

**Present**  
**Mr. Justice Sheikh Abdul Awal**  
**Criminal Appeal No. 4779 of 2018**

Md. Ashadul Islam Gazi

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Abu Hasnat Md. Mofizur 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 21.01.2024 and 04.02.2024 and**  
**Judgment on 06.02.2024.**

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Ashadul Islam Gazi is directed against the impugned judgment and order of conviction and sentence dated 12.04.2018 passed by the learned Sessions Judge, Jhenaidah in Sessions Case No. 669 of 2015 arising out of G.R. No. 197 of 2013 corresponding to Moheshpur Police Station Case No. 02 dated 02.09.2013 convicting the accused-appellant under table 3(ka) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 and sentencing 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 imprisonment for 3 (three) months more.

The prosecution case, in brief, is that one, Md. Syed Ali, B.P. No. 7796034053 Sub-Inspector of police, Moheshpur Police Station, Jhenaidah as informant on 02.09.2013 at about 19:30 hours lodged an Ejahar with Moheshpur Police Station, Jhenaidah against the accused appellant stating, inter-alia, that while the informant along with other police forces were on special duty as per General Diary No. 58 dated 02.09.2013 got a secret information on 02.09.2013 at 16:35 hours as to phensedyl business in the house of absconding accused appellant, Md. Ashadul Islam Gazi and then police team rushed to the house of accused Md. Ashadul Islam Gazi at village: Pach Baria under Moheshpur Police Station and recovered total 52 bottles of Indian phensedyl syrup under the khat of the said house kept in a polythin bag and thereafter, informant party seized those phensedyl syrups by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Moheshpur Police Station Case No. 02 dated 02.09.2013 under table 3(kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 was started against the accused appellant.

Thereafter one Solaiman, Sub Inspector of police investigated the case, who during investigation visited the

place of occurrence and examined the witnesses under Section 161 of the Code of Criminal Procedure and after completion of usual investigation submitted charge sheet against the accused appellant (absconding), vide charge sheet No. 176 dated 09.10.2013 under table 3(kha) of section 19(1) of the Madok Drabya Neyontran Ain, 1990.

Thereafter, the case record was sent to the Court of learned Sessions Judge, Jhenaidah, wherein the case was registered as Sessions Case No. 669 of 2015.

During trial of the case the accused appellant voluntarily surrendered before the trial Court on 06.09.2015 and thereafter, the accused appellant obtained bail.

At the trial, the prosecution has examined in all 04(four) witnesses to prove its case while the defence examined none.

On conclusion of trial the learned Sessions Judge, Jhenaidah by the impugned judgment and order dated 12.04.2018 found the accused appellant guilty under table 3(ka) of section 19(1) of the Madok Drabya Neyontran 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 imprisonment for a period of 3 (three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 12.04.2018 the accused-appellant preferred this criminal appeal.

Mr. Abu Hasnat Md. Mofizur Rahman, the learned Advocate appearing for the convict-appellant submits that admittedly the accused appellant was not apprehended from the place of occurrence and no incriminating phensydel syrup was recovered from his direct possession and control and it is on record that appellant on knowing about the fact of the case voluntarily surrendered before the trial Court on 06.9.2015 and thereafter obtained bail. The learned Advocate further submits that in this case no independent or neutral seizure list witness was examined and police witnesses namely PW-1, PW-2, PW-3, PW-4 inconsistently deposed before the trial Court as to recovery of Phensedyl from the house of the convict appellant although the learned Sessions Judge without considering all these aspects of the case from a correct angle mechanically held that accused appellant guilty for the offence under table 3(ka) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 and accordingly, 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 imprisonment for a period of 3 (three) months more. The learned Advocate further relying on the decision reported in 18 BLD 691 submits that to saddle an accused with the liability of possessing contraband goods the prosecution

must prove the exclusive possession or domain of the accused over the goods in question but in this case nothing was recovered from the direct possession of the accused appellant, who long 3 years after the occurrence voluntarily surrendered before the trial Court. The learned Advocate adds that in this case no independent seizure list witness was examined, which creates serious doubt as to truthfulness of the prosecution case although the trial Court below giving a go by to such facts and circumstance of the case mechanically passed the impugned judgment and order of conviction and sentence and as such, the same is liable to be set-aside.

Ms. Sabina perven, the learned Assistant Attorney General, on the other hand, supports the impugned judgment and order, which was according to her just, correct and proper. She submits that in this case all the members of the raiding party categorically testified that 52 bottles phensedyl syrup were recovered from the house of the convict appellant and investigating Officer obtained chemical examination report which shows that seized Phensedyl syrups contained ingredients of Codeine and it is on record that accused appellant on knowing about the presence of police somehow managed to escape from the place of occurrence and the trial Court below considering all these aspects of the case justly found the accused appellant guilty under table 3(ka) of section 19(1) of the Madok Drabya Neyontran Ain, 1990.

Having heard the learned counsel for the parties and having gone through the materials on record, the only question that falls 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) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 .

It appears that admittedly the accused appellant was not arrested from the place of occurrence, it is on record that in this case the informant party recovered total 52 bottles of Phensedyl syrup from the house of the accused appellant on 02.09.2013 and the convict appellant voluntarily surrendered on 06.09.2015 before the trial Court. PW-1, PW-2, PW-3, PW-4 all are members of the raiding party, who categorically testified that 52 bottles of Indian Syrup were recovered from the house of the accused appellant. It further appears that out of 7 charge sheeted witnesses prosecution examined only 4 witnesses and withheld other 3 witnesses specially some of the close neighbours which creates serious doubt as to genuineness of the prosecution case and in that view of the matter the trial Court ought to have drawn an adverse inference under Section 114(g) of the Evidence Act against the prosecution for non-examination of independent witnesses whose statements were recorded by the Investigating Officer during the course of the investigation. According to Mr. Abu Hasnat Md. Mofizur Rahman, for the convict-appellant, if those witnesses would have been examined by the prosecution,

then their evidence would have rendered the ocular version of the eyewitnesses highly doubtful.

In the present case, there is no evidence on record to suggest that the accused appellant was owner of the house in question or the house in question was being used for the purpose of the narcotic substance dealing in connivance with the accused appellant. Law is by now well settled that to saddle an accused with the liability of possessing contraband drugs, the prosecution must prove the exclusive possession of the accused over the goods in question and in this case there being nothing on record to show that the seized articles were from the exclusive possession of the accused appellant and in this case there being nothing on record to show that the seized articles were recovered from the exclusive possession of the accused appellant. In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove the charge of carrying and possessing Phensedyl syrups against accused appellant beyond reasonable doubts.

As discussed above, the accused appellant was not arrested from the palace of occurrence, nothing was recovered from his direct possession and control, no close neighbours having been examined in this case. 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 light, 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 12.04.2018 passed by the learned Sessions Judge, Jhenaidah in Sessions Case No. 669 of 2015 arising out of G.R. No. 197 of 2013 corresponding to Moheshpur Police Station Case No. 02 dated 02.09.2013 convicting the accused-appellant under table 3(ka) of section 19(1) of the Madok Drabya Neyontran Ain, 1990 is set-aside and the appellant Md. Ashadul Islam Gazi is acquitted of the charge levelled against him.

Convict appellant Md. Ashadul Islam Gazi is discharged from his bail bond.

Send down the lower Court records at once.