

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 3481 of 2017

Md. Jony Sheikh

.....Convict-Appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Mahabubur Rahman, 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 08.07.2024, 10.07.2024 and
Judgment on 14.07.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Jony Sheikh is directed against the judgment and order of conviction and sentence dated 28.02.2017 passed by the learned Additional Sessions Judge, 1st Court, Faridpur in Sessions Case No. 363 of 2012 arising out of G.R No. 525 of 2011 corresponding to Kotwali Police Station Case No. 07 dated 07.12.2011

convicting the accused-appellant under table 3(ka) to section 19(1) of the Madok Drabya Niyantaran Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for a period of 2(two) years and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for a further period of 02 (two) months.

The prosecution case, in brief, is that one Md. Zakiruzzaman, Sub Inspector, Madok Drabya Niyantaran Adhidaptar, Faridpur as informant on 07.12.2011 at about 19.13 hours lodged an Ejahar with Kotwali Police Station, Faripur against the accused appellant and 2 others stating, inter-alia, that on 07.12.2011 while the informant along with other forces of Madok Drabya Niyantaran Adhidaptar and RAB was on special duty under Kotwali Police Station got a secret information as to drugs dealing and thereafter at 12 noon they rushed near to the Guhlaksmipur Basti when sensing the presence of law and enforcing agencies accused Nos. 2&3 somehow managed to escape leaving their phensidyls kept in synthetic bags and a mobile phone. Thereafter, the informant party seized those synthetic bags and recovered 15+12= 27 bottles of phensidyl kept inside those bags and also apprehended accused No.1, Jony Sheikh (appellant) and recovered 8 bottles of

phensidyl syrup from him kept in his hand bag. In this way the informant party recovered 35 bottles of phensidyl syrup and thereafter, the informant party seized those phensidyls by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Kotwali Police Station Case No. 07 dated 07.12.2011 under table 3(kha) of section 19(1)/25 of the Madok Drabya Niyantaran Ain, 1990 was started against the accused-appellant and 2 others.

Thereafter, as per direction of the higher authority, the informant Md. Zakiruzzaman, Sub Inspector, Madok Drabya Niyantaran Adhidaptar himself investigated the case, who during investigation visited the place of occurrence, prepared sketch-map and index, examined the witnesses under section 161 of the Code of Criminal Procedure and obtained chemical examination report and after completion of investigation submitted charge sheet against the accused-appellant and 2 others, vide charge sheet No. 24 dated 31.01.2012 under table 3(kha) of section 19(1)/25 of the Madok Drabya Niyantaran Ain, 1990.

Thereafter, the case record was sent to the court of learned Sessions Judge, Faridpur, wherein it was

registered as Sessions Case No. 363 of 2012 which was subsequently transmitted to the Court of the learned Additional Sessions Judge, 1st Court, Faridpur for disposal in which the accused appellant and others were put on trial to answer a charge under table 3(kha) of section 19(1)/25 of the Madok Drabya Niyantaran Ain, 1990 to which the accused appellant and others pleaded not guilty and prayed to be tried stating that they have been falsely implicated in this case.

At the trial, the prosecution side examined as many as 06 (six) 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 and others under section 342 of the Code of Criminal Procedure appeared to be that the accused-appellant and other accused were innocent and they have been falsely implicated in the case.

On conclusion of trial, the learned Additional Sessions Judge, 1st Court, Faridpur by the impugned judgment and order dated 28.02.2017 convicted the accused-appellant under table 3(ka) to section 19(1) of the Madok Drabya Niyantaran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 2(two) years and to pay a fine of Taka 2,000/-

(two thousand) in default to suffer simple imprisonment for 02(two) months more while acquitted 2 other accused from the charge levelled against them.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 28.02.2017, the convict-appellant preferred this criminal appeal.

Mr. Md. Mahabubur Rahman, the learned Advocate appearing on behalf of the convict-appellant in the course of his 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 and then submits that the convict-appellant is innocent, who has been made scapegoat in this case, in-fact, the seized phensidyls were not recovered from him. The learned Advocate further submits that in this case 2 seizure list witnesses namely, PW-4 and PW-5 in their evidence stated nothing as to recovery of phensidyls from the possession and control of the accused appellant, which creates a serious doubt as to involvement of the appellant with the alleged crime although the trial Court without applying its judicial mind into the facts and circumstances of the case from a correct angle mechanically came to conclusion that the accused-appellant guilty under table 3(ka) of

section 19(1) of the Madok Drabya Niyantaran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 2(two) years and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 02(two) months more.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, appearing for the State supports the impugned judgment and order of conviction and sentence, which was according to her just, correct and proper.

Having heard the learned Advocate and the learned Deputy Attorney General and having gone through the materials on record including impugned judgment and order of conviction and sentence, 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 Section under table 3(ka) to section 19(1) of the Madok Drabya Niyantaran Ain, 1990.

On perusal of the record, it appears that in this case to prove the charge against the accused appellant as to recovery of phensidyls, the prosecution examined in all 6 witnesses out of whom PW-1, Md. Akbar Ali, Madok Drabya Niyantaran Adhidaptar, Sadar Circle stated in his

deposition that on 07.12.2011 at 12:00 noon under the leadership of Inspector Zakiruzzaman they rushed to the place of occurrence and apprehended accused No.1 and recovered 8 bottles of phensidyl from synthetic bag kept in his right hand while recovered 15 and 12 bottles of phensidyls from the synthetic bags of accused No.2. Md. Monwar Hossain Mona and accused No.3 Md. Shakil Sheikh. This witness also stated that the informant party seized those phensidyls by preparing seizure list in presence of the witnesses and also single out 3 bottles of phensidyl from 3 bags for chemical examination. This witness in his cross-examination stated that- “আমি মালামাল নিজে উদ্ধার করি নাই। আমি সাথে ছিলাম। আমি জব্দ তালিকায় কোন স্বাক্ষর দেই নাই। আমি জব্দকৃত ফেনিসিডিল নিজে গননা করি নাই।” PW-2, Inspector Zakiruzzaman, informant as well as Investigating officer of the case stated in his evidence that on 07.12.2011 at 12:00 noon the informant party on the basis of a secret information apprehended accused No. 1, Jony Skhikh, while 2 other accused somehow managed to escape leaving their phensidyls kept in their bags and on search recovered 8 bottles of phensidyl from him kept in a synthetic bag and also recovered 15 and 12 bottles of phensidyl of the accused Nos. 2 and 3 kept in bags and thereafter, the informant party seized those phensidyl by preparing seizure list in presence of

the witnesses and also single out 3 bottles of phensidyl from 3 bags for chemical examination. This witness proved the F.I.R and his signature thereon as “Ext.-1 and 1/1, seizure list and his signature thereon as “Ext.-2 and 2/1” also proved the seized phensidyls as “material Ext.-I series” and Mobile set as “material Ext.-II series”. This witness in his cross-examination stated that- “ঘটনাস্থল গুলশানীপুর বস্তি সংলগ্ন। দুপুর ১২:০০ টার সময় সেখানে পৌঁছাই। দুপুর ১২:১৫ ঘটিকার সময় জব্দ তালিকা প্রস্তুত করি।” This witness in his cross-examination also stated that- “জব্দ তালিকা ঘটনাস্থলে করি। ড্রাইভারের সহি নেই, সুপারভাইজার ও হেলপারের সহি নেই নাই।” PW-3, Md. Yunus Ali, Sipahi, Madok Drabya Niantran Adhidaptar deposed in support of the prosecution case. PW-4, Md. Abul Kalam Azad stated nothing against the accused-appellant. This witness in his cross-examination also stated that- “আমি পানের দোকানদার করি। পুলিশ বললে সহি স্বাক্ষর করি ব্যবসা করার জন্য। এর বাহিরে কিছু জানি না।” PW-5, M.A. Mannan, seizure list witness, who was declared hostile by the prosecution.

PW-6, Zakiruzzaman, Inspector, Madak Drabya Niantran Adhidaptar, informant as well as Investigating Officer of the case, who stated in his evidence that during investigation he examined the witnesses under section 161 of the Code of Criminal Procedure, sent 3 bottles of seized phensidyl for chemical examination

report and accordingly obtained chemical examination report and after completion of investigation found prima-facie case against the accused persons and accordingly submitted charge sheet against the accused-appellant and 2 others, vide charge sheet No. 24 dated 31.01.2012 under table 3(kha) of section 19(1)/25 of the Madok Drabya Niyantran Ain, 1990. This witness proved the sketch-map, index and his signature thereon as “Ext.-3 and 3/1, chemical examination report as “Ext.-4” and also proved material exhibits.

On scrutiny of the above quoted evidence, it appears that prosecution witnesses namely, PW-1, PW-2, PW-3 and PW-6 are members of law and enforcing agencies, who in their respective evidence stated that only accused appellant was apprehended from the place of occurrence and 2 others somehow managed to escape from the place of occurrence. It further appears that independent seizure list witness PW-4 stated nothing against the accused-appellant and another seizure list witness namely PW-5 was declared hostile by the prosecution. It further appears that the learned trial Judge acquitted 2 other accused persons namely, Md. Monwar Hossain Mona and Skhakil Sheikh, who somehow managed to escape leaving their phensidylys kept in bags. In a case of this nature since the local witnesses namely,

PW-4 and PW-5 stated nothing as to recovery of phensidyls from the possession and control of the accused-appellant, it is difficult to hold that alleged seized phensidyls were actually recovered from the actual control and possession of the accused-appellant.

In view of the attending facts and circumstances of the case and the evidence on record, I am constrained to hold that the prosecution has failed to prove the charge against accused appellant beyond any reasonable doubts. The learned trial Judge failed to properly to evaluate the evidence on record as adduced before the trial court thereby reaching a wrong decision, which occasioned a miscarriage of justice. In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove charge under section under table 3(kha) of section 19(1)/25 of the Madok Drabya Niyantaran Ain, 1990 against accused Md. Jony Sheikh beyond reasonable doubts. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned order of conviction and sentence passed by the learned Additional Sessions Judge, 1st Court, Faridpur in Sessions Case No. 363 of 2012 arising out of G.R No. 525 of 2011 corresponding to Kotwali Police Station Case No. 7 dated 07.12.2011 against accused appellant,

Md. Jony Sheikh is set aside and he is acquitted of the charge levelled against him.

Accused appellant Md. Jony Sheikh is discharged from his bail bonds.

Send down the lower Court records at once.