

Before Sudip Ahluwalia, J.

PRABH SINGH @ HARRY & ANR.—Petitioners

versus

STATE OF PUNJAB—Respondent

CRM-M No.747 of 2018

June 1, 2018

Code of Criminal Procedure, 1973—S.439—Narcotic Drugs and Psychotropic Substances Act, 1985—Ss. 22, 27A, 29 and 42—Smuggling of Heroin from Pakistan—No compliance of provisions of arrest search and seizure Regular bail—S.42(2) of NDPS Act itself specifies that where officer concerned takes down any information in writing under Sub-Section (1) or records his beliefs thereto, he shall within 72 hours send a copy thereof to his immediate Superior Officer—Held, officer holding rank of a Sub Inspector, who ostensibly sent information to SHO of Police Station, who in normal course happens to be his immediate superior by virtue of holding Inspector's rank therefore, cannot be said that there was no compliance in terms of Section 42(2).

Held, that now on perusal of the endorsement made by the officer recording the FIR (Annexure P-1) at the end of Column No.12 therein, it is seen that it was specifically noted therein that the Ruqa alongwith copy of FIR was being forwarded for spot investigation and a “Special report prepared” was being sent through Head Constable Hazura Singh No.425/Ludhiana to the Area Magistrate as well as “Senior Officers”, and that information is conveyed by DCR. Needless to mention, according to Section 125 of the Indian Evidence Act, 1872, no Police Officer can be compelled to disclose the source of gathering any secret information, on the basis of which the FIR/criminal proceedings are started, and Section 42(2) of the NDPS Act itself specifies that where the officer concerned takes down any information in writing under Sub-Section (1) or records his beliefs thereto, he shall within 72 hours send a copy thereof to his immediate Superior Officer. In the present case, the officer concerned happened to be Jaspal Singh holding the rank of a Sub Inspector, who ostensibly sent the information to the SHO of the Police Station, who in the normal course happens to be his immediate superior by virtue of holding an Inspector's rank. So it cannot be said that no compliance in

terms of Section 42(2) was done at all. It has been argued that the concerned officer-in-charge at that time happened to be one subordinate in rank to the Authorized Officer, being an ASI. This submission would again appear to be unconvincing, as undoubtedly in terms of Section 2(o) of the Code of Criminal Procedure, any Police Officer above the rank of Constable falls within the definition of “Officer-in-charge (Station House Officer) of a Police Station” in the event of a temporary absence or inability to perform duties by the regular SHO. It can therefore, be safely determined that the authorized officer holding a rank of Sub Inspector of Police had in the normal course conveyed the requisite information in terms of Section 42(2) to his immediate superior holding an Inspector's rank as officer-in-charge/SHO of the Police Station, and the fact that at the given time when such information was received, an authorized officer though lower in rank was performing the duties due to some temporary absence or inability of the regular SHO in terms of Section 2(o) of the Cr.PC, there cannot be said to be any material irregularity in the matter of compliance of Section 42(2), since in any event a “special report prepared” was further sent up from the Police Station to the “Superior Officers”.

(Para 9)

Vipul Jindal, Advocate, *for the Petitioners.*

Luvinder Sofat, A.A.G., Punjab.

SUDIP AHLUWALIA, J.

(1) This is an Application filed under Section 439 of the Code of Criminal Procedure on behalf of Petitioners seeking regular bail in FIR No.123 dated 15.09.2017, under Sections 22, 27-A & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “the NDPS Act”) registered at Police Station Moti Nagar, Ludhiana.

(2) The FIR was registered on 15.09.2017 against Gurlal Singh, Gurpreet Singh and Prabh Singh on the basis of complaint made by SI Jaspal Singh. On 15.09.2017, SHO Jaspal Singh, P.S. Moti Nagar, Ludhiana, who along with the Police Party in connection with Patrolling and checking of bad elements, was present at Gate of P.S. Moti Nagar. At that time, a Secret Informer came and gave information that Gurlal Singh who is a Drug Smuggler and also Proclaimed Offender along with his companion Gurpreet Singh and Prabh Singh, in connivance with each other, smuggles Heroin from Pakistan and supplies it to customers, and that those culprits also keep with them

Mobile Sim of Pakistan. It was further informed that at that time, Gurlal Singh @ Lali, Gurpreet Singh @ Gopi and Prabh Singh were sitting in front of Vardhman Mill in white Car bearing Registration No.PB-46-U- 4771 and if raid is conducted then heavy amount of Heroin smuggled from Pakistan and Mobile Sim of Pakistan can be recovered. On finding the information reliable, the present FIR was drawn up.

(3) Thereafter during Nakabandi, the concerned Car was got stopped and on checking the same, in which three men were sitting, one black polythene from the arm rest box of Car was recovered. When the black polythene was opened, 500 Grams Heroin was recovered. Further, Gurlal Singh and Prabh Singh later got recovered another two Kilograms Heroin which was hidden by them in the land of Gurmail Singh @ Gaij. Samples were sent to the Laboratory for FSL report vide order dated 16.09.2017 by the Illaqa Magistrate, Ludhiana. Subsequently, investigation was conducted and challan against the accused persons has since been submitted.

(4) At this stage, the Petitioners have prayed for their release on bail by raising certain contentions, which have already been noted in the earlier order passed on 21.5.2018, and which are again set out as below -

“(i) That there was no compliance of the mandatory provision of Section 50 of the NDPS Act in as much as the offer of search in pursuance of a Gazetted Officer, allegedly made by Kuldeep Singh DSP STF, Moga was improper since he had only given option to the petitioners to get the car searched from “Gazetted Officer of some other Department or Magistrate who can be called at the spot without delay on request.” It has been further contended relying upon the decision of the Apex Court in “*State of Rajasthan versus Parmanand and another, 2014 (85) ACrC 662*” that the offer for being searched by treating the DSP, who himself was a part of the raiding party would not meet the test of validity as required under the statute;

(ii) That the mandatory provision required under Section 42 (1) was also not complied in as much as substance of the secret information was not conveyed in writing by the complainant who happens to be an Inspector of Police, to any of his superiors, and that mere sending of the ruqa on the basis of which FIR was drawn up in the Police Station

cannot be treated as sufficient compliance of Section 42 in terms of the decision of the Supreme Court in “*Darshan Singh versus State of Haryana, 2016 (1) R.C.R. (Criminal) 333*” ;

(iii) That even otherwise the fact that the complainant namely, Jaspal Singh who conducted virtually all the investigation himself after the FIR had also been drawn up on the basis of his own complaint, was not justified in doing so himself in view of the decision of the Supreme Court in “*State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu versus Rajangam, 2010 (15) SCC 369*” wherein acquittal of the accused on the same ground was upheld.”

(5) The application has been opposed on behalf of the State by relying upon the Large Bench of the Supreme Court in *Vijaysinh Chandubha Jadeja versus State of Gujarat*¹, wherein it had been held-

“That the object with which right under Section 50 (1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimize the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in **Re Presidential Poll, (1974) 2 SCC 33**, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed.”

(6) Ld. counsel for the Petitioner has however, submitted that

¹ 2011(1) SCC 609

in terms of the aforesaid Judgment, “strict compliance” of the provisions as prescribed in the Statute has been called for in preference to “substantial compliance”.

(7) At the same time however, further observations of the Apex Court in the same referential decision also warrant attention wherein it has been observed -

“Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

(8) Now it is not at all the case that absolutely no compliance of the provisions of Section 50 of the NDPS Act was done. On the contrary, the submission noted in this regard is that the offer given to the Petitioners to get the Car searched from “Gazetted Officer of some other Department or Magistrate who can be called at the spot without delay on request” was in itself a defective offer and *non est* in the eyes of law, since the requirement of the Statute is that the offer should be to “take such person without unnecessary delay to the nearest Gazetted Officer of any of the Department mentioned in Section 42 or to the nearest Magistrate” and that the authorized officer concerned could not have added the words “other department or Magistrate can be called at the spot without delay”. This contention in the opinion of the Court is not convincing enough, since the basic gist of the offer as required under law was apparently communicated to the Petitioners, which was declined by them, and since the Supreme Court has itself observed that it would neither be possible nor feasible to lay down any absolute formula for determining whether or not the procedure prescribed has been followed in terms of the requirement of Section 50, which in itself would be a matter of trial.

(9) Now on perusal of the endorsement made by the officer recording the FIR (Annexure P-1) at the end of Column No.12 therein, it is seen that it was specifically noted therein that the Ruqa along with copy of FIR was being forwarded for spot investigation and a “Special report prepared” was being sent through Head Constable Hazura Singh No.425/Ludhiana to the Area Magistrate as well as “Senior Officers”, and that information is conveyed by DCR. Needless to mention, according to Section 125 of the Indian Evidence Act, 1872, no Police Officer can be compelled to disclose the source of gathering any secret information, on the basis of which the

FIR/criminal proceedings are started, and Section 42(2) of the NDPS Act itself specifies that where the officer concerned takes down any information in writing under Sub-Section (1) or records his beliefs thereto, he shall within 72 hours send a copy thereof to his immediate Superior Officer. In the present case, the officer concerned happened to be Jaspal Singh holding the rank of a Sub Inspector, who ostensibly sent the information to the SHO of the Police Station, who in the normal course happens to be his immediate superior by virtue of holding an Inspector's rank. So it cannot be said that no compliance in terms of Section 42(2) was done at all. It has been argued that the concerned officer-in-charge at that time happened to be one subordinate in rank to the Authorized Officer, being an ASI. This submission would again appear to be unconvincing, as undoubtedly in terms of Section 2(o) of the Code of Criminal Procedure, any Police Officer above the rank of Constable falls within the definition of "Officer-in-charge (Station House Officer) of a Police Station" in the event of a temporary absence or inability to perform duties by the regular SHO. It can therefore, be safely determined that the authorized officer holding a rank of Sub Inspector of Police had in the normal course conveyed the requisite information in terms of Section 42(2) to his immediate superior holding an Inspector's rank as officer-in-charge/SHO of the Police Station, and the fact that at the given time when such information was received, an authorized officer though lower in rank was performing the duties due to some temporary absence or inability of the regular SHO in terms of Section 2(o) of the Cr.PC, there cannot be said to be any material irregularity in the matter of compliance of Section 42(2), since in any event a "special report prepared" was further sent up from the Police Station to the "Superior Officers".

(10) To counter the submission that the complainant SI Jaspal Singh who conducted virtually all the investigation himself, ought not have done so, Ld. counsel for the State has cited the decision in *Hardip Singh versus State of Punjab*² in which the Apex Court dismissing an appeal and a similar contention was raised had observed inter- alia -

"14. As far as the submission that as Inspector Jarnail Singh was the complainant he should not have been made the investigating officer is concerned we may make reference to

² 2008(4) R.C.R. (CrI.) 97

the decision of this Court in **State v. V. Jayapaul, 2004(2) RCR(Criminal) 317 : 2004 (2) Apex Criminal 568 : [(2004) 5 SCC 223]**, wherein it was held as under:

“We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper 12 of 13 to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased”

Concurring with the Courts below we have already held that the version of the defense is nothing more than a got up story of his own whims and caprices, thus in the facts and circumstances of the present case the question of bias does not arise. Sri Jarnail Singh made the recoveries of the opium and seized the same and therefore, he was rightly made the Investigating Officer in the case. The defence case which is found to be a got up story was sought to be made out only during the trial by which time investigation was complete. This contention therefore is also found to be without merit.

15. In view of the aforesaid observations and findings recorded by us, we find no merit in the appeal, which is accordingly dismissed. The appellant, who is in the custody, shall serve the remaining sentence, in accordance with law.” (Emphasis added)

(11) For the aforesaid reasons, in view of the classified offences of the NDPS Act under which the challan has been submitted, and considering that the contraband involved happens to be above the commercial quantity, this Court is not inclined to direct release of Petitioners on bail at this stage in view of the Statutory bar of Section 37 of the NDPS Act.

(12) Dismissed.