**Present**
**Mr. Justice Sheikh Abdul Awal**

**Criminal Appeal No. 4307 of 2018**

Most. Nadia Akter Rimi

.....Convict-Appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Zobaidur 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 22.02.2024, 29.02.2024, 05.03.2024 and**

**Judgment on 06.03.2024**

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Most. Nadia Akter Rimi is directed against the judgment and order of conviction and sentence dated 17.04.2018 passed by the learned Sessions Judge, Jhenaidah in Sessions Case No. 82 of 2016 arising out of G.R No. 492 of 2014 corresponding to Jhenaidah Police Station Case No. 28 dated 20.10.2014 convicting the accused-appellant under table 3(ka) to 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 simple imprisonment for a period of 03 (three) months more.

The prosecution case, in brief, is that one, Md. Mosharof Hossain, Inspector of Madak Drabbya Niyontron Adhidaptar, Jhenaidah as informant on 20.10.2014 at about 20.35 hours lodged an Ejahar with Jhenaidah Police Station against the accused-appellant stating, inter-alia, that on 20.10.2014 at 17:00-17:30 hours under the leadership of Executive Magistrate the informant along with other members of law and enforcing agencies on the basis of a secret information went to the house of Most. Mahmuda Akter of Mazmader para under Jhenaidah police station and on search, recovered 32 bottles of phensidyl from the bedroom of convict-appellant kept in a plastic shopping bag under the bed and thereafter, the informant party seized those phensidyls by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Jhenaidah Police Station Case No. 28 dated 20.10.2014 under table 3(kha) of section 19(1) and 19(4) of the

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

The Informant, Md. Mosharof Hossain, Inspector, Madok Drabya Niyantran Adhidaptar himself as per order of higher authority after completion of investigation submitted charge sheet against the accused-appellant, vide charge sheet No. 460 dated 25.11.2014 under table 3(kha) of section 19(1) and 19(4) of the Madok Drabya Niyantran Ain, 1990.

In usual course, the case record was sent to the Court of learned Sessions Judge, Jhenaidah, wherein it was registered as Sessions Case No. 82 of 2016 in which the accused appellant was put on trial to answer a charge under table 3(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 she has 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, 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 she has been falsely implicated in the case.

On conclusion of trial, the learned Sessions Judge, Jhenaidah by the impugned judgment and order dated 17.04.2018 found the accused-appellant guilty under table 3(ka) to section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced her 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 simple imprisonment for 03(three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 17.04.2018, the convict-appellant preferred this criminal appeal.

Mr. Md. Zobaidur Rahman, 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 17.04.2018 and then submits that at the time of occurrence the accused-appellant was a college student, who was made scapegoat in this case, in-fact, no incriminating

phensidyls were recovered from the direct possession and control of the accused-appellant. He next submits that the informant on the basis of a secret information rushed to the place of occurrence without complying the provision of section 103 of the Code of Criminal Procedure despite of fact that the informant party has/had enough time to bring 2 respectable local witnesses from near about the place of occurrence but the informant party did not do so resulting provision of section 103 of the Code of Criminal Procedure has not been complied at all which creates doubt on the prosecution case. The learned Advocate further submits that admittedly the accused-appellant is not owner of the house in question (place of occurrence) and at the time of occurrence she was aged about 18 years although the prosecution miserably failed to produce any witnesses of the rented house and it is on record that in this case no independent witnesses were examined to prove the search and recovery of phensidyl syrups but the trial Court below without considering all these aspects of the case most illegally passed the impugned judgment and order of conviction and sentence against the appellant, which is liable to be set-aside. The learned Advocate to fortify his submission has relied on the decision reported in 60 DLR 34.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, appearing for the State supports the impugned judgment and order of conviction and sentence dated 17.04.2018, which was according to her just, correct and proper. She submits that the proposition of law is by now well settled that Court can act only relying on the evidence of police witnesses and in this case as PWs. as members of law and enforcing agencies categorically stated that seized phensidyl syrups were recovered from under the bed of the accused-appellant and after chemical examination the chemical examiner found those seized phensidyl syrups contained ingredients of codeine. Finally, 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 these aspects of the case by the impugned judgment and order justly found the accused-appellant guilty under table 3(ka) of section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced her 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 simple imprisonment for 3(three) months more and as such, the appeal is liable to be dismissed.

Having heard the learned counsels for the parties 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-appellant guilty of the offence under table 3(ka) to section 19(1) of the Madok Drabya Niyantran Ain, 1990.

On perusal of the record, it appears that PW-1 Md. Mosharof Hossain, Inspector, Madok Drabya Niyantran Adhidaptar lodged the FIR. This witness in his deposition stated that on 20.10.2014 at 17:00-17:30 hours on the basis of a secret information under the leadership of Executive Magistrate he along with 5 police forces went to the house of Most. Mahmuda Akter of Maspara @ Beparipara under Jhenaidah police station and thereafter, encircled the bedroom of the accused-appellant and on search, recovered 32 bottles of phensidyl from the bedroom of the convict-appellant kept in a plastic shopping bag under the bed and thereafter, the informant party seized those phensidyls by

preparing seizure list in presence of the witnesses. This witness proved the FIR as "Ext.-1" and his signature thereon as "Ext.-1/1" and also proved the seizure list as "Ext.-2" and his signature thereon as "Ext.- 2/1". This witness in his cross-examination denied the suggestion in the following language that- "সত্য নয় যে ঘটনার দিন আসামীর ঘড় থেকে কোন ফেনসিডিল উদ্ধার হয়নি এবং অন্য কোথাও থেকে ফেনসিডিল উদ্ধার করে আসামীকে এই মামলায় জড়িয়েছি। জব্দ তালিকার নির্বাহী ম্যাজিস্ট্রেটকে সাক্ষী করিনি।" PW-2, Komol Krishna Biswas, member of the raiding party stated in his cross-examination that- "আসামীর বাড়ীর মালিক বাড়ীতে ছিলনা। তার স্ত্রী সন্তানেরা বাড়ীতে ছিল কিনা বলতে পারবো না। আসামীর বাড়ীর মালিক ঐ বাড়ীতে বসবাস করে। আমরা গাড়ী নিয়ে যাই। রাস্তার পার্শ্বে পি,ও বাড়ীর পশ্চিমে গাড়ী রাখি।" PW-3 Md. Mahbub Alam, also member of the raiding party. This witness stated in his deposition that total 32 bottles of phensidyl syrup were recovered. This witness identified the accused-appellant on doc. This witness in his cross-examination stated that- "আমি অফিস সহায়ক। আমি নির্বাহী ম্যাজিস্ট্রেটের সাথে বেপাড়ী পাড়ায় যাই। তবে কার বাড়ীতে যাই বলতে পারবো না। কোন জায়গা থেকে ফেন্সিডিল উদ্ধার করা হয় দেখিনি।" PW-4, Md. Abdul Aziz Khan, also member of the raiding party, who was tendered by the prosecution. PW-5, Md. Ruhul Quddus as seizure list witness stated in his deposition that 32 bottles of phensidyl were recovered from the bed room of the accused-appellant,

who put his signature on the seizure list. PW-6, as informant and investigating officer of the case stated in his evidence that during investigation he visited the place of occurrence, prepared sketch-map and obtained chemical examination report and after completion of investigation having found prima-facie case and accordingly, he submitted charge sheet against the accused-appellant. This witness in his cross-examination stated that- "আসামী কেসি কলেজের ছাত্রী এবং তার সাথে তার মাও পি,ও বাড়ীতে বাস করতো।"

On a close analysis of the above quoted evidence together with the F.I.R. and charge sheet, it appears that on receipt of a secret information the informant and other police forces went to the place of occurrence and on search recovered total 32 bottles of phensidyl from under the bed of the accused-appellant. It further appears that PW-1, PW-2, PW-3, PW-4 and PW-5 are members of the raiding party. The conviction is based on the evidence of the police witnesses, who were members of the raiding party.

Police 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 phensidyls from the bedroom of the accused-appellant although it is on record that the informant party rushed to the place of occurrence on the basis of a secret information despite of such fact the informant party did not bring any local witnesses with them in complying the mandatory provisions of section 103 of the Code of Criminal Procedure.

In the instant case PW-1, PW-2 and PW-4 are the members of Madok Drabya Niyantran Adhidaptar and PW-3 and PW-5 are the staffs of the Deputy Commissioner and accordingly those witnesses are interested witnesses without 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 inasmuch as no local and private witnesses supported 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 limps and 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 by the learned Sessions Judge, Jhenaidah in Sessions Case No. 82 of 2016 arising out of G.R No. 492 of 2014 corresponding to Jhenaidah Police Station Case No. 28

dated 20.10.2014 against accused appellant, Most. Nadia Akter Rimi is set aside and he is acquitted of the charge levelled against him.

Accused appellant, Most. Nadia Akter Rimi is discharged from his bail bonds.

Send down the lower Court records at once.