Present
Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 2656 of 2017

Alamgir Hossain

.....Convict-Appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Jalal Uddin, Advocate

.....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 04.03.2024, 12.03.2024, 14.03.2024, 18.03.2024 and Judgment on 20.03.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Alamgir Hossain is directed against the judgment and order of conviction and sentence dated 22.02.2017 passed by the learned Additional Sessions Judge, 4th Court, Cumilla in Sessions Trial Case No. 145 of 2012 arising out of G.R No. 917 of 2011 corresponding to Kotwali Model police Station Case No. 64 dated 18.11.2011 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 7(seven) years and to pay a fine of Taka 10,000/- (ten thousand) in default to suffer rigorous imprisonment for a period of 04 (four) months more.

The prosecution case, in brief, is that one, Md. Shamsujjaman, S.I, Kotwali police station as informant on 18.11.2011 at about 22.45 hours lodged an Ejahar with Kotwali model Police Station against the accused-appellant stating, inter-alia, that while the informant and a contingent of police forces were on special duty under Kotwali model police station got a secret information and accordingly at 21:40 hours they rushed to village Chapapur adjacent to Mitali brick field and then they saw one person is running with some bags, who sensing the presence of police tried to escape while police apprehended him and asked him about the goods kept inside the bag and thereafter, the accused in presence of witnesses namely, Dudu Mia and Md. Hossain brought out cannabis/ganja from those bags totalling 20+15+15 = 50 Kgs and thereafter, the informant party seized those Ganza by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Kotwali Model Police Station Case No. 64 dated

18.11.2011 under table 7(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990 was started against the accused-appellant.

Police after completion of investigation submitted charge sheet against the accused-appellant, vide charge sheet No. 870 dated 17.12.2011 under table 7(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990.

Thereafter, in usual course the case record was sent to the Court of learned Sessions Judge, Cumilla, wherein it was registered as Sessions Trial Case No. 145 of 2012. Ultimately, the case was transmitted to the Court of the learned Additional Sessions Judge, 4th Court, Cumilla for disposal before whom 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 6 (six) 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, 4th Court, Cumilla by the impugned judgment and order dated 22.02.2017 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 7(seven) years and to pay a fine of Taka 10,000/- (ten thousand) in default to suffer rigorous imprisonment for 04(four) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 22.02.2017, the convict-appellant preferred this criminal appeal.

Mr. Md. Jalal Uddin, the learned Advocate appearing on behalf of the convict-appellant in the course of argument takes me through the F.I.R, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order and then submits that the convict-appellant is out and out innocent, who has been falsely implicated in this case. He next submits that as per F.I.R. version police at first

saw the accused appellant was running with 3 bags of 50 Kgs cannabis, which is totally impossible for a human being to run with 50 Kgs cannabis (গাঁজা) keeping the same in 3 bags. He further submits that in this case in all 6 witnesses were examined but the witnesses in their respective testimony inconsistently deposed before the trial Court as to recovery of cannabis (গাঁজা) from the possession of the accused-appellant. The learned Advocate further relying on the decisions reported in 14 BLD 477 and 15 BLD 129 submits that as per F.I.R. version cannabis (গাঁজা) were seized in-front of 2 public witnesses namely, Dudu Mia and Md. Hossain although the prosecution side could not produce Md. Hossain before the Court and non-examination of such important witnesses particularly some of the neighbour creates serious doubt as to truthfulness of the prosecution case as per provisions of section 114(g) of the Evidence Act to the effect that if those witnesses would have been examined, then probably the ocular version of the eyewitnesses would have stood falsified. He adds in this case Dudu Mia was examined as PW-5 although he stated nothing as to recovery of cannabis from the possession of the accused-appellant and therefore, in the facts and circumstances of the case it can safely be said that the prosecution could not prove this case beyond

reasonable doubt. Finally, the learned Advocate submits that 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.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, appearing for the State supports the impugned judgment and order of conviction and sentence dated 22.02.2017, which was according to her just, correct and proper. She submits that in this case police witnesses namely, PW-1, PW-2, PW-3 and PW-6 categorically stated that cannabis (গাঁজা) was recovered from the possession of the accused-appellant and PW-5, seizure list witness also disclosed the manner of recovery and it is on record that the trial Judge on due considering all these 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 7(seven) years and to pay a fine of Taka 10,000/- (ten thousand) in default to suffer rigorous imprisonment for 4(four) months more and as such, the appeal is liable to be dismissed.

Having heard the learned Advocate and 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 the prosecution side to prove the case against the accused appellant examined in all 6 (six) witnesses out of which PW-1, A.S.I. Abdur Rahman stated in his deposition that on the basis of a secret information the informant party rushed to the place of occurrence under the team leader S.I. Zaman and then sensing the presence of police the accused-person tried to run away but police team under the leadership of S.I. Zaman apprehended the accused-appellant and thereafter, on a query the accused-appellant admitted that he kept cannabis in bags and thereafter, in presence of police he brought cannabis from those bags weighing 20+15+15 = 50 Kg and thereafter the informant party prepared seizure list in presence of the witnesses. PW-2, Inspector Md. Samsuzzaman, informant of the case stated in his deposition stated that on the basis of a secret information the informant and other police forces rushed to Mitali

bricks adjacent to highway road under Kotwali model police station and found one man was running with some bags and then police team apprehended him and on a query he disclosed that his name is Alamgir Hossain and thereafter police open those bags and recovered total 50 Kgs cannabis and prepared seizure list in presence of local witnesses. This witness proved the seizure list as "Ext-1" and his signature thereon as "Ext.-1/1", Ejahar as "Ext.-2" and signature thereon as "Ext.-2/1" and also proved 500 grams cannabis as "material Ext.-I" and identified the accused-appellant on doc. This witness in his cross-examination stated that- "আমরা ৪০/৫০ হাত দৌড়াইয়া আসামীকে ধৃত করি। আসামী চটের তিনটি বস্তা নিয়া দাড়াইয়াছিল। এগুলি পাটের তৈরী। অদ্য আদালতে নাই।" PW-3, S.I, Goutom Chandra Dey corroborated the evidence of PW-2 in respect of all material particulars, PW-4 was tendered, PW-5, seizure list witness stated in his deposition that- "১৮.১১.১১ ইং তারিখের ঘটনা। ঐ দিন আসামী বাখরাবাদ হইতে ধরিয়া আনে এবং বারপাড়ার জবা ব্রীক ফিল্ডের সামনে আসামীর কাছে মাল পায়। আমি একটি বস্তা দেখিয়াছি। তাহার কথায় আমি একটি কাগজে স্বাক্ষর দিয়াছি। এই সেই জব্দ তালিকা, প্রদর্শিত ক ক্রমিকে আমার স্বাক্ষর আছে। প্রদঃ ১/২।" PW-6, Police Inspector, who investigated the case. This witness 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.-3,” and his signature thereon as “Ext.-3/1”. 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.

On a close analysis of the above quoted evidence, it appears that all the PWs except PW-5 are police personnel and they gave evidence in support of the prosecution case and corroborated each other in respect of material particulars stating that they saw the accused-appellant was running with bags of cannabis (গাঁজা) weighing 50 Kgs and police seized those cannabis (গাঁজা) by preparing seizure list in presence of 2 witnesses namely, Dudu Mia and Md. Hossain. It further appears that F.I.R named witness Dudu Mia was examined as PW-5 who stated that accused-appellant was apprehended from Bakhrabad and goods were recovered from brick field. This witness also stated he put his signature as per request of police on a paper. Police witnesses in their respective evidence categorically stated that the accused-appellant was apprehended with 50 Kgs cannabis (গাঁজা). It further appears that F.I.R.

named witness namely, Md. Hossain was not examined in this case without any explanation which raises a presumption under section 114(g) of the Evidence Act against the prosecution to the effect that had he been examined, he would not support the prosecution case and benefit of doubt must go in favour of the accused-appellant.

In the case of Habibur Rahman lias Jane Alam Vs. State reported in 15 BLD 129 it has been held that-

> "From a plain reading of sub-section (1) of section 103 of the Code of Criminal Procedure it is abundantly clear that the search by the police must be conducted in presence of at least two respectable inhabitants of the locality and the things which are to be seized in connection with any case are to be seized during the course of such search conducted in presence of at least two respectable local inhabitants. The requirements of sub-section (2) of section 103 read with sub-section (1) of section 103 are that the entire search from the beginning to the end must be conducted in presence of two respectable local inhabitants and the requirements are not fulfilled if the search and the seizure have taken place either preceding the arrival of the local inhabitants or takes place after their departure from the place of search. The provision relating to search and seizure provided in sub-section (1) and sub-section (2) of section 103 of the Code of Criminal Procedure are mandatory

> and any search and seizure without strictly complying with the aforesaid provisions must be deemed to be illegal and, as such, must be left out of consideration in a criminal trial".

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 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. Moreover, as per F.I.R. version police at first saw the accused appellant was running with 3 bags of 50 Kgs cannabis, which is totally impossible for a human being to run with 50 Kgs cannabis (গাঁজা) keeping the same in 3 bags.

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 22.02.2017 by the learned Additional Sessions Judge, 4th Court, Cumilla in Sessions Trial Case No. 145 of 2012 arising out of G.R No. 917 of 2011 corresponding to Kotwali Police Station Case No. 64 dated 18.11.2011 against accused appellant, Alamgir Hossain is set aside and he is acquitted of the charge levelled against him.

Accused appellant, Alamgir Hossain is discharged from his bail bonds.

Send down the lower Court records at once.