

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

Present:

Mr. Justice S M Kuddus Zaman

Criminal Appeal No.426 of 2014

Md. Salim Mia @ Md. Salim

....Appellant

-Versus-

The State

.... Opposite Party

None appears

... For the appellant.

Mr. Nawroz M R Choudhury, DAG with

Mr. Prince Al Mahsud, AAG,

Ms. Tahmina Poly, AAG

.... For the State.

Heard and Judgment on 28.04.2024.

S M Kuddus Zaman, J:

This appeal at the instance of convict Md. Salim Mia @ Md. Salim is directed against the judgment and order of conviction and sentence dated 21.01.2014 passed by the learned Additional

Sessions Judge, First Court, Brahmanbaria, in Sessions Case No.153 of 2009 arising out of Kosba Police Station Case No.22 dated 20.04.2009 corresponding to G.R. Case No.106 of 2009 convicting the appellant and absconding co-accused Md. Abdullah Al Mamun under Section 19(1) Table 1(Ka) of the Narcotics Control Act, 1990 and sentencing them thereunder to suffer rigorous imprisonment for 2(two) years and also pay fine of Tk.1000/- in default to suffer simple imprisonment for 1(one) month more.

Facts in short are that Md. Mokter Uddin, Sub-Inspector of Narcotics Control Directorate, Brahmanbaria Circle lodged an ejahar at 20.10 hours on 20.04.2009 alleging that he alongiwth his accompanying force set out from Brahmanbaria by a microbus and on conducting a search in the dwelling hut of the appellant at 13.30 hours recovered 20 puria heroine (2 grams) from inside a plastic bottle in the meatsafe. He seized above heroine and arrested the appellant and co-accused Md. Abdullah Al Mamun from in above ghor.

The investigation of the case was assigned to Md. Mizanur Rahman, Inspector of Narcotics Control Directorate,

Brahmanbaria Circle who in course of investigation prepared a sketch map of the occurrence ghar alongwith an index thereof and recorded statement of witnesses under Section 161 of the Code of Criminal Procedure and obtained chemical examination report of the seized alamat.

In above investigation offence punishable under Section 19(1) Table 1(Ka)/25 of the Narcotics Control Act, 1990 having prima facie proved against accused Md. Salim Miah and Md. Abdullah Al Mamun he submitted charge sheet against them.

At trial the prosecution examined 6 witnesses and the defence cross examined all of above PWs excepting PW3 Uttam Paul.

On consideration of the facts and circumstances of the case and evidence on record the learned Additional Session Judge convicted the appellant and co-accused Md. Abdullah Al Mamun under Section 19(1) Table 1(Ka) of Narcotics Control Act, 1990 and sentenced them thereunder to rigorous imprisonment for 2(two) years and fine of Tk.1000/- in default to suffer simple imprisonment for 1(one) month as mentioned above.

No one appears on behalf of the appellant when the appeal was taken up for hearing although the appeal appeared in the list for hearing today.

Mr. Nawroz M R Choudhury, learned Deputy Attorney General for the State submits that on consideration of the facts and circumstances of the case and mutually corroborating oral evidence of 4 prosecution witnesses the learned Additional Session Judge rightly held that the prosecution succeeded to prove the charge leveled against the appellant and absconding co-accused Mamun beyond reasonable doubt and accordingly convicted both above mentioned two accused persons.

I have considered the submissions made by the learned Deputy Attorney General and carefully examined all materials on record including the FIR, seizure list and other oral, documentary and circumstantial evidence.

As mentioned above to bring home the charge leveled against the appellant and absconding co-accused Md. Abdullah Al Mamun the prosecution examined as many as six witnesses.

PW1 Md. Mokter Uddin a Sub-Inspector of Narcotics Control Directorate, Brahmanbaria is the informant of this case.

He stated that on 20.04.2009 pursuant to a secret information he alongwith Inspector Mizanur Rahman, Sepahi Ziaul Hoque, Uttam Paul and other 4 police personnel boarding a car set out for the occurrence house of appellant Md. Salim Miah at Syedabad Tillakopir village and on conducting search in the above ghor in presence of PW4 Md. Nowajish Bhuiyan and PW5 Milon Miah recovered 20 puria heroine from a plastic box kept in the meatsafe. He seized above heroine by a seizure list and arrested appellant Md. Selim and Mamun from inside above ghar. In cross examination he stated that he found seized heroine in the ghar of two accused persons. He denied that the occurrence ghar did not belong to any of the accused persons.

PW2 Sepahi Ziaul Hoque stated that on 20.04.2009 at 13.30 hours a raiding party comprising informant Mokter Uddin, he and others conducted search in the dwelling hut of appellant Salim and recovered 20 puria heroine. They arrested accused Salim and Abdullah Al Mamun from above ghar. In cross examination he stated that both the accused persons were sitting in the occurrence ghar. Above heroine was not recovered from physical possession of the accused persons.

PW3 Sepahi Uttam Paul another member of the raiding party stated that he accompanied Sub-Inspector Mukter Uddin on 24.04.2009 at 13.30 hours in conducting search in the dwelling hut of Md. Salim. Above Sub-Inspector recovered 20 gram heroine from inside a plastic box in the meatsafe and arrested. Accused Md. Salim and co-accused Md. Abdullah Al Mamun. Since both above accused persons absconded above witness was not cross examined by the defence.

PW4 Md. Nowajish Bhuiyan is a witness to the seizure list and a resident of the occurrence village. He stated that in the afternoon he was sitting in his business office at Tinlakhpeer bus stand when the informant alongwith two arrested accused persons came to his office boarding a microbus and obtained his signature on a piece of paper. The witness proved his signature on the seizure list which was marked as Exhibit No.2/2. In cross examination he stated that he did not see the accused person consuming narcotics.

PW5 Md. Milon Miah is another witness to the seizure list who stated that in the afternoon when he came on the road in front of Tinlacpeer Mosque the informant stated that accused

Salim and Mamun had consumed heroine and asked him to give signature on a piece of paper and he gave a signature. The witness proved his signature on the seizure list which was marked as Exhibit No.2/3. In cross examination he stated that he did not see accused persons were consuming heroine or fencidyle

PW6 Md. Mizanur Rahman was a member of the raiding party and investigation Officer of this case. He stated that in course of investigation he prepared a sketch map of the occurrence ghar alongwith an index thereon and sent a sample of the seized heroine for chemical examination and recorded the statement of the witnesses under Section 161 of the Code of Criminal Procedure. The witness proved the sketch map and his signature in the same which were marked as Exhibit Nos.3 and 3/1 respectively. In above chemical examination report heroine was found in the seized alamat. He proved the chemical examination report which were marked as Exhibit No.4. In his investigation the charge brought against accused Salim and Mamun having prima facie proved he submitted against them charge sheet No.102 on 14.15.2009. In cross examination he stated that the Chairman resides on the west side of the occurrence

house but he did not make him a witness. He denied that the accused person is a CNG driver and he has been falsely implicated in this case and he did not visit the occurrence place nor examine the local elders and submitted a false charge sheet.

Above is all about the evidence, oral and documentary adduced by the prosecution to prove the charge leveled against two accused persons, namely appellant Md. Salim and Abdullah Al Mamun.

In the FIR and in his evidence as PW1 informant Mukter Uddin stated that he recovered 20 puria heroine from inside a plastic box kept in the meatsafe in the occurrence ghar. But in the seizure list there is no mention that seized heroine was found in a plastic box inside a meatsafe.

It has been stated by PW1 Mukter Uddin, PW2 Sepahi Ziaul and PW3 Uttam Paul that accused Md. Salim and Md. Abdullah Al Mamun were arrested from inside the occurrence ghar. In the FIR and in their respective evidence PW1 Mukter Uddin and PW6 Md. Mizanur Rahman stated that the occurrence ghar belonged to the appellant Md. Salim alone. But in his cross examination PW1 Mukter Uddin stated that he found heroine in the dwelling ghar

of two accused persons. He further stated that both the accused persons were sitting in the occurrence ghar and he denied the defence suggestion that the occurrence ghar did not belong to the accused persons.

In the chemical examination report it was mentioned that the seized amount was heroine and by their consistent evidence PW1 Mukter Uddin, PW2 Ziaul Hoque and PW3 Uttam Paul have succeeded to prove that above heroine was recovered from the occurrence ghar. Two local witnesses to the seizure list PW4 Nowajish and PW5 Milon did not support the prosecution case of recovery of seized heroine from the occurrence ghar. But since the heroine was not recovered from exclusive personal possession of appellant Md. Salim or co-accused Md. Abdullah Al Mamun the prosecution was required to prove by legal evidence that the occurrence ghar belonged to both above accused persons or any one of them.

As mentioned above PW1 Mukter Uddin who conducted search and recovered above heroine stated in cross examination the occurrence ghar belonged to both appellant Md. Salim and accused Abdullah Al Mamun.

Undisputedly PW1 Mukter Uddin, PW2 Ziaul Hoque, PW3 Uttam Paul and PW6 Md. Mizanur Rahman all are Officers of Narcotics Control Directorate, Brahmanbaria and they went to the occurrence village from their Brahmanbaria office. As such they were not well acquainted as to the ownership of the occurrence ghar since both accused Md. Salim and Milon were allegedly sitting in above ghar. PW4 Nowajish and PW5 Milon two local witnesses examined in this case did not support the prosecution case that the occurrence ghar belonged to accused Md. Salim or both accused Md. Salim and Abdullah Al Mamun.

In above view of above evidence on record I hold that the prosecution has failed to prove that the occurrence ghar from which 2 gram heroine was recovered and appellant Md. Salim or accused Md. Abdullah Al Mamun were arrested belonged to appellant Salim or he was in exclusive possession of the same by legal evidence. But the learned Additional Session Judge has failed to appreciate above aspect of the evidence on record and most illegally convicted appellant Md. Salim under Section 19(1) of Narcotics Control Act, 1990 and convicted thereunder which is not tenable in law.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence dated 21.01.2014 passed by the learned Additional Sessions Judge, First Court, Brahmanbaria, in Sessions Case No.153 of 2009 arising out of Kosba Police Station Case No.22 dated 20.04.2009 corresponding to G.R. Case No.106 of 2009 is hereby set aside.

Accused appellant Md. Salim Mia @ Md. Salim is acquitted of the charge leveled against him under Section 19(1) Table 1(Ka) of the Narcotics Control Act, 1990 and he is relieved of his bail bond.

Send down the L.C.R. at once.

Communicate this judgment and order to the Court concerned at once.

MD. MASUDUR RAHMAN
BENCH OFFICER