

(2002) 02 MAD CK 0018

In the Madras High Court

Case No : Criminal Appeal No. 346 of 1992

The Assistant Director, Directorate of Revenue Intelligence, T. Nagar, Madras APPELLANT

Vs

Narayanaswamy Ravishankar @ Ravishankar RESPONDENT

Date of Decision : 18-02-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 165, 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 23, 41, 42, 42(1)

Citation : (2002) 2 LW(Cri) 816

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : P.N. Prakash, Spl. Public Prosecutor, for the Appellant; R. Shanmugasundaram, S.C. and C.R. Malarvannan, Amicus Curiae, for the Respondent

Judgement

M. Karpagavinayagam, J.—The Assistant Director, Directorate of Revenue Intelligence, Chennai, has filed this appeal challenging the order

passed by the Principal Sessions Judge, Chengleput,

acquitting the accused in respect of the offence u/s 8(c) read with 21 and 23 read with 28 of the N.D.P.S. Act, for having been in possession of

5,940 grams of heroin worth about Rs.3,05,640/- concealed in the bottom of the suitcase and for having attempted to transport the same from

International Airport, Chennai to Singapore.

2. The prosecution case in brief is as follows:

(a) P.W.1 is the Senior Intelligence Officer attached to the Directorate of Revenue Intelligence. On information, on 4.1.1987 at about 10.30

P.M., accosted the respondent/accused after he had crossed the Customs Check,

while proceeding to the Security Check and asked to identify his package. At that time, the accused was having a suitcase and a Rexin bag. When he was asked whether he was carrying any contraband goods or narcotic substance, the accused replied in negative. He was asked to open the suitcase. Accordingly, he opened it with his key. When the package was searched, it was found to have false bottom and false top. In both these places, the Officers found four polythene bags kept concealed.

(b) Then, the accused admitted that the polythene bags contained heroin. They found that the polythene bags were weighing about 5,940 grams.

Along with the suitcase, the other belongings of the accused, namely Passport, U.S. Dollars, Traveler's Cheque, etc. were recovered. Mahazar

Ex.P1 was prepared and the same was signed by the witness P.W.1 and the accused.

(c) On 5.1.1987 morning, the accused gave a confession Ex.P19 to P.W.1. The accused and seized articles were handed over to P.W.3, another

Officer, who was entrusted with the investigation relating to narcotic drugs. Accordingly, P.W.3 arrested the accused and sent for remand along

with the remand report. Through the Court, a request was made for analysing the suspected heroin. P.W.4 Analyst gave the report stating that the

contraband is heroin. After investigation, a complaint was filed against the accused u/s 8(c) read with 21 and 23 read with 28 of the N.D.P.S.

Act.

3. In the course of trial, P.W.1, the seizing officer, P.W.2, the mahazar witness, P.W.3, the investigating officer and P.W.4, the Chemical Analyst

were examined and through those witnesses, Exs.P1 to P27 were filed and M.Os.1 to 20 were marked on the side of the prosecution. On the side

of the defence, Exs.D1 and D2 were marked. When the accused was questioned u/s 313 Cr.P.C., he simply denied his complicity.

4. The trial Court acquitted the accused on the ground that various mandatory provisions have not been complied with. Challenging the same, this

appeal has been filed by the complainant, namely the Assistant Director, D.R.I., Chennai.

5. I have heard Mr. P.N. Prakash, the learned Special Public Prosecutor appearing for the appellant as well as Mr. R. Shanmugasundaram, the

learned senior counsel appearing for the respondent.

6. Initially, the respondent/accused was not represented. Therefore, this Court appointed Mr. C.R. Malarvannan, as Amicus Curiae to appear on

behalf of the accused. At the end, even during the pendency of the appeal before this Court, Mr. Shanmugasundaram, the learned senior counsel

through the counsel on record Mr. Kamalanathan, entered appearance on behalf of the respondent/accused.

7. Mr. P.N. Prakash, appearing for the complainant/appellant would elaborately argue contending that the reasonings of the trial Court for acquittal

are wrong and the same are liable to be set aside.

8. With equal vehemence, the learned senior counsel as well as the Amicus Curiae appearing for the respondent would contend that though some

of the grounds of acquittal could not be sustained, most of the other grounds, namely violation of the mandatory provisions would sustain the

acquittal.

9. I have carefully considered the submissions of the counsel for the parties.

10. Let us first see the grounds referred to by the trial Court in its judgment for acquitting the accused.

(I) Section 42 of the N.D.P.S. Act, a mandatory provision, has been violated.

(II) There is a contravention of the provision of Section 50 of the N.D.P.S. Act.

(III) P.W.1's presence during the search and seizure is not proved beyond reasonable doubt.

(IV) The accused was not arrested immediately by P.W.1, who effected seizure, though he has got powers for arrest.

(V) There is a violation of Section 52 of the Act, since the property has not been forwarded to the Magistrate forthwith and there is no signature of

the accused in the arrest memo. The grounds of arrest were not informed to the accused.

(VI) There is a violation of Section 52-A, since the articles seized and the person arrested were not handed over to the Officer in charge of the

nearest Police Station.

(VII) Section 57 was not complied with, since the arrest was not communicated to the immediate superior officer.

11. Let us now go into the validity of the reasonings one by one. As regards the

first ground, i.e., violation of Section 42 of the Act, since elaborate discussion is to be made, it would be better to refer to the same after analysing the rest of the grounds. Thus, we would go from the second ground.

12. Under this ground, the trial Court would hold that Section 50 of the Act has been violated, as the accused was not given opportunity in regard

to the option for making a search either in the presence of Gazetted Officer or Magistrate or P.W.1 himself could search.

13. There is no difficulty in holding that Section 50 of the Act would not apply to the present case, as this case does not deal with the personal

search, in view of the legal position that Section 50 would apply only where personal search was conducted.

14. As per the evidence of P.W.1 and P.W.2, Ex.P1, the mahazar and Ex.P19, the statement of the accused, it is clear that there is no search of

the person to attract Section 50 of the Act and the suitcase was searched. In *Kalema Tumba Vs. State of Maharashtra and Another*, the

Supreme Court held that Section 50 is attracted only where the search was conducted in respect of person and not in respect of packages.

Therefore, this ground would fail.

15. The next ground is that P.W.1's presence during the search and seizure was not proved. This finding is against the available evidence. Ex.P1,

the mahazar would show that P.W.1 seizing officer was present and the contraband was seized by him. In the mahazar, it has been specifically

stated as "seized by me". Below this writing, P.W.1 signed as S.K. Karuppan with designation Superintendent, DRI, Madras.

16. It may be true that one Jayanth wrote Ex.P1 mahazar and the said Jayanth was not examined. Merely because the said Jayanth, who is one of

the Intelligent Officers, wrote Ex.P1 under the direction of P.W.1, he cannot be said to be the author of the document. Since the words "seized by

me" are contained in Ex.P1 and the same was signed by P.W.1, it shall be construed that the author of the contents of Ex.P1 is P.W.1. Under

those circumstances, non-examination of Jayanth would not affect the prosecution case.

17. Furthermore, the evidence of P.W.1 also would show that he questioned the accused and accused opened his package wherein the polythene

bags containing heroin was recovered. This is mentioned in the deposition of P.W.1, P.W.2 and in Ex.P19, the confessional statement of the accused. So, this ground also would not deserve acceptance.

18. The trial Court found fault with the prosecution, since P.W.1 did not arrest the accused immediately after the seizure. According to P.W.1,

after recovery of the contraband from the suitcase, the accused was taken to D.R.I. Office and in the morning of 5.1.1987, he obtained Ex.P19

confessional statement which was written by the accused in his own hand covering about 9 pages. Thereafter, he handed over the seized articles

and the documents as well as the accused to P.W.3 Pachaiyappan, who is another Senior Intelligent Officer. According to him, the same were

received by him on 5.1.1987 at 1.00 P.M. After perusal of the records, he effected arrest of the accused at 2.00 P.M. In the cross-examination,

P.W.3 would state that he was entrusted with the investigation in regard to the N.D.P.S. Cases and therefore, the accused as well as the other

things in this case were handed over by P.W.1 to him. On the same day, he was produced before the Court and he was remanded to judicial

custody within the stipulated time.

19. Therefore, the failure of P.W.1 to arrest the accused would not affect the powers of P.W.3, who took up further investigation to effect the

arrest of the accused. Furthermore, P.W.1 was able to obtain a voluntary confession from the accused when he was not arrested. Therefore, this

ground also would fall to the ground.

20. In this case, Ex.P21, the remand report would show the details of the seizure of properties. It would also reveal that the properties seized were

produced before the Court along with the remand report. Since the investigating officers were asked to bring the Analyst to take sample from the

polythene bags, the contraband was produced on 8.1.1987 and next day, the sample was taken by P.W.4.

21. On a perusal of the arrest memo Ex.P20, it is seen that the signature of the accused is available. It is not correct to state that the grounds of

arrest had not been informed to the accused, since the reading of the arrest memo itself would show that the grounds of the arrest had been

informed to him and the copy of the arrest memo also was served on the accused, who in turn signed in the arrest memo. Therefore, it cannot be

said that Section 52 is violated.

22. In regard to non-compliance of Section 52-A, it shall be stated that the said section would not apply to this case, since the properties were not sought to be given pretrial disposal. On the other hand, it is the specific case of the prosecution that P.W.1 after initial investigation handed it over to P.W.3, another officer, who is competent to investigate the matter, who in turn after effecting arrest of the accused handed him over and properties to the Court. Therefore, non-compliance of Section 52-A would not arise in this case.

23. It is stated by the trial Court that Section 57 has not been complied with. But, the reading of the evidence of P.W.3 would clearly reveal that his immediate superior officer was informed, who is a Deputy Director whose office is situated near to his office in the same building. Therefore, the question of non-compliance of Section 57 would not arise.

24. Let us now go into the question of non-compliance of Section 42 of the N.D.P.S. Act, which needs detailed discussion.

25. According to the senior counsel appearing for the respondent/accused, P.W.1 admitted in cross-examination that he went to the Airport on specific information that the respondent/accused was in possession of the narcotic substance and despite the receipt of information, he did not take down the information in writing and consequently, no copy of the information was sent to his superior officer and as such, there is a clear violation of Section 42 of the N.D.P.S. Act.

26. In contra to the said submission, the learned Special Public Prosecutor would contend that P.W.1 being the Gazetted Officer came to the Airport on information as provided u/s 41 and as such, Section 42 would not apply to the Officers who would come under the category mentioned in Section 41. He would also submit that the search and seizure was made in a public place as contemplated u/s 43 of the Act and as such, recording the information and sending the copy of the same to the superior officer are unnecessary.

27. The senior counsel appearing for the respondent/accused in order to substantiate his plea, would cite the decisions in Roy V.D. Vs. State of Kerala, , K.C. Jaya Kumar Vs. The State, and Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, and submit that the officer concerned cannot

wriggle out of the conditions stipulated in Section 42(1) and (2) by merely showing Section 43.

28. On the other hand, the Special Public Prosecutor would cite the authorities in *Utpal Mishra Vs. Nicelai Christensen*, , *SAYAR PURI v.*

STATE OF RAJASTHAN (1998) 3 Crimes 254 (SC) , *HARDEEP SINGH v. STATE OF RAJASTHAN (2000 D Cas 439)*, *ABDUL AZEEZ*

v. STATE OF KERALA 2001 M.L.J. 583 Kerala H.C.) and *Mohd. Hussain Farah Vs. Union of India and Another*, and contend that the

empowered officers u/s 41, while searching and seizing the contraband at the public place, are not required to comply with the provisions of

Section 42.

29. In *Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat*, , the Supreme Court would, on the facts, hold that P.W.2, the Inspector of Police

admitted that he proceeded to the spot only on getting the information that somebody was trying to transport the narcotic drug and he did not take

down the information in writing nor informed the superior officer of any such information either then or later and then, he went to the spot and

intercepted the autorickshaw and on checking, the Inspector of Police and others found 4 gunny bags placed inside it. In that context, the Supreme

Court would say that Section 42 would apply, since the officer, who searched and seized the gunny bags containing contraband, would come

under the category of any such officer as provided u/s 42.

30. Furthermore, the facts of that case would indicate that the autorickshaw being a conveyance as provided u/s 42 was searched and in that

context, it was held that P.W.2, the officer as provided u/s 42 cannot wriggle out of the conditions stipulated in Section 42(1) or (2) by merely

showing Section 43.

31. In this case, P.W.1 is admittedly a Deputy Collector in Customs and Gazetted Officer. Therefore, P.W.1 would not come under the category

as mentioned in Section 42, but he would include in the category of the Gazetted Officers as provided u/s 41(2).

32. In the similar case, it was held by the Supreme Court in *Mohd. Hussain Farah Vs. Union of India and Another*, that when a search was carried

out by the officers referred to u/s 41(2), they were not required to comply with the provisions of Section 42.

33. Even in the decision cited by the learned senior counsel for the respondent reported in Roy V.D. Vs. State of Kerala, , the Supreme Court

observed as follows:

It follows that any collection of materials, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer

not being an empowered officer or an authorised officer u/s 41(2) of the NDPS Act, lack sanction of law and is inherently illegal and as such the

same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the

prosecution vitiates the trial.

This observation would clearly indicate that Section 42 would not apply to the empowered officer or an authorised officer u/s 41(2) of the

N.D.P.S. Act.

34. Section 41 of the N.D.P.S. Act has the heading ""Power to issue warrant and authorization"". Section 41(1) gives power to Magistrates to issue

warrant for the arrest of a person or for the search. Section 41(2) gives power to Gazetted Officers to go to the spot and to arrest a person or to

conduct search by themselves. They are given powers to issue authorization to do the same.

35. Under the Code of Criminal Procedure, a Police Officer has got power to arrest any person who has committed a cognizable offence without

a warrant. Similarly, u/s 165 of Cr.P.C., a Police Officer can conduct search even without a search warrant after sending advance intimation to

Court.

36. Since N.D.P.S. Act gives powers to Revenue Officers, Customs Officers, Police Officers, etc. of Gazetted rank, it became necessary to

confer specific powers on such officers for conducting search and arresting a person. In other words, the Act gives a special place for officers of

the Gazetted rank because there is a general presumption that officers of higher status will exercise their powers with circumspection and caution.

37. That is why Section 41(2) confers powers on Gazetted Officers to conduct search or arrest a person themselves or give an authorization to an

officer subordinate to them. But, these special powers have not been given to the officers mentioned in Section 42, who are non-Gazetted officers.

38. There is a major difference in the wordings in Sections 41(2) and 42 of the

Act. It is said in Section 41(2) that any such officer of Gazetted rank of the specified department, if he has reason to believe from personal knowledge or from information regarding the offence under this Act, may himself arrest the person and search of the building, conveyance or place both in the day time and in the night time or authorize any officer subordinate to him who is superior to a Constable. But, in Section 42, it is said that if any officer above the rank of a Peon or Sepoy or Constable of specified department authorized by the Government has reason to believe either from personal knowledge or from information, he shall take the same in writing and after sending the same to the superior officer, he can search the building, conveyance or enclosed place during the day time.

39. Thus, the power conferred on the Gazetted Officers as per Section 41(2) is that on information they can themselves go and search any place and arrest any person at any time. But, this special power has not been conferred on the officers mentioned in Section 42. u/s 42, it is obligatory on the part of the officers concerned to take down the information in writing; send the said information to the superior officer; and search the building, conveyance or enclosed place only during the day time.

40. The main difference between Section 41(2) and Section 42(1) and (2) is that the superior officials like Gazetted Officers u/s 41(2) even without sending the information in writing to their superior officers could go to the spot at any time and search any place, whereas the non-Gazetted Officers u/s 42 cannot go to the specified places mentioned in the said section without writing the information and without sending the same to the superior officers.

41. The Supreme Court would say in *State of Punjab Vs. Balbir Singh*, and *State of Punjab Vs. Baldev Singh*, etc. etc., that Section 42 is mandatory. While dealing with Section 41(2), the Supreme Court in *BALBIR SINGH* case observing that Section 41(2) is not mandatory, would lay down the following principle:

If an empowered officer or an authorised officer u/s 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C., namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C., then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

42. In the light of the above observation, if we look at the facts of the case, it is clear that P.W.1, a Gazetted Officer who has been conferred with

the special powers u/s 41(2), went to the spot on intelligence information and conducted a search and recovered the contraband from the suitcase

which the accused brought to the Airport. Since P.W.1, Deputy Collector of Customs being the senior Gazetted Officer need not send the

information u/s 42 to his superior officer, the admission of P.W.1 that he did not record the information would not affect his powers of going to the

spot on information for the purpose of searching the place and arresting a person concerned, as laid down in the BALBIR SINGH case.

Therefore, non-observance of Section 42 of the Act could not be complained of.

43. Then, we will come to the point whether Section 43 is attracted.

44. The Supreme Court in SAYAR PURI v. STATE OF RAJASTHAN (1998) 3 Crimes 254 would hold that Section 42 would not apply where

the search is conducted in a public place as referred to in Section 43 of the Act.

45. A joint reading of Section 42(1) and 42(2) of the N.D.P.S. Act makes it very clear that the requirement in Section 42(2) will be attracted only

to a case where the information relates to the availability of narcotic drug in a building, conveyance or enclosed place. In this section, there is no

reference about the public place.

46. The public place is covered by a separate section, namely Section 43. In Section 43 of the N.D.P.S. Act, there is no provision similar as in

Section 42(2), which makes it obligatory for the officer who receives the information to record the same and to send it to the superior officer. The

reading of Section 42 would make it clear that 42(2) will be attracted only in respect of the information relating to the availability of the contraband

in a building or conveyance or enclosed place.

47. On taking note of the ingredients of Section 42, it has been held by the Supreme Court in State of Punjab Vs. Balbir Singh, as follows:

(2C). Under Sec. 42(1) the empowered officer if he has any a prior information given by any person, that should necessarily be taken down in

writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may

furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant

between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Sec. 42(1) if

such an officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

In this judgment, there is no observation by the Supreme Court that Section 42(2) would apply even to a case where the information relates to the availability of contraband in a public place.

48. Another five member Bench of the Apex Court in *State of Punjab Vs. Baldev Singh, etc.*, while considering the aforesaid decision, gave

the salient features of Sections 41, 42 and 43 of the Act. The gist of the same is given below:

(1) Section 41(2) of the Act conferred the powers on the Gazetted Officers of the various Departments of the Government to search and arrest a

person in a building or conveyance or vessel or place.

(2) u/s 42(1), the empowered officer after sending the information shall take down in writing the information received by him regarding the offence

being committed in any building, conveyance or enclosed place. u/s 42(2), the empowered officer shall send the information taken down forthwith

to his immediate official superior.

(3) The caption in Section 43 is "Power of seizure and arrest in public places". As per this section, any officer of any of the departments specified

in the Act, if he has reason to believe that offence is being committed in a public place, can go to the said place detain and search any person.

(4) The material difference between the provisions of Section 42 and Section 43 is that whereas Section 42 requires recording of reasons for belief

and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section

43 does not contain any such provision and as such while acting u/s 43 of the Act, the empowered officer has the power of seizure of article etc.

and for arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession

appears to him to be unlawful.

49. The above features, as pointed out by the Apex Court, in the light of the variations in the Sections 41, 42 and 43 would reveal that the various

fetters like recording an information or recording the grounds of his belief for search during the day time and night time does not apply to Section

43. The obvious reason is, in a public place, it is the duty of every law enforcing official to apprehend the accused and provide safety to the law

abiding citizen. In Section 41(2), it is mentioned as "place" which would mean that "public place" also is included. In Section 42(1), it is mentioned

as "enclosed place" which would mean that "public place" is not included.

50. Therefore, both BALBIR SINGH case and BALDEV SINGH case would clearly declare that the provisions of Section 42(1) and (2) will

apply to the case of information relating to the availability of the contraband in a "building or conveyance or enclosed place" and the said provisions

will not apply to a case of information relating to possession of contraband by any person as available in a public place.

51. It was held by the Delhi High Court in Utpal Mishra Vs. Nicelai Christensen, that the International Airport is a public place and as such,

Section 42 would not apply and Section 43 alone would apply. In that case, the meaning of the expression ""public place"" has been elaborately

dealt with and found that the Airport is a public place where the public has got access.

52. In this case, P.W.1 would state that on information, he went to the International Airport along with other officers and waited in the Hall of the

Airport. It was not elicited from him that the place in which the search was conducted is an enclosed place. Under those circumstances, it has to be

construed that the search was conducted in the public place, namely Airport.

53. To sum up: When the empowered officer being a Gazetted Officer as provided in Section 41(2), goes to the Airport on getting the information,

he need not take down the said information in writing and send it to the superior officer, as Section 42 would not apply to the said officer, moreso,

when the search was conducted in a public place as provided in Section 43 of the Act.

54. Under those circumstances, the trial Court shall be held to be wrong in acquitting the accused, in view of the fact that the prosecution proved

its case beyond reasonable doubt through the evidence of P.Ws.1 to 4 and Exs.P1 to P27 that while the accused was attempting to export the

contraband drug, he was intercepted, the search was conducted in a public place and seizure of 5,940 grams of the same was effected in

accordance with the procedure and after obtaining voluntary confession, the accused was arrested and sent for remand with the contraband to the

Court, which was ultimately found to be heroin.

55. Therefore, the respondent/accused is liable to be convicted for the offence u/s 8(c) read with 21 and 23 read with 28 of the N.D.P.S. Act.

Accordingly, the acquittal is set aside and the respondent is convicted for the above said offence. Post the matter for question of sentence on

11.3.2002. Accused/respondent is directed to be present on that day.

ORDER

1. At last, this Court has been allowed today to put question regarding question of sentence. The accused has filed statement narrating various

circumstances under which the leniency could be shown to him. It is stated in the statement filed by him that he is the father of three children and

marriage of his daughter has to be conducted. It is also stated that as per the orders of this Court, he has surrendered his passport on 2.5.2002

and as such, sympathy could be shown by awarding the sentence of period already undergone, which may be set off as contemplated u/s 428 of

Cr.P.C. He would also request this Court to award minimum sentence and impose a minimum fine taking into account his family situation and his

pathetic condition.

2. In view of what is stated above, the respondent/accused is sentenced to undergo the minimum sentence of 10 years imprisonment and to pay a

fine of Rs.1,00,000/- (Rupees one lakh only) in default to undergo R.I. for one month. Therefore, the respondent Ravi Shankar S/o Narayanasamy

is remanded to judicial custody to undergo the remaining period of sentence.