

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-57249-2023
DECIDED ON: 22.12.2023

MAKHAN PASWAN @ MAKHAN

.....PETITIONER

VERSUS

STATE OF PUNJAB

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. SPS Khaira, Advocate
for the petitioner.

Mr. Rajiv Verma, DAG Punjab.

SANDEEP MOUDGIL, J (ORAL)

1. The jurisdiction of this Court has been invoked under Section 439 Cr.P.C., seeking regular bail to the petitioner in FIR 111, dated 05.10.2021, under Sections 20, 25, and 29 of NDPS Act, 1985 (Section 25 of the Act deleted later on), registered at Police Station Sadar Banga, District Shaheed Bhagat Singh Nagar, Punjab.
2. Learned counsel for the petitioner contends that the petitioner has been falsely implicated in the present case and no recovery has been effected from his conscious possession. As per the allegation against the petitioner, 80 Kg 250 gm of Ganja was allegedly found in the vehicle, which was being driven by the petitioner, which was intercepted consequent upon the receipt of a secret information. There is non-compliance of Section 42 of the Act, as neither the complaint has not reduced the information into writing nor he had sent a copy of the alleged information so received to his immediate senior. It is submitted on behalf of the petitioner that the

vehicle from which the alleged contraband was recovered is registered in the name of Paramjit Kaur w/o Parmanand Rai, which is a private vehicle and it cannot be termed to be a public conveyance within the meaning of explanation to Section 43 of NDPS Act.

Learned counsel for the petitioner has placed reliance upon the judgment of the Apex Court rendered in the case of ***Rajender Singh vs. State of Haryana, Criminal Appeal No.1051 of 2009 decided on 08.08.2011***, wherein it has been held as under:-

"1. At about 4 p.m. on the 30th January 1997, PW-6 Inspector Kuldip Singh of the CIA Staff, Hisar sent Ruqa Ex. PG to Police Station Bhuna that while he was present at the Bus Adda of village Bhuna in connection with the investigation of a case, he had received secret information that the appellant Rajinder Singh @ Chhinder, was an opium addict and also dealing in its sale, and that he had kept some opium in the shed used for storing fodder in his farm house, and if raid was organized, the opium could be recovered. On the basis of the aforesaid Ruqa, a formal First Information Report was drawn up for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the Act"). A wireless message was also sent to the DSP, Fatehabad PW-5 Charanjit Singh to reach the spot.

2. Mr. Zafar Sadiqui, the learned counsel for the appellant, has made four submissions during the course of the hearing. He has first submitted that as the provisions of Section 42(2) of the Act had not been complied with, the conviction of the appellant could not be sustained in the light of the judgment of the Constitution Bench of this Court in Karnail Singh vs. State of Haryana 2009 (5) RCR (Criminal) 515: 2009(4) Recent Apex Judgments (R.A.J.) 638 :(2009)8 SCC 539 8 SCC 539. He has further submitted that no serious effort had been made to associate an independent witness with the search and seizure and that the link evidence in the case was also missing as the Malkhana register pertaining to the recovered opium was deposited had not been produced as evidence. He has finally submitted that as the provisions of Sections 52, 55 and 57 of the Act had not been complied with was an additional reason as to why the conviction could not be sustained. Mr. Manjit Dalal, the learned counsel for the State of Haryana, has however supported the judgments of the courts below and has pointed out that the Ruqa Exhibit PA had

been sent to the Police Station for the registration of the FIR and the fact that information had been conveyed on the wireless to DSP Charanjit Singh was sufficient compliance with the provisions of Section 42(2) of the Act. He has also controverted the other submissions made by Mr. Sadiqui.

3. We have heard the learned counsel for the parties and gone through the judgment impugned. To our mind, the entire controversy hinges on Section 42 which is reproduced below:

"42. Power of entry, search, seizure and arrest without warrant or authorization.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance. Provided that if such officer has 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.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

42(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

4. A reading of the above said provision pre-supposes that if an authorized officer has reason to believe from personal knowledge or information received by him that some person is dealing in a narcotic drug or a psychotropic substance, he should ordinarily take down the information in writing except in cases of urgency which are set out in the Section itself. Section 42(2), however, which calls for interpretation in the matter before us, is however categorical that the information if taken down in writing shall be sent to the superior officer forthwith. In Karnail Singh's case, this Court has held that the provisions of Section 42(2) are mandatory and the essence of the provisions has been set out in the following terms:

"In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham 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."

5. It is therefore clear that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced.. We have gone through the evidence of PW-6 Kuldeep Singh. He clearly admitted in his cross examination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW-5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer Inspector Kuldeep Singh.

It is, therefore, clear that there has been complete non compliance with the provisions of Section 42(2) of the Act which vitiates the conviction.

6. Mr. Dalal, the learned counsel for the respondent- State has, however, referred to paragraph 34 of the judgment of the Constitution Bench in which general observations have been made with regard to the provisions of Section 41 (1) and 42(2) with respect to the latest electronic technology and the possibility that the said provisions may not be entirely applicable in such a situation. Concededly the present case does not fall in this category. In any case the principles settled by the Constitution Bench are in paragraph 35 and have already been re-produced by us hereinabove. Likewise, the dispatch of a wireless message to PW-6 does not amount

to compliance with Section 42(2) of the Act as held by this Court in State of Karnataka vs. Dondusa Namasa Baddi 2010(4) RCR (Criminal) 367: 2010(5) Recent Apex Judgments (R.A.J.) 333 : (2010) 12 SCC 495.

It has been further submitted on behalf of the petitioner that though the charges were framed on 12.09.2022, but till date only 3 prosecution witnesses have been examined out of total 17 witnesses; the petitioner is behind the bars for the last 2 years, 2 months and 12 days.

Learned State counsel filed the custody certificate of the petitioner, which is taken on record. According to the custody certificate, the petitioner is behind the bars for the last 2 years, 2 months and 12 days and he is not involved in any other case of any nature whatsoever. He prays for dismissal of the present petition on the ground that the petitioner has been apprehended at the spot with the recovery of 80 kg and 250 grams of *ganja*, which falls within the commercial quantity. He further submits that the co-accused namely Mintu Kumari has been granted the bail being juvenile, but her husband namely Ramesh Sahni, who is also an accused in the present case is at large and is also evading the process of law.

Be that as it may, in view of the custody period undergone by the petitioner i.e., 2 years, 2 months and 12 days and in the light of the fact that the recovery of the contraband has been effected from a private vehicle, which falls within the meaning of Section 43 of NDPS Act, as has been observed by the Apex Court in Rajender Singh's case (*supra*). As far as the argument raised by learned State counsel with regard to the absconding of co-accused Ramesh Sahni is concerned, the same cannot be the reason to deny the concession of bail to the present petitioner. The Apex Court in the case of ***Sebil Elanjimpally vs. The State of Orrissa, Criminal Appeal No.1578 of 2023 decided on 18.05.2023*** has categorically observed that the co-accused, who was released on bail has not surrendered cannot be a germane factor to decline bail to the co-accused.

\ Even otherwise, the trial is moving at a snail's pace, as is evident that out of total 17 prosecution witnesses, only 3 have been examined after framing of charges on 12.09.2022, no useful purpose would be served by keeping the petitioner behind bars for an indefinite period, which would also violate the principle of right to speedy trial and expeditious disposal under Article 21 of Constitution of India, as has been time and again discussed by this Court, while relying upon the judgment of the Apex Court passed in ***Dataram Singh vs. State of Uttar Pradesh & Anr. 2018(2) R.C.R. (Criminal) 131.***

5. In light of the discussions made hereinabove, the petitioner is directed to be released on regular bail on his furnishing bail and surety bonds to the satisfaction of the Trial Court/Duty Magistrate, concerned.

6. The present petition is hereby allowed.

7. However, it is made clear that anything stated hereinabove shall not be construed as an expression of opinion on the merits of the case.

22.12.2023

Raman

(SANDEEP MOUDGIL)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>