

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

1. CRA-S-2655-SB of 2018 (O&M)
Date of Decision: 11.07.2018

Balwinder Singh @ RajuAppellant

VERSUS

State of PunjabRespondent

2. CRA-S-2743-SB of 2018 (O&M)

Kuldeep Singh @ DeepaAppellant

VERSUS

State of PunjabRespondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present : Mr. Ravi K. Mattoo, Advocate
for the appellant in CRA-S-2655-SB-2018.

Mr. M.K. Singla, Advocate
for the appellant in CRA-S-2743-SB-2018.

Mr. Rakeshinder Singh Sidhu, AAG, Punjab.

SURINDER GUPTA, J.

Both the above-captioned appeals have been taken up together for disposal as these arise out of the common judgment dated 01.06.2018 passed by Judge, Special Court, Patiala convicting and sentencing the appellants in both the appeals as follows:-

<i>Under Section</i>	<i>Name of Accused</i>	<i>Punishment</i>
15 NDPS Act	Balwinder Singh @ Raju	Rigorous imprisonment for ten years with fine of ₹1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for three years
15 NDPS Act	Kuldeep Singh @ Deepa	Rigorous imprisonment for ten years with fine of ₹1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for three years

2. As per case of prosecution, SI Shiv Inder Dev alongwith his police party was present at the backside gate of Punjabi University, Sahu Bela Road, Patiala on 21.06.2014, where he received a secret information of bringing of poppy-husk to Patiala City in two vehicles i.e. tractor make Mahindra bearing registration no. HR-20-A-9877 and canter bearing registration no. HR-57-2014. A *naka* was held and at about 05.00 p.m., police party spotted Balwinder Singh @ Raju (appellant in CRA-S-2655-SB-2018) coming on tractor from Mehmadpur side carrying two bags on mudguard of the tractor. In the meantime, canter bearing registration no. HR-57-2014 also came from Mehmadpur side and on seeing the police party two occupants of that canter succeeded in fleeing away from the spot. They were chased by ASI Harminder Singh, HC Lakhwinder Singh and HC Kuldeep Singh but could not be nabbed.

3. Firstly, SI Shiv Inder Dev apprised appellant-Balwinder Singh @ Raju of his suspicion about carrying of contraband in the bags on his tractor and gave him option to get his search conducted before a gazetted officer or a Magistrate but vide consent memo (Ex. PA) Balwinder Singh @ Raju reposed his confidence in him. On search, poppy-husk was found in bags out of which two samples of 100 gms. from each bag were taken and remaining poppy-husk, when weighed with bags came to be 29 kgs. 800 gms. and 21 kgs. 800 gms. i.e. 51 kgs. 600 gms. Samples and the bags were sealed at the spot. Thereafter, search of canter was conducted, which was found loaded with blankets. From the pile of blankets a plastic bag containing 10 kgs. of poppy-husk was recovered out of which two samples of 100 gms. each were separated. Samples and remaining poppy-husk was also sealed at the spot. All the samples were sealed with seal of SI Shiv

over to ASI Harminder Singh (PW-6). All the sealed parcels were taken into possession vide memo Ex. PB. The tractor was taken into possession vide memo Ex. PC and the canter alongwith 158 bundles of blankets and PAN card of appellant-Kuldeep Singh @ Deepa, which was found in the canter, was taken into possession vide memo Ex. PD.

4. *Ruqa* (Ex. PE) was sent to Police Station on which formal FIR (Ex. PE/1) was registered. Appellant-Balwinder Singh @ Raju was formally arrested vide arrest-cum-intimation memo (Ex. PF). On his personal search, currency notes of ₹200/- and a mobile phone were recovered vide memo Ex. PG.

5. During investigation, identity of occupants of canter was disclosed by appellant-Balwinder Singh @ Raju vide his disclosure memo (Ex. PG/1) as Kuldeep Singh @ Deepa and Manjit Singh, who were later on arrested. Samples were sent to Chemical Examiner and found to be that of poppy-husk. On completion of investigation, challan was prepared and presented in Court.

6. Finding a *prima facie* case, both the appellants alongwith Manjit Singh @ Mannu Mian were charge-sheeted for offence punishable under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') for carrying commercial quantity of poppy-husk. They pleaded not guilty to the charge and claimed trial.

7. In support of its case, prosecution examined C. Deepak Kumar as PW-1, Gulab Singh, Registration Clerk, Registering Authority, Hisar as PW-2, MHC Sheesh Pal as PW-3, Kirpal Singh, Junior Assistant, Office of DTO, Fatehgarh Sahib as PW-4, SI Shiv Inder Dev as PW-5, ASI Harminder Singh as PW-6 and Inspector Rajesh Kumar as PW-7.

8. On completion of prosecution evidence, statements of accused as required under Section 313 Cr.P.C. were recorded wherein they denied the allegations of prosecution and pleaded their false implication.

9. Learned Judge, Special Court found appellants, Balwinder Singh @ Raju and Kuldeep Singh @ Deepa, guilty of possession of commercial quantity of poppy-husk and they were convicted and sentenced as mentioned in para 1 above. Accused-Manjit Singh was, however, acquitted of charge framed against him.

10. The first question raised by learned counsel for appellant-Kuldeep Singh @ Deepa is regarding clubbing of recovery separately effected from tractor and canter. He has argued that two separate recoveries were effected by the police and both could not be clubbed to hold Kuldeep Singh @ Deepa guilty for possession of commercial quantity of poppy-husk.

11. Learned State counsel has argued that though recovery was separately effected from the tractor and canter but the police was having common secret information about poppy-husk being brought to Patiala in a tractor and canter, as such, it was a common recovery and has been rightly clubbed by the trial Court to hold both the appellants guilty for offence punishable under Section 15 of the NDPS Act for possession of commercial quantity of poppy-husk.

12. Before proceeding further, it will be relevant to appreciate the submission of learned counsel for appellant-Kuldeep Singh @ Deepa and learned State counsel on the issue as to whether recovery of poppy-husk from possession of appellants, Kuldeep Singh @ Deepa and Balwinder Singh @ Raju, falls in the commercial category of poppy-husk?

13. As per Table attached with NDPS Act, Poppy-husk above 50 kgs. falls in the category of commercial quantity of contraband. In this case

police party was having a secret information that poppy-husk was being brought to Patiala in two separate vehicles. While appellant-Balwinder Singh @ Raju was nabbed with poppy-husk weight of which alongwith bags was found to be 52 kgs., recovery from the canter was of 10 kgs. The prosecution has not been able to prove that appellants, Balwinder Singh @ Raju and Kuldeep Singh @ Deepa, are related to each other or were having any common plan, intention or place to carry the poppy-husk so as to draw the inference that they are jointly liable for recovery effected from both the vehicles. Appellant-Balwinder Singh @ Raju is resident of Old Bishan Nagar, Patiala while appellant-Kuldeep Singh @ Deepa is resident of Fatehgarh Neoan, District Fatehgarh Sahib. Even if version of prosecution be believed, it is quite possible and probable that both were taking poppy-husk to their respective places through a common route. The mere fact that police after recovery of contraband from two vehicles registered a common FIR, presented joint challan against all the accused and a joint investigation was conducted, is no reason to draw the inference that poppy-husk being carried in the tractor and canter was being jointly carried by occupants of these vehicles. Learned trial Court was also conscious of this fact when it posed a question to itself as to whether the accused charge-sheeted can be made liable for recovery of entire 62 kgs. quantity of poppy-husk?

14. While answering the above question, learned trial Court observed as follows:-

“33. As per further prosecution story, the recovery team recovered two bags containing consolidated weight of 52 kilograms poppy husk from the tractor driven by accused Balwinder Singh whereas third bag containing 10 kilograms poppy husk was recovered from the

impounded Canter no. HR-57-2014 making the entire recovery of 62 kilograms poppy husk. Although, SI Shiv Inder Dev PW5 and ASI Harminster Singh PW6 have deposed regarding receipt of secret information about the bringing of commercial quantity of poppy husk by these three accused on two vehicles, but rest of their testimony is silent to prove any connection between these three accused except the disclosure statement of accused Balwinder Singh Ex.PG/1 wherein he disclosed the names of occupants of impounded Canter to be Kuldeep Singh and Manjit Singh without any further detail of their parentage or residential addresses.....”

15. Regarding disclosure statement of Balwinder Singh @ Raju disclosing names of persons travelling in the canter, learned trial Court observed as follows:-

“33.Now the question arises as to whether the disclosure statement Ex.PG/1 suffered by accused Balwinder Singh is admissible in the eyes of law. When this disclosure statement was recorded, accused Balwinder Singh was in police custody and thus, the self incriminating part of this accused in this disclosure statement is not admissible by virtue of Section 25 and 26 of Indian Evidence Act, 1872.”

16. On the basis of recovery of registration certificate (RC) and PAN card of appellant-Kuldeep Singh @ Deepa from canter, it was observed that the vehicle belongs to him and his nomination by the police

cannot be doubted. Even if the recovery of 10 kgs. of poppy-husk from the

vehicle of Kuldeep Singh @ Deepa be believed, the prosecution has not been able to connect this recovery with recovery effected from appellant-Balwinder Singh @ Raju. As observed by learned trial Court itself, the prosecution has failed to prove any connection between Balwinder Singh @ Raju, who was on the tractor, and two persons travelling in the canter. The investigating officer appears to have shown his over enthusiasm while showing both the recoveries of contraband effected separately from two vehicles in one case and attempting to prove recovery of 10 kgs. of poppy-husk recovered from the vehicle of Kuldeep Singh @ Deepa as joint recovery with poppy-husk recovered from tractor of Balwinder Singh @ Raju. Though, learned trial Court was of the view that both the recoveries are not connected with each other but still in the end it took both the recoveries together while convicting Kuldeep Singh @ Deepa for recovery of 62 kgs. of poppy-husk, a commercial quantity. The findings of learned trial Court to this effect are not only erroneous but are perverse and against the evidence on record. The same are set aside.

17. From the testimony of prosecution witnesses, which has not been assailed by learned counsel for appellant-Kuldeep Singh @ Deepa, it is proved that recovery of 10 kgs. of poppy-husk was effected from the vehicle of Kuldeep Singh @ Deepa, who fled away from the spot after leaving the vehicle and disclosure statement of appellant-Balwinder Singh @ Raju when read in context with documents recovered from the vehicle i.e. Canter proves that it was Kuldeep Singh @ Deepa who fled away from the spot on witnessing police party.

18. As per case of prosecution, appellant-Balwinder Singh @ Raju was apprehended while carrying 52 kgs. of poppy-husk on his tractor. As per statement of SI Shiv Inder Dev, investigating officer (PW-5), he on

finding poppy-husk in two bags took out two samples of 100 gms. each from both the bags and then weighed the bags and found the total weight of both the bags as 29 kgs. 800 gms. and 21 kgs. 800 gms. His testimony clearly shows that poppy-husk was weighed alongwith bags and no separate weight of the bags was taken. The question, which arises for consideration, is as to what was the weight of bags? No evidence has come on file in this regard. It has also not been stated by him that bags were canvas bags, jute bags or plastic bags. In the absence of any evidence to this effect, it can be safely presumed that weight of bags may be around 2 kgs. and if deducted from total weight of recovery as mentioned in recovery memo as 52 kgs, recovery from appellant-Balwinder Singh @ Raju falls below the commercial quantity of poppy-husk.

19. Learned counsel representing appellant-Balwinder Singh @ Raju has argued that no independent witness was joined at the spot. Sample of 100 gms. each of poppy-husk taken at the spot were sent to FSL on 28.07.2014 with a delay of more than one month. Version of prosecution is improbable that appellant-Balwinder Singh @ Raju was bringing the poppy-husk in open on his tractor from Hisar to Patiala. The police party was having secret information but there is non-compliance of Section 42 of NDPS Act.

20. I find no substance in the submission of learned counsel for appellant-Balwinder Singh @ Raju to disbelieve the statements of prosecution witnesses. Appellant has not alleged any reason or motive for his false implication. The mere fact that prosecution witnesses are official witnesses is no reason to discard their statements. PW-5 SI Shiv Inder Dev has stated that he tried to join the independent witness before laying *naka* but nobody was willing to join the police party. It is a well known fact that

people usually avoid joining the police party to avoid their unnecessary harassment in going to police station and then to the Court. Everybody wants to play safe for himself as well as for his family. The fact that poppy-husk was being brought on the mudguard of the tractor is no reason to term the prosecution version as improbable. A person bringing contraband may have thought that nobody will have suspicion about bags lying on the mudguard. As per prosecution version, he was bringing the poppy-husk from Rajasthan and succeeded in reaching place of recovery without being noticed by anybody. Even the police party headed by PW-5 SI Shiv Inder Dev had not apprehended appellant-Balwinder Singh @ Raju on the basis of suspicion but on the basis of secret information they had.

21. On the question of delay in sending the sample to FSL, learned State counsel has argued that sample was initially sent to FSL on 23.06.2014 i.e. two days after the recovery but some objections were raised by the FSL. It was brought back and again deposited after fulfilling the objections. Submission of learned State counsel is based on testimonies of Constable Deepak Kumar and ASI Shishpal, who was posted as MHC of Police Station Urban Estate, Patiala. Both have stated this fact in their affidavits (Ex. PW-1/A and Ex. PW-3/A). The sample was duly sealed when tested. There is nothing on record that seal on the sample was tampered, as such, delay in sending the sample is not material.

22. Learned counsel for appellant-Balwinder Singh @ Raju has argued that after the receipt of secret information, it was not recorded nor was it sent to higher officers, as such, there is non-compliance of provisions of Section 42 NDPS Act.

23. As per testimony of PW-5 Shiv Inder Dev, he apprised the police party of the secret information and then tried to join the independent

witness. In the meanwhile, he found tractor of appellant-Balwinder Singh @ Raju and proceeded to apprehend the same. In case **Karnail Singh vs. State of Haryana, 2009 (5) RCR (Criminal) 515**, it has been held by the Apex Court that non-compliance of provisions of Section 42 NDPS Act does not vitiate the case of prosecution and render the recovery of contraband effected from the appellant as illegal unless it is proved that it has caused prejudice to the accused. Learned counsel for appellant-Balwinder Singh @ Raju has not argued on this aspect nor has pointed out that any prejudice was caused to the appellant-Balwinder Singh @ Raju due to non-compliance of provisions of this Section.

24. As a sequel of my above discussions, these appeals are partly accepted as follows:-

- (i) The prosecution has been able to prove recovery of poppy-husk from possession of appellant-Balwinder Singh @ Raju and also from the canter of appellant-Kuldeep Singh @ Deepa, who fled away from the spot on witnessing the police party.
- (ii) Recovery effected from tractor of appellant-Balwinder Singh @ Raju and canter of appellant-Kuldeep Singh @ Deepa have no connectivity and are distinct and separate.
- (iii) Poppy-husk found in possession of appellant-Balwinder Singh @ Raju was less than 50 kgs., which is a non-commercial quantity. Similarly recovery of 10 kgs. of poppy-husk effected from canter of appellant-Kuldeep Singh @ Deepa also falls in the category of non-commercial quantity.

25. In view of above, the judgment of learned trial Court is modified as follows:-

- (i) Conviction of appellants, Balwinder Singh @ Raju and Kuldeep Singh @ Deepa, for possession of poppy-husk as per quantity discussed above is upheld.
- (ii) Sentence awarded to appellants, Balwinder Singh @ Raju and Kuldeep Singh @ Deepa is modified as follows:-
 - (a) Appellant-Balwinder Singh @ Raju is sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹25000/- for offence punishable under Section 15 NDPS Act. In default of payment of fine, he shall further undergo rigorous imprisonment for six months.
 - (b) As per custody certificate placed on file, appellant-Kuldeep Singh @ Deepa has already undergone sentence of 1 year and 2 months as on 03.07.2019. The sentence awarded to him is reduced to the period of imprisonment already undergone by him. He is also sentenced to pay fine of ₹10,000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for two months.

26. Superintendent, Central Jail, Patiala be apprised about modification of sentence of both the appellants.

July 11, 2019

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(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No