

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 6842 of 2014

Md. Mominul Islam @ Himel
.....Convict-Appellant.

-Versus-

The State.
.....Respondent.

Mr. Md. Saiful Islam Khandker,
Advocate

....For the Convict appellant.

Ms. Shahida Khatoon, D.A.G with
Ms. Sabina Perven, A.A.G with
Ms. Kohenoor Akter, A.A.G.
.... For the Respondent.

Heard on 10.06.2024, 04.07.2024,
09.07.2024 and Judgment on
10.07.2024.

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Mominul Islam @ Himel is directed against the judgment and order of conviction and sentence dated 30.09.2014 passed by the learned Special Sessions Judge and Druto Bichar Tribunal No.2, Dhaka in Special Sessions Case No. 102 of 2013 arising out of

G.R No. 416 of 2013 corresponding to Palton Police Station Case No. 04 dated 01.09.2013 convicting the accused-appellant under table 3(ka) to section 19(1) and 19(4) of the Madok Drabya Niyantaran Ain, 1990 and sentencing him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for 03(three) months more and also convicting another accused namely, Nasrin Akter under table 7(ka) to section 19(1) and 19(4) of the Madok Drabya Niyantaran Ain, 1990 and sentencing her thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 1,000/- (one thousand) in default to suffer rigorous imprisonment for 01(one) month more.

The prosecution case, in brief, is that one, Md. Nazrul Islam, Sub-Inspector, D.B (South), DMP, Dhaka as informant on 01.09.2013 at about 23:30 hours lodged an Ejahar with Palton Police Station against the accused-appellant, Md. Mominul Islam @ Himel and another stating, inter-alia, that as per G.D. No. 032 dated 01.09.2013 while the informant and other police forces were on special duty under Palton, Motijhel and Bijoy Nagar Moor at about 22:05 hours got a secret information that the accused persons are dealing liquid

phensidyl and Ganja in-front of Superstar Engineering Workshop, Culvert Road under Palton Model police station and then the informant party rushed there and at that point of time sensing the presence of police the accused persons tried to escape but the police apprehended them in presence of witnesses and on query accused, Md. Mominul @ Himel brought 5 litres liquid phensidyl from a bag kept in his right hand and another accused, Nasrin Akter brought out 2 Kg Ganja from a cement bag kept in her right hand in presence of the witnesses and thereafter, the informant party seized those phensidyls and Ganja by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Palton Model Police Station Case No. 04 dated 01.09.2013 under table 3(kha) and 7(ka) of section 19(1) of the Madok Drabya Niyantaran Ain, 1990 was started against the convict-appellant and another.

Police, after completion of investigation, submitted charge sheet against the accused-appellant and another under section 3(kha) and 7(ka) of section 19(1) of the Madok Drabya Niyantaran Ain, 1990 and the case was then sent to learned Special Sessions Judge and Druto Bichar Tribunal No.2, Dhaka for trial and in the trial the prosecution examined 7 witnesses and the defence

examined 4 witnesses. The defence case appeared to be that the accused-appellant and another accused were innocent and they have been falsely implicated in the case.

On conclusion of trial, the learned Special Sessions Judge and Druto Bichar Tribunal No.2, Dhaka by the impugned judgment and order dated 30.09.2014 found the accused-appellant guilty under table 3(Ka) of section 19(1) and 19(4) of the Madak Drobbya Niyontron Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for 03(three) months more and also convicting another accused namely, Nasrin Akter under table 7(ka) to section 19(1) and 19(4) of the Madok Drabya Niytran Ain, 1990 and sentencing her thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 1,000/- (one thousand) in default to suffer rigorous imprisonment for 01(one) month more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 30.09.2014 the present accused-appellant preferred this criminal appeal.

Mr. Md. Saiful Islam Khandker, the learned Advocate appearing on behalf of the convict-appellant submits that the accused appellant is out and out innocent, who has been made scapegoat in this case, in fact no incriminating drugs were recovered from the exclusive possession and control of the accused-appellant. He further submits that in this case the legal requirement of section 103 of the Code of Criminal Procedure was not complied despite of fact that the informant party got secret information and accordingly rushed to the place of occurrence and apprehended the accused-appellant and no one of the alleged place of occurrence was motioned in the seizure list as witness and thus, it can safely be said that no search and seizure was made in accordance with law. The learned Advocate further submits that the defence witnesses in their respective evidence categorically stated that the accused-appellant and another were apprehended from Bhuighar, Narayangonj, that is, far away from the place of occurrence being Culvert road under Paltan Police Station although the learned Judge of the trial Court below without considering all these aspects of the case as well as the defence case most illegally held that the accused-appellant guilty of the offence under table 3(ka) of section 19(1)/19(4) of the Madok Drabya Niyantran

Ain, 1990 and sentenced him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for a period of 03(three) months more. Finally, the learned Advocate submits that in the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove charge of carrying and possessing contraband liquid phensidyl against the accused appellant beyond reasonable doubts.

Ms. Shahida Khatoon, the learned Deputy Attorney-General appearing for the State, on the other hand, supports the impugned judgment and order of conviction and sentence, which was according to her just, correct and proper. She submits that in this case 7 witnesses were examined and all of them categorically testified that the accused appellant and another were apprehended with liquid phensidyl and they proved the time, place and manner of occurrence. Finally, the learned Deputy Attorney General submits that the plea as canvassed by the defence by adducing 4 DWs that the accused-appellant and another were apprehended from Bhuighar, Fatulla, Narayangonj and subsequently they were falsely implicated in this case showing place of occurrence Culvert road under Paltan Police Station at

the instance of their business enemies which does not find any support from the prosecution case or the same fails to gather anything as to the credibility of the prosecution witnesses on the matter to which they testified and thus the appeal is liable to be dismissed.

Having heard the Advocate and the learned Deputy Attorney General and having gone through the materials on record including the impugned judgment, first information report, charge sheet, deposition of witnesses and other materials on record, the only question that calls for my consideration in this appeal is whether the learned trial Judge committed any error in finding the accused-appellant guilty of the offence under table 3(ka) of section 19(1)/19(4) of the Madok Drabya Niyantaran Ain, 1990.

On scrutiny of the record, it appears that in this case police got secret information as to drug deals and thereafter, they rushed to the place of occurrence and apprehended the accused-appellant and another with liquid phensidyl and Ganja and thereafter, police prepared seizure list in presence of the witnesses, police after completion of investigation having found prima-facie case and accordingly, submitted charge sheet against the convict-appellant and another. It further appears that at the trial the prosecution side examined in

all 7 witnesses out of which, PW-1, Sub Inspector Md. Nazrul Islam, informant of the case stated in his deposition that on 01.09.2013 at night as per G.D. entry No. 32 dated 01.09.2013 while the informant and other police were on special duty under Paltan police station got a secret informant as to drugs and accordingly they rushed to Culvert road in front of Superstar Engineering Workshop and arrested the accused Md. Mominul Islam @ Himel (appellant) and another Nasrin Akter in presence of witnesses and on search, recovered 5 litres liquid phensidyl from accused Himel and also recovered 2 Kgs. Ganja from another accused Nasrin kept in a cement bag. Thereafter, police seized phensidyl and Ganja by preparing seizure list in presence of witnesses. This witness also stated that on a query, the accused appellant disclosed that they brought it from border area for selling. This witness proved the seizure list as “Ext.-1”, and his signature thereon as “Ext.-1/1”, F.I.R as “Ext.-2” and his signature thereon as “Ext.-2/1” and seized alamats as material “Ext.-I&II”. This witness also identified the accused on dock. This witness in his cross examination stated that- “ইহা সত্য নহে যে, আসামীদেরকে ঘটনাঙ্কল হইতে ধৃত করা হয় নাই। ইহা সত্য নহে যে, আসামীদের ভূইগড়, ফতুল্লা হইতে ধৃত করা হইয়াছে।” PW-2, A.S.I. Sohel Mahmood, member of the raiding party, PW-3,

Constable Md. Lokman, also member of the raiding party, PW-4, Constable Ismail, also member of the raiding party, PW-5, Constable Golam Sarwar, also member of the raiding party, all these police witnesses gave evidence in support of the prosecution and made similar statements like P W-1 and they proved that liquid phensidyl and Ganja recovered from the accused appellant and another. Defence cross examined PWs but failed to find out any contradiction in the evidence of P Ws. PW-6, Md. Hanif, seizure list witness stated in his deposition that- “ঘটনার তারিখ ০১/০৯/১৩ ইং সময় রাত অনুমান ১০:০০ টা। ঘটনাস্থল কালভাট রোডস্থ একটি ইঞ্জিনিয়ারিং ওয়ার্কসপের সামনে রাস্তার উপর। সেখানে আমার চায়ের দোকান আছে। ঘটনার সময় আমি চা বিক্রয় করিতে ছিলাম। তখন ডিবি পুলিশ আমাকে ডাকিয়া ঘটনাস্থলে নিয়া যায়। সেখানের গিয়া একজন ছেলে ও একজন মেয়েকে দেখিতে পাই। ছেলের হাতে একটি গ্যালেন ও মেয়ের হাতে একটি ব্যাগ ছিল। আমার সামনে গ্যালেন হইতে অনুমান ৫ (পাঁচ) লিটার ফেন্সিডিল এবং মহিলার হাতে থাকা ব্যাগের ভিতর হইতে অনুমান ২ (দুই) কেজি গাঁজা উদ্ধার করিয়া পুলিশ জব্দ তালিকা প্রস্তুত করিলে আমি উহাতে স্বাক্ষর করি। এই সেই চন্দ তালিকায় আমার স্বাক্ষর প্রদঃ- ২/১। আসামীরা ডকে হাজির আছে (সনাক্তকৃত)।” Defence cross-examined this witness but could not able to discover anything as to the credibility of this witness on the matter to which he testifies. PW-7, S.I. Md. Nazrul Islam, Investigating officer, who during investigation visited the place of occurrence, prepared

sketch-map, examined the witnesses under section 161 of the Cr.p.c. and obtained chemical examination report and exhibited the same as “Ext.-5”. This witness stated in his evidence that on completion of the investigation he found a prima facie case and accordingly submitted charge sheet against the accused. In this case it is found that defence examined in all 4 witnesses as DWs. On going through the evidence of DWs, it appears that the defense side took a plea that the accused appellant and another are innocent, who have been falsely implicated in this case out of business, their business enemies engineered this false case in order to victimize the accused persons.

On a close analysis of the above quoted evidence, it appears all the prosecution witnesses including PW-6, seizure list witness were present at the place of occurrence i.e. Culvert road under Paltan police station and police witnesses apprehended the accused-appellant and another and on search recovered 5 litres liquid phensidyl from the accused-appellant and 2 Kg. Ganja from another accused and thereafter, the informant party prepared seizure list in presence of witnesses. It further appears that the chemical examiner submitted report (Ext.-5) stating that- “১টি প্লাস্টিকের বোতলে প্রাপ্ত ১০০ এম.এল. বাদামী তরল পদার্থে অপিয়াম উদ্ভূত ‘কোডিন’ পাওয়া গিয়াছে। সীলমোহর

অক্ষত ছিল। ১টি খাকি খামে প্রাপ্ত ৯৮.০২ গ্রাম সবুজাভ বাদামী গুল্ম গাঁজা।
সীলমোহর অক্ষত ছিল।”

PW-1, informant, PW-2, PW-3, PW-4 and PW-5 all are members of the raiding party who were eye witnesses of the occurrence by their testimony proved the prosecution case and corroborated each other in support of the prosecution case and the informant deposed that the accused-appellant illegally brought contraband liquid phensidyl into Bangladesh from border area and he could not show any document in support of contraband goods and the prosecution witnesses proved that the accused-appellant kept in his possession 5 litres liquid phensidyl and failed to show any legal documents in respect of those phensidyl and all the prosecution witnesses namely, PW-1-7 proved the prosecution case as to time, place and manner of occurrence and thus the prosecution proved the guilt of the accused appellant beyond reasonable doubts.

Besides, the plea was taken by the defence that the police after being influenced by business rival group of the appellant arrested the accused-appellant from village Bhuigar, Fatulla, Narayangonj (near his residence) and thereafter, falsely implicated in this case of Culvert road in front of Superstar Workshop under Paltan police station but could not able to establish anything as to the

credibility of the PWs on the matter to which they testified.

It is found that the trial Court below in the facts and circumstances of the case and on due consideration of the entire evidence and materials on record found the accused-appellant guilty under table 3(Ka) of section 19(1) of the Drobbya Niyontron Ain, 1990 and sentenced him thereunder as stated above. The learned trial Judge appears to have considered all the material aspects of the case and justly came to the conclusion that the accused-appellant guilty of the offence under table 3(ka) of section 19(1) of the Madok Drabya Niyantran Ain, 1990.

However, considering the law, facts and circumstances of the case as discussed above, particularly the fact that the convict appellant has already suffered his sentence to some extent and faced the agony of the protracted prosecution and also suffered the mental harassment for a long period of more than one decade, I think that, the ends of justice, will be met in the facts and circumstances of the case if the sentence of fine of the accused-appellant is maintained and the substantive sentence is reduced to the period of 1 (one) year in place of 3 years, as prayed for.

Learned Deputy Attorney General has, of course, been able to defend this case on merits but practically has nothing to say insofar as to reduction of sentence.

Hence for all the reasons above, the sentence of fine of the accused-appellant is maintained and the substantive sentence of appellant under table 3(ka) to section 19(1) of the Madok Drabya Niyantaran Ain, 1990 is reduced to the period of 1 (one) year in place of 3 years.

The appeal is, accordingly, dismissed with modification of sentence in the above manner. Since the appeal is dismissed, the convict-appellant is directed to surrender his bail bond within 3 (three) months from today to suffer his rest sentence in accordance with law, failing which the Trial Court shall take necessary steps against the convict-appellant, Md. Mominul Islam @ Himel to secure arrest.

Send down the lower Courts' records at once.