

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

SR. No.466

**CRA-S-506-SB-2005 (O&M)
Reserved on:25.01.2023
Pronounced on:31.01.2023**

Harinder Singh

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

**Present: Mr.Harsh Aggarwal, Advocate,
for the appellant.**

Ms. Sheenu Sura, DAG, Haryana.

N.S. SHEKHAWAT, J.

The present appeal has been preferred against the judgment of conviction dated 17.02.2005 and order of sentence dated 19.02.2005 passed by the learned Special Judge, Rewari, whereby the appellant has been convicted for the offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.5,000/- with default stipulation.

The case of the prosecution in brief is that on 10.11.2003, when ASI Niranjan Lal was present in a Govt. vehicle bearing Registration No.HR-35A 9739, driven by Mangtu Ram at NH-8 near village Kathuwas for patrolling, he received a secret information that one person was standing nearing village Asalwas at NH-8 to board the bus for Delhi with a gunny bag containing poppy husk and was signaling the vehicles to stop. On this,

the complainant-ASI Niranjan Lal reached Kasola Chowk where HC Ved Kumar, C. Suresh Kumar, C. Satbir, were already present. Thereafter, they proceeded to the spot. A person was seen carrying a gunny bag in his right hand and on interrogation, he disclosed his name as Harender Singh son of Bant Singh resident of Ram Nagar Basti Railway Station, Sangrur. A notice under Section 50 of the Act was served upon him, on which the accused opted to get himself searched by a gazetted officer. DSP Jag Pravesh Dahiya was called at the spot and in his presence, the search was conducted on his instructions. The search of the gunny bag led to the recovery of poppy husk weighing 40 kgs and out of the recovered substance, two samples each weighing 100 grams were separated. The samples as well as the remaining quantity of the contraband were properly sealed and were taken into possession vide separate recovery memo. The ruqa was sent to the police station and the formal FIR was ordered to be registered against the accused. After necessary investigation, the challan was presented in the competent court by the police.

Finding a prima facie case, the accused was ordered to be charge sheeted under Section 15 of the Act, to which he pleaded not guilty and claimed trial.

In order to bring home the guilt of the accused/appellant, nine witnesses were examined by the prosecution. ASI Inder Singh was examined as PW-1, who received the ruqa Ex.PA from ASI Niranjal Lal and recorded the formal FIR and made his endorsement on the ruqa. PW-2 MHC Suraj Bhan tendered his affidavit Ex.PB in his evidence. HC Ved Kumar was associated by ASI Niranjan Lal and after forming a team, the search of the accused and the gunny bag were conducted, which led to the

recovery of the poppy husk, weighing 40 kgs. He supported the case of the prosecution. SI Randhir Singh was examined as PW-4, who prepared the final report under Section 173 Cr.P.C. and submitted the same in the court. C. Dharam Pal, Draftsman, was examined as PW-5, who prepared the scaled site plan Ex.PW5/A on the pointing out by ASI Inder Singh. ASI Niranjana Lal, who was the star witness of the prosecution, was examined as PW-6. He stated that on receipt of secret information, the raid was conducted and a person holding a gunny bag in his right hand was apprehended and he disclosed his name as Harender Singh son of Bant Singh. A notice under Section 50 of the Act was served upon him and the search was conducted at the instance and in the presence of DSP Jag Parvesh Dahiya. On weighing, the recovered poppy husk was found to be 40 kgs and two samples of poppy husk were drawn from the total quantity. He conducted the initial investigation and also produced the case property, witnesses and the accused before the SHO. After this, the further investigation was conducted by ASI Inder Singh. In his cross-examination, he admitted that he had not sent the secret information to his higher officer. He stated that the place of occurrence was a public place and the persons were coming and going there in the vehicles and efforts were made to join the public witnesses, but none was prepared. No person from the public was joined when notice under Section 50 of the Act was served upon the accused. He further stated that on that day, the case property gunny bag did not contain any seal. The case property also did not bear the round seal of the police station. Even the SHO had not marked his seal on the case property and SHO had not signed any of the papers prepared by him during the investigation. He had deposited the case property with MHC. PW-7 Constable Satbir Singh was part of the

police team, which had recovered the poppy husk from the accused. Still further, DSP Jag Parvesh Dahiya was examined as PW-8, who was called at the spot and in his presence, the recovery was effected from the accused/appellant. The prosecution further examined C. Vijay Pal as PW-9, who tendered his affidavit Ex.PW9/A in evidence.

After the closure of the prosecution evidence, the statement of accused-appellant was recorded under Section 313 Cr.P.C and he pleaded his false implication in the present case. However, he assigned no reason for false implication. He also opted to lead defence evidence, however, later on no defence witness was examined by him.

Learned counsel for the appellant submitted that the mandatory provisions of Section 42 of the ACT have been violated. In the instant case, it is apparent from the contents of the FIR as well as from the testimony of PW-6 that a secret information was received with regard to the presence of the appellant near village Asalwas. However, the said secret information was not reduced into writing and was not sent to the superior officers. Still further, even PW-6 ASI Niranjan Lal admitted that he had not sent the secret information to his higher officers. Even there was no evidence on the file to indicate that any secret information was submitted to the superior officers by PW-6 ASI Niranjan Lal.

The above-said submissions made by the learned counsel for the appellants have been countered by the learned State counsel by submitting that the provisions of Section 43 of the Act would be applicable in the instant case and there was no such requirement of law. Thus, there was no need to reduce the secret information into writing and send it to the higher police officers and thus, the impugned judgment of conviction and

order of sentence are liable to be upheld.

After hearing the learned counsel for the parties and going through the entire case file, I find substance in the arguments raised by the learned counsel for the State. From the FIR Ex.PA/1, it is apparent that PW-6 ASI Niranjali Lal was present for patrolling duty near village Kathuwas and he was informed by one secret informer that a person was standing near village Asalwas on NH-8 and was carrying a gunny bag and was selling the chura post (poppy husk). The raid was immediately conducted and he was apprehended at the spot with 40 kgs of poppy husk. Even the recovery was effected from a public place and not from a private place. Thus, the provisions of Section 43 of the Act do not lay down that the information has to be taken down into writing and after recording the grounds of belief, the IO should send a copy of the same to his superior officers forthwith. Section 43 of the Act deals with the powers of seizure and arrest of a suspect in a public place and there is no requirement to inform the superior officers. It has been so held by the Hon'ble Supreme Court in the matter of **Karnail Singh vs State of Haryana, 2009(5) RCR (Criminal) 515**. The relevant observations read as under:-

“The material difference between the provisions of Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of 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”.

Still further, it has been held by the Hon'ble Supreme Court in the matter of **State of Rajasthan vs Jagraj Singh @ Hansa, 2016(3) RCR (Criminal) 539: 2016 AIR 2016 (SC) 3041** as under:-

*“18. There is one more aspect which needs to be noted. The present is a case where prosecution himself has come with case that secret information was received from informer which information was recorded in Exh. P-14 and Exh. P-21 Roznamacha and thereafter the Station House Officer with police party proceeded towards the scene. The present is not a case where the Station House Officer suddenly carried out search at a public place. The Station House Officer in his statement has also come up with the facts and case to prove compliance of Section 42. When search is conducted after recording information under Section 42(1), the provisions of Section 42 has to be complied with. This Court in **Directorate Of Revenue & Another v. Mohammed Nisar Holia, 2008(1) RCR (Criminal) 241 : (2008) 2 SCC 370**, had occasion to consider Sections 41,42 and 43 explanation. Following was stated in paragraph 14:*

"14. Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as noncompliance of the said provision

would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance....."

19. Thus the present is not a case where Section 43 can be said to have been attracted, hence, noncompliance of Section 42(1) proviso and Section 42 (2) had seriously prejudiced the accused. This Court had occasion in large number of cases to consider the consequence of non-compliance of provisions of Section 42(1) and 42(2), whether the entire trial stand vitiated due to above non compliance or conviction can be set aside. In this context reference is made to the judgment of this Court in *State of Punjab v. Balbir Singh* 1994(1) RCR (Criminal) 736 : (1994) 3 SCC 299. In the above batch of cases, the High Court has acquitted accused on the ground that search was conducted without conforming to the provisions of the NDPS Act. Sections 41,42 43 and other relevant provisions came for consideration before this Court, referring to the provisions of Chapter IV following was stated in paragraph 8:

"8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal

knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Subsection (2) of 8 1990 Cri LJ 414 (Del) Section 42 further lays down that when such officer takes down any information in writing or records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

In view of the above discussion, it is apparent that in the instant case, the provisions of Section 43 of the Act would be applicable and not the provisions of Section 42 of the Act and the argument raised by the learned Counsel for the State is liable to be accepted.

During the course of submissions, learned counsel for the appellants submitted that even though there were sufficient time and opportunity with the police to join some independent witness, but the police did not join any independent witness. Even PW-3 Ved Kumar as well as PW-6 ASI Niranjan Lal admitted that the place of recovery was a busy place, still no independent witness was joined by the police.

Learned counsel appearing for the State of Haryana submitted

that though the entire case was based on the testimonies of the official witnesses, but the same cannot be thrown out on the ground of their official status. I find sufficient force in the argument raised by learned State counsel. Even though, it is apparent from the testimonies of PW-3 Ved Kumar and PW-6 ASI Niranjan Lal that every attempt was made to join the public witnesses, but no one joined the entire procedure of search and seizure. Even otherwise, it is a matter of common experience that nobody is willing to depose against the drug paddlers and the appellant cannot derive any benefit out of the said argument. Still further, learned counsel for the appellant submitted that as per PW-6 ASI Niranjan Lal, there was no seal of the police station on the case property nor there was any other seal on the case property. Still further, learned counsel for the appellant also pointed out certain material discrepancies in the statements of various prosecution witnesses. However, the said contradictions do not affect the case of either of the parties in any manner and are liable to be rejected by this Court.

No other argument was raised.

In this case, the FIR was registered on 11.11.2003 and thus, the appellant is facing the mental agony of trial/appeal for the last more than 19 years. The appellant was only 20 years when he was arrested. Apart from that 40 kgs of poppy husk was recovered from the appellant, which is non-commercial quantity in nature. Still further, as per the custody certificate dated 23.01.2023, the appellant has already undergone 06 months and 06 days of total sentence and there is no other case against the appellant. Thus, this Court is of the considered view that it is just and expedient to reduce the sentence of the appellant to the period already undergone by him, while upholding his conviction.

In view of the above, the present appeal is partly allowed. The impugned judgment of conviction dated 17.02.2005 passed by the learned Special Judge, Rewari, is upheld, however his sentence is ordered to be reduced to the period already undergone by him. The amount of total fine imposed upon the appellant is enhanced to Rs.30,000/-, which shall be deposited with the Punjab and Haryana High Court Bar Association Lawyer's Family Welfare Fund (Account No.41564846387 SBI High Court Branch) within a period of 03 months from today, failing which the appellant shall undergo further imprisonment of 02 months.

With the above modification, the present appeal stands partly allowed in the above terms. Pending application(s), if any, shall also stand disposed of. Pending application, if any, is also disposed off, accordingly.

Case property, if any, be dealt with, and, destroyed after the expiry of period of limitation. The trial Court record be sent back.

(N.S. SHEKHAWAT)
JUDGE

31.01.2023
mks

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO