle. It, however, needs to be noticed that post amendment of Section 42 of the Act in the year 2001, the provisions have rather been relaxed. 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". A 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' in any case, is being sent and that too within a period much earlier than the prescribed 72 hours. The Courts, while construing such provisions should not interpret them so literally so as to render their compliance impracticable. As already mentioned above, the secret information was received at 1:30 PM and within 20 minutes i.e. at 1.50 PM, the police party was able to apprehend the accused and the ruqa containing complete particulars was sent to police station headed by S.I. Ramanpreet Kaur by 2.50 pm. Consequently, it cannot be said that there is absolute non-compliance of provisions of Section 42 of the Act.

16. Even if, it is presumed for the sake of arguments that there is non-compliance of provisions of Section 42 of the Act, still keeping in view the ratio of judgement rendered by Constitution Bench in Karnail Singh's case(supra), any such omission may not be held to be a illegality affecting the validity of recovery or trial. The relevant extract from the said judgement reads 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)

17. It was further held by the Constitution Bench in Karnail Singh's case(supra) that the question as to whether there is adequate or substantial compliance with Section 42 of the Act or not is a question of fact to be decided in each case. Such a finding can only be returned after evidence is led before the trial Court. At this stage, it cannot be said that the accused has been

prejudiced in any manner on account of any alleged non-compliance of provisions of Section 42 of the Act.

18. No other argument has been addressed before this Court. 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 petitioner is not guilty of the offence in question. The petition is found to be sans merit and is hereby dismissed.

10.08.2021

kamal/pankaj

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No