Present
Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 5328 of 2018

Md. Harun

.....Convict-Appellant.

-Versus-

The State.

.....Respondent.

None appears.

.....For the Convict-appellant.

Ms. Shahida Khatoon, D.A.G with
Ms. Sabina Perven, A.A.G with
Ms. Kohenoor Akter, A.A.G.

..... For the Respondent.

Heard on 14.03.2024 and

Judgment on 19.03.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Harun is directed against the judgment and order of conviction and sentence dated 09.05.2018 passed by the learned Additional Sessions Judge, 2nd Court, Chattogram in Sessions Case No. 501 of 2005 arising out of G.R No. 11 of 2005 corresponding to Chattogram Railway police Station Case No. 2 dated 06.05.2005 convicting the accused-appellant under table 7(kha) of section 19(1) of the Madok Drabya Niyantran

Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for a period of 06 (six) months more.

The prosecution case, in-brief, is that one, Md. Bahauddin, A.S.I, Madak Drabbya Niyontron Adhidaptar, Doublemooring Circle, Chattogram as informant on 06.05.2005 at about 22.45 hours lodged an Ejahar with Chattogram Railway Police Station against the accused-appellant stating, inter-alia, that on 06.05.2005 at evening he along with other members of Madak Drabbya Niyontron Adhidaptar on the basis of a secret information rushed to Chattagram railway station and thereafter while the Karnafuly express arrived at station and then they found the accused with a synthetic bag in right hand and then the informant party detained him and thereafter, the informant party opened the synthetic bag and found total 8 Kgs Gaza and accordingly, the informant party seized those Gaza by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Chattogram Railway Police Station Case No. 2 dated 06.05.2005 under table 7(ka) of section 19(1) of the

Madok Drabya Niyantran Ain, 1990 was started against the accused-appellant.

One, Osman Kabir, Inspector, Madok Drabya Niyantran Adhidaptar, Chattogram after completion of investigation submitted charge sheet against the accused-appellant, vide charge sheet No. 06 dated 31.05.2005 under table 7(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990.

In usual course, the case record was sent to the Court of learned Sessions Judge, Chattogram, wherein it was registered as Sessions Case No. 501 of 2005, the case was subsequently transmitted to the Court of the learned Additional Sessions Judge, 2nd Court, Chattogram for disposal in which the accused appellant was put on trial to answer a charge under table 7(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990 to which the accused appellant pleaded not guilty and prayed to be tried stating that he has been falsely implicated in this case.

At the trial, the prosecution side examined in all 4 (four) witnesses to prove its case, while the defence examined none.

The defence case, as it appears from the trend of cross-examination of the prosecution witnesses and

examination of the accused-appellant under section 342 of the Code of Criminal Procedure that the accused-appellant was innocent and he has been falsely implicated in the case.

On conclusion of trial, the learned Additional Sessions Judge, 2nd Court, Chattogram by the impugned judgment and order dated 09.05.2018 found the accused-appellant guilty under table 7(kha) to section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for 06(six) months more.

Aggrieved convict accused then preferred this criminal appeal.

No one found present to press the appeal on repeated calls despite of fact that this criminal appeal has been appearing in the list with name of the learned Advocate for the appellant for hearing for a number of days.

In view of the fact that this petty old criminal appeal arising out of 3 years sentence, I am inclined to dispose of it on merit on the basis of the evidence and materials on record.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, appearing for the State supports the impugned judgment and order of conviction and sentence dated 09.05.2018, which was according to her just, correct and proper. The learned Deputy Attorney General submits that unless there is anything indicating some sorts of enmity for false implication of the accused appellant, the evidence of the police personnel, who made the recovery, cannot be discarded and in this case there is nothing on record to suggest that there was any enmity in between the police and the convict-appellant and it is on record that the trial Judge on due considering all the aspects of the case justly found the accused-appellant guilty under table 7(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to sufferr rigorous imprisonment for 6(six) months more, which should not be disturbed.

Having heard the learned Deputy Attorney General and having gone through the materials on record, the only question that calls for my consideration in this appeal is whether the trial Court committed any error in finding the accused-appellants guilty of the offence

under table 7(kha) to section 19(1) of the Madok Drabya Niyantran Ain, 1990.

On scrutiny of the record, it appears that to prove the charge against the accused appellant, the prosecution side examined in all 4 (four) witnesses out of which PW-1, Subud Kumar Biswas, Superintendent of Madok Drabya Niyantran Adhidaptar stated in his deposition that on 06.05.2005 while they were on duty at 19:45 hours apprehended the accused appellant in a suspicious condition with a synthetic bag in hand and thereafter, the informant party on search recovered total 8 Kgs. cannabis from his synthetic bag. This witness also stated that the informant party prepared seizure list in presence of the witnesses. This witness identified the accused-appellant on doc. PW-2, Md. Bhauddin, A.S.I. of Madok Drabya Niyantran Adhidaptar and informant of the case gave similar type of statement as PW-1 in respect of all material particulars. PW-3, Osman Kabir, Investigating Officer stated in his deposition that he sent some seized cannabis for chemical examination and thereafter, obtained the chemical report. This witness also stated that he prepared sketch-map of the place of occurrence and index and proved the same as “Ext.-4” and his signature thereon as “Ext.-4/1”. This witness also stated that he examined the witnesses under section 161 of the

Code of Criminal Procedure and after completion of investigation having found prima-facie case against the accused-appellant and accordingly, he submitted charge sheet against the accused-appellant. PW-4, member of the raiding party, who also gave evidence in support of the prosecution case and made similar type of statement in support of the prosecution case. In cross examination the defence could not able to discover anything as to the credibility of this witness on the matter to which he testifies.

On a close analysis of the above quoted evidence, it appears that all the PWs are members of the Madok Drabya Niyantran Adhidaptar as well as members of the raiding party and they gave evidence in support of the prosecution case and corroborated each other in respect of all material particulars, the conviction is based on the evidence of the police witnesses, who were members of the raiding party. It further appears that in this case the prosecution having failed to examine any independent or neutral on seizure list witnesses.

Law and enforcing agencies witnesses are partisan and interested witnesses in the sense that they are concerned in the success of the raid and search and therefore, there evidence must be tested in the same way as the evidence of other interested witnesses and in that

view of the matter their evidence requires independent corroboration. But in this case the prosecution miserably failed to examine any independent local witnesses to prove the recovery of cannabis from the possession and control of the accused-appellant.

On perusal of the seizure list, it appears that 2 independent witnesses, who put their signature in the seizure list although the prosecution could not produce them before the trial Court, which creates serious doubt as to truthfulness of the prosecution case.

In the instant case all the PWs are the members of Madok Drabya Niyantran Adhidaptar and those witnesses are interested witnesses without having any corroboration from any independent or neutral witnesses, which cannot be usually treated as conclusive. In the absence of such corroboration, the accused becomes entitled to the benefit of doubt.

In the case of A Wahab alias Abdul Wahab Vs. State reported in 60 DLR 34 it has been held that-

> "Allegedly on receipt of information through secret source PW1 and some other staff of his department raided and searched the shop of the accused at the bazar at 8-00 PM. Thus the search was prearranged and pre-planned one. But it was not made in presence of two respectable persons of the

> locality, even not in presence of the neighbouring shop-keepers. One of the seizure list witnesses was not examined without any explanation. Another one, PW2, did not support search, recovery and seizure in his presence. Thus it is evident that search was not made in accordance with section 103 of the Code of Criminal Procedure though there was ample scope of making search complying with the mandatory provision of that section. It is held in the cases of Moklesur Rahman and another vs State, 1994 BLD 126, Habibur Rahman vs State, 47 DLR 323 = 1995 BLD 129, Julfikar Ali @ Kazal vs State, 1995 BLD 570 = 47 DLR 603, Jewel vs State, 5 MLR 170 = 5 BLC 501 that search for and seizure of incriminating articles without strictly complying with requirement of section 103 of the Code of Criminal Procedure cannot be held legal."

The proposition of law is by now well settled that the search and seizure of incriminating articles must be held strictly in complying with the requirement of section 103 of the Code of Criminal Procedure otherwise search and seizure cannot be held legal. This principle of law is applicable in the instant case as no local or private seizure list witness was produced before the Court to support the alleged recovery and seizure. I have already noticed that in this case no independent witnesses specially no one of the alleged place of occurrence has been examined by the prosecution without reasonable explanation which raises a presumption

under Section 114(g) of the Evidence Act against the prosecution to the effect that had they been examined, they would not support the prosecution case.

From the position of law as afore noted, it can be said that the entire prosecution case should be disbelieved by applying a straight jacket formula of non-examination of a material witnesses and drawing of adverse inference under Section 114 (g) of the Evidence Act.

As discussed above, there are so many doubts about the existence of the facts as well as circumstance. In that light, it creates a doubt in the case of the prosecution about the accused appellant being involved in the alleged crime. It is trite law that if any benefit of doubt arises, then the benefit should be given to accused. In that light, the trial Court ought to have acquitted the accused by giving the benefit of doubt. In that light, the judgment of the trial Court is to be interfered with.

In the result, the appeal is allowed and the impugned order of conviction and sentence dated 09.05.2018 by the learned Additional Sessions Judge, 2nd Court, Chattogram in Sessions Case No. 501 of 2005 arising out of G.R No. 11 of 2005 corresponding to Chattogram Railway Police Station Case No. 2 dated

06.05.2005 against accused appellant, Md. Harun is set aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Harun is discharged from his bail bonds.

Send down the lower Court records at once.