Present
Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 2680 of 2017

Md. Ohiduzzaman

........Convict-appellant.

-Versus-

The State

.....Respondent.

Mr. Abdul Kader Bhuiyan, Advocate

.....For the 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 05.02.2024, 12.02.2024, 18.02.2024 and Judgment on 22.02.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Ohiduzzaman is directed against the judgment and order of conviction and sentence dated 14.02.2017 passed by the learned Additional Metropolitan Sessions Judge, 4th Court, Chattogram in Sessions Case No. 4292 of 2016 arising out of G.R No. 185 of 2016 corresponding to Kornafuly Police Station Case No. 26 dated 22.07.2016 convicting the accused-appellant under table 9(Kha) of section 19(1) of the

Madak Drobbya Niyontron Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer simple imprisonment for a period 03 (three) months more.

The prosecution case, in brief, is that one, Md. Abdul Boshor, Sub-Inspector of Police, Kornafuly Police Station, Chattogram as informant on 22.07.2016 at about 00:15 hours lodged an Ejahar with Kornafuly Police Station against the accused appellant under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 (as amended in 2004) stating, inter-alia, that the informant along with a contingent of police force during their special duty at Moizartek police check post under Kornafuly police station found that one man was walking away quickly while police challenged him and ultimately, on search recovered total 500 yaba tablets from the right pocket of his wearing pant kept in white polythine bag covered with black scotch tape, which valued at Tk. 1,00,000/= and thereafter, the informant party seized those yaba tablets by preparing seizure list in presence of local witnesses.

Upon the aforesaid First Information Report, Kornafuly Police Station Case No. 26 dated 22.07.2016 under table 9(Kha) of section 19(1) of the Madak

Drobbya Niyontron Ain, 1990 (as amended in 2004) was started.

During investigation of the case police visited the place of occurrence, prepared sketch-map, obtained chemical examination report, recorded statements of the witnesses under section 161 Cr.P.C. and having found prima-facie case against the accused appellant and accordingly submitted charge sheet being charge sheet No. 193 dated 11.08.2016 under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 (as amended in 2004) against the accused-appellant.

In usual course the case record was sent to the Court of learned Metropolitan Sessions Judge, Chattogram, wherein it was registered as Sessions Case No. 4292 of 2016. Ultimately, the case was transmitted to the Court of the learned Additional Metropolitan Sessions Judge, 4th Court, Chattogram for disposal, wherein the accused-appellant was put on trial to answer a charge under table 9(Kha) to section 19(1) of the Madak Drobbya Niyontron Ain, 1990 to which the accused-appellant pleaded not guilty and claimed to be tried stating that he has been falsely implicated in this case.

At the trial the prosecution side has examined in all 08(eight) witnesses to prove its case, while the defence examined none.

The defence case, 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 appeared to be that the accused-appellant was innocent and he has been falsely implicated in the case.

On conclusion of trial, the learned Additional Metropolitan Sessions Judge, 4th Court, Chattogram by the impugned judgment and order dated 14.02.2017 found the accused-appellant guilty for the offence under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Tk. 5,000/- (five thousand) in default to suffer simple imprisonment for 03(three) months more.

Feeling aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 14.02.2017, the accused-appellant preferred this criminal appeal.

Mr. Abdul Kader Bhuiyan, the learned Advocate appearing for 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 of conviction and sentence dated 14.02.2017 and then submits that the accused-appellant is innocent, who has made scapegoat in this case, in-fact, no incriminating yaba tablets were recovered from the direct possession and control of the accused-appellant. He next submits that in this case the sole seizure list witness namely, PW-7 stated nothing as to recovery of yaba tablets from the possession and control of the convict-appellant and rest witnesses, namely PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-8 all are police witnesses, who inconsistently deposed before the trial Court as to recovery of yaba tablets from the possession of the convict-appellant although the trial Court below without considering all these material aspects of the case mechanically passed the impugned judgment and order of conviction and sentence dated 14.02.2017 against the appellant, which is liable to be set-aside.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, on the other hand, supports the impugned judgment and order of conviction and

sentence, which was according to her just, correct and proper. She submits that in this case the prosecution side examined in all 8 witnesses and all of them categorically testified that 500 yaba tablets were recovered from the possession and control of the convict-appellant and in such view of the matter the learned Additional Metropolitan Sessions Judge, 3rd Court, Chattogram justly found that the accused-appellant guilty under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer simple imprisonment for 03(three) months more.

Having heard the learned Advocate and the learned Deputy Attorney General, perused the memo of appeal, the First Information Report, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence dated 14.02.2017. Now, the only question that calls for my consideration in this appeal is whether the trial Court committed any error in finding the accused-appellant guilty of the offence under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990.

On scrutiny of the record, it appears that the prosecution to prove its case examined in all 8 (eight) witnesses out of which PW-1, informant, S.I. Abul Bashar stated in his deposition that on 21.07.2016 while the informant along with a contingent of police forces were on special duty at Moizartek police check post under Kornafuly police station found that the accused-appellant was walking away quickly and then police challenged him and on search, recovered total 500 yaba tablets from the right pocket of his wearing pant kept in white polythine bag covered with black scotch tape. The defence cross-examined P. W 1 but failed to find out any contradiction in the evidence of P. W 1 and other witnesses namely, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-8 in their respective evidence corroborated the evidence of PW-1 in respect of all material particulars. It further appears that sole seizure list witnesses namely, PW-7 in his deposition stated that police seized total 500 yaba tablets, who proved his signature in the seizure list as “Ext.-1/2”.

On going through the evidence of PWs, it appears that the prosecution witnesses namely PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-8 proved the prosecution case as to the time, place and manner of occurrence and thus the prosecution proved the guilt of the accused

petitioner beyond reasonable doubt. In the facts and circumstances of the case and the evidence on record, I find no reason to disbelieve the evidence of police witnesses.

On perusal of impugned judgment, I find no flaw in the reasonings of the trial court or any ground to assail the impugned Judgment. The learned Judge of the trial Court appears to have considered all the material aspects of the case and justly passed the judgment and order of conviction and sentence dated 14.02.2017, I find no reason to interfere therewith.

However, at the end of the day, Mr. Abdul Kader Bhuiyan, the learned Advocate for the convict appellant after placing the decisions reported in 19 MLR 104 and III ADC (AD) 343 refers table 9(Ka) and 9(kha) of section 19 of the Madak Drobbya Niyontron Ain, 1990 and thereafter, submits that in order to maintain impugned conviction and sentence under table 9(Ka) of section 19 of the Madak Drobbya Niyontron Ain, 1990 it is essential for the prosecution to prove possession of more than 5 grams of methamphetamine but in the light of the decision reported 19 MLR 104 a single tablet contains only 5.1 mg methamphetamine and in this way seized 500 yaba tablets of this case which contains below than 5 grams methamphetamine and so,

according to the learned Advocate, the prosecution has failed to prove recovery of more than 5 grams of methamphetamine from the possession of the accused appellant and in such view, the impugned order of conviction and sentence under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 cannot stand in the eye of law.

I have studied both the decisions reported in 19 MLR 104 and III ADC (AD) 343 together with table 9(Ka) and 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 to the best of my ability and find a slight variation or mistake in the measurement of quantum of narcotics that would be fatal in order to determine the sentence of the accused and thus determination of quantum of narcotics is very much essential inasmuch as the different quantum of the Narcotics, the law prescribes different punishment.

In this case the informant without any scientific measurement mere on presumption stated in the FIR weight of the narcotics 50 grams which is not correct inasmuch as in the cited decision, it has been held that according to chemical analysis a single tablet contains only 5.1 mg methamphetamine, near about 1000 pieces of yaba tablet will contain 5 grams of methamphetamine and will therefore, come under Table 9(Ka) of section

19(1) of the Madak Drobbya Niyontron Ain, 1990 and in that view of the matter seized 500 yaba tablets of this case contains below 5 grams amphetamine and the same will constitute an offence under Table 9(Ka) of section 19(1) of the Narcotics Control Act, 1990 and as such, in this case the trial court below committed wrong in holding that the accused-appellant guilty under Table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 instead of under Table 9(Ka) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 wherein the minimum sentence is 6 months and maximum sentence is 3 years.

Finally, the learned Advocate further submits that the accused-appellant has already suffered the agony of protracted trial, spanning over a period of seven years. Appellant was 30 years of age at the time of occurrence and further that he has already undergone sentence for a period of more than 6 months (pre and post trial) and therefore in these circumstances appellant's sentence may be reduced to the period already undergone otherwise the appellant's future career will be ruined.

Learned Deputy Attorney General has, of course, been able to defend this case on merits but practically has nothing to say insofar as reduction of sentence imposed upon the appellant is concerned.

Now, let me see the relevant provisions of law in this regard. In this connection table 9(Ka) and 9(Kha) of section 19 of the Madak Drobbya Niyontron Ain, 1990 reads as follows:

৯	ফেনসাইক্লিআইন, মেথাকোয়াল, এল,এস,ডি, বারবিরেটস, এ্যামফিটামিন অথবা এইগুলির যে কোনটি দ্বারা প্রস্তুত মাদকদ্রব্য	(ক) মাদক দ্রব্যের পরিমাণ অনুর্ধ্ব ৫ গ্রাম হইলে অন্যুন ৬ মাস এবং অনুর্ধ্ব ৩ বৎসর কারাদন্ড।
		(খ) মাদক দ্রব্যের পরিমাণ ৫ গ্রামের উর্ধ্বে হইলে অন্যুন ৫ বৎসর এবং অনুর্ধ্ব ১৫ বৎসর কারাদন্ড।

From the above, it appears that sentence of table 9(Ka) of section 19 of the Madak Drobbya Niyontron Ain, 1990 is minimum 6 months and maximum sentence is 3 years.

Now, let me see the cited decision reported in 19 MLR 104 for having a better view of the dispute in question, wherein it has been held as follows:

> "In order to determine the sentence of the accused, determination of quantum of narcotics is very much essential. For the different quantum of the Narcotics, the law prescribes different punishment. To sustain a charge under the table as prescribed by section 19(1) of the Narcotics Control Act, the

> correct ascertainment of the quantum of the Narcotics is an essential factor. Under Table 9, if the quantum of the narcotics in question (here methamphetamine) is found to be upto 5 grams the sentence will range from 6 months to 3 years but in case of even a smaller fraction above 5 grams, the sentence will range from 5 years to 15 years. Since a slight variation or mistake in the measurement may lead to greater punishment, it is necessary that the actual and real quantity of the Narcotics in question be ascertained accurately and the law interpreted carefully and strictly. Any reasonable doubt on this score must go to the benefit of the accused.
> According to the chemical analysis report, as quoted above since a single tablet contains only 5.1 mg methamphetamine, near about 1000 pieces of Yaba Tablet will contain 5 grams of methamphetamine and will therefore, and come under Table 9 (Ka) of section 19(1) of the Narcotics Control Act. More than 1000 pieces of Yaba Tablet containing above 5 grams of methamphetamine will constitute an offence under Table 9(Kha) of section 19(1) of the said Act. In any sense, before awarding conviction anti sentence of any accused for possessing Yaba it is very essential to get an actual measurement of the quantum of methamphetamine that was seized or recovered from the office of the Department of Narcotics Control Laboratory".

From the above quoted decision, it appears that according to chemical analysis report a single tablet contains only 5.1 mg methamphetamine/ Narcotics. In that view of the matter in this case police has allegedly been seized 500 yaba tablets which contained below 5 grams of methamphetamine/ Narcotics and the same falls under table 9(Ka) of section 19 of the Madak Drobbya Niyontron Ain, 1990 in which highest sentence

is 3 years and minimum sentence is 6 months as stated above. Besides, it is also found that in this case no witnesses including chemical examiner stated anything as to the exact weight of methamphetamine /Narcotics.

In the case of Md. Ashraful Islam Vs The State III ADC (AD) 343, it has been held as follows:

> "it is essential for the prosecution to prove possession of more than 25 grams of heroin. But, according to him, in the instant case there is no evidence of possession of more than 25 grams of heroin from the petitioner. Referring to the report of the chemical Examination No. 1671/1758 dated 12.09.1991 submitted by Assistant Chemical Examiner he submits that it appears from the said report that only 500 milligram of heroine was received by the Examiner for the examination which has allegedly been found to be heroine and so, according to the learned Advocate, the prosecution has failed to prove recovery of more than 25 grams of heroin from the possession of the petitioner and in such view, the impugned conviction and sentence cannot stand in the eye of law.
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> The submissions merit consideration.
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> Leave is, therefore, granted to consider the ground that the trial Court and the High court Division failed to consider that unless the quantity of hereon in question is ascertained by a report by chemical examiner the conviction under section 19(1) of Table 1(kha) of Narcotics Control Act, 1990 is not sustainable in law and as such it is liable to be set aside".

Considering all these aspects of the case vis-a-vis principles laid down in the cited decisions reported in 19 MLR 104 and III ADC (AD) 343, I think, the ends of justice will be met in the facts and circumstances of the case, if the sentence of fine is maintained and the substantive sentence is reduced to the period already undergone, as prayed for.

In the result, therefore, the appeal is disposed of with modification of sentence. While maintaining the conviction of the accused-appellant, his sentence is reduced to the period already undergone by him. The sentence of fine is, however, maintained. The accused appellant may be discharged from his bail bond on payment of fine amounting to Taka 5,000/- (five thousand) in accordance with law.

Send down the lower Court records at once.