4 SCOB [2015] HCD 61

HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Death Reference No. 35 of 2009

The State
-vs-
Md. Saiful Islam

Mr. Shafiul Bashar Bhandary, D.A.G
- for the State.
Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the condemned prisoner.
with

Criminal Appeal no. 3849 of 2009

Md. Delowar Mallik
- Appellant.
-vs-
The State
- Respondent.

Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.
with
Criminal Appeal no. 3723 of 2009

Md. Saiful Islam
- Appellant.
-vs-
The State
- Respondent.

Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.
with

Jail Appeal no. 425 of 2009

Md. Saiful Islam
- Appellant.
-vs-
The State
- Respondent.
Mr. Farid Uddin Khan with
Mr. Saifuddin Md. Aminur Rahim
(Chandan), Advocate,
- for the Appellant.
Mr. Mr. Shafiul Bashar Bhandary , D.A.G
- for the Respondent.

Heard on 05.05.2015
Judgment on 10.05.2015 and 12.05.2015

Present:
Mr. Justice A.N.M. Bashir Ullah

Code of Criminal Procedure, 1898
Section 103:
Strict non-compliance of section 103 of the Code in order to search and seizure of madak articles either from a person or any place will not render the case unbelievable.
...(Para 62)

Madak Drabbya Niontran Ain, 1990
Section 36 and 37
And
Code of Criminal Procedure, 1898
Section 103:
From the plain reading of section 36 of the Ain it has been found that the law enforcing agency in order to recover madak articles can enter into any place and on search can

seize the madak articles along with the aiding articles and documents and he is also empowered to search a person even for the same purpose. The provisions of section 36 of the Ain appear to be more progressive and dynamic than that of the section 103 of the Code. In section 103 of the Code before making the search calling upon two or more respectable inhabitants of that locality is must but there appears no such obligatory provision in section 36 of the Ain. ...(Para 65)

Judgment

A.N.M. Bashir Ullah, J:

1. The learned Sessions Judge, Sylhet passed the judgment and order of conviction and sentence dated 17.05.2009 convicting the condemned prisoner Md. Saiful Islam and convict Delowar Mallik under serial no. 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 (in short, the Ain) awarding sentence of death upon condemned prisoner Md. Saiful Islam while sentenced convict Delowar Mallik to suffer imprisonment for life with a fine of taka 20,000/- in Sessions Case no. 114 of 2009 in default to suffer rigorous imprisonment for 2(two) years.

2. Consequent upon the said order of conviction and sentence of death, the proceeding was submitted to the High Court Division under section 374 of the Code of Criminal Procedure (in short, the Code) by the Sessions Judge, Sylhet and the same was registered as Death Reference no. 35 of 2009. The condemned prisoner Md. Saiful Islam against the said judgment and order of conviction and sentence preferred Criminal Appeal no. 3723 of 2009 and Jail Appeal no. 425 of 2009 and Delwoar Mallik preferred Criminal Appeal no. 3849 of 2009.

3. A division bench of the High Court Division heard the death reference together with the appeals and upon the hearing the said bench passed dissenting judgments in the death reference. One of Judge of the division bench rejected the death reference and allowed all the appeals filed by the condemned prisoner Saiful Islam and another convict appellant Delowar Mollik acquitting them from the charge levelled against them and the another judge though rejected the death reference but upheld the conviction of both the appellants commuting the death sentence of Md. Saiful Islam into the imprisonment for life. Since the judgment and order of conviction and sentence passed by the division bench of the High Court Division was a split one, the Hon'ble Chief Justice of Bangladesh referred the death reference and the appeals to this single bench as third bench to dispose of the same.

4. The prosecution case as unfurled at trial, in short, is that on 22.012.2008 at 19.45 hours the informant BDR Nayek Subedar Abdul Motaleb on the basis of a secret information along with BDR Habilder Md. Hakikul Islam, Nayek Md. Abdur Razzak, Sepahi Md. Akramuzzaman, Sepahi Sree Provash Singh, Sepahi Md. Mohsin Ali, Sepahi Sree Nemai Kanti, Lance Nayek Signal Mozammal Hoque and Lance Nayek Batellion Md. Moniruzzaman had started for a patrol duty from the BDR, Sector Head Quarter, Sylhet and reached at Humayun Rashid square on the Dhaka-Sylhet high way in front of Apon restaurant. They halted a Sylhet bound bus from Dhaka of Hanif Enterprise being no. Dhaka Metro-Ba-14-2336 at 20.45 hours and searching the bus found a bag in the possession of Md. Saiful Islam sitting on the seat nos. 3 and 4, son of Tohed Molla at village Kalakhali, Post office and district Pirojpur. He in presence of Md. Rezaul Alam, Supervisor of the bus, and Md. Khorshed Alam, the driver of the bus and also in presence of the passengers of the bus

searching the said bag found a packet wrapped by carbon paper at a weight of 1,100 kgs. The informant also found accused Delowar Mollik sitting by the side of accused Saiful Islam. Saiful Islam told the informant that Delowar Mollik is his accompanying member. The informant arrested those two persons and seized the goods under a seizure list and lodged the First Information Report (in short, the FIR) with the Kotwali Model Police Station, Sylhet narrating the above facts. Before filing of the FIR, the recovered heroin was measured at Rony Enterprise, Sheikh Ghat, Sylhet.

5. On the basis of the above FIR, Sylhet Kotwali Model Police Station case no. 60 dated 23.12.2008 corresponding to G.R no. 124 of 2008 was started. The case was investigated by Police Sub-Inspector Khorshed Alam who on completion of the investigation submitted police report on 24.01.2009 recommending the trial of both the accused under serial no. 1(Kha) of the table attached to section 19(1) of the Ain.

6. The Chief Judicial Magistrate, Sylhet on receipt of the case record sent the same to the Sessions Judge, Sylhet where the case was registered as Sessions Case no. 114 of 2009 and the accused were put on trial before the Sessions Judge, Sylhet. At trial, charge under serial no. 1(Kha) of the table attached to section 19(1) of the Ain was framed on 31.03.2009. The charge was read over and explained to the accused to which they pleaded not guilty and claimed to be tried.

7. The prosecution in order to prove the charge examined 9 witnesses and tendered 4 witnesses and on completion of the recording of the evidence the accused were examined under section 342 of the Code of Criminal Procedure when they repeated their innocence and disclosed their unwillingness to adduce any defence witness but both of the accused made oral statements before the Court which has duly been recorded by the trial Court.

8. The defence case, as it appears from the trend of cross-examination of the prosecution witnesses and also from the statements given at the time of examination under section 342 of the Code of Criminal Procedure is the case of innocence, false implication and total denial of the prosecution case. The further defence taken by accused Saiful Islam is that he is innocent, he did not bring and possess those heroin. He had come to Sylhet to pay respect in the Mazar and in his language for ziarot of Mazar but he has been falsely implicated in this case.

9. The defence case of Delowar Mollik is that he is a sanitary contractor and he used to work as sanitary contractor in various places of sylhet town as such enmity developed between him and others. His such enemies had involved him with the occurrence of this case. He is innocent and has become the victim of circumstances etcetera.

10. The trial Court on consideration of the evidence and other materials on record found both the accused guilty under serial no. 1(Kha) of the table attached to section 19((1) of the Ain and sentenced the condemned prisoner to death while imprisonment for life to Delowar Mallik and sent the case record to the High Court Division for confirmation of sentence of death of condemned prisoner Md. Saiful Islam and since there were split judgments on the conviction and sentence of the condemned prisoner Md. Saiful Islam and another convict appellant Delowar Mallik, the death deference along with 3 appeals preferred by the condemned prisoner and Delowar Mallik has been sent to this bench by the Hon'ble Chief Justice of Bangladesh as has been narrated earlier.

11. Mr. Shafiul Bashar Bhandary, the learned Deputy Attorney General appearing for the state having been taken me through the judgment and order of conviction and sentence under

the reference, the FIR, the evidence and other materials on record makes his submissions supporting the reference and opposing the appeals. He submits that in a very transparent way the members of the BDR had recovered 1100 grams heroin from the possession of the condemned prisoner Md. Saiful Islam when he was carrying the same on 22.12.2008 through a Sylhet bound us from Dhaka. The PW 1 BDR Nayek Subedor Md. Abdul Motaleb, on the basis of a secret information had reached at Humayun Rashid Square on Dhaka-Sylhet highway along with other forces and he entering into the bus in question of Hanif Enterprise found both the accused sitting on the seat nos. 3 and 4 of the bus with a bag in the possession of condemned prisoner Md. Saiful Islam. The informant in presence of the driver and supervisor of the bus had searched the said bag and found 1100 grams heroin within the bag which was possessed by condemned prisoner Md. Saiful Islam.

12. The learned Deputy Attorney General also submits that the bus was standing in an open place of the road and in that prevailing circumstances the driver and supervisor of the bus were the most competent witnesses of the search and seizure. Neither the BDR party nor the informant had any special interest into the matter and the accused were not known to the informant party. The driver and supervisor were very much independent and disinterested witnesses for the purpose of search and seizure and as such in their presence the search and seizure were made and although at last they did not support the prosecution case in to-to but they could not deny the entry of the BDR personnel into the bus and the recovery of the goods from the passenger of the bus. The Deputy Attorney General also submits that the said driver and supervisor for the reasons best known to them had become bias at the time of giving deposition in the Court but the pious intention of the informant has been revealed through the search and seizure in their presence.

13. The learned Deputy Attorney also submits that now a days there is no bar to rely upon the evidence of the members of the recovery party when their evidence is found unimpeachable and unshaken and even they are not supported by the witnesses of the search and seizure. He also submits that in this particular case the PWs 1 and 2 as the members of the BDR party had recovered those heroin from the accused Saiful Islam and at trial they have given a clear picture as to the said recovery and the defence cross-examined them very meticulously but their evidence as to the recovery of the heroin from the condemned prisoner Saiful Islam has not been shaken away in any way. Moreso, it is to be looked into that the accused were not known to the members of the recovery party. There is no any suggestion of enmity between them, so there appears no earthly reason on the part of the BDR members for giving any false evidence against the accused. The members of the recovery party as part of their solemn duty had recovered the heroin from the accused and they had simply said the occurrence of the case to the trial Court and their such evidence had inspired confidence in the mind of the trial Judge. As such, though the witnesses of search and seizure did not support the prosecution case accurately but the trial Court relying upon the evidence of the members of the recovery party (PWs 1 and 2) rightly found the accused guilty under serial no. 1(Kha) of the table attachéd to section 19(1) of the Ain.

14. He also submits that after the recovery of the heroin the same was measured by PW 12 who found that the weight of the recovered substance is 1100 grams and whenever more than 25 grams of heroin is found in the possession of an accused he is liable to be convicted and sentenced under serial no. 1(kha) of the table attached to section 19(1) of the Ain.

15. He next submits that the recovered heroin was examined by a chemical examiner and the report will go to show that the recovered substance was heroin. He also submits that

though the chemical examiner was not examined at trial but there was no necessity for the examination of the chemical examiner. Section 510 of the Code of Criminal Procedure as well as the section 50 of the Ain provide that the report of a chemical examiner will be admitted into the evidence without examining of its maker. Since the law is very much clear on the subject that a report of a chemical examiner is admitted into the evidence without his examination, the trial Court rightly admitted the chemical examiner report into the evidence.

16. He also submits that a lot of madak articles are available in the society in this or that way. The Madak Drabbya Niontran Ain, 1990 was incorporated by the legislature in order to save the people from the injury of madak and to that end for some of the madak there are some stringent provisions in the Ain and the heroin is one kind of madak which can cause severe harm to the people. As such, the legislature has provided the death sentence for preserving or possessing only more than 25 grams of heroin but in the instant case the quantity of the recovered articles is of 1100 grams. So, considering the quantity of the heroin and also considering the very unequivocal and nitid evidence of the members of the recovery party the trial Court convicted both the accused and sentenced Saiful Islam to death as the heroin was found in his possession and his accomplice Delowar Mollik has rightly been convicted under the said section of law and was sentenced to suffer imprisonment for life. So, the death reference may kindly be accepted affirming the conviction and sentence of both the condemned prisoner and convict Delowar Mallik dismissing the appeals filed by the condemned prisoner Saiful Islam and appellant Delowar Mallik.

17. On the other hand Mr. Farid Uddin Khan, the learned Advocate appearing with Mr. Saifuddin Md. Aminur Rahim (Chandan) for the condemned prisoner as well as for the appellant Delowar Mallik sought to impeach the judgment and the order of conviction and sentence of them on the following grounds.

18. He firstly submits that the heroin was allegedly recovered on 22.12.2008 at 20.45 hours but the FIR was lodged on the following day on 23.12.2008 at 16.10 hours with a delay of more than 19 hours but there is no explanation for such delay. The un-explained delay in lodging the FIR creates doubt as to the genuineness of the prosecution case.

19. The heroin was measured by PW 12 but PW 12 stated at trial that he did not know what was in the packet. Had there been anything like heroin in the said packet, the BDR party at the time of measuring of the same with the help of PW 12 surely would have disclosed the name of the articles. So, there is no scope to say that BDR party had recovered the heroin.

20. The learned Advocate also submits that the search and seizure of the heroin from the accused Saiful Islam is totally doubtful and not believable. Had there been any such search and seizure of the heroin from accused Saiful Islam that would have been done in presence of the local witnesses. Admittedly the BDR party had halted in the bus in front of the restaurant Apon and the BDR party before entering into the bus could have called the manager, proprietor or any other persons from the said restaurant but they without doing so had entered into bus alone. As such, the search and seizure is not at all believable. The members of the recovery party had violated the provisions of section 103 of the Code of Criminal Procedure in making the search and seizure of the heroin from the condemned prisoner. So, the trial Court should have not relied upon the so-called search and seizure conducted by the PW 1.

21. He next submits that though the so-called search and seizure were made in presence of the driver and the supervisor of the bus but they did not support the prosecution case in any

way and had there been any search and seizure in presence of the said driver and supervisor they would have surely supported the prosecution case, but since no such recovery was made in their presence they did not ultimately support the search and seizure done by the PW 1.

22. He also submits that it is fact that the evidence of the members of the recovery party can be taken into consideration in order to find the guilt of the accused when their such evidence appear to be unimpeachable and unshaken in nature and when it inspired confidence in the mind of the judge. But there is no reason to consider the evidence of PWs 1 and 2 to be such of unimpeachable and unshaken as because they without following the provision of section 103 of the Code of Criminal Procedure tried to make the search and seizure.

23. He also submits that sections 36 and 37 of the Ain provide that any member of law enforcing agency can search a person or place in order to recover or to find out madak but before making such search the reasons for his such believing that somebody else has been possessing madak needs to be recorded but the PWs 1 and 2 before moving to the place of occurrence in order to recover the madak articles did not record any such reason for their believing that the accused might have possessed the madak within the bus. So, the very movement of the PWs 1 and 2 towards the place of occurrence without proper compliance of the provisions of sections 36 and 37 of the Ain rendered the whole job and attempt of the PWs 1 and 2 unbelievable. So, the evidence of PWs 1 and 2 should have not been taken into consideration by the trial Court.

24. The learned Advocate also submits that after recovery of heroin a very small portion of heroin was sent for chemical examination, so relying on the said chemical examination report which is based on the examination of a small portion of the heroin it is difficult to hold that all the recovered articles were heroin but the trial Court has ignored the said facts of the case.

25. He also submits that the trial Court considered and admitted the chemical examination report into the evidence without examining its maker. Before admitting the chemical examination report, the maker of the same should have been examined by the trial Court. So, the trial Court should have not been relied upon the report which was admitted into evidence without examining its maker.

26. The learned Advocate lastly submits that the prosecution could not show transparency in searching the bus and in filing of the case against the accused. So, the conviction and sentence as awarded upon the condemned prisoner Saiful Islam by the trial Court is not sustainable in law.

27. The learned Advocate in respect of accused Delowar Mallik submits that there appears no tangible evidence against Delowar Mallik that he had committed any offence leading to the recovery of heroin as nothing was found in his possession. The learned Advocate also submits that if it is conceded for a moment that they were coming jointly from Dhaka to Sylhet but it does not mean and indicate that Delowar Mallik had any knowledge about the goods which were allegedly in the exclusive possession of another accused. So, for the recovery of any goods from another accused Delowar Mallik cannot be convicted and sentenced and there is nothing in the hands of the prosecution to show that within the knowledge of Delowar Mallik, the another accused was possessing and carrying those article. So the conviction and sentence of Delowar Mallik did not justify at all in any way. So, both the convicts may kindly be acquitted from the charge levelled against them.

28. I have considered the above submissions and arguments of the learned Advocates of both the parties with profound attention and have gone through the materials on record particularly the FIR, the exhibited documents, the judgment under reference and the materials on record.

29. Now, in order to appreciate the arguments advanced by the learned Advocates for the prosecution and the convict appellants, let the evidence adduced by the prosecution in this case be scrutinized and analyzed.

30. PW 1 BDR Nayek Subedar Abdul Motaleb has stated in his examination-in-chief that at present he is posted at BDR Sector Head Quarter, Akhalia, Sylhet, on 22.12.2008 at 19.45 hours on the basis of a secret information he, BDR Habilder Md. Kakihul Islam, Nayek Abdur Razzak, Sepahi Mohosin, Provash Singh along with other BDR forces nine in numbers forming a raiding party under his leadership had gone in front of Apon restaurant at Humayun Rashid Square, they halting a Sylhet bound bus from Dhaka of Hanif Enterprise being no. Dhaka Metro-Ba-14-2336 searched the bus and at one stage of his such searching at 8.45 pm found accused Saiful Islam sitting on the seat no. F-3 having a school bag on his lap and the said accused being suspected by him, he in presence of the supervisor and driver of the bus had searched the said bag and found 1100 grams heroin in a packet wrapped by carbon paper, on query Saiful Islam told that Delowar Mallik who was sitting by his side in seat no. F-4 is also his accomplice and they entered into the bus upon a joint ticket. He seized the said heroin in presence of the witnesses. He proved the seizure list and his signature in it, marked exhibits 1 and 1/1.

31. He further stated that he separated 4 grams heroin from the recovered heroin for chemical examination and sealed the remaining 1096 grams heroin. He identified the school bag and the heroin in the Court marked material exhibits I and II respectively. He also stated that the recovered heroin has been scaled at Rony Enterprise and the proprietor of Rony Enterprise Kumar Das has given a certificate to that effect. He proved the said certificate marked exhibit 2. He arrested accused Saiful Islam and Delowar Mallik and producing them before the Sylhet kotowali Police Station lodged the First Information Report (in short, the FIR) of this case. He proved the FIR and his signature in it, marked exhibits 3 and 3/1, he also proved the ticket no. F-3. He also identified both the accused in the Court.

32. In cross-examination of the defence he stated that on the basis of a secret information he had left the BDR Head Quarters at 19.45 hours and he got the information before 15 minutes of his movement, the place of occurrence is a busy area of the locality and on that day they did not search any other bus, in the bus there was shelf under the roof of the bus, at the time of search there were other passengers in the bus, there were some restaurants and shops adjacent to the place of search and there were also some peoples near the bus at the time of occurrence but they were not made the witnesses, no one from Apon restaurant was made witness in the seizure list, he did not know whether Saiful was in the Ansar bahini, he cannot say whether Saiful Islam was going to Sylhet, he cannot say whether Delowar Mallik was a sanitary contractor. He denied the defence suggestion that no such recovery was made from the accused. He also denied the further defence suggestion that the accused have been entangled with the occurrence of this case falsely. He denied the further defence suggestion that he got the materials in the shelve of the bus and using the same has involved the accused in the case.

33. PW 2 BDR Habilder Hakikul Islam has testified that at present he has been serving at Sylhet BDR Head Quarters, on 22.12.2008 he was posted in the same place and on that day he as a member of the raiding party under the leadership of the informant had come at Apon restaurant at Humayun Rashid Square and they halting a bus of Hanif Paribahan being Dhaka Metro Ba-14-2336 searched the same, accused Saiful Islam and Delowar Mallik were found sitting on the seat nos. F-3 and 4 and there was also a bag on the lap of accused Saiful Islam belonged to seat no. F-3 of the bus, they searched the bag of Saiful Islam and found a packet wrapped by the carbon paper in which there were 1100 grams heroin, he identified the bag and the heroin in the Court, the informant seizing the heroin took signature of the witnesses in the seizure list. He identified the accused in the dock of the Court, the informant producing the accused and heroin lodged the FIR with the police station. They had sealed the heroin, scaled the same into a shop and found 1100 grams heroin in the packet.

34. In cross-examination of the defence he stated that they had searched 30-35 passengers of the bus spending a time of 15-20 minutes, the passengers of the bus generally put their bags on the shelf under the roof but the bag belonged to Saiful Islam was in his lap, the seizure list was prepared in front of the Apon restaurant, They took 4-5 hours time to prepare the seizure list and to lodge the FIR, they had come in the place of occurrence through pickup. He denied the defence suggestion that Delowar used to work as a sanitary contractor at the cantonment area. He also denied the defence suggestions that no such heroin was recovered from the accused Saiful Islam. He further denied the defence suggestion that the heroin might have been recovered from the others but they have entangled the accused Saiful Islam with the same.

35. PW 3 BDR Sepahi Provash Singh testified that on 22.12.2008 at 7.45 hours he as one of the members of the informant party had gone at Humayun Rashid Square and on arrival of a bus of Hanif Enterprise they halted the same, the informant searching the bus found a bag on the lap of accused Saiful Islam in which there were 1100 grams heroin, he identified the bag and the heroin in the Court. He also identified the accused Saiful Islam and Delowar Mallik in the Court, the informant seizing those goods under a seizure list filed the case with the police station. In cross-examination of the defence he stated that on the date of occurrence he was not in any other duty, the bus had arrived at the place of occurrence after 15 minutes of their arrival there, they did not search any other bus, he did not enter into the bus, they 7 in numbers were outside of the bus, the informant and Habilder Hakikul Islam were within the bus, they took 15-20 minutes time to prepare the seizure list. He denied the defence suggestion that no such recovery was made from the accused.

36. PW 4 Md. Khorshed Alam, the driver of the bus being no. Dhaka Metro-Ba-14-2336 of Hanif Enterprise has said that on 22.12.2008 at 4.45 pm they had started from Sayedabad, Dhaka for Sylhet and at 8.30 pm of the night reached at Humayun Rashid Square, he stopped the bus on the signal of the BDR, thereafter two BDR personnel had entered into the bus and got down with two passengers of the bus along with a black bag, on query the BDR told them that there were heroin in the bag, the informant seized those heroin under a seizure list and he signed the same, they showed the heroin and bag to him. He proved his signature in the seizure list, marked exhibit 1/2. He identified 2 accused in the Court whom arrested the BDR. In cross-examination of the defence he stated that there were 34 passengers in the bus, at the time of occurrence he was sitting in his driving seat and he cannot say from whom the heroin containing bag was recovered, he did not find the alamats within the bag but he put his signature on the seizure list at the time of preparation of the same, the informant had searched

the bus for half an hour, two BDR personnel had entered into the bus and the rest were outside of the bus.

37. PW 5 Md. Rezaul Alam, the supervisor of the bus in question has stated that on 22.12.2008 at 8.30 pm of the night when they had reached at Humayun Rashid Square the BDR stopping the bus entered into the bus and informed them that they recovered the heroin from the custody of the two accused, the informant had seized the said goods under a seizure list on which he put his signature, marked exhibit 1/3, the BDR arrested the passengers of seat nos. F-3 and F-4, he also identified the accused in the Court. In-cross examination of the defence he stated that he cannot say which goods were recovered from whom but the BDR entering into the bus had recovered some substance, the accused were not known to him earlier.

38. PW 6 Md. Afzalur Rahman testified that on 23.12.2008 he was posted at BDR Sector Head Quarters, on that day the informant had come to him with some alamats of the recovered goods and he examined the same in his own lab and furnished a report, he found that the recovered goods are heroin. He proved the report furnished by him, marked exhibit 5 and his signature in it marked exhibit 5/1. In cross-examination of the defence he stated that he is not a chemical examiner but the informant brought the recovered articles before filing of the case for its chemical examination. He also stated that he being a doctor has been posted in the BDR Sector Head Quarters, Sylhet and he examined the heroin before filing of the case as a result there was no number of the case in the report. He has experience in examining the heroin. He denied the defence suggestion that the recovered substance are not heroin.

39. The prosecution tendered PW 7 BDR Sephai Mohsin Ali, PW 8 BDR Sepahi Nemai Chakrabortty, PW 9 BDR Nayek Mozammel Haque and PW 10 BDR Lance Nayek Moniruzzaman and the defence declined to cross-examine them.

40. PW 11 BDR Nayek Md. Abdur Razzak has testified that on 22.12.2008 he was posted at BDR Sector Head Quarters, Akalia, Sylhet, on that day at 8.15 pm he under the leadership of Nayek Subeder Abdul Motaleb had gone at Humayun Rashid Square, the informant on the basis of a secret information had halted a Sylhet bound bus of Hanif Enterprise being no. Dhaka Metro-Ba 14-2336 and the informant entering into the bus searched the bus, they were standing outside of the bus, the informant got down from the bus with two accused along with a bag of 1100 grams heroin. He identified the said two accused in the Court whose name is Saiful and Delowar Mallik. The informant seizing the said goods under a seizure list took signature of the witnesses. Thereafter, the informant producing the accused with the alamats in the police station lodged the FIR. In cross-examination of the defence PW 11 stated that they had gone at Humayun Rashid Square by motor car, they searched only one bus, he was outside of the bus as such he did not witness the exact place of the bus from where the heroin was recovered, they had showed the heroin to the people present there. He denied the defence suggestion that no such heroin was recovered from the accused.

41. PW 12 Manik Kumar Das has testified that he is the proprietor of Rony Enterprise, on 23.12.2008 the members of the BDR having been in his shop asked him to scale a packet, he found 1100 grams weight of the packet but the BDR did not tell as to the substance of the pocket. He also furnished a certificate as to the weight of the packet, he proved his signature on the said certificate, marked exhibit 2/1. In cross-examination of the defence he stated that his shop Rony Enterprise is situated in front of the Kotwali police station under Sylhet district which is 2½ kilometers away from the Humayun Rashid Square, he gave the certificate at

4.05 pm of the day. He cannot say who wrote the said certificate and also cannot say which substance did he scale?

42. PW 13 and the last witnesses Md. Khorshed Alam, the Sub-Inspector of Police and the Investigating Officer of this case testified that on 23.12.2008 he was posted at Sylhet Kotwali Model Police Station, Police Sub-Inspector Abdul Awal as duty officer on receipt of the FIR from the informant had recorded the present case filling up the FIR columns, he proved the FIR columns and signature of Abdul Awal on it, marked exhibits 6 and 6/1. He further stated that the case was endorsed to him for investigation and at the time of investigation he visited the place of occurrence, prepared sketch map and index of the place of occurrence, the sketch map and index have been marked as exhibits 7 and 8 and his signature on it marked as exhibits 7/1 and 8/1, he sent some alamats from the recovered articles for chemical examination, he examining the witnesses recorded their statements under section 161 of the Code, during the investigation he got the chemical examination report of the alamats, he proved the said report marked exhibit 9, the chemical examiner found that the recovered substance was heroin and on completion of the investigation he submitted Police report recommending the trial of the accused.

43. In cross-examination of the defence he stated that the occurrence of this case was taken place at 20.45 hours on 22.12.2008 but the case was filed on 23.12.2008 at 16.10 hours, neither in the FIR nor in the seizure list there is any remark about the colour of the heroin, the witnesses of the seizure list belonged to Mirpur, Dhaka, he visited the place of occurrence at 10.00 am on 24.12.2008 which is in front of the Apon restaurant, he has examined the owner and staffs of the restaurant, since they were not aware about the occurrence of this case he did not record their statements, most of the surrounding people of the place of occurrence are floating as such he did not record their statements, there are homestead 400-500 yards away from the place of occurrence, he had sent some alamats for chemical examination seeking permission from the Court, the previous record of the accused are nil, he cannot say whether Delowar Mallik was a sanitary contractor or not. He denied the defence suggestion that no such heroin was recovered from the accused. He also denied the further defence suggestion that he without any proper investigation submitted a perfunctory Police report in this case.

44. These are the evidences that have been given by the prosecution in this case. From the evidence discussed above it appears that the prosecution examined 9 witnesses and tendered 4 witnesses and among these 9 witnesses PWs 1,2,3 and 11 are the members of the BDR party, PWs 4 and 5 are the seizure list witnesses, PW 6 is a doctor attached to the BDR Head Quarters who examined the heroin before filing of the case, PW 12 is a local shop keeper of Sylhet who had scaled the heroin before filing of the case and PW 13 is the Investigating Officer of this case.

45. It was argued by the defence before me that the alleged recovery of heroin was made at 20.45 hours on 22.12.2008 while the FIR was lodged at 16.10 hours on 23.12.2008, that is, the FIR was lodged after 19 hours 25 minutes of the recovery of the articles. It is fact that there is no any statement or explanation in the FIR as to the reasons of the said delay. In the case of Abdul Latif-Vs-State 44 DLR 492 it has been held that the Court have always view the FIR with grave suspicion when there has been unexplained delay in lodging it and under this situation it can be presumed that the delay of the FIR was caused for the purpose of manipulation of specific story and the same view was also taken in the case of Kishore Kumar-Vs-State, 11 BLC 251.

46. As I have found from the record that there is no explanation as to the said delay in lodging the FIR but at the time of arguing the learned Deputy Attorney General submits that immediately after recovery of the heroin the BDR members held that they should be sure whether the recovered articles are heroin or not and in order to examine the said articles in their own ways they had waited till the office time of the following days as PW 6 though is not a chemical examiner but being a doctor has the experience to identify any substance whether the same is heroin or not and to take him with the said heroin the BDR had to wait till the office time of the following day. As such immediate after recovery of the goods the FIR could not be filed.

47. The learned Deputy Attorney General candidly submits that considering the nature of the case the FIR could have been filed earlier. From the materials on record it appears that before filing of the case the recovered articles were examined by PW 6 for a primary satisfaction as to whether the articles were heroin or not. So, there appears some substance in the submissions of the learned Deputy Attorney General.

48. I have scanned the evidence of PW 1 who is the maker of the FIR. There appears no suggestion or cross-examination from the defence regarding the delay in lodging the FIR. Generally when the FIR is lodged with some delay that is done with some motive in order to manipulate some untrue story. In this particular case there appears no suggestion to the PW 1 that he had taken those times or he had filed the FIR with delay in order to manipulate some false story. Now, whether the delay in filing the FIR was taken place in order to take undue advantage that will be ascertained and considered along with other facts of the case which will be discussed and determined later on.

49. The learned Advocate for the defence argued before me that search and seizure of the heroin has not been made in compliance of the provisions of section 103 of the Code. He categorically submits that Apon restaurant is situated at Humayun Rashid Square and in front of the said restaurant the bus was halted, so it is possible on the part of the PW 1 to make the search and seizure calling upon the staffs who have been working in the restaurant. So, the search and seizure have not been made in compliance of section 103 of the Code. So, the condemned prisoner and the convict appellant cannot be found guilty relying on such a defective search and seizure.

50. The materials of this proceeding clearly reveal that at the time of search and seizure the PWs 1 and 2 did not enter into the bus with any local people as the same has been admitted by them. Now, the prominent question before me whether a search and seizure in order to recover any madak article should be made under section 103 of the Code or by any other law.

51. The learned Advocate for the defence also raised the question as to the legal capacity of the PW 1 as to making search and seizure in view of section 36 of the Ain. He submits that though the section 36(1) of the Ain empowers the subordinate or the higher officer of BDR to make search in order to recover the narcotics but the informant was not subordinate or higher officer of BDR. So, the search and seizure by the PW 1 was not legal and fair.

52. He also submits that the informant was not empowered or directed by his superior officer in order to make the search and seizure and he did not record the reasons for his believing that an offence may likely be commenced at the time of the occurrence, so the search and seizure by the PW 1 is not legal.

53. Now, coming to the question regarding the legal capacity of the PW 1 as to the search and seizure of the narcotic articles the learned Deputy Attorney General submits Pw 1 Nayek Subddor Md. A. Motaleb who is the leader of the recovery party is a Junior Commissioned Officer of BDR and the same will be revealed from the FIR itself, so, there is no any legal infirmity on his part to lead a recovery party. The first sentence of the FIR reads as follows:

Se¡h,

বিনীত নিবেদন এই আমি জেসিও নং ৫৩৪৩ নাঃ/সুবেঃ মোঃ আঃ মোতালেব সেক্টর সদর দপ্তর, বিডিআর, সিলেট . . . . . |||||||||||||||||||z

54. From the above statement of the FIR it appears that the informant before his name put the very word 'JCO' which means "Junior Commissioned Officer" and this identity of the informant has not been challenged by the defence at any point of trial as such it can safely be said that the informant was a Junior Commissioned Officer at the relevant time. So, in my consideration I find it difficult to hold that the PW 1 was not empowered to make the search and seizure in connection of this case in view of the provisions of section 36 of the Ain.

55. The another question raised by the learned Advocate for the defence that PW 1 was not specially empowered on behalf of the authority to cause a search and seizure in connection of this case. PW 1 appears to be a Junior Commissioned Officer in the post of Nayek Subedor and it is both in the FIR and in his evidence that on the basis of a secret information he forming a raiding party had reached to the place of occurrence in order to nab the narcotics trafficker. Section 59 of the Code provides that any private person may arrest any person who in his view commits a non-bailable and cognizable offence. The offences under the Madak Drabbaya Niontran Ain are cognizable offence in view of section 31 of the Ain.

56. The BDR personnel are the members of the law enforcing agencies. The primary object of such a force to curb the crime in the society and if a Junior Commissioned Officer of BDR on the basis of a secret information storms in the place of occurrence in order to nab the narcotics trafficker that cannot be considered as illegal and unfair.

57. The learned Advocate for the defence also raised objection as to the non-recording of the reasons of his believing of commission of offence. It is fact that section 36 of the Ain provides the provisions that before making any search and seizure in order to recover any narcotic articles there is necessity to record the reasons for his such believing that any such offence may likely to commit. From the materials on record there appears no recording of the reasons by the PW 1 before proceeding towards the place of occurrence.

58. Now, if it is taken as a fact that the PW 1 without recording the reasons of his believing as to the commission of offence relating to narcotics had moved to the place of occurrence, that is simple an irregularity but not illegality and this provisions of law has been made to regulate the members of the law enforcing agency so that they cannot abuse their inherent power to search and to nab the offender but for not recording the reasons as has been found in this case, the accused has not been prejudiced in any way.

59. Now, the prominent question before me whether the search and seizure as conducted by the PW 1 has been done in compliance with the provisions of section 103 of the Code. In this regard, the learned Deputy Attorney General referring the decision of the case of Tajendra Nama-Vs-the Tripura Administration, reported in AIR 1965 Tripura 45 submits that

section 103 of the Code of Criminal Procedure applies only to search the places but does not apply to search a person. From the reading of the referred case it appears that the said case was under section 15 clause(b) of the Opium Act and in that case 30 tolas of opium was recovered from the pocket of Tajendra Nama and in that case the total search and seizure was challenged by the defence taking the arguments that section 103 of the Code has not been complied with. In answering the said question, the High Court Division, Tripura observed in the following ways:

> "There is no force in this contention of the learned lawyer for the petitioner. In the instant case the search was not conducted under section 103 of the Code of Criminal Procedure. It is to be noted that, section 103 of the Code of Criminal Procedure refers only to search of places and does not apply to search of persons. The ruling cited by the lawyer for petitioner does not apply to this case as it refers to a search of a house. In the present case the search of the accused and the seizure of a tin containing opium was effected under clause (b) of S.15 of the Opium Act which empowers an Excise Officer to detain and search any person whom he has reason to believe to be guilty of any offence under the said Act and also to arrest him if he is found to be in possession of opium. That being so, no question arises of any compliance with the provisions of section 103 of the Code of Criminal procedure in effecting the search. In support of this I may refer to Aung Kim Sein –Vs-the King, AIR 1941 Rang 333."(para 13 of the judgment)

60. The same view has also been taken in the case of Dilip Kumar Ghose-Vs-The State, reported in 42 DLR 464. This Court in the said reported case observed in the following ways:

> "Now let me revert to the first contention. Section 103 Code of Criminal Procedure, in my opinion, has no application to the facts of the instant case. This section falls under Chapter VII of the Code. Chapter VII relates to issuance of processes to compel the production of documents and other moveable property and for discovery of persons wrongfully confined. Section 103 relates to search to which process is required to be issued to compel production of the moveable and requires that before making such search the officer conducting the search shall call upon two or more respectable inhabitants of the locality in which the place to be searched situates to attend and witness the search and the seizure list shall be prepared in their presence and they shall sign the same. In this case the question of compelling the petition to produce the country-made wine which is being sold secretly to the officer conducting the search upon secret information does not arise inasmuch as the very issuance of summons to produce the wines in question will frustrate the purpose of the search and no useful result will be had. I thing that for the purpose of conducting search in order to find out as to whether a person is guilty of an offence punishable under section 46 of the Excise Act the provision of section 103 of the Code of Criminal Procedure has no application." (para 12 of the judgment)

61. The same view has also been taken in the case of Tarikul Islam -Vs- the State, 21 BLD 140. This Court in the said case held in the following manner:

> "The provision of section 103 of the Code of Criminal Procedure apply only when search is made under Chapter VII of the Code. These provisions do not apply to a case of apprehension of persons suspected to be carrying any intoxicant, or any other nothing liable to be confiscation under the law. The

incriminating article of the present case are, no doubt, intoxicated element and as such we are of opinion that the compliance of section 103 of the Code of Criminal Procedure is not necessary. On the other hand, it appears that the members of raiding party have proved the recovery of the incriminating articles from the control and possession of the accused appellant and the private witnesses admitted their signatures over the seizure list, but did not support their knowledge about seizure of the incriminating articles in their presence without any explanation as to why they signed in the seizure list without seeing the incriminating articles. In view of such facts and circumstances we are led to hold that the learned Tribunal has rightly found that the prosecution has successfully proved the recovery of the incriminating articles from the control and possession of the accused appellant and as such the same deserves no interference by this Court." (para 15 of the judgment)

62. Now, having regards to the above views as has been emerged from the above cited decisions I am of the view that the strict non-compliance of section 103 of the Code in order to search and seizure of madak articles either from a person or any place will not render the case unbelievable. Section 103 of the Code finds place in chapter VII of the Code. The purpose and scheme of chapter VII has been described in its preamble which runs as follows:

"OF PROCESS TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED"

63. The above preamble of chapter VII of the Code clearly indicates the very purpose of the chapter which enables the Court as well as the Police to procure documents including the movable properties and the persons wrongfully confined. The chapter contsists from sections 94 to 105 of which section 94 deals with the production of any document or other things while section 96 deals for the production of person. Sections 101 to 103 of the Code belonging to this chapter deal as to how the search and seizure will be made in order to address the provisions of sections 94 and 96 of the Code. It is fact that in section 103 of the Code there is also provisions as to how a place and person will be searched but the whole purpose of 103 of the Code has been attributed and designed to make the provisions of sections 94 and 96 effective. So, there is a little scope to say that for non-compliance of section 103 of the Code at the time of seizing of madak articles from a madak peddler, the whole case will be unbelievable.

64. Now, the vital question before me whether sections 36 and 37 of the Madak Drabbya Niontran Ain are the relevant laws for the recovery of madak articles from a madak merchandiser. Section 36 of the Ain runs as follows:

"(1) jq¡-f¢lQ¡mL h¡ a¡q¡l ¢nekট হইতে এতদুদ্দেশ্যে সাধারণ বা বিশেষভাবে ক্ষমতাপ্রাপ্ত কোন কর্মকর্তা বা Ef-পুলিশের পরিদর্শক বা তদূর্ধ্ব কোন কর্মকর্ত¡ বা কাস্টমসের পরিদর্শক বা সমমান সম্পূর্ণ বা তদূর্ধ্ব কোন কর্মকর্তা, বা বাংলাদেশ রাইফেলস্ এইরুপ বিশ্বাস করিবার কারণ থাকে যে, এই আইনের অধীনে কোন অপরাধ কোন স্থানে সংঘটিত হইয়াছে, হইতেছে বা হওয়ার সম্ভাবনা আছে, তাহা হইলে অনুরুপ বিশ্বাসের কারণ ¢m¢fhÜ L¢lu¡ ¢ae ®k ®L¡e pju-

(ক) উক্ত স্থানে প্রবেশ করিয়া তল্লাসি করিতে পারিবেন এবং প্রবেশে বাধাপ্রাপ্ত হইলে, বাধা অপসারণের জন্য clS¡-জানালা ভাংগাসহ যে কোন প্রয়োজনীয় বাবস্থা গ্রহন করিতে পারিবেন;

(খ) উক্ত স্থান তল্লাসিকালে প্রাপ্ত অপরাধ সংঘটনে ব্যবহার্য মাদকদ্রব্য বা বস্তু এই আইনের অধীন আটক বা বাজেয়াপ্তযোগ্য বস্তু এবং এই আইনের অধীন কোন অপরাধ প্রমাণের সহায়ক কোন দলিল, দস্তাবেজ বা জিনিস আটক করিতে পারিবেন;

(গ) উক্ত স্থানে উপস্থিত যে কোন ব্যক্তির দেহ তল্লাসি করিতে পারিবেন;

(ঘ) উক্ত স্থানে উপস্থিত কোন ব্যক্তিকে এই আইনের অধীন কোন অপরাধ করিয়াছে বা করিতেছে বলিয়া সন্দেহে গ্রেফতার করিতে পারিবেন।

(2) Ef-dj l¡ (1)-এ যাহা কিছু থাকুক না কেন, সূর্যাস্ত হইতে সূর্যোদয় পর্যন্ত সময়ের মধ্যে কোন স্থানে প্রবেন L¢lu¡ am¡C পরিচালনা না করিলে অপরাd pçfL£u ®L¡e hÙ¹eø h¡ mç qCh¡l h¡ Afl¡d£ f¡m¡Cu¡ k¡Ch¡l সম্ভাবনা আছে বলিয়া উক্ত উপধারায় উল্লিখিত কোন কর্মকর্তার বিশ্বাস করিবার সংগত কারণ থাকিলে অনুরুপ বিশ্বাসের কারণ লিপিবদ্ধ করিয়া তিনি উক্ত সময়ের মধ্যে উক্ত স্থানে প্রবেশ ও তল্লাসি করিতে পারিবেন।"

65. From the plain reading of section 36 of the Ain it has been found that the law enforcing agency in order to recover madak articles can enter into any place and on search can seize the madak articles along with the aiding articles and documents and he is also empowered to search a person even for the same purpose. The provisions of section 36 of the Ain appears to be more progressive and dynamic than that of the section 103 of the Code. In section 103 of the Code before making the search calling upon two or more respectable inhabitants of that locality is must but there appears no such obligatory provisions in section 36 of the Ain. Section 37 of the Ain provides the provisions of mechanical examination for the recovery of hidden madak articles from the person.

66. But both the sections 36 and 37 of the Ain which are relevant for the search and seizure of madak articles from a place and person are almost silent as to how the seizure list will be prepared by an officer who had conducted the search and seizure. The provisions of section 36 of the Ain appears to have stopped empowering the officer to search and seize of the goods but what will be the manner of seizing of the goods are very much absent in sections 36 and 37 of the Ain which is available in section 103 of the Code.

67. Section 103 of the Code provides that before making search of a place, the officer concerned will call upon two or more respectable inhabitants of that locality and in their presence he will search, thereafter, he will make a list of the goods which he intends to seize and he will take the signatures of those respectable persons on the list. In section 36 of the Ain though there is provisions of seizing of the goods but the very terms "seizure list" is absent in the said section but in order to seize something, the preparation of the seizure list is must.

68. Now, in my consideration section 103 of the Code is not legally applicable for making search and seizure in order to recover the madak articles as the Madak Drabbya Niontran Ain, 1990 is self contained on this subject being it is decorated by section s 36 and 37 of the Ain but as I have found so far that a law enforcing officer cannot complete the search and seizure relying on sections 36 and 37 of the Ain only because these sections are very much incomplete as to how an officer will prepare the seizure list and as to who will be the witnesses of the search and seizure. Sections 36 and 37 of the Ain are very much silent on those important points. But since the search of a place or a man and seizing of the materials are not sufficient to bring those articles into the book rather there must be a seizure list also for seizing the articles in presence of the local witnesses.

69. Since in the sections 36 and 37 of the Ain there appears no provision or any indication as to how the seizure list will be prepared, the seizing officer pursuant to section 42 of the Ain may follow the provisions of 103 of the Ain. Section 42 of the Ain provides that the provisions of the Code shall be applied for warrants, search, arrest and seizure under this Act if the same did not appear contradictory with the provisions of the Ain (Madak Drabbya Niontran Ain).

70. Now, until and unless there is a comprehensive and complete provisions of law under the Ain (Madak Drabbya Niontran Ain), regarding the search and seizure, an officer is to follow the provisions of the Ain to enter into the place of the occurrence in view of sections 36 and 37 of the Code and after seizing of the goods he will prepare the seizure list keeping harmony with the provisions of section 103 of the Code, so far, as the law relating to search and seizure of the madak articles as provided in sections 36 and 37 of the Ain is not fit and comprehensive and also there is no any better and alternative provisions before the seizing officer.

71. Now, I will consider the search and seizure of the madak articles of this particular case in the light of the above observation. From the discussion made hereinabove.

72. Now, coming to the fact of search and seizure of this case it appears that PW 1 in his evidence stated that he entering into a bus found a bag on the lap of the accused Saiful Islam and in presence of the supervisor and driver of the bus had searched the said bag and found 1100 grams heroin within the bag. Thus it is found that the search was made in presence of the driver and supervisor of the bus who appears to be the witnesses nos. 4 and 5 in this case.

73. In this connection as I have told it earlier that for the recovery of any madak articles on search there appears specific provisions in section 36 of the Ain but there is no provision regarding the preparation of seizure list in sections 36 and 37 of the Ain. Surely until and unless there is any law in connection of sections 36 and 37 of the Ain for preparing of seizure list of madak articles, every seizure list should be prepared as nearly as possible complying the provisions of section 103 of the Code.

74. Section 103 of the Code provides that the search and seizure must be done in presence of two local inhabitants and also the seizure list will be signed by them. The seizure list was made in presence of the PWs 4 and 5. The learned Advocate for the defence repeatedly tried to say that in order to make search and seizure the PW 1 should have called the Manager or staffs of Apon restaurant in order to comply the provisions of section 103 of the Code. Section 103 of the Code has given much stress upon two local respectable inhabitants in order to make search and seizure. The driver and the supervisor of the bus were going to Sylhet from Dhaka boarding 34 passengers in it, so, the supervisor and driver are the most competent witnesses of the search and seizure as the recovery was made from within the bus. In my consideration, the search and seizure in presence of the driver and the supervisor of the bus has fulfilled the demand of the law as provided in section 103 of the Code. .

75. But how far their (PWs 4 and 5) evidence will be relevant for the prosecution or the defence, that is the subject matter of discussion of evaluation but so far the preparation of seizure list in presence of the local inhabitants is concerned in my consideration that condition has been covered by the presence of the driver and the supervisor of the bus. So, I find no legal infirmity in the search and seizure of the articles from the bus and the accused.

76. Now, the question whether the evidence of the search and seizure as given by the PWs 1,2,3,4,5 and 11 are believable and sufficient to find the accused guilty. PWs 1 and 2 are the BDR personnel who had entered into the bus in order to search the bus and the accused, they in a chorus voice very consistently stated that they had found the school bag on the lap of the accused Saiful Islam and on search of the said bag, they recovered 1100 grams heroin from the said bag wrapped by a carbon paper. The PWs 1 and 2 has been cross-examined

meticulously by the defence. But there appears nothing in the said cross-examination of PWs 1 and 2 for which their such evidence can be discarded in any way.

77. PWs 1 and 2 are the members of the BDR party while the accused Saiful Islam is a man of another district of Pirojpur. There is no any suggestion from the defence that for any reason, the BDR party became interested to entangle Saiful Islam in a case like this. There appears no suggestion of enmity, even no suggestion that for any reason they were known to each other. A case against the accused may be false but there must be some reasons for filing a false case against a particular accused. In this particular case there is no suggestion from the defence why the BDR personnel who had conducted the search and seizure will be interested against accused Saiful Islam. I find no reason to discard the unimpeachable and unshaken evidence of the PWs 1 and 2 regarding the recovery of the bag as well as the heroin from the physical possession of Saiful Islam.

78. PWs 4 and 5 as the seizure list witnesses who ultimately did not support the prosecution case in to-to. But at the same time they could not deny the very appearance of the BDR party in their bus and taking away of two accused from the bus with a bag. So, the evidence of PWs 4 and 5 ultimately corroborate the prosecution case. The total evidence of PW 4, Md. Khorshed Alam reads as under:

> "আমি হানিফ এন্টারপ্রাইজের ঢাকা মোট্রো-h-14-২৩৩৬ নং বাসের চালক। ২২/১২/০৮ ইং তারিখ বিকাল অনুমান ৪.৪৫ মিঃ এর সময় ঢাকা সাইদাবাদ হইca সিলেটের উদ্দেশ্যে রওয়ানা দিয়া রাত ৮.৩০ মিঃ এর সময় হুমায়ুন রশিদ চত্তরে পৌঁছি। বিডিআর সিগনাল দেওয়ার পর আমি গাড়ি থামাইলে তাহারা ২ জন গাড়িতে উঠিয়া ২ জন যাত্রীকে কালো ব্যাগসহ নামিয়া যাইতেছিল। জিজ্ঞাসাবাদে বিডিআর সদস্যগন তাহাতে হিরোইন আছে বলিয়া জানাইয়াছে। এজাহারকারী উদ্ধারকৃত হিরোইনের জব্দ তালিকা তৈরী করিলে আমি তাহাতে দস্তখত করিয়াছি। EÜ¡lLa হিরোইন ও ব্যাগ এখন আমাকে দেখানো হইল। বাদী জানাইয়াছে যে, হিরোইন উক্ত ২ জন যাত্রীর নিকট হইতে পাওয়া গিয়াছে। বিডিআর যে ২ জন যাত্রীকে আটক করিয়াছে তাহারা এখন ডকে উপস্থিত আছে জব্দ তালিকায় দস্তখত প্রদঃ 1/2z
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> গাড়ীতে ৩৪ জন যাত্রী ছিল। তল্লাশীর সময় যাত্রীগন যার যার সীটে বসা ছিল। আমি আমার ড্রাইভিং সিটে বসা ছিলাম। কার নিকট হইতে হিরোইন ভর্তি ব্যাগটি উদ্ধার করিয়াছে তাহা বলিতে পারিব না। আমি ব্যাগের মধ্যে রক্ষিত আলামত দেখি নাই। এজাহারকারী জব্দ তালিকা প্রস্তুত করার সময় আমি তাহাতে দস্তখত করিয়াছি। এজাহারকারী অনুমান আধা ঘন্টা বাসটি তল্লাশী করিয়াছে। বাসের ভিতর ২ জন বিডিআর ঢুকিয়াছে। বাকীরা বাহিl ¢Rmz ¢h¢XBl সদস্য ২ জন অন্য কোন লোককে নিয়া বাসে উঠW e¡Cz Cq¡ paÉ euz B¢j ¢h¢XBl HL Lb¡u ¢jbÉ¡ p¡rÉ fËe L¢lu¡¢Rz"

79. From the above noted evidence of PW 4 it appears that he had halted the bus on the signal of the BDR party, he found two BDR persons to enter into the bus and also found to get down from the bus with two passengers and a bag, the BDR personnel told them that they had seized heroin and after preparation of seizure list he signed the seizure list but in cross-examination he also tried to help the accused as he stated that he cannot say from whom the bag was recovered and he did not find the alamat kept in the bag. A bus is always a confined place and it cannot be more than 50'X12' and the accused were found sitting on seat no. F3 and F4, so, it is not a believable story that the driver did not see the recovery from the particular person and his such evidence clearly reveals that he tried to help the accused out of the way.

80. PW 5 Rezaul Islam, the Supervisor of the bus and at the same time witness of the seizure list has stated in the following ways:

> "B¢j q¡¢eg এন্টারপ্রাইজের ঢাকা মেট্রো-h-২৩৩৬ নং বাসের সুপারভাইজার। ২২/১২/০৮ ইং তারিখ বিকাল বেলা বাসটি ঢাকা হইতে ছাড়িয়া রাত অনুমান ৮.৩০ মিঃ এর সময় হুমায়ুন রশিদ চত্তরে পৌঁছার পর বিডিআর

¢pNe¡m ®cJu¡l fl Bমার বাসটি থামাই। এরপর ২ জন বিডিআর জওয়ান বাসে উঠিয়া তল্লাশী করিয়া ২ জন যাত্রীকে নিয়া আমাদেরকে জানাইয়াছে যে, তাহাদের নিকট হইতে ১টি ব্যাগ যাহাতে হিরোইন ছিল উদ্ধার করিয়াছে। তাহাতে আটার মত পদার্থ ছিল। এজাহারকারী উদ্ধারকৃত বস্তুর জব্দ তালিকা তৈরী করিলে আমি তাহাতে দস্তখত L¢lu¡ছি। দস্তখত প্রদঃ ১/৩। যে ২ জন যাত্রীকে ধৃত করিয়াছে তাহারা F3 J F4 নং সীটের যাত্রী। ধৃত আসামী ২ জন ডকে উপস্থিত আছে।

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কার নিকট হইতে কি জিনিস উদ্ধার করা হইয়াছে তাহা আমি দেখি নাই। তবে বিডিআর সদস্য গন গাড়ীর ভিতর হইতে বস্তু উদ্ধার করিয়াছে। আসামীগন আমার পূর্ব পরিচিত নয়।"

81. The findings of this Court regarding the evidence of PW 4 is also relevant and applicable for this PW 5 who as supervisor of the bus surely was vigilant as to what was going to be happened in presence of the BDR party in his bus. So this is not a believable and rational story that he did witness the recovery closely. In fact, for the reasons best known to everyone PWs 4 and 5 tried to help the accused but ultimately they could not deny the appearance of two BDR personnel in his bus and taking away of two accused which ultimately supports the prosecution case.

82. Now, if we accept the arguments of the defeence as a whole that for any reason the PWs 4 and 5 did not support the recovery in that case the evidence of PWs 1 and 2 are sufficient to find the accused Saiful Islam guilty. In the case of 8 BLD 106, 59 DLR 104 and15 MLR (AD) 77 it was held by this Court and also by the Appellate Division that the evidence of the recovery officer can be taken into consideration if the same appears to be unimpeachable, fair and inspired confidence into the mind of the Judge that they have given a true version of the case in the Court. I find it difficult to show any disagreement with the findings and decision made in the above cited cases.

83. In the case of Asadul Hossain-Vs-State, 57 DLR 615 it was held that even if the seizure list witnesses do not support the prosecution case or do not speak for the prosecution case, the conviction can be given if the case is proved otherwise on the basis of the evidence of the members of the recovery party. In my consideration, the principle enunciated in the above noted case is applicable in this case. So, I find it difficult to discard the evidence of PWs 1 and 2 which has been supported by the evidence of PWs 4 and 5 to a greater extent regarding the recovery of a bag and 1100 grams heroin from the said bag of Saiful Islam. I find that the trial Court did not commit any error of law and fact in believing the evidence of recovery officers in convicting and sentencing the accused Saiful Islam for possessing of 1100 grams heroin.

84. At trial, the chemical examination report of heroin was admitted as evidence and the same report was marked as exhibit 9. The learned Advocate of the condemned prisoner submits that without examining the chemical examiner, the report should have not been admitted into evidence. I find it difficult to consider this submission as a good argument. The submission is inconsistent with the provisions of section 510 of the Code. Section 510 of the Code clearly provides that any document purporting to be a report under the hand of Chemical examiner or Assistant chemical examiner to the Government, may without calling him as a witness be used as evidence in any trial. As such, I find that non-examination of the chemical examiner cannot be a point or controversy in a case like this.

85. In the case of Kamruzzaman-Vs-State, 12 BLC 553 it has been held by this Court that the report of chemical examiner may be used in evidence in the trial without calling the said

chemical examiner as witness. The report exhibit 9 is going to show that the chemical examiner found the existence of the heroin in the substance sent to him in examination.

86. The heroin was scaled by the PW 12, so in view of the case of State-Vs-Miss Eliadah Mc Cord, 16 BLD (AD) 239, the recording of conviction under serial no. 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 from possessing more than 25 grams heroin against condemned prisoner Saiful Islam has rightly been made by the trial Court. Now, having consideration of the above facts and discussion I find it difficult to interfere in the findings and decisions of the trial Court so far as it relates for the condemned prisoner Saiful Islam but so far the sentence of Saiful Islam is concerned he has been sentenced to death but it has come from the arguments that he is a young man of 30 years. In my consideration the best purpose of justice would be served if his death sentence is commuted into the imprisonment for life.

87. So far the conviction and sentence of Md. Delowar Mallik is concerned it is found from the materials on record that he was found sitting on the seat no. F-4 by the side of condemned prisoner Saiful Islam and they were going to Sylhet through a joint ticket but all the evidence so far it has been found that the packet of the heroin was found within the school bag which was possessed by accused Saiful Islam. If it is conceded for a moment that the condemned prisoner Saiful Islam and Delowar Mallik were sitting side by side in a Sylhet bound bus, can it be said that Delowar had any knowledge about the objectionable materials inside the bag of Saiful Islam. I find no legal evidence in the record to show that with the knowledge of Delowar Mallik and Saiful Islam was carrying the heroin within his bag. So, in my consideration there appears no legal evidence against Delowar Mallik that he had abated Saiful Islam in order to carry the heroin from Dhaka to Sylhet in any manner. Mere taking a seat with Saiful Islam side by side does not mean that Delowar Mallik had any knowledge or he had abated Saiful Islam in carrying those heroin. So, I find that the conviction and sentence upon Delowar Mallik based on no evidence. In fact, there appears no material in the hands of the prosecution to show that the accused Delowar Mallik is guilty in any manner whatsoever in carrying the heroin. So the conviction and sentence of Delowar Mallik does not deserve at all.

88. Now, having regards to the above decision the death reference is rejected but the conviction of the condemned prisoner Saiful Islam under serial 1(Kha) of the table attached to section 19(1) of the Madak Drabbya Niontran Ain, 1990 is upheld and the death sentence is commuted into the sentence of imprisonment for life. As a result, the Criminal Appeal being no. 3723 of 2009 and Jail Appeal being no. 425 of 2009 filed by Saiful Islam are disposed of accordingly.

89. The convict appellant Delowar Mallik is found not guilty of the charge as levelled against him and he is acquitted of the charge. Consequently the Criminal Appeal being no. 3849 of 2011 filed by him is allowed.

90. Let a copy of this judgment along with the lower Court's record be sent to the Court concerned at once.