DALEL SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 1034 of 2003)

OCTOBER 7, 2009

[V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss.20 and 42 – Conviction u/s.20 – Challenged – Non-compliance of s.42 alleged – Held: Challenge not tenable – Information was received by PW6 Inspector when he was not in the police station but was on patrol duty – He immediately, after receipt of information, informed his superior officer ASP on wireless –Information having been transmitted through wireless, there was substantial compliance of s.42 since the situation was of emergency – Had the police officer not moved in right earnest, the appellant-accused would have had opportunity to remove the contraband "charas" and escaped from the arms of police.

PW6 Inspector, while on patrol duty, received secret information that the appellant was selling "charas" and keeping it in his house and informed his superior officer PW5 ASP on the wireless. Police party raided the house of the appellant and 6.5 kgs "charas" was recovered from there. On basis of the evidence tendered by the raiding party, the trial court convicted the appellant under s.20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced him to rigorous imprisonment for 10 years. The conviction was upheld by the High Court.

In appeal to this Court, the appellant contended that there was total non-compliance of the provision of Section 42 of the Act inasmuch as there was no recording of the information prior to taking any action, either before

A the raid or even thereafter; that the said non-compliance breached a mandatory provision of the Act and as such the said non-compliance was fatal to the prosecution case. The other point argued by the appellant was that there were discrepancies inasmuch as PW 6 stated in his B statement that the recovered "charas" weighed 4½ kg while PW1, an independent witness said on oath that the recovered "charas' weighed only 1.5 kg while, actually it was 6.5 kg which was alleged to have been recovered from the appellant.

C Dismissing the appeal, the Court

HELD: 1.1. The information was received by PW6 Inspector when he was not in the police station but was on patrol duty in the town. He immediately, after receipt D of the information, informed his superior officer on wireless. There is no doubt that he did not record it in writing but passed on it to his superior ASP by wireless. The fact that the superior officer was informed is deposed to by ASP who appeared as PW5. Both the said E witnesses have deposed about the information having been transmitted through wireless and this would be a substantial compliance of Section 42 of the Act since the situation was of emergency. Had the police officer not moved right in the earnest, the appellant-accused would F have had an opportunity to remove the contraband "charas" and escaped from the arms of police. There is no infirmity in the judgments of the courts below. [Para 6] [1135-G-H; 1136-A-D]

1.2. The contraband of "charas" was found in the G house of the appellant which was described as "gher" (compound). Besides, there is no serious cross-examination of any of the witnesses on the question of ownership of the house. Insofar as the recovery of contraband "charas" is concerned, it has been fully

H

established that 6.5 kg of "charas" was recovered and the samples thereof were sent to the forensic laboratory along with the seals. The documents like panchanama and seizure memos clearly bring out the position that 6.5 kg of charas was found in the plastic bag. On that backdrop, the error committed by witnesses could be attributed to failure of human memory which is inconsequential. [Para 4] [1133-C-F]

Kamail Singh v. State of Haryana **2009(10) SCALE 255, followed.**

Case Law Reference:

2009(10) SCALE 255	**followed**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1034 of 2003.

From the Judgment & Order dated 13.3.2003 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 739 of 2000.

Ratan Kumar Choudhuri for the Appellant.

Kamal Mohan Gupta (Not Present) for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This is an appeal by the appellant-accused against his conviction for the offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "NDPS Act") and the consequent sentence of R.I. for 10 years and to pay fine of Rs. 1.5 lakhs, in default to undergo further R.I. for one year.

2. The prosecution story in very short conspectus is that on 4.7.1997 at about 2 p.m., Inspector Mahabir Singh along with other police officials was present at Gubhana bus-stop where he received a secret information that the appellant-accused

A was doing the business of selling charas and was keeping charas in the courtyard of his house. On this information, Inspector Mahabir Singh immediately informed his superior Kala Ramchandran, Additional Superintendent of Police on wireless and the police party went to the house of the accused B after joining Surajbhan, Namberdar and Chanderbhan, Chowkidar as witnesses. In the meantime, ASP Kala Ramchandern also reached the spot and directed the Inspector Mahabir Singh to conduct the search of the premises. The house of the accused which was in a gher (compound) was C found locked. Ultimately, it was the wife of the accused who brought the key of that "gher". The "gher" had three rooms. The "gher" was opened and searched. In the fodder room (kotha of tura) inside the "gher", one plastic bag was found which was opened and checked and charas weighing 6.5 kilo gram was recovered. The usual investigation went on. The samples were D collected and sent along with the seal; a rukka (information) was immediately sent on the basis of which the first information report was registered in the concerned police station. In support of its case, prosecution examined PW6 Inspector Mahabir Singh, PW5 ASP Kala Ramachandra apart from examining, E PW1 Surajbhan, PW2 Satbir Singh, PW3 Constable Sunil Kumar and PW4 ASI Hari Singh. They were all part of the raiding party along with Inspector Mahabir Singh. On the basis of their evidence, the trial court convicted the accused against which there was an appeal before the High Court. The High F Court dismissed the appeal. Hence, the present appeal.

3. Mr. Ratan Kumar Choudhary, learned counsel appearing for the appellant very painstakingly took us through the evidence of all the witnesses and urged that this was a case G where there was a total non-compliance of the provision of Section 42 of the NDPS Act inasmuch as there was no recording of the information prior to taking any action. Under the said Section, the investigating officer had to record the information and send the same to the immediate superior officer. However, that was not done either before the raid or H

even thereafter. It was pointed that the said non-compliance was the breach of a mandatory provision of the Act and as such the said non-compliance was fatal to the prosecution case. The other point argued by the learned counsel is that there were discrepancies inasmuch as the PW 6 Inspector Mahabir Singh had stated in his statement that the recovered charas weighed 4 ½ kilo gram while PW1 Suraj Bhan, an independent witness had said on oath that the recovered charas weighed only 1.5 kilo gram while, actually it was 6.5 kilo gram which was alleged to have been recovered from the appellant.

4. We have seen the evidence ourselves. However, we are totally convinced that there was undoubtedly the contraband of chars found in the house which was described as "gher" (compound). Learned counsel was at pains to point out that there was no evidence collected regarding the ownership of the room from where the contraband charas was seized. We do not think that this can be urged at this stage as both the courts below have accepted that the house actually belonged to the accused and the concerned room was within the "gher" (compound) and was in his possession. This is apart from the fact that there is no serious cross-examination of any of the witnesses on the question of ownership of the house. Insofar as the recovery of contraband charas is concerned, it has been fully established that 6.5 kilo grams of charas was recovered and the samples thereof were sent to the forensic laboratory along with the seals. The documents like panchanama and seizure memos clearly bring out the position that 6.5. K.G. Of charas was found in the plastic bag. On that backdrop, the error committed by witnesses could be attributed to failure of human memory which is inconsequential. The courts below have accepted this discovery.

5. Learned counsel for the appellant very vehemently urged that there was total non-compliance of Section 42 of the NDPS Act. We do not think that the accused can succeed even on this point in view of the judgment of Constitution Bench of this

court rendered in *Kamail Singh vs. State of Haryana* 2009(10) SCALE 255 wherein, in paragraph 10, it was held as under:

> "In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 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 concerned Register and forthwith send a copy to his immediately 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 Section 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 officer 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 of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of 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 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."

6. On this backdrop when we see the prosecution case here, it is apparent that the information was received by PW6 Inspector Mahabir Singh when he was not in the police station but was on patrol duty in the town. He immediately, after receipt

A of the information, informed his superior officer on wireless. There is no doubt that he did not record it in writing but passed on it to his superior ASP Kala Ramachandran by wireless. The fact that the superior officer was informed is deposed to by ASP Kala Ramachandran who appeared as PW5. We have B seen her cross-examination which really is totally irrelevant. Similarly, we have gone through the evidence of PW6 Inspector Mahabir Singh. Again, his cross-examination is also redundant cross-examination. Both the witnesses have deposed about the information having been transmitted through wireless and in our C opinion would be a substantial compliance of Section 42 of the NDPS Act since the situation was of emergency. Had the police officer not moved right in the earnest, the appellant-accused would have had an opportunity to remove the contraband charas and escaped from the arms of police. Under the D circumstances, we are unable to agree with the contentions raised before us by learned counsel for the appellant. In our view, there is no infirmity in the judgments of the courts below. The appeal, being devoid of any merit, is dismissed.

7. The appellant is reported to be on bail. The bail bonds E are cancelled. The appellant is directed to surrender within four weeks from today to serve out the remaining sentence failing which non-bailable warrants shall be issued to secure his arrest. We appreciate the sincere efforts made by Mr. Ratan Kumar Choudhary, learned counsel appearing for the appellant to F assist us during the hearing of the matter as the learned counsel for the State of Haryana remained absent.

B.B.B. Appeal dismissed.