
(2013) 1 RCR(Criminal) 41

High Court Of Punjab And Haryana At Chandigarh

Case No: C.R. A-D No. 102-DB of 2011

Harwinder Singh Alias
Ripal

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Aug. 22, 2012

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) " Section 21, 41(2), 42, 42(2), 43

Citation: (2013) 1 RCR(Criminal) 41

Hon'ble Judges: Jasbir Singh, Acting C.J.; Rakesh Kumar Jain, J

Bench: Division Bench

Advocate: Sant Pal Singh Sidhu and Mr. Vijay Kumar Jindal, for the Appellant; Gurveen H. Singh, Addl. A.G., Punjab, for the Respondent

Final Decision: Dismissed

Judgement

Rakesh Kumar Jain, J.

Two criminal appeals bearing CRA-D-102-DB of 2011 and CRA-S-197-SB of 2011 are being disposed of

together as they arise out of order of the Trial Court dated 07.12.2010, convicting all the three appellants for the offence punishable u/s 21 of the

Narcotic Drugs and Psychotropic Substance Act, 1985 [for short "the Act"] and sentencing them as under:-

However, the period already undergone by the appellants during investigation and trial was ordered to be set off against their substantive sentence.

2. As per case of the prosecution, on 02.10.2006, Harvinder Pal Singh Kang, A.I.G., Counter Intelligence, Amritsar along with SI Baldev Singh

told Inspector Balbir Singh (PW 4), posted in Special Narcotic Cell, Amritsar that as per secret information, notorious heroin international

smugglers Karnail Singh @ Kali, Chanan Singh @ Channa and Harwinder Singh @ Ripal (appellants) were roaming near bus stand, Amritsar in

their Maruti car bearing registration No. DL-IC-3673 : If he picket and raid near the bus stand, the appellants along with huge quantity of heroin

could be apprehended. PW 4 brought the said information to the notice of Makhan Singh, SSP, SNC, Amritsar, and constituted a team of SI Har

winderpal Singh; SI Varinder Kumar and other police officials. He along with the police team reached near the Bus Stand, Amritsar in

departmental bus and started picketing after putting barricades. They saw blue coloured Maruti car bearing registration No. DL-IC-3673 coming

from the side of General Bus Stand, Amritsar which was signalled and stopped at some distance from which three persons with bags in their hands

were trying to escape. However, they were apprehended by the police party and on disclosure, they were found to be the appellants. PW 4

disclosed each of the appellant his identity and informed that he suspect some narcotic intoxicant and psychotropic substance in their possession

and before conducting the search, they were informed that they have a right to be searched by some Gazetted Officer or Magistrate whom they

trust. The appellants did not repose faith in him and opted for search in the presence of some Gazetted Officer. PW 4 prepared non-consent

memos Ex. PM, Ex. PP and Ex. PO of all the three appellants. Accordingly, he requested DSP Rajpal Singh (PW 1) to reach at the spot and in

the meantime, one Ramesh Chand son of Dayal Chand was also associated. After reaching, DSP Rajpal Singh (PW 1) disclosed his identity to the

appellants and again made an offer that they can get themselves searched from some other Gazetted Officer whom they trust, but all the appellants

separately reposed faith in him. Accordingly, accepted memo of consent Ex. PA, Ex. PB and Ex. PC were prepared which were thumb marked

and signed by the appellants. On the direction of PW 1, PW 4 conducted search of the bag from which one Kg. heroin each was recovered from

Channan Singh and Karnail Singh and 2 Kg. heroin was recovered from Harwinder Singh @ Ripal. Separate recovery memos Ex. PD, Ex. PF

and Ex. PH were prepared and recovery memo of hand bags Ex. PK, Ex. PL and Ex. PM from which heroin was recovered were also prepared.

The personal search of the appellants was conducted and separate memos Ex. PE, Ex. PG and Ex. P1 were prepared. Maruti car used for the

purpose of transportation was recovered by the separate recovery memo Ex. PN and then all the three appellants were arrested vide arrest

memos Ex. PR, Ex. PS and Ex. PT. The case property contained in four parcels of heroin, each weighing 995 grams, was sealed with seals BS

and RS.

3. After completion of the investigation, challan was presented and the appellants were charge-sheeted for commission of offence u/s 21 of the

Act.

4. The prosecution examined 6 witnesses, namely, DSP Rajpal Singh (PW 1), Inspector Harwinderpal Singh (PW 2), Const. Gurdeep Singh (PW

3), Inspector Gurpreet Singh (PW 4), Inspector Balbir Singh (PW 4), Const. Munish Arora (PW 5) and Const. Balwant Singh (PW 6).

5. After recording the prosecution evidence, the entire, incriminating material was put to the appellants, they pleaded innocence and alleged that no

recovery of narcotic substance has been effected from them. They also lead evidence and examined five witnesses, namely, Harbans Singh (DW

1), Avtar Singh (DW 2), Ajaib Singh (DW 3), Gurdip Singh (DW 4) and Manmohan Sehgal (DW 5).

6. From the FSL report (Ex. PX), all the four parcels were found containing Diacetylmorphine heroin and the quantity in terms of percentage was

75% in three parcels, whereas it was 74.5% in the fourth parcel.

7. In order to attack the decision of the learned Trial Court convicting and sentencing the appellants for offence u/s 21 of the Act, it is common

argument of the counsel for the appellants that there is non-compliance of Section 42 of the Act. It is submitted that the case has been registered

on the basis of the secret information which was neither reduced into writing nor brought to the notice of the higher officers. They have extensively

referred to Section 42 of the Act, whereas the State counsel has submitted that as the recovery has been effected at a public place in transit,

Section 43 of the Act would apply instead of Section 42 of the Act. In this regard, reference to a decision of this Court in CRA-D-145-DB-2007

titled as ""Davinder Kumar v. State of Punjab"" dated 21.11.2011 has been made by the learned State counsel.

8. Insofar as the first argument is concerned, admittedly, the recovery has been made at a public place, therefore, the provisions of Section 43 of

the Act are attracted instead of Section 42 of the Act. In this regard, in Davinder Kumar's case (supra), this Court, while adjudicating upon the

difference between Sections 42 and 43 of the Act, has observed as under:-

There is a marked difference between Sections 42 and 43 of the Act. A five-Judge Bench of Hon"ble the Supreme Court in Karnail Singh Vs.

State of Haryana, has reconciled the ratio of law propounded in two different judgments rendered by three-Judge Bench in Abdul Rashid Ibrahim

Mansuri Vs. State of Gujarat, and Sajan Abraham Vs. State of Kerala, and has held as under:

34....As a result, if the statutory provision under Sections 41 (2) and 42(2) of the Act of writing down the information is interpreted as a mandatory

provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These

provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as

a discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug peddlers.

Thus, it is evident that mere non-compliance of Section 42 of the Act will not vitiate the trial till the accused is able to bring on record the prejudice

caused to him. That apart, in the facts and circumstances of each case, it is for the Court to decipher as to whether in a given case, which of the

two Sections, i.e. Section 42 or Section 43, of the Act is attracted.

In State of Haryana Vs. Jarnail Singh and Others, , Hon"ble the Supreme Court has dilated upon the distinction between two Sections, i.e. Section

42 or Section 43, of the Act and has to say as under:

7. The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no

application to the facts of this case Section 42 authorizes an officer of the Departments enumerated therein, who are duly empowered in this behalf,

to enter into and search any such building, conveyance or place, 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, etc. is kept or concealed in any building, conveyance or

enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter

and search such building, conveyance or enclosed place, he must record the grounds for his belief 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.

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 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.

9. 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 sunrise.

(Emphasis supplied)

Furthermore, in Karnail Singh's case (supra) a further distinction between both the Sections, i.e. Section 42 or Section 43, of the Act has been

noticed as under:

26. The material difference between the provisions of Sections 42 and 43 of the NDPS Act is that 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 the

article, etc. and 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.

9. As such, we are of the considered opinion that the plea of non-compliance of Section 42 of the Act is not available to the appellants as the case

is covered by the provisions of Section 43 of the Act.

10. Next argument of counsel for the appellants is that of noncompliance of Section 50 of the Act.

11. Counsel for the State has submitted that after preparation of the non-consent memo, PW 4 had requested PW 1 to reach the spot as the

appellants had desired to be searched by a Gazetted Officer. PW 1, after disclosing his identity, again made the offer that in case they do not want

to be searched by him, he can still arrange another Gazetted Officer, but the appellants gave their consent and accordingly consent memos were

prepared. At no point of time, the appellants had asked for their search in the presence of a Magistrate. It is also argued by counsel for the State

that as the hand bags carried by the appellants were searched from which the narcotic has been recovered and hence Section 50 of the Act is not

attracted. In this regard, an order of this Court passed in CRA-D-645-DB-2005 titled as "Karambir v. State of Haryana" dated 09.02.2012 has

been pressed into service.

12. Admittedly, the search of the hand bags carried by the appellants was conducted as per law. In Karambir's case (supra), wherein the

appellant was carrying a plastic bag and was searched by the prosecution in presence of a Gazetted Officer, this Court observed as under:-

Be that as it may, in the present case, contraband was recovered from a bag in possession of the appellant. Their Lordships of the Supreme Court

in the case of State of Rajasthan v. Babu Ram, 2007 (3) RCR (Cri.) 280, specifically opined that when recovery is effected from a bag carried by

an accused, there is no need to comply with the provisions of Section 50 of the Act. It was further opined that the bag, briefcase etc. cannot be

treated as a part of the human body, it was observed as under:-

9. A bag, briefcase or any such article or container, etc, can, under no circumstances, be treated as body of a human being. They are given a

separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the

physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a

carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be

required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would

be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore,

it is not possible to include these articles within the ambit of the word ""person"" occurring in Section 50 of the Act.

10. The scope and ambit of Section 50 of the Act was examined in considerable detail by a Constitution Bench in *State of Punjab v. Baldev Singh*,

1999 (3) R.C.R. (Cri.) 533 : (1999 (6) SCC 172) and para. 12 of the reports is being reproduced below"" ""12. On its plain reading, Section 50

would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered

officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal

course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also

recovered, the requirements of Section 50 of the Act are not attracted.

To the same effect is the ratio of the judgment of the Supreme Court in the case of *State of Rajasthan Vs. Tara Singh*,

13. Counsel for the appellants have further argued that samples are not bearing seal of the Magistrate as the same were not produced before him,

whereas it is submitted by counsel for the State that samples were duly presented before the Magistrate and were signed by him. In this regard, the

observations made by the learned Trial Court required to be referred to, which read as under:-

This shows that the objection raised by the learned" counsel for the accused is unfounded as the Area Magistrate had put his signatures on all the

samples produced before him. The learned counsel for the accused did not put any further question regarding the authenticity of the

initials/signatures of the area magistrate. Even otherwise also, the record has shown that SI Balbir Singh of Special Narcotic Cell had moved an

application before the Area Magistrate on 3.10.2006 in order to present the accused, samples as well as the contraband. The back side of the said

application shows that the Judicial Magistrate 1st Class (Duty), vide order dated 3.10.2006 had signed the main four parcels and four sample

parcels and then returned to the Investigating Officer. Meaning thereby, all the parcels were presented before the Area Magistrate.

14. Hence, the third argument raised by counsel for the appellant is also rejected.

15. Counsel for the appellants have further argued that nonproduction of Ramesh Chand son of Dayal Chand, an independent witness, is a serious

lacuna in the trial which demolishes the case of the prosecution.

16. Learned State counsel has submitted that since the independent witness was not supporting the prosecution case, the public prosecutor opined

not to examine him as he was suspected of joining hands with the accused. Moreover, he has also referred to the observations made by this Court

in Davinder Kumar's case (supra) in which similar submissions were made and it was held that examination of the independent witness is a rule of

prudence and not of necessity. In a case where deposition of the official witnesses is found to be reliable and credible by the Court, it will not

discard the same merely on the ground that an independent witness has not been examined. It is only in the cases where there is some doubt, the

Court will insist for the testimony of independent witness, otherwise his examination is not a rule of thumb. It was also observed that in the given

facts and circumstances of each case, while applying rules of appreciation, the Court may ignore non-examination of the independent witness or

may insist for its examination.

17. We have appreciated the evidence led by the prosecution which, according to us, inspires confidence and as such, the non-examination of

independent witness is not a serious lacuna.

18. It is further argued by counsel for the appellants that number of the alleged car used in transportation has not been found to be correct because

in the secret information, the car number was informed as DL-IC-3673, whereas by way of recovery memo (Ex. PN), the prosecution has tried to

prove that the car was bearing registration No. HR-6CD-3673.

19. Learned State counsel has argued that PW 2 had received information about a Maruti car bearing registration No. DL-IC-3673 and as per the

recovery memo (Ex. PN), the said car bearing registration No. DL-IC-3673 was recovered, but at that time it was without documents but during

investigation, it was concluded that the car involved in commission of crime was a Maruti car bearing registration No. DL-6CD-3673, Chasis No.

1157068 and Engine No. 1562351 which was in the name of PW 5 who had tendered his affidavit Ex. PW 5/A that it was sold to Harwinder

Singh @ Ripal (appellant) who had also tendered his affidavit Ex. PW 5/B about the purchase of the aforesaid car bearing registration No. DL-

6CD-3673.

20. In this regard, we are one with the finding re-corded by the learned Trial Court in which it has taken judicial notice of the fact that usually the

persons involved in illegal activities ply their vehicles by putting fake numbers plates. Harwinder Singh (appellant) did not disown his affidavit Ex.

PW 5/B. Moreover, the digits 3673 are common in both the cars and the cars belong to Delhi as has been shown from the alphabets DL. The only

difference is of alphabets ""IC"" and ""6CD"", but after checking up the documents, it was found that the car was bearing registration No. DL-6CD-

3673. Hence, this argument of the appellants is also not of much significance in order to extend any benefit of doubt to them.

21. It is further argued that the secret information has to be recorded/reduced into writing by the officer who receives the same and not by the

officer to whom it is conveyed.

22. Learned State counsel has submitted that as it is not a case falling u/s 42 of the Act, rather it falls within the ambit of Section 43 of the Act,

therefore, recording of secret information into writing pales into insignificance.

23. We agree with the submission made by the learned State Counsel and reject the argument raised by counsel for the appellants. After thorough

discussion on various aspects in this matter with regard to the violation of mandatory provisions of the Act, we are of the considered opinion that

there is no error in the order of conviction and sentence passed by the learned trial Court. Accordingly, both the appeals are hereby dismissed

being denuded of any merit.