# Sukhdev Singh vs State Of Haryana on 13 December, 2012

## Equivalent citations: AIR 2013 SUPREME COURT 953, 2013 (2) SCC 212, 2013 AIR SCW 312, AIR 2013 SC (CRIMINAL) 370, 2012 (12) SCALE 699, 2013 (1) SCC(CRI) 933, 2013 ALL MR(CRI) 764, (2013) 1 CURCRIR 261, (2013) 1 DLT(CRL) 845, (2013) 1 EFR 301, (2013) 1 MAD LJ(CRI) 395, (2013) 54 OCR 700, (2013) 2 RECCRIR 232, (2013) 1 ALLCRIR 1095, (2012) 12 SCALE 699, (2013) 2 MH LJ (CRI) 42, (2012) 4 CHANDCRIC 280, (2013) 3 ALLCRILR 311, 2013 (2) ALD(CRL) 261

## Author: Swatanter Kumar

## Bench: Madan B. Lokur, Swatanter Kumar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2118 OF 2008

Sukhdev Singh ... Appellant

Versus

State of Haryana ... Respondent

J U D G M E N T

Swatanter Kumar, J.

1. The present appeal is directed against the judgment dated 27th March, 2008 pronounced by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 802-SB of 1998. We may notice the case of the prosecution and the facts which have given rise to the filing of the present criminal appeal.

2. On 4th February, 1994, ASI Nand Lal along with HC Hoshiar Singh, HC Suraj Bhan and other police officials were present in village Jogewala, in connection with patrolling duty. ASI Nand Lal, who was examined as PW 1, received secret information against the accused that the accused was in the habit of selling chura post (poppy husk) in his house and if a raid is conducted upon the house of the accused, the accused can be caught red- handed with the contraband. One Nacchatter Singh is stated to have been associated with the raiding party which raided the house of the accused. However, this witness was declared hostile before the Court during his examination. On conducting a search, five bags were found lying concealed under a heap of chaff in the courtyard of the house of the accused. On suspicion of having some intoxicant in his possession, the Investigating Officer served notice upon the accused under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') giving him an offer to be searched before a Gazetted Officer or a Magistrate. Accused is stated to have responded to such notice vide Ext. PC/1 where he expressed his desire to be searched before a Gazetted Officer of the police. Upon having known the desired choice of the accused, it is stated that PW1 had sent an application, Ext. PD, to the Deputy Superintendent of Police, Dabwali, through Constable Amir Singh requesting him to reach the spot. Mr. Jagdish Nagar, DSP, reached the spot after about half an hour and upon his instruction the search of the bags was conducted. From each gunny bag, 100 grams of chura post was separated as sample. The samples as well as the remaining gunny bags weighed 39 kgs. and 900 grams each and were sealed with the seal bearing impressions JN and NL, and thereafter were taken into possession vide recovery memo Ext. PE. The seal NL was handed over to HC Hoshiar Singh while seal JN was retained by the DSP himself. After completing this process, a ruqa Ex. PF was sent to the police station where the FIR being Ext. PF/1 was registered under Sections 15/16/61/85 of NDPS Act. The Investigating Officer prepared a site plan Ext. PG. On return to the police station, the case property was handed over to the MHC with its seals intact. After receiving the test report Ext. PH from the Forensic Science Laboratory, Haryana, Madhuban (Karnal) and after completing all other formalities, the challan was filed. The challan in terms of Section 173 of the Code of Criminal Procedure, 1973 (for short "Cr.PC") was presented before the court of competent jurisdiction. The prosecution examined a number of witnesses including PW1 Nand Lal, PW2 Jagdish Nagar, DSP and PW Nachhattar Singh. Affidavits of Nihan Singh, Head Constable and Tejas Singh, Constable (Ext. PA and PB respectively) were taken into evidence. The accused took the plea that he had been falsely implicated in the case at the instance of Harnand Singh, Ex-Member of the Block Samiti of the area and examined four witnesses in support of his case. The Trial Court vide its judgment of conviction dated 4th July, 1998 held the accused guilty of an offence punishable under Section 15 of NDPS Act and after hearing the party on the quantum of sentence vide its order dated 6th July, 1998 awarded 10 years' rigorous imprisonment to the accused with fine Rs. 1 lakh and in the event of default to undergo simple imprisonment for another two years. The legality and correctness of the judgment and order of sentence was challenged by the accused before the High Court.

3. The High Court vide its detailed judgment dated 27th March, 2008 declined to interfere with the judgment of the Trial Court and while upholding the same, maintained the order of sentence, giving rise to the filing of the present appeal.

4. The only contention raised before us on behalf of the appellant is that the case of the prosecution must fail for total non-compliance of the statutory provisions of Section 42 of NDPS Act. These provisions are mandatory and in the present case, there is admittedly no compliance of the said provisions, thus the accused is entitled to acquittal as the whole case of the prosecution is vitiated in law.

5. To the contra, the contention on behalf of the State is that there is substantial compliance of the provisions of Section 42 of NDPS Act and therefore, the concurrent judgments of conviction and order of sentence do not call for any interference.

6. In order to examine the merit or otherwise of the above contention, it is necessary for us to discuss the entire gamut of the prosecution evidence.

7. At this stage, it will be useful to refer to the relevant statement of ASI Nand Lal, PW1 who is stated to have received a secret information, proceeded to raid the house of the accused and recovered the chura post as noticed above:

> "On 04.02.1994, I was posted as Incharge of CIA Staff, Dabwali. On that day, I alongwith Hoshiar Singh H.C. Suraj Bhan H.C. and other police officials was present at village Jogewala in connection with patrolling and detection of crimes. Then, I received a secret information that the accused present in the court is in the habit of selling churapost and if a raid is conducted at the once, churapost could be recovered from him. On receipt of this information, I formed a raiding party and when I reached near the school of village Panniwala Morika, Nicchattar Singh son of Sunder Singh met me and he was joined in the raiding party and then the raiding party reached the house of the accused. The accused was found present in the court-yard of his house and at that time, he was sitting on a cot. Then, I conducted the house search of the accused and on search five bags lying under the heap of Turi were recovered which were lying in the court-yard of the house of the accused. Then, I served a notice Ex. PC on the accused on the suspicion of his having possessed some narcotic substance in these five gunny bags, offering him the search of the bags before any Gazetted Officer of Police or a Magistrate. The accused as per his reply Ex.PC/1 desired the search of the gunny bags before any Gazetted Officer of Police. Ex. PC and Ex. PC/1 were signed by the accused and attested by PWs H.C. Suraj Bhan and Hoshiar Singh and Nachittar Singh independent witness. Then I sent a written application Ex.PD through constable Amir Singh to DSP Dabwali requesting him to reach on the spot. Thereafter, the DSP Dabwali reached at the spot after half an hour and then on his instructions, I conducted the search of the five gunny bags in the presence of PWs. Poppy straw was found in it. 100 grams churapost was separated as samples from each gunny bags. The remaining on weighment was found to be 39 kgs.

> 900 grams in each gunny bag. The samples and the gunny bags remaining churapost were sealed with the seals NL and JN and were taken into possession vide recovery memo Ex. PE attested by DSP Jegdish Nagar, Nichhatar Singh, Suraj Bhan H.C. Seal NL after use was handed over to Hoshiar Singh H.C., while the seal JN was retained by the DSP himself I sent ruqa Ex. PF to the Police- Station for registration of a case on which for-mail FIR Ex.PF/1 was recorded by Shri Davinder Kumar ASI whose signatures I identify."

8. It is clear from the statement of PW1 that he, upon receiving the secret information, neither reduced the same in writing nor communicated to his senior officer about receiving the secret information as required under Section 42 of NDPS Act.

9. In his cross-examination, he admitted that he had received the secret information at about 11.30 a.m. at Village Jogewala. He did not know from where the secret information was received. He was in a jeep. The distance between the house of the accused and the spot where he was at the time of receiving the secret information was merely 6 kilometers, but he reached the house of the accused only at 2 p.m. He also admitted that the house of the accused was situated in the middle of the village in a busy locality, and yet he did not call anybody from the neighbourhood at the time of effecting recovery.

10. According to the learned counsel appearing for the State, there was substantial compliance inasmuch as after effecting the recovery he had sent a ruqa Ext. PF to his senior officer, on the basis of which the FIR Ext. PF/1 was registered and thus, there was substantial compliance of the provisions of Section 42 of NDPS Act. This aspect has also been considered by the High Court and while accepting the contention of the State as to substantial compliance of the provisions of Section 42 of NDPS Act, the High Court in the judgment impugned herein noticed as under:-

> "9-A. In the instant case too, a secret information, was received by Nand Lal, ASI on 4.2.1994, when he alongwith Hoshiar Singh, HC, Suraj Bhan and other police officials, was present in village Jogewala, in connection with patrol duty, and detection of crime. It means that Nand Lal, ASI, was in motion, at the time, when he received the secret information, against the accused. Since, the secret informer had informed Nand Lal, ASI that if a raid was conducted immediately, then a big haul of contraband, could be recovered from the house of the accused, where he was present. It was his bounden duty, to immediately rush to the disclosed place, to detect the accused with contraband. It was, in this view of the matter, that he had no time to record the information, and send the same to the Officer Superior, as had he done so, there would have been every possibility of the accuse absconding, and the purpose of the very raid would have been defeated. However, he substantially complied the provisions of Section 42 of the Act, by recording the ruqa, embodying the secret information therein, as also by sending the message to the DSP, to come to the spot, as a result whereof, he came to the spot. Since, there was substantial compliance, with the provisions of Section 42 of the Act, it could not be said that there was intentional and deliberate non- compliance thereof strictly. On account of this

> reason, the case of the prosecution cannot be thrown out. The principle of law, laid down in Sajan Abraha's case (supra), a case decided by three Judge Bench of the Apex Court, is, thus, fully applicable to the facts of the present case. In this view of the matter, fully applicable to the facts of the present case. In this view of the matter, the submission of the Counsel for the appellant, in this regard, does not appear to be correct, and stands rejected."

11. We may notice that the High Court, while arriving at the above conclusion, appears to have relied upon the judgment of this Court in the case of Sajan Abraham v. State of Kerala [(2001) 6 SCC 692].

12. The High Court has proceeded apparently on the basis of substantial compliance of the provisions. The concept of substantial compliance appears to have been construed on the basis that PW1 had sent a ruqa and had informed about the recovery effected on the basis of which the FIR was registered. All these are post-recovery steps taken by PW1.

13. Now, the question that arises for consideration is as to at what stage and by what time the authorized officer should comply with the requirements of Section 42 of the Act and report the matter to his superior officer. For this purpose, we must refer to Section 42 of the NDPS Act at his stage :

> "Section 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 forces 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 or special order of the State Government, if he has reason to believe from persons 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,--
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> (a) enter into and search any such building, conveyance or place;
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> (b) in case of resistance, break open any door and remove any obstacle to such entry;
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> (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) detain 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 within seventy-two hours send a copy thereof to his immediate official superior."

14. Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words 'forthwith' stood amended by the words 'within 72 hours'. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. In the case of Basheer @ N.P. Basheer v. State of Kerala [(2004) 3 SCC 609] wherein this Court was concerned with the Amending Act 9 of 2001 of the NDPS Act, the Court took the view that application of the Amending Act, where the trial had been concluded and appeal was pending on the date of its commencement and where the accused had been tried and convicted, would not apply. The contention that trials were not held in accordance with law was not sustainable for the reason that there could be direct and deleterious consequences of applying the amending provisions of the Act to trials which had concluded in which appeals were filed prior to the date of Amending Act coming into force. This would certainly defeat the first object of avoiding delay in

such trials. Another Bench of this Court in the case of Jawahar Singh @ Bhagat Ji. v. State of GNCT of Delhi [(2009) 6 SCC 490], while dealing with the amendments of Section 21 of the NDPS Act, the Court took the view that amendments made by Act 9 of 2001 could not be given retrospective effect as if it was so given, it would warrant a retrial which is not the object of the Act. The Court held as under :

> "9. It is now beyond any doubt or dispute that the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of conviction, there was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending Act, in our considered opinion, would not arise.
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> 10. It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only."

15. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.

16. Still, reference can be made to the judgment of this Court in the case of Ravinder Singh v. State of Himachal Pradesh [(2009) 14 SCC 201], wherein this Court was dealing with the question as to what would be the law applicable for imposition of a sentence irrespective of when the trial was concluded with reference to Article 21 of the Act and provision of the Punjab Excise Act, 1914 as applicable and amended by H.P. Act 8 of 1995 where punishment was enhanced and minimum sentenced was provided. The Court held that it is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial'.

17. Even in the case of Hari Ram v. State of Rajasthan & Ors. [(2009) 13 SCC 211], this Court stated with reference to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act of 2006) that the relevant date for applicability of the Act so as the age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial.

18. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer

forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

19. This question is no more res integra and stands fully answered by the Constitution Bench judgment of this Court in Karnail Singh v. State of Haryana [(2009) 8 SCC 539]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513] and Sajan Abraham (supra) and held as under:-

> "35. In conclusion, what is to be noticed is that 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 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).
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> (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.
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> (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."

20. Having referred to the above settled principle of law, we are unable to accept the contention raised on behalf of the State and have to grant our approval to the submission made on behalf of the appellant.

21. As per the statement of PW1, no effort was made by him to reduce the information into writing and inform his higher authorities instantaneously or even after a reasonable delay which has to be explained with reasons in writing. On the contrary, in the present case, the Investigating Officer PW 1 had more than sufficient time at his disposal to comply with the provisions of Section 42. Admittedly, he had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep. There is not an iota of evidence, either in the statement of PW 1 or in any other documentary form, to show what the Investigating Officer was doing for these two hours and what prevented him from complying with the provisions of Section 42 of NDPS Act.

22. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that : (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post- recovery.

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra).

24. Thus, the present appeal merits grant of relief to the accused. We accordingly set aside the judgment of the High Court as well as the Trial Court and acquit the accused of an offence under Section 15 of NDPS Act. We direct the accused to be set at liberty forthwith, if not required in any other case.

25. Before we part with this file, we consider it the duty of the Court to direct the Director General of Police concerned of all the States to issue appropriate instructions directing the investigating officers to duly comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of Karnail Singh (supra).

26. The Registry shall send a copy of this judgment to all the Director Generals of Police of the States for immediate compliance.

27. The appeal is accordingly allowed.

.....J. (Swatanter Kumar) .....J. (Madan B. Lokur) New Delhi, December 13, 2012