

**Jagiro Vs. the State**

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**Court :** Delhi

**Decided On :** Apr-04-2014

**Judge :** V. K. Jain

**Appellant :** Jagiro

**Respondent :** The State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

04. 04.2014 + CRL. A.1021 of 2013 JAGIRO Through: ..... Appellant Mr. Sunil Mehta & Mr. Raman Sahney, Advs. versus THE STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP. CORAM: HON'BLE MR. JUSTICE V.K. JAIN JUDGEMENT V.K. JAIN, J.

(Oral) On 4.4.2011, S.I. Alok Kumar of Police Station Nand Nagri was on patrol along with Head Constable Sita Ram and Constable Sonu. At about 6:40 p.m., he received a secret information that a woman, who would come from the side of DTC Depot, Nand Nagri and go towards Pratibha School, D-Block of Nand Nagri could be having illicit ganja with her. The information was conveyed by him to the SHO, Police Station Nand Nagri on telephone. The SHO having instructed him to take appropriate action, he called lady Constable Kavita to the spot and the raiding party reached Pratibha School, D-Block and took positions there. 4-5 passers-by were requested to join the raiding party but as usual no one agreed to join the said

party. At about 8:00 p.m., the appellant before this Court was seen coming from the side of DTC Depot carrying a white polythene bag in her hand. She was apprehended on being identified by the secret informer. A notice under Section 50 of the NDPS Act was served on her informing her that it was her legal right to be searched in the presence of a Magistrate or a Gazetted Officer. She having declined the said option, the bag which she was carrying with her was searched and was found to contain ganja kept in two (2) white polythene. On being weighed the ganja was found to be 2.8 kg. 200 grams of the substance was drawn as sample and the sample as well as the residual substance were sealed with the seal of AK. Form FSL was also filled at the spot and seal was handed over to Constable Sita Ram. In the meanwhile SHO, Police Station Nand Nagri also reached the spot. The sealed parcels were handed over to the SHO who left the spot, taking the said parcels with him. After completion of investigation the appellant was prosecuted under Section 20 of the NDPS Act.

2. Since the appellant pleaded not guilty to the charge as many as eleven (11) witnesses were examined by the prosecution. CrI. A. No.1021 of 2013 No witness was Page 2 of 20 examined in defence.

3. S.I. Alok Kumar came in the witness box as PW11 and inter alia stated that on 4.4.2011, when he was on patrol, he met Head Constable Sita Ram and Constable Sonu near Tonga Stand, Nand Nagri. Thereafter at about 6:45 p.m. he received a secret information, from an informer, that a lady will come from DTC Depot side and go towards D-1 Block with ganja. The information was conveyed to the SHO, Police Station Nand Nagri and a lady Constable was called to the spot. He requested 4-5 persons to join the raiding party but all of them left the spot without disclosing their names and addresses. At about 8:00 p.m. they saw the accused Jagiro coming from DTC Depot side with a bag (katta) in her hand. On being identified by the secret informer, she was apprehended by lady Constable Kavita and her particulars were ascertained. She was apprised of the information which the police officers had with them and a notice under Section 50 of the NDPS Act Ex.PW1/F was served upon her. She, however, refused the offer by making an endorsement Ex.PW11/B on the notice itself. The white bag was then taken from her hand and when opened it was found to contain ganja. It was weighed on a

manual scale and found to be 2.8 kg. 200 grams of the substance was drawn as sample. CrI. A. No.1021 of 2013 The sample as well as the residual Page 3 of 20 substance were sealed with the seal of AK and the same seal was affixed on Form FSL which was filled on the spot. The seal was handed over to Head Constable Sita Ram. In the meanwhile the SHO, Police Station Nand Nagri, Inspector Narender Singh Rana reached there and the sealed parcels were handed over to him. He affixed his own seal NSR on both of them as well as FSL Form.

4. PW1 Constable Sonu, PW2 Head Constable Sita Ram and PW4 lady Constable Kavita have corroborated the deposition of PW11 S.I. Alok Kumar with respect to the appellant having been apprehended and ganja weighing 2.800 kg being recovered from her. They also corroborated with respect to the sealing the sample as well as the residual substance with the seal of AK and the sealed parcels having been handed over to Inspector Narender Singh Rana. HC Sita Ram also confirmed that the seal after use was handed over to him.

5. PW8 Retired Inspector Narender Singh Rana deposed that on 4.4.2011, S.I. Alok Kumar had apprised him on telephone of the secret information regarding a lady Jagiro would pass through Nand Nagri Bus Depot on foot to supply ganja. He further stated that at about 9:00 p.m., he reached D-Block in front of Pratibha School, Nand Nagri where the aforesaid police officer were present. The accused was also present there. He further stated that two sealed parcels duly sealed with the seal of AK were handed over to him. He affixed his own seal NSR on both the parcels and returned to the police station. In the police station he called MHC(M) and handed over both the sealed parcels to him. A DD entry in this regard was also made by him which is Ex.PW8/A.

6. PW5 S.I. Chaman Lal was working as SO to the ACP, Seema Puri on 5.4.2011. He inter alia stated that on the aforesaid date information under Section 57 of the NDPS Act, forwarded by the SHO, Police Station Nand Nagri was received in their office and was perused by the ACP Shri S.P. Gupta. The said report Ex.PW5/A bears signatures of S.P. Gupta at point A. PW7 Constable Tejpal is the police official who took the sample parcel sealed with the seals of AK and NSR along with FSL Form to FSL Rohini from MHC(M), Nand Nagri on 7.4.2011 and

deposited the same with FSL. PW9 Head Constable Manoj Kumar was posted as MHC(M) at Police Station Nand Nagri on 4.4.2011. He stated that on the aforesaid date Inspector Narender Singh Rana called him in his office along with register No.19. Two sealed parcels sealed with the FSL form duly sealed with the aforesaid seals along with carbon copy of the seizure memo were handed over to him. He made entry in this regard in register No.19 which is Ex.PW9/A. He further stated that on 7.4.2011, he handed over the sample parcels duly sealed with the aforesaid seals as well as FSL Form and other documents to Constable Tejpal.

7. In her statement under Section 313 of Cr.P.C., the appellant denied the allegations against her and claimed to be innocent.

8. Vide impugned judgement dated 19.7.2013, the appellant was convicted under Section 20b(ii)(B) of the NDPS Act and vide impugned Order on Sentence dated 25.7.2013, she was sentenced to undergo RI for four (4) years and to pay fine of Rs.10,000/- or to undergo RI for a period of three (3) months in default. Being aggrieved from her conviction and sentence, the appellant is before this Court by way of this appeal.

9. The impugned judgement has been assailed by the learned counsel for the appellant only on the ground that there was non-compliance of Section 42 of the NDPS Act. The contention of the learned counsel for the appellant is that though the secret information was received when the police officer were on patrolling, it was quite possible to reduce the said information into writing and send the same to the concerned SHO, instead of orally informing him on telephone.

10. In my view, since the ganja was recovered from a bag which the appellant was carrying at a public place, the provisions of section 42 of the Act would not apply and consequently it was not obligatory for SI Alok Kumar to reduce the information into writing before proceeding to the place where the appellant was later apprehended. A somewhat similar issue came up for consideration before this Court in *Brijesh Kumar Gupta v Narcotics Control Bureau* [Criminal Appeal No.1242/2010, decided on 3.4.2014.]. and the following view was taken:

17. Section 41(1) of the Act enables a Magistrate to issue a warrant (i) for the arrest of any person whom he has reasons to believe to have committed any offence punishable under the Act; OR (ii) for the search of any building, conveyance or place in which, he has reasons to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence under the 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 of any illegally acquired property which is liable for seizure or forfeiture under Chapter VA, is kept or concealed. Sub-Section (2) of Section 41 empowers any gazetted officer of central excise, narcotics, customs, revenue intelligence or any other department of the Government as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drug 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, to authorize any officer, subordinate to him but superior in rank to a Peon, sepoy or a constable (i) to arrest a person if he has reason to believe from personal knowledge or information given by any person and taken in writing that he has committed an offence punishable under the Act or (ii) to search a building, conveyance or place, if he has reasons to believe, from personal knowledge or information given by any person and taken in writing, that any narcotic drug or psychotropic substance or controlled substance, in respect of which any offence under the 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 forfeiture under Chapter VA of the Act, is kept or concealed in such building, conveyance or place. Such an officer (for short `empowered officer) can himself also arrest such a person or search such a building, conveyance or place. Section 42 of the Act, to the extent it is relevant, empowers any such officer of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government as is empowered in this behalf by general or special order by the Central Government or such officer 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 (for short `empowered officer), if he has reasons to believe, from personal 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 the 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 the Act is kept or sealed in any building, conveyance or enclosed place, to enter into and search any such building, conveyance or place between sunrise and sunset and 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 reasons to believe to be liable to confiscation under the Act and any document or other article which he has reasons to believe may furnish evidence of the commission of any offence punishable under the Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the Act.

18. It would thus be seen that both, Sections 41 as well as 42 apply only to entry into and search of any building, conveyance or place where, as per the knowledge of or information received by the concerned officer (a) any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed or (b) any document or other article which may furnish evidence of the commission of such offence or (c) 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, is kept or concealed. As a necessary corollary, the aforesaid Sections would not apply where the knowledge of the officer or the information received by him does not pertain to the narcotic drug/psychotropic substance/controlled substance or illegally acquired property or document or article furnishing evidence of illegally acquired property being kept or concealed in any building, conveyance or enclosed place.

19. Section 43 of the Act empowers any officer of any of the departments mentioned in Section 42 to seize, (i) in any public place or (ii) in transit, any narcotic drug/psychotropic substance/controlled substance in respect of which he has reasons to believe an offence punishable under the Act has been committed. He can also seize, in any public place or transit, any animal or conveyance or article liable to confiscation under the Act as well as any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under the Act 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 the Act. The explanation of Sections 41 to 43 of the Act gives only a deeming definition of the expression `public place which in terms of the said explanation includes any public conveyance, hotel, shop or other place intended for use by, or accessible to the public.

20. A combined reading of the provisions containing in Sections 41 to 43 would thus show that even where an officer of any of the departments mentioned in Section 42 of the Act carries out search and/or seizure pursuant to receipt of an information, he need not, before carrying out search and/or seizure record such information into writing and convey the same to his immediate official superior, where the seizure is effected either at a public place or in transit. Any other interpretation would substantially curtail the power conferred upon an officer under Section 43 of the Act. In my view, it cannot be said that the provisions of Section 43 of the Act would apply only to those cases where the concerned officer does not have a prior information or knowledge. Any other interpretation, in my view, would be contrary to the express provisions of the Act and substantially defeat the objective behind conferring the power of seizure and arrest in a public place on an officer of the departments mentioned in Section 42 of the Act.

21. The question as to whether Section 42 of NDPS Act applies to a case of seizure of a narcotic drug at a public place or not has come up for consideration of the Apex Court in a number of cases. In State of Haryana Vs. Jarnail Singh & Ors. (2004) 5 SCC188 the Apex Court inter alia held 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 authorises 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 under Section 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 the sunrise.

In *Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence* (2002) 8 SCC7 heroin was recovered from a suit case which the appellant was attempting to transport at the airport. The appellant pleaded non-compliance of Section 42 of the Act. The contention was rejected holding that the seizure had taken place at the airport which was a public place. In *State, NCT of Delhi Vs. Malvinder Singh* (2007) 11 SCC314 the opium was recovered from the body of the accused. The High Court acquitted him on the ground of non-compliance of Section 42 of the Act. Allowing the appeal filed by the State it was held that Section 42 had no application. In taking the aforesaid view, the Apex Court relied upon its earlier decisions in *T. Thomson Vs. State of Kerala & Anr.* (2002) 9 SCC618 and *State of Haryana Vs. Jarnail Singh & Ors.* (supra). In *Union of India Vs. Major Singh & Ors.* (2006) 9 SCC170 the narcotic drug was recovered from a truck at a public place. It was held that since the seizure was made from a public carrier at a public place, between sun rise and sun set, Section 42 of the Act was not applicable. In *Ravindran Vs. Superintendent of Customs* (2007) 6 SCC410 the appellant was arrested at a bus stand pursuant to an information that he was carrying drug with him. Noticing that the arrest and seizure took place at a bus stand and not in any building, conveyance or enclosed place, the Honble Supreme Court held that the case was covered by Section 43 of the Act which did not require information to be taken down in writing and similarly, there was no requirement that the officer concerned must send a copy thereof to his immediate official superior within 72 hours. In *Crl. Appeal No.D-1097-DB of 2009 titled Ankit Kumar Vs. State of Punjab* decided on 21.12.2013, a Division Bench of Punjab & Haryana High Court inter alia held as under:

14. A reading of Section 42 of the Act shows that the requirement to take down the secret information in writing and sending to superior officers prior to search is in respect of recoveries made from a private place such as building, conveyance or enclosed place. There is no requirement to record such information in writing in respect of search and arrest in a public place or in transit. The expression 'transit' in Section 43 of the Act is applicable to the expression 'conveyance' used in Section 42 of the Act as well, which is evident from the provisions of Section 49 of the Act, which authorizes an empowered officer to stop any conveyance, if the officer is suspecting that such conveyance is carrying narcotic drug or

psychotropic substance or controlled substance. Thus Sections 43 & 49 of the Act, in respect of conveyance, creates an exception to carry out the search and seizure operations in respect of a vehicle in motion. The Supreme Court in *State of Haryana versus Jarnail Singh*, (2004) 5 SCC188 while considering search of a tanker moving on a public highway, found that Section 43 is applicable to the case in question.....

11. The learned counsel for the appellant relies upon *Directorate of Revenue and another v Mohammed Nisar Holia* [(2008) 2 SCC370. A perusal of the aforesaid judgment would show that in that case a secret information was received that one person staying in a room of a hotel was in possession of a fax copy of consignment note under which Mandrex tablets were being transported from Delhi to Mumbai. On searching, a sum of Rs.4. 25 lac in cash and a fax copy of the receipt showing sending of medicine was found. The consignment arrived at as per the said receipt within a couple of days. The High Court acquitted the accused on the ground that provisions of Section 42 of the NDPS Act had not been complied. Being aggrieved from the decision of the High Court, the Directorate of Revenue filed an appeal and contended that since the hotel was a public place within the meaning of Section 43 of the Act, it was not necessary to comply the provisions of Section 42. During the course of judgment, the Apex Court, inter alia, noted that the place which was sought to be searched being a room in a hotel, was not open to public though it was situated in a public place. However, in the case before this Court, ganja was recovered from a bag which the appellant was carrying at a place frequented by the members of the public, it being a public road. The room in a hotel, on the other hand, is not accessible to the members of the public despite the hotel being a public place. It is accessible only to the person staying in the room or to the hotel management. Therefore, the aforesaid decision would not be applicable to the factual situation prevailing in the case before this Court. In fact, in paras 21, 22 and 23 of the judgment, the Apex Court took note of its earlier decisions in *Narayanaswamy Ravishankar* (supra), *Abdul Rashid Ibrahim Mansuri v. State of Gurajat*, [2000] 2 SCC513, *Jarnail Singh* (supra) and *Major Singh and ors.* (supra). Referring to *Major Singh* (supra), it was held that the said decision had no application in the case before it. Therefore, the decision in *Mohammed Nisar Holia* (supra), in my view does not help the appellant. In

Rajinder Singh v State of Haryana [(2011) 8 SCC130, another judgment relied upon by the learned counsel for the appellant, the information received by the police officer was that the appellant Rajinder Singh had kept some opium in the shed used for storing fodder in his farm house and opium was later recovered from the said fodder room. Since the fodder room in the farm house would either be building or a place it being enclosed with roof and walls, this judgment would not apply where the recovery is effected at a public place. In State of Karnataka v. Dondusa Namasa Baddi [JT2010(9) SC444, the Court referring to the Constitutional Bench Decision in Karnail Singh v. State of Haryana [JT2009(10) SC360 found that sufficient time was available to record the information and send to the superior police officers. The judgment would have no applicability to a case where seizure is effected at a public place and not from a building, conveyance or place. In State of Rajasthan v. Shanti AIR2010(43), the primary issue before the Apex Court was applicability of Section 50 of the Act to the search of the bag of the accused. It was held that the aforesaid case that the provision was not applicable to the search of a bag. However, in the para of the judgment, the Apex Court observed that there had been non-compliance with the requirement of Section 42(2) and that being so, there was no merit in the appeal filed by the State of Madhya Pradesh. Thus, in this case, the Court did not really examine the question as to whether Section 42 of the Act would have application in a case where the drug is seized at a public place, which is accessible to all the members of the public or not. In fact, the learned counsel for the appellant has not drawn my attention to any case where the Court took a view that wherever a prior information was received, it has to be reduced into writing irrespective of whether the information relates to the narcotic drug being available at a public place or it relates to such drug being available in a building, conveyance or place.

12. No argument on the merit of the case has been advanced. Even otherwise, considering that the testimony of PW11 SI Alok Kumar, which finds full corroboration of the deposition of PW1 - Constable Sonu, PW2 - HC Sitaram, PW4 - Lady Constable Kavita, the recovery of ganja weighing 2.8 kg from the possession of the appellant at a public place stands duly proved. The prosecution has also produced the relevant link evidence by examining PW8 Insp. Narender Singh Rana who took the sealed parcels from PW11 - SI Alok Kumar on the spot,

put his own seal on it and on reaching to the police station, deposited the parcels as well as the FSL form in the Malkhana. The prosecution has also examined MHC(M) HC Manoj Kumar and also produced the relevant entry made in Register No.19. PW7 - Constable Tejpal who had taken the sample to FSL has also been examined. A perusal of report of FSL would show that the parcels containing samples were duly sealed with the seal of AK and NSR when it was received in the laboratory. The prosecution has thus ruled out any reasonable possibility of the samples being tampered with from the time, ganja was recovered till the time it was received in FSL. The conviction of the appellant, therefore, cannot be interfered with.

13. Coming to the sentence, though the appellant is a previous convict, admittedly she is a woman aged more than 74 years. On perusal of the impugned order on sentence would show that at the time of sentence, she was stated to be 73 years old. The learned counsel for the appellant has placed on record a copy of the voter identity card issued by the Election Commission, in which her age as on 1.1.2008 has been shown as 68 years, meaning thereby that she is more than 74 years old. The learned counsel also submits that the appellant is so heavy that she finds it difficult even to walk. Considering the fact that the quantity of ganja recovered from the appellant was an intermediate quantity and 1/8th of the commercial quantity, which is 20 kg, I am inclined to take a lenient view as far as substantive sentence awarded to the appellant is concerned. However, in that event, the fine imposed on her needs to be suitably enhanced. The counsel for the appellant submits that she cannot afford to pay a stiff fine, and therefore, the amount of fine may not be enhanced. In the facts and circumstances of the case, while enhancing the amount of fine from Rs.10,000/- to Rs.25,000/-, the period of substantive sentence awarded to the appellant is reduced to one and a half year. The appeal stands disposed of in above terms. One copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back with a copy of this order. APRIL04 2014 bmesh/rd V.K. JAIN, J.