

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 4838 of 2018

Most. Roksana

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. M. Bulbul Abu Saiyed, 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 28.05.2024 and
Judgment on 30.05.2024.

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Most. Roksana is directed against the impugned judgment and order of conviction and sentence dated 15.04.2018 passed by the learned Special Sessions Judge, Special Sessions Court No.3, Dhaka in Special Sessions Case No. 158 of 2013 arising out of G.R. No. 242 of 2013 corresponding to Hajaribag Police Station Case No. 22 dated 22.08.2013 convicting the accused-appellant under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 and sentencing her 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 rigorous imprisonment for 6 (six) months more.

The prosecution case, in brief, is that one, Md. Liakat Ali, DAD, JCO-6858, CPC-2, RAB-2, Shia Mosjid Camp, Mohammadpur, Dhaka as informant on 22.08.2013 at about 1:30 hours lodged an Ejahar with Hajaribag Police Station, DMP, Dhaka against the accused appellant stating, inter-alia, that on 21.8.2013 while the informant along with other forces were on petrol duty at Tenary Mor under Hajaribag Police Station area and then at 20:30 hours got a secret information as to drug deals in the 1st floor of Ismail Miah's House being No. 26/6, Moneshwar Road, 1st. Lane, Hajaribag, Dhaka and thereafter, as per instruction of the higher authority the informant party rushed there and apprehended the accused appellant and on search through lady member of RAB named Mst. Bobita Akter recovered total 100 pieces yaba tablet from the right side under the sallower of accused, which valued at Tk. 30,000/- and thereafter, informant party seized those Yaba tablets by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Hajaribag Police Station Case No. 22 dated 22.08.2013 under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 was started against the accused .

Police after completion of usual investigation submitted charge sheet against the accused appellant, vide

charge sheet No. 206 dated 21.09.2013 under table 9(Kha) to section 19(1) of the Madok Drabya Neyontran Ain, 1990.

Ultimately, the accused Most. Rokhana was put on trial before the learned Special Sessions Judge, Special Sessions Court No.3, Dhaka to answer a charge under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 to which the accused appellant pleaded not guilty and claimed to be tried stating that she has been falsely implicated in the case.

At the trial, the prosecution examined in all 11 (eleven) 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 under section 342 of the Code of Criminal Procedure that the accused-appellant is innocent, who has been falsely implicated in the case and the defence declined to adduce any witness.

On conclusion of trial, the learned Special Sessions Judge, Special Sessions Court No.3, Dhaka by the impugned judgment and order dated 15.04.2018 found the accused appellant guilty under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 and sentenced her 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 rigorous imprisonment for 6 (six) months more.

Aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 15.04.2018, the accused-appellant preferred this criminal appeal.

Mr. M. Bulbul Abu Saiyed, the learned Advocate appearing for the convict-appellant submits that accused appellant is an innocent house wife, who has been made scapegoat in this case, in fact, no incriminating yaba tablets were recovered from her exclusive possession. The learned Advocate adds that in this case total 11(eleven) witnesses were examined out of which neutral seizure list witnesses namely, PW-9 and PW-10 were declared hostile by the prosecution and police witnesses namely PW-2, PW-4, PW-7, PW-8 were tendered and rest police witnesses namely PW-1, PW-3, PW-5, PW-6, PW-11 inconsistently deposed before the trial Court as to recovery of yeaba tables and in such facts and circumstances of the case the trial Court below ought to have given benefit of doubt to the accused appellant although the learned trial Judge without properly evaluate the evidence on record from a correct angle mechanically held the accused appellant guilty of the offence under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 and thus, the impugned judgment and order of conviction and sentence dated 15.04.2018 is liable to be set-aside. The learned Advocate in

support of his submission has relied on the decisions reported in 7BLC 226 and 5BLC 703.

Ms. Kohenoor Akter, the learned Assistant 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 as per FIR the appellant was apprehended on 21.08.2013 and on search through a lady Rab Member namely Mst. Babita Akter recovered 100 pieces of yaba tablet from her body and all the police witnesses namely PW-1, PW-3, PW-5, PW-6, PW-11 categorically testified that 100 yaba tablets were recovered from her exclusive possession and control and thus, the trial Court committed no wrong in holding the accused appellant guilty of the offence under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of Appeal, F.I.R, Charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order, the only question that calls for 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 Madok Drabya Neyontran Ain, 1990.

On scrutiny of the record, it appears that one, Md. Liakat Ali, DAD, JCO-6858, CPC-2, RAB-2, Shia Mosjid Camp, Mohammadpur, Dhaka as informant on 22.08.2013 at about 1:30 hours lodged an Ejahar with Hajaribag Police Station against the accused appellant on the allegation that the appellant possessed 100 pieces of yaba tablet, which valued at Tk.30000/- and police after completion of investigation submitted charge sheet against the accused appellant under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990. It further appears that the prosecution to prove its case examined in all 11 witnesses out of which PW-1, Md. Liakat Ali, JCO-6858, CPC-2, RAB-2 as informant of the case stated in his deposition that on 21.08.2013 while the informant along with his forces were on special duty got a secret information and according to that information informant party went to the house of Ismail Miah being No. 26/6, 1st floor, Moneshwar, 1st. Lane, Hajaribag and found the accused appellant and on search recovered total 100 yaba tablets from the right side under her selower. This witness also stated that police prepared seizure list in presence of witnesses. This witness in his cross-examination stated that he does not say how many persons were present in that house. This witness also stated that Ismail Miah was the owner of that house and 3 /4 persons came there, he denied the suggestion stating in the following language “সত্য নহে যে, আসামীর শত্রু পক্ষের দ্বারা প্রভাবিত হয়ে মিথ্যা মামলায় আসামীকে সম্পৃক্ত করে মিথ্যা সাক্ষ্য দিলাম।” PW-2, Md.

Masum Billah, Corporal, Rab-2, was tendered. This witness in his cross-examination stated that “আমি আলামত উদ্ধারে কাজ করি নাই।” PW-3, Md. Delwar Hossen, S.I. Rab-2 gave similar type of evidence as like PW-1 in respect of all material particulars. PW-4, Md. Abdur Rahman, A.S.I was tendered, PW-5, Sarwar Jahan, member of the Rab, who supported the prosecution case in respect of all material particulars. PW-6, Bobita Akter, Sepai, who also gave evidence in support of the prosecution and made similar statements like PW- 1. PW-7, Rehani Akter, Sepai was tendered. PW-8, Sohel Rana, Constable was tendered. PW.9, Md. Ismail, who stated in his deposition that “গত ২১.৮.২০১৩ইং তারিখ রাত আনুমানিক ৯.৪৫ ঘটিকায় কয়েকজন র্যাব সদস্য আমার বাসায় যেয়ে বাসার দোতলায় আসামী রোকসানার ঘরে যায়। রোকসানার ঘরে যেয়ে চেক করে তবে আমার সামনে কিছু পায় নাই। পরে র্যাব সদস্যরা একটি কাগজে স্বাক্ষর নেয়। প্রদর্শনী-২ দেখে বলেন এতে আমার স্বাক্ষর আছে প্রদর্শনী-২/২।” This witness was declared hostile by the prosecution. PW-10, Most. Mukta, who stated in her deposition that-“ ২১.০৮.২০১৩ইং তারিখে রাত ৯.৪৫ ঘটিকায় আমি আমার মায়ের বাড়ী থেকে এসে দেখি আমাদের বাসায় র্যাবের লোকজন এবং তারা আসামী রোকসানাকে তার বাসা অর্থাৎ আমাদের বাড়ীর দোতলা থেকে নিয়ে আসে। আমিও ২৬/৬ নং বাসায় ভাড়া থাকি। র্যাব বলে যে, রোকসানাকে নিয়ে যাচ্ছে তাই আমাকে স্বাক্ষর দিতে হবে - তখন আমি একটি কাগজে স্বাক্ষর দিয়েছি। জব্দ তালিকা প্রদর্শনী-২ দেখে বলেন এতে আমার স্বাক্ষর আছে প্রদর্শনী-২/৩।” This witness was declared hostile by the prosecution. PW-11, Md. Jahirul Islam, S.I. (in-charge) Kakrail Police Fari, Ramna, DMP,

Dhaka, who investigated the case and submitted charge sheet against the accused appellant. This witness stated in his evidence that during investigation he visited the place of occurrence, obtained chemical examination report and examined the witnesses under section 161 of the Code of the Criminal Procedure and having found prima-facie case against the accused appellant and therefore, submitted charge sheet against the accused appellant under table 9(Kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990.

From the above quoted evidence, it appears that as per F.I.R together with the evidence of members of the raiding party the accused Most. Rokhana was apprehended in the house of Ismail Miah and police on search recovered total 100 yaba tablets from her body through lady RAB member namely Mst. Bobita Akter although PW-9, Md. Ismail and PW-10 Mukta as inhabitants of the house were declared hostile by the prosecution inasmuch as both of them (PW-9 and PW-10) did not support the prosecution case in any manner. In this case allegedly on receipt of information through secret source PW I and some other police personnel raided and searched the house of PW.9, Md. Ismail. 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

people. Both the seizure list witnesses were declared hostile as they did not support search, recovery and seizure in their 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. Law is by now well settled that search and seizure of incriminating articles without strictly complying with requirement of section 103 of the Code of Criminal Procedure cannot be held legal. No local and private witnesses supported the alleged recovery and seizure. The conviction is based on the evidence of police witnesses only, who were the members of the seizing party and one of them is the informant. It is held in the case of *Serajul Islam vs State*, 48 DLR 301, that police witnesses are partisan and interested witnesses in the sense that they are concerned in the success of the raid and search and therefore, their evidence must be tested in the same way as the evidence of the other interested witnesses. In the case of *Habibur Rahman vs State*, 47 DLR 323 =1995 BLD 129, it is held that police personnel conducting the search and seizure are interested witnesses and their evidence requires independent corroboration. Same view was taken in the case of *Gaziur Rahman vs State* 1991 BLD

11, it is held that conviction cannot be based on the uncorroborated testimony of the informant, who is a police officer and virtually interested in the result of the case. In the case of *Aslam Jahangir vs State*, 2000 BLD 426 = 5 BLC 514, it is held that the evidence of the private witnesses regarding denial of their presence at the scene of recovery in no way can be cured by the police witnesses, who are interested in the result of the case. It is held in the case of *Tabbur Rahman vs State*, 49 DLR 167, that in order to convict an accused solely on the basis of solitary witnesses who made the search and seizure, the Judge must ensure that the witnesses are disinterested and their evidence is unimpeachable and unshaken. This principle of law is applicable in the instant case.

As discussed above, there are so many limps and gaps as well as 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 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 view of the matter, the

judgment of the trial Court is to be interfered with. Consequently the appeal succeeds.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 15.04.2018 passed by the learned Special Sessions Judge, Special Sessions Court No.3, Dhaka in Special Sessions Case No. 158 of 2013 arising out of G.R. No. 242 of 2013 corresponding to Hajaribag Police Station Case No. 22 dated 22.08.2013 against the accused-appellant is set-aside and the accused appellant Most. Roksana is acquitted of the charge levelled against her.

Convict appellant Most. Roksana is discharged from her bail bond.

Send down the lower Court records at once.