

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 4891 of 2018

Sree Biman Kumar Saha

.....Convict-appellant.

-Versus-

The State

.....Respondent.

Mr. Tonoy Kumar Saha, Advocate

.....For the 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 11.07.2024, 14.07.2024,
15.07.2024 and Judgment on 24.07.2024**

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Sree Biman Kumar Saha is directed against the judgment and order of conviction and sentence dated 20.03.2018 passed by the learned Additional Sessions Judge, 1st Court, Naogaon in Sessions Case No. 713 of 2015 arising out of G.R No. 61 of 2015 corresponding to Mohadevpur Police Station Case No. 20 dated 21.03.2015 convicting the accused-appellant under table

9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Taka 1,000/- (one thousand) in default to suffer rigorous imprisonment for a period 01 (one) month more.

The prosecution case, in brief, is that one, Md. Lalbur Rahman, Sub-Inspector, Mohadevpur Police Station, Naogaon as informant on 21.03.2015 at about 22:10 hours lodged an Ejahar with Mohadevpur Police Station against the accused appellant under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 stating, inter-alia, that according to G.D. entry No. 773 dated 21.03.2015 while the informant and other police forces were on duty as to anti drugs activities got a secret information as to selling yaba tablets in-front of a grocery shop at Gopinathpur village under Mohadevpur Police Station and thereafter, the informant party rushed there and at night 21:10 hours apprehended the accused-appellant and on search, recovered total 125 yaba tablets from his jeans pant pocket weighing 13.80 grams, which valued at Tk. 25,000/= (twenty five thousand) and thereafter, the informant party seized those yaba tablets by preparing seizure list in presence of local witnesses.

Upon the aforesaid First Information Report, Mohadevpur Police Station Case No. 20 dated 21.03.2015 under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 was started.

Police after completion of usual investigation submitted charge sheet against the accused-appellant being charge sheet No. 65 dated 12.04.2015 under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990.

Thereafter, in usual course the case record was sent to the Court of learned Sessions Judge, Naogaon, wherein it was registered as Sessions Case No. 713 of 2015 which was subsequently transmitted to the Court of learned Additional Sessions Judge, 1st Court, Naogaon for disposal. Ultimately, the accused-appellant was put on trial before the learned Additional Sessions Judge, Naogaon to answer a charge under table 9(Kha) to section 19(1) of the Madak Drobbya Niyontron Ain, 1990 to which the accused-appellant pleaded not guilty and claimed to be tried stating that he has been falsely implicated in this case.

At the trial the prosecution side has examined in all 09(nine) 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 under section 342 of the Code of Criminal Procedure appeared to be that the accused-appellant was innocent and he has been falsely implicated in the case. The defence declined to adduce any evidence.

On conclusion of trial, the learned Additional Sessions Judge, 1st Court, Naogaon by the impugned judgment and order dated 20.03.2018 found the accused-appellant guilty under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 5(five) years and to pay a fine of Tk. 1,000/- (one thousand) in default to suffer imprisonment for 01(one) month more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 20.03.2018, the accused-appellant preferred this criminal appeal.

Mr. Tonoy Kumar Saha, the learned Advocate appearing for 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 20.03.2018 and then submits that the convict-appellant is innocent, who has been made scapegoat in this case, in-fact, no occurrence took place at all. He adds that in this case the prosecution side examined in all 9 witnesses out of whom public witnesses namely, PW-1 and PW-3 were declared hostile by the prosecution and PW-4 & 5 were tendered, rest police witnesses namely, PW-2, PW-6, PW-7, PW-8 and PW-9 were inconsistently deposed before the trial Court as to recovery of yaba tablets from the possession and control of the accused-appellant although the trial Court below without appreciating the case from a correct angle mechanically passed the impugned judgment and order of conviction and sentence against the convict appellant, which is liable to be set-aside. Finally, the learned Advocate relying on the decision reported in 5 MLR 170, 45 DLR (AD) 13, 5 BLC 514 submits that in this case public witnesses namely PWs. 1,3,4,5 stated nothing as to recovery of yaba tablets from the possession of the accused appellant, no persons living around the place of occurrence was examined as possession witness to prove recovery and seizure of articles from the place of occurrence as required under section 103 of the Code of Criminal Procedure which

rendering the recovery of incriminating articles doubtful and the same cannot form the basis of conviction.

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 police witnesses namely, PW-2, PW-6, PW-7, PW-8 and PW-9 stated in one voice that the accused appellant was apprehended along with 125 yaba tablets and in this case the chemical examiner submitted a report (Ext.-4) stating that after thorough examination he found ingredients of methamphetamine/ drugs in the seized yaba tablets and thus, the learned Additional Sessions Judge, 1st Court, Naogaon justly found that the accused-appellant guilty under table 9(Kha) of section 19(1) of the Madak Drobbya Niyontron Ain, 1990.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of appeal, the First Information Report, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence dated 20.03.2018, the only question that calls for our 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 Madak Drobbya Niyontron Ain, 1990.

On scrutiny of the record, it appears that the prosecution to prove its case examined in all 9 (nine) witnesses out of whom public witnesses namely, PW-1 and PW-3 were declared hostile, PW-4 and PW-5 were tendered. PW-2, Md. Lablur Rahman, S.I., informant, stated in his deposition that on 21.03.2015 while he and other police forces were on special duty at 20:50 hours got a secret information that a man is selling yaba tablets in-front of a shop at Gopinathpur bazaar and thereafter, the informant party rushed there and at night 21:15 hours apprehended the accused and on search recovered total 125 yaba tablets from his jeans pant pocket. This witness also stated that police prepared seizure list in presence of the witnesses and obtained signature of the witnesses on the seizure list and the informant also put his signature on the seizure list. PW-6, PW-7 and PW-8 all are police witnesses, who stated in their respective evidence that the accused-appellant was arrested on 21.03.2015 and police seized 125 yaba tablets from him. PW-9, Md. Anisur Rahman, Sub Inspector investigated the case, who stated in his evidence that during investigation he examined the

witnesses under section 161 of the Code of Criminal Procedure, obtained chemical examination report and after completion of investigation having found prima-facie case against the accused (appellant) and submitted charge sheet under table 9(kha) of section 19(1)/25 of the Madok Drabya Niyantran Ain, 1990.

On an analysis of the evidence of PWs, it appears that in this case neutral public witnesses namely, PW-1, PW-3, PW-4, PW-5 stated nothing against the accused-appellant as to recovery of yaba tables from the possession of the accused-appellant. It further appears that PW-2, informant of the case deposed the F.I.R. case in details and rest police witnesses namely, PW-6, PW-7 and PW-8 stated the prosecution case as to recovery of yaba tablets against the accused-appellant in a very slipshod manner and PW-9, Investigating Officer submitted charge sheet against the accused-appellant.

In this case it appears that informant PW-2, Md. Lablur Rahman, S.I, on receipt of a secret infuriation rushed to the place of occurrence along with other police forces and thus the search was prearranged and preplanned one. But it was not made in presence of two respectable persons of the locality, even not in presence of the neighbouring persons. One of the seizure list witnesses namely, PW-1 and PW-3 were declared hostile

who 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. 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 1705 BLC 248 and Harun Bepari (Md) vs State 5 MLR 3955 BLC 501 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. This principle of law is applicable in the instant case.

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 view of the matter, 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 passed by the learned Additional Sessions Judge, 1st Court, Naogaon in Sessions Case No. 713 of 2015 arising out of G.R No. 61 of 2015 corresponding to Mohadevpur Police Station Case No. 20 dated 21.03.2015 against accused appellant, Sree Biman Kumar Saha is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Sree Biman Kumar Saha is discharged from his bail bonds.

Send down the lower Court records at once.