



2024:DHC:5574



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*** IN THE HIGH COURT OF DELHI AT NEW DELHI****Date of Decision: 12th July 2024**

+ CRL.M.C. 5264/2024

JITENDER KUMAR

.....Petitioner

Through: Ms. Pooja Roy and Mr. Aditya
Aggarwal, Advocates.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Manoj Pant, APP for the State
with Mr. Mridul Arora, Mr. Nitian
Bhardwaj, Ms. Parul Sharma,
Advocates and S.I. Dinesh Kumar,
P.S.: Najafgarh.**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI****J U D G M E N T****ANUP JAIRAM BHAMBHANI J.****CRL.M.A. 20114/2024**

Exemption allowed, subject to just exceptions.

Let requisite compliances be made within 01 week.

The application stands disposed-of.

CRL.M.C. 5264/2024

By way of the present petition filed under section 482 of the Code of Criminal Procedure 1973 ('Cr.P.C.'), the petitioner impugns order dated 31.05.2024, whereby the learned Special Judge (NDPS), Dwarka Courts, New Delhi has dismissed an application filed by the

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petitioner under section 311 of the Cr.P.C., whereby the petitioner had sought to recall PW-1 : Constable Pooja for cross-examination.

2. Ms. Pooja Roy, learned counsel appearing for the petitioner argues, that the examination-in-chief of PW-1 Ct. Pooja was recorded on 12.04.2023, whereafter she was cross-examined by learned counsel who was then appearing on behalf of the petitioner.
3. Subsequently however, learned counsel appearing for the co-accused persons Dharambir and Amit was granted an opportunity to cross-examine PW-1; but they did not avail that opportunity.
4. Ms. Roy submits, that the case arises from an allegation that in a search and seizure operation conducted by S.I. Vikas, 21.3 kilograms of *ganja* was recovered from the petitioner.
5. Counsel submits, that the examination-in-chief of PW-1 Ct. Pooja would show that the information alleged to have been received telephonically by S.I. Vikas from a secret informer was admittedly reduced into writing by way of DD No.11 dated 21.05.2022 *by Ct. Pooja*, since she was posted as the Duty Officer at AATS, Dwarka on 21.05.2022 from 08:00 a.m. to 08:00 p.m.
6. Ms. Roy argues, that section 42 of the Narcotic Drugs & Psychotropic Substances Act 1985 ('NDPS Act') mandates that if information is received and the police have reasons to believe that contraband will be found in a premises, the police are entitled (between sunrise and sunset) to enter such premises, and to search, seize, and arrest *without a search warrant*, provided that such information is reduced into writing by an officer who is "*superior in rank to a peon, sepoy or constable*". It is argued that since admittedly the DD entry in the present case was



recorded by Ct. Pooja, who was not of the required rank, the information so recorded was not in compliance with the requirements of section 42 of the NDPS Act; and therefore the alleged seizure of contraband is illegal.

7. Attention in this behalf is drawn to section 42 of the NDPS Act, which reads as follows :

“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 including para-military forces or armed forces 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, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act 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 this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act; 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 this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

*Provided further that if such officer has reason to believe that a search warrant or authorisation 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 within seventy-two hours send a copy thereof to his immediate official superior.”

(emphasis supplied)

8. Ms. Roy has also drawn attention to the examination-in-chief of Ct. Pooja as recorded on 12.04.2023, the relevant extract whereof reads as under :

“1. On 21.05.2022 I was posted as Duty Officer at AATS Dwarka and duty hours were from 8 a.m. to 8 p.m. On that day at about 9 a.m. S.I. Vikas Yadav lodged his departure entry along with HC Dinesh, HC Jagat Singh, Ct. Manoj and Ct. Praveen for patrolling in the area. True copy of DD No. 3 is Ex. PW 1/A (OSR).

2. On the same day, at about 11 a.m. SI Vikas gave telephonic information that when he along with HC Jagat, HC



Dinesh, Ct. Manoj, Ct. Praveen were on patrolling duty in the area PS Najafgarh and Chhawla and at about 10:40 a.m. when they reached at Najafgarh red light **one secret informer met them and informed** that one person namely Jitender R/o Palam who use to supply Ganja would come between 12 to 1 p.m. at Nangli Industrial area near Bharadwaj Properties office for supply of Ganja. **SI Vikas further informed me** that he has informed the Inspector AATS on which Inspector AATS ordered that the secret information (sic, be) reduced into writing u/s 42 NDPS Act and further sent to ACP Dwarka.”

(emphasis supplied)

9. In support of her submission learned counsel has placed reliance upon order dated 19.01.2024 passed by a Co-ordinate Bench of this court in BAIL APPLN. No.3840/2023 titled **Gulab Rai @ Chetan vs. State (NCT of Delhi)**, to argue that in the said case, while relying on the judgement of the Supreme Court in **Directorate of Revenue & Anr. vs. Mohammad Nisar Holia**,¹ as well as judgment dated 13.06.2017 passed by the Bombay High Court in **Rajaram Kadu vs. State of Maharashtra**,² the Co-ordinate Bench has held that where the *first recipient* of the secret information with regard to an offence under the NDPS Act does not reduce such information into writing, and the information is reduced into writing by *some other person*, the information so recorded becomes mere hearsay and is therefore not in compliance with the requirements of section 42 NDPS Act.
10. It is argued that in the present case, not only was the information reduced into writing by a person (namely, Ct. Pooja) who was *not* the

¹ (2008) 2 SCC 370

² 2017:BHC-AS:14746



person who had received the information (namely, S.I. Vikas), but the person who reduced the information into writing was also *below the rank of a peon, sepoy or constable*, which is impermissible under section 42 of the NDPS Act. It is submitted therefore, that the information comprised in DD Entry No.11 dated 21.05.2021 could not have been the basis of a valid entry, search or seizure operation.

11. Despite the above legal position, Ms. Roy argues, that by reason of inadvertence, the cross-examination of PW-1 Ct. Pooja was limited only to the aspect of whether she had received a call with regard to the arrest of the petitioner and recovery of 21.3 kgs of *ganja* from him; and PW-1 was not cross-examined on other aspects relating to the requirement of section 42 of the NDPS Act, which would go to the root of the matter.
12. Ms. Roy submits, that it is for this reason that PW-1 needs to be cross-examined further, in the context of the mandatory requirements of section 42 of the NDPS Act, for which purposes she needs to be recalled as witness.
13. Issue notice.
14. Mr. Manoj Pant, learned APP appears on behalf of the State on advance copy; accepts notice; and opposes the relief prayed-for.
15. Learned APP argues that the provisions of section 42 NDPS Act only apply to cases of entry, search, seizure, detention or arrest that is to be made *between sunrise and sunset*. It is argued that this position is based on the following wording in section 42(1) of the NDPS Act :

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—(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 any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf ... 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, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) * * * * *

(b) * * * * *

(c) * * * * *

(d) * * * * *

Provided that * * * * *

Provided further that if such officer has reason to believe that a search warrant or authorisation 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) * * * * *

(emphasis supplied)

16. It is argued that in the present case, the *actual* search and seizure operation was conducted after sunset; and therefore the requirements of section 42(1) had no application; and it was sufficient for the police to have recorded their ‘reasons to believe’ as regards the existence of contraband, since there was no time to obtain a search warrant; and that the search and seizure operation was covered by the *second proviso* to



section 42 of the NDPS Act, which was duly complied with. It is their contention, that there is no legal requirement for the ‘reasons to believe’ to have been recorded by an officer of any particular rank.

17. In support of his submission, Mr. Pant places reliance upon the decision of the Supreme Court in *Karnail Singh vs. State of Haryana*.³ Furthermore, attention of the court has also been drawn to the decision of the Supreme Court in *State of Punjab vs. Balbir Singh*.⁴
18. Both sides have sought to read and interpret the verdicts of the Supreme Court in *Karnail Singh* (supra) and *Balbir Singh* (supra) in different ways to support their respective contentions. In the opinion of the court however, it is neither necessary nor proper for this court to express any opinion as to the interpretation of the said decisions in the present proceedings.
19. Suffice it to say however, that by their respective arguments, both the petitioner as well as the State have accepted and emphasised the *relevance* of section 42 of the NDPS Act in relation to the search and seizure operation which is the genesis of the prosecution in this case.
20. Accordingly, in the opinion of this court, there is merit in the submission made by Ms. Roy on behalf of the petitioner, that it was critical for the petitioner to have cross-examined PW-1 Ct. Pooja in relation to how DD Entry No.11 dated 21.05.2022 came to be recorded, since the recording of that DD entry goes to the root of the matter insofar as the search and seizure operation is concerned; and would be

³ (2009) 8 SCC 539

⁴ (1994) 3 SCC 299



relevant in deciding whether the alleged seizure of contraband has been made in accordance with and compliance of section 42 of the NDPS Act. The submission made is also of relevance in view of the decision of the Supreme Court in *Mohammad Nisar Holia* (supra) and the view taken by the Co-ordinate Bench in *Gulab Rai* (supra).

21. Suffice it to say that (i) *who receives* information; (ii) *who reduces it into writing*; and (iii) *rank of the person who reduces the information into writing*, are all aspects that are relevant for purposes of section 42 of the NDPS Act. Illegality in this behalf could vitiate the entire process of entry, search, seizure, and even arrest. Clearly PW-1 Ct. Pooja has not been cross-examined on these aspects.
22. Needless to add, that in a prosecution under the NDPS Act, which provides for harsh and stringent punishment, compliance with procedural requirements *inter-alia* as contained in section 42 of the NDPS Act, is crucial and therefore mandatory.
23. The record shows that chargesheet in the matter was filed on 11.10.2022 and charges were framed on 01.02.2023. The State has cited 19 prosecution witnesses in the matter; and PW-1 Ct. Pooja has been examined on 12.04.2023.
24. In view of the above, notwithstanding the delay in filing the present petition; considering the nature of the offence alleged; and the mandatory requirement of compliance with the procedural provisions under the NDPS Act, this court is persuaded to allow the present petition.
25. Accordingly, impugned order dated 31.05.2024 is set-aside; and PW-1 Ct. Pooja is directed to be recalled for cross-examination at the instance



of the petitioner Jitender Kumar. However, the opportunity for cross-examination will be granted on *only one date*, as per the convenience of the learned Special Judge as well as the parties, on which date the cross-examination must be completed, failing which no further opportunity will be granted for that purpose.

26. The next date in the matter before the learned Special Judge is 20.07.2024. Let PW-1 be called for the cross-examination within 02 months thereafter.
27. Petition stands disposed-of.
28. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

JULY 12, 2024/ds