

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.270 of 2018

Arising Out of PS. Case No.-138 Year-2015 Thana- NAVINAGAR District- Aurangabad

Govind Kumar Patel S/o Bishundeo Singh, R/o Village- Kanker, P.S.- Badem
O.P. Nabinagar, District- Aurangabad.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 415 of 2018

Arising Out of PS. Case No.-138 Year-2015 Thana- NAVINAGAR District- Aurangabad

Navkej Kumar Patel @ Naukej Kumar Patel S/o Raghubir Singh, R/o Vill.-
Kanker, P.S.- Barem Out Post, Nabinagar, District- Aurangabad.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 445 of 2018

Arising Out of PS. Case No.-138 Year-2015 Thana- NAVINAGAR District- Aurangabad

Chotu Kumar Yadav Son of Late Karmdeo Yadav, Resident of Village Kanker,
P.O Barun, P.S. Barun O.P., Nabinagar, District- Aurangabad, Bihar.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 270 of 2018)

For the Appellant : Mr. Yogesh Chandra Verma, Senior Advocate
Mr. Ansul, Advocate
Mr. Anuj Kumar, Advocate

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 415 of 2018)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mr. Md.Imteyaz Ahmad, Advocate
Mr. Ritwik Thakur, Advocate
Ms. Vaishnavi Singh, Advocate
Mrs. Kiran Kumari, Adv

For the Respondent : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 445 of 2018)

For the Appellant : Mr. Rajesh Kumar Singh, Advocate

For the Respondent : Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE RAJIV ROY



ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 13-04-2023

All these three appeals have been preferred against the same judgment of conviction dated 25.01.2018 and the order of sentence dated 29.01.2018 passed by learned 1st Additional Sessions Judge-cum-Special Judge (NDPS) Act, Aurangabad, in G.R. No. 06 of 2015/07 of 2015, arising out of the same Nabinagar P.S. Case No. 138 of 2015 and accordingly they have been heard together and are being disposed of by the present common judgment and order.

2. By the impugned judgment and order, the appellants have been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 270 of 2018				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Sole appellant (Govind Kumar Patel)	20(b) of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	25 of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	27A of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
Cr. Appeal (D.B.) No. 415 of 2018				
Sole appellant (Navkej Kumar Patel @ Naukej Kumar Patel)	20(b) of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	25 of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	27A of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment



Cr. Appeal (D.B.) No. 445 of 2018				
Sole appellant (Chotu Kumar Yadav)	20(b) of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	25 of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment
	27A of the NDPS Act	14 years	1,25,000/-	One year simple imprisonment

3. The sentences have been ordered to run concurrently.

4. Briefly narrated, it is the prosecution's case, as disclosed in the self statement of the Officer In-charge of Nabinagar Police Station dated 21.09.2015, that, at about 3:30 A.M., he had received a secret information to the effect that one Scorpio vehicle, loaded with ganja, was likely to come from the side of Japla; when he was conducting raids for arrest of criminals. A Sub-Inspector of Police Ashish Kumar Sah (PW 3), Police Officer Tar Babu Yadav (PW 5), Driver-Constable Kamlesh Kumar (not examined), Assistant Commandant C.R.P.F. 153-D Battalion Abhijeet (not examined), Sub-Inspector C.R.P.F. K.K. Chetri (not examined) were accompanying him during the course of the raid for the arrest. In the wake of the secret information, they waited for the Scorpio vehicle to arrive, and the moment, the vehicle reached near them, they intercepted the same. The occupants of the vehicle attempted to flee away immediately thereafter. They were, however, apprehended, who disclosed their name as Chotu Kumar Yadav [appellant in Cr. Appeal (DB) No.



445 of 2018], Govind Kumar Patel (appellant in Cr. Appeal (DB) No. 270 of 2018) and Navkej Kumar Patel @ Naukej Kumar Patel (appellant in Cr. Appeal (DB) No. 415 of 2018). On search of the vehicle 85 kilograms of ganja was recovered and currency notes of one thousand and five hundred denominations, totalling rupees One Lakh Fifty Thousand were recovered from the appellant Govind Kumar Patel. Based on said self statement of the Station House Officer, Nabinagar P.S. Case No. 138 of 2015 came to be registered for the offences of punishable under Section 20(b)(i), 23, 25, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act).

5. The prosecution examined altogether six witnesses, namely, Satyendra Vishwakarma (PW 1, a seizure list witness), Surendra Vishwakarma (PW 2, a seizure list witness), Ashish Kumar Sah (PW 3, a Police Officer and a member of the raiding party), Awadhesh Kumar (PW 4, Station House Officer), Tar Babu Yadav (PW 5, member of the police party) and Gopal Sharan Singh (PW 6, the IO). Further, the prosecution marked seizure list and signature of the witnesses thereon as Exhibit-1, 1/A and 1/2, notice to search as Exhibit-2, *Fardbeyan* as Exhibit-3, formal FIR as Exhibit-4, petition for sending the report of the FSL as Exhibit-5-5/1, petition for report of FSL as Exhibit-6-6/1, charge sheet as



Exhibit-7 and FSL report as Exhibit-8-8/A. The material exhibit ganja was marked as 1, 1/i, 1/ii and 1/iii.

6. Upon closure of the evidence of the prosecution's witnesses, the statement of accused persons were recorded under Section 313 of the Cr.P.C., upon explaining to them the circumstances, which were emerging against them on the basis of the evidence of the prosecution witnesses. The defence examined four witnesses namely, Rinku Devi (DW-1), Mahangi Devi (DW-2), Naresh Singh (DW-3) and Govind Kumar Patel (DW- 4).

7. On the appreciation and analysis of the evidence adduced at the trial, the trial court reached a conclusion that the prosecution was able to prove the charge of commission of offences against the appellants punishable under Sections 20(b), 25, 27A of the N.D.P.S. Act, and accordingly, by the impugned order of sentence has imposed punishment, as has been noted at the outset.

8. We have heard Mr. Ajay Kumar Thakur, learned counsel for the appellants, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor appearing on behalf of the State in Criminal Appeal (DB) Nos. 445 of 2018 and 415 of 2018 and Mr. Abhimanyu Sharma, learned Additional Public Prosecutor, has represented the State in Criminal Appeal (DB) No. 270 of 2018.



9. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellants has submitted that there has been gross violation of mandatory statutory provisions under the N.D.P.S. Act. He has submitted that the evidence of the prosecution's witnesses do not establish that the alleged contraband articles were recovered from the possession of these appellants. He has referred to the evidence of PW-1 to submit that as a matter of fact, the said contraband articles were not recovered from the vehicle, which the appellants were occupying, rather the same were seen lying near the vehicle on the road and the persons, who were, in fact, in possession of the said articles, were seen persuading these appellants to load the same in the vehicle, which these appellants were objecting to. He has submitted that PW-1 has not been declared hostile by the prosecution and the appellants may rely on the evidence of a prosecution witness, who has not been declared hostile, in support of their defence.

10. He has further submitted that there has been non-compliance of Section 42 of the N.D.P.S. Act inasmuch as the search and seizure was made before sunrise and further a copy of the information, which the officer conducting search and seizure was required to record in writing in accordance with Sub-section (1) thereof, was not sent to his immediate official superior. He has



submitted that the action of search and seizure conducted after the sunset and before the sunrise is not justified even with the aid of the second *proviso* to Section 42(1) of the N.D.P.S. Act, as there is no recording of the grounds of his belief, available on record of the trial court. In support of his submission, he has relied on the Supreme Court's decisions in case of ***Karnail Singh v. State of Haryana***, reported in (2009) 8 SCC 539, ***Dharamveer Prasad v. State of Bihar***, reported in (2020) 12 SCC 492 and ***Darshan Singh v. State of Haryana***, reported in (2016) 14 SCC 358.

11. He has further submitted that though the seizure was made on 21.09.2015 at 3.30 AM, sample, said to have been taken by the Police Officer, was sent for forensic examination on 21.11.2015 (Exhibit-6). There is no explanation, emerging from the evidence of the prosecution's witnesses, for the two month's delay in sending the sample to the FSL, Bihar Patna. He has further submitted that the sample was sent to the CFSL, Kolkata, much thereafter on 20.01.2016. The entire prosecution has become doubtful on account of delay in transmission of the samples for scientific examination, he contends. He has placed reliance on Supreme Court's decisions in the case of ***Mohan Lal v. State of Punjab***, reported in (2018) 17 SCC 627 and ***State of U.P. v. Hansraj***, reported in (2018) 18 SCC 355. He has also placed



reliance on a decision of the Supreme Court rendered on 10.11.2022 in Criminal Appeal No. 1945 of 2022 (*Amirul Rahman Vs. Union of India*) to contend that since the seizure list witness did not support the case of the prosecution and has not been declared hostile, his evidence becomes relevant for adjudication and the finding of conviction recorded by the trial court based on the evidence of only such persons, who were members of the raiding team, is unsustainable. He has also submitted that no material exhibit was produced at the trial and in such view of the matter, the finding of conviction becomes completely unsustainable in the light of the law reiterated by the Supreme Court in case of *Vijay Pandey v. State of U.P.*, reported in (2019) 18 SCC 215.

12. Mr. Sujit Kumar Singh and Mr. Abhimanyu Sharma, learned APP, representing the State, on the other hand, have submitted that the seizure list witnesses have not disputed their signatures on the seizure list and, therefore, they could not have denied the contents of the seizure list. In support of this submission, they have relied on the Division Bench decision of this Court in case of *Ashok Rai vs. The State of Bihar*, reported in 2010 (1) PCCR 21.



13. We have perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions made on behalf of the appellants and the State.

14. It would be apt to notice the evidence of the respective witnesses to consider the submissions, which have been advanced on behalf of the parties. As has been noted above, PW-1 and PW-2 are the seizure list witnesses. PW-1, in his examination-in-chief at the trial, deposed that upon hearing some uproar, he had gone to the place where he found the recovered articles lying out of the vehicle on the ground. He was not knowing from whom the recovery was made. He identified his signature on the seizure list. In his cross-examination, he further deposed that there were two female members also present in the Scorpio vehicle. He further deposed that when he went to the place of occurrence, he noticed that there was an altercation going on amongst some persons as some of them were pestering the driver of the vehicle to load the article in the vehicle, which the driver had denied. During the course of the altercation, the police reached. Thereafter, the unknown person managed to escape.

15. PW-3, Sub-Inspector of Police, supporting the prosecution's case, deposed at the trial that at about 11:00 PM, on



20.09.2015, the SHO, Awadhesh Kumar (PW-4), was on a patrolling duty with other police personnel. Under the orders of the SHO, he had reached the place of occurrence, i.e., Tetaria More. Upon interception of the Scorpio vehicle and searched thereof, 85 kgs. Ganja kept in different boxes were recovered and thereafter seizure list was prepared. Similar depositions were made by other police officials, namely, PW 4 and PW 5. PW 6, the IO, deposed that the seized contraband articles, mobile and money recovered from the possession of the appellants was kept in *malkhana* for safety. He had obtained restatement of the SHO and Ashish Kumar Sah, K.K. Chetri (not examined) of CRPF. He had produced before the court the seized ganja, which was kept in *malkhana* as material Exhibit- 1, 1/i, 1/ii and 1/iii. During the cross-examination, he deposed that he had recorded the statement of the seizure list witnesses on 21.09.2015 at the place of occurrence. Further, before sending the samples to the FSL, he had not opened the seal of the seized articles as he had presumed the articles in the sealed bag to be ganja.

16. We find substance in the submission made on behalf of the appellant that there has been no compliance of the mandatory statutory requirements under Section 42 of the NDPS Act, even if the prosecution's case, as set up at the trial, is



accepted. It is manifest from the prosecution's evidence adduced at the trial that the search and seizure was made after sunset and before sunrise. The second *proviso* to Section 42(1) clearly prescribes that if an officer empowered to conduct search and seizure and arrest under the Act has a 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 (underscored for emphasis). Sub-section (2) of section 42 further mandates that where an officer takes down any information in writing under sub-section (1) or records his belief under the *proviso* thereto, he shall within 72 hours send a copy thereof to his immediate official superior. From the lower court records, it is manifest that the SHO had neither taken down any information in writing in accordance with the requirement under sub-section (1) nor recorded the grounds for his believe under the second *proviso* to sub-section (1) of Section 42 of the Act, let alone sending a copy thereof to his immediate official superior. The Supreme Court in case of ***Karnail Singh*** (supra) has, while dealing with the mandatory nature of the provision under Section 42 of the Act, in no uncertain terms held



that while total non-compliance with requirement of sub-section (1) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42 of the NDPS Act. After considering the law laid down on compliance/substantial compliance of the provisions under Section 42(1) and 42(2) of the Act in the cases of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*, reported in (2000) 2 SCC 513 and *Sajan Abraham v. State of Kerala*, reported in (2001) 6 SCC 692, the Supreme Court has concluded in case of *Karnail Singh* (supra) in paragraph 35 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.”

17. The requirement under Section 42 have been lucidly explained in paragraph 35 in case of **Karnail Singh** (supra) to the effect that where the police officer does not record the information at all and does not inform the officers superior at all then also it will be a clear violation of Section 42 of the Act. Where there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case.



18. In the present case, we may record without any demur that there has been no compliance at all of the statutory requirement under Section 42 of the Act.

19. The Supreme Court had the occasion to consider again the statutory requirements under Section 42(1)(2) of the Act in case of ***Darshan Singh*** (supra) and after having noticed the earlier decisions in case of ***Karnail Singh*** (supra), ***Abdul Rashid Ibrahim Mansuri*** (supra) and ***Sajan Abraham*** (supra), the Supreme Court has noted that the mandate contained in Section 42(1) of the NDPS Act requiring recording in writing, the details pertaining to receipt of secret information, as also the communication of the same to the superior officer was distinct from the procedure stipulated under the provisions of the Cr.P.C. Section 42(1) of the NDPS Act lays down that the empowered officer, if he has prior information given by any person, has to necessarily take it down in writing where he has reason to believe from his personal knowledge that the offence under Chapter-IV have been committed and that materials, which may furnish the evidence of commission of such offence are concealed in a building, he may carry out raid and search even between sunrise and sunset, and he may do so without recording his reasons or belief. Two separate procedures, noticed above, are exclusive of



one and other. Compliance with one would not imply compliance with the other, the Supreme Court has held in case of ***Darshan Singh*** (supra). In the circumstances contemplated under Section 42(1) and Section 42(2) of the Act, the procedure will have to be followed separately in the manner interpreted by the Supreme Court in case of ***Karnail Singh*** (supra), the Supreme Court has opined in case of ***Darshan Singh*** (supra). The Supreme Court clarified that compliance of Section 42(1) and 42(2) shall not be assumed only because the SHO concerned had registered an FIR, which was also dispatched to the Superintendent of Police in compliance with the provisions of the Cr.P.C.

20. Noticing non-compliance of the provisions under Section 42(1) and 42(2) of the Act, the Supreme Court in case of ***Darshan Singh*** (supra) interfered with the concurrent finding of conviction recorded by the trial court and Punjab and Haryana High Court and acquitted the appellants of that case solely on the ground of non-compliance of the provisions under Section 42 of the Act. Similar view has been taken subsequently in case of ***Dharamveer Prasad*** (supra), noticing the non-compliance of the provisions under Section 42 of the Act, paragraphs 6 and 7 of which are relevant and are being reproduced hereinbelow for the benefit of quick reference: -



“6. Even if we were to assume that the anxiety of the investigating officer was to reach Raxaul which is on the international border and therefore, he did not have the time to record said information as per requirement of Section 42 of the Act, the matter does not rest there. There are other suspicious circumstances affecting the credibility of the prosecution case. Though, the investigating officer has stated that he had moved to Raxaul along with a team and two independent witnesses, the said independent witnesses were not examined. No explanation is forthcoming on this count also. That apart from the materials on record it appears that no memos including the seizure memo were prepared at the spot and all the papers were prepared on reaching the police station at Patna on 4-7-2007.

7. The above, in our considered view, would affect the prosecution case with the vice of non-compliance of Section 42 of the Act and the law laid down by the Constitution Bench in Karnail Singh [Karnail Singh v. State of Haryana, (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887].”

21. As we have noted hereinabove that the seizure list witnesses were examined. PW 1, a seizure list witness, did not support the prosecution's case that the recovery of ganja was made from the vehicle. He rather gave altogether a different story about the circumstance in which he had seen the bag filled with ganja



lying on the ground near the vehicle when he had reached the place of occurrence. According to his evidence, two other persons were insisting the driver of the vehicle to load ganja, which the driver was objecting to. During the course of some altercation between the occupants of the vehicle and the persons, who were trying to load ganja, the police had arrived at the place of occurrence, according to PW 1. In such situation, in our view, the defence is rightly relying on the evidence of PW 1.

22. On the sole ground of non-compliance of the requirement under Section 42(1) of the NDPS Act, in our opinion, the conviction recorded by the trial court cannot be sustained in view of series of decisions rendered by the Supreme Court, as noted above.

23. We have not gone into other points raised on behalf of the appellants in the present appeals, as we are satisfied that non-compliance of the provisions under Section 42 of the NDPS Act by the SHO (PW 4) was fatal to the prosecution.

24. The impugned judgment of conviction dated 25.01.2018 and order of sentence dated 29.01.2018 passed by learned 1st Additional Sessions Judge-cum-Special Judge (NDPS) Act, Aurangabad, in G.R. No. 06 of 2015/07 of 2015, arising out



of the same Nabinagar P.S. Case No. 138 of 2015, cannot be sustained and are accordingly set aside.

25. These appeals are accordingly allowed.

26. Let the appellants, namely, Navkej Kumar Patel @ Naukej Kumar Patel (appellant in Cr. Appeal (DB) No.415 of 2018) and Chotu Kumar Yadav (appellant in Cr. Appeal (DB) No.455 of 2018) be released from jail forthwith, if not required in any other case.

27. Appellant Govind Kumar Patel (appellant in Cr. Appeal (DB) No. 270 of 2018 is on bail. He is discharged from the liabilities of bail bonds and the sureties, if any.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Pawan-niku/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	06.05.2023
Transmission Date	06.05.2023

