

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1502 of 2007

Md. Harun

...Convict-petitioner

-Versus-

The State

...Opposite party

No one appears.

...For the convict-petitioner

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G

...For the State

Heard on 03.03.2024

**Judgment delivered on 10.03.2024**

This Rule under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 01.06.2006 passed by Additional Metropolitan Sessions Judge, Court No. 2, Chattogram in Criminal Appeal No. 133 of 2004 affirming those dated 15.04.2004 passed by Assistant Sessions Judge, Court No. 1, Chattogram in Session Case No. 241 of 2002 arising out of Kotwali Police Station Case No. 59(9)01 G.R. No. 905 of 2001 convicting the petitioner Md. Harun under Section 19(1)3(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentencing him thereunder to suffer imprisonment for 2(two) years and fine of Tk. 500, in default, to suffer imprisonment for 15(fifteen) days.

The prosecution case, in short, is that Sub-Inspector Syed Md. Raihan Uddin of Narcotics Control Department, Chattogram along with the departmental officers and members forming a raiding party on 26.09.2001 from 5.30 to 6.00 pm encircled the accused Md. Harun adjacent to the house of Md. Yeakub Ali situated at 88 Baniar Tila Station Road, Kotwali and searching his body recovered two bottles of Indian phensedyl kept on his waist in the folding of his lungi. The accused Harun informed that there are phensedyl in the house of

accused Md. Ismail alias Babul and searching the three-bedroom house of accused Md. Ismail recovered seven bottles of phensedyl kept under the cot of room No. 2 of the said house. He prepared the seizure list, took the signatures of the witnesses on the seizure list and sent one bottle of phensedyl for a report to the chemical examiner. Since the accused Md. Ismail alias Babul was not present at the time of the search, the informant party could not detain him.

The informant Sub-Inspector Syed Md. Raihan Uddin of the Narcotics Control Department took up the investigation of the case. He visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898, collected the report of the chemical examiner and after completing the investigation submitted the charge sheet on 28.03.2002 against the accused-persons. On 09.05.2002, the Chief Metropolitan Magistrate, Chattogram transmitted the records to the Metropolitan Sessions Judge, Chattogram and the Metropolitan Sessions Judge, Chattogram took cognizance of the offence against the accused under Section 19(1)3(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sent the case to the Metropolitan Assistant Sessions Judge, Court No. 1, Chattogram for trial.

During trial on 09.09.2002 charge was framed against the accused-persons under Section 19(1)3(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ which was read over and explained to them and they pleaded not guilty to the charge. The prosecution examined 3(three) witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses the accused persons were examined under Section 342 of the Code of Criminal Procedure, 1898 and they declined to adduce any D.W. After concluding the trial, the trial Court by judgment and order dated 15.04.2004 convicted the accused under Section 19(1)3(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentenced him to suffer imprisonment for 2(two) years and fine of Tk. 500, in default, to suffer imprisonment for 15(fifteen) days against which the accused

preferred Criminal Appeal No. 133 of 2004 before the Metropolitan Sessions Judge, Chattogram. The said appeal was transferred to the Additional Metropolitan Sessions Judge, Court No. 2, Chattogram who by impugned judgment and order dated 01.06.2006 dismissed the appeal affirming the judgment and order passed by the trial Court against which the convict-petitioner obtained the Rule.

P.W. 1 Sub-Inspector Syed Md. Raihan Uddin is the informant. He stated that on 26.09.2001 while he was discharging his duty as Sub-Inspector of Kotwali Circle based on secret information forming a raiding party encircled the accused Md. Harun in front of the house of Md. Yeakub Ali situated at 88 Baniar Tila under Kotwali Thana and searching his body recovered two bottles of phensedyl from the waist of the accused kept in the folding of the lungi. He informed that accused Md. Ismail sold the phensedyl and searching his three-bedroom house recovered seven bottles of phensedyl kept under the cot of room No. 2 of the house of the accused. At that time, the accused Ismail was not present at the place of occurrence. He took the signatures of the witnesses on the seizure list and he also signed the seizure list. He proved the seizure list as exhibit 1 and his signature as exhibit 1/1. He sent one bottle phensedyl for the report of the chemical examiner. He handed over the accused to Thana. He proved the FIR as exhibit 2 and his signature on the FIR as exhibit 2/1. He proved eight bottles of phensedyl as material exhibit I. He identified the accused persons in the dock. During cross-examination, he stated that Harun was standing in front of the gate of the house of Yeakub Ali. He denied the suggestion that when the accused was playing carrom, he was detained and falsely implicated in the case. He also denied the suggestion that no phensedyl was recovered from the possession of the accused. During cross-examination on behalf of the accused, he stated that the mother and wife of the accused Ismail were not cited as witnesses in the case.

P.W. 2 Sepoy Abul Bashar stated that on 26.09.2001, he was a member of a raiding party formed under the leadership of P.W. 1 Sub-Inspector Syed Md. Raihan Uddin. The members of the raiding party searched the body of the accused Md. Harun who was standing in front of the house of Yeakub Ali at 17.30 situated at 88 Baniara Tila under Kotwali Thana. Searching the body of accused Md. Harun in the presence of two neutral witnesses recovered two bottles of phensedyl from the waist of the accused kept in the folding of his lungi. As per his confession, seven bottles of phensedyl was recovered while searching the house of the accused Md. Ismail kept under the cot. He prepared the seizure list and signed the seizure list. He also took the signature of the accused on the seizure list. During cross-examination on behalf of the accused Harun, he stated that eight persons including police and driver went to the house of Yeakub Ali and detained the accused from the gate of the said house. He affirmed that an old lady was present in the house but her signature was not taken but other witnesses who were present signed the seizure list. After detaining the accused Harun, the raiding party entered the house of Ismail and after searching the house came back to the circle office. He denied the suggestion that no phensedyl was recovered from the waist of the accused. Since Ismail was not present at the house, the members of the raiding party detained Harun.

P.W. 3 Sub-Inspector Syed Md. Raihan Uddin is the Investigating Officer. He stated that during the investigation, he visited the place of occurrence, prepared the sketch map and index and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898, sent the phensedyl for the report of the chemical examiner. He proved the report of the chemical examiner as exhibit 3, sketch map and index as exhibit 4 and his signature as exhibit 4/1. After completing the investigation he submitted charge sheet on 28.03.2002 against the accused persons. During cross-examination, he stated that the house of Raja Mia and the hotel were situated to the west of the place of occurrence. The House of Nawab Ali was situated to the

west, the house of Ayub Ali and Chand Mia to the north and the house of Sikder Mia and Ayub Ali to the south. He denied the suggestion that the accused was arrested from the road and was falsely implicated in the case.

No one appears on behalf of the convict-petitioner.

Learned Assistant Attorney General Mr. A. Monnan (Manna) appearing on behalf of the State submits that the accused was caught red-handed along with two bottles of phensedyl from his waist kept in the folding of his lungi and P.Ws. 1 to 3 proved the charge against the accused beyond all reasonable doubt. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Assistant Attorney General Mr. A. Monnan (Manna) who appeared on behalf of the State, perused the evidence, impugned judgments and orders passed by the Courts below and the records.

On perusal of the records, it appears that two bottles of phensedyl was allegedly recovered from the waist of the accused kept in the folding of his lungi while he was sitting in front of the house of one Yeakub Ali. Thereafter at the instance of accused Md. Harun seven bottles of phensedyl was recovered from the room of the co-accused Md. Ismail kept under the cot of room No. 2 of his house. Out of 9 bottles of phensedyl, the Investigating Officer sent one bottle of phensedyl for the report of the chemical examiner. During trial, eight bottles of phensedyl was produced in Court and marked as exhibit 8 and the prosecution proved the report of the chemical examiner as exhibit 3. In the said report, it has been mentioned that "ক" চিহ্নিত কাঁচের বোতলে রক্ষিত বাদামী বর্ণের তরল পদার্থে "কোডিন" ফসফেট পাওয়া গিয়াছে যাহা ফেনসিডিলের উপাদান।

No Statement was made by P.W. 1 that out of two bottles of phensedyl allegedly recovered from the waist of the accused Md. Harun, one bottle of phensedyl was sent to the chemical examiner. Furthermore, P.W. 2 stated that the search was conducted at 7.30 pm and two neutral witnesses were present there but they were not

examined in the case. During cross-examination on behalf of the accused Harun, P.W. 2 stated that eighteen persons including police and driver went to the house of Yeakub Ali but the prosecution only examined P.W. 1 Sub-Inspector Syed Md. Raihan Uddin and P.W. 2 Sepoy Abul Bashar. P.W. 1 Sub-Inspector Syed Md. Raihan Uddin was also examined as P.W. 3.

The evidence of police personnel is not sacrosanct. No explanation was given by the prosecution as to why the neutral two seizure list witnesses and other police personnel including the driver were not examined. Furthermore, P.W. 1 stated nothing as regards the time of recovery of the alleged phensedyl from alleged possession of the accused. The Investigating Officer P.W. 3 Sub-Inspector Syed Md. Raihan Uddin stated that the houses of Raja Mia, Nowab Ali, Ayub Ali, Chand Mia and Sikder Mia were situated adjacent to the place of occurrence but they were not examined in the case. Non-examination of the seizure list witnesses, neighbouring people and the large number of witnesses who were the members of the raiding party give rise to an adverse presumption under Section 114(g) of the Evidence Act, 1872 against the prosecution.

Because of the above facts and circumstances of the case, evidence, findings, observation and proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgment and order passed by the Courts below are hereby set aside.

However, there will be no order as to costs.

Send down the lower Court's records at once.