

Present:
Mr. Justice Zafar Ahmed

Criminal Revision No. 1651 of 2017

Md. Moti Matbor

.....Convict-petitioner

-VERSUS-

The State

....Opposite party

Mr. Mohammad Shishir Manir with

Mr. Md. Ruhul Amin, advocates

..... for the petitioner

Mr. Md. Enamul Haque Molla, DAG with

Ms.Marufa Akhter, AAG

..... for the opposite party No.1

Heard on: 01.09.2020, 16.09.2020,
23.09.2020, 07.10.2020, 21.10.2020 and
02.11.2020

Judgment: 08.11.2020

The instant criminal revision filed under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 (in short, the ‘Cr.P.C.’) is directed against the judgment and order dated 11.05.2017 passed by the Additional Metropolitan Sessions Judge, 7th Court, Dhaka in Criminal Appeal No. 179 of 2017 dismissing the appeal and affirming judgment and order dated 08.01.2017 passed by the Joint Metropolitan Sessions Judge, 3rd Court, Dhaka in Metropolitan Sessions Case No. 723 of 2016 arising out of Kotwali Police Station Case No. 19 dated

23.11.2015 corresponding to the G.R. No. 190 of 2015 convicting the petitioner and another under table 9(Kha) of Section 19(1) read with Section 19(4) of the মাদক দ্রব্য নিয়ন্ত্রন আইন, ১৯৯০ (Narcotics Control Act, 1990) (in short, the 'Act', 1990') and sentencing him to suffer rigorous imprisonment for a period of 5(five) years and also to pay a fine of Tk. 20,000/-, in default to suffer rigorous imprisonment for further period of 03(three) months more.

The prosecution story, as stated in the FIR, in brief, is that on 23.11.2015, the informant, who is a DAD of RAB-10, received secret information that some drug dealers were staying in room No. 405 of hotel 'Golden Peak' at Wise Ghat Road, Kotwali, Dhaka. Thereafter, the members of the RAB lead by the informant raided the place, recovered 411 pieces of yaba tablets from the convict-petitioner and 700 pieces of yaba tablets from another accused, total weight being approximately 111.01 grams, value being Tk. 3,30,300/- approximately. The raiding team also seized 5 mobile phones and Tk. 2,439/- from their possession and prepared a seizure list. Thereafter, FIR was lodged on 23.11.2015 against the petitioner and another.

The prosecution examined 9 witnesses, while the defence examined none. Out of 9 prosecution witnesses, 7 witnesses are members of law enforcing agencies (RAB and police) and the rest 2 PWs are independent seizure list witnesses.

The defence case, which was put to the PWs, is that the accused persons are innocent; that they were not arrested from room No. 405 of Hotel Golden Peak; that the raiding team recovered yaba tablets from someone else, but upon receipt of financial benefit released them and set up the accused persons.

The prosecution succeeded in the trial Court in proving its case that the accused petitioner was in possession of 411 pieces of yaba tablets and the co-accused was in possession of 700 pieces of yaba tablets. The defence could not establish its case. Accordingly, the trial Court found the petitioner and the co-accused guilty of the offence. The petitioner preferred the appeal, but the trial Court's judgment was upheld by the appellate Court below.

Mr. Mohammad Shishir Manir appearing with Mr. Md. Ruhul Amin, the learned Advocates, submits that out of 9 PWs, PW Nos. 6 and 7, who are independent seizure list witnesses, did not support the prosecution case. The learned Advocate

further submits that there are discrepancies in the evidences of other PWs in material particulars which lay support to the defence case that the accused-petitioner is innocent and that he was set up by the RAB.

The learned Deputy Attorney General, on the other hand, submits that members of the RAB participated in the anti narcotic raid. They had specific information about the location of the petitioner and another. They apprehended the petitioner and another and recovered yaba tablets from their possession. The members of the raiding team deposed as PWs. They were extensively cross-examined by the defence on material particulars, but they were not shaken. The PWs proved the case beyond reasonable doubt. The learned Deputy Attorney General further submits that the defence did not allege that there was any previous enmity between the petitioner and the members of the RAB. The defence failed to establish its case. The learned Deputy Attorney General finally submits that the alleged discrepancies in the evidences of the PWs are minor and trifling in nature which is quite normal and suggest that the PWs were not tutored.

The learned Advocates of both sides took this Court through the evidences on record in details. The chemical examination report (exhibit-5) was not challenged by the defence. The Chemical Examiner was not called as a witness. Under Section 510 of the Cr.P.C. the chemical report can be used as evidence without calling the Chemical Examiner as a witness. Being encountered with the evidences on record, Mr. Shishir Manir failed to lay hands on the merit of the case and conceded to the arguments advanced by the learned Deputy Attorney General.

To recapitulate, total 1111 pieces of yaba tablets weighing approximately 111.01 grams were recovered from the possession of the petitioner and another. 411 pieces of yaba tablets were recovered from the exclusive possession of the petitioner. The evidences on record, both oral and documentary, do not mention the total weight of 411 pieces of yaba tablets. This is important for the purpose of determining the period of sentence of imprisonment. According to the chemical examination report, 11 tablets (which were sent to the examiner) weigh 1.0076 gram. Accordingly, 411 pieces of yaba tablets weigh 37.65 grams. The learned Advocate for the

petitioner does not object to this method of calculation, because neither the total weight of 1111 pieces of yaba tablets nor the chemical examination report was challenged by the petitioner during the trial. In the chemical examination report, it has been mentioned that 'methyl amphetamine' was found in the sample tablets.

According to WIKIPEDIA, yaba in Thai literally means 'mad drug'. It was formerly known as yama or ya maa (in Thai meaning 'horse drug'). It was given to horses when pulling carts up steep hills and for other strenuous work in Shan State in Burma (now Myanmar). The drug was named yaba in 1996. It contains a mixture of methamphetamine and caffeine. In Bangladesh, it is colloquially known as baba, guti, laal, Khawon, stuff etc.

The petitioner has been convicted under table 9 (kha) appended to Section 19(1) of the Act, 1990. Under table 9(kha) of Section 19(1) read with Section 9(1) of the Act, any person in possession of among other things amphetamine or narcotic substance made of amphetamine weighing more than 5 grams is liable to be sentenced to imprisonment for not less than 5 years and not more than 15 years. In addition, under Section 19(4), he

is also liable to pay fine. The petitioner has been awarded sentence of 5 years rigorous imprisonment and fine.

At this juncture, Mr. Shishir Manir, the learned Advocate for the petitioner, raised an issue. Relying upon some case laws, Mr. Manir submits that determination of the actual quantum of narcotic is *sine qua non* for awarding sentence. His precise argument is that the 'purity' of narcotic, not the 'mixture' or 'substance' of narcotic as a whole is the determining factor for the purpose of sentencing under the Act, 1990.

Let us examine the case laws. In *State vs. Innocent N. Egbunine condemned-prisoner*, 18 BLD 250 (decided on: 22.06.1994), the accused was sentenced to death for possession of 3 Kg 100 grams of heroin. Applying the 'purity' test, the High Court Division commuted the sentence to 5 years rigorous imprisonment.

In *State vs. Miss Eliadah McCord*, 2 BLC (AD) 1 (date of judgment: 04.07.1996), Miss McCord was sentenced to imprisonment for life by the trial Court for possession of 3 kg 2700 grams of heroin. The High Court Division applied the 'purity' test and reduced the sentence to the period already undergone (about 3 years 6 months). The Appellate Division

applied the ‘whole substance’ test and restored the trial Court’s order *i.e.* life sentence.

In *Shahidur Rahman vs. State*, 19 BLC 514 (decided on: 15.03.2012), 2 pounds of heroin were recovered from the appellant. He was sentenced to imprisonment for life. The High Court Division acquitted the appellant on merit, but also applied the ‘purity’ test.

While considering applications for bail in pending trial, the High Court Division in *Tabarak Hossain vs State*, 21 BLT 101 and in *Md. Jafar Alam vs. State*, MANUPATRA LEX/BDHC/0149/2012 (both decided on 08.05.2012) applied ‘purity’ test. The accused in both the cases were arrested for possession of 600 pieces of yaba tablets. Both of them were granted bail.

In *E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau* (2008) 5 SCC 161, the Indian Supreme Court applied the ‘purity’ test and held that only the actual content by weight of the offending narcotic drug is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. In *Hira Singh and another vs. Union of India and another*, 2020 (2) RCR (Criminal) 523 (decided on

22.04.2020), the Indian Supreme Court revisited the issue and applied the ‘whole substance’ test and declared that *E. Micheal Raj* is not a good law.

The above discussions show that there were/are differences of opinion in Bangladesh as well as in India in respect of method for determining the weight of the offending narcotic drug. In 1996, our apex Court in *Eliadah McCord* (supra) declared the law that, “*when it has been proved that the seized packets contained heroin then the whole of the contents must be treated as heroin for punishment. It is not necessary for the prosecution to prove the “actual and real heroin content” for the purpose of a conviction under 1(b) of the table*”. (underlining is mine). Under Article 111 of the Constitution, the law declared by the Appellate Division is binding on the High Court Division. Therefore, in the instant case, the ‘whole substance’ test would apply and accordingly, this Court holds that the petitioner was rightly convicted and sentenced under table 9 (kha) for possession of 411 pieces of yaba tablets weighing approximately 37.65 grams containing methyl amphetamine.

The learned Advocate for the petitioner did not give up. He filed an application under Section 5 of the Probation of Offenders Ordinance, 1960 (in short, the 'Ordinance') for releasing the petitioner on probation for a period of 1 (one) year. In the said application, it has been stated that the petitioner categorically admits that he is guilty of the offence; that he has no previous criminal record; that out of 5 years' imprisonment, he has already undergone imprisonment for a period of 20 months; that after being released on bail, the petitioner has not misused the privilege of bail. Other relevant factual statements have also been made in the application.

Under Section 2(e) of the Ordinance, 1960 'probation order' means an order made under Section 5. Section 5 of the Ordinance is quoted below:

5. (1) Where a Court by which

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Penal Code, or under sections 216A, 328, 382, 386, 387, 388, 389, 392, 393, 397, 398, 399, 401, 402, 455, or 458 of that Code, or an offence punishable with death or imprisonment for life, or

(b) any female person is convicted of any offence other than an offence punishable with death, is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order, that is to say, an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years, as may be specified in the order:

Provided that the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period:

Provided further that the court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and any other matter which the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.

(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect.

Under the Ordinance, 1960 there is no prohibition to grant probation to a person convicted under the Narcotics Control Act, 1990 except in cases where the offences are punishable with death or imprisonment for life. Under Section 3 of the Ordinance, the High Court Division in exercise of power of revision is empowered to exercise powers under the

Ordinance. Therefore, there is no legal bar to examine the merit of the probation application.

Upon query by this Court, the learned Advocate for the convict-petitioner informs that the petitioner does not have any bank account and Tax Identification Number (TIN) and that due to financial and other circumstances he is not in a position to open those. This Court took the view that for effective disposal of the probation application, the bank account and TIN of the petitioner are required. Accordingly, on 07.10.2020, this Court directed the Association for Offenders Correction and Rehabilitation, Dhaka (অপরাধী সংশোধন ও পুনর্বাসন সমিতি, ঢাকা) of which the Deputy Commissioner, Dhaka is President and District Probation Officer, Dhaka District is Member-Secretary to render assistance to the petitioner to open the bank account and TIN. The direction was carried out and bank account and TIN of the petitioner were opened.

On 21.10.2020, this Court directed the Probation Officer, Dhaka District to submit an antecedent report in respect of the petitioner to this Court. The report has been submitted. In the report it has been stated that the date of birth of the petitioner is 02.02.1974. While the petitioner was 6 years old, his father

died. He did not get opportunity to attend school. In early childhood he worked in workshop, at teen age he worked in motorcycle garage and tailor shop. Since 1994, he has been working as broker of scrap iron and also a part-time worker in Jam Jam Navigation launch. He has been living along with members of his family in the present rented accommodation for the last one year, but he has been living in the locality since 1975. The petitioner's family consists of his aged mother, wife, two sons and one daughter. The eldest son, aged about 18 years, is an apprentice in an electric shop. The daughter, aged about 16 years, attends school and shall appear at the S.S.C. examination next year. The youngest son, aged about 8 years, attends school. In the antecedent report it has been further that the family bonding of the petitioner is good. He has no social issue. His monthly income is about Tk. 15,000/- to Tk. 20,000/. He is the sole bread earner of the family. The Probation Officer spoke to the petitioner's mother, wife, neighbours, member of the local Union Parishad, Muezzin of the mosque and shopkeepers (those who have been living in the area for the last 20/30 years). They know the petitioner as a man of good character and did not find him getting involved in local crime.

The Probation Officer stated in the report that the petitioner is repentant for the crime he has committed and that if the petitioner is sent to jail, the education of his two school going children would be put at risk and the family would be highly affected. Considering the fact that the petitioner has no previous criminal record as well as the financial, social and family context of the petitioner, the Probation Officer made specific recommendation for granting probation to the petitioner.

In *Abdul Khaleque vs. Hazera Begum and another*, 58 DLR 322, a Single Bench of this Division observed, “... *the penal system of Bangladesh is essentially reformative in character as opposed to retributive. The provision afforded by the Probation of Offenders Ordinance, 1960 (“the Ordinance”) is a prime example of such a penal policy. If a sentence of probation is imposed for a period of time, then it is likely to be more of a deterrent and will have rehabilitating effect which will fulfil the intention of the legislature in promulgating Section 5 of the said Ordinance”.*

In *State vs. Mazdoor* PLD 1969 Peshwar 226, it has been observed, “*The object of punishing an offender is the prevention of offences or reformation of the offender.*”

Punishment would be a greater evil, if instead of reforming an offender, it is likely to harm the offender to repetition of crime with the possibility of irreparable injury to him. The provisions of the Probation of Offenders Ordinance are, thus, intended to enable the Court to carry out the object of reformation and give the accused person a chance of reformation which he would lose by being incarcerated in the prison”.

The purpose of probation under Section 5(2) of the Ordinance is to prevent a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law abiding citizen. In Article 7.1 of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (adopted by the General Assembly on 14.12.1990) emphasis has been given on obtaining report prepared by the competent authority for the purpose of passing non-custodial order by judicial authority. Article 7.1 of the Tokyo Rules states that the report should contain social information on the offender that is relevant to the person’s pattern of offending and current offences. The report should also contain information and recommendations that are relevant to the sentencing procedure.

The report should be factual, objective and unbiased, with any expression of opinion clearly identified.

Since the rationale for probation under the Ordinance, 1960 is to facilitate social reintegration and fostering rehabilitation, Courts should consider relevant factors before passing any probation order. For adult offenders, the factors are - age, character, antecedents or physical or mental condition of the offender, the nature and gravity of the offence and the conduct of the offender during the trial. In narcotic drug related offences, it is desirable that the dope test of the offender is carried out. The result of the test should be considered along with other factors in passing the order. If the Court considers it suitable it should direct the concerned Probation Officer to submit a 'Pre-Sentence Report' (PSR) or antecedent report before making the order.

Narcotic drugs related offences are crimes against the society. The drugs are being used for weakening of the nation. There is no doubt that such offences have to be dealt with iron hands. In the instant case, this Court has considered facts, circumstances of the case as well as the probation application and the antecedent report which is favourable to the petitioner

with specific recommendation to grant him probation. Having considered all aspects of the materials record and the Ordinance, 1960 this Court is of the view that in this case a probation order would be most apt and suitable since it will have the likely effect of deterring the convict-petitioner from committing further offence within the period of probation, which will also allow his rehabilitation as an honest, industrious and law-abiding citizen, which is the intent and purport of the Ordinance.

In the result, the Rule is discharged. The application for probation under Section 5 of the Ordinance, 1960 is allowed. The petitioner is released from the bail bond.

The convict-petitioner is placed under the supervision of the Probation Officer, Dhaka District, who is now present in the Court, for a period of 1(one) year 6(six) months starting from today. Under Rule 11 of the Bangladesh Probation Offenders Rules, 1971 the petitioner is entrusted to the charge of the Probation Officer for 1 year 6 months with immediate effect. Upon receipt of this order, the Probation Officer shall produce the petitioner without delay to the Court of Joint Metropolitan Sessions Judge, 3rd Court, Dhaka (the trial Court) for

compliance of the provisions of the first proviso to Section 5(1) of the Ordinance, 1960 *i.e.* requiring the petitioner to enter into a bond with sureties to commit no offence and to keep the peace and be of good behavior during the probation period.

Being empowered by Section 5(2) of the Ordinance, this Court imposes the following conditions upon the petitioner which will continue during the probation period:

- (a) The petitioner shall take care of his family members who are dependent on him and maintain the family bonding.
- (b) The petitioner shall take care of his aged mother who lives with him.
- (c) The petitioner shall ensure the progress of institutional education of his school going daughter and son.
- (d) The petitioner must not marry-off his daughter before she attains the legal age.
- (e) The petitioner shall not use and/or consume narcotic drugs referred to in the first Schedule of the Narcotics Control Act, 1990 (Class A, B and C narcotic drugs) unless prescribed by registered doctor in accordance with the provisions of Section 13 of the Act, 1990.

(f) Dope test of the petitioner in respect of Class A, B and C narcotic drugs shall be carried out every six months during the probation period. The first dope test shall be carried out immediately upon receipt of this order. The Association for Offenders Correction and Re-habilitation, Dhaka shall bear the cost of dope testing. If the petitioner tests positive, the probation order shall cease to have effect immediately provided the same is covered by Section 13 of the Act, 1990.

In addition to above, the trial Court is at liberty to impose further conditions which in its opinion may be necessary for securing the supervision of the petitioner by the Probation Officer.

The remaining portion of the sentence of imprisonment (3 years 4 months) which the petitioner has not served yet and payment of fine of Tk. 20,000/- shall remain stayed till completion of the probation period. After successful completion of the probation, those shall stand vacated.

If the petitioner fails to observe any of the conditions mentioned above and/or conditions of his bond, the trial Court shall proceed with the matter in accordance with the provisions

of Section 7 of the Ordinance and the probation order shall cease to have effect and the petitioner shall be sent to the jail to serve the remaining portion of sentence of imprisonment and he will also be liable to pay the fine.

The Probation Officer is directed to supervise the activities of the petitioner during the probation period in accordance with law and as per order passed by the trial Court.

Send down the lower Courts records (LCR).

Communicate the judgment and order to the Court concerned at once. Office is directed to send a copy of this judgment and order to the Probation Officer, Dhaka District at Room No. 203, Post Office Building, Collectorate Bhaban, Dhaka-1100 forthwith.