

359 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1246-SB-2004

Reserved on: 19.12.2022

Date of Pronouncement: 09.01.2023

Jasbir Singh

...Appellant

vs.

State of Haryana

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

Present : Mr. Gurnoor Singh, Advocate
for the appellant.

Mr. Rajinder Kumar, DAG, Haryana.

N.S.Shekhawat J.

The present appeal has been preferred against the judgment of conviction dated 14.05.2004 and order of sentence dated 15.04.2004, whereby the present appellant has been convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to be as the 'Act') and sentenced to rigorous imprisonment for a period of six months and to pay a fine of Rs.10,000/- and in default thereof, to further undergo imprisonment for three months.

The story of the prosecution, as it emerges from the report under Section 173 Cr.P.C. is that on 06.11.1999, ASI Jahangir Singh along with other police officials was present on patrolling in crime detection duty and in the meantime, they received a secret information that Jasbir Singh @ Pappi S/o Darshan Singh, resident of Village Sujra was coming to village Sujra after

loading crushed poppy husk in car bearing registration No. HR-02B/6651, driven by Harbhajan Singh S/o Sardool Singh and if nakabandi was held, they could be apprehended at the spot. Finding the said information reliable, the naka was set up and after sometime, the car bearing registration No.HR-02B/6651 came from Babain side and turned towards village Sujra. On seeing the police party, the driver stopped the car immediately and ran away after leaving the said car. One person was caught at the spot and he disclosed his name to be Jasbir Singh @ Pappi S/o Darshan Singh resident of Sujra and the car was also taken into possession. On searching the car, a gunny bag was found on the back seat and during the course of interrogation, the name of the driver, who had fled from the spot, was found to be Bhajan Singh S/o Sardool Singh, resident of village Sujra. Since the police party had suspicion that some narcotic substance was being carried in the car, a notice under Section 50 of the NDPS Act was served upon Jasbir Singh and Jasbir Singh, suspect, opted to get his search conducted in the presence of a Gazetted Officer. The memos were prepared at the spot in this regard and the DSP, Headquarter was requested to reach at the spot by sending a wireless message. After sometime, the DSP reached at the spot in the government vehicle and on his direction, the search was conducted and 20 kgs of crushed poppy husk was recovered from the car, out of which 250 grams was separated as sample. The sample as well as the residue poppy husk were converted into separate parcels and were sealed with the seals bearing impressions 'JS' and the DSP also affixed his seal bearing impressions 'BS'. The car bearing registration No.HR-02B/6651 was also taken into possession by the police and the seal bearing impressions 'JS' was handed over to ASI Siya Nand and the recovery memo was also attested by the

DSP. After necessary formalities as per law, the FIR in the instant case was registered.

After completion of the investigation, the challan under Section 15 of the Act was presented against Jasbir Singh only. After complying with the mandatory provisions of Section 207 of Code of Criminal Procedure, the accused was charged-sheeted under Section 15 of the NDPS Act, to which he pleaded not guilty and claimed trial.

To support the charge, the prosecution examined seven witnesses and had given up Deputy Superintendent of Police Ashok Kumar, UGC Des Raj, Kundan Singh and Shiv Kumar as unnecessary. Ram Kishan No.191, S.P.Office, Kurukshetra, appeared as PW-1, who received the report under Section 57 of the NDPS Act and the same was shown to the welfare Inspector. Bishan Singh, retired DSP was examined as PW-2, who, on receipt of a V.T. message, reached at the spot on 06.11.1999 and found that a notice under Section 50 of the Act had already been served upon the accused. After verifying the facts, he directed ASI Jahangir Singh to conduct the search of the gunny bag from the car and it was found that the gunny bag was lying on the back seat of the car bearing No.HR-02B-6651 and the accused was sitting with that gunny bag. On search of the gunny bag, 20 kgs. of the poppy husk was found and the necessary formalities were completed in accordance with the mandatory provisions of the Act. He supported the case of the prosecution in totality. The prosecution examined HC Ishwar Singh and C. Jawant Lal, as PW-3 and PW-4 respectively and their statements were formal in nature. Ranbir Singh, SI was examined as PW-5, who was posted as SI/SHO of Police Station Babain on 06.11.1999 and he had recorded the formal FIR Ex. PE/1 on receipt of the ruqqa

Ex.PE. On the same day, ASI Jahangir Singh produced before him the accused Jasbir Singh along with parcels of sample, residue, specimen, seal impressions and the car bearing No.HR-02B/6651 along with the witnesses and after verifying the facts from the accused and the witnesses, he had affixed his seal 'RS' on both the parcels of sample and residue as well as on the specimen seal impressions. He also directed ASI Jahangir Singh, deposited the case property etc. with the MHC of the police station and the accused was further interrogated. ASI Siya Nand, was examined as PW-6, who was part of the police team and he explained the case of the prosecution with regard to search and seizure and supported the case of the prosecution, as explained in the FIR. ASI Jahangir Singh is the star witness of the prosecution and was examined as PW-7. He supported the case of the prosecution in totality and was cross-examined at length.

After the closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C. and he had taken the defense that he had been falsely implicated in the present case at the instance of Harbhajan Singh S/o Sardool Singh, resident of Village Sujra. In fact the recovery was affected from Harbhajan Singh and his car and the appellant was wrongly involved. His real cousin Jeet Singh S/o Chuhar Singh had died in an accident in Kurukshetra and he was present near his dead body. Harbhajan Singh colluded with the local police and got himself declared innocent wrongly.

To prove his defense, the accused examined DW-1 Davinder Singh, who was ex-sarpanch of village Haripura / Sujra. He deposed that Jeet Singh S/o Chuhar Singh had died in an accident on 05.11.1999 and his dead body was brought to the village in the evening on 06.11.1999. The accused

Jasbir Singh remained present during the post-mortem and till the cremation of Jeet Singh by the members of the family. Ashok Kumar, DSP headquarter was examined as DW-2. The said witness had conducted the inquiry on receipt of the application moved by Harbhajan Singh S/o Sardool Singh and found Harbhajan Singh innocent. He had mentioned in his report that Jeet Singh S/o Chuhan Singh had met with an accident. However, it did not appear during his inquiry that the dead body of Jeet Singh was brought by Jasbir Singh, accused on 06.11.1999 in the village.

I have heard learned counsel for the parties and with their able assistance, I have gone through the trial Court record carefully.

Learned counsel for the appellant has vehemently argued that the alleged recovery of the contraband had been effected on the basis of a secret information and the Investigating Officer was under a legal obligation to comply with the provisions of Section 42 of the Act and in absence of non-compliance of the provisions of Section 42 of the Act, a prejudice has been caused to the accused and he is liable to be acquitted only on this ground. The said submission has been opposed by the learned State Counsel on the ground that in cases of recovery of a contraband from a conveyance or public place, the provisions of Section 43 of the Act read with Section 49 of the Act would be applicable and not the provisions of Section 42 of the Act.

I have considered the submissions made by learned counsel for the parties in the light of the evidence on record in the settled law and I find sufficient force in the said argument raised on behalf of the present appellant.

Still further, the Hon'ble Supreme Court considered the applicability of Section 42 of the NDPS Act in similar circumstances in the

matter of *Boota Singh & others Vs. State of Haryana, 2021(2) RCR (Criminal) 892*, 2021 AIR (Supreme Court) 1913 and held as follows:-

“10. In *Karnail Singh*, 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 Sajjan 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)

11. 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).

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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. P14 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.

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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."

Now adverting to the facts of the instant case, PW-7 ASI Jahangir Singh, who is the main witness of the prosecution admitted that Harbhajan Singh had produced the RC of the car in question during investigation and the same was taken into police possession vide recovery memo Ex.PL and the same is also on the judicial file. The said witness admitted that the secret information had not been reduced into writing and the same was not sent to the police station or higher authority. Thus, the evidence clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to Harbhajan Singh. Even the Registration Certificate clearly suggested that Harbhajan Singh was the registered owner of the car in question from which the contraband was recovered. Even the explanation appended to Section 43 of the Act clearly shows that a private vehicle would not come within the expression 'public place' as mentioned in Section 43 of the Act. Consequently, it cannot be said that the provisions of Section 43 of the NDPS Act would be attracted in the

instant case and the findings recorded by the learned trial Court are liable to be reversed. The facts of the case and the evidence on record clearly established that it was mandatory to comply with the provisions of Section 42 of the Act and as per the admitted stand of the prosecution; there was complete non-compliance of the said requirement of law. Consequently, following the decisions of the Hon'ble Constitutional Bench in the matter of *Karnail Singh Vs. State of Haryana, (2009) 8 SCC 539, State of Rajasthan Vs. Jagraj Singh alias Hansa, (2016) 11 SCC 687*, it is held that the non-compliance of the mandatory provisions of Section 42 of the Act is impermissible and the learned trial Court committed error in rejecting the submissions made by learned counsel for the appellant in this regard.

Consequently, it is held that the impugned judgment passed by the learned trial Court suffers from the patent illegality and infirmity and is liable to be set aside by this Court. As a consequence, the appeal is allowed and the impugned judgment dated 14.05.2004 and order of sentence dated 15.05.2004, passed by the learned Special Court, Kurukshetra are set aside.

Pending applications, if any, are also disposed off, accordingly.

The trial court record be sent back, immediately.

09.01.2023

Hemlata

(N.S.SHEKHAWAT)
JUDGE

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes