

K.C. Jaya Kumar Vs. the State

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Court : Andhra Pradesh

Decided On : Jun-21-1996

Reported in : 1996(3)ALD970; 1996(2)ALD(Cri)455; 1996(2)ALT(Cri)175; 1997CriLJ10

Judge : K.B. Siddappa, J.

Acts : Terrarist and Disruptive Activities Act - Sections 5 and 10; Narcotic Drugs Psycho. Sub. Act - Sections 8(C), 18, 22, 41, 41(1), 41(2), 41(3), 42, 42(1), 42(2), 49, 50, 53, 53(1), 54, 55, 57 and 67; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 4, 100, 164, 165 and 428

Appeal No. : Criminal Appeal No. 457 of 1995

Appellant : K.C. Jaya Kumar

Respondent : The State

Advocate for Def. : N. V. Ranganadhan, Public Prosecutor

Advocate for Pet/Ap. : B. Nalin Kumar, Adv.

Judgement :

1. This appeal is filed against the judgment and sentence passed in S.C. No. 164 of 1994 on the file of Metropolitan Sessions Judge, Hyderabad. Following are the brief facts of the case :-

The complainant is a public servant, working under Director General of Revenue, Division, New Delhi. He is authorised to register the case under N.D.P.S. Act, 1995. On 26-3-1994, at about 8 p.m. P.W. 1 on receiving information that some prohibited drugs were being transported in a car from the compound of Pearl Apartments, Shymalal Buildings, Begumpet, assembled along with other officers and panch witnesses at plot No. 2, L.I.C. Colony, Domalguda, and proceeded to Pearl Apartments, Shyamlal Buildings, Begumpet. They reached there at about 11 p.m. They noticed one blue colour Maruthi Car bearing No AP-9-E 1799, parked inside the compound of the Pearl Apartments. They noticed at about 1.30 a.m. the accused coming towards the car and taking out the keys of the car. He was stopped by the raid party and on their enquiry, the accused disclosed his name as K. C. Jayakumar. The dicky of the car was opened at the instance of P.W. 1. They found three wooden boxes. On asking, the accused revealed that the boxes contained some clothes meant for export. On opening the three wooden boxes, they found three tin boxes, one each in the three wooden boxes. (M.Os. 1 to 3). The tin boxes were marked as M.Os. 1-X, 2-X and 3-X. On removing the lids, they found polythene packets containing gray coloured round tablets. The tablets contained Swastik mark on one side and letter 'M' on the other side. One sample from each box i.e., M.Os 1-X, 2-X and 3-X were drawn and sent for chemical analysis to Anna Laboratory, Himayatnagar. M.O-1X contained 33 packets, M.O-2X contained 33 packets and M.O-3X contained 15 packets. P.W. 4, who went with samples to Anna Laboratory, came with the report which showed that the samples contained Methagualone. The samples collected from M.O. 1X are marked as A-2, A-3 and A-4, the samples collected from M.O-2X are marked as B-2, B-3 and B-4 and the samples collected from M.O-3X are marked as C-2, C-3 and C-4. These samples are drawn in the presence of panchayatdars. They signed on the envelopes in which the samples were packed. Again, the samples were put in the tin boxes and were sealed. Thereafter, the raid party proceeded to the residence of the accused and conducted search of the residence. They did not find any incriminating material. P.W. 1 served summons, Ex. P-2 (copy) to the accused to appear before him in his office on the next day i.e., 27-3-94, at about 11 a.m. The Mahazar of the search and seizure is marked as Ex. P-3. On 27-3-94, at 11 a.m. the accused appeared before him (P.W. 1) and his statement was

recorded under Section 67 of the N.D.P.S. Act. The accused admitted his guilt. He was arrested u/S. 43 of the N.D.P.S. Act on 27-3-1994, and was produced before the Court. The seized substance was deposited in the custodianship of the Collector of Customs and Central Excise, Godown, Hyderabad. On 28-3-1994, the samples i.e., A-4, B-4 and C-4 were sent to Forensic Science Laboratory, Hyderabad, for testing purpose. The report dt. 19-4-1994, proved the presence of Methaqualone, in the seized material. The evidence collected clearly established that the accused contravened Section 8(c) of the N.D.P.S. Act and Rule 64 of the N.D.P.S. Rules. Therefore he is liable for punishment under Section 22 of the N.D.P.S. Act, 1985.

2. On the above facts, the Lower Court framed charge under 22 r/w 8(c) of the N.D.P.S. Act. When the charge was read over, the accused denied the charge and claimed to be tried.

3. To prove their case, the prosecution examined P.Ws. 1 to 6 and marked Ex. P-1 to P-19 and also marked Ex. C-1 and M.Os. 1 to 32.

4. After considering both oral and documentary evidence, the learned Sessions Judge found the accused guilty for the offence punishable under Section 22 of the N.D.P.S. Act. He sentenced him to undergo R.I. for a period of 10 years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine, the accused is directed to undergo S.I. for a period of one year. The period of remand is directed to be given set off by virtue of Section 428 Cr.P.C.

5. Aggrieved by the said judgment and sentence, the present appeal is filed by the accused.

6. P.W. 1 is the Assistant Director, Revenue Intelligence, Hyderabad. He is a Gazetted Officer, belonging to Class-I category of Govt. of India's Officers, equivalent to the rank of Assistant Collector. He stated that on 26-3-1994 at about 8 p.m. he received information that some prohibited drugs were being transported in a car. He noted the address where the car was parked. The address indicated that it was parked at Pearl Apartments, Shyamlal Buildings, Begumpet. He assembled his officers and Narendra Surana and Sudhir Kumar, mediators at his

office and they proceeded to Pearl Apartments. They reached there at 11 p.m. They noticed a blue Maruthi car bearing No. AP-9-E 1799 parked inside the compound. At about 11.10 p.m. they noticed the accused coming to the car taking out the keys. He started the engine and was about to drive away by taking U turn. Then the raid party asked him to stop the car. The accused revealed his name as K. C. Jayakumar. They opened the dicky. There was one wooden box in the boot and two boxes in the back seat of the car. On enquiry, the accused stated that the boxes contained some clothes meant for export. Upon opening the wooden boxes. M.Os. 1 to 3, they found tin boxes, one each in the wooden boxes. The tin boxes are marked as M.O-1X, 2X and 3X. They cut open the adhesive tapes and removed the lids and found some polythene packets, containing tablets. P.W. 1 further stated that they drew one sample from each packet and sent the same for chemical analysis to Anna Laboratory, Himayatnagar. M.O-1X contained 33 packets, M.O-2X contained 33 packets and M.O-3X contained 15 packets. They took the weight of the boxes. M.O-1X contained 22 kgs. 500 gms. M.O-2X contained tablets weighing 22 kgs. 200 gms. and the tablets in M.O-3X weighed 9 kgs. 300 gms. Ex. P-1 is the report received from Anna Laboratory. The report indicated that the tablets contained Methaqualone. On questioning by P.W. 1, the accused stated that he has no permission to possess and transport Psychotropic substances. P.W. 1 seized M.Os 1X, 2X and 3X. He took three samples from each packet. The samples collected from M.O. 1X are marked as A-2, A-3 and A-4, the samples collected from M.O-2X are marked as B-2, B-3 and B-4, and the samples collected from M.O-3X are marked as C-2, C-3 and C-4. Each sample consisted of three tablets and from each packet three such samples were taken. All these proceedings were conducted before the panchayatdars. The samples were put in the tin box and they are put in the wooden boxes. They searched the residence of the accused, but no incriminating material was noticed. P.W. 1 issued summons, Ex. P-2, to the accused to be present at his office on 27-3-1994. The seizure proceedings were incorporated in Ex. P-3, which is the Mahazar. It contained the signatures of P.W. 1, panch witnesses and other witnesses. A copy of this was given to the accused under acknowledgment P.W. 3 is the scribe of Ex. P-3. The accused in pursuance of Ex. P-2, appeared before P.W. 1 and his statement was recorded under Section 67 of the N.D.P.S. Act, in his own writing. The said

statement is marked as Ex. P-4. The accused gave the addresses and telephone numbers of those persons who have entrusted these boxes to him. P.W. 1 took up the following-up action. On 27-3-1994, at about 5 p.m. P.W. 1 served the accused with the grounds of arrest. Ex. P-5. The accused was arrested and was produced before the Court on 28-3-1994. P.W. 1 further stated that on 28-3-1994, he deposited M.Os 1 to 3 in the Central Excise Godown. Ex. P-6 is the receipt. Ex. P-7 is his letter, requesting to receive M.Os 1 to 3. He gave all the information to his immediate superior, namely, Deputy Director, D.R.I. Madras, in compliance with Section 57 of N.D.P.S. Act, under Ex. P-11. On the same day he sent the samples A-4, B-4 and C-4 to Central Forensic Laboratory, for the purpose of analysis, by letter Ex. P-8. On his request, the Regional Transport Authority furnished the particulars that the car belongs to the accused. Ex. P-10 is his request. Ex. P-10-a is the reply of the Additional Registering Authority, Hyderabad Central Zone. He further stated that Methaqualone is mentioned in Schedule II at Sl. No. 20 of the N.D.P.S. Act as a Psychotropic substance. The officer in-charge of Customs and Central Excise Godown is authorised to receive all the seized goods by virtue of notification No. 7/85/F. No. 664/51/85, dt. 14-11-1985, of Government of India. On M.Os. 1 to 3, the slips containing the signatures of panchayatdars were pasted.

7. The procedure adopted by P.W. 1 is spoken to by other witnesses also. P.W. 2 is working as Intelligence Officer, D.R.I. Hyderabad. He speaks about going to Pearl Apartments and the procedure conducted there. There are no deviations in his evidence. He stated that Balaji, P.W. 4, took the sample to Anna Labs for the purpose of analysis and Ex. P-1 is the report. He also speaks about the search of the residence of the accused where no incriminating material was found. P.W. 3 is another Intelligence Officer, D.R.I. Hyderabad. He stated that P.W. 1 had received credible information that some prohibited drugs are being transported in Blue Maruthi car. He also speaks about the raid and the proceedings that took place at Pearl Apartments. He stated that at the time of raid, P.Ws. 1 and 2, he and other officers and panchayatdars went to Pearl Apartments. Ex. P-3 is the proceedings written at the place of seizure of the contraband goods.

8. P.W. 4 is also an Intelligence Officer of D.R.I. He is the person who took sample after seizure to Anna Labs. Ex. P-1 is the report which he produced before P.W. 1.

Thereafter, further proceedings were conducted, P.W. 5 is the Junior Scientific Officer, Central Forensic Science Laboratory, Hyderabad. On 29-3-94, he received three envelopes duly sealed from the Assistant Director, D.R.I. Hyderabad. He further stated that he conducted chemical examination of each tablet of 27 tablets. They are marked as A-1, B-1 and C-1, - I-1; A-2, B-2, C-2 - I-2; and A-3, B-3, C-3 - I-3. The tests proved the presence of methaqualone, which is a psychotropic substance. P.W. 6 is the mediator. He also speaks about the proceedings, which were conducted at Pearl Apartments, Shyamlal Buildings, Hyderabad.

9. Learned counsel for the appellant-accused submitted that though the accused was in possession of the methaqualone tablets, he was not in conscious possession of the same. To constitute an offence, mere possession is not enough. The prosecution should prove that the accused was in conscious possession of the same. In support of his contention, he relied upon the judgment rendered in *Kale Khan v. State of M.P.*, 1990 Cri LJ 1119 (Madh Pra). In this case it was held that under Section 18, punishment is provided for possession or transportation of opium and that the possession is made up of two elements, firstly, the corpus i.e., the element of physical control and, secondly, the animus or intent with which such control is exercised. It was held that the conscious possession, which is contemplated by a penal statute, provides and penalizes possession of any contraband article or thing and that the driver of the vehicle is certainly in possession of the vehicle in question, but he cannot be said to be in possession of any article or thing concealed in the body of the vehicle, unless there are circumstances indicating knowledge to the driver of such concealment. He also relied upon a premier judgment of the Supreme Court in *Sanjay Dutt v. The State Through C.B.I. Bombay*, 1994 III AD S.C. (Cri) 381 : (1994 AIR SCW 3857). In this case, it was held :- (at P. 3876 of AIR SCW)

'The meaning of the first ingredient of 'possession' of any such arms etc. is not disputed. Even though the word 'possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the

ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorized substance has been understood.'

10. On the other hand, the learned Public Prosecutor relied upon a judgment of Supreme Court in *Inder Sain v. State of Punjab*, : 1973 CriLJ1537 , and submitted that the prosecution need only show that the accused has dealt with the article, or has physical custody of the same or is directly concerned with it and once it is shown, the onus of proof is placed by virtue of Section 10 on the accused to prove by preponderance of probability that he did not knowingly possess the article. He also places reliance on a judgment of the Supreme Court rendered in *Kailash Chandra Sahu v. Republic of India*, : 1985 CriLJ1860 . In this case, the opium was recovered from licensed ganja shop of the accused. The accused was not in the shop at the time of raid. The salesman was alone present. Even then, the Supreme Court held that the accused would be liable to be convicted for possession of opium. It was held that the concept of conscious possession could not be extended too far so as to defeat the very object of Section 10. They followed the judgment of the Supreme Court, rendered in *Inder Sain v. State of Punjab*. (1973 Cri LJ 1537), (referred supra)

11. The concepts of possession and conscious possession were considered in number of cases by the Supreme Court. Now, it is settled law as laid down in *Sanjay Dutt's Case*, (1994 AIR SCW 3857), (referred supra), that it is only the conscious possession that attracts the penal provision, particularly under N.D.P.S. Act, where the penalty is heavy.

12. Now, let us see whether the accused was in conscious possession of the Psychotropic Substance seized in this case.

13. It is the consistent evidence of P.Ws 1 to 6 that they reached the premises where the car of the accused was parked at about 11 p.m. They saw the accused opening the door and trying to drive away the car. At that juncture, the raid party stopped the vehicle and on asking, P.W. 1 opened the dicky. There was one wooden box. Two similar wooden boxes were there on the back seat of the car.

When asked as to the contents of the boxes, i.e., M.Os 1 to 3 the accused stated that they contained garments meant for export. When the boxes were opened, they found the tablets. The report, Ex. P-1 was obtained from Anna Laboratory, Himayatnagar, which confirmed that the tablets contain methaqualone, which is a Psychotropic substance, notified as item No. 20 in Col, No. 4 in schedule 2 of N.D.P.S. Act. The copy of the report, Ex. P-1, was given to the accused under acknowledgment. The accused stated that those tablets were entrusted to him by one Aziz and his friend Saleem, who belonged to Bombay. He had given the particulars and telephone numbers of those two people. He also stated that immediately after the entrustment, they left Hyderabad. P.W. 1 stated that on their enquiry, they found their names, address and telephone numbers as fictitious and, therefore, they could not trace the source of the drugs. It is pertinent to note that the accused was trying to transport these drugs in the middle of the night. This casts doubt as to the genuineness of his statement that he does not know the contents of M.Os. 1 to 3. The fact that he gave fictitious names also indicates that he was conscious that the boxes contained methaqualone tablets. It is further pertinent to note that it is not a small quantity. The circumstances clearly indicate that the accused fully knew that the boxes contained Psychotropic substance. Therefore, it cannot be said that he was not in conscious possession of M.Os. 1 to 3. It is not the case that all the three boxes were in the dicky. Two boxes were in the back seat of the car. When the entrustment is made to him, certainly he would enquire as to the contents. Eventhough he knew that the boxes contained methaqualone tablets, he deliberately misled the directorate staff by saying as usual, that the boxes contained some garments and, subsequently, he changed his version that they contained drugs for export. This prevaricating statement itself indicates his guilty mind that he was trying to conceal the identity of the tablets. Therefore, I am of the firm opinion that the accused was in conscious possession of M.Os 1 to 3. Immediately, the presumption under Section 54 is drawn and the accused is directed to account satisfactorily for the possession of the Narcotic Drugs. The presumption is that when the accused is shown to be in conscious possession, the accused has committed an offence under chapter 4 of the Act. Of course, the accused can prove his innocence by preponderance of probability as laid in number of cases. In this case, there is no attempt on the part of the accused

to lead any evidence to prove his innocence at least by preponderance of probability. Therefore, the culpability is made out.

14. Learned counsel for the appellant-accused submitted that once the search is conducted by the raid party, the operation of Section 50 comes into operation. The accused should be informed that he has a right to be searched by Gazetted Officer or by a I Class Magistrate. This procedure is not adopted in this case. The provisions of Section 50 are mandatory. Therefore, the entire proceedings are vitiated. In support of his case, he relied upon the famous case of State of Punjab v. Balbeer Singh, : 1994 CriLJ3702 . In this case, it was held :- (at p. 3719 of Cri LJ)

'On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be question of fact.'

He also relied upon a judgment rendered in Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, : 1995 CriLJ2662 . This judgment is rendered on the basis of Balbeer Singh's case, (1994 CriLJ 3702) (SC), (referred to above). He also relied upon a judgment of the Supreme Court rendered in Mohinder Kumar v. The State, Panaji, Goa, : 1995 CriLJ2074 . In this case also, the ratio of Balbeer Singh's case was followed.

15. There cannot be any doubt that the accused should be informed during search that he is entitled to be searched before a Gazetted Officer or a Magistrate. In this case, P.W. 1 himself is a Gazetted Officer. Therefore, he need not take the accused to another Gazetted Officer, for the purpose of search. There are case which fortify this view of mine. Further, in this case the accused is not searched.

The vehicle i.e., Maruthi car of the accused was searched. In such case, there is no question of the Maruthi Car being taken to a Gazetted Officer, for the purpose of search. The Lower Court rightly relied upon Section 49 of N.D.P.S. Act for the purpose of searching the vehicle. The Lower Court also rightly held that the operation of Section 50 is not called for in this case.

16. Learned counsel for the appellant-accused submitted that even for search of the vehicle, the requirement of Section 50 should be complied with. He relied upon the above judgments for the said purpose. But, the facts of the above three judgments indicate that only persons were search in those cases. They are not authorities for the proposition that the provisions of Section 50 should be complied with even in respect of search of vehicles. Therefore, in my considered view, the operation of Section 50 is not called for in this case, particularly when P.W. 1 himself is a Gazetted Officer.

17. Learned counsel for the appellant further submitted that EX. P-2 summons were issued under Section 108 of the Customs Act though the statement was recorded under Section 67 of the N.D.P.S. Act. There is difference between Section 108 of the Customs Act and Section 67 of N.D.P.S. Act. The proceedings under Section 108 of the Customs Act are a judicial proceedings and it well settled that where the power has been given to a person to do a particular thing in a particular manner, all other methods are forbidden. 'The Lower Court wrongly relied upon Rajkumar Karwal, : 1991 CriLJ97 . The judgment only says that the empowered officer under N.D.P.S. Act is not a police officer and therefore, the statement made before him is admissible. He does not deal with the safeguards provided under Section 164 of the Code of Criminal Procedure. He also relied upon a judgment of the Supreme Court rendered in Directorate of Enforcement v. Deepak Mahajan, : 1994 CriLJ2269 . In this case the Supreme Court relying upon a judgment in A. R. Antulay v. Ramdas Srinivas Nayak, : 1984 CriLJ647 , held that, S. 4 of Cr.P.C. is comprehensive and would be applicable to the extent in the absence of any contrary provision under the said Act or any special provision excluding the jurisdiction or applicability of the provisions of the Code. He submitted that these authorities are not brought to the notice of the Sessions Judge. Further, a Division Bench of A.P. High Court in a Judgment reported in N.

S. R. Krishna Prasad v. Collector of Customs, : 1992(57)ELT568(AP) , held that the safeguards under Section 164 of the Code of Criminal Procedure are applicable when the confessional statement is recorded. This point may not detain us any longer. The Lower Court did not rely upon the so called confessional statement in Ex. P-4. The accused did not admit in Ex. P-4 that the boxes M.Os. 1 to 3, contain methaqualone tablets. He only stated that they contain garments and some tablets, meant for export. I am also of the view that the contents of Ex. P-4 do not carry the case of the prosecution any further.

18. Learned counsel for the appellant-accused laid great stress on the point that the mandatory provisions of Section 42(1) proviso and 42(1) of the Act, which are mandatory, are not complied in this case. In his submission, the entire proceedings are vitiated. He emphatically relied upon Balbeer Singh's Case, (1994 Cri LJ 3702), (referred to supra) where the Supreme Court summarised the procedure to be adopted, which is as follows :- (at pp. 3718 and 3719 of Cri LJ)

'If a police officer without any prior information as contemplated under the provisions of the N.D.P.S. Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage Section 50 of the N.D.P.S. Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the N.D.P.S. Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the N.D.P.S. Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offence punishable under Chapter IV of the Act etc. When he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who

is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Sections 41(1) and 42(1) can act under the provisions of the N.D.P.S. Act. If such arrest or search is made under the Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(1) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(1) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provisions the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be question of fact in each case.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165 Cr.P.C. including the requirement to record reasons, such failure would

only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(1) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165 Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the Courts while appreciating the evidence in the facts and circumstances of each case.'

19. On the other hand the learned Public Prosecutor submitted that search and seizure and arrest was made in this case by P.W. 1 who is an empowered officer, by virtue of powers under Section 41(1). To establish the right to arrest etc., to the empowered officer he relied upon the words appearing in Section 41(1) 'or himself arrest a person or search a building, conveyance or place.' He further submitted that the empowered officers are entitled to search and seize and arrest without following the procedure laid down under Section 42(1). The Legislature had implicit faith in the honesty of the empowered officers in conducting search and seizure and arrest and therefore designedly used the above words in Section 41(1) of the N.D.P.S. Act. He further submitted that the officers not empowered are obliged to follow the procedure laid down under Section 42(1) of the Act. Therefore the proceedings are not vitiated even if P.W. 1 did not take down in writing the information given by some person in this case. The proceedings are also not vitiated for not complying with Section 42(1) and Section 42(2) of the N.D.P.S. Act. He also relied upon the judgment of Balbir Singh cited, (1994 Cri LJ 3702) (SC) supra.

20. I am unable to agree to the interpretation given by the learned Public Prosecutor. The heading of Section 41(1) itself indicates the power to issue warrant and authorisation. Section 41(1) indicates that Magistrates empowered by the State Government alone shall issue warrants. Section 41(1) indicates that any officer of the gazetted rank of the Department of Central Excise, Customs etc., and empowered officers of Revenue and Drugs Control Departments, etc., of the State Government alone are empowered to authorise any officer subordinate to him but

superior in rank to a peon, sepoy or a constable to arrest a person and conduct search of the building etc. Section 41(1) indicates that the officer to whom the warrant was addressed under Sub-section (1) and the Authorised Officer under Section 41(1) will have all the powers of an officer acting under Section 42(1). This indicates that the empowered officer also has to follow the procedure adumbrated in Section 42(1) of the Act. Further the opening words of Section 42(1) of the Act indicate that the empowered officer of the Central Government or the empowered officers of the State Government have to follow the procedure. If there was no need for the empowered officers, as contended by the learned Public Prosecutor, to follow the procedure under section 42(1), there was no need to mention again the words 'empowered officer' in Section 42(1) also. The words 'or himself arrest a person or search a building, conveyance or place' do not indicate the legislative intent that the empowered officers can search and seize and arrest a person without following the procedure. In Balbir Singh's Case, (1994 Cri LJ 3702) (SC) great stress was laid by the Supreme Court that the officers should follow the procedure when they observed; (at p. 3712 of Cri LJ).

'So far as the first requirement is concerned, it can be seen that the legislature intended that only certain Magistrates or certain officers or officers of higher rank and empowered, can act to effect the arrest and search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent person are not harassed. Therefore, if an arrest or search contemplated under the provisions of N.D.P.S. Act has to be carried out, the same can be done only by competent and empowered Magistrates and officers mentioned thereafter'.

In view of the above observation I hold that the empowered officers are also required to follow the procedure laid down under Section 42(1) of the Act.

21. Now let us see whether the said mandatory provision are complied in this case. P.W. 1 and another official witnesses in their evidence categorically stated that PW-1 received information that some prohibited drugs are being transported in a car, in the chief-examination. In the cross-examination it is elicited that P.W. 1 recorded the information on the basis of which he proceeded to Pearl Apartments.

However, P.W. 1 admitted that he did not mention in the charge sheet that he recorded the information. He did not mention in the charge sheet also the fact that he forwarded the message to Deputy Director, D.R.I. Madras. He admitted that he has not mentioned in the charge sheet that he faxed Ex. P-11 message to Deputy Director, D.R.I., Madras, and that he has not mentioned in the list of enclosures either the information received by him or the factum of sending fax message to his Deputy Director. Under Section 42(1), the information given by any person should be taken down in writing. P.W. 1 admittedly has taken down the same. However, as I have observed, this is not brought to the notice of the Court. Admittedly, the vehicle was searched between sunset and sunrise. There is no evidence to show that he has reason to believe that such a search warrant or authorisation cannot be obtained without affording an opportunity for 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. Admittedly P.W. 1 did not record the grounds of his belief in compliance with section 42(1) proviso. Further under Section 42(1), when the officer took down any information in writing under Sub-section (1) (done in this case) and record grounds of his belief under proviso thereto, he shall, forthwith, send a copy thereof to his immediate official superior. P.W. 1 did not comply with the mandatory requirement of Section 42(1) proviso or Section 42(1) of the Act.

22. As seen above, that the Supreme Court laid great stress on compliance of these provisions and they are held to be mandatory. The Supreme Court was very categorical on this aspect when it observed that 'to this extent these provisions are mandatory and the contravention of the same would affect the prosecution case and vitiate the trial'.

23. The Lower Court also found that P.W. 1 did not record the grounds of belief when he searched the vehicle between sunset and sunrise and there is violation of proviso to Section 42(1). However, he termed this lapse as technical on the part of P.W. 1. He only considered whether there was any prejudice caused to the accused by P.W. 1 not strictly complying the proviso to Section 42(1) of the N.D.P.S. Act and held that this ground alone is not sufficient to acquit the accused. This finding of the Lower Court is quite erroneous. The judgment of Balbeer

Singh's Case. (1994 Cri LJ 3702) (SC), was cited before the learned Sessions Judge. The Supreme Court in that case categorically stated that Section 42(1) proviso and Section 42(1) are mandatory and the violation of which vitiates the trial itself. Therefore, I am constrained to hold that the entire prosecution case is vitiated for non-compliance of the above mandatory provisions.

24. Learned counsel for the appellant-accused submitted that there is violation of Section 55 of the N.D.P.S. Act also. He referred to the following cases :-

(1) (1987) 31 DLT 305

(2) (1989) 3 Crimes 608 : (1989 Cri LJ 1412) (Him Pra)

(3) 1992 (1) Crimes 53 (Sic)

(4) 1992 Cri LJ 2342 (Raj)

(5) 1993 (3) Crimes 1130 (Sic)

The facts of the case on hand are different from the facts of the cases cited above, on this point. In this case, M.Os. 1 to 3 were not deposited in any police station. Therefore, the provisions of Section 55 are not attracted. The Lower Court rightly held that affixing of the seal by the S.H.O. will arise if the samples are taken in the police station. The Lower Court is also right in holding that Section 53 is attracted in this case. The notification number 30823(3), dated 14-11-1985, issued by the Ministry of Finance envisaged the Officers of Customs the powers specified in Section 53. Therefore, the officer-in-charge of Godown is competent to keep in custody the contravened articles seized under the provisions of the Act. The Lower Court rightly held that Section 53 did not lay down that the articles or goods so deposited in the custom godown under Section 53 of the N.D.P.S. Act shall be sealed by the officer-in-charge of such godown.

25. Learned counsel for the appellant-accused further submitted that the analyst report is not admissible. It was sent to Central Forensic Laboratory, Himayatnagar, Hyderabad. According to the Government of India, Ministry of Finance Department (Revenue) standing orders 1/89, dated 13-6-1989, that such articles must be

seized and produced as evidence and that if the Customs Central Excise and Revenue Department, the samples should be sent to Central Revenue Labs and CBI, BSF and other Central Police Force, it has to be sent to CFSL, Delhi and State police and others have to sent the samples to State CFSL. In the present case, the samples have not been tested by Central Revenue Laboratory, Customs House, Madras. Thus, the report is not admissible.

26. It is true that the samples have not been tested by the Central Revenue Laboratory, Customs House, Madras, but they were tested by Central Forensic Laboratory, Hyderabad, which is also a recognised laboratory. It is not the case of the accused that there is any defect in the test adopted by the Forensic Laboratory, Hyderabad. No irregularities are suggested to P.W. 5 with regard to the findings. This itself shows the absence of any prejudice. The case cannot be thrown out on this ground. Learned counsel further submitted that no site plan is prepared, investigation is biased, no link evidence is produced, the samples remain in the possession of the investigating officer, there is no mention of sealing in the mahazar, the seizure memo is not a contemporaneous document etc.

27. In support of his contention he relied on the judgment reported in *Peter Robertson Cowan v. State* (1987) 31 DLT 305. In this case it was held that all the samples taken from the seized material under this Act have necessarily to be sealed with the seal of the Officer incharge of the police station and that it is a mandatory provision. The facts in the case on hand are different. P.W. 1, who is a Gazetted Officer, has followed the procedure laid down by the Act. Therefore, not much weight can be given to this argument of the learned defence counsel. However, on the basis of my finding on the violation of Section 42(1) Proviso and Section 42(1) of the Act, which are held to be mandatory, the accused is entitled for acquittal.

28. Accordingly, the appeal is allowed and the accused is acquitted. The judgment and sentence passed by the Lower court are set aside. The appellant is directed to be set at liberty forthwith unless he is required in any other case.

29. Appeal allowed.

