
(2008) 02 P&H CK 0311
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 455-SB of 1997

Jagdish and others

APPELLANT

Vs

The State of Haryana

RESPONDENT

Date of Decision : 28-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 42, 42(1), 42(2), 43

Citation : (2008) 2 PLR 205

Hon'ble Judges : Sham Sunder, J

Bench : Single Bench

Advocate : Baldev Singh and Mr. Sudhir Sharma, for the Appellant; Kartar Singh, A.A.G., Haryana, for the Respondent

Final Decision : Dismissed

Judgement

Sham Sunder, J.—This appeal is directed against the judgment of conviction dated 23.4.1997, and the order of sentence of the even date, rendered by the Court of Addl. Sessions Judge, Hissar, vide which it convicted the accused/appellants Jagdish, Radhey Sham, and Sajjan Singh, for the offence, punishable u/s 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter called as "the Act" only) and sentenced them, to undergo rigorous imprisonment for a period of ten years each, and to pay a fine of Rs. 1 lac each, and in default of payment of the same, to undergo rigorous imprisonment for another period of two years each.

2. The facts, in brief, are that on the night intervening 6/7.2.1996, at about 2.00 a.m., in pursuance of the secret information, Ram Avtar, SI, of Police Station Siwani, along-with other police officials held a picket (naka), at "T" point in the area of Dhani Daryapur, and intercepted a Jeep bearing registration No. DL-2 CE/9487, wherein, three persons were found travelling Ten bags, containing 40 kgs. poppy husk each, were recovered from the said Jeep, after conducting the

search thereof, in accordance with the provisions of law. A sample from each of the bags, was taken out, and the remaining poppy-husk was put into the same bags. The samples and the bags, containing remaining poppy- husk, were converted into parcels, which were duly sealed with the seals bearing impressions "RA" and "US". Ruqa was sent to the Police Station, on the basis whereof, formal FIR was registered. The statements of the witnesses were recorded. Rough site plan of the place of recovery was prepared. The accused were arrested. After the completion of investigation, the accused was challaned.

3. On their appearance, in the Court, the copies of documents, relied upon by the prosecution, were supplied to the accused. Charge u/s 15 of the Act, was framed against them, to which they pleaded not guilty and claimed judicial trial.

4. The prosecution, in support of its case, examined Dilbag Singh, HC (PW1) and Suresh Kumar, Constable (PW2), formal witnesses, Khusi Ram, SP, Gurgaon (PW3), at the relevant time posted as Addl. SP (Operation), Hisar, Risal Singh, ASI (PW4), and Ram Avtar, SI/SHO (PW5). Thereafter, the Public Prosecutor for the State, closed the prosecution evidence.

5. The statements of the accused u/s 313 Cr. P.C, were recorded, and they were put all the incriminating circumstances, appearing against them, in the prosecution evidence. They pleaded false implication. Jagdish, accused, in his statement recorded u/s 313 Cr.P.C. stated that, in fact, he was apprehended by the Police from Bus Stand, Siwani, when an altercation took place between him and the police party. He further stated that he was falsely implicated. Accused Radhey Sham and Sajjan Singh, in their statements recorded u/s 313 Cr.P.C. also took up the same pleas. They, however, did not lead any evidence, in their defence.

6. After hearing the Public Prosecutor for the State, the Counsel for the accused, and, on going through the evidence, on record, the trial Court, convicted and sentenced the accused/appellants as stated herein before.

7. Feeling aggrieved, against the judgment of conviction and the order of sentence, rendered by the trial Court, the instant appeal, was filed by the accused/appellants.

8. I have heard the learned Counsel for the parties, and have gone through the evidence and record of the case, carefully.

9. The Counsel for the appellants, at the very outset, contended that though a secret information was received, and, in pursuance thereof, a picket (naka) was allegedly held, but the same was neither reduced into writing, nor sent to the Officer superior, as a result whereof, there was complete violation of the provisions of Section 42(1) and 42(2) of the Act. It may be stated here, that the police party headed by Ram Avtar, SI/SHO, Police Station Siwani, and consisting of other police officials, was already on patrol duty, and detection of crime, on the turning of Tosam Road, in the area of Siwani, when a secret information was

received, against the accused. It means that the police party was already in motion, when the said information was received. Had the Sub- Inspector/SHO started recording the secret information, and sending the same to the Officer superior, it would have consumed sufficient time, as a result whereof, the possibility of escape of the accused, with contraband, would not have been ruled out. The delay, in conducting the raid, would have certainly defeated the very purpose of the same. In *Sajan Abraham Vs. State of Kerala*, , a case decided by three Judge Bench of the Apex Court, it was held by the Apex Court, that substantial compliance with the provisions of Section 42 would be sufficient, and the strict compliance should not be insisted upon. The facts of *Sajan Abraham's* case (supra) were to the effect that HC (PW3), got information at about 7 P.M., that the appellant was selling injectable narcotic drugs, at a particular place. When he proceeded for the Police Station, to give this information, to his immediate superior, Sub Inspector of the police (PW5), he found him (PW5) alongwith his police party, which was on patrol duty coming, hence the said information was communicated there by PW3 to PW5. Thereafter, PW5 along with his police party and PW3 proceeded immediately towards the place, where the appellant was standing, and apprehended him. It was contended that PW5 had not recorded the information, given by PW3, with respect to the accused/appellant's involvement, before proceeding to arrest him, nor he had communicated the same to his immediate superior, which constituted violation of Section 42. The said contention of the counsel for the appellants, was repelled, by the Apex Court, holding that PW5, could not have recorded the information given by, PW3, and communicate the same, to his superior, while he was in motion on patrol duty, in the jeep, before proceeding to apprehend him. Had they not acted immediately, the appellant would have escaped. It was, thus, held that no inference could be drawn, that there had been any violation" of the provisions of Section 42 of the Act. In these circumstances, in the said authority, it was held as under:

"In constructing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

9-A. In the instant case too, a secret information was received, by Ram Avtar, SI/ SHO, when he alongwith other police officials, was in motion. It was, in this view of the matter, that a picket was held by Ram Avtar, SI/SHO at "T" point Dariyapur Dhani, alongwith other police" officials. He had no time to record the information and send the same to the officer superior, as had he done this, there would have been every possibility of the accused absconding and the very purpose of the raid would have been defeated. However, he made a substantial compliance of the provisions of Section 42 of the Act, by recording a ruqa, embodying the secret information therein, though sent the same to the officer superior later on. Since, there was substantial compliance, with the provisions of Section 42 of the Act, it could not be said that there was intentional and deliberate violation of the same. On account of this reason, the case of the prosecution could not be thrown out. The principle of law, laid down in Sajan Abraha's case (supra), a case decided by three Judge Bench of the Apex Court is, thus, fully applicable to the facts of the present case. In this view of the matter, the submission of the Counsel for the appellants, being without merit, must fail, and the same stands rejected.

10. The counsel for the appellants, however, placed reliance on Phuman Singh v. State of Punjab 2006 (4) R.C.R. (Cri) 226, Beckodan Abdul Rahiman v. State of Kerala 2002 (2) R.C.R. (Cri) 385, Dilip v. State of M.P. 2007 (1) R.C.R. (Cri) 586, in support of his contention. No doubt, Phuman Singh's case (supra) was decided by a Division Bench of this Court. Beckodan Abdul Rahiman's and Dalip's case (supra), were decided by a two Judge Bench of the Apex Court. In these cases, it was held that non-compliance of the provisions of Section 42 of the Act, which are mandatory, in nature, vitiated the investigation. However, in Sajjan Abraham's case (supra), a case decided by a Bench of three Judges of the Apex Court, held that if there was substantial compliance of the provisions of Section 42(1) and 42(2) of the Act, then the investigation and further proceedings did not stand vitiated. In the instant case, it has been held above, as to under what circumstances, the Investigating Officer was unable to comply with the provisions of Section 42(1) and 42(2) of the Act strictly. However, he made substantial compliance thereof, by sending the ruqa embodying therein, the secret information, after the recovery of the contraband, from the accused. The principle of law, laid down, to the contrary in Phuman Singh Beckodan Abdul Rahiman's, and Dilip's cases (supra), on the same point would not hold the field, in view of the principle of law, laid down, on the same point, by a larger Bench of three Judges of the Apex Court. No help, therefore, can be drawn by the Counsel for the appellants, from these authorities. The submission of the Counsel for the Appellants, being without merit, must fail, and the same stands rejected.

11. It was next contended by the Counsel for the appellants, that since the alleged recovery was effected between sun-set and sun-rise, the mandatory provisions of Section 42(1) of the Act were required to be strictly complied with. The contention of the Counsel for the appellants, as the recovery was not

effected from an enclosed place or a vehicle in an enclosed place. With a view to properly deal with the argument of the Counsel for the appellants, it would be appropriate to notice the provisions of Section 42 and 43 of the Act, which reads as under:

"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, if he has reasons 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 which 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 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 offence 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.

43. Power of seizure and arrest in public place- Any officer of any of the department mentioned in Section 42 may-(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed,

and, along with such drug or substance, any animal or conveyance article 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 an offence punishable under Chapter IV relating to such drug or substance;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be useful, arrest him and any other person in his company.

11-A. A conjoint reading of Sections 42 and 43 of the Act, shows that these sections are independent of each other. Section 43 authorises any Officer of the departments, mentioned in Section 42, for search, seizure, arrest and detention in any public place, or in transit, in respect of any narcotic drug or psychotropic substance, in respect of which he has reason to believe that an offence punishable under Chapter IV has been committed, whereas Section 42 of the Act empowers the officer for search and seizure and arrest in a building, conveyance or enclosed place. When the information is with regard to concealment of some narcotic, in a vehicle, in transit, then provisions of Section 43 of the Act are applicable. The word "public place" has been explained for the purpose of Section 43 of the Act, which includes any public conveyance, hotel, shop or other places, intended for use or accessible to the public."

12. A Division Bench of this Court in *Dharminder Kumar v. State of Punjab* 2002 (4) R.C.R. (Crl.) 278 has held as under:

"Thus it is evident that if seizure is made from any animal, conveyance or article in a public place or in transit then Section 43 of the Act would be applicable. Section 43 and Section 42 of the Act operate in different spheres. Since the conveyance has been specifically included in Section 43 of the Act also, therefore, the conveyance which is found in a public place or in transit would be covered under the provisions of Section 43 of the Act whereas conveyance used in Section 42 of the Act has to be read as conveyance which is other than a public place. This interpretation is the only harmonious interpretation of Sections 42 and 43 of the Act.

12-A. It is well settled principle of law, that the provisions of a Statute are to be construed, in harmonious manner so that none of the same is rendered nugatory. By harmonious construing Section 42 and 43 of the Act, it can be safely concluded, that if a conveyance, is intercepted or apprehended, at a public place, or in transit, then the provisions of Section 42 of the Act would not be applicable."

13. It was held in *State of Haryana v. Jarnait Singh* 2004 (2) R.C.R. (Crl.) 960 (S.C.) as under:

"7. 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 authorized 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.

8. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made u/s 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the Narcotic Drugs and Psychotropic Substances Act for searching the vehicle between sunset and the sunrise.

13-B. In the instant case, the accused were coming in a vehicle (Jeep) with a big haul of poppy-husk. It was, in this view of the matter, that a picket was held by the SI/SHO alongwith other police officials. It was, at that time, that the accused came in a jeep, and from the said Jeep, ten bags, containing poppy- husk were recovered. Such information was general, in nature, and not specific. The recovery was effected from a vehicle in transit, at a public place. Thus, the provisions of Section 43 were applicable, and not the provisions of Section 42. In this view of the matter, the question of compliance of the provisions of Section 42, did not at all arise. The submission of the Counsel for the appellants, being without merit, must fail, and the same stands rejected."

14. It was next contended by the counsel-for the appellants, that no independent witness was joined by the Investigating Officer, at the time of effecting the alleged recovery, despite availability, and, as such, the case of the prosecution became doubtful. The recovery, in this case, was effected at about 2 AM, at night. At that odd hour of the night, the question of the presence of any independent witness, at the time of recovery, and not at all arise. There is nothing, on the record, that any independent witness passed time, at the time of recovery, at that odd hour of the night. It was, under these circumstances, that no independent witness was joined by the Investigating Officer, at the time of effecting the recovery. The mere fact that the case of prosecution is based, on the evidence of official witness, does not mean that the same should be disbelieved. The evidence of the official witnesses cannot be disbelieved and disbelieved, merely on account of their official status. In *State of NCT of Delhi v. Sunil* (2000) 1 S.C.C. 748, it was held as under:

It is an archaic notion that actions of the Police Officer, should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the Court cannot

start with the presumption that the police records are untrustworthy. As a proposition of law, the presumption should be the other way round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature.

14-A. In Appabhai and Another Vs. State of Gujarat, , it was held that the prosecution story cannot be thrown out, on the ground, that an independent witness had not been examined, by the prosecution. It. was further held, in the said authority, that the civilized people, are generally insensitive, when a crime is committed, even in their presence, and they withdraw from the victim's side, and from the side of the vigilant. They keep themselves away from the Courts, unless it is inevitable. Moreover, they think the crime like a civil dispute, between two individuals, and do not involve themselves, in it. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the present case. In these circumstances, mere non joining of an independent witness, when the evidence of the prosecution witness, has been held to be cogent, convincing, credit worth, and reliable, and there was no reason, on their part to falsely implicate the accused, no doubt, is cast on the prosecution story. In this view of the matter, the submission of the Counsel for the appellants, stands rejected.

15. No Other point was urged, on behalf of the parties.

16. In view of the above discussion, it is held that the judgment of conviction and the order of sentence, rendered by the trial Court, are based on the correct appreciation of evidence, and law, on the point. The same do not warrant any interference, and are liable to be upheld.

17. For the reasons recorded, herein before, the instant appeal is dismissed. The judgment of conviction, and the order of sentence dated 23.4.1997, are upheld. The bail bonds of the accused are cancelled. The Chief Judicial Magistrate, Hissar, shall take necessary steps to comply with the judgment, with due promptitude.

Appeal dismissed.