
(2010) 03 SHI CK 0104
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 433 of 1996

State of Himachal Pradesh	Vs	APPELLANT
Manohar Lal		RESPONDENT

Date of Decision : 30-03-2010

Acts Referred:

Constitution of India, 1950 — Article 21
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 37, 42, 42(1), 42(2)

Citation : (2010) 2 ShimLC 378

Hon'ble Judges : Sanjay Karol, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This appeal by the State is directed against the judgment dated 29.2.1996 passed by the learned Additional Sessions Judge, Solan, H.P., in Sessions Trial No. 10-NS/7 of 1994 whereby he acquitted the accused of having committed an offence punishable u/s 20 of the Narcotic Drug and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

2. The prosecution case in brief is that on 25.1.1994 Si-Rattan Singh (PW-8) who was the then S.H.O. Police Station, Arki was on routine patrol duty at Batal Ghati alongwith ASI-Som Dutt, HC- Hem Raj, Constable Sita Ram and Lady Constable Malti Devi. There he received secret information that the accused is indulging in trafficking of drugs. According to PW-8 since it was Statehood Day and offices were closed he could not obtain the search warrant and he also apprehended that if he went to obtain search warrant the accused might come to know of it, and dispose of the contraband. He however telephonically informed the S.D.M., Arki and then proceeded to village Majiat. The S.D.M. also reached the village. The house of the accused was raided after associating two independent witnesses Sh, Balak Ram (PW-4) and Sh. Pawan Kumar (PW-5) and during this raid 990 grams Charas was recovered. Two samples of 100 grams each were drawn. The

bulk Charas and the two samples were sealed with seal-A and taken into possession vide memo Ext. PB. Thereafter Rukka Ext. PW-8/B was sent to the police station, Arki and F.I.R. Ext. PW-8/C was registered on its basis. Site plan Ext. PW-8/D was prepared by PW-8. He recorded the statements of the witnesses and after apprising the accused of the grounds of arrest vide memo Ext. PW-8/G the accused was arrested. Special Report Ext. PW-8/H was sent to the immediate superior officer i.e. the Superintendent of Police, Solan. The case property was deposited in the Maalkhana. Thereafter, one sample was sent for chemical analysis to C.T.L. Kandaghat. On analysis the sample was found to be of Charas vide report Ext. PW-8/J and hence the accused was challaned for having committed the offence aforesaid.

3. The learned trial Court acquitted the accused mainly on two grounds, firstly that there has been no compliance of Sections 42 of the Act and secondly that Section 50 of the Act has not been complied with. As far as Section 50 of the Act is concerned the same is not at all applicable since no personal search was involved and the search was conducted from the house. Admittedly this is a case of prior information and the raid was conducted in the house which according to the prosecution belongs to the accused. Therefore, Section 42 of the Act is attracted.

Section 42 of the Act as it stood at the relevant time read as under:

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 or any other department of the Central Government including para-military 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 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) 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 VA of this Act; and

(d) Detail 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 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 immediately send a copy thereof to his immediate official superior.

4. The Apex Court in *State of Punjab Vs. Balbir Singh, Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*, *Karnail Singh Vs. State of Rajasthan*, and in many other cases has held that the provisions of Section 42 are mandatory in nature and non-compliance thereof renders the search illegal.

5. The NDPS Act is a penal statute. It invades the rights of an accused to a large extent. It raises a presumption of a culpable mental state. Ordinarily, even an accused may not be released on bail having regard to Section 37 of the Act. The Court has the power to publish names, address and business etc. of the offenders. Any document produced in evidence becomes admissible. A vast power of calling for information upon the authorities has been conferred by reason of Section 67 of the Act.

6. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used in Section 42. Such belief may be founded upon secret information that may be orally conveyed by the informant. This must then be recorded in writing.

7. Draconian provisions which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India require striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other.

In *Karnail Singh Vs. State of Haryana*, the Apex Court held as follows:

35. In conclusion, what is to be noticed is that *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*, did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham Vs. State of Kerala*, 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 Sub-sections (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.

8. The provisions of Section 42 of the Act are mandatory in nature as held by the Apex Court in number of cases.

9. Section 42 of the Act clearly lays down that the authorized officer is entitled to enter into or search any building 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 liable for seizure or forfeiture under the Act is kept or concealed in such building. The Investigating Officer has not stated that he recorded the information received by him in writing. This is a mandatory provision of law and non-compliance of the same makes the search illegal.

10. Proviso to Section 42 provides that if the Officer receiving such information has reason to believe that a search warrant cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of an offender, he may enter and search the building after recording the grounds of his belief. In the present case the Investigating Officer did not make any attempt to obtain search warrants and he also did not record the grounds for making the search without obtaining the search warrant. This also amounts to non-compliance of the provisions of Section 42. True it is that an explanation is now being given. However the grounds of belief should have been recorded before conducting the search.

11. Section 42(2) of the Act as it stood at the relevant time provided that the Officer taking down any information in writing under Sub-section (1) or recording the grounds for his belief under the proviso thereto shall immediately send a copy thereof to his immediate official superior. This provision has also not been complied with at all. Therefore, there is total non-compliance with the provisions of Section 42 of the Act.

12. In the present case we find that there has been no compliance of Section 42 of the Act. The information was not recorded in writing as mandated by the provisions of Section 42 of the Act at the relevant time. Reliance has been placed by the State on the Constitution Bench Judgment in Karnail Singh Vs. State of Haryana, wherein the Apex Court has held that in a given circumstance there is chance of the accused absconding or disposing of the drug. This portion of the judgment will not apply to the present case since admittedly PW-8 had telephoned the S.D.M. Sh. N.L. Sharma (PW-6) and informed him about the occurrence. It would have taken him only a couple of minutes to record the information in writing. He was not alone and was accompanied by large number of police officials who could have proceeded to the spot while he wrote the report.

13. Therefore, there has been total non-compliance of Section 42 of the Act and the accused is entitled to be acquitted on this ground alone.

14. Even if we ignore the aforesaid lacunae in the prosecution case even the other evidence on record is not sufficient to convict the accused. According to the prosecution the Charas was recovered from the house of the accused. The accused has taken up a plea that this house does not belong to him and in fact he owns a kutcha house and whereas the Charas was recovered from a pucca house. Even PW-8 has admitted in his cross-examination that a kutcha house was also raided in which nothing was recovered. The prosecution has led no evidence whatsoever to show to whom the pucca house from which Charas was

allegedly recovered belongs. In fact in the site plan Ext. PW-8/D pucca house is shown to be that of Roshan Lal. The defence of the accused is that the pucca house belongs to Nanak Chand and Babu Ram. The prosecution has led no evidence by producing the revenue record or any other authentic record to prove the ownership of the house from which recovery was made. It has miserably failed to show that the accused was in exclusive possession of the house. In fact the independent witnesses turned hostile and have denied that any recovery took place in their presence. More importantly PW-4 states that first the police went to the Kutcha house of accused Manohar Lal and nothing was recovered. PW-5 also states that Manohar Lal lives in a Kutcha house which is near the houses of Nanak Chand and Babu Ram. Presence of Sh. N.L. Sharma, S.D.M., Arki (PW-6) at the relevant time at the spot itself is doubtful. Though he states that he visited the spot and was part of the raiding party he could not give the number of rooms of the house which was raided. He could not state whether there were two rooms or four rooms. Other than the bed from below which the Charas was recovered he does not remember the other articles lying in the house. He could not state whether the house which was searched belongs to Jiwanu or Roshan Lal. Once the presence of PW-6 on the spot is not established it would lead to an inference that the documents were not prepared on the spot and were prepared later on and the signatures of PW-6 were obtained later on these documents.

15. Special report Ext. PW-8/H is purported to have been sent by PW-8 to the Superintendent of Police. However, the perusal of the special report does not show that it is addressed to the Superintendent of Police. It is only addressed to "Shriman ji". There is no endorsement on Ext. PW-8/H of it having been received by the Superintendent of Police. No witness from the office of the Superintendent of Police, Solan has been examined to prove that this report was received in the said office. Other than the bald statement of PW-8 there is no other proof with regard to the sending of the report or receipt thereof in the office of the Superintendent of Police, Solan. Violation of Section 57 of the Act by itself is not fatal to the prosecution case but here we are dealing with a case of prior information where the information was not recorded at the time when the same was received and special report has not been proved to have been sent to the immediate superior officer.

16. There are other flaws in the prosecution case. Whereas according to HC-Hem Raj (PW-7) the seal which was used was handed over to Balak Ram but according to the Investigating Officer (PW-8) he kept the seal with himself. There is no reason why the Investigating Officer should keep the seal with himself.

17. In view of the above discussions we find no merit in the appeal is accordingly dismissed. Bail bonds furnished by the accused are ordered to be discharged.