

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 206 of 2007

Md. Habibur Rahman

.....Convict Petitioner

-versus-

The state

.....Opposite Party

None appears

.... For the convict petitioner

Mr. S.M. Golam Mostofa, DAG with

Mr. Md. A. Mannan, AAG

....For the State

Heard on 25.01.2024

Judgment delivered on 30.01.2024.

This Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 17.5.2006 passed by Additional Sessions Judge, Court No. 3, Rajshahi in Criminal Appeal No. 44 of 2004 affirming the judgment and order of conviction and sentence dated 29.2.2004 passed by Additional District Magistrate, Rajshahi in Godagari P.S. Case No. 11 dated 11.11.1997, corresponding G.R. No. 457 of 1997, convicting the petitioner under Section 19 (3) of the Narcotics Control Act, 1990 and sentencing him thereunder to suffer rigorous imprisonment for two years and fine of Tk. 5000, in default, to suffer

imprisonment for three months should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The prosecution case, in short, is that on 11.11.1997 at 13.30 based on secret information Md. Abdul Bari, Inspector, Narcotics Control Department, Sadar Circle, Rajshahi along with his force went to village Khajur and raided the house of accused Md. Habibur Rahman and searched the house. At the time of searching the house in the presence of witnesses recovered a cannabis tree (4.5 kg) cultivated within the boundary of the house. He prepared a seizure list at the place of occurrence and took the signatures of the witnesses. He collected the sample from the recovered tree for chemical examination. At the time of recovery of the cannabis tree, the accused was absconding. Thereafter, Inspector Md. Abdul Bari lodged the FIR.

Md. Solaiman Sheikh Inspector of Narcotics Control Department was appointed as investigating officer. 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. After completing the investigation, he submitted charge sheet against the accused on 22.06.1998 under section 19(3) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০.

During the trial, the charge was framed against the accused under section 19(3) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 5 witnesses to prove the charge against the accused. After examination of prosecution witnesses, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and he declined to examined any DW. After concluding the trial, the Additional District Magistrate, Rajshahi by judgment and order dated 29.02.2004 convicted the accused under section

19(3) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentenced him thereunder to suffer rigorous imprisonment for 02 (two) years and fine of Tk. 5000, in default, to suffer imprisonment for 3 months more.

Being aggrieved by and dissatisfied with the said judgment and order passed by the trial court the accused filed Criminal Appeal No. 44 of 2004 before the Sessions Judge, Rajshahi. After that, the Sessions Judge, Rajshahi sent the appeal to the Additional Sessions Judge, Court No. 3, Rajshahi for disposal. The Additional Sessions Judge, Court No. 3, Rajshahi after hearing the parties by judgment and order dated 17.05.2006 affirmed the judgment and order of conviction and sentence passed by the trial court against which the convict petitioner obtained the instant Rule.

P.W. 1 Md. Abdul Bari is the Inspector of the Narcotics Control Department. He stated that on 11.11.1997 he was posted at Rajshahi Sadar Circle. Based on secret information he along with departmental staff went to the house of the accused Md. Habibur Rahman situated at village Khatuj under Godagari Thana and at 1.30 pm encircled the house of the accused in the presence of witnesses. Searching the house found that a cannabis tree was cultivated in front of the bedroom of the accused. He seized the cannabis tree in the presence of witnesses and prepared the seizure list. He took the signatures of the witnesses on the seizure list. He collected the sample from the cannabis tree and sent the sample for the report of the chemical examiner. At the time of recovery of the cannabis tree, the accused was absconding. After that, he lodged the FIR. He proved the FIR as exhibit-1 and the seizure list as exhibit-2. He proved his signature as exhibit-1/2. He proved the cannabis tree as material exhibit-III. In the FIR the name of the departmental staff was not mentioned. At the time of searching the house of the accused, aged person was not present there. There were two bhiti huts on the west and east side of the said house and there was a kitchen on the south side of the said house. There were 2 other

houses adjacent to the house of the accused but he could not say the name of the owner of those houses. He searched the house in the presence of two witnesses which was not mentioned in the FIR but in the FIR it has been mentioned that the search was conducted in the presence of the witnesses. One Moniruzzaman written the FIR. Sub-Inspector Moklesur Rahman prepared the seizure list at the place of occurrence. The house of the accused was situated beside the road. The witnesses of the seizure list are the responsible persons of the locality. He denied the suggestion that he did not search the house of the accused and no cannabis tree was recovered from the house of the accused.

P.W. 2 Muklesur Rahman is the Sub-Inspector of the Narcotics Control Department, Chapainawabgonj Circle. He stated that the occurrence took place on 11.11.1997 at 1.30 pm. At that time, he was posted at Rajshahi Circle. On that day, he along with the informant Abdul Bari went to the house of the accused situated at village Khetuj under Godagari Thana and in the presence of two witnesses a cannabis tree cultivated in front of the house of the accused was recovered. The informant prepared the seizure list at the place of occurrence and took the signatures of the witnesses. The informant collected the sample from the cannabis tree and sent it for the report of the chemical examiner. At the time of occurrence, the accused was absconding. During cross-examination, he stated that no document regarding the ownership of the place of occurrence was seized at the time of recovery of the alamat. He affirmed that he along with six other staff raided the house of the accused. The informant prepared the seizure list at the place of occurrence. The cannabis tree was cultivated on the east side of the baranda. At the time of the search, the local responsible persons were present there. A local Imam was also present there. He denied the suggestion that no cannabis tree was recovered at the time of occurrence and that the raiding party did not search the house of the accused.

P.W. 3 Md. Abdur Rashid is a Sepoy of the Narcotics Control Department. He stated that on 11.11.1997, he was posted at the Narcotics Control Department, Rajshahi. On that day at 1.30 pm he along with P.W. 1 Inspector Abdul Bari along with departmental staff went to the village Khatuj under Godagari Thana following the instruction of the informant and in the presence of the witnesses searching the house found a cannabis tree in the house of the accused. The seizure list was prepared at the place of occurrence and the witnesses signed the seizure list. At the time of occurrence, the accused was absconding. He could not say how many bhiti huts were situated in the house of the accused. During cross-examination, he stated that he could not say the exact location of the cannabis tree. He denied the suggestion that he deposed falsely in the case.

P.W. 4 Md. Osman Ali is a witness on the seizure list. He proved his signature on the seizure list as exhibit 2. He was declared hostile. During cross-examination on behalf of the state, he stated that on 11.11.1997 at 1.30 pm P.W. 1 Abdul Bari searched the house of the accused and at the time of searching, the members of the search party found a cannabis tree. The cannabis tree was seized. They requested him to be the witness. He denied the suggestion that to save the accused he deposed falsely. During cross-examination on behalf of the accused, he could not say exactly where from the cannabis tree was recovered. The house of the accused was situated far from his house and he is not aware of the occurrence.

P.W. 5 Md. Solaiman Ali Sheikh is the Inspector of the Narcotics Control Department. He stated that on 23.02.1998 he took up investigation of the case. During the investigation, he visited the place of occurrence and prepared the sketch map and index. He proved the sketch map as exhibit-3 and his signature as exhibit-3/1. He proved the index as exhibit-4 and his signature as exhibit-4/1. He recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898. A sample was collected and the investigating officer Abdul Bari sent the sample for the

report of the chemical examiner. He obtained the report of the chemical examiner. He proved the report of the chemical examiner as exhibit-5. After completing the investigation, he found the truth of the allegation against the accused and submitted charge sheet against him. During cross-examination, he stated that he visited the place of occurrence. He affirmed that at the time of inspection, he did not find any evidence of cultivation of cannabis. He did not verify that the accused is the owner of the said house which has been visited. He did not examine the locals mentioned in the boundary of the index. He denied the suggestion that he did not visit the place of occurrence. In the sketch map, the name of the village was not mentioned. He stated that the alamats was not produced today in court. He denied the suggestion that he deposed falsely.

No one appears on behalf of the convict petitioner.

The learned Assistant Attorney General, Mr A. Monnan appearing on behalf of the State submits that PW. 1 along with the staff of the Narcotics Control Department searched the house of the accused on the date and time of the occurrence and found that a cannabis tree was cultivated in his house and he seized the cannabis tree in presence of the witnesses and sent the alamats for the report of the chemical examiner. He further submits that the chemical examiner found cannabis in the alamot. P.Ws. 2 and 3 accompanied P.W. 1 at the time of searching the house of the accused. Although P.W. 4 was declared hostile, during cross-examination on behalf of the state he admitted that at the time of searching the house of the accused a cannabis tree was found. The prosecution witnesses proved the charge against the accused beyond all reasonable doubt and both the courts below arrived at a concurrent finding of guilt of the accused. Therefore, he prayed for discharging the rule.

I have considered the submission of the learned Assistant Attorney General who appeared on behalf of the state, perused the evidence, the impugned judgment and order passed by the courts below and the records.

On perusal of the evidence, it appears that on 11.11.1997 at 1.30 pm P.W. 1 along with six other staff of the Narcotics Control Department searched the alleged house of the accused Md. Habibur Rahman. He stated that there were 2 houses beside the house of the accused but he could not say the name of the owner of those houses. During cross-examination, he stated that at the time of the search, he did not find the neighbouring respectable persons. He also affirmed that in the presence of two witnesses, he conducted the search and that one Moniruzzaman had written the FIR and Sub-Inspector Muklesur Rahman prepared the seizure list. The witnesses mentioned in the seizure list are respectable persons. During cross-examination, P.W. 2 stated that the informant prepared the seizure list at the place of occurrence and that at the time of searching the house, the local respectable persons including one Imam were present there. During cross-examination, P.W. 3 stated that he could not remember the exact location of the cannabis tree. P.W. 4 Md. Osman Ali was declared hostile. However, he stated that at the time of the search of the house of the accused a cannabis tree was found there. During cross-examination on behalf of the accused, he stated that he could not say anything where from the cannabis tree was recovered and his house is situated far from the house of the accused and he is not aware of the occurrence.

On perusal of the sketch map and index (exhibits 3 and 4), it reveals that the name of the village of the place of occurrence was not mentioned in the sketch map. In the sketch map 'D' has been shown as the place of occurrence which is situated in front of the kitchen. The kitchen is situated on the south side of the 'A' which is the alleged house of Habibur Rahman. In the index, it has been mentioned that the houses of Khaimuddin and

Zeker were situated to the west and east side of the place of occurrence. Admittedly many other respectable persons were present at the time of searching the alleged house. The occurrence took place at 1.30 pm in a brought daylight. Admittedly, at the time of occurrence, the accused was not present at the place of occurrence. Out of 2 seizure list witnesses Md. Osman Ali was examined as P.W. 4 but he was declared hostile and during cross-examination made on behalf of the State and the defence, he made the contradictory statement as regards the recovery of the alleged alamots. Therefore, I am of the view that P.W. 4 Md. Osman Ali is not a reliable and trustworthy witness. No explanation has been given by the prosecution as to why the seizure list witness Md. Nuzrul Islam was not examined in the case.

In the FIR it has been mentioned that the father of the accused was alive. P.W. 5 investigating officer stated that during the investigation he did not verify that the accused was the owner of the house. The accused was not present at the time of the alleged recovery of alamot. Therefore, there is doubt about the actual owner of the house where from alleged cannabis tree was recovered. Furthermore, the respectable persons who were admittedly present at the time of the alleged recovery of the cannabis tree were not examined in the case.

On perusal of the evidence, it further appears that one Moniruzzaman wrote the FIR but he was not examined in the case. P.W. 1 stated that P.W. 2 Moklesur Rahman prepared the seizure list but P.W. 2 stated that the informant prepared the seizure list which also creates doubt about the alleged recovery of cannabis tree from the house of the accused.

The report of the chemical examiner is not proved in the case. In the absence of the report of the chemical examiner, it cannot be held that cannabis tree was recovered from the alleged house of the accused.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgment and order of conviction and sentence passed by the courts below against convict petitioner Md. Habibur Rahman is hereby set aside.

Send down the lower Court's record at once.