

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 5241 of 2018

Md. Robbani

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Ms. Sabnam Momtaz Khan, 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 08.07.2024 and
Judgment on 11.07.2024.

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Robbani is directed against the impugned judgment and order of conviction and sentence dated 23.04.2018 passed by the learned Judge, Special Tribunal No. 1, Panchagarh in Special Tribunal Case No. 36 of 2015 arising out of G.R. No. 119 of 2014 corresponding to Atowary Police Station Case No. 05 dated 09.09.2014 convicting the accused-appellant under Section 25B(2) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for a period of 01(one) year

and to pay a fine of Tk. 5,000/= (five thousand) in default to suffer rigorous imprisonment for 02 (two) months more.

The prosecution case, in short, is that one, Md. Mozammel Hoque, S.I. District Detective Branch, Panchagarh as informant on 09.09.2014 at 19.05 hours lodged an Ejahar with Aotwary Police Station, Panchagarh against the accused appellant stating, inter-alia, that on 09.09.2014 at about 14.45 hours as per secret information, the informant along with a contingent of police force rushed in front of old Atowary Mosque under Atowary Police station, Panchagarh and found the accused appellant is selling phensedyl syrups and thereafter, the informant party apprehended the accused appellant and on search recovered 3 bottles of Indian made phensedyl from him in presence of witnesses, which valued at Tk. 2100/- and thereafter, police seized those phensedyls by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Atowary Police Station Case No. 05 dated 09.09.2014 under Section 25B (2) of the Special Powers Act, 1974 was started against the accused appellant.

Police after completion of usual investigation submitted charge sheet being charge sheet No. 168 dated 30.11.2014 under Section 25B(2) of the Special Powers Act, 1974 against the accused appellant.

Ultimately, the accused appellant was put on trial before the learned Judge, Special Tribunal No. 1, Panchagarh to answer a charge under Section 25B (2) of the Special Powers Act, 1974 to which the accused appellant pleaded not guilty and claimed to be tried stating that he has been falsely implicated in the case.

At the trial, the prosecution side examined in all 07 (seven) witnesses to prove its case, while the defence examined none.

The defence case, from the trend of cross-examination of the prosecution witnesses and examination of the accused-appellant under section 342 of the Code of Criminal Procedure appeared to be that the accused-appellant was innocent and he has been falsely implicated in the case. The defence declined to adduce any evidence.

On conclusion of trial, the learned Judge, Special Tribunal No. 1, Panchagarh by the impugned judgment and order dated 23.04.2018 found the accused appellant guilty under Section 25B (2) of the Special Powers Act, 1974 and sentenced him thereunder to suffer rigorous imprisonment for a period of 01(one) year and to pay a fine of Tk. 5,000/= (five thousand) in default to suffer rigorous imprisonment for 02(two) months more.

Aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 23.04.2018, the accused-appellant preferred this criminal appeal.

Mr. Sabnam Momtaz Khan, the learned Advocate appearing for the convict-appellant submits that the accused appellant is out an out innocent, who has been made scapegoat in this case, in-fact, no incriminating phensedyl syrups were recovered from his possession. She further submits that in this case 07(seven) witnesses were examined, who inconsistently deposed before the trial Court as to recovery of 03 bottles phensedyl syrup from the possession of the accused appellant. She adds that in this case the prosecution having failed to obtain chemical examination report which creates serious doubts whether the seized goods were actual contraband in nature although the learned Special Tribunal Judge without considering all these vital aspects of the case mechanically found the accused appellant guilty of the offence under section 25B (2) of the Special Powers Act, 1974. She further submits that in this case prosecution in all examined 7(seven) witnesses although none of the witnesses testified any single word as to the fact that the accused appellant brought those phensedyls by way of smuggling from India to Bangladesh for the purpose of sale and thus, the ingredients of section 25B(2) of the Special Powers Act, 1974 are totally absent in the present case.

Ms. Kohenoor Akter, the learned Assistant Attorney General, 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 all the witnesses categorically testified in one voice that the accused appellant was apprehended with 03 bottles of Indian made phensedyl and as per evidence and materials on record it is clear that accused appellant brought those phensedyls from India by way of smuggling and kept the same under his possession for the purpose of sale, the learned Judge, Special Tribunal No. 1, Panchagarh justly passed the impugned judgment and order of conviction and sentence dated 23.04.2018.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of Appeal, F.I.R, Charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order, now only the question that calls for consideration in this appeal is whether the trial Court committed any error in finding the accused- appellant guilty of the offence under Section 25B(2) of the Special Powers Act, 1974.

On scrutiny of the record, it appears that one, Md. Mozammel Hoque, S.I. District Detective Branch, Panchagarh as informant on 09.09.2014 at 19.05 hours lodged an Ejahar with Aotwary Police Station, Panchagarh against the accused appellant on the allegation that the

appellant was apprehended with 03 (three) bottles of Indian made Phensedyl Syrup, which valued at Tk. 2100/- and police after completion of investigation on 30.11.2014 submitted charge sheet against the accused appellant under Section 25B(2) of the Special Powers Act, 1974. It further appears that the prosecution to prove its case examined in all 7 witnesses out of whom, PW-1, S.I. Md. Mozammel Hoque, informant of the case, who stated in his deposition that on 09.9.2014 as per G.D. entry No. 61 while the informant and other police forces were on special duty as to recovery of drugs got a secret information and then the police team rushed in front of old Atowary Mosque at 14.45 hours and apprehended the accused appellant and on search recovered 3 bottles of Indian made phensedyl from him in presence of local witnesses, namely Moinul, Saiful and Anwar while some miscreants namely Nawshed, Kudrat, Mantu, Harun, Eklasur, Nayeb Ali, Dulu, Alefa Begum, Kulsum, Lovely, Rashida Begum, Ayesha Begum and Sufia Begum tried to snatch the victim and on hearing this news more police forces came there while the miscreants left the premises. This witness proved the FIR as exhibit-2 and his signature thereon as exhibit-2/1 and also proved the seized phensedyls as material exhibit. PW-2, Md. Anwar Hossain, seizure list witness, who stated in his deposition that Rabbani was apprehended with 3 bottles of Phensedyl. He proved the seizure list and his signature thereon as exhibit-1/2. PW-3, Moinul Haque, another seizure list witness, who

stated in his deposition that Robbani was apprehended with 3 bottles of Phensedyl. He proved the seizure list and his signature thereon as exhibit-1/3. PW-4, Md. Saiful Islam, another seizure list witness, who corroborated the evidence of PW-2 and PW-3 in respect of all material particulars. PW-5, A.S.I. Md. Mosharof Hossain, member of the raiding party, who gave evidence in support of the prosecution case as like as PW-1 in respect of all material particulars . PW-6, Md. Sohel Rana, constable, who also deposed as like as PW-1. PW-7, S.I. Md. Faruque Siddik, Investigating Officer. This witness stated that during investigation he visited the place of occurrence, prepared sketch-map, examined the witnesses under section 161 of the code of the criminal procedure and after completion of investigation having found prima-facie case against the accused appellant and submitted charge sheet being charge sheet No. 168 dated 30.11.2014 under Section 25B(2) of the Special Powers Act, 1974. This witness was not cross-examined by the defence.

On scrutiny of the above quoted evidence, it appears that all the witnesses testified that the accused appellant was apprehended with 03 bottles of Indian made Phensedyl on 09.09.2014 although in this case it is found that the prosecution could not produce or adduce any documents to show that the seized goods were contraband goods.

Moreover, PW-1 to PW-7 in their respective evidence stated nothing that the accused appellant brought those

Phensedyl by way of smuggling from India to Bangladesh for the purpose of sale. Further, in this case no chemical examination of the phensydil in question was held. It is thus difficult to believe that alleged seized phensydils were actually contraband in nature or the same were brought into Bangladesh from India by way of smuggling.

In the case of Raju Ahmed and others Vs. The State reported in 7 MLR 112, it has been held as follows:

“There has been no chemical examination of the phensydil in question which is serious lacuna on the part of the prosecution whose duty it was to establish that the seized goods are contraband goods.”

In the case of Nannu Mia alias Habibur Rahman Vs. The State reported in 55 DLR7, it has been held as follows:

“Before convicting the appellant the court must give findings that the phensydil in question found in his possession was a contraband item smuggled into Bangladesh for sale”.

In the case of Md Akram vs the State reported in 1LM (AD) 581, it has been held as follows:

Normally this Division does not interfere with the judgment of the High Court Division on appeal if it is found that the judgment is based on proper appreciation of the evidence. It cannot reassess the evidence afresh as a court of appeal to examine whether or not the High Court Division has properly appreciated the evidence

while believing the recovery of the contraband goods from the possession of the petitioner. Learned counsel appearing for the petitioner is also conscious on the question of finding of fact and does not argue that the prosecution has failed to prove the recovery beyond reasonable doubt. He however argues that on the admitted facts no offence discloses against the petitioner at all and therefore, of the High Court Division has erred in law in maintaining the conviction petitioner. In this connection the learned counsel has drawn our attention to the evidence on record and section 25B (2) of the Special Powers Act, 1974.

Sub-section (2) of section 25B reads thus: "Whoever sells, or offers or displays for sale, or keeps in his possession or under his control for the purpose of sale, any goods the bringing of which into Bangladesh is prohibited by or under any law for the time being in force shall be punishable with imprisonment for a term which may extend to seven years and shall not be less than one year, and shall also be liable to fine."

This sub-section lays down the constituents of the constitution of an offence of second degree smuggling and its sentence. It provides that if any person is found (i) in selling or (ii) offering or displaying for sale, or (iii) keeps in his possession or under his control for the purpose of sale, any goods the bringing of which into Bangladesh prohibited by law, he will be guilty of the offence. Now taking these three conditions in mind, it is to be examined whether any of these preconditions has been proved by the prosecution against the petitioner. The first two conditions are not attracted in this case since it is not the prosecution case that the petitioner was selling or offering for sale or displays for sale of a bottle of phensedyl. He was found in possession of a bottle of phensedyl

which he was carrying on his way by driving a motorbike. Therefore, he may be charged with for violating the last subject to the condition that he has kept it in his possession or has carried it for the purpose Of sale. Neither in the FIR nor in the evidence of P.W.1 or in the evidence of other witnesses, there is any allegation that the petitioner has kept or carried one bottle of phensedyl for the purpose of sale. It is the consistent case that the phensedyl bottle was recovered from his possession while the petitioner was approaching towards Dupchanchia. Only possession of contraband goods does not constitute an offence of smuggling within the meaning of section 25B (2). It is only if any person keeps in his possession for the purpose of sale of the contraband goods the bringing of which is prohibited by law, an offence of the second category of smuggling will be attracted.

From a plain reading of the above quoted decisions of our Apex Court, it appears that only possession of contraband goods does not constitute an offence of smuggling within the meaning of section 25B (2) of the Special Powers Act, 1974.

I have already discussed that in this case the prosecution could not produce or adduce any evidence both oral or documentary to show that the convict-appellant brought those phensidyl syrups from India by way of smuggling and kept the same under his possession for the purpose of sale. In view of the attending facts and circumstances of the case and the evidence on record, I am constrained to hold that the prosecution has failed to prove

the charge under Section 25B(2) of the Special Powers Act, 1974 against the accused appellant, Md. Rabbani beyond any reasonable doubts.

The learned Special Tribunal failed to evaluate the evidence on record as required by law and also failed to consider the defence case thereby reaching to a wrong decision, which occasioned a failure of justice. In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution has failed to prove charge of smuggling against accused appellant, Md. Rabbani beyond reasonable doubts. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence dated 23.04.2018 passed by the learned Judge, Special Tribunal No. 1, Panchagarh in Special Tribunal Case No. 36 of 2015 arising out of G.R. No. 119 of 2014 corresponding to Atowary Police Station Case No. 05 dated 09.09.2014 against the accused-appellant is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Robbani is discharged from his bail bonds.

Send down the lower Court records at once.