

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 564 of 2007

Md. Eusuf Ali

...Convict-petitioner

-Versus-

The State

...Opposite party

Ms. Saleha Islam, Advocate

...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 18.01.2024, 24.01.2024, 25.01.2024  
and 01.02.2024**Judgment delivered on 04.02.2024**

On an application under Section 439 of the Code of Criminal Procedure, 1898 filed by the convict-petitioner Md. Eusuf Ali Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 10.04.2007 passed by Metropolitan Additional Sessions Judge, Court No. 5, Dhaka in Metropolitan Criminal Appeal No. 48 of 2007 affirming the judgment and order of conviction and sentence dated 20.12.2006 passed by Metropolitan Magistrate, Court No. 11, Dhaka in Khilgaon Police Station Case No. 29(7)2003 corresponding Narcotics G.R. No. 244 of 2003, TR No. 698 of 2003 convicting the petitioner under Section 19(1)/7(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentencing him thereunder to suffer rigorous imprisonment for 1(one) year should not be set aside and/or pass such other or further order or orders as to this Court may deem fit and proper.

The prosecution case, in short, is that on 14.07.2003 at 4-4.30 pm the informant Md. Abdullah Bhuiyan, Sub-Inspector of Narcotics Control Department, Dhaka based on secret information along with departmental Assistant Director Md. Fazlur Rahman, Md. Tojammel Haque, Abdul Motaleb, Sepoy Md. Liakat Hossain, Md. Taijul Islam,

Md. Taj Uddin, Md. Nazmul Huda, Md Mujibar Rahman and Md. Eusuf having formed a raiding party encircled the house of accused Md. Eusuf Ali situated at 260/B, Khilgaon Chowdhury Para, Dhaka and in presence of neutral witnesses Md. Selim Mia and Hydul searched the bhiti hut of the accused Md. Eusuf Ali and recovered cannabis and money kept under the cot and prepared a seizure list at the place of occurrence. He took the signatures of the witnesses on the seizure list. He also signed the seizure list and sent 5 grams of cannabis for the report of the chemical examiner.

P.W. 1 informant Md. Abdullah Bhuiyan, Sub-Inspector of the Narcotics Control Department, took up investigation of the case, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898, visited the place of occurrence, prepared a sketch map and index, and collected the report of the chemical examiner on 26.07.2003. After completing the investigation found prima facie truth of the allegation against the accused and submitted charge sheet on 11.08.2003 under Section 19(1)/7(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ against the accused.

During the trial, charge was framed against the accused under Section 19(1)/7(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ which was read over to him and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 4(four) witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he again pleaded not guilty. After concluding the trial, the Metropolitan Magistrate, Court No. 11, Dhaka by judgment and order dated 20.12.2006 convicted the accused under Section 19(1)/7(Ka) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentenced him thereunder to suffer rigorous imprisonment for 1(one) year against which the convict-petitioner filed Criminal Appeal No. 48 of 2007 in the Court of Sessions Judge, Dhaka. The appeal was heard by Metropolitan Additional Sessions Judge, Court No. 5, Dhaka who

by impugned judgment and order dated 10.04.2007 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. Abdulla Bhuiyan is the Inspector of Narcotics Control Department and the informant of the case. He stated that on 14.07.2003 at 16.00-16.30, he along with the members of the raiding party encircled the north bhiti tinshed house of accused Md. Eusuf Ali situated at 53/2 Meradia Porabarimor, Khilgaon, Dhaka and in the presence of neutral witnesses recovered 900 grams of cannabis and Tk. 300 kept under the cot in a black and red bag made of cloth. The members of the raiding party also recovered a Motorola mobile set from the right hand of the accused and prepared the seizure list at the place of occurrence. He proved the seizure list as exhibit 1 and his signature as exhibit 1/1. He proved the seized alamat as material exhibit Ka. He kept 5 grams of cannabis separately and preserved it. He detained the accused and subsequently lodged the FIR. He proved the FIR as exhibit 2 and his signature as exhibit 2/1. During cross-examination, he stated that the FIR was not written by him. A sepoy wrote the FIR. He signed the FIR. He reached the place of occurrence at 4 pm. At the time of encircling the house of the accused, there was no public. He affirmed that at the time of entering the house, there was a public. He searched the body of the accused. Witness No. 1 mentioned in the seizure list searched the body of the accused but he could not say his name. There was one door and one window in the house. Subsequently, he stated that there was two doors and two windows. There was other houses adjacent to the house of the accused. In column Nos. 2, 5 and 6 of the seizure list name of the accused was not mentioned. He wrote the seizure list. He denied the suggestion that he did not enter into the house of the accused and no cannabis was recovered from his possession. He denied the suggestion that forcibly he had taken the signature of the accused.

P.W. 2 Abdul Motaleb is the Superintendent of the Narcotics Control Department. He stated that on 14.07.2003 at the request of the S.I. Abdullah Bhuiyan, he along with the departmental staff having formed a raiding party encircled the tin-shed bhiti hut of the accused Md. Eusuf Ali situated in the Meradia Porabari area under Khilgaon Thana. The informant along with two locals searching the bhiti hut of the accused recovered 900 grams of cannabis kept under the cot of the accused in a black and red bag made of cloth. The informant also recovered Tk. 300 and a mobile set. He prepared the seizure list. He seized 5 grams of cannabis. He claimed that he witnessed the entire recovery. During cross-examination, he stated that he reached the place of occurrence at 4 pm. The informant prepared the seizure list. The house of the accused was north-facing and there was a door. He could not say how many doors were there in the bhiti hut. There were many houses beside the house of the accused. The house of the accused was opened. The informant entered the house. He heard from the informant that the accused lived in the house. At that time, the accused was present in the said bhiti hut. He denied the suggestion that the members of the raiding party did not enter into the house and he was falsely implicated in the case.

P.W. 3 Md. Selim Mia is the witness on the seizure list. He stated that on 14.07.2003 at 4 pm, police called him to sign and accordingly he signed. He proved his signature. During cross-examination, he stated that he did not see recovery of anything from the accused. He affirmed that he signed following the instruction of the police. He denied the suggestion that he falsely deposed in the case.

P.W. 4 Md. Abdulla Bhuiyan is the Investigating Officer as well as the Investigating Officer. He stated that on 17.07.2003, he took up investigation of the case and visited the place of occurrence. He prepared the sketch map and index. He proved the sketch map and index as exhibit 3 and his signature as exhibit 3/1. He recorded the statement of witnesses under Section 161 of the Code of Criminal

Procedure, 1898. On 26.07.2003, he obtained the report of the chemical examiner. He proved the report as Exhibit 4. After concluding the investigation, he submitted charge sheet on 11.08.2003 against the accused. During cross-examination, he stated that at 4.00-4.30 pm, he prepared the seizure list. It took 25 minutes. He affirmed that in the FIR, he did not mention the time and he did not write the FIR. He prepared the seizure list. The house was north-facing and there were many houses beside the house of the accused. The House of Kalam was situated to the north, house of Mizan was situated to the south. They were not cited as witnesses in the case.

Learned Advocate Ms. Saleha Islam appearing on behalf of the convict-petitioner submits that admittedly a ten-member raiding party searched the alleged house of the accused and there was public at the time of the alleged search of the alleged house of the accused and in the presence of the neutral witnesses the raiding party conducted the search but prosecution only examined P.W. 1 informant Md. Abdullah Bhuiyan, P.W. 2 Abdul Motaleb and P.W. 3 Md. Selim Mia. Although P.W. 2 is a seizure list witness, he did not corroborate the evidence of P.Ws. 1 and 2 regarding the recovery of the alleged cannabis from possession of the accused and the prosecution also did not examine the seizure list witness Hydul. P.W. 4 is the Investigating Officer as well as the informant and was also examined as P.W. 1. The prosecution failed to prove the charge beyond all reasonable doubt against the accused by adducing independent and reliable witnesses.

Learned Assistant Attorney General Mr. A. Monnan (Manna) appearing on behalf of the State submits that P.W. 1 recovered 900 grams of cannabis from the north-facing bhiti hut of the accused kept under the cot in a black and red bag made of cloth. P.W. 2 corroborated the evidence of P.W. 1 regarding the recovery of the cannabis from the possession of the accused. He further submits that no particular number of witnesses is required to prove the charge against the accused. The prosecution witnesses cannot be disbelieved because they are police

personnel or departmental officers of the government. The prosecution witnesses proved the charge against the accused beyond all reasonable doubt.

I have considered the submission of the learned Advocate Ms. Saleha Islam who appeared on behalf of the convict-petitioner and 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 the prosecution examined four witnesses to prove the charge against the accused. P.W. 1 Md. Abdulla Bhuiyan is the informant as well as the Investigating Officer of the case and P.W. 2 is the Superintendent of the Narcotics Control Department and P.W. 3 is a witness of seizure list. P.W. 4 is the Investigating Officer and he was also examined as P.W. 1.

P.W. 1 Md. Abdulla Bhuiyan stated in the FIR that he along with the nine other members of the patrol party raided the house of the accused on 14.07.2003 at 4.00 pm and recovered cannabis from the house of the accused kept under the cot of the house in a black and red bag made of cloth. P.W. 2 corroborated the evidence of P.W. 1 as regards the recovery of cannabis. In the report of the chemical examiner (exhibit 4), it has been mentioned that “কাগজের প্যাকেটে রক্ষিত সবুজাতো বাদামী গুলু “গাঁজা”। সীল মোহর অক্ষত ছিল।” During cross-examination, P.W. 1 stated that there were many houses beside the house where from the cannabis was recovered. The House of Kalam was situated to the north, house of Mizan was situated to the south but they were not examined in the case. In the seizure list, it has been mentioned that the alleged cannabis was recovered in the presence of witnesses Md. Selim Mia and Hydul who are the locals. Hydul was not examined by the prosecution. Although Md. Selim Mia was examined as P.W. 3 but he did not corroborate the evidence of P.Ws. 1 and 2 as regards recovery of the alleged cannabis from the house of the accused. During cross-examination, P.W. 2 affirmed that including the driver, there were

eleven members of the raiding party but the prosecution only examined P.Ws. 1 and 2 out of the eleven members of the raiding party.

On perusal of the evidence of P.Ws. 1, 2, sketch map and index (exhibit 3), it reveals that there were many houses including the house of Hydul, Jabalia Molla, Mizan, Kalam and many others adjacent to the place of the accused. In the FIR, the informant stated that in the presence of neutral witnesses, he searched. None of the locals was examined by the prosecution to prove that the accused was the owner of the alleged house where from the alleged cannabis was recovered. No explanation was given by the prosecution as to why only P.Ws. 1 and 2 were examined by the prosecution out of eleven members of the raiding party. In the FIR, the informant only stated that he recovered cannabis and money kept under the cot of the house of accused Md. Eusuf Ali. No quantity of cannabis has been mentioned in the FIR. In the FIR form, it has been mentioned that 900 grams of cannabis was recovered from the house of the accused. During cross-examination, P.W. 1 affirmed that a sepoy wrote the FIR, but he was not examined in the case.

There is no particular number of witness to prove the charge but the prosecution is bound to prove the charge against the accused by adducing independent, reliable and trustworthy witnesses of the case. A witness cannot be disbelieved only on the ground that he is a police personnel. Although the evidence of P.W. 1 is corroborated by P.W. 2, P.W. 3 did not corroborate the evidence of P.W. 1 and 2 as regards recovery of the alleged cannabis from possession of the accused.

In view of the above evidence, the facts and circumstances of the case and the findings, I do not find any confidence on the evidence of P.Ws. 1 and 2 to affirm the judgment and order of conviction passed by the Courts below. Due to the non-examination of the seizure list witness Hydul and the neighbouring people of the alleged house of the accused, an adverse inference is required to be drawn against the prosecution.

Both the Courts below failed to assess and evaluate the evidence of the prosecution witnesses following law and arrived at a wrong decision in passing the impugned judgments and orders of conviction and sentence against 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 the convict-petitioner Md. Eusuf Ali are hereby set aside.

Send down the lower Court's records at once.