Present
Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 4749 of 2018

Md. Babul Sheikh alias Zakir Hossain

.....Convict-Appellant.

-Versus-

The State.

.....Respondent.

Mr. S.M. Mahbubul Islam, 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 21.01.2024, 01.02.2024 and Judgment on 06.02.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Babul Sheikh alias Zakir Hossain is directed against the judgment and order of conviction and sentence dated 30.04.2018 passed by the learned Additional Sessions Judge, 3rd Court, Khulna in Sessions Case No. 135 of 2012 arising out of G.R No. 194 of 2011 corresponding to Rupsha Police Station Case No. 1 dated 01.12.2011 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 5(five) years and to pay a fine of Taka 20,000/- (twenty thousand) in default to suffer simple imprisonment for a period of 06 (six) months more.

The prosecution case, in brief, is that one Md. Kayum Khan, DAD (Inspector of Armed Police), RAB-6, Khulna as informant on 01.12.2011 at about 00.15 hours lodged an Ejahar with Rupsha Police Station against the accused appellant stating, inter-alia, that on 30.11.2011 at about 21:25 hours while the informant along with other members of RAB were on special duty they at around 21:35 hours stopped a public bus on the highway namely Banalata Paribahan being Reg. No. Khulna Metro. Ba-11-0025 and thereafter, started checking in the bus and got 2 bags in bunker on seat No. B-3 which was appellant Md. Babul Sheikh's seat and police recovered 101 bottles of phensidyl syrup kept inside those 2 bags and thereafter, on interrogation the appellant, Md. Babul Sheikh admitted that as owner of the those phensidyl syrups he kept it bunker on seat No. B-3 and thereafter, the informant party seized those phensidyls and ticket of the passenger, Md. Babul Sheikh (appellant) by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Rupsha Police Station Case No. 01 dated 01.12.2011 under table

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

One, Abdul Khaleque, Sub Inspector of police investigated the case, who during investigation 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, vide charge sheet No. 151 dated 21.12.2011 under table 3(kha) of section 19(1) of the Madok Drabya Niyantran Ain, 1990.

Thereafter, the case record was sent to the court of learned Sessions Judge, Khulna, wherein it was registered as Sessions Case No. 135 of 2012. Ultimately, the case was transmitted to the Court of the learned Additional Sessions Judge, 3rd Court, Khulna for disposal in which the accused appellant was put on trial to answer a charge under table 3(kha) of section 19(1) and 19(4), 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 as many as 05(five) witnesses out of 14 charge sheeted witnesses to prove its case, while the defence examined none.

On conclusion of trial, the learned Additional Sessions Judge, 3rd Court, Khulna by the impugned judgment and order dated 30.04.2018 convicted the accused-appellant

under table 3(ka) to section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 20,000/- (twenty 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 30.04.2018, the convict-appellant preferred this criminal appeal.

Mr. S.M. Mahbubul Islam, 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 and sentence and then submits that admitted premises of the allegation there is nothing on record to show that any contraband phensidyl syrups were recovered from the direct possession and control of the convict-appellant. He adds that the convict-appellant as passenger of a public bus has been made scapegoat in this case, in-fact, he did not carry or possess any contraband medicines or phensidyl syrups. The learned Advocate further submits that admittedly 101 bottles of phensidyl syrup were recovered from the bunker of a public bus which kept in 2 plastic bags and in this case only 5 witnesses were examined out of 14 charge sheeted witnesses out of which PW-3 was declared hostile by the prosecution and driver, helper or any passengers of the bus

were not examined in this case and witnesses namely PW-1, PW-2, PW-4 and PW-5 as members of raiding party inconsistently deposed before the trial Court as to recovery of phensidyl from the bunker of a public bus although the trial Court without applying its judicial mind into the fact 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 Niyantran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 20,000/- (twenty thousand) in default to suffer simple imprisonment for 06(six) months more. Finally, the learned Advocate submits that in this case since the prosecution failed to examine the driver and helpers of the bus and other neutral witnesses to prove its case and only seizure list witness PW-3 was declared hostile which 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.

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. She submits that the proposition of law is by now well settled in number of cases that Court is empowered to pass an order of conviction

only relying on the evidence of police witnesses and in this case witnesses namely PW-1, PW-2, PW-4 and PW-5 as members of law and enforcing agencies categorically stated that 101 bottles of phensidyl syrup were recovered from the bunker which relating to seat 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 sort of enmity for false implication of the accused the evidence of the police personnels 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 that considering all these aspects of the case the trial court justly relying on the evidence of police personnels found the accused-appellant guilty under table 3(ka) of section 19(1) of the Madok Drabya Niyantran Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 20,000/- (twenty thousand) in default to suffer simple imprisonment for 6(six) months more and thus, the appeal is liable to be dismissed. The learned Deputy Attorney-General to fortify her submissions has relied on the decisions reported in 9 MLR 429, 6 MLR 200 and 6 BLC 705.

Having heard the learned counsel 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 Section under table 3(ka) to section 19(1) of the Madok Drabya Niyantran Ain, 1990.

On perusal of the record, it appears that the informant along with other members of law and enforcing agencies during checking a public bus namely, Banalata Paribahan being Reg. No. Khulna Metro. Ba-11-0025 found 2 bags in a bunker on seat No. B-3 where accused-appellant sitting as passenger and on search police recovered 101 bottles of phensidyl syrup kept in those 2 bags and thereafter, on interrogation the accused-appellant admitted that he as owner kept those phensidyl syrups in presence of driver and passengers of the bus and thereafter, the informant party seized those phensidyls and ticket of the accused appellant by preparing seizure list in presence of the witnesses. It further appears that in this case to prove the case against the accused appellant, the prosecution examined in all 5 witnesses out of 14 charge sheeted witnesses in which PW-3, seizure list witness was declared hostile by the prosecution as he did not support the prosecution case in any manner whatsoever and rest witnesses in their respective evidence testified that the phensidyls were recovered from the bunker of a public bus on seat of the accused-appellant. PW-1, informant of the case stated in his cross-examination that- "বাংকার নির্দিষ্ট করা ছিল না। বি-৩ এর সামনে কি বলিতে পারি না বা

পিছনে কত বলিতে পারি না। কয়টি সিট নিয়া বক্স বলিতি পারি না। একটি সিটের জন্য একটি বক্স না।" This witness in his cross-examination also stated that- "জব্দ তালিকা ঘটনাস্থলে করি। ড্রাইভারের সই নেই, সুপারভাইজার ও হেলপারের সই নেই নাই।"

PW-2, S.I. Md. Abdul Kahleque Hawlader, Investigated the case, who after completion of investigation submitted charge sheet against the accused-appellant. This witness stated in his evidence that during investigation he examined the witnesses under section 161 of the Code of Criminal Procedure and also sent 2 bottles of phensidyl syrup as sample for chemical examination and accordingly obtained chemical examination report. This witness in his cross-examination stated in the following language- "সত্য নয় যে, গাড়ী পরিদর্শন করিনি বা ড্রাইভারকে জিজ্ঞাসা করি নাই বা সঠিকভাবে সীট, বাঙ্কার অংকন করিনি বা আসামীর শত্র"পক্ষের দ্বারা প্রভাবিত হয়ে ঠিক তদন্ড় করি নাই।" PW-4, member of the raiding party, who corroborated the evidence of PW-1 in respect of all material particulars. This witness in his cross-examination stated that- "B-3... সিট নম্বর। B C double seat এর একটা সিট। তার পাশের সীটেও যাত্রী ছিল। গাড়ীতে প্রথম DAD কাইয়ুম সাহেব প্রবেশ করেন। তার পেছনে আমিও ছিলাম আসামীর ব্যাগে আসামীর নাম ঠিকানা ছিল না।" PW-5 also member of the raiding party. This witness in his evidence corroborated the evidence of PW-1 in respect of all material particulars.

On scrutiny of the above quoted evidence together with the F.I.R. and charge sheet, it appears to me that admittedly 101 bottles of phensidyls were recovered from a

bunker of a public bus and convict-appellant was a passenger of seat No. B-3 and there was another passenger of another seat being No. B-2 and there is nothing on record to suggest that the appellant kept those phensidyls inside the bunker and recovered the same from his exclusive possession. Therefore, in view of the attending facts and circumstances of the case and the evidence on record, it is difficult to believe that alleged seized phensidyls were actually recovered from the control and possession of the accused-appellant.

Besides, I have already noticed that in this case specially some of the independent witnesses including the driver and helper of the bus have not been examined by the prosecution which calls of a adverse inference against the prosecution under Section 114(g) of the Evidence Act, for non-examination of the material witnesses, as according to Mr. S.M. Mahbubul Islam, if those witnesses would have been examined, then probably the ocular version of the eyewitnesses would have stood falsified. It is thus difficult to believe that the alleged seized goods were actually recovered from the possession and control of the 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 coming to a wrong decision.

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 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.

The decisions cited by the learned Deputy Attorney General are distinguishable on facts. Consequently, the appeal succeeds.

In the result, the appeal is allowed and the impugned order of conviction and sentence by the learned Additional Sessions Judge, 3rd Court, Khulna in Sessions Case No. 135 of 2012 arising out of G.R No. 194 of 2011 corresponding to Rupsha Police Station Case No. 1 dated 01.12.2011 against accused appellant, Md. Babul Sheikh is set aside and he is acquitted of the charge levelled against him.

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

Send down the lower Court records at once.