

Kandra Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Aug-16-1999

Reported in : 2000(1)MPHT289; 2000(1)MPLJ98

Judge : R.S. Garg, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#)- Sections 8, 18, 42, 42(1), 42(2), 52 and 57

Appeal No. : Criminal Appeal No. 1209/92

Appellant : Kandra

Respondent : State of M.P.

Advocate for Def. : Advocate General

Advocate for Pet/Ap. : S.L. Kochar, Adv.

Disposition : Appeal allowed

Judgement :

R.S. Garg, J.

1. Being aggrieved by the Judgment passed by learned Special Judge, (NDPS), Balaghat in Special Criminal Case No. 67/91, decided on 28-11-92, convicting the appellant under Section 8/18 of Narcotic Drugs and Psychotropic Substances Act,

sentencing him to undergo R.I. for ten years and pay fine of Rs. 1 lac, in default of payment of fine to undergo R.I. for two years, the appellant has filed this appeal.

2. The prosecution case in brief is that on 28-2-91 Sub- Inspector Salim Khan received an information that the present accused-appellant was cultivating Poppy in contravention of the provisions of Narcotic Drugs and Psychotropic Substances Act. Taking with him certain Panchs and the Police guard he proceeded to village Suswa where he found the accused and enquired from him that he had come to take search of the Badi (field) of the accused as he had the information about the growing of the Poppy plants. The accused straight way admitted cultivation of the Poppy plants. Thereafter, a Panchnama was prepared, the Poppy plants were uprooted, samples were taken out and thereafter the samples and the remaining plants were sealed. The accused was brought to the police station where the First Information Report was registered against him. The prosecution further says that the samples were sent to the Forensic Science Laboratory, who as per their report informed the prosecution that the articles sent for examination were Poppy plants were having fruits, unopened fruits and some flowers. The prosecution being well equipped with the report of the F.S.L., filed the challan against the accused. The learned trial Court after recording the evidence and hearing the parties convicted and sentenced the accused as referred to above.

4. Taking shelter under the judgment of the Supreme Court in the matter of State of Punjab v. Balbir Singh, (AIR 1994 SC 1872), Mohinder Kumar v. State, Panaji Goa, (AIR 1995 SC 1157) and Mukkan v. State of M.P., (1997 (2) MPLJ 244), learned counsel for the appellant submits that as the mandatory provisions of Sections 42, 52 and 57 were not complied and as the prosecution has not produced the material documents which could throw some light on these mandatory provisions, the trial Court was absolutely unjustified in convicting and sentencing the accused.

5. Shri Naik, learned Additional Advocate General submits that if the judgment in the matter of Balbir Singh (supra) is read in its true perspective, it would show that compliance of Sections 42(1), 42(2), 52 and 57 are not mandatory and unless failure of justice or abuse of the process or occasion of prejudice is shown the

accused would not be entitled to be acquitted. He further submits that as Salim Khan, the Investigating Officer had stated before the Court that he had complied with the provisions of N.D.P.S. Act, the Court below was justified in convicting the accused.

6. For a proper appreciation of the matter it would be necessary to refer to some portions of Section 42(1) and 42(2). Section 42(1), provides that whenever the empowered officer has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug etc., in respect of which an offence has been committed between sunrise and sunset he may enter in the premises and make a search. The proviso to Section 42(1) provides that where such officer has reason to believe that a search is required to be taken without warrant between sunset and sunrise, he is obliged to record the grounds of his belief. Sub-section 2 of Section 42 provides that 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 forthwith send a copy thereof to his immediate official superior.

7. Section 42(1) contemplates two situations, the first one says that where the empowered officer has reason to believe from personal knowledge he may take search between sunrise and sunset. Sub-section 1 of Section 42 does nowhere provide that if an officer has reason to believe that an offence punishable under the provisions of N.D.P.S. Act has been committed or is committed and he has reason to believe then in such a situation is not required to record his reasons. But if the empowered officer receives an information regarding commission of the offences then he is obliged to take down the same in writing, after taking down the same in writing he has to proceed further.

8. Section 42(2) provides that where the information is taken down in writing or the grounds of belief under the proviso are recorded in writing the same shall be forwarded to the immediate official superior. As already observed the proviso to Sub-section (1) of Section 42 provides for a case where the search is required to be taken between sunset and sunrise. On proper appreciation of Section 42 it would simply appear that the personal belief of the officer is not required to be

reduced to writing if the search is to be taken between sunrise and sunset but if the search is to be taken between sunset and sunrise even the grounds of belief are required to be recorded. But when an information is received regarding commission of offence the empowered officer is obliged under the mandate of law to record the same in writing. Whenever the information is recorded or the grounds of belief as nursed by the empowered officer and recorded under the proviso, the same are required to be informed to the immediate official superior.

9. In the matter of State of Punjab v. Balbir Singh (supra) their Lordships while appreciating and interpreting the provisions of Section 42 etc., have observed as under :--

'The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent to comply with these requirements thus affects the prosecution case and therefore vitiates the trial'.

10. These very observations have again been quoted in Paragraph 26 (2C). Their Lordships have clearly observed that 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. Their Lordships have further said that to that extent those provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

Their Lordships have further said that if there is non-compliance of the provisions of Section 42(2), the same would affect the prosecution case and to that extent the same is mandatory. While referring to Section 42(1) their Lordships have said that non-compliance would affect the prosecution case and vitiate the trial but while referring to Section 42(2), their Lordships have simply said that it would affect the prosecution case. The Supreme Court has nowhere said that non-compliance of Section 42(2) would vitiate the trial. The reason is apparent, because non-compliance of Section 42(1) regarding non-recording the information would clearly show non-compliance of the mandatory provisions and would shatter the very foundation that on some information the prosecution/police party had gone for the search. In a case, where the officer wants to Court to believe that he had received some information not only he is required to speak in the Court that he had complied with the provisions of Section 42(1) but is also obliged to produce the records which he had maintained. Non-compliance of Section 42(1) has observed by their Lordships of the Supreme Court would vitiate the trial, while non-compliance of Section 42(2) would only affect the prosecution case, Where it is proved to the satisfaction of the Court that provisions of Section 42(1) were complied with then the Court would be obliged to see whether non-compliance of Section 42(2) i.e., non-sending of the information to the immediately superior officer had caused some prejudice to the defence of the accused or has affected his defence adversely. In the present case, Salim Khan, the officer concerned has simply stated that he complied with the provisions of Section 42(1) by recording the information. He has not produced the record. He has not produced the information as recorded by him; he has not produced copy of the Panchnama prepared by him; he has also not produced the Rojnamcha Sanha in which he has recorded about the information received by him. For want of documents and these lapses of Salim Khan, I am bound to draw inference against the prosecution agency and must further hold that provisions of Section 42(1) were not complied with. The result is obvious. The trial is vitiated. As the accused is being acquitted on the grounds of non-observance of Section 42(1), it is not necessary to refer to other arguments but a reference for future guidance can always be made to the judgment of the Supreme Court in the matter of Mohinder Kumar and Mukkan (supra). The accused is acquitted of the charges because of the non-observance

of the mandatory provisions. The appeal is allowed. The accused is acquitted.

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