

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 2295 of 2017

Most. Amena alias Abiran Begum alias
Abiran Amena

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Qazi Zahed Iqbal, 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 18.02.2024, 22.02.2024 and
Judgment on 25.02.2024.

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Most. Amena alias Abiran Begum alias Abiran Amena is directed against the impugned judgment and order of conviction and sentence dated 20.02.2017 passed by the learned Judge of Special Tribunal No. 06, Jessore in Special Tribunal Case No. 77 of 2010 arising out of S.G.R. No. 59 of 2009 corresponding to Sharsha Police Station Case No. 11 dated 15.10.2009 convicting the accused-appellant under Section 25B(2) of the Special Powers Act, 1974 and

sentencing her thereunder to suffer rigorous imprisonment for a period of 01(one) year and to pay a fine of Tk. 2,000/= (two thousand) in default to suffer simple imprisonment for 1 (one) month more.

The prosecution case, in brief, is that one, Md. Sirajul Islam, A.S.I, Sharsha Police Station, Jessore as informant on 15.10.2009 at about 10.35 a.m. lodged an Ejahar with Sarsha Police Station, Jessore against the accused appellant stating, inter-alia, that on 15.10.2009 at about 9:15 a.m. while the informant along other police forces were on duty at Navaran Shatkhira Mor then they saw a lady is coming from Navaran Bazar by Van in a suspicious manner resulting police team asked her about illegal goods and then that lady bought total 10 bottles of Indian phensedyl Syrups from her body, which valued at Tk. 3,000/-(three thousand) and thereafter, police seized those phensedyl Syrups by preparing seizure list in presence of witnesses and arrested the accused appellant.

Upon the aforesaid First Information Report, Sharsha Police Station Case No. 11 dated 15.10.2009 under Section 25B(2) of the Special Powers Act, 1974 was started against the accused appellant.

Police after completion of investigation submitted charge sheet against the accused appellant, vide charge sheet No. 249 dated 31.10.09 under Section 25B(2) of the Special Powers Act, 1974.

Ultimately, the accused appellant was put on trial before the Special Tribunal No. 06, Jessore to answer a charge under Section 25B(2) of the Special Powers Act, 1974.

At the trial, the prosecution has examined in all 7(seven) witnesses to prove its case and exhibited some documents, while the defence examined none.

On conclusion of trial, the learned Judge of Special Tribunal No. 06, Jessore by the impugned judgment and order dated 20.02.2017 found the accused appellant guilty under Section 25B(2) of the Special Powers Act, 1974 and sentenced her thereunder to suffer rigorous imprisonment for a period of 01(one) years and to pay a fine of Tk. 2,000/= (two thousand) in default to suffer simple imprisonment for 1 (one) month more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 20.02.2017, the accused-appellant, Most. Amena alias Abiran Begum alias Abiran Amena preferred this criminal appeal.

Mr. Qazi Zahed Iqbal, the learned Advocate appearing for the convict-appellant submits that the accused appellant is innocent, who has been made scapegoat in this case, in fact, no incriminating article was recovered from the possession and control of the convict appellant. He adds that in this case total 7 witnesses were examined out of which 3 local seizure list witnesses namely PW-4, 5 and 6 did not

support the prosecution case in any manner whatsoever although the tribunal Judge without applying his judicial mind to the facts and circumstance of the case and law bearing on the subject most illegally found the accused appellant guilty under Section 25B(2) of the Special Powers Act, 1974 and as such, the impugned judgment and order of conviction and sentence is liable to be set-aside. Finally, the learned Advocate submits that in this case no chemical examination was held as to phensedyl Syrups and thus, it is difficult to hold that the seized phensedyls are contraband in nature.

Ms. Kohenoor Akter, the learned Assistant Attorney General, on the other hand, supports the impugned judgment which was according to him just, correct and proper. She submits that in this case seizure list witnesses in their respective evidence disclosed the manner of occurrence and as such, it cannot be said that the seizure list witness did not support the prosecution case in any manner. The learned Assistant Attorney General further submits that PW-1, PW-2, PW-3 are members of the raiding party, they categorically testified that 10 bottles of Indian made phensedyl syrups were recovered from the direct possession and control of the accused appellant and it is on record, the learned Judge, Special Tribunal No. 6, Jessore on assigning sound reason justly found the accused appellant guilty under Section 25B(2) of the Special Powers Act, which should be disturb.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of Appeal, deposition of witnesses and other materials on record including the impugned judgment the only question that falls for my 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. Sirajul Islam A.S.I, Sharsha Police Station, Jessore as informant on 15.10.2009 lodged an Ejahar with Sarsha Police Station, Jessore against the accused appellant on the allegation that the accused appellant was apprehended along with 10 bottles of Indian Phensedyl syrups, which valued at Tk. 3,000/-(three thousand) and police after completion of investigation 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 which PW-1, A,S, I, Tariquzzaman, examined the address of accused appellant. PW-2, Constable, Md. Zahurul Islam, stated in his deposition that accused appellant was apprehended along with 10 bottles of Indian phensedyls and thereafter police prepared seizure list in presence of witnesses. PW-3, A.S.I, Md. Sirajul Islam, informant of the case, who stated in his deposition that on 15.10.2009 the accused appellant was apprehended with 10 bottles of contraband Indian phensedyl

syrops. Police seized those phensedyl syrups by preparing seizure list in presence of witnesses. PW-4, Dilip Kumar, stated in his cross-examination that –“ পুলিশ আমাকে সাদা কাগজে স্বাক্ষর করতে বলে। এছাড়া আমি অন্য কিছু জানি না।” PW-5, Anwar Hossain stated in his cross examination that-“আমি সাদা কাগজে সই করা ছাড়া আর কিছু জানি না” PW-6, Shahidul Islam, stated in his deposition that “সকাল ৯.৩০ টার দিকে নাভারন সাতক্ষীরা মোড়ে পুলিশ আসামী মহিলাকে ধরে নিয়ে যাচ্ছিল। আসামীর কাছে কিছু মাল পাওয়া গেছে বলে পুলিশ জানায়।” This witness in his cross-examination also stated that “আমি সাদা কাগজে সই করেছিলাম।” PW-7, investigating officer of the case, who stated in his deposition 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, who after completion of investigation submitted charge sheet against the accused appellant under Section 25B(2) of the Special Powers Act, 1974. This witness proved the sketch map as exhibit-4 and his signature thereon as exhibit 4/1. This witness in cross-examination stated that- “উদ্ধারকৃত আলামত আজ আদালতে নেই।”

On perusal of the record, it appears that in this case the prosecution could not produce any chemical report to prove that the seized Phensedyl Syrups were contraband in nature. Moreover, seizure list witnesses namely, PW-4, PW-5 and PW-6 in their respective evidence stated nothing as to recovery of phensidyl syrups from the possession and

control of the convict-appellant and in this case there is no evidence on record to suggest that the accused-appellant brought those phensidyl syrups from India by way of smuggling and kept the same under his possession and control for the purpose of 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 decision 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 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 and control for the purpose of sale. Besides, seizure list witnesses namely, PW-4, PW-5 and PW-6 in their respective evidence stated nothing as to recovery of phensidyl syrups from the possession and control of the convict-appellant. 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 against accused appellant Most. Amena alias Abiran Begum alias Abiran Amena beyond any reasonable doubts. The learned Special Tribunal Judge failed to properly evaluate the evidence on record thereby reaching a wrong decision that the offence has been proved beyond reasonable doubt against the appellant, which occasioned a miscarriage of justice.

In the facts and circumstances of the case and the evidence on record vis-a-vis the decision reported in 1 LM (AD) 581, it must be held that the prosecution failed to prove charge of smuggling against accused appellant 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

20.02.2017 passed by the learned Special Tribunal No. 06, Jessore in Special Tribunal Case No. 77 of 2010 arising out of S.G.R. No. 59 of 2009 corresponding to Sharsha Police Station Case No. 11 dated 15.10.2009 against the appellant Most. Amena alias Abiran Begum alias Abiran Amena is set aside and she is acquitted of the charge levelled against her.

Accused appellant, Most. Amena alias Abiran Begum alias Abiran Amena is discharged from her bail bonds.

Send down the lower Court records at once.