

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7635 of 2011

Md. Abu Sufian alias Suman

...Appellant

-Versus-

The State

...Respondent

No one appears.

...For the appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G with

Mr. Md. Shaifour Rahman Siddique Saif, A.A.G

...For the State

Heard on 11.10.2023

Judgment delivered on 17.10.2023

This criminal appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order of conviction and sentence dated 20.03.2007 passed by the Additional Sessions Judge, Moulavibazar in Session Case No. 90 of 2005 arising out of Sreemongal Police Station Case No. 15 dated 28.12.2004, G.R. No. 191 of 2004 convicting the appellant under Table 1(Ka) of Section 19(1) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and sentencing him to suffer imprisonment for 3(three) years.

The prosecution case, in a nutshell, is that A.S.I Prodip Kumar Das of Shreemongal Thana along with his force while was engaged in mobile duty on 29.12.2004 at night obtained secret information that accused Abu Sufian (Suman) is selling heroin in his house situated at Sindhurkhan Road. After that at 3.00 am A.S.I Prodip Kumar Das along with his force went to the house of the accused Abu Sufian (Suman) and detained him and searching his body recovered 11(eleven) puria heroin kept in a matchbox in the pocket of his shirt, a silver coin, one note of taka two and a dolphin matchbox and prepared the seizure list. The informant handed over the accused to Thana.

P.W. 3 S.I Md. Abu Yousuf took up the investigation of the case. 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 investigation, the investigating officer found prima facie truth of the allegation against the accused under Table 1(Ka) of Section 19(1) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০.

After that, the case record was transmitted to the Sessions Judge, Moulavibazar. On 23.07.2005 the charge was framed against the accused under Table 1(Ka) of Section 19(1) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ and at the time of the framing charge, the accused Abu Sufian (Suman) was absconding. The prosecution examined 6(six) witnesses to prove the charge against the accused. After granting bail, the accused absconded and the Court below by order dated 17.10.2006 cancelled the bail of the accused for which he was not examined under Section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which the accused filed the appeal.

P.W. 1 Constable No. 90 Alfaz Uddin stated that on 28.12.2004 at 3.00 am under the leadership of A.S.I Prodip Kumar Das he went to the house of accused Abu Sufian and recovered 11 puria heroin, a silver coin, one note of taka two and one matchbox from the possession of the accused and arrested him. During cross-examination, he stated that the heroin was found in the bed of accused Sufian. He was not known to him. He could not say the name of the owner of the house of the accused Abu Sufian. The informant A.S.I Prodip Kumar Das sitting in the house of accused Abu Sufian prepared the seizure list. He denied the suggestion that no heroin was recovered from the possession of the accused.

P.W. 2 Suman Mia is a witness of the seizure list. He stated that on 28.12.2004 at 3.30 am at night, A.S.I Prodip Kumar Das of Shreemongal Thana recovered 11 puria heroin, one silver coin, one note of taka two and one matchbox from accused Abu Sufian. He prepared the seizure list. He proved the seizure list as exhibit 1. He proved his signature on the seizure

list as exhibit 1/1. During cross-examination, P.W. 2 stated that A.S.I Prodip Kumar Das recovered the heroin from the third drawer of the Chester drawer. A.S.I. Prodip Kumar Das said at the place of occurrence that he recovered heroin. The seizure list was prepared at Thana. He signed the seizure list at Thana. He admitted that he is a boatman of Shreemongal Thana. He denied the suggestion that A.S.I Prodip Kumar Das recovered nothing from the possession of the accused. He denied the suggestion that in connivance with the police of Shreemongal Thana, he became the witness of the seizure list.

P.W. 3 Md. Abu Yousuf stated that on 28.12.2004 he was posted as S.I. at Shreemongal Thana. He is the investigating officer of the case. During the investigation, he visited the place of occurrence and prepared the sketch map and index. He sent the seized heroin for the report of the Chemical Examiner, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and collected the report of the Chemical Examiner. After completing the investigation, he found the prima facie truth of the allegation against the accused Abu Sufian and submitted charge sheet on 28.03.2005. He proved the sketch map as exhibit 2 and his signature as exhibit 2/1. He proved the index as exhibit 3 and his signature as exhibit 3/1. He proved the interpretation of the index as exhibit 4 and his signature as exhibit 4/1. He proved the report of the Chemical Examiner as exhibit 5 and the signature of the Chemical Examiner as exhibit 5/1. During cross-examination, he stated that the seized alamat was not produced in Court. In the FIR he did not mention the name of the owner of the house wherein the accused resides. In the place of occurrence house, there were 6 rooms. The accused was arrested from the southwest corner room of the house. The family members of the accused reside in 6 rooms. There were houses beside the house of the accused and the neighbour Khokan Mia is a witness of the case. He denied the suggestion that no heroin was recovered from the possession of the accused.

P.W. 4 A.S.I Md. Kamal Hossain is a member of the raiding party. He stated that on 28.12.2004 while under the leadership of A.S.I Prodip

Kumar Das was on duty, received secret information that heroin was selling in the house of accused Abu Sufian alias Suman situated at Sindurkhan Road. At 3.30 am the police personnel went to the house of the accused and found him in his house and recovered 11 puria heroin kept in his pocket, one silver coin, one note of taka two in the presence of witnesses and arrested the accused from the place of occurrence and handed over the accused along with the heroin to Thana. The accused Abu Sufian is present in Court today. During cross-examination, he stated that he did not sign the seizure list. The place of occurrence is the house of the accused Abu Sufian. Father of the accused is the owner of the place of occurrence. He went to the place of occurrence at the order of the Officer-in-Charge of Shreemongal Thana. There were three rooms in the houses of accused Abu Sufian. There were many houses besides the house of the accused. He denied the suggestion that he did not go to the place of occurrence.

P.W. 5 Basu Mitra Barua is a Constable of the Police. He was tendered and declined by the prosecution.

P.W. 6 A.S.I Prodig Kumar Das is the informant. He stated that on 28.12.2004 at 3.00 am he along with the officer and the members of the police force went to the house of the accused Suman Mia situated at Sindurkhan Road, Shreemongal and detained accused Suman Mia and searching his body recovered 11 puria heroin kept in the matchbox of his shirt, one silver coin of taka one, one note of taka two, one matchbox in presence of the witnesses. He handed over the accused along with the goods to Thana. He proved the FIR as exhibit 6 and his signature as exhibit 6/1. He proved the heroin as material exhibit I. During cross-examination, he stated that the seized goods were produced before the Court. On 28.12.2004 he went to the place of occurrence. The father of the accused is the owner of the place of occurrence. There were 4/5 rooms in the house of the accused. The accused Suman was alone in his room. The house of the accused is situated 1 kilometre away from the Shreemongal Highway Road. There were houses beside the house of the accused. The accused Suman used to sell heroin in his house. He found the accused

Suman wearing shirt at the place of occurrence. He denied the suggestion that heroin was not recovered from the possession of the accused. He also denied the suggestion that the accused was falsely implicated in the case.

No one appears on behalf of the appellant.

Learned Assistant Attorney General Mr Md. Shaifour Rahman Siddique Saif appearing on behalf of the State submits that P.W. 6 A.S.I Prodip Kumar Das along with P.W. 1 Constable Alfaz Uddin, P.W. 4 A.S.I Md. Kamal Hossain and other members of the police force raided the house of the accused situated at Sindurkhan Road of Shreemongal Thana and recovered 11 puria heroin from the pocket of the shirt of accused kept in a matchbox, one silver coin, one note of take two. P.Ws. 1, 2 and 4 also corroborated the evidence of P.W. 6 as regards recovery of the heroin from the possession of the accused. The prosecution proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submissions of the learned Assistant Attorney General, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that P.Ws. 1 to 6 along with other members of the police force raided the house of accused Md. Abu Sufian alias Suman. P.W. 6 A.S.I Prodip Kumar Das stated that on 28.12.2004 at 3.00 am he along with the police force went to the house of the accused and arrested him. No reason was assigned by P.W. 6 as to why he went to the house of the accused and arrested him. After arrest, he searched the body of the accused and recovered 11 puria heroin from his pocket of shirt kept in the matchbox. He also stated that he prepared the seizure list at the place of occurrence. P.W. 1 Constable Alfaz Uddin stated that 11 puria heroin was recovered from the bed of the accused. P.W. 2 Suman Mia stated that 11 puria heroin was recovered from accused Md. Abu Sufian alias Suman but during cross-examination, he stated that A.S.I Prodip Kumar Das recovered heroin from the third drawer of the chester drawer and prepared the seizure list at Thana and he signed the seizure list at Thana. P.W. 4 A.S.I Md. Kamal Hossain stated that 11 puria

heroin was recovered from the pocket of the shirt of the accused. P.W. 3 stated that there were 6 rooms in the house of the accused but P.W. 4 A.S.I Md. Kamal Hossain in cross-examination stated that there were 3 rooms in the house of the accused. The investigating officer P.W. 3 Md. Abu Yousuf proved the report of the Chemical Examiner as exhibit 5. In the chemical report exhibit 5, it has been opined that “একটি হলুদ খামে চারটি রাংতা কাগজের পুড়িয়ায় রক্ষিত বাদামী বর্ণের গুড়া পদার্থে হেরোইন পাওয়া গিয়াছে।” P.W. 3 Investigating Officer Md. Abu Yousuf proved the report of the Chemical Examiner as exhibit 5.

A bare reading of Section 510 of the Code of Criminal Procedure, 1898 reveals that a report of the Chemical Examiner or Assistant Chemical Examiner to the Government or any serologist, handwriting expert, fingerprint expert or fire-arm expert appointed by the Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may without calling him as a witness be used as evidence in any inquiry, trial or other proceeding under this Code.

If any person is aggrieved due to the non-examination of the Chemical Examiner or any expert appointed by the Government he may apply to the trial Court for examination of the expert. In the instant case, at the time of examination of P.W. 3 Md. Abu Yousuf, the accused was absconding. No application was filed by the accused during the trial of the case for examination of the Chemical Examiner. Therefore, I am of the view that there is no bar in law in using the report of the Chemical Examiner against the accused without examining the Chemical Examiner.

P.W. 2 stated that the seizure list was prepared at Thana and he signed the seizure list at Thana. P.W. 4 stated that he did not sign the seizure list. P.W. 6 stated that he prepared the seizure list at the place of occurrence. P.W. 4 A.S.I Md. Kamal Hossain stated that there were 3 rooms in the house of the accused. P.W. 3 Md. Abu Yousuf stated that there were 6 rooms in the house of P.W. 6. Therefore, there is doubt as regards the presence of P.Ws 3 and 6 at the place of occurrence.

During cross-examination, P.W. 1 Alfaz Uddin stated that the heroin was recovered from the bed of the accused. P.W. 2 Suman Mia stated that heroin was recovered from the third drawer of the Chester drawer of the accused. P.W. 2 also stated that the seizure list was prepared at Thana and he signed the seizure list at Thana. P.Ws. 4 and 6 stated that 11 puria heroin was recovered from the pocket of accused kept in a matchbox. The evidence of P.Ws. 4 and 6 as regards the recovery of heroin from the pocket of the accused kept in the matchbox is materially contradicted by P.Ws. 1 and 2. P.Ws. 1, 4 and 5 are police personnel and P.W. 2 is a boatman of Shreemongal Thana and paid by the police. There is no bar in law to convict the accused relying on the evidence of police personnel. There is a contradiction in the evidence of P.Ws. 1, 2, 4 and 6 as regards the recovery of the heroin from the possession of the accused. Therefore, I do not find any confidence to rely on the evidence of P.Ws. 1, 2, 4 and 6 who contradicted each other as regards the recovery of heroin from possession of the accused.

In view of the above evidence, facts and circumstances of the case, findings, reasoning and the proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial Court is hereby set aside.

Send down the lower Court's records at once.