

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

**C.R.A. 118 of 2019
(CRAN 2 of 2021)
(CRAN 3 of 2021)**

Sunil Kumar Roy & Anr.

-Vs-

The State of West Bengal

For the Appellant	:	Mr. Sekhar Kumar Basu, Id. Sr. Adv., Mr. Soubhik Mitter, Adv. Ms. Rajnandini Das, Adv.
For the State	:	Mr. Saibal Bapuli, Id. A.P.P., Mr. Bibaswan Bhattacharya, Adv.
Heard on	:	21.04.2023, 24.04.2023 & 27.4.2023.
Judgment on	:	28.04.2023.

Joymalya Bagchi, J.:-

1. Appeal is directed against judgment and order dated 18th December, 2018 and 19th December, 2018 passed by the learned Judge, Special Court under the NDPS Act-cum-Additional Sessions Judge, 1st Court, Bankura in Special Case No.21 of 2017 convicting the

appellants for commission of offence punishable under Section 20(b)(ii)(c) of the NDPS Act and sentencing them to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- each, in default, to suffer rigorous imprisonment for one year more.

2. Prosecution case, as alleged against the appellants is to the effect that on 27th July, 2017, SI, Ashis Majumdar (PW1), Special Operation Group, CID, West Bengal received credible information that a gang of professional criminals dealing in Andhra Pradesh Malkhana made cannabis in high percentage are clandestinely operating by procuring/selling the contraband to different users for wrongful gain. Information revealed that the criminals used to carry their stock in car from Andhra Pradesh. They would transport the contraband in the night between 27.7.2017 to 28.7.2017 and reach Burdwan by 28.7.2017. The matter was informed to the superior and with his consent PW1 and his team proceeded to work out the information. Enroute PW1 contacted his source who informed the contraband would be carried in a red coloured Alto vehicle bearing registration mark JH 01 CJ 9992 and would cross Bishnupur more in the morning or early noon through NH 60. The team reached Bishnupur Police Station and diarised the information vide Bishnupur P.S. G. D. Entry No.1144 dated 28.07.2017. Thereafter, the raiding team being accompanied by police officials of Bishnupur Police Station lay ambush in front of

Hindu Hotel of Bapi Mahato on NH 60. Around 11.30 hours they stopped a red Alto car bearing registration mark JH 01 CJ 9992 and intercepted the appellants. Written notice was given to the appellants offering them to be searched before a gazetted officer or Magistrate. They expressed their willingness to be searched before a gazetted officer. Inspector of DDI, Prasanta Kumar Nandi (PW9) was summoned to the spot. Upon search, two white plastic bags containing 41.155 kgs. and 41.860 kgs. each suspected to be ganja were recovered. Samples were drawn from the seized consignment. Appellants were arrested and along with the vehicle and seized contraband were brought to the police station. PW1 lodged first information report resulting in registration of Bishnupur Police Station Case No.122 dated 28.07.2017 under Sections 20(b)(ii)(c)/29 of the NDPS Act. In course of investigation, the seized contraband was produced before the Judicial Magistrate by the Investigating Officer (PW11). Inventory was made in presence of the Judicial Magistrate and certificate issued. Photographs and videography of the inventory were also done. Samples drawn from the contraband and sent for chemical examination. Report of the State Drug Control and Research Laboratory, Ext.15 was obtained. In course of investigation, complicity of one Prosenjit @ Mahabir Chowdhury transpired and charge-sheet was filed against the appellants and said Prosenjit @ Mahabir Chowdhury.

3. Charges were framed under Sections 20(b)(ii)(c)/29 of the NDPS Act against the appellant and the said Prosenjit @ Mahabir Chowdhury. They pleaded not guilty and claimed to be tried.

4. Prosecution examined 11 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

5. In conclusion of trial, the trial Judge by judgment and order dated 18.12.2018 and 19.12.2018 convicted and sentenced the appellants, as aforesaid. Co-accused viz., Prosenjit @ Mahabir Chowdhury was acquitted on the ground of lack of evidence.

6. Ashis Majumdar (PW1) is the leader of the raiding party. He deposed he received prior information with regard to the transportation of cannabis by a gang of persons from Andhra Pradesh to West Bengal. He informed the matter to his superior and as per his permission, he proceeded with his team comprising of ASI Timir Acharjee, Constable Sushil Kumar (PW4) and Constable Kazi Nazrul Islam (PW10) to work out the information. He proved the command certificate No.223 of SOG, CID dated 27.07.2017, Ext.1. As per information of source, he proceeded to Bishnupur police station. He diarised the matter at the local police station being GD Entry No.1144 dated 28.07.2017, Ext.13. Thereafter, the team along with local police including NVP Asit Patra (PW5) proceeded near the Hindu Hotel of Bapi Mahato on NH 60.

Around 11.30 hours, they apprehended a red coloured Alto vehicle being registration mark JH 01 CJ 9992. The appellants were found inside the vehicle. They issued notice upon the appellants offering them to be searched before a gazetted officer or a Magistrate, Exts.4, 4/1. Appellants expressed their desire to be searched before a gazetted officer. Inspector, Prasanta Kumar Nandi (PW9) attached to DDI, Bankura was requested to come to the spot. Upon his arrival, search was conducted. In course of search, two white plastic bags containing 41.155 kgs. and 41.860 kgs. of ganja each were recovered from the rear seat of the vehicle. The seized contraband tested positive to ganja. Two samples of 50 grams each were drawn from the said contraband and marked as A/1 and A/2 respectively. Inventory and seizure list were prepared. Seizure was made in presence of local persons. PW1 proved the seizure list, Ext.5 and the inventory list, Ext.6. Appellants were arrested. Vehicle was also seized. They were brought along with the contraband and other seized articles including the vehicle to Bishnupur Police Station. PW1 lodged written complaint, Ext.7. He sent message to the Head Quarters and District Control Room, Ext.8 (series). He deposited the seized articles and vehicle at Bishnupur Police Station.

7. Sushil Kumar Rai (PW4) and Kazi Nazrul Islam (PW10) are Constables attached to Special Operation Group, West Bengal. They accompanied PW1 in the raid. They proved their signatures on the

inventory list as well as on the labels pasted on the contraband and the samples drawn therefrom.

8. NVF Asit Patra (PW5) was attached to Bishnupur Police Station. He accompanied the raiding team and corroborated P.Ws.1, 4 and 10. He proved his signatures on the seizure list, inventory list and the labels.

9. Biswanath Hembram (PW7) is another Police Officer attached to Bishnupur Police Station. He proved the general diary recorded at the police station, Ext.13.

10. Prasanta Kumar Nandi (PW9) is the gazetted officer who was present at the time of search. He proved his signature on the seizure list and inventory list.

11. Pranab Kumar Ghosh (PW11) is the Investigating Officer. He proved the certificate issued by the learned Magistrate under Section 52A of the NDPS Act, Exts.14 and 14/1. He deposed he sent the samples for chemical test at State Drug Control and Research Laboratory, Ext.15. He submitted charge sheet.

12. Mr. Sekhar Kumar Basu, learned Senior Advocate with Mr. Soubhik Mitter argued the search and seizure is vitiated on the ground of complete non-compliance of Section 42 of NDPS Act. In FIR, PW1 stated he received credible information that narcotics were being transported in a car from Andhra Pradesh to West Bengal between the

night of 27.07.2017 and 28.07.2017. The information was not reduced in writing. Oral intimation to a superior would not comply the requirements of Section 42 of NDPS Act. He relied on various authorities in support of his contentions.

13. Mr. Bibaswan Bhattacharyya, learned Advocate for the State argued that the vehicle used to transport narcotics was a hired one. Hence, Section 43 and not Section 42 of NDPS Act is attracted. He further submitted search and seizure was in presence of a gazetted officer, i.e. P.W. 9. Under such circumstances, section 42 of the NDPS Act is not attracted. He prays for acquittal.

14. Analysis of the evidence on record show recovery was made from a red Alto vehicle bearing registration mark JH 01 CJ 9992. Prosecution argued that the vehicle was let out to the appellants and was a public conveyance. Unfortunately, no evidence is forthcoming to establish this vital fact. No registration certificate/permit of the vehicle has been produced. No other evidence is also forthcoming that the vehicle in question was a public conveyance. Prosecution had examined P.W. 6 to establish the fact that the vehicle was let out on hire. But the said witness turned hostile. He merely stated he is a driver of Atithi Travel and one Dilip, brother of co-accused Prasenjit had hired a travel vehicle. He is mum whether the vehicle in question had been let out to

the appellants. Hence, prosecution has failed to prove that the seized vehicle had been let out to the appellants and was a public conveyance.

15. Section 43 of the NDPS Act, inter alia, deals with seizure of narcotics from a public place or in transit. The word 'public place' includes a public conveyance. Section 43 of the NDPS Act would not apply to seizure of narcotics from a private vehicle. In **State of Haryana v. Jarnail Singh and others**¹ the Apex Court observed if a public conveyance is searched in a public place, the search is governed by section 43 of the NDPS Act. It held as follows:-

“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.”

[emphasis supplied]

16. In **State of Rajasthan vs. Jagraj Singh**² the Apex Court, inter alia, held recovery from a vehicle which is not a public conveyance while it was traveling down a public thoroughfare would not be construed to be a recovery from a public place attracting section 43 of the NDPS Act. The Bench held as follows:-

“18. The Explanation to Section 43 defines the expression “public place” which includes any public conveyance. The word “public

¹ (2004) 5 SCC 188

² (2016) 11 SCC 687

conveyance” as used in the Act has to be understood as a conveyance which can be used by the public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public motor vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.”

17. The view was reiterated in ***Boota Singh and Others vs. State of Haryana***³.

18. The aforesaid authorities make it amply clear search of a vehicle in a public place would be regulated by section 43 of the NDPS Act if the prosecution proves the vehicle is a public conveyance.

19. As discussed above, prosecution has singularly failed to prove that the vehicle in question was a public conveyance. Hence, I am unable to agree with Mr. Bhattacharya that search in the instant case is governed by section 43 of the NDPS Act.

20. Section 42 of the NDPS Act governs search and seizure of narcotics which is kept in a building, conveyance or enclosed space. Section 42(1) provides any empowered officer of the departments of the Central Government or State Government as specified therein if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug which is liable for seizure is kept or concealed in any building, conveyance or any enclosed space he may between sunrise and sunset enter into and

³ 2021 SCC OnLine SC 324

search such building, conveyance and space without search warrant or authorization. The proviso to the said sub-section enjoins such search may even be conducted between sunset and sunrise provided such officer has reason to believe and records the ground of his belief that delay in obtaining search warrant would offer opportunity for concealment of evidence and escape of offender. Sub-section (2) of the said section states that the information recorded in writing in sub-section (1) or the grounds of belief recorded under the proviso shall within 72 hours or the ground of belief recorded shall within 72 hours be sent to his immediate superior.

21. The Constitution Bench in ***Karnail Singh vs. State of Haryana***⁴ held total non-compliance of the aforesaid requirement of section 42 of the NDPS Act is impermissible. The Bench held as follows:-

“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

⁴ (2009) 8 SCC 539

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.”

[emphasis supplied]

22. Evidence on record shows there is complete non-compliance of the aforesaid provision of law. In the FIR. P.W. 1 stated he had credible information that a group of persons from Andhra Pradesh were transporting cannabis of high quality in a car between the night of 27.07.2017 and 28.07.2017. He did not reduce the information into

writing. He claimed that he has orally informed his superior. Pursuant to his direction, he proceeded to work out the information. Thereafter, he proceeded towards Bishnupur and lodged general diary (Exhibit 13). Therefrom, a team laid ambush in front of Hindu Hotel of Bapi Mahato (NH 60). At 11:30 hours they saw the red Alto vehicle bearing registration No. JH 01 CJ 9992 and detained it. Search led to recovery of 41.15 kgs. and 41.860 kgs. of ganja in two white plastic bags.

23. The aforesaid evidence show P.W. 1 had prior information that a gang of criminals were transporting narcotics from Andhra Pradesh to West Bengal in a car between the night of 27.07.2017 and 28.07.2017. Pursuant to such information P.W. 1 had proceeded to the road which led to the recovery. It was not a chance recovery. P.W. 1 received the prior information at the police station and had ample opportunity to reduce it into writing before he left the station. Admittedly, he had not reduced the information in writing and sent it to his superior. Oral communication in this regard would not suffice. There appears to be a total non-compliance of section 42 of the NDPS Act. No cogent explanation is forthcoming why he failed to do so.

24. Even the general diary lodged at Bishnupur Police Station (Exhibit 13) is completely silent with regard to the prior information. Subsequent communication to the superior (Exhibit 8 series) merely relates to the arrest of accused and does not refer to any prior

information. Hence it cannot be said there was substantial compliance of section 42 of the NDPS Act immediately after the search.

25. It is argued recovery was in presence of a gazetted officer (P.W. 9). Hence, the seizure is governed by section 41 (2) of the NDPS Act. I am unable to agree with this proposition too. In ***M. Prabhulal vs. Assistant Director, Directorate of Revenue Intelligence***⁵, the Bench held only when a search is conducted or authorized by a gazetted officer, the search would fall within the scope of section 41(2) and not 42 of the NDPS Act. The Bench elucidated as follows:-

“14. Section 41(1) which empowers a Magistrate to issue warrant for arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, has not much relevance for the purpose of considering the contention. Under Section 41(2) only a Gazetted officer can be empowered by the Central Government or the State Government. Such empowered officer can either himself make an arrest or conduct a search or authorize an officer subordinate to him to do so but that subordinate officer has to be superior in rank to a peon, a sepoy or a constable. Sub-section (3) of Section 41 vests all the powers of an officer acting under Section 42 on three types of officers (i) to whom a warrant under sub-section (1) is addressed, (ii) the officer who authorized the arrest or search under sub-section (2) of Section 41, and (iii) the officer who is so authorized under sub-section (2) of Section 41. Therefore, an empowered Gazetted officer has also all the powers of Section 42 including the power of seizure. Section 42 provides for procedure and power of entry, search, seizure and arrest without warrant or authorization. An empowered officer has the power of entry into and search of any building, conveyance or place, break open any door, remove obstruction, seize contraband, detain, search and arrest any person between sunrise and sunset in terms provided in sub-section (1) of Section 42. In case of an emergent situation, these powers can also be exercised even between sunset and sunrise without obtaining a search warrant or authorization, in terms provided in the proviso to sub-section (1) of Section 42. Sub-section (2) of Section 42 is a mandatory provision. In terms of this provision a copy of information taken down in writing

⁵ (2003) 8 SCC 449

*under sub-section (1) or ground recorded for the belief under the proviso thereto, is required to be sent by the officer to his immediate superior official. It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted officer. But on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted officer contemplated by sub-section (2) of Section 41, when such a Gazetted officer himself makes an arrest or conducts search and seizure. It would be useful to also notice Section 43 which relates to power of seizure and arrest in a public place. Any officer of any of the departments mentioned in Section 42 is empowered to seize contraband etc. and detain and search a person in any public place or in transit on existence of ingredient stated in Section 43. It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted officer whereas Section 41(2) requires an officer to be so. A Gazetted officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a Gazetted officer. The High Court is, thus, right in coming to the conclusion that since the Gazetted officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decisions in *State of Punjab v. Balbir Singh* [(1994) 3 SCC 299], *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513] and *Beckodan Abdul Rahiman v. State of Kerala* [(2002) 4 SCC 229] on the aspects under consideration are neither relevant nor applicable.”*

26. Similarly, in ***Sekhar Suman Verma vs. Superintendent of Narcotics Control Bureau And Another***⁶ where the raid was conducted by a gazetted officer, the Apex Court held section 42 of the NDPS Act does not apply.

⁶ (2016) 11 SCC 368 (see para 12)

27. The situation in the present case is different. Prior information was received and the raid was conducted by P.W. 1. Admittedly, he was not a gazetted officer. Thus, the search and seizure was done by an empowered officer (who is not a gazetted officer) under section 42 of the NDPS Act and not by a gazetted officer or by an officer authorized by the said gazetted officer under section 41(2) of the NDPS Act. It is argued a gazetted officer, P.W. 9 was summoned and was present at the search. This would not alter the fact situation leading to the recovery. Raid was conducted by P.W. 1 who is not a gazetted officer upon receipt of prior information at the police station. The aforesaid facts attract section 42 of the NDPS Act which requires recording of the said prior information received by the empowered officer and communicated to his immediate superior. This was not done. In course of the raid, appellants were detained on the suspicion they were carrying narcotics. Thereafter, P.W. 1 summoned a gazetted officer i.e. P.W. 9 to be present during the search in terms of section 50 of the NDPS Act. Presence of the gazetted officer in terms of section 50 of the NDPS Act would not establish that the search was either conducted by the said gazetted officer or the latter had authorized the empowered officer i.e. P.W. 1 under section 41(2) of the NDPS Act to hold the same. A gazetted officer who is present at the time of search in terms of section 50 of the NDPS Act is not a member of the raiding

party. Hence, search cannot be said to have been conducted under his leadership or by an officer authorized by him under section 41(2) of the NDPS Act. His presence would not absolve P.W. 2 from complying with the mandatory requirements of section 42 of the NDPS Act.

28. The other authorities relied on behalf of the State are also distinguishable.

29. In ***Jalil Ali vs. State of West Bengal***⁷ a prior information was received by P.W. 5, Assistant Commandant Jay Prakash who was a gazetted officer. He authorized Commandant Inspector Bachhan Singh to proceed to the spot. Thereafter, he searched the spot and search was held in presence of Jay Prakash. In the factual background, this Court held that the search and seizure was under the auspices of the gazetted officer and governed by section 41(2) and not 42 of the NDPS Act.

30. Similarly, in ***Balkar Singh And Another vs. Union of India***⁸ the raid was held under the leadership of S.P. Singh, Deputy Director, DRI who was a gazetted officer and the case was governed by section 41 of the NDPS Act.

31. In the light of aforesaid discussion, I am of the opinion there is total non-compliance of section 42 of the NDPS Act in the matter of

⁷ 2023 SCC OnLine Cal 681

⁸ 2022 SCC OnLine Cal 1626

search and seizure of the narcotics which has vitiated the trial. Appellants are accordingly acquitted.

32. The appeal is allowed. In view of disposal of the appeal, the connected application, if any, stands disposed of.

33. Appellants shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

34. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

35. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)