

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

Present:

Mr. Justice Md. Akram Hossain Chowdhury

And

Mr. Justice Mohammad Showkat Ali Chowdhury

Criminal Appeal No. 1778 of 2011

IN THE MATTER OF:

An appeal under Section 410 of the Code of
Criminal Procedure

-AND-

IN THE MATTER OF:

Wali Miah @ Ole Miah and another

..... Convict-Appellants

-Versus-

The State

..... Opposite party

Mr. Abdullah Al Baki, Advocate with

Mr. Quide Azam Iqbal, Advocate

-----For the Convict-Appellants

Mr. Md.Fazlur Rahman Khan, DAG with

Mr. Md. AwladHossain, AAG

----- For the State.

Heard on 24.01.2024.

Judgment on: 25.01.2024.

Mohammad Showkat Ali Chowdhury, J:

This appeal is directed against the judgment and order of conviction and sentence dated 02.03. 2011 passed by the learned Additional Sessions Judge, 2nd Court, Brahmanbaria in Sessions Case No.314 of 2009 arising out of Nabinagar Police Station Case No.15 dated 20.05 2009 corresponding to G.R No. 68 of 2009 convicting the appellants under table 3 (Kha) of section 19(1) of the Madak Drabbiya Niatran Ain, 1990 (in short the Ain, 1990)

and sentencing them thereunder to suffer imprisonment for life and also to pay a fine of Tk.5,000/- each, in default to suffer imprisonment for a further period of 6(six) months more.

2. The prosecution case as projected in the FIR, in brief, are that the Informant, namely, Sub-Inspector Ranjon Kumar Ghosh, in-Charge of Salimgonj Naval Police outpost has lodged an FIR with Nabinagar Police Station, District-Brahmanbaria alleging inter alia that on 20.05.2009 at about 19.30 hours, he having got a secret information that one Wali Miah @ Ole Miah and his wife Sofiyia Khatun who are the inhabitants of last side of Dovachail village under Nabinagar Police Station have been dealing with Narcotics business and they stocked various types of Narcotics in their homestead. The Informant having the said information informed the matter to his higher authority and at the direction of the higher authority he along with Naiak A. Awal, Constable, 339, Humiyun Kabir, Constable 486 Humayun Kabir, Constable 793 Babul Kanti Dey and Constable 233 Samadul Hossain pursuant to G.D entry No. 429 dated 19.05.2009 of Salimgonj Naval Police out post moved towards Dovachail village and on 20.05.2009 at about 2.10 a.m.(night) while they arrived at the house of Wali Miah, on sensing the presence of the police personnel, the accused Wali Miah and his wife Sofiyia Khatun tried to escape themselves by running but at that moment, the Informant with the help of his companion force arrested the accused Wali Miah and his wife Sofiyia Khatun. In the meantime, surrounding people, namely, Mahtab Miah, Sajidul Islam, Dipal Chakrabarti and Md. Moti Miah came to the house of Wali Miah. The Informant in presence of the people asked the accused about the wine and phensedyl and

confessed that they secretly have been dealing with the business of wine and phensedyl. The accused in front of the witnesses brought out 44 bottles of wine as kept in a plastic sack and 22 bottles of phensedyl brought from under neth of the wooden made Chowki of their homestead. The Informant seized those incriminating wine and phensedyl in presence of the witnesses and brought the accused and alamats in the Police Station and has lodged the FIR on that day on 20.05.2009 at 11.30 hours.

3. On the basis of that FIR, the above-mentioned case was started against the convict appellants. The Officer-in-Charge of Nabinagor Police Station was entrusted the investigation of the case upon the Informant of the case, S.I. Ranjon Kumar Ghosh who after investigation having finding prima facie case submitted charge sheet against the convict appellants under section 19(1) of table 3(Kha), of the Ain, 1990.

4. Then in due course the case record was sent to the Court of learned Sessions Judge, Brahmanbaria for its trial who after taking cognizance against the convict appellants under section 19(1) of table 3(Kha) of the Ain, 1990 transferred the case record to the learned Additional Sessions Judge, 2nd Court, Brahmanbaria for its trial and disposal.

5. The learned Additional Sessions Judge, 2nd Court, Brahmanbaria, on perusal of the case record and hearing both the sides has framed the charge in the case against the convict appellants Wali Miah @ Ole Miah and his wife Sofiyia Khatun under section 19(1) of table 3(Kha) of the Ain, 1990 and read over the said charge to the convict appellants who however pleaded not guilty and claimed to be tried.

6. The Investigating Officer after investigation cited 15(fifteen) witnesses in the charge sheet to prove the charge but at the time of trial, the prosecution was able to produce and examine as many as 09(nine) witnesses to prove the charge as framed against the convict appellants. After closure of the prosecution witnesses, the convict appellants on the dock were examined under section 342 of the Code and they again pleaded their innocence, and declined to adduce any defence witness.

7. The defence case, as it appears from the trend of cross examination of the prosecution witnesses are that of innocence and false implication the convict appellants in the case.

8. The learned Additional Sessions Judge, 2nd Court, Brahmanbaria after conclusion of the trial pronounced the judgment and order of conviction and sentence dated 02.03.2011 against the appellants as stated above.

9. The convict appellants being aggrieved by and dissatisfied with the said impugned judgment and order of conviction and sentence dated 02.03.2011 preferred this criminal appeal before this Court.

10. Mr. Abdullah Al Baki appearing with Mr. Quide Azam Iqbal, the learned Advocates on behalf of the convict appellants submits that P.W.1 Police Constable No.339, Md. Humayun Kabir, PW.2 Constable 486, Md. Humayun Kabir and local public witnesses, namely, P.W.3 Sajedul Islam Shaymol, P.W.4 Ruhul Amin, P.W.7-Dipal Chakraborty & P.W.8 Moti Miah in their testimonies did not support the prosecution case and in their testimonies, they stated that they did not see the recovery of seized

incriminating articles from the possession of the convict appellants.

11. He further submits that though the raiding party member P.W.6, Police constable No.233 Samadul Hossain supported the Informant but still there remains contradictions between their testimonies on the point of presence of local member and elite persons and his presence in the place of occurrence is also doubtful.

12. He next argues that the Investigating Officer who as P.W.9 even deposed but he is also being the Informant the question of impartiality in conducting the investigation should be looked into with doubt. He goes to contend that in true sense, it is a case of no evidence. The convict appellants have been falsely implicated in the case and hence the impugned judgment and order of conviction and sentence is found based on surmise and conjecture and therefore, the learned Advocate prayed for allowing the appeal and thereby to acquit the convict appellants.

13. Per contra, Mr. Fazlur Rahman Khan, the learned Deputy Attorney General appearing with Mr. Ashraf Hossain and Ms. Nurun Nahar Nupur, the learned Assistant Attorney Generals on behalf of the State by opposing the submission of the learned Advocate for the convict appellants contended that though the local public witnesses did not support the prosecution case but in spite of that on the basis of the testimonies of the police personnel conviction can well be recorded, if it inspires the confidence of the court.

14. The learned Deputy Attorney General next submits that there is no bar in conducting the investigation of a case by the

Informant who is the police officer. He thus contends that the impugned judgment and order of conviction and sentence suffers from no illegality and supporting the impugned judgment and order of conviction and sentence, he has prayed for dismissal of this criminal appeal.

15. We have heard the learned Advocate for the convict appellants and the learned Deputy Attorney General along with the Assistant Attorney Generals for the State as well and perused the materials on record and the relevant provisions of law and also the decisions of our Hon'ble Apex Court and decisions of the Indian Supreme Court on the point of the fate of conducting the investigation by the Informant of the case.

16. Before considering the submissions of the learned Advocates for the respective parties, it is necessary to peruse and discuss and scrutinize the evidence adduced by the prosecution witnesses.

17. P.W.1 Police Constable No.339 Md. Humayun Kabir in his testimony testified that on 19.05.2009 under the leadership of S.I. Ranjon Kumar Ghosh along with other companion force at 2.10 a.m. (night) they went to the Dovachail village and encircled the house of convict appellants Wali Miah and his wife Sofia Khatun with a view to recover Narcotics materials. Sub-Inspector Ranjon Kumar and Habilder searched the house of the convict appellants and recovered 22 bottles of phensedyl and 44 bottles of illegal wine from their possession in presence of the witnesses and seized those alamats and then they came to the Police Station with the arrested accused and alamats. He further stated that their officer lodged the FIR and he helped his officer in this matter. In

cross-examination, he said that Constable No.339 Humayun Kabir was on duty outside of that house and he did not recover any goods. He further admitted that he was not aware who else came to the place of occurrence from the surrounding houses and they did not go there with the public. The seizure list was prepared at the light. He could not remember whether the member and chairman came to the place of occurrence or not.

18. P.W.2- Constable No.486 Md. Humayun Kabir in his testimony testified that on 19.03.2009 he went to Dovachil Village under the leadership of S.I. Ranjon Kumar Ghosh with other members of the companion force and encircled the house of the accused persons. S.I. Rahjon Kumar Ghosh in presence of the witnesses seized the narcotics materials. In cross-examination, he admitted that another Humayun Kabir (Constable No. 339) and he was posted outside the house in giving guard. He admitted that he did not give any statement to the Investigation Officer.

19. P.W.3-Sajedul Islam Shaymol in his testimony testified that on 20.05.2009 the police brought the accused Wali Miah and another woman by saying that narcotics were recovered from the possession of the accused. He admitted the seizure list and his signature thereon as Exhibits -1 and Exhibit-1(1) and he also identified the accused in the doc. In cross-examination he admitted that he did not see the recovery of any alamats from the possession of the accused.

20. P.W. 4 Ruhul Amin in his testimony testified that the accused Wali Miah and his wife Sofiyia Khatun were known to him and he heard that on 20.05.2009 the police arrested them. The defence declined to cross examine him.

21. P.W. 5-Sub-Inspector Ranjon Kumar Ghosh who is the Informant of the instant case, in his testimony testified that on 19.05.2009 while he was on duty at Salimgonj Naval Police out post at about 19.30 hours, on the basis of the secret information he along with his companion force went to the Dovachail village and encircled the house of the accused Wali Miah and his wife Sofia Khatun and on 20.05.2009 at 2.10 a.m. arrested the accused and during search, the accused as per their admission, had brought out 44 bottles of whisky and 22 bottles of Indian made phensedyl from under neth of chowki of their house and he seized those alamats under the seizure list. He also proved his signature on seizure list as Exhibits 1(2) and the FIR and his signature thereon as Exhibits 2 and 2(1) respectively. He further proved the seized alamats as Material Exhibits 1 series. In cross examination, he said that they arrested the accused while they tried to flee away and at that time Mahtab, Shaymol and many others came to the place of occurrence. They had been made witnesses in the seizure list. He denied the suggestion that he did not recover any goods from the house of the accused.

22. P.W.6- Constable No. 233 Shamadul Hossain who is the member of the raiding party, in his testimony testified that on 19.05.2009 he was posted at Solimgonj Naval Police outpost and he accompanied with the I.C Sub-Inspector Ranjon Kumar with other forces and at 19.30 hours they went to the Dovachail village and they searched the house of accused Wali Miah and his wife Sofia; on query they confessed that they possessed illegal narcotics and in presence of the witnesses they brought out 44 bottles of wine and 22 bottles of phensedyl and I.C seized those

alamats under the seizure list. In cross-examination, he said that they caught hold the accused Wali Miah and his wife Sofia and on hearing the hue and cry 30/40 persons came to the place of occurrence and he was present at the time of preparing seizure list. He denied the suggestion that no alamats were recovered from the possession of the accused.

23. P.W.-7 Dipal Chakrabarty who happened to be the public witnesses in his testimony testified that the occurrence was taken place on 20.05.2009 at 2.00 hours and the police arrested the accused Wali Miah and his wife and he heard that the police recovered phensedyl, Ganza and wine from the possession of the accused but he did not see any alamats. He further said that he made statement to the police. In cross examination, he admitted that he did not see any goods and he was not present at the time of arrest of the accused and he also did not see the recovery of any alamats from the possession of the accused.

24. P.W.8 Moti Miah in his testimony testified that he heard that Police/ RAB arrested the accused from the place of occurrence on 20.05.2009 at 2.00 hours. He did not see any goods and he also did not see the recovery of the any goods from the possession of the accused. In cross-examination, he also admitted that he did not see about the arrest of the accused by the police with the goods. The Police/RAB did not show any goods to them. He denied the suggestion that he adduced the false evidence before the court.

25. P.W.9- Sub-Inspector Sree Ranjon Kumar Gosh being Investigating Officer in his testimony testified that he was posted at Salimgonj Naval Police outpost as I.C on 20.05.2009 and on

being assigned to conduct the investigation, he had visited the place of occurrence, prepared Sketch Map and Index and put his signatures thereon as Exhibits 3 and 3(1) respectively. He further stated that he forwarded the accused to the court and took the seized narcotics under his custody and sample of the narcotics were sent to Dhaka for its chemical examination and he got the report of the chemical examination and he proved that chemical examination report as Exhibit 4. He further said that after investigation having finding the prima facie materials, he submitted charge sheet in the case against the accused. He also identified the accused in the doc. In cross-examination, he said that he seized the alamats under the seizure list. He denied the suggestion that he did not visit the place of occurrence and being influenced by others, he submitted charge sheet against the truth. He further denied the suggestion that no illegal narcotics were recovered from the possession of the accused. He denied the suggestion that he implicated the accused by giving the abandoned alamats.

26. We have carefully perused and scanned the materials on record and the evidences adduced and produced in the case by the prosecution witnesses . On careful analysis of the evidences of the prosecution witnesses, it appears to us that P.W.1 Constable No. 339 Md. Humayun Kabir and P.W.2 Constable No. 486 Md. Humayun Kabir being member of the raiding party at the relevant time, they encircled the house of the convict appellants but they did not enter into the house of the convict appellants and naturally they did not see the recovery of narcotics from the exclusive possession of the convict appellants, so the prosecution got no

support from them. P.W.3. Shajedul Islam Shaymol, P.W.4.Ruhul Amin, P.W.7 Dipal Chakrabarty and P.W.8. Moti Miah being public and neutral witnesses who also did not support the prosecution case and they in their testimonies unequivocally stated that they did not see the recovery of the said alamats from the possession of the convict appellants. The rest is remained the P.W.6 police constable No.233 Shamadul Hossain who was one of the members of the raiding party though supported the Informant but he failed to say exactly how many persons came to the place of occurrence. It is remarkable to note that P.W.6 police constable Shamadul Hossain in his testimony at the very outset of his testimony stated that he made search in the house of the accused Wali Miah and Sofiyia Khatun but this had not been supported by other witnesses. It further appears to us that P.W.1 Constable No.339 Md. Humayun Kabir in his testimony testified that S.I. Ranjon Kumar and Habilder entered into the house of the accused and made search, but P.W.6. Police Constable bearing No.233 Shamadul Hossain is not Habilder, so, as per the testimony of P.W.1, Constable No.339 Md. Humayun Kabir, P.W.6 Shamadul Hossain searched the house of the convict appellants appears to be the wrong version.

[Emphasis added]

27. It appears from the materials on record that S.I. Ronjon Kumar Gosh who is also the Informant of the case has conducted the investigation of the case as Investigating Officer. The learned Advocate for the convict appellants to that extent argued that the Informant if so investigate a case, then the doubt may arise about

the fairness of the investigation and accordingly the convict is entitled to be acquitted.

28. In the case of Gaziur Rahman Vs. the State, 12 BLD 11, wherein their Lordships observed, “now from the analysis of the entire evidence on record, it is now only P.W.1 who stands as the solitary witness to prove the prosecution case beyond all reasonable doubt. Admittedly he is the informant as well as the Investigating Officer in the case and naturally he is an interested witness”. On the other hand, in the case of Abdus Salam Vs. the Government of Bangladesh in writ Petition No. 5035 of 2020 with the case of T. Mashful Bobby Vs. Bangladesh and others in Writ Petition No. 6283 of 2020, their lordships elaborately discussed the decisions as made in the cases of Megha Singh Vs. State of Haryana, the case of Bhagwan Singh Vs. State of Rajasthan, the case of Mohon Lal Vs. State of Panjab, the case of Mokesh Singh Vs. the State (Narcotics Branch of Delhi) MANU/SC/0660/2020= AIR 2020 SC 4794, the case of Bhagwan Singh, Megha Singh, Rajanganm and Mohon Lal, State Vs. Jaypaul MANU/SC/0256/2004:5 SCC 223 and the decision of the larger Bench of the five judges of the Indian Supreme Court and their lordships in the above writ petitions held, “we have no hesitation to hold that there is no reason whatsoever to doubt the credibility of the informant and the investigation report solely on the ground that the Informant himself has investigated the case. Merely on the basis of some unfounded apprehension or the doubts, the entire prosecution version could not be discarded and the accused is not to be straightly discharged or acquitted unless and until the accused is able to establish and prove the bias and the

prejudice. The question of bias or prejudice requires to be established and it cannot be inferred. It would have to be decided on the facts of each case". We are respectful agreement with the decision of their lordships as laid down decision in the above writ petitions.

29. For the reasons narrated above, we disbelieve the Investigating Officer PW-9 S. I Ranjan Kumar Gosh not for conducting the case since he was the Informant but his evidence has not been corroborated by the members of his raiding party as well as independent and disinterested witness in material particular. From the above observations, it appears to us that if the Informant becomes the Investigating Officer and investigate the case the reasonable doubt may arise but the fate of the acquittal of the accused is not to be based on totally on that point and if the Informant is not supported by the evidences of other witnesses and accordingly, the testimony of such Investigating officer should not be taken as worthy of credit.

30. We have already found and discussed herein above that the members of the raiding party did not support the prosecution case and also the public witnesses did not see the recovery of the incriminating wine and phensedyl from the possession of the convict appellants. Moreover, members of the raiding party even were not examined by the Investigating Officer and from the above, it clearly ventilates before us that there is absence of fairness on the Investigating Officer S.I Ronjon Kumar Ghosh and for this reason he cannot be believed as disinterested witness in the case. The convict appellants by cross examining the

prosecution witnesses was able to establish and prove the bias and the prejudice.

[Emphasis added]

31. Having considered the facts and circumstances and evidence on record, it appears to us that the impugned judgment and order of conviction and sentence passed by the Trial Court is based on surmise and conjecture and accordingly the same suffers from serious legal infirmities. The learned Judge of the trial Court has failed to appreciate the evidences as produced and adduced in the case by the prosecution witnesses. Since this is a case under Section 19(1) table 3 (Kha) of the Ain, 1990 and the highest punishment prescribed for committing such offence by the Ain is the capital punishment, accordingly, the Learned Additional Sessions Judge, 2nd Court, Brahmanbaria ought to apply be cautious in course of assessment of the evidence adduced by the prosecution witnesses. But the said learned said Judge miserably failed to appreciate in doing so. But in such circumstances, it is our considered view that the awarding conviction and sentence is not sustainable in the eye of law and the interference of this appellate court is necessary for the sake of ends of justice and thus we find substance in the instant appeal and consequently, the impugned judgment and order of conviction and sentence dated 02. 3.2011 should be set-aside.

32. In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence dated 02.03.2011 passed by the learned Additional Sessions Judge, 2nd Court, Brahmanbaria is hereby set aside. The convict appellants Wali Miah@ Ole Miah and his wife Sofiyia Khatun are acquitted from

the charge leveled against them under section 19(1), table (Kha) of the Ain, 1990.

33. The convict appellants and their sureties are discharged from their respective bail bonds.

34. Let the L.C.R along with the copy of the judgment and order of this court be transmitted to the concerned Court, at once.

Md. Akram Hossain Chowdhury, J.

I agree