

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

212-CRM-A-1717-MA-2016

Date of Decision: 04.01.2023

State of Haryana

... Applicant

VS.

Jagjeet @ Jaggi

... Respondent

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL

Present: Mr. Surender Singh, AAG Haryana for the applicant

Sandeep Moudgil, J.

This application under Section 378(3) CrPC has been filed by the applicant seeking leave to appeal against the judgment dated 30.09.2015 passed by Addl. Sessions Judge, Bhiwani (hereinafter referred to as 'trial court') vide which the respondent has been acquitted in case FIR No.296 dated 02.06.2015 under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station Sadar Dadri.

The allegations against the respondent are that on the basis of the secret information, the petitioner was apprehended by SI Attar Singh, alongwith the help of other police officials, and Charas (sulfa) wrapped in a polythene paper was recovered from him which was 150 grams in weight Sulfa. The currency notes of Rs.3200/- were also recovered from him, which were taken into police possession vide recovery memo. As such, the case for commission of the offence under Section 20 of the NDPS Act (in short the Act) was got registered. Charges against the respondent for commission of offence punishable under Section 20(b)(ii)(B) of the NDPS Act were framed. Prosecution examined as many as 8 witnesses. The trial court, vide judgment dated 30.09.2015, acquitted the respondent of the charges leveled against him

on the ground that there is no compliance to Section 42 of the Act; no intimation was sent to the superior officers; there was no independent corroboration to the testimonies of the police officials; and there were material contradictions in the statements of the prosecution witnesses and as such the prosecution failed to make out its case beyond reasonable shadow of doubt.

Learned counsel for the applicant/State contended that secret information was not reduced into writing since the seizure of the contraband was made from a public place, as such Section 42 of the Act would not come into play. Even otherwise, the police was not bound to reduce the information into writing and forward it to the superior official in view of **Mohan Lal vs. State of Rajasthan 2015(2) RCR (CrI.) 779** and **Directorate of Revenue & Anr. Vs. Mohammad Nisar Holia (2008) 2 SCC 370**, wherein it has been held that if the search is made in a public place, there is no need to comply with the provisions of Section 42(1) & (2) of the NDPS Act.

It is further contended that the trial court failed to consider the fact that there was nothing in the defence evidence to prove that the case has been falsely registered against the respondent at the behest of the neighbours. The trial court also did not consider the fact that the efforts were made by the investigating officer to join the independent witnesses, whereas no one showed willingness to join the investigation, and therefore, giving of notice under Section 160 CrPC was also not required. Reliance has been placed on **Ramesh Kumar vs. State of Haryana 2013(4) RCR (CrI.) 320**.

Having heard ld.counsel for the applicant and going through the case file, this Court is of the considered opinion that there is no illegality or infirmity in the judgment passed by the trial court.

Firstly, it is well settled that charge under the NDPS Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment for 10 years and fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. In **Ajmer vs. State of Haryana, 2010 (2) SCR 785**, the Hon'ble Supreme Court held that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The Hon'ble Supreme Court further held that the courts will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence. The observations made by the trial court that it was incumbent upon the Investigating Officer to give the notice to them or should had at least noted down their names and addresses and should had taken some action against them regarding showing of the helplessness, can sustain in the eyes of law.

The trial court rightly emphasized the compliance of Section 42 of the Act, which has not been complied with, in this case as no effort was made by Investigating Officer to reduce the secret information in writing and inform his higher authorities instantaneously.

A perusal of the record shows that Section 50 of the Act, has not been complied with in this case. Section 50 of the Act reads as under:-

“50. Conditions under which search of persons shall be conducted.—

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

A Constitution Bench of the Hon'ble Supreme Court in **State of Punjab vs. Baldev Singh, [1999] Insc 224 (21 July 1999)**, held as under:-

“(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;

(2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is

important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.”

It is thus well settled that it is imperative upon the investigating official to inform the concerned person of his right under Sub-section (1) of Section 50 of the Act for making the search either by the Gazetted Officer or the nearest Magistrate and failure to do so, would cause prejudice to an accused. The factum of non-compliance of Section 50 of the NDPS has gone unnoticed by the trial court which is a mandatory requirement in drug seizure cases. That being the position in the present case, no ground to set aside the acquittal of the respondent is made out.

In view of the above, this Court is of the considered view that no fault can be found with the judgment passed by the trial court and as such the present application seeking leave to appeal is dismissed.

04.01.2023
V.Vishal

(Sandeep Moudgil)
Judge

- 1. Whether speaking/reasoned?
- 2. Whether reportable?

Yes/No
Yes/No