

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

Present:

Mr. Justice Mustafa Zaman Islam
And
Mr. Justice Md. Aminul Islam

Criminal Appeal No. 7572 of 2022

Md. Kamal Ahammed and another
....convict-appellants.

-Versus-

The State

... opposite party.

Mr. Mohammad Mostafezur Rahaman Miah, Advocate

.....For the convict-appellant.

Mr. Sarowar Hossain Bappi, DAG with
Mr. Mohammad Shah Newaj, A.A.G with
Mr. Anisur Rahman, A.A.G

.....For the State.

Heard On 15.10.2023 and

Judgment On: 22.02.2024.

Mustafa Zaman Islam. J

This appeal has been preferred against the judgment and order of conviction and sentence dated 23.03.2022 passed by the learned Joint Sessions Judge, 1st Court, Cox's Bazar in Sessions Case No.584 of 2018 arising out of Teknaf Police Station Case No.19 dated 24.09.2017 corresponding to G.R. Case No.732 of 2017 convicting the appellants under Table 9(Kha) of section 19(1) of the Madok Drabbya Niyontron Ain, 1990 and sentencing them to suffer rigorous imprisonment for

10(ten) years and also to pay a fine of Tk. 10,000/-in default to suffer simple imprisonment for 03(three) months more.

The Prosecution case in short is that one S.I. Habilder Md. Lutfor Rahman, as informant lodged an FIR with the Teknaf Model Police Station against the appellants alleging inter alia that on 23.09.2017 the informant along with his accompanying forces were a patrol duty on Naff River and at one stage, the informant found that a boat crossed the border of the Myanmar and entered into Bangladesh through Naff River and anchored the boat to the Ghat and 02 persons unloaded 02 Bags from the boat. Thereafter, the informant rushed to the spot and then the accused are tried to escape from the spot and then the informant arrested with the help of others forces. Subsequently, the informant recovered 4,35,805 pieces of yaba Tablet from the appellants. The informant seized the alamots and prepared a seizure list and hence this case.

After completion of the investigation, the police submitted charge sheet being No. 960 dated 12.12.2017 against the accused persons including the convict appellant under section 19(1) table 9(Kha) of the Madok Drabbya Niyontron Ain, 1990 (Amended -2004) and the case record was transferred in the court of learned Joint Sessions Judge, 1st Court, Cox's Bazar and registered the same as Sessions Case No. 584 of 2018 and on 14.01.2019.

The learned Joint Sessions Judge framed charge on 12.12.2017 under Table 9(Kha) of section 19(1) of the Madok Drabbya Niyontron Ain, 1990 and read over to the accused petitioners while they pleaded not guilty and claimed to be tried.

The prosecution examined as many as 6 witnesses out of 10 witnesses in support of its case while the defence examined none.

After conclusion of trial, the learned Joint Sessions Judge, Cox's Bazar perusing the record

considering the material points of the evidence convicted the convict appellants under Table 9(Kha) of section 19(1) of the Madok /Drabbya Niyontron Ain, 1990 and sentencing them to suffer rigorous imprisonment for 10(ten) years and also to pay fine of Tk. 10000/- and in default to suffer rigorous imprisonment for 3(three) months more by the judgment and order of conviction and sentence dated 23.03.2022 in Sessions Case No. 584 of 2018.

Aggrieved by his conviction, appellants preferred this appeal against the judgment and sentence dated 23.03.2022 before this Division.

Mr. Mohammad Mostafezur Rahaman Miah, the learned Advocate appearing for the convict appellants submits that all the witnesses are police personnel and there are no public witnesses and the prosecution failed to prove the case by producing any neutral and impartial witnesses and as such the judgment and order of conviction is liable to be set aside. More so, That the investigating officer sent some alamots for justifying the same by Chemical Examiner and the Chemical Examiner issued a report wherein stated that "কাগজের প্যাকেটে

রক্ষিত দশটি ট্যাবলেটে অ্যামফিটামিন পাওয়া গিয়াছে।" but it is not clear that how many percentage of the 'Amphetamine' contents the said alamots so without determining the percentage/volume the chemical Report is defective. It should be mentioned here that the 'purity' of narcotics, not the 'mixture' or 'substance' of narcotics as a whole is the determining factor for the purpose of sentencing under the Act, 2018. In support his contention Md. Miah returned some decisions reported decision is 18BLD 250, 2BLC (AD) 1, 19 BLC 514, 21 BLT 101 and unreported in Criminal Revision No. 1651 of 2017 Judgment date 08.11.2020) and as such the impugned judgment and order is liable to be set aside.

He submits that as per FIR the Yaba recovered from 02 persons but the informant did not mark the same as accused No.1 and 2 for the sample collection is defective [Ref: 72 DLR (2020)-229] and as such the impugned judgment and order is liable to be set aside. He submits that the chemical examiner was not produced as witness and the prosecution has examined as many as 6 out of 10 charge sheeted witnesses and it presumes that if the prosecution produced the rest 4 witnesses before the trial court they would not support the prosecution

case and so the convict-appellant will get the benefit of under section 114(Ga) of the Evidence Act and hence the judgment and order of conviction is liable to be set aside. He add that the deposition of witnesses are discrepancies and controversial and the prosecution failed to prove the case by neutral and public witnesses; moreover the seizure list witnesses disclosed that the alamot were not present at the time of recovering the articles and hence the judgment and order of conviction is liable to be set aside.

Mr. Sarowar Hossain Bappi, the learned Deputy Attorney General appearing for the state support the conviction and sentence of the appellants and submits that trial court after considering the evidence on record the appellants have been rightly convicted under section 19(1) Table 9(Kha) of the Madok Drabbya Niyontron Ain, 1990 (amended-2004) and sentenced thereunder, on proper appreciation of the facts and circumstance of the case.

In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions. Let us now weigh and sift the evidence on record

as adduced by the prosecution to prove the charge against the convict appellants.

P.w. 1, Nayek Subeder Md. Lutfur Rahaman, deposed that on 23/09/2017, he was working as BGB Cox's Bazar along with his fellow BGB members in nature park area under Teknaf police station on the edge of Naff River on the basis of secret information during duty at 3.20 pm. Convicts are Md. Kamal and Md. Elias and we searched the 2 sacks with the said accused and recovered a total of 435805 pieces yaba tablets from the 2 sacks. Accused have 1 mobile phone.

This statement is mine. Ex: 1, this is his signature. Ex.1/1, this is the seizure list, Ex.2, this is his signature on the seizure list. Ex. 2/1.

P.W. 2 Sepay Md. Baten Mia, deposed that on 23.09.2017 he was working as BGB Cox's Bazar, on the basis of secret information, under the leadership of Nayek Subeder Md. Lutfur Rahman, on duty in Teknaf Naff River Nature Park area, at 3.20 pm, the said boat came to the place from the Myanmar side, 2 people came from the boat with 2 sacks on their heads and arrested them with sacks. Accused Md. Kamal Ahmed's bag was searched and 2,18,000 pieces of Yaba tablets

were found and 2,17,805 pieces of Yaba tablets were found in the bag of the other accused Md. Eliyas, which were seized. He was a witness in the seizure list.

P.W.3 Md. Mizanur Rahman has been declared Tendered by the prosecution.

P.W. 4, Md. Delwar Hossain, deposed that on 23.09.17, while attached at 2BGB Damdamiya BGB Teknaf, Cox's Bazar, he became a member of the Petrol- team led by Habildar Md. Lutfar Rahman and during duty on the same date and night around 3.20 o'clock. a hand –operated boat Crossed the Zero line from Myanmar and entered the border of Bangladesh and came towards the ghat along the nature park. When, we got there, the boat came to the ghat along the nature park and took the 2 sacks from the boat to the bank and took them on their head. Then, 2,18,000 pieces of yaba in 1090 packets from accused Md. Kamal Ahmad and accused Elias 2,17,805 pieces of yaba in 1090 packets of blue color in bag were found from accused Md. Elias. Besides, 1 (one) symphony mobile phone was recovered from the accused. As there were no local people at the spot, informant Habildar Lutfar Rahman prepared the

seizure list in the presence of 2 members of the patrol team, took the signatures of the witnesses and signed it themselves.

In his cross examination, he stated that it is not true that no yeaba was found with the accused. It is not true that the yeaba are found in the abandoned boat in the river. It is not true that the accused Kamal and accused Elias were detained in illegal way while coming to Bangladesh as a refugee.

P.W. 5. Sujon Rajbonsi, Sepay, deposed that he was a member of the patrol party led by informant Md. Lutfar Rahman while working at 2 BGB Damdamia, BGB Teknaf, Cox's Bazar on 23.09.2017 on the same date at 3.20 (night) along the Natural Park, a hand operated boat from Myanmar to the Zero line of Naff River . After crossing the border of Bangladesh and coming to the ghat along with Natural park, we continue to follow up. Two people come out from the boat with 2(two) sacks on their head. Searching the presence of the petrol party, they tried to flee away but arrest the accused Md. Kamal and accused Md. Elias. After searching them , the informant party recovered 2,18000 pieces of yeaba from accused Kamal and 2,17,805 pieces of yeaba tablets recovered from accused Elias.

In his cross examination, it is not true that the accused Kamal and his family came from Myanmar to Bangladesh but he arrested illegally as a refugee.

P.W. 6, Md. Main Uddin Khan, inspector as investigating officer who deposed in his examination in chief that he was attached to the Teknaf Police Station as officer-in-charge at the time of occurrence. He lodged the FIR and took up the investigation of the case, visited the place of occurrence, prepared sketch map of the place of occurrence along with index. He also examined the witnesses and recorded their statements under section 161 of the Code of Criminal procedure and he collected the report for Chemical examination as 10 pieces of yeaba sample from seized article. The Chemical examination report found the substance of amphetamine in the seized article. The investigating officer after concluded the investigation submitted charge-sheet against the convict-appellants.

The learned Joint Sessions Judge, on sifting the evidence on record has held that the prosecution has been able to prove that informant Md. Lutfor Rahman, Habilder, during duty on 23.09.2017 at night around 3.20, a hand operated boat crossed

the Zero line from Myanmar to Bangladesh border and came towards the ghat of nature park at Taknef and they found that two accused took 2 sacks from the boat to the bank with their head. Sensing the presence of the patrol party, the accused tried to flee away but failed and arrested them after searching, the informant party recovered the alleged yeaba tablets from the accused Md. Kamal Ahmed and Md. Elias. Pws 1-2 and 4-6 who are the companion forces of the informant have deposed corroborating the informant on material facts regarding time, place and manner of occurrence and recovery of the seized article from the possession of the convict-appellants. During cross examination the evidence of their of these pws could not be shaken on the vital points regarding time, place and manner of occurrence.

There is nothing to show for which the evidence of the pws as referred to above, may be disbelieved or made impeachable.

Considering all the above aspects of the matter we find no substance in this appeal, as such conviction is upheld with modification of sentence. The convict appellants have been languishing in jail custody since 23.09.2017 for about 6(six) years.

It appears from the evidence on record that trial court found the appellants guilty of the offence punishable under Table 9 Kha of sections 19(1) of the Madak Drabbay Niyrantran Ain, 1990.

In view of the discussion made above and the facts and circumstances of the case and also the legal position we are of the opinion that the prosecution has been able to prove the case beyond all reasonable doubt against the appellants. Therefore, the conviction passed by the Joint Sessions Judge, 1st Court, Cox's Bazar in sessions case No. 584 of 2018 is hereby maintained, but the sentence is reduced from 10 (ten) years to sentence already undergone and the fine of tk. 10,000/- (ten thousand) is maintained.

In the result the appeal is dismissed with above modification of sentence.

The convict appellants namely 01.Md. Kamal Ahammed, son of late Sirajul Mostafa and 02. Md. Elias, son of Boshed Ali be released forthwith is not connected with any other cases.

Send down the lower court's record at once.

(Mustafa Zaman Islam, J:)

Md. Aminul Islam, J:

I agree.