

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)**

Present:

Mr. Justice Md. Bashir Ullah

Criminal Appeal No. 12132 of 2019

In the matter of:

An Appeal under Section 410 of the Code of
Criminal Procedure.

And

In the matter of:

Md. Apel Mahmud

...Convict-Appellant

-Versus-

The State

...Respondent

Mr. Md. Wahiduzzaman Sohel, Advocate

...For the Appellant

Mr. Md. Shafiquil Islam, D.A.G with

Ms. Farhana Abedin, A.A.G with

Mr. Hedayth Uddin, A.A.G and

Mr. K. M. Saiful Islam, A.A.G

... For the State

**Heard on: 22.06.2026, 24.06.2026, 25.06.2026,
28.06.2026 and 29.06.2026**

Judgment on: 07.07.2026

This appeal, preferred under Section 410 of the Code of Criminal Procedure is directed against the judgment and order dated 30.09.2019, passed by the learned Sessions Judge, Pirojpur in Sessions Case No. 156 of 2013 arising out of Nesarabad Police

Station Case No. 12 dated 20.07.2013 corresponding to G.R. No. 83 of 2013 convicting the convict-appellant under Table 9(Kha) under Section 19(1) of the Madok Drabbyo Niyrantran Ain, 1990 and sentencing him to suffer rigorous imprisonment for 05 (five) years with a fine of Taka 5,000/-, in default to suffer simple imprisonment for 06(six) months.

The facts, relevant for disposal of the appeal, in short, are that on 20.07.2013 one Md. Delwar Hossain, Sub-Inspector of District Detective Branch, Pirojpur being the informant lodged a First Information Report (FIR) with Nesarabad Police Station, Pirojpur against the present convict-appellant and another under Table 9(Ka)(Kha) under Section 19(1) and 25 of the Madok Drabbyo Niyrantran Ain, 1990 alleging *inter alia*, that while the raiding party was conducting patrol duty at Miarhat Bazar under Nesarabad Police Station pursuant to G.D. Entry No. 175 dated 20.07.2013, they received a secret information regarding trading of narcotics on the 2nd floor of Ifti Boarding. Acting on this information, the raiding party proceeded to the location. Upon arrival, they apprehended accused Apel Mahmud and, upon search they recovered 100 pieces of Yaba from his trouser's pocket. Acting on information provided by the arrested accused Apel

Mahmud, the raiding party proceeded to Sutiakhali and arrested the co-accused, Milan Sikder from whose possession 4 pieces of Yaba were recovered. Thereafter, the informant prepared a seizure list in the presence of witnesses and lodged the FIR.

On closure of the investigation, the investigating officer submitted charge sheet No. 72 dated 10.09.2013 against the accused-persons under Table 9 (Ka) (Kha) under Section 19(1) of the Madok Drabbyo Nyantran Ain, 1990.

Subsequently, the case was transferred to the learned Sessions Judge, Pirojpur and was registered as Sessions Case No. 156 of 2013. The learned Sessions Judge, Pirojpur framed charges against the accused-persons under Table 9(Kha) under Section 19(1) of the Madok Drabbyo Nyantran Ain, 1990 on 26.11.2013 to which the accused pleaded not guilty and claimed to be tried.

In course of the trial, 9(nine) prosecution witnesses were examined while the defence examined none. The accused-persons were examined under Section 342 of the Code of Criminal Procedure and repeated their innocence.

Upon conclusion of trial and hearing the parties, the learned Sessions Judge, Pirojpur convicted the accused under Table 9(Kha) appended to Section 19(1) of the Madok Drabbyo

Niyantran Ain, 1990 and sentenced him to suffer rigorous imprisonment for 05 (five) years with a fine of Taka 5,000/- and acquitted co-accused Milan Sikder of the charge levelled against him.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, the convict preferred this instant Criminal Appeal before this Court. This Court enlarged the appellant on bail on 08.12.2019, which was subsequently extended from time to time and finally extended till disposal of the appeal on 22.08.2023.

Mr. Md. Wahiduzzaman Shohel, the learned Advocate appearing on behalf of the appellant contends that the seizure list witnesses, Md. Saiful Islam (PW 1) and Md. Shamim Hasan (PW 2) deposed that they did not witness the seizure of the incriminating articles from the convict-appellant. This patent contradiction casts a serious doubt on the prosecution's narrative entitling the appellant to an acquittal.

He further submits that the principle of parity has been violated as the co-accused Milan Sikder was acquitted on similar charges while the appellant has been erroneously convicted.

He next submits that there was a gross non-compliance with the mandatory provisions of Section 103 of the Code of Criminal Procedure regarding the conduct of the search and the preparation of the seizure list. The independent witnesses were not asked to witness the recovery and their signatures were procured without apprising them of the contents of the seizure list.

He contends that the informant stated in the FIR that the raiding party recovered 100 pieces of pink coloured Yaba tablets, whereas he as PW 3 stated in his evidence that they recovered white coloured Yaba tablets and the chemical examination report noted the colour of the recovered Yaba is reddish. The contradiction concerning the colour of the seized Yaba tablets creates a significant doubt and strikes at the core of the prosecution's case.

Mr. Sohel further submits that there is no previous criminal record against the appellant and he has already served more than 06(six) months of his sentence despite being falsely implicated.

In support of his contention, the learned Advocate referred to the cases of *Abu Bakar Siddique Vs. State*, reported in 7 BLC(2002)226, *A Wahab alias Abdul Wahab Vs. State*, reported

in 60 DLR(2008)34 and *Pancha alias Paigam Ali Vs. The State*, reported in 25 DLR(1974) 297.

He finally prays for allowing the appeal and for setting aside the judgment and order of conviction and sentence.

Per contra, Mr. Md. Shafiquil Islam, the learned Deputy Attorney General appearing on behalf of the State-respondent opposes the appeal supporting the impugned judgment and order of conviction and sentence.

He further contends that the chemical examination report conclusively establishes the presence of the ingredients of Yaba in the seized substances rendering the colour of the tablets immaterial.

He next submits that the prosecution successfully proved the time, date, place and manner of recovery of narcotics from the appellant and the testimonies of the prosecution witness, particularly the police officers are consistent and reliable.

Learned Deputy Attorney General submits that the testimony of a single witness, if credible, is sufficient to prove the charge and as such, there is no illegality in relying upon it. In support of his contention the learned Deputy Attorney General

referred to the cases of *Jharu and another Vs. State*, reported in 69(DLR)(AD) 362.

He next submits that the Court below rightly and legally convicted and sentenced the accused and there is no ground for interference with the impugned judgment and order. There is no illegality, infirmity or impropriety in the impugned judgment and order of the sentence and conviction and as such the instant appeal is liable to be dismissed.

I have considered the submissions of the learned Advocates for both sides, perused the impugned judgment and order passed by the trial Court and the materials on records.

For a proper adjudication of the matter and analysis of the facts on record, the prosecution's evidence is being reviewed as follows:

PW 1, Md. Saiful Islam, seizure list witness deposed that the Detective Branch of Police brought the accused before him after apprehending and informed that Yaba tablets had been recovered from his possession. Thereafter, the Police prepared a seizure list which was marked as Exhibit 1.

In his cross-examination, he stated that he had never previously seen Yaba tablets. He further stated that he did not

know from where and when the accused, Apel Mahmud had been apprehended. He had no knowledge of the contents of the seizure list. He had signed the seizure list merely at the instance of the Police.

PW 2, Md. Shamim Hasan, another seizure list witness deposed that on 20.07.2013, the DB Police brought accused Apel Mahmud before him and showed a packet containing tablets and he had just signed the seizure list.

He proved his signature on the seizure list which was marked as Exhibit 1/2.

In cross-examination, he candidly stated that he did not read the seizure list and did not see the seized tablets and he signed it simply at the behest of the Police.

PW 3, Md. Delowar Hossain, Sub-Inspector of Detective Branch and the informant of the case, deposed that while he and other members of the DB Police were performing their duties under Nesharabad Police Station, they received secret information that certain persons were dealing in narcotic substances at Ifti Boarding, Miarhat; then they proceeded to the place at 18.45 p.m. On seeing the Police, the accused Apel Mahmud attempted to flee but was apprehended. Upon searching him, 100 pieces of white

coloured Yaba tablet were recovered from his possession. Based on the information provided by the accused, Apel Mahmud they subsequently proceeded to Sutiakhati, where co-accused Milan Sikder was apprehended with four Yaba tablets from his possession.

He prepared the seizure list and after that lodged the First Information Report (FIR) which was marked as Exhibit 2.

He further deposed that one piece Yaba out of 100 was sent for chemical examination.

He identified the seized tablets as Material Exhibit II.

In cross-examination, he stated that he himself had not received the secret information. He denied the suggestion that the accused Apel Mahmud had been falsely implicated at the instigation of his enemies. He also denied the suggestion that no Yaba tablets have been recovered from Milan. He rather admitted that the President, Secretary or any UP member was not called upon to witness the act of preparation of the seizure list.

PW 4, Constable Manir Hossain, a member of the raiding party deposed that acting upon secret information, the police proceeded to Ifti Boarding where Apel Mahmud was apprehended. Upon searching, 100 pieces Yaba were recovered from the pocket

of his jeans trousers. Thereafter they proceeded to Sutiakhali and arrested Milan Sikder from whose possession 4 pieces of Yaba tablets were recovered.

He identified the jeans trousers as Material Exhibit III.

He also identified seized 3 pieces Yaba tablets out of 04 recovered from Milan Sikder as Material Exhibit II.

PW 5, Md. Mahiuddin, Constable deposed that acting upon secret information they proceeded to Ifti Hotel and arrested Apel Mahmud and recovered 100 pieces of Yaba tablets from his possession. Upon interrogation, the accused disclosed the involvement of Milan Sikder. Thereafter they proceeded to Sutaikathi, apprehended Milan Sikder and recovered 4 pieces Yaba tablets from his possession.

PW 6, Md. Shamsul Alam, Assistant Sub-Inspector of Police was tendered by the prosecution for cross-examination. In cross-examination, he deposed that he had been present at Ifti Hotel with S.I. Tajuddin.

PW 7, Md. Anower Hossain, Sub Inspector of Police and Investigating Officer deposed that he visited the place of occurrence during the course of investigation.

He proved chemical examination report as Exhibit 3 and 4.

In cross-examination, he deposed that he did not cite either the owner or the manager of Ifti Hotel as prosecution witnesses in the charge sheet.

PW 8, Md. Rasel, Constable of Police deposed that upon receiving secret information they proceeded to the place of occurrence, apprehended Apel Mahmud and recovered 100 pieces of Yaba tablets from his possession. Subsequently, they arrested accused Milan Sikder and recovered 4 pieces of Yaba from his possession.

PW 9, Md. Taj Uddin Manik, Sub-Inspector of Police, and one of the investigating officers stated that he visited the place of occurrence, prepared the sketch map and index during the course of investigation.

He proved the sketch map as Exhibit-5, the index as Exhibit 6 and the sketch map of 2nd place of occurrence as Exhibit 7. He recorded the statements of 8 witnesses under Section 161 of the Code of Criminal Procedure.

In cross-examination, he denied the defence suggestion that the accused persons were innocent and had been falsely implicated.

Record shows that PW 1, Md. Saiful Islam, seizure list witness in his cross-examination deposed that “আমি অদ্য ১ম ইয়াবা টেবলেট অত্র আদালতে দেখিলাম। আর কখনও দেখি নাই। আসামী আপেল মাহমুদকে পুলিশ কখন কোথায় গ্রেফতার করে জানি না। উদ্ধার কার্যক্রম দেখি নাই। ... জব্দনামায় কি লিখা হয় জানি না। পুলিশের কথায় জব্দনামায় সহি করি।”

Another seizure list witness, PW 2, Md. Shamim Hasan stated in his testimony that “ঐ সময় ডিবি পুলিশ আপেল মাহমুদকে আমার কাছে নিয়া আসিয়া এই প্যাকেট এই টেবলেট দেখায়। জব্দনামা পড়িয়া দেখি নাই। পুলিশের কথায় জব্দনামা সহি করি। ... উদ্ধার হওয়া টেবলেট আমি দেখি নাই।”

Upon a careful scrutiny of the above-mentioned testimonies it is manifest that two independent seizure list witnesses (PW 1 and PW 2) categorically disowned the alleged recovery. They have not only stated that they did not see any recovery but have also admitted that their signatures were obtained on the seizure list without the contents being read over to them and at the mere instance of the police. This is a fundamental and fatal flaw in the prosecution’s case, rendering the alleged recovery and seizure highly suspect and unreliable.

It appears from the testimony of the informant as PW 3, who stated that “যৌথ অভিযান পরিচালনার বিষয়ে থানা এলাকায় পৌঁছার পূর্বে

সংশ্লিষ্ট থানায় লিখিতভাবে জানাইনি। ইফতি বোর্ডিয়ে প্রবেশের পূর্বে স্থানীয় বাজার কমিটির সদস্য বা স্থানীয় লোকদের ডাকিনি। জব্দ তালিকা প্রস্তুতের সময় বাজার কমিটির সভাপতি, সম্পাদক বা ঐ এলাকার ইউ.পি সদস্যদের ডাকিনি তবে হোটেল কর্তৃপক্ষকে ডাকা হয়।

PW 7, the investigating officer did not make the witness the owner or manager of the Hotel. He stated that “ইফতি হোটেলের মালিক বা ম্যানেজারকে সাক্ষী করিনি।”

The provision of Section 103 of the Code of Criminal Procedure is a mandatory safeguard, designed to ensure the transparency and credibility of searches and seizures. It mandates that the search be conducted in the presence of respectable inhabitants of the locality and the list of seized articles be signed by them. The object of this provision is to prevent the planting of evidence and to protect the accused against false accusations.

In the case in hand, the mandatory requirement of Section 103 has been flouted. The signatures of the witnesses were procured without allowing them to witness the recovery or understand the contents of the seizure list. This patent violation vitiates the entire recovery process, making it highly suspect and unreliable. Section 103 of the Code of Criminal Procedure is reproduced below for convenience:

103.(1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Penal Code.

The established principle is that it is unsafe to convict an accused solely based on the testimonies of police officials when the independent witnesses explicitly disown the alleged recovery. The prosecution failed to prove beyond reasonable doubt that the contraband material was in the exclusive possession of the accused.

The prosecution is bound to prove its case beyond reasonable doubt. If there is any structural flaw or material contradiction in the evidence, the benefit of doubt must always be given to the accused.

PW 3, Md. Delowar Hossain, the informant in his examination-in-chief deposed that ১০০ পিস সাদা জাতীয় ইয়াবা ট্যাবলেট ১৮.৪৫ ঘটিকায় জন্ম করি। Whereas in FIR he described that আসামী আপেল মাহমুদ এর দখল হইতে উদ্ধার জন্মকৃত আলামত (১) ১০০(একশত) পিচ গোলাপী রং এর মাদক জাতীয় ইয়াবা ট্যাবলেট ওজন অনুমান ১০ গ্রাম। It appears from the chemical examination report (Exhibit 3) that the colour of Yaba was described as reddish. It is stated that “১টি লালচে ট্যাবলেটে মিথাইল অ্যাম্ফিটামিন পাওয়া গিয়াছে।”

The contradiction between the ocular testimony (PW 3) and the official records (FIR and Chemical Report) concerning the colour of the contraband tablets further deepens the suspicion. Such glaring contradictions as to colour of Yaba tablets creates doubt in the prosecution case. This inconsistency in respect of colour creates a massive shadow of doubt over whether the exhibit produced in Court is actually the same substance allegedly recovered from the accused.

It is not a minor or peripheral discrepancy but strikes at the core of the prosecution's case, undermining its foundational premise. In the case of narcotics, the description of the seized material in the FIR, the seizure list, the chemical examiner's

report and the physical evidence produced before the Court must be consistent. In the absence of such consistency, the foundational premise of the prosecution's case is undermined. The colour discrepancy between the FIR, the oral testimony and the Chemical Report renders the identity of the seized substance doubtful, thereby breaking the chain of custody.

Additionally, the trial Court convicted the appellant while acquitted the co-accused Milan Sikder on similar allegations raises concerns about the parity of treatment, although it is not the sole factor for this judgment. It is a settled principle of law that a criminal court cannot convict one accused and acquit another when there is similar or identical evidence pitted against two accused-persons. In this connection, reliance may be placed upon the decision passed in the cases of *Yogarani Vs. State by Inspector of Police*, reported in AIR 2024 SC 4641, *Javed Shaukat Ali Qureshi Vs. State of Gujarat*, reported in AIR 2023 SC 4444 and *Shahin Vs. The State*, reported in 19 SCOB [2024] AD 148 wherein it has been held:

“When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the

Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This Principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.”

A similar view was taken by the Apex Court in *Shahin Vs. The State*, reported in 21 ADC (2024) 654, wherein it has been held:

“However, according to the prosecution, regarding the active participation of the appellant in committing the murder of the deceased, he is on the same footing with the other accused. So, it will be a matter of outright injustice to the appellant if the same benefit of doubt is not granted to him.”

Considering the gravity of the alleged offence, the facts and circumstances of the case, and the *ratio* laid down in the above-mentioned decisions, this Court finds that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. The recovery of contraband articles is rendered unreliable due to the patent contradictions in respect of colour of the seized Yaba tablets, the material inconsistencies in the testimony of the independent seizure witnesses and the gross non-compliance with the mandatory safeguards enshrined under Section 103(1) and (2) of the Code of Criminal Procedure.

Furthermore, having acquitted the co-accused on identical evidence, the trial Court erred in applying the principle of parity. I am of the considered view that the judgment and order of conviction and sentence is found to be perverse, based on conjectures and unsupported by legally sustainable evidence and thus it cannot be sustained in law, and is liable to be set aside.

I find merit in the appeal and substance in the submissions advanced by the learned Advocate appearing on behalf of the appellant.

In the result, the appeal is allowed.

The judgment and order dated 30.09.2019 passed by the learned Sessions Judge, Pirojpur in Sessions Case No. 156 of 2013 is hereby set aside.

The appellant, Md. Apel Mahmud is acquitted of all charges levelled against him.

The convict-appellant is hereby discharged from his bail bond.

Let a copy of the judgment along with the lower Court's records (LCR) be communicated to the Court concerned forthwith.

(Justice *Md. Bashir Ullah*)

Md. Ariful Islam Khan
Bench Officer³