2023 SCC OnLine P&H 593

In the High Court of Punjab and Haryana at Chandigarh

(BEFORE N.S. SHEKHAWAT, J.)

Kewal Singh ... Appellant;

Versus

State of Punjab and Others ... Respondents.

CRA-S-1238-SB-2004 (O&M)

Decided on June 8, 2023

Advocates who appeared in this case :

Mr. D.N. Ganeriwala, Advocate for the appellant.

Mr. Nayandeep Rana, Advocate as Amicus Curiae for the appellant.

Mr. M.S. Bajwa, DAG, Punjab.

The Judgment of the Court was delivered by

N.S. SHEKHAWAT, J.:— The present appeal has been preferred by the appellant challenging judgment of conviction and order of sentence dated 14.05.2004 passed by the learned Judge, Special Court, Jalandhar, whereby, the appellant was convicted for the commission of offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred as 'the NDPS Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/- alongwith default stipulation.

2. The brief facts of the case are that on 26.02.2000, Inderjit Singh, PW6, Investigating Officer alongwith several other police officials was present near High School of village Ghurka, where, he received a secret information that the present appellant and his co-accused were indulging in transportation and smuggling of poppy husk and on that day all the accused were present near the bridge of the water reservoir (also known as Sua in Punjab), within the area of village Ghurka and in case a raid was conducted, they could be apprehended at the spot. It was also informed that the accused were in possession of a scooter. A *rukka* was prepared by the Investigating Officer and he sent the same to the Police Station by hand through H.C. Harjinder Singh and on the basis of the same, one formal FIR was registered under Section 15 of the NDPS Act. An independent witness Vijay Kumar was also joined and message was sent to Sajjan Singh Cheema, DSP, with a request to reach at the spot. On registration of the FIR, police party raided at the disclosed place and on arrival of the DSP, they apprehended Kewal Singh while sitting on the gunny bags. However, the remaining co-accused fled away on seeing the police party and they were identified

by Vijay Kumar.

3. The present appellant was apprehended at the spot and was apprised of his right to get the search of the bags conducted from a gazetted officer or a Magistrate. PW2 Sajjan Singh Cheema, DSP, introduced himself being the gazetted officer of Government of Punjab. The accused desired to get his search conducted from him and reposed confidence in him and consent memo was prepared in this regard, which was duly thumb marked by the accused and was attested by Vijay Kumar. Further, a sample of 250 gms was separated from each bag and on weighing, the remaining quantity of poppy husk was found to 30 kgs 750 gms of poppy husk in each bag. All the 50 samples of 50 bags were converted into separate parcels and were sealed with the seal of Investigating Officer, having impression of 'IS' and the seal of the DSP was having seal impression 'SS'. The specimen seal was also prepared. The DSP retained the seal, whereas, the Investigating Officer handed over his seal to Harjit Singh. The entire contraband was taken into possession by the police and the accused was formally arrested. The initial investigation was conducted by the police and the case property was deposited with the MHC in intact position. On 27.02.2000, the entire case property was produced by ASI Suhash Chander before the Ilaqa Magistrate through the application Ex.PD. The sample was sent to the chemical examiner for analysis and was found to be containing poppy husk.

4. After the presentation of the challan, the learned trial Court considered the matter in the light of the incriminating evidence collected by the police during the course of investigation and ordered framing of charge under Section 15 of the NDPS Act. The accused pleaded his innocence and claimed trial.

5. In support of the prosecution case, the prosecution examined six witnesses. HC Amrik Singh was examined as PW1, who tendered his affidavit Ex.PA in evidence. Sajjan Singh, DSP Vigilance, Ludhiana was examined as PW2, who reached at the spot after getting the wireless message. Even, the accused was given offer to get his search conducted in the presence of a gazetted officer or a Magistrate but the accused reposed confidence in him and after recording his consent memo, the search was conducted at his instance. The prosecution further examined PW3 HC Jaswinder Singh, who was posted as MHC on 26.02.02000 and the entire recovery was deposited with him. So long as the sample, case property and papers remained in his custody, neither he tampered with the same nor allowed anyone else to tamper with the same. PW4 Ajaib Singh was examined to prove the case against the co-accused of the present appellant. ASI Subhash Chander was examined as PW5, who produced the accused and the case property in the present case in the Court in an intact condition and

after producing the case property and on return to police station, he handed over the said articles to MHC Jaswinder Singh in an intact condition. SI Inderjit Singh was examined as PW6, who was acting as Station House Officer, Police Station Goraya on the said day. He alongwith other police officials were present near the high school, Ghurka, where a secret informer informed that the present appellant alongwith other accused, in the area of water course, Ghurka, appellant and others were present with huge quantity of poppy husk in the pits on the road side and were waiting for the vehicle for transporting the contraband and were also having scooter with them. On this, FIR was registered and the appellant alongwith others was found there. The appellant was apprehended at the spot with 50 bags of poppy husk. He conducted the initial investigation also.

6. After closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr. P.C. He stated that he was innocent and had been falsely implicated at the instance of Vidya wife of Swaran Singh, Mindi son of Swaran Singh, resident of village Goraya, who is like sister of Tarsem Kaur. On 26.02.2000, Kewal Singh appellant was picked by the police in the early morning alongwith Mehangi. In fact, a writ petition was preferred before this Court regarding illegal detention of the appellant and a warrant officer had raided the Police Station Goraya on the same day and the DDR entry was made in this regard. He further stated that Billi wife of Meet and Deepa son of Meet had already been convicted by the learned Special Court as they were dealing in poppy husk trade in large scale and the appellant has been falsely implicated in the present case.

7. The accused examined HC Makhan Singh as DW1, who brought FIR No. 174 dated 11.10.1999 under Sections 302/34 IPC, which was registered on the statement of Parshotam Lal. It was registered against accused Tarsem Kaur @ Soma and also against Mangal Ram son of Telu Ram. Even, the photocopy of the FIR was exhibited as Ex.D1 and as per that, Kewal Kumar was the prosecution witness in the case alongwith Parshotam Lal. Even, the Constable Manjinder Singh was examined as DW2, who also exhibited certain documents on record.

8. Learned counsel for the appellant vehemently argued that the learned trial Court had not appreciated the evidence led by the parties in the correct perspective and the impugned judgment is liable to be set aside by this Court. He further contended that the police had already received secret information and the secret information was neither reduced into writing nor sent to the higher police officers by the police. Consequently, there was non-compliance of mandatory provisions of Section 42 of the NDPS Act and the appellant was liable to be acquitted only on this ground alone. Apart from that, even the conscious possession of the present appellant was not proved. Even,

the prosecution did not ask specific questions to show that the bags were in conscious possession of the appellant. Even, the CFSL form was not filled at the spot and it was later on prepared in the police station after a long delay. The filling of the CFSL form at the spot is very valuable safeguard to ensure that the sample seal is not tampered with at all in its analysis by the FSL. Apart from that, the independent witness Vijay Kumar was not examined and he was found to be a stock witness. Apart from that, the present appellant had taken a specific stand that he had been falsely involved in the present case due to filing of writ petition before this Court. However, there were other discrepancies in the case of the prosecution and the appellant was liable to be acquitted.

9. Opposing the submissions made by the learned counsel for the appellant, the learned State counsel argued that the provisions of Section 42 of the NDPS Act are not attracted in the present case, rather the recovery was from a public place and the provisions of Section 43 of the NDPS Act would be applicable. Apart from that, the learned trial Court had recorded detailed findings with regard to conscious possession of the appellant. Further, the case of the prosecution cannot be discarded only on the ground of non-filling of CFSL form at the spot. Even, the private witness Vijay Kumar won over by the accused and could not be examined by the prosecution. However, the appellant cannot take advantage of the same. Even, the appellant was put to specific questions in his plea in his statement under Section 313 Cr. P.C. and the minor discrepancies are liable to be ignored by this Court.

10. I have heard learned counsel for the parties and perused the trial Court record with their able assistance.

11. The main argument on behalf of the appellant was that there was total non-compliance of the mandatory provisions of Section 42 of the NDPS Act. Learned counsel for the appellant vehemently argued that in the present case, the police party headed by PW6 Inderjit Singh had received a secret information with regard to the presence of the accused with the huge quantity of the contraband. However, the secret information was neither reduced into writing nor sent to the higher police officer and the investigating officer had only sent a simple *rukka* Ex.PE to the police station and it can never be termed as sufficient compliance of the mandatory provisions of Section 42 of the NDPS Act. However, there is no force in the said submission raised by the learned counsel for the appellant. While interpreting the provisions of Section 42 and 43 of the NDPS Act, the Hon'ble Supreme Court in Criminal Appeal No. 311 of 2002 titled as "*Directorate of Revenue* v. *Mohammed Nisar Holia*" decided on 05.12.2007, has held as follows:—

> *13. Requirements of Section 42 was read into Section 43 of the NDPS Act. A somewhat different view, however, was taken*

subsequently. Decisions were rendered opining that in conducting search and seizure in public place or a moving vehicle, provisions appended to sub-section (1) of Section 42 would not be attracted. Decisions were also rendered that in such a case even sub-section (2) of Section 42 need not be complied with.

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 with Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search a nullity. A distinction therefore must be borne in mind between 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.

It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance therewith is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or housekeeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person.

Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places.

It was further held as follows:—

21. In Narayanaswamy Ravishankar *v.* Asstt. Director, Directorate of Revenue Intelligence *[(2002) 8 SCC 7 : 2003 Cri LJ 27, while dealing with search and seizure at a public place, this Court opined : (SCC PP. 8-9, Para 5).*

"5. In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of Section 42 of the NDPS Act is wholly irrelevant. Furthermore, in the mahazar which was prepared, it is clearly stated that the seizure was made by PW 1. The mahazar was no doubt drawn by one S. Jayanth. But, the contention of the learned Senior Counsel that the prosecution version is vulnerable, because Jayanth has not been examined, is of no consequence because it is PW 1 who has conducted the seizure. With regard to the alleged non-compliance with Section 57 of the NDPS Act, the High Court has rightly noted that PW 3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director."

22. XXXX XXXXX XXXX

23. In State of Haryana *v.* Jarnail Singh *(2004) 5 SCC 188 : 2004 Cri LJ 2541, (2004) 12 SCC 188, (2004 SCC (Cri) 1571, this Court, while dealing with the provisions of Section 43 of the NDPS Act, opined:*

"8. Section 43 of the NDPS Act provides that any officer of any of the departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has

reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression 'public place' includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

12. It has also been held by the Hon'ble Supreme Court in the matter of *Boota Singh* v. *State of Haryana*, (2021) RCR (Cri) 2 and 892 AIR 2021 SC 1913 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 Sajan 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).

.....

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. P-14 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.

.....

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."

(Emphasis added)

"12. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to Section 43 shows that a private vehicle would not come within the expression "public place" as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court in jagraj Singh @ Hansa, the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act".

13. Adverting to the facts of the present case, it is apparent that the police had received the secret information that the accused were present on the bridge of water reservoir. Even, when the police party raided the place, all the accused were found present with heavy quantity of the poppy husk in pits adjoining the water course and were waiting for the vehicle to transport the contraband. Consequently, the recovery of the contraband had taken place from a "Public Place" as explained under Section 43 of the NDPS Act and the provisions of Section 42 of the NDPS Act would not be applicable to the facts of the

instant case. As per Section 43 of the NDPS Act, the expression "Public Place" includes any public conveyance, hotel, shop or any other place intended for use by, or accessible to the public. When the recovery of 50 bags of poppy husk was effected, the accused were sitting at a "Public Place" and there is no need of compliance of the mandatory provisions of Section 42 of the NDPS Act and the argument raised by the learned counsel for the appellant is meritless.

14. This Court does not agree with the submissions made by the learned counsel for the appellant that the appellant was not in conscious possession of 50 bags containing 1550 Kgs of poppy husk. This Court has carefully perused the findings recorded by the learned trial Court and the same are liable to be upheld. The learned trial Court has rightly observed that the present appellant was found sitting over 50 bags of poppy husk, alongwith other co-accused. The appellant was apprehended at the spot, whereas his co-accused had run away from the spot. Even, the present appellant could not offer any explanation as to how he was in possession of those bags. Apart from that, the learned trial Court has rightly referred to the provisions of Section 35 and 54 of the NDPS Act. As per Section 35 of the NDPS Act, there is a presumption of culpable mental state of the accused. Further, Section 54 of NDPS Act provides for presumption from possession of illicit articles and the same is reproduced below:—

> 54. Presumption from possession of illicit articles
>
> *In trials under this Act, it may be presumed, unless and until the contrary is proved that the accused has committed an offence under this Act in respect of-*
>
> *(a) any narcotic drug or psychotropic substance or controlled substance;*
>
> *(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;*
>
> *(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any Narcotic Drug or Psychotropic Substance or controlled substance; or*
>
> *(d) any materials which have undergone any process towards the manufacture of a Narcotic Drug or Psycho-tropic Substance or controlled substance, or any residue left of the materials from which any Narcotic Drug or Psychotropic Substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.*

15. In fact, Section 54 of the NDPS Act places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily. Once the possession is established, the person, who claims that it was not a conscious possession, has to establish it. In

terms of Section 54 of the Act, the presumption of conscious possession is there and the appellant could not lead any evidence to rebut the said presumption. Apart from that, it was apparent from the testimonies of PW2 Sajjan Singh, DSP and PW6 SI Inderjit Singh that the present appellant was in possession of the contraband and the recovery was effected from him. Consequently, the learned trial Court has rightly held that about 06.20 a.m., on 26.02.2000, 50 bags containing 1550 kgs of poppy husk were recovered from the conscious possession of the present appellant. This Court finds no substance in the arguments raised by the learned counsel for the appellant that CFSL form was not filled at the spot and was filled subsequently in the police station. In fact, the case of the prosecution cannot be discarded only on the ground that the CFSL form was filled subsequently, especially, when the recovery was effected from the present appellant and it was found by the Forensic Science Laboratory that the seals on the samples analysed, were found to be intact. Still further, the present appellant failed to show any prejudice caused to him in this regard and it was otherwise not a mandatory requirement of law. Thus, the appellant cannot derive any benefit out of the same.

16. Apart from that, at the time of the recovery of the poppy husk from the present appellant, one independent person Vijay Kumar was associated by the police. However, the said witness was later on won over by the appellant and could not be examined as a prosecution witness. Merely because, the case is based on the testimonies of the official witnesses, their statements on oath, cannot be discarded by this Court. Only, as a rule of caution, their testimonies have to be scrutinized with care and circumspection. This Court has perused the testimonies of all the six witnesses, who have been subjected to lengthy cross-examination and their testimonies could not be shattered. Thus, even if, the prosecution failed to examined Vijay Kumar, an independent witness, still the conviction can be based on the testimonies of all the official witnesses and the plea raised by the appellant is liable to be rejected.

17. Learned counsel for the appellant also referred to various discrepancies appearing in the statements of the prosecution witnesses. However, the learned trial Court has recorded the findings in this regard and the same are liable to be upheld by this Court. The witnesses got a chance to appear before the learned trial Court after a long gap and certain minor contradictions are bound to occur in the testimonies of the prosecution witness. However, such minor variations have to be overlooked by the Courts, when the case of the prosecution is otherwise found to be reliable and trustworthy. Even, this Court has perused the testimonies of various prosecution witnesses and the prosecution evidence inspires confidence. Thus, there is no merit in the appeal and

the same is ordered to be dismissed.

18. The impugned judgment of conviction and order of sentence dated 14.05.2004 passed by the learned Judge, Special Court, Jalandhar, are upheld and affirmed.

19. The appellant/accused, if on bail, is directed to surrender within 15 days from today, failing which, the CJM concerned shall issue non bailable warrants against the present appellant/accused and shall commit him to custody to serve the remaining sentence of imprisonment.

20. All pending applications, if any, are disposed off, accordingly.

21. The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

22. Records of the Court below be sent back.
