

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.6 of 2021**

Arising Out of PS. Case No.-24 Year-2015 Thana- GOVERNMENT OFFICIAL COMP.
District- Patna

RUBUL HUSSAIN @ RUBUL HASAN Son of Idrish Ali Resident of Village
- Kakajuri, P.S. - Bokaghat, District - Golaghat (State - Assam).

... .. Appellant

Versus

1. The State of Bihar
2. Directorate of Revenue Intelligence, Regional Unit Patna. Bihar.

... .. Respondents

Appearance :

For the Appellant	:	Mr. Ansul, Advocate Mr. Rampravesh Nath Tiwary, Advocate Mr. Aditya Pandey, Advocate Ms. Sagarkia, Advocate
For the Respondent	:	Mr. Ranvir Kumar, Senior Standing Counsel(DRI)

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 12-07-2023

This appeal has been preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 07.02.2020 and the order of sentence dated 10.02.2020, passed by the learned Additional Sessions Judge-VIth-cum-Special Judge, N.D.P.S. Act, Patna, in Special Case No.28 of 2015/ CIS No. 28 of 2015 (Arising out of DRI/LZU/PRU/718(II)/ENQ-24/2015), whereby the appellant has been convicted and sentenced as under:



Cr. Appeal (DB) No. 6 of 2021				
Appellant	Penal provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Rubul Hussain @ Rubul Hasan	Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act, for short)	R.I. for 15 years	1,00,000/-	S.I. for one year

2. We have heard Mr. Ansul, learned counsel appearing on behalf of the appellant and Mr. Ranvir Kumar, learned Senior Standing Counsel appearing for the D.R.I..

3. It is the case of the prosecution, as disclosed in the forwarding report submitted by Pradeep Kumar Pandey (PW 5), an Intelligence Officer, DRI (Directorate Revenue Intelligence), Patna, to the Court of learned District and Sessions Judge, Patna, while forwarding the accused persons, namely, Rubul Hussain @ Rubul Hasan (the appellant) and Ali Hussain (a juvenile, aged 15 years) that based on certain specific information, the Officers of DRI, Patna, an Ashok Leyland truck bearing registration No.WB-71A-1087 was intercepted on 25.09.2015 at 9 AM at Hathidah and had apprehended the said two persons from the said truck. A thorough search of the truck led to recovery of 72 packets containing 696.02 kg of substance believed to be ganja, concealed in a specially built cavity in the truck. The occupants, who were apprehended, said to have admitted before the DRI Officials that the recovered substance was ganja and the same was brought from Dimapur within their knowledge. The substance, believed to be



ganja, the truck, packaging materials and some cash, according to the prosecution's case, was seized under the provisions of Section 43(a) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') at 5 PM and the said two persons were arrested in exercise of power under Section 43(b) of the Act. A seizure memo and a panchnama were drawn. While forwarding the persons, so arrested by the DRI Officials, the Intelligence Officer mentioned in his said report dated 25.09.2015 that two sets of representative samples had been drawn and sealed in yellow envelopes marked as A-1, A-2, B-1 and B-2 respectively. A request was made to the court to order for dispatch of the samples to CRCL, Customs House, Kolkata, for testing.

4. We note, at this stage itself, that according to the case as disclosed in the forwarding report dated 25.09.2015, the samples of the seized articles were drawn by the DRI Officials themselves and not in the presence of a Magistrate as contemplated under Section 52-A(2)(b) of the Act. Subsequently, the said Intelligence Officer, Pradeep Kumar Pandey (PW 5), filed a complaint petition in the Court of learned District and Sessions Judge, Patna, against the appellant, after completion of investigation. It transpires from the records that the other person, namely, Ali Hussain, who was forwarded to the court on



25.09.2015, came to be declared a juvenile. In the complaint petition, the complainant (PW 5) cited seven witnesses, five of them being officials of the DRI and two independent witnesses, namely, Ram Naresh and Ramesh Kumar, who, according to the complaint petition, were the seizure list witnesses.

5. It is the prosecution's case, as narrated in the complaint petition, that based on an information received, a team of officials of DRI, Patna, had proceeded towards Hathidah and had mounted surveillance on Bhagalpur-Patna road along with two independent witnesses. At about 9 am, the said truck was seen coming from the direction of Bhagalpur and was intercepted by them. The persons apprehended after interception were informed in writing about secret information and their right to be searched in accordance with the provisions of Section 50 of the Act before a gazetted officer or a magistrate. As they consented in writing and expressed their willingness to be searched before departmental Gazetted Officer present at the spot. A search was conducted accordingly. From the appellant's possession, one Samsung mobile phone, a voter's identity card, a driving licence, a PAN Card and a cash of Rs. 500 was recovered. Further, a crowd had gathered at the place of interception during the search operation and, therefore, keeping in mind the safety of the persons, who had been



apprehended and the goods as well, the DRI officials decided to conduct further search in the official premises of DRI, Patna. The persons apprehended and goods with the conveyance intercepted were brought to the DRI office, Patna from Hathidah. After intensive search, the DRI officials found a specially built cavity in the chassis of the truck from which 72 packets wrapped in black and transparent polythene using brown adhesive tape were recovered. Each packet was found to be containing dark green dried leafy substance having smell of ganja. The packets were marked as 1 to 72. The persons, who were apprehended, disclosed to the DRI Officials that the said substance was ganja, was wrapped with a newspaper of Nagaland edition and thereafter in black and transparent polythene materials using transparent adhesive tapes. Each packet was weighed and a list was prepared. Net weight of ganja was found to be 696.02 kgs. It is the specific case of the prosecution, as disclosed in the complaint petition, that four representative samples were drawn and the sealed envelopes were marked A-1, A-2, B-1, B-2 and all the remaining amount of ganja contained in 72 packets were repacked in 20 bags and sealed. We reiterate, at this juncture, that it was never the case of the prosecution that the representative samples were drawn in the presence of a Magistrate as required under Section 52A(2)(b) of



the Act. The complaint further disclosed that both the persons apprehended made confessional statement before the DRI officials under Section 67 of the Act, according to which, a person named 'Bahar' had met him in Dimapur, who had offered him a sum of Rs 5000/- for carrying the ganja loaded on the truck to be handed over to a person, who could be contacted on either of his two mobile numbers, i.e, 9163247571 and 879448308. They are said to have confessed before the DRI officials that the registration plate of the vehicle, i.e., NL-021-8446 was changed by them to WB-71A-1087 at the outskirts of Dimapur as directed by the said 'Bahar'. While they were stuck up in traffic jam near Bhagalpur on 23.09.2015 and 24.09.2015, they were directed by the said Bahar to go to Banaras *via* Patna. The samples drawn by the DRI officials were submitted to the court, while forwarding the accused persons on 25.09.2015 to the court. The samples marked A-1 and B-1 were dispatched to the chemical examiner CRCL, Custom House, Kolkata, (wrongly typed on '19.09.2015' in the complaint petition) and the seized goods and rest of the samples sealed in the envelopes A-2 and B-2 were deposited in the customs godown on 28.09.2015. The complaint petition further disclosed that CAF (Consumer Application Form) of the mobile numbers recovered from the possession of the appellant were procured from the



concerned service provider. The CAF of mobile number in use by Bahar was also procured from the concerned service provider from which it transpired that subscriber of the said mobile number was one Sahito Sumi of Nagaland. Subsequently, on address verification, the holder of the mobile number was found to be fictitious. Further, from the seized truck, three registration certificates were recovered in respect of which a request was made to the Regional Transport Officer, Nagaland, to verify the ownership of the truck, whereupon, the Regional Transport Officer, Mokokchung, Nagaland, provided the registration details, which was the same as mentioned in the recovered registration certificate. Address verification of the appellant was conducted by the Deputy Director, DRI, Guwahati. The appellant's address was found to be correct. On 14.10.2015, the report of CRCL, Kolkata, was received, which confirmed that each of the two samples responded to the test for Cannabis and each had the characteristics of ganja. It is also mentioned in the complaint petition that in the light of the order dated 07.10.2015, certification of seized ganja, seized samples in the envelopes and the seized truck was done by a learned Judicial Magistrate on 08.01.2016 under the provisions of Section 52-A(3) of the Act. With the aforesaid allegations, the complaint petition was filed for violation of the provisions under



Section 8(c) of the Act, punishable under Section 20(b)(ii) and Section 25 of the Act.

6. The trial court framed the charge of commission of offences punishable under Section 20(b)(ii), Section 25 and Section 29 of the Act on 14.06.2016. The appellant denied charge and claimed to be tried. Accordingly, he was put to trial.

7. At the trial, the prosecution examined six witnesses, all of them were members of the raiding team. The seizure list witnesses did not turn up to depose at the trial. The prosecution brought on record documentary evidence which came to be marked as exhibits as under: -

Ext.1	Notice under Section 50 of NDPS Act, to accused Rubul Hussain.
Ext.2	Notice under Section 50 of NDPS Act, to accused Ali Hussain.
Ext.3	Seizure list.
Ext.4	Panchnama.
Ext.5	Signature of accused Rubul Hussain and witnesses.
Ext.6	Signature of accused Ali Hussain and witnesses.
Ext.7	Arrest memo of Accused Ali Hussain.
Ext.8	Arrest memo of Accused Rubul Hussain.
Ext.9	Forwarding.
Ext.10	Complaint petition.
Ext.11	Signature of informant on the information letter.
Ext.12	Computer typed one page list.
Ext.13 and 13/1	Test Memo (CRCL, Kolkata).
Ext.14 and	Summons to the accused Rubul Hussain and Ali



14/1	Hussain.
Ext.15	Seizure list.
Ext.16	Photocopy of inventory.

8. After closure of the prosecution's evidence, the appellant was questioned under Section 313 of the CrPC. In the wake of the submissions, which has been made on behalf of the appellant to assail the impugned judgment, we deem it proper to reproduce the question put by the learned trial court and response of the appellant there to, which is as under: -

प्रश्न: आपके विरुद्ध साक्ष्य है की आप ट्रक संख्या WB-71A-1087 के चालक के रूप में उक्त ट्रक से कुल 72 पैकेट गांजा जिसका वजन 695.02 किलोग्राम है, ले जा रहे थे जिसे ले जाने के क्रम में दिनांक 25.09.15 को जब्त किया गया था।।

उत्तर : ऐसा बात नहीं है।

प्रश्न: सफाई में कुछ कहना है।

उत्तर : निर्दोष हूँ।

9. Learned trial court, after having appreciated evidence adduced at the trial, concluded that the prosecution was able to establish successfully the charge framed against the appellant of commission of the offences punishable under Section 20(b)(ii)(C) of the Act. The trial court, however, acquitted the appellant of the charge of commission of the offence punishable under Sections 25



and 29 of the Act. After having held the appellant guilty of the aforesaid charge, by the impugned judgment dated 07.02.2020, sentenced the appellant to undergo imprisonment and fine as noted above, by an order dated 10.02.2020.

10. Assailing the impugned judgment of conviction and the order of sentence, Mr. Ansul, learned counsel appearing on behalf of the appellant, has submitted that the finding of the trial court is vitiated on several counts including the fact that there has been apparent breach of the provisions under Section 42 of the Act inasmuch as there is no evidence to the effect that the complainant, who had received the secret information, consequent upon which the raid was conducted, had taken down in writing and reported to his immediate official superior about his reason to believe or information as contemplated under Section 42 of the Act. He has submitted that it is true that, according to the prosecution's case, the truck was intercepted at a public place, the empowered officials under Section 42 of the Act were still required to strictly comply with the requirements under Section 42 of the Act. He has contended that the recovery was made from a truck, which does not satisfy the requirement of the expression 'public place' as explained in the explanation under Section 43 of the Act. Section 43 of the Act applies only when seizure or arrest is made of a



public conveyance intended for use by or accessible to the public, he contends. In support of his submission, he has placed heavy reliance on a Full Bench decision of Bombay High Court, in case of *Jayantilal Modi and Another vs. State of Maharashtra*, reported in [2001 (2) Mh.L.J. 615] with particular reference to paragraphs 16 to 18 and 20 thereof. He has also placed reliance on a Division Bench decision of Calcutta High Court in case of *Sunil Kumar Roy and Another vs. State of West Bengal*, reported in 2023 SCC OnLine Cal 1082, in support of his submission that even if, according to prosecution's case, the conveyance was intercepted at a public place, strict compliance of the requirement under Section 42 is mandatory for effecting search of the vehicle (a truck) which was not intended for use by or accessible to the public. Referring to the said decision of Calcutta High Court in case of *Sunil Kumar Roy and Another* (supra), he has submitted the Division Bench of Calcutta High Court has taken note of the various Supreme Court's decisions in this context. He has given much emphasis on the observations made by Calcutta High Court in case of *Sunil Kumar Roy and Another* (supra) in paragraphs 15 and 16, which are based on the Supreme Court's decision in case of *State of Haryana v. Jarnail Singh*, reported in (2004) 5 SCC



188 and *State of Rajasthan v. Jagraj Singh*, reported in **(2016) 11 SCC 687**.

11. He has also laid emphasis on the Supreme Court's decision in case of *State of Haryana v. Jarnail Singh* (supra), wherein the Supreme Court has comprehensively dealt with the expression 'public place' falling under Section 43 of the Act. To bolster his contention, he has referred to paragraphs 18 and 22 of the said decision. He has also submitted that, according to the prosecution's case, the appellant and his accomplice (a juvenile) were occupying the truck when the same was intercepted. The contraband, according to the case of the prosecution, was found concealed somewhere near the chassis of the vehicle. Except for the confessional statement of the appellant said to have been recorded by the DRI officials under Section 67 of the Act to the effect that the appellant was in know of presence of ganja in specially built cavity, which was found out upon thorough examination by the DRI officials, there is no other evidence on record to establish that the appellant was knowing about the presence of ganja in the truck. He contends that in the light of the Supreme Court's decision in case of *Tofan Singh v. State of T.N.*, reported in **(2021) 4 SCC 1**, the confessional statement made before an officer empowered under Section 53 of the Act is not



admissible as evidence. He has accordingly submitted that the prosecution failed to prove beyond reasonable doubt that the ganja was recovered from the conscious possessions of the appellant. He has added that, in any case, the confession, said to have been made by the appellant, was retracted by the appellant in his deposition recorded under Section 315 of the CrPC. He has also argued that it is manifest from the nature of question put to the appellant by the trial court under Section 313 of the CrPC that the circumstances emerging from the evidence of the witnesses were not duly explained to the appellant for him to respond. He contends that the trial court has committed illegality in taking into account such circumstances also for holding the appellant guilty of the charges punishable under Section 20(b)(ii)(C) of the Act, which were not explained to him while questioning him under Section 313 of the CrPC. He contends that such circumstances, which were not explained to the appellant, should have been kept away from consideration by the trial court while recording his finding upon evaluation of the evidence of the witnesses. He has further argued that there has been no compliance of Section 57 of the Act inasmuch as no information was given to immediate official superior, i.e., an official superior, who was not a member of the raiding party. Relying on the Division Bench decision of this court



in case of *Sonu @ Sri Sonu and others vs. Union of India* (Criminal Appeal (DB) No. 1155 of 2018, decided on 29.04.2023), he has submitted that supply of information by the Intelligence Officer, who was a member of the raiding party, to another superior officer, who, too, was a member of the raiding party, cannot be said to be due compliance of Section 57 of the Act. He has argued that failure on the part of the prosecution to produce material exhibits before the court at the trial has further weakened the prosecution's case and the finding of conviction recorded by the trial court is unsustainable. In support of his submission, he has relied on the Supreme Court decision in the case of *Vijay Jain v. State of M.P.*, reported in (2013) 14 SCC 527.

12. He has further submitted that, in the present case, all the witnesses are officials of the DRI, who had conducted the raid. The independent seizure list witnesses were not examined and there is no explanation coming forth to justify their absence. In a situation, when no independent witnesses has been examined to prove the seizure, all the prosecution's witnesses are official witnesses and the prosecution has failed to produce the material exhibits, conviction of the appellant is wholly unjustified. It is also his submission that the prosecution was under obligation to draw the samples of the seized contraband in the presence of the



Magistrate, which is a mandatory requirement under Section 52-A(2)(b) of the Act. Relying on the Supreme Court's decision in case of ***Union of India v. Mohanlal***, reported in **(2016) 3 SCC 379**, he has submitted that the appellant deserves to be acquitted for non compliance of the mandatory requirement under Section 52-A(2)(b) of the Act

13. Mr. Ranvir Kumar, learned Senior Standing Counsel appearing for DRI, *per contra*, has submitted that in the present case, there was no requirement of compliance of the provisions under Section 42 of the Act, as the truck, in question, was intercepted and seized in a public place. He has submitted that in the present case, Section 43 of the Act will have application and not Section 42 of the Act. He has submitted that the DRI officials, in the present case, derived the power of search of the vehicle, which was intercepted in public place, from Section 49 of the Act. He has placed heavy reliance on the Supreme Court's decision in case of ***State of Haryana v. Jarnail Singh***, reported in **(2004) 5 SCC 188**, paragraphs 8 and 9 of which read thus: -

“8. Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and



search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.”

14. Relying upon the Supreme Court’s decision, in case of ***State of Punjab v. Baldev Singh***, reported in (1999) 6 SCC 172, he has submitted that the *proviso* to sub-section (1) of Section 42 of the Act lays down that if such officer has reason to believe that a search warrant or authorization 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, while Sub-section (2) of Section 42 empowers to take down the information



in writing or record the grounds for his belief under the first proviso to sub-section (1) of Section 42 and he is required to forthwith send a copy of the same to his immediate official superior. He argues that Section 43, on the other hand, deals with the power of seizure and arrest of the suspect in any public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief after taking down the information received, in writing, with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such, while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person, who is found to be in possession of any narcotic drug or psychotropic substance in a public place, where such possession appears to him to be unlawful.

15. Another material distinction between search of the building, conveyance or enclosed place conducted under the provisions of Section 42 of the Act and on search of a vehicle in transit in terms of Section 43 of the Act, he contends, is that in case of search of a vehicle in transit, there is no requirement of obtaining any search warrant even if search is conducted after sunset and before sunrise by a non-gazetted officer unlike a case of



search of a building, conveyance or an enclosed place. He has emphasized that whereas Section 42 of the Act empowers the officers of the specified departments to carry out search, seizure and arrest of any building, conveyance or enclosed place, Section 43 deals with the similar power of seizure and arrest in public place. Power under both these sections can be exercised if the concerned officer has reason to believe that some offence relating to narcotic drugs and psychotropic substances has been committed. He has referred to Section 49 of the Act, which empowers the officers to stop and search animals and conveyance used for illegal transport of narcotic drugs and psychotropic substances. He has submitted that the Legislature in its wisdom has considered it desirable to draw a demarcating line between building, conveyance and enclosed place on one side and the public place or a material in transit on the other. He has also submitted that the provisions of the statute should be construed in a harmonious manner so that none of the provisions are rendered nugatory. By harmoniously construing Sections 42 and 43 of the Act, it can be safely concluded that if a conveyance is intercepted or apprehended at a public place or in transit then the provisions of Section 42 of the Act shall not apply, he would argue.



16. We have perused the impugned judgment and order as well as the lower court records and we have given out thoughtful consideration to the rival submissions advanced on behalf of the parties.

17. One of the primordial issues, which has emerged in the present appeal, is as to whether it is mandatory for an empowered officer, while conducting search of a conveyance in the nature of truck to follow the requirement laid down in Section 42 of the Act, if such conveyance is sought to be seized and any person arrested, in exercise of power under Section 43 of the Act. The question has arisen in the light of the stand taken on behalf of the DRI that when a vehicle is intercepted and seized by an empowered officer under Section 43 of the Act, there is no requirement of following the procedure for search as contemplated under Section 42 of the Act. To answer the said issue, we consider it apt to reproduce Sections 42 and 43 of the NDPS 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 authorization 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.]

43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in Section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act 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;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation.—For the purposes of this section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.]

18. On close reading of Sections 42 and 43 of the Act, it can be easily culled out that the empowered officer of a department under Section 42 of the Act, is vested with the power of seizure in any public place or in transit any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe that an offence punishable under the Act has been committed and along with such drug or substance, any animal or conveyance or article liable for confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of commission of an offence 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. Further, the empowered officer has the authority in exercise of power under



Section 43(b) of the Act to detain or search any person whom, he has reason to believe, has committed an offence punishable under the NDPS Act and if such person has any narcotic drugs and psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful and to arrest him or any other person in his company. There is thus power of search of a person under Section 43(b) of the NDPS Act. Section 43(a) of the Act, however, does not confer any power upon the empowered officer to search a vehicle seized in a public place. The power under Section 43(a) of the Act in relation to a conveyance is confined to seizure in the circumstances mentioned therein. Further, explanation to Section 43 of the Act assumes significance, which deals with the expression ‘public place’ falling under the said Section, which, according to the said explanation, includes “any public conveyance intended for use or accessible to the public”. In the present case, the conveyance seized was a truck. It is not the case of the prosecution that the said conveyance (the truck) was intended for use or accessible to the public.

19. The Supreme Court had the occasion to deal with the distinguishing features of Sections 42 and 43 of the Act in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, reported in (2000) 2 SCC 513 and *Koluttumottil Razak v. State of Kerala*,



reported in (2000) 4 SCC 465. In the case of *Abdul Rashid Ibrahim Mansuri* (supra), an auto-rickshaw was intercepted from a public place based on certain information received by an Inspector of Police. In the said case, it was urged on behalf of the State that since Section 43 of the Act was applicable, the officer was not required to take down the information or forward its copy to immediate official superior under Section 42 of the Act. Repelling the said contention, the Supreme Court held as under: -

“We are unable to appreciate the argument because in the said case PW-2 has admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the provisions of Section 42(1) of the Act. Hence, PW 2 could not wriggle out of the condition stipulated in the said sub-section. We, therefore, unhesitatingly hold that there was non-compliance of Section 42 of the Act”

20. A similar question, which we are dealing in the present judgment, had arisen before the Bombay High Court, leading to a reference of the following question made for determination by a larger bench: -

“Whether in respect of an offence under the Narcotics Drugs And Psychotropic Substance Act, 1985, it is necessary for an empowered officer to comply with the provisions of Section 42, when the information received by him is regarding the



commission of an offence in a public place of the like mentioned in the explanation to Section 43?”

21. Upon dealing with the statutory provisions and various Supreme Court's decisions, a Full Bench of the Bombay High Court, in case of **Jayantilal Modi** (supra), answered the reference in following terms: -

“In respect of an offence under the Narcotics Drugs And Psychotropic Substances Act, 1985, it is necessary for the empowered officer to comply with the provisions of Section 42, even when the information received by him is regarding the commission of an offence in a public place of the like mentioned in the explanation to Section 43.”

22. It is noteworthy that the scope of Section 42 and 43 of the Act had fallen for consideration before the Supreme Court in case of **State of Haryana v. Jarnail Singh** (supra). After having examined the two provisions threadbare, the Supreme Court held in paragraph 9 as under: -

“9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched



in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.”

23. We deem it apt, at this juncture, to consider the submission advanced on behalf of the DRI apropos the public place from where the truck was seized by the DRI officials, in the backdrop of the explanation appended to Section 43 of the Act. The expression ‘public place’ appended to Section 43 of the Act has been considered by the Supreme Court in case of ***State of Rajasthan v. Jagraj Singh*** (supra). The Supreme Court in no uncertain terms has held in the case of ***State of Rajasthan v. Jagraj Singh*** (supra) that the explanation to Section 43 defines the expression ‘public place’, which includes any public conveyance. The words ‘public conveyance’ as used in the Act, the Supreme Court has held, has to be understood as a conveyance which can be used by the public in general. The Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988, were enacted to regulate the law relating to the motor vehicles. Having taken note of the said aspect, the Supreme Court ruled that the vehicles, which can be used for public are public motor vehicles for which necessary permits need to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, no vehicle can be used



for transporting passengers. In this case, it is not the case of the DRI that the vehicle, in the nature of a truck was being used or had permit for transporting passengers. In such circumstance, the submission that Section 42 of the Act, for the purpose of search of the vehicle, shall have no application, as advanced on behalf of the DRI, cannot be accepted and his hereby rejected.

24. It is pertinent to mention that the said view taken in case of *State of Rajasthan v. Jagraj Singh* (supra) has been reiterated in a recent decision of the Supreme Court in the case of *Boota Singh and Others vs. State of Haryana*, reported in **2021 SCC OnLine SC 324**, paragraphs 13 and 14 of which read as under: -

13. In Karnail Singh I, the Constitution Bench of this Court concluded:—

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take



action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not



recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

(Emphasis added)

14. In Jagraj Singh alias Hansa, the facts were more or less identical. In that case, the vehicle (as observed in para 5.3 of the decision) was not a public transport vehicle. After considering the relevant provisions and some of the decisions of this Court including the decision in Karnail Singh, it was observed:—

“14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext.



P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

.....

16. In this context, it is relevant to note that before the Special Judge also the breach of Sections 42(1) and 42(2) was contended on behalf of the defence. In para 12 of the judgment the Special Judge noted the above arguments of defence. However, the arguments based on non-compliance with Section 42(2) were brushed aside by observing that discrepancy in Ext. P-14 and Ext. P-15 is totally due to clerical mistake and there was compliance with Section 42(2). The Special Judge coming to compliance with the proviso to Section 42(1) held that the vehicle searched was being used to transport passengers as has been clearly stated by its owner Vira Ram, hence, as per the Explanation to Section 43 of the Act, the vehicle was a public transport vehicle and there was no need of any warrant or authority to search such a vehicle. The High Court has reversed the above findings of the Special Judge. We thus, proceed to examine as to whether Section 43 was attracted in the present case which obviated the requirement of Section 42(1) proviso.

.....

29. After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance with requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance with Section 42. The



Constitution Bench noted the effect of the aforesaid two decisions in para 5. The present is not a case where insofar as compliance with Section 42(1) proviso even an argument based on substantial compliance is raised there is total non-compliance with Section 42(1) proviso. As observed above, Section 43 being not attracted, search was to be conducted after complying with the provisions of Section 42. We thus, conclude that the High Court has rightly held that non-compliance with Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.”

(Emphasis added)

25. A Division Bench of Calcutta High Court, in the case of ***Sunil Kumar Roy and Another*** (supra), after having noticed the Supreme Court’s decisions, as noted above, has clearly concluded that search of a vehicle in a public place would be regulated by Section 43 of the Act, if the prosecution proves that the vehicle is a public conveyance. In our considered view, it is neither the case of the prosecution nor it has been proved as such at the trial that the vehicle in question was a public conveyance for application of Section 43 of the Act as explained by the Supreme Court in the case of ***State of Rajasthan v. Jagraj Singh*** (supra).

26. We need not encumber the present judgment with the precedents laying down the law that total non-compliance of



the requirement under Section 42 of the Act is impermissible. We, however, consider it appropriate to refer to the Supreme Court's decision in case of **Karnail Singh v. State of Haryana**, reported in **(2009) 8 SCC 539**, paragraph 35 of which reads as under: -

“35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should



normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.”

27. After having discussed the legal position as above, we need to revert back to the relevant facts of the present case.



According to the complainant, he had received a secret information, based on which a raiding party was constituted, leading to interception of the vehicle (truck) from a public place. Section 42 of the Act ordains that if the officer, upon receipt of information given by any person, has reason to believe that an offence punishable under the Act has been committed in relation to any narcotic drugs or psychotropic substances or controlled substances, he must take down the information in writing forming reason to believe, if he intends to exercise his power of search without warrant under Section 42 of the NDPS Act. Section 42 further requires 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. In the present case, with reference to exhibit-11, a submission has been advanced that though Section 42 has no application in the present case, the requirement under the said provision was complied with inasmuch as the information obtained from a person by the complainant was recorded in writing and it was sent to an official superior. We have carefully perused exhibit-11, which does not contain the nature of information, which the complainant had allegedly received. It vaguely mentions that an information had been received to the



effect that a truck, loaded with huge consignment of ganja, was coming to Patna. Exhibit-11 does not disclose any fact forming reason to believe, which is a condition precedent for exercising power under Section 42 of the Act. We are, therefore, of the conclusive opinion that, in the present case, there has been no compliance of the mandatory requirements under Section 42 of the Act, as noted above. Secondly, in the present case, all the witnesses are officials of the DRI. Rakesh Ranjan (PW 4) is the officer, to whom, according to the complainant, the information was sent, being the official superior, as contemplated under Section 42, who himself was a member of raiding team, which had conducted the search and seized the contraband articles. The seizure list witnesses were not examined at the trial. There is no explanation on record as to why the seizure list witnesses did not turn up for the evidence at the trial. No material exhibits were produced at the trial, which is an admitted fact. The Supreme Court, in case of *Jitendra v. State of M.P.*, reported in (2004) 10 SCC 562, has held that in such circumstance, there was no evidence to connect the forensic report with the substance that was seized from the possession of the other accused. The said view has been reiterated in case of *Ashok v. State of M.P.*, reported in (2011) 5 SCC 123. Paragraph 12 and 13 of which read as under: -



“12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in Jitendra v. State of M.P. [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] , on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] , the Court observed and held as under: (SCC pp. 564-65, paras 5-6)

“5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory



were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, 'non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced'. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama



is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched.”

28. Noticing the Supreme Court’s decision in case of **Ashok** (supra) and **Jitendra** (supra), the Supreme Court in case of **Gorakh Nath Prasad v. State of Bihar**, reported in **(2018) 2 SCC 305**, held the conviction of the appellant of that case unsustainable for the failure on the part of the prosecution to produce the material exhibits (ganja) at the trial.

29. There is yet another glaring flaw in the prosecution’s case. The samples were admittedly not drawn in the presence of a Magistrate, as contemplated under Section 52-A(2)(b) of the Act, which is a mandatory requirement, as has been held by the Supreme Court in case of **Union of India v. Mohanlal** (supra). Further, in our considered view, in the light of the law laid down by the Supreme Court, in case of **Tofan Singh** (supra), the



confessional statement of the persons, who were apprehended, before the DRI officials could not be taken in evidence. In the case of **Tofan Singh** (supra), the Supreme Court has concluded in paragraphs 158.1 and 158.2 as under:-

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

30. We further find from the impugned judgment of the trial court that the trial court has taken note of and considered the confessional statement of the appellants said to have been recorded by DRI officials. It has been rightly submitted on behalf of the appellant that appellant was not questioned by the trial court under Section 313 of the Cr.P.C with reference to the confessional statement said to have been recorded. In such situation, it was impermissible for the trial court to have taken into account the said confessional statement for recording finding of conviction.

31. For the reasons noted above, we are of the considered view that the impugned finding of conviction recorded



by the trial court convicting the appellant guilty for commission of offences punishable under Section 20(b)(ii)(C) of the NDPS Act is unsustainable, hence requires interference. The appellant deserves to be acquitted by giving him benefit of doubt.

32. Accordingly, the impugned judgment of conviction dated 07.02.2020 passed by the learned Additional Sessions Judge-VIth-cum-Special Judge, N.D.P.S. Act, Patna, in Special Case No.28 of 2015/ CIS No. 28 of 2015 (Arising out of DRI/LZU/PRU/718(II)/ENQ-24/2015) is hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section 20(b)(ii)(C) of the NDPS Act. The order of sentence dated 10.02.2020 also stands set aside.

33. This appeal is allowed.

34. The appellant is in custody. Let him be released forthwith, if not required in any other matter.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Sudha

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	07.08.2023.
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