

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-787-DB of 2010

DATE OF DECISION: FEBRUARY 11, 2015

AJIT SINGH

...APPELLANT

VERSUS

STATE OF PUNJAB

...RESPONDENT

**CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.
HON'BLE MR. JUSTICE DARSHAN SINGH.**

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. VINOD GHAI, SR.ADVOCATE
WITH MR. VINEET KAUSHAL, ADVOCATE
FOR THE APPELLANT.

MR. P.P.S.THETHI, ADDL.A.G., PUNJAB.

M. JEYAPPAUL, J.

1. Appellant-accused Ajit Singh and his brother, accused Harbans Singh, faced trial under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act') before the trial Court. The trial Court convicted Ajit Singh and acquitted Harbans Singh. Accused Ajit Singh has preferred the present appeal challenging the conviction and sentence recorded by the trial Court under Section 15 of the NDPS Act.

2. The case, in brief, of the prosecution is that on 6.9.2002, PW6 Kuldeep Singh proceeded alongwith PW5 ASI Karamvir Singh and other police officials in connection with search of suspected persons at Rophti bridge. DW2 Ran Singh came on a scooter and remained there chatting with PW6 . At about 10.00 p.m. on the said day, PW6 received a secret

information that Head Constable Ajit Singh and Harbans Singh ASI were present with poppy husk in civil dress in an Indica car without registration number and they were waiting for the customers for selling the same near Lala Wala peer on a kacha raasta of village Beeharwal. If raid was conducted, they could be apprehended with poppy husk, the secret informer further disclosed to him. As the information was found to be authentic, he sent a message to secure the presence of a Gazetted Officer or a Magistrate at the spot. PW6 alongwith the police party and DW2 Ran Singh raided the spot and found that both the accused were unloading the bags from Indica car. On seeing the police party, they tried to flee away from the spot. PW6 alongwith the police party surrounded them. But accused Harbans Singh ran away in the Indica car towards Beeharwal, whereas accused Ajit Singh was apprehended at the spot. PW6 could identify accused Habans Singh as he remained posted with him in CIA Staff, Patiala in the year 1991-92. PW6 disclosed his identity. Accused Ajit Singh also revealed his identity. Both the accused were found to be brothers. PW7 DSP Shamsheer Singh Boparai reached the spot at about 10.30 p.m. in his official vehicle alongwith his gunman. The Head Constable made an attempt to chase the car of accused Harbans Singh, but returned unsuccessful. PW7 disclosed his identity to the accused and informed him of his option to subject himself for a search either before a Gazetted Officer or before a Magistrate. The accused reposed faith in PW7. Consent memo Ex.PE was obtained from accused Ajit Singh. Thereafter, as per the directions of PW7, PW6 opened the mouth of both the bags which were unloaded from the Indica car by the accused. Poppy husk

was found in both the bags. Two samples of 250 gms. each, from each of the bags were separated. The remaining bags weighed 34 kgs. 500 gms. each. The samples as well as the remaining quantity were separately packed and parcelled. PW6 and PW7 put their seal on the samples as well as the bags containing remaining quantity. PW6 handed over his seal to DW2 Ran Singh after use, whereas PW7 retained his seal with him. The case property was taken into possession vide memo Ex.PF which was signed by PW2, PW5 and PW7. From the personal search, a sum of ₹150/-, an identity card and a gold ring were taken into possession vide memo Ex.PG. Memo of grounds of arrest Ex.PH was prepared. Accused Ajit Singh was arrested. PW6 sent ruqa Ex.PK on the basis of which a formal FIR Ex.PK/1 was recorded by ASI Nirmal Singh. PW6 produced the case property as well as the accused before PW1 SHO Harbhajan Singh. On the next day, as per the direction of PW1, the case property was taken to MHC Jaswant Singh and thereafter, it was produced before the Illaqa Magistrate. Accused Harbans Singh was arrested later on. Samples were sent for examination. The FSL report would disclose that the samples sent for examination was nothing but poppy husk.

3. Accused Ajit Singh set up a plea in his statement under Section 313 Cr.P.C. that he remained posted as Driver in P.S. Kotwali Nabha. Two motorcycles and one Allwyn Nissan, which were not in working condition, remained lying parked in P.S. Kotwali Nabha. However, the petrol of those three vehicles was being used by PW7 DSP Shamsheer Singh Boparai as well as PW6 ASI Kuldeep Singh for their personal use. Accused Ajit Singh being

the driver, serving in the police station, objected to the same before PW6 and PW7. Both of them became inimical towards him. Accused Ajit Singh also brought it to the notice of his brother Harbans Singh to make a request to PW6 and PW7 not to misuse the petrol for their personal use. On 5.9.2002, PW5 ASI Karamvir Singh came to his house. At that time, DW1 Harvinder Singh @ Kuku was present. PW5 took him to the office of PW7. Later on, accused Ajit Singh was falsely implicated in the case by PW6 SI Kuldeep Singh. No recovery was effected from him. He was innocent, he further pleaded.

4. DW1 Harvinder Singh, the cousin brother of accused Ajit Singh, supported him and stated that a person in civil dress came to the house of Ajit Singh and informed him that he was called by PW7. Accused Ajit Singh felt some foul play, as he had objected to the use of petrol of the breakdown vehicles parked in the police station.

5. DW2 Ran Singh who was cited as a recovery witness by the investigating official, was not examined on the side of the prosecution on the ground that he was won over by the accused. He was examined on the side of the defence. He stated there was no such recovery made in his presence. He never joined any police party headed by PW6 SI Kuldeep Singh, but during the course of cross-examination, he admitted that the memo Ex.PF bore his signature; however, he deposed that his signatures were obtained on blank papers.

6. DW3 Head Constable Roop Chand spoke about the fact that accused Ajit Singh remained posted as Driver in CIA Staff, Nabha, from

11.5.1987 to 20.4.1988 and he also remained posted as driver in Police Station Kotwali Nabha.

7. DW4, DW5 and DW6 spoke about the engagement of the co-accused ASI Harbans Singh in yet another case during the relevant point of time.

8. The trial Court having relied upon the evidence of PW1, PW5, PW6 and PW7, in the background of FSL report returned a finding that accused Ajit Singh committed the offence under Section 15 of the NDPS Act.

9. The evidence of PW1, PW5, PW6 and PW7 would categorically establish that accused-appellant Ajit Singh was found unloading two bags of poppy husk weighing 35 kgs. each from an Indica car when PW6 alongwith PW5 was present on receiving the secret information by PW6. Accused-appellant was apprehended at the spot. After samples were drawn from each bag, the samples as well as the remaining quantity were separately packed and parcelled. They were also sealed by PW6 and PW7 in the presence of PW5 ASI Karamver Singh. In the recovery memo, PW5 ASI Karamver Singh also subscribed his signature alongwith DW2 Ran Singh. The sample sent for examination would disclose that it contained only poppy husk. We do not find any reason to disbelieve the above evidence adduced by the prosecution.

10. Learned Sr. counsel Mr. Vinod Ghai, appearing for the appellant would vehemently contend that PW6 SI Kuldeep Singh and PW7 DSP Shamsher Singh Boparai were inimical towards accused Ajit Singh who

questioned the wisdom of using the petrol for their personal vehicles by showing petrol consumption of three vehicles which remained parked in unworthy condition in the Police Station. PW6 and PW7 also had a grudge against co-accused ASI Harbans Singh as accused Ajit Singh asked his brother ASI Harbans Singh to question the wisdom of PW6 and PW7 in misusing the petrol drawn in the account of unused parked vehicles. Therefore, it is his submission that the police had a reason to book a false case as against accused Ajit Singh.

11. Learned Addl.A.G., Punjab would submit that a novel story had been invented by accused with a view to wriggle out of the complexity in the crime.

12. It is not easy for any police official to book a case against co-police official under the NDPS Act just to wreak vengeance. The top officials would not brook false implication which may demoralize and damage the reputation of the entire uniformed force.

13. It is true that the prosecution witnesses have admitted that three vehicles were parked unused in the police station. In our considered view, such a situation had been unduly taken advantage of by accused Ajit Singh to build an unacceptable story in order to escape from the charges under Section 15 of the NDPS Act. There was no documentary proof to show that petrol bills had been prepared in the name of unused parked vehicles. The accused could have summoned the documents from the police station concerned to establish that there had been misuse of petrol by PW6 and PW7. In the absence of any documentary proof, we are not inclined to give

credence to the defence that petrol drawn in the name of unused vehicles parked in the police station was misused by PW6 and PW7.

14. We are of the considered view that misuse of petrol by PW6 and PW7 was not at all established by accused Ajit Singh. Under such circumstances, the contention of the accused that PW6 and PW7 had a grouse against the appellant as he had questioned the wisdom of misuse of petrol, does not arise for consideration.

15. Even assuming for the sake of arguments that PW6 and PW7 had some grouse against accused Ajit Singh, there was no reason for them to show ASI Harbans Singh as co-accused in this case. There is no evidence that co-accused Harbans Singh brought to the notice of PW6 and PW7 about such misuse complained of by accused Ajit Singh. In our view, a driver would not have the guts to challenge PW7 DSP Shamsher Singh Boparai even if he had been misusing the petrol. Therefore, the defence set up by accused Ajit Singh that he challenged PW6 and PW7 who chose to misuse the petrol and therefore, they bore a grudge against him does not appear to be believable.

16. Learned senior counsel appearing for the appellant would submit that the co-accused was infact acquitted by the trial Court disbelieving his association in the crime under Section 15 of the NDPS Act. Therefore, there was every possibility for PW6 to fabricate a case as against the appellant as well.

17. Accused Harbans Singh through the defence witness DW4 and DW6 had produced some documentary proof to establish his plea of alibi.

Further, accused Harbans Singh was not arrested at the scene of crime. Therefore, the trial Court had doubted the participation of co-accused Harbans Singh in the crime under Section 15 of the NDPS Act.

18. Accused Ajit Singh was arrested at the scene of crime itself. 70 kgs. of poppy husk had been recovered from the spot by PW6 in the presence of PW5 and PW7. Therefore, the benefit of doubt as extended to co-accused Harbans Singh cannot be extended to the accused-appellant herein.

19. Learned senior counsel appearing for the appellant would submit that as per the evidence of DW2 Ran Singh, the alleged recovery witness in this case, no recovery of contraband was effected in his presence nor was he associated as a recovery witness in the instant case. Learned Addl.A.G., Punjab would submit that DW2 was completely won over by the accused. The very fact that he had been examined on the side of the defence speaks volumes of his interest in acquittal of the accused, he further submitted.

20. The fact remains that DW2 was not examined by the prosecution as he had been allegedly won over by the accused. The stand of the prosecution that he was won over is strengthened by the fact that Ran Singh was examined on the side of the defence as DW2. It is very important to note the fact that DW2 chose to admit his signature on the recovery memo prepared by PW6 at the scene of crime. It is not as if the recovery effected by PW6 was not spoken to by any other witness in this case. In the absence of support from the independent witness DW2, PW6 ASI Kuldeep Singh had

spoken about the recovery effected not only in his presence, but also in the presence of DW2 Ran Singh. In the above facts and circumstances, we are of the considered view that DW1 was completely won over by the accused and therefore, he has come out with a plea supporting the accused that there was no recovery in his presence. If he was not at all concerned with the recovery of the contraband in the instant case, there would have been no occasion for him to subscribe his signature in the recovery memo. Therefore, we have no hesitation to reject the testimony of DW2.

21. It is the case of the prosecution that PW6 SI Kuldeep Singh received a secret information that appellant Ajit Singh alongwith his brother Harbans Singh was waiting for the customers to sell contraband, after unloading the same from the vehicle. The said information was not, of course, reduced into writing by PW6 and informed to the higher official concerned.

22. Learned senior counsel appearing for the appellant, in the above context, would submit that Section 42 of the NDPS Act was not complied with by PW6. Even in a case where the recovery was not effected from the vehicle the moment PW6 received secret information, he should have reduced it into writing, he further submitted.

23. Learned Addl.A.G., Punjab would submit that the recovery was effected in the open space and not from the vehicle and therefore, Section 42 of the NDPS Act would not apply to the present case.

24. An intimation in writing as regards the secret information received by police official to the higher official is expected under Section 42

of the NDPS Act only to put a check on the proposed search to be made by the police official in a house, an enclosed place or a vehicle. Further, it is a well settled proposition of law that the police officer who was on patrol duty could reduce the secret information into writing and despatch to the higher official even after the search was made and recovery effected. In the instant case, PW6 was on the move when he received a secret information. There was no bar for him to make a search and recover the material object as there was every possibility for the depletion of the contraband by the accused if timely search was not made. The secret information was received only to the effect that the contraband was kept in an open place after unloading from the vehicle. The search of the contraband and the recovery of the same were also made only in the open. Therefore, in our considered view, the mandatory provision under Section 42 of the NDPS Act does not apply to the facts and circumstances of this case.

25. Of course, PW5 ASI Karamver Singh has deposed that the secret information received by PW6 was reduced into writing. PW7 DSP Shamsher Singh Boparai deposed that the secret information received by PW6 was already reduced into writing. PW6 SI Kuldeep Singh who received the secret information was the competent person to speak about the fact as to whether he reduced the secret information into writing or not. He has deposed that he had never reduced the secret information, he received in the instant case, into writing. At any rate, the above contradictory version of PW5, PW6 and PW7 does not weaken the case, inasmuch as it is found that the mandatory provision under Section 42 of the NDPS Act does not apply

to the case in hand.

26. DW1 Harvinder Singh is admittedly a cousin of the accused. He deposed that accused Ajit Singh was taken away by a person in civil dress on the plea that he was summoned by PW7 DSP Shamsher Singh Boparai. In the face of secret information received by PW6, search was made and recovery effected by him in the presence of PW5 and PW7. We are not inclined to give any weightage to the interested version of DW1, in the above facts of the case.

27. Learned senior counsel appearing for the appellant would submit that Indica car which was allegedly used for transportation of the contraband and for the escape of the co-accused was not recovered. It is a fact that the investigating official had not evinced interest in the recovery of Indica car which was used for the above purposes. Non-recovery of the car used for the aforesaid purposes does not weaken the case of the prosecution, in the face of the heavy recovery effected by PW6 on the basis of secret information he received. But, in all fairness, the investigating official should have taken all out efforts to recover the Indica car. It may be a lapse on the part of the investigating official; however, the same cannot be made the basis for rejecting the case of the prosecution.

28. In the case under the Narcotic Drugs & Psychotropic Substances Act, the prime dealer of the narcotic drug is not detected and arrested by the investigating agencies. No investigation is directed to zero-in on the origin of the contraband recovered. The shark behind the nefarious deal in contraband is always left untouched by the investigating officials.

That was one of the reason why the States could not control the offence being committed under the NDPS Act. But the question that arises for consideration is whether the person who was actually found in possession of the contraband can be acquitted just because the bulk dealer behind the transportation of contraband was not unravelled by the investigating agency. It is actually in the interest of the State to book the bulk dealers in narcotic drugs & psychotropic substances to put a check on such nefarious activities. There is actually a clear lapse on the part of the investigating officials under the control of the State in not evincing any interest in apprehending the real culprit behind the drug deal. But for such a lapse, the person who was actually been in possession of narcotic drugs & psychotropic substances, cannot be given a clean chit. Conscious possession of the contraband is an offence under the NDPS Act.

29. Lastly, it was submitted by the learned senior counsel appearing for the appellant that the charge framed by the trial Court only refers to the possession of poppy husk weighing 35 kgs. by each of the accused. The trial Court also formulated a question on the premises that each of the accused was found in possession of 35 kgs. of poppy husk. Therefore, it is his submission that even if the appellant is found guilty, he cannot be convicted for the possession of commercial quantity of poppy husk.

30. It is the case of the prosecution that both the accused having unloaded the entire quantity of 70 kgs. of poppy husk from the vehicle, kept it in the open and were waiting for the customers. No specific quantity of contraband was recovered from each of the accused. Further, on a perusal of

the charge framed by the trial Court, it is found that the accused was informed of the total quantity of 70 kgs. of poppy husk recovered from the spot. It appears that the trial Court omitted to refer in the charge-sheet the fact that from each bag 35 kgs. of poppy husk was recovered. In other words, the word 'bag' is missing from the charge-sheet.

31. Section 464 of the Code of Criminal Procedure, 1973, comes to the rescue of the prosecution. Any error, omission or irregularity in the charge shall not render the finding of sentence or order passed by the competent Court as invalid. Though the trial Court formulated a point as to whether the accused was in possession of 35 kgs. of poppy husk, in our considered view, the accused was properly informed of the fact that 70 kgs. of poppy husk were recovered in the open place in the presence of the accused-appellant. The trial Court also finally arrived at the conclusion that 70 kgs. of poppy husk was recovered from the accused-appellant. Therefore, in our view, the omission to specifically refer to the word 'bag' in the charge does not vitiate the conviction and sentence passed by the trial Court.

32. The accused was found in possession of 70 kgs. of poppy husk which was just above the commercial quantity. Therefore, in our considered view, reduction of the sentence to 10 years R.I. of course, with the fine and the default sentence imposed by the trial Court would meet the ends of justice.

33. In view of the above, the judgement of conviction recorded by the trial Court against the accused-appellant under Section 15 of the NDPS

Act stands confirmed, but the sentence of imprisonment imposed by the trial Court is reduced to 10 years R.I. The fine amount and the default sentence imposed by the trial Court also stands maintained.

34. With the above modification in the matter of sentence, the appeal stands dismissed.

(M. JEYAPPAUL)
JUDGE

February 11, 2015
Gulati

(DARSHAN SINGH)
JUDGE