

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

**Present:**

**Mr. Justice Md. Shohrowardi**

**Criminal Revision No. 217 of 2007**

**Md. Mobarak Ullah**

.....**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 01.02.2024**

**Judgment delivered on 04.02.2024.**

The Rule under section 439 read with section 535 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 date 26.2.2007 passed by Metropolitan Additional Sessions Judge, Court No.5, Dhaka in Metropolitan Criminal Appeal No. 575 of 2006 affirming the judgment and order of conviction and sentence dated 29.6.2006 passed by Metropolitan Assistant Sessions Judge, Court No. 7, Dhaka in Metropolitan Session Case No. 315 of 2000 arising out of Gulshan P.S. Case No. 27 dated 04.12.1998, corresponding G.R. Case No. 2636 of 1998 convicting the petitioner under section 22(Ga) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentencing him thereunder to suffer rigorous imprisonment for 02 years and to pay a fine of Tk. 2000, in default, to suffer

imprisonment for 03 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 the informant Police Inspector Md. Fazlul Hoque of Narcotics Control Department, Gulshan Circle, Dhaka based on secret information along with the Assistant Director S.M. Mahfuzur Rahman, Inspector Md. Kabir Uddin, Md. Tafazzal Hossain Howlader forming a raiding party on 03.12.1998 at 11/11.30 pm encircled the under-construction House No. 28, Road No. 9, Banani and detained accused Md. Mobarak Ullah who was the guard of the said house. On interrogation, at the instance of the accused recovered 08 bottles of Glen Castle Scotch Whisky and 03 bottles of Napoleon Brandy foreign wine kept under the soil on the east side of the house near the wall. The seizure list was prepared at the place of occurrence and the witnesses signed the seizure list. The informant also signed the seizure list. He sent one bottle of Glen Castle Scotch Whisky for the report of the chemical examiner. Total of 11 litres of foreign wine (one litre in each bottle) was recovered and the accused was detained and handed over to the police.

P.W. 4 Subod Kumar Biswas, Inspector Gulshan Circle of Narcotics Control Department was appointed as the investigating officer of the case. During the investigation, he sent the alamat for the report of the chemical examiner, recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure, 1898, visited the place of occurrence and prepared the sketch map and index. After completing the investigation submitted charge sheet against the accused on 30.07.1990 under section 22(Ga) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০.

After that, the case record was sent to the Metropolitan Assistant Sessions Judge, Court No. 7, Dhaka for trial. On 04.09.2000 the charge was framed against the accused under section 22(Ga) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ which was read over and explained to the accused present in court and he pleaded not guilty to the charge and claimed to be tried following law. The prosecution examined 4 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.

After concluding the trial, the trial court by judgment and order dated 29.06.2006 convicted the accused under section 22(Ga) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentenced him thereunder to suffer rigorous imprisonment for 02 (two) years and a fine of Tk. 2000, in default, to suffer imprisonment for 3 months more against which the convict petitioner filed Metropolitan Criminal Appeal No. 575 of 2006 to the Metropolitan Sessions Judge, Dhaka and the appeal was heard by Metropolitan Additional Sessions Judge, Court No. 5, Dhaka. The appellate court below by impugned judgment and order dated 26.02.2007 affirmed the judgment and order passed by the trial court against which the convict petitioner obtained the instant Rule.

P.W. 1 Md. Baha Uddin is a Sepoy of the Directorate of Narcotics Control Department, Jessore Sub Area. He stated that on 03.12.1998 he was posted at Gulshan Circle, Dhaka. He was a member of the raiding party headed by Inspector Fazlul Haque. On that day at 21.00 hours, he raided the under-construction House No. 28, Road No. 9, Banani under Gulshan Thana and arrested the accused Mobarak Ullah who was the guard of the said house. On interrogation, he brought out 8 bottles of Glen Castle Scotch Whisky and 03 bottles of Napoleon Brandy (one litter in each bottle) kept under the soil from the east side along the wall. The informant prepared the seizure list at the place of occurrence and took the signatures of the witnesses. He sent one bottle of foreign whisky for the report of the chemical examiner and detained the accused. He identified the accused in court. During cross-examination, he stated that following the instruction of the informant, he went to the under-construction house. He could not say whether the two witnesses mentioned in the seizure list were the employees of the contractor of the house. The accused was the guard of the under-construction house. He could not say whether the accused guarded the house for 24 hours. He denied the suggestion that no

goods were recovered from the possession of the accused and no alamat was recovered at the instance of the accused.

P.W. 2 Md. Fazlul Haque is the Inspector of the Narcotics Control Department, Pabna Sadar Circle. He stated that on 03.12.1998 while he was posted at Gulshan Circle, Dhaka he along with departmental staff and police force forming a raiding party at 9 pm encircled the under-construction House No. 28, Road No. 9, Banani under Gulshan Thana in the presence of witnesses and at the instances of the accused Md. Mobarak Ullah recovered 08 bottles of Glen Castle Scotch Whisky, (one litre in each bottle) and 03 bottles of Napoleon Brandy wine (one litre in each bottle) kept under the soil to the east side of the house near the wall. He prepared the seizure list and sent one bottle of Glen Castle Scotch Whisky for the report of the chemical examiner and detained the accused. On that night, the accused was kept under the custody of the Ramna Thana and lodged the FIR on the next day at Gulshan Thana. He proved the seizure list as exhibit-1 and his signature as exhibit-1/1. He proved the FIR as exhibit-2 and his signature as exhibit-2/1. During cross-examination, he stated that out of 08 bottles of Glen Castle Scotch Whisky one bottle was sent for the report of the chemical examiner and he produced 03 bottles of Napoleon Brandy wine and 07 bottles of Glen Castle Scotch Whisky as material exhibit-I series. During cross-examination, he stated that he raided the under-construction House No. 28, Road No. 9 along with the members of the raiding party and the accused is the guard of the said house and there was a boundary wall to the four corners of the house and no other person was present there. On interrogation, he brought out 11 bottles of foreign wine. The total value of goods was Tk. 5,500. None of the adjacent people was cited as a witness in the case. The owner of the house was not present at the time of recovery for which he was not cited as a witness. After arrest, the accused was taken to Ramna Thana. He denied the suggestion that the accused was falsely implicated in this case.

P.W. 3 Ayat Ali is the S.I. of the Narcotics Control Department, Chandpur Circle. He was tendered by the prosecution and declined by the defence.

P.W. 4 Subodh Kumar Biswas is the Inspector of the Narcotics Control Department, Bandar Circle, Chattogram. He stated that on 08.06.1999 he took up investigation of the case as per order of the authority and received the records from the previous investigating officer Md. Fazlul Haque. During the investigation, he found that the alamat was sent for the report of the chemical examiner and the statement of 2 witnesses was recorded under section 161 of the Code of Criminal Procedure, 1898. 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. During the investigation, he recorded the statements of 3 witnesses who were the members of the raiding party. He received the report of the chemical examiner on 24.02.1999. He proved the report as exhibit 5. After completing the investigation, he found the prima facie truth of the allegation against the accused and submitted charge sheet on 30.07.1999 against the accused under section 22(Ga) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০. During cross-examination, he stated that the first investigating officer was Inspector Fazlul Haque. The occurrence took place on 04.12.1998 and he took up investigation of the case on 30.06.1999. The under-construction house was 2/5 storied building. There was a boundary of the building and the accused was the guard of the under-construction house. He denied the suggestion that he was falsely implicated in this case.

None appears on behalf of the accused.

The learned Assistant Attorney General, Mr. A. Monnan appearing on behalf of the State submits that P.W. 2 Md. Fazlul Haque is the informant and he stated that 11 litres of foreign whisky was kept in the possession of the accused and he was the guard of the house where from the alamat were recovered. The evidence of P.W. 2 is corroborated by P.W. 1 who is also a

member of the raiding party and the prosecution witnesses proved the charge against the accused beyond all reasonable doubt.

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

On perusal of the records, it appears that P.Ws. 1 and 2 are the members of the raiding party. They stated that 11 bottles of foreign whisky (one litre kept in each bottle) were recovered at the instance of the accused kept under the soil of the under-construction building and the accused was the guard of the said house where from the foreign whisky was recovered. P.W. 3 Ayet Ali is the S.I. of the Narcotics Control Department and he was tendered by the prosecution. P.W. 4 is the Investigating Officer, P.W. 1 is Sepoy and discharged his duty under P.W. 2.

On perusal of the seizure list dated 03.12.1998, it reveals that one Ignacius and Md. Nazrul Islam are the witnesses of the seizure list but they were not examined by the prosecution. In the sketch map and index (exhibits 3 and 4) it has been mentioned that Dr. Shamim Ahmed is the owner of the under-construction House No. 28, Road No. 9, Banani which is the place of occurrence. Major Abdul Motin is the owner of House No. 29 and Mr Farid is the owner of House No. 27 and Dr Shakil Bin Mazid is the owner of House No. 12 which were situated around House No. 28. None of the residents or employee of those houses was examined by the prosecution.

The preparation of the seizure list at the time of recovery of the alamt is not without any purpose. The recovery of the contravened items in the presence of reliable and independent witnesses protect the accused from harassment by the police or false implication at the instance of others. The place of occurrence is an under-constructed house and the employees of the contractor of House No. 28 was neither cited as a witness nor made accused in the case. Therefore in the given facts, non-examination of the seizure list

witnesses creates doubt about the truth of the recovery of the contravent items or narcotics from the possession of the accused.

The prosecution witnesses admitted that the accused Md. Bobarak Ullah is the guard of the under-constructed House No. 28 which is the place of occurrence. Mere knowledge about any prohibited goods in a particular place is not an offence. Dr. Shamim is the owner of the house and many workers of the contractor entered into the place of occurrence. Therefore, it cannot be said that the guard of the house kept the recovered foreign wine under the soil of the building. Furthermore, report of the chemical examiner was not proved by the prosecution to prove that narcotics was found in the recovered bottles.

Because of the given facts and the circumstances of the case, I do not find any confidence on the evidence of P.W.s 1 and 2 to affirm the judgment and order of conviction and sentence passed by the courts below without corroboration of the seizure list witnesses, neighbouring witnesses and the employees of the contractor. The prosecution failed to prove the charge against the accused beyond all reasonable doubt. The courts below without proper assessment and evaluation of the evidence mechanically passed the impugned judgment and order convicting the accused.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgment and order passed against the convict petitioner Md. Mobarak Ullah by the courts below is hereby set aside.

Send down the lower Court's record at once.

