
(2006) 10 DEL CK 0059
In the Delhi High Court
Case No : Criminal Appeal 209 of 2001

Shiv Dayal Shah	Vs	APPELLANT
State (NCT of Delhi)		RESPONDENT

Date of Decision : 06-10-2006

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 42, 42(1), 42(2), 43

Citation : (2006) 91 DRJ 441

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : Sumeet Verma, for the Appellant;

Final Decision : Dismissed

Judgement

J.M. Malik, J.—This appeal is directed against the order passed by the learned A.D.J, under the NDPS Act wherein the appellant was sentenced to undergo Rigorous Imprisonment for a period of ten years and to pay a fine in the sum of Rs. 1,00,000/- in default of Rigorous Imprisonment for six months for possessing 4.470 kilograms of Charas on 02.04.1999 near Temple Chah Indra H.C. Sen Road and fountain in the area of Chandni Chowk within the bounds of Police Station Kotwali, u/s 20 NDPS Act. Aggrieved by that order, the appellant has filed the instant appeal before this Court.

2. The argument urged by the learned Counsel for the appellant has two prongs. He argued with vehemence that provisions of Section 42 (ii) of the original NDPS Act, 1985 were not complied with. Section 42(ii) runs as follows:

(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.

3. In order to embolden his case, the learned Counsel for the appellant has drawn the attention of the Court towards an authority reported in Beckodan

Abdul Rahiman Vs. State of Kerala, , wherein it was held.

After referring to host of judgments, the Constitution Bench of the Court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed.

It was further observed:

In State of Punjab Vs. Balbir Singh, it was held that u/s 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is a total non compliance of the provisions the same affects the prosecution case. To that extent it is mandatory. To the same effect is the judgment in Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, .

4. To my mind, the abovesaid authority does not dovetail with the facts of this case. In this ease, the contraband was recovered from the bag which the accused/appellant was holding. Although, there was no need to serve notice u/s 50 NDPS Act, yet, it was served and in reply, accused/appellant desired to be searched in presence of a Gazetted Officer. Consequently, I.K. Jha, Sub-Inspector, the Investigating Officer in this case sent wireless messages to the ACP as well as SHO and requested them to arrive at the spot. Inspector Raja Ram PW9, Police Station Kotwali and Ashok Sikka, ACP, PW10 arrived at the spot separately at about 8.15 and 8.20 PM respectively. I.K. Jha, Sub-Inspector deposed that he brought the facts to their knowledge. He explained that SHO and ACP made separate inquiries from the accused/appellant. Both SHO and ACP stated that the accused conducted the search of the IO in their presence vide recovery memo Ex.PW5/C. ACP Ashok Sikka, PW10 deposed that search of the accused/appellant was effected in his presence and he also signed as a witness on the recovery memo Ex.PW5/D. Inspector Raja Ram, PW9 also deposed in the same vein.

5. In G. Srinivas Goud Vs. State of A.P., , it was held,

It will be anomalous to say that officers of gazetted rank who are conferred with power to authorise junior officers to carry out arrest, search and seizure, are required to report to their superior officers when they carry out arrest, search or seizure on their own. As already seen the rationale for this provision of informing superiors appears to be that when the arrest, search and seizure is without authorisation by gazetted rank officers, the officers taking action must keep their superiors informed. The superior officers must know about the action taken by their subordinates. However, the position of gazetted rank officers, in view of their rank and seniority and power to authorise subordinates to proceed to action, is totally different. They are the source of power of authorisation. The gazetted rank officers enjoy special position and privileges under the Act. They

need not be equated to sending information to superior officers under sub-section (2) of Section 42 cannot be insisted Upon in their case. There is no bar in the statute to functions of arrest, search and seizure being carried out by the officers of the gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

6. In the instant case the superior officers were called and were present on the spot. The above evidence reveals that they were apprised of the facts of this case. They were the witnesses to the recovery of contraband.

7. The prime reason which puts the prosecution case in an impregnable position is that the contraband was recovered at a public place. Section 42 has got no application to the facts of this case. In *Rajendra and Anr. v. State of Madhya Pradesh*, 2004 (1) AD (S.C.) 66, the Apex Court was pleased to observe:

Section 42 comprises of two components. One relates to the basis of information i.e. (i) from personal knowledge (ii) information given by person and taken down in writing. The second is that the information must relate to commission, of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-section (2) mandates as was noted in *Baldev Singh's* case (supra) that 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. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place.

8. In *State of Haryana v. Jarnail Singh and Ors.* 2004 VI AD (S.C.) 499, it was observed,

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 NDPS Act for searching the vehicle between sunset and the sunrise.

9. In *Narayanaswamy Ravishankar v. Asstt. Dir., Directorate of Revenue Intelligence*, 2002 VIII AD (S.C.) 204, it was held,

"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.

For these reasons, the argument urged by learned Counsel for the appellant must be eschewed out of consideration.

10. The learned Counsel for the appellant next argued that there are incongruities in the depositions of PWs as have been noted in the impugned judgment. ACP Ashok Sikka stated that he remained on the spot for 30-40 minutes but Inspector Raja Ram deposed that they remained at the spot for 90 minutes. It is clear that counsel for the appellant quibbled over a niggling difference between the two depositions. It must be borne in mind that there time of arrival was not the same.

11. Rajesh, Constable stated that the scale and weights were brought from a shop but ACP Ashok Sikka stated that the same were brought from a shop of Halwai. I see no contradiction in their statements.

12. Inspector Raja Ram stated that the Charas was weighed 1 kilogram each in four times and 470 grams at one time but" AGP Ashok Sikka and SI I.K. Jha contradicted him by stating that the whole Charas was weighed at one time. ACP Ashok Sikka stated that his statement was recorded while standing but SI I.K. Jha stated that the writing work was done while sitting on the benches.

13. To my mind, these are small, minor and insignificant contradictions. It must be borne in mind that human memory is vicissitudinary. With the passage of time human memory fades away. Secondly, the police officers have to work day in and day out. It is very difficult to keep in mind all the minute details after the expiry of so much time. Thirdly, the incident took place on 02.04.1999. Statement of ACP Ashok Sikka was recorded on 21.07.2000-31.07.2000. Statement of SI I.K. Jha was recorded on 31.07.2000. It is clear that both of them were deposing in the Court after the elapse of one year.

14. The observations made by the Apex Court in the case of State of Punjab Vs. Wassan Singh and Others, , aptly applies to the facts of this case. In that case, too, the statements were recorded after 17 months, wherein there were exaggerations and the court ignored the same.

15. Similar view-was taken in Sohrab and Another Vs. The State of Madhya Pradesh, ; Appabhai and Another Vs. State of Gujarat, ; Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, ; Bhargavan and Ors. v. State of Kerala, 2003 (IX) AD (S.C.) 403, State of Maharashtra v. Jagmohan Singh Kuldeep Singh Anand and Co. 2004 VIII AD (S.C.) 381 and Surender Singh Vs. State of Haryana, .

16. No other point was raised. The appeal is without merit and the same is,

therefore, dismissed.