

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 3256 of 2017

Md. Reazul Islam
.....Convict-appellant.
-Versus-
The State
.....Respondent.

None appears
.....For the 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 31.07.2024 and Judgment on
01.08.2024**

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Reazul Islam is directed against the judgment and order of conviction and sentence dated 15.03.2017 passed by the learned Judge, Special Tribunal No.4, Thakurgaon in Special Tribunal Case No. 75 of 2012 arising out of G.R No. 224 of 2008(T) corresponding to Thakurgaon Police Station Case No. 21 dated 23.03.2012 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 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer imprisonment for 03(three) months more.

The prosecution case, in brief, is that one, S.I. Shamol Chandra Barman as informant on 23.03.2012 at about 21:45 hours lodged an Ejahar with Thakurgaon Police Station against the accused appellant and another stating, inter-alia, that while the informant and other police forces were on special duty as per G.D. No. 1080 dated 23.03.2012 got a information that UP chairman, member and others caught hold of 2 accused persons with phensidyls and accordingly police team rushed there and took control over the accused appellant and another and on search, recovered 6 bottles phensidyl syrup from accused Reazul and 3 bottles phensidyl from another accused Md. Abdullah (Abdul), who disclosed that they used to bring phensidyls from India by way of smuggling for the purpose of sale. Thereafter, the informant party seized those phensidyls by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Thakurgaon Police Station Case No. 21 dated 23.03.2012 under section 25 B(2) of the Special Powers Act, 1974 was started.

Police after completion of investigation submitted charge sheet No. 139 dated 24.06.2012 under section 25 B(2) of the Special Powers Act, 1974 against the accused-appellant and another.

Thereafter, in usual course the case record was sent to the Court of learned Sessions Judge and Special Tribunal No.1, Thakurgaon, wherein the case was registered as Special Tribunal Case No. 75 of 2012. Subsequently, the case was transmitted before the learned Special Tribunal No.4, Thakurgaon for disposal before whom the accused appellant and another were put on trial to answer a charge under section 25B (2) of the Special Powers Act, 1974 to which the accused persons pleaded not guilty and claimed to be tried stating that they have been falsely implicated in this case.

At the trial, the prosecution side has examined as many as 8(eight) witnesses to prove its case, while the defence examined none.

The defence case as it appears 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 that the accused-appellant is innocent, who has been falsely implicated in the case. The defence declined to adduce any witness.

On conclusion of trial the learned Judge, Special Tribunal No.4, Thakurgaon by the impugned judgment and order dated 15.03.2017 found the accused appellant and another guilty under section 25B(2) of the Special Powers Act, 1974 and sentenced them thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer imprisonment for 3 (three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 15.03.2017, the accused-appellant preferred this criminal appeal.

No one found present to press the appeal on repeated calls despite of fact that this criminal appeal has been appearing in the list with name of the learned Advocate for the appellant for hearing for a number of days.

In view of the fact that this petty old criminal appeal arising out of 3 years sentence, I am inclined to dispose of it on merit on the basis of the evidence and materials on record.

Ms. Shahida Khatoon, the learned Deputy Attorney-General supports the impugned judgment and

order of conviction and sentence dated 15.03.2017, which was according to her just, correct and proper.

Having heard the learned Deputy Attorney General and having gone through the materials on record, the only question that calls for our 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 the prosecution to prove the charge under section 25-B(2) of the Special Powers Act, 1974 against the accused-appellant and another examined in all 08 (eight) witnesses out of whom PW-1, Shamol Chandra Barman, informant of the case stated in his deposition that on 23.03.2012 while the informant and other police forces were on special duty got a secret information that local people caught hold of 2 accused persons with phensidyl near Palli Biddyut Bazar and thereafter, the informant party rushed there and found those accused persons and then police arrested the accused persons and on search recovered 6 bottles of phensidyl syrup from the pant pocket of accused Reazul (appellant) and 3 bottles of phensidyl from another accused Md. Abdulla and

thereafter, police seized those phensidyls by preparing seizure list in presence of the witnesses. This witness proved the ejahar and his signature thereon as “Ext.-1, 1(Ka), Seizure list and his signature thereon as “Ext.-2, 2(Ka)”. This witness identified the seized phensidyl as material “Ext.-II”. This witness in his cross-examination stated that- “আমি পৌছানোর কিছুক্ষন আগে আসামীদেরকে স্থানীয় লোকজন আটক করেছিল কিনা আমি জানিনা।” PW-2, constable Liton, PW-3, constable Abdul Khatirul Islam, PW-4, constable Aatur Rahman, all these witnesses are members of the raiding party, who as eye witnesses gave evidence in support of the prosecution case and made similar statements like PW-1. PW-5, Md. Abdul Hannan, Chairman, Rahimanpur Union Parishad, who stated in his evidence that- “গত ২৩/৩/১২ তাং ঘটনা আসামী মোঃ রিয়াজুল মাদক ব্যবসা করতো এরা স্থানীভাবে ফেন্সিডিল কেনা বেচা করতো তা প্রায়ই শুনতাম । ঘটনার দিনে আমার ইউনিয়নের মধ্য বয়সী প্রতিবাদী কিছু যুবক মিলে তার বাড়ির পূর্ব পাশে ঘিরে ফেলে তার নিকট হতে ০৬(ছয়) বোতল ফেন্সিডিল উদ্ধার করা হয় এবং তার সামনেই আব্দুল্লাহ নামে আরেকজনের নিকট হতে ০৩(তিন) বোতল ফেন্সিডিল উদ্ধার হয়।” This witness proved the seizure list and his signature thereon as “Ext.-2, 2/2”. This witness also stated that during recovery of 6+3=9 bottles of phensidyl he was present in the place of occurrence. PW-6, Md. Hazimuddin and PW-7, Md. Ikramul Haque, both of them are local seizure list

witnesses, who testified in one voice that 6+3 =9 bottles of phensidyl were recovered from the accused appellant and another.

PW-8, Sub Inspector, Md. Abu Rayhan investigated the case. This witness stated in his deposition that during investigation he prepared sketch map, index and proved the same as “Ext. Nos. 3, 3/1, 4 and 4/1 respectively”. This witness also stated that during investigation he examined the witnesses under section 161 of the Code of Civil Procedure and after completion of investigation submitted charge sheet against the accused-appellant and another being charge sheet No.139 dated 24.06.2012 and proved the charge sheet and his signature thereon as “Ext.-5 &5/1”

On an analysis of the above quoted evidence, it appears that PW-5, PW-6, PW-7 stated in their respective evidence that local people apprehended the accused-appellant and another with phensidyls. All these witnesses proved the seizure list and their signature thereon. PW-1, PW-2, PW-3 and PW-4 are police personnel, who stated in their respective evidence that on hearing about the incident they went to the place of occurrence and arrested the accused appellant and another and thereafter they prepared seizure list in presence of the witnesses.

On a close perusal on record, it appears that none of the witnesses stated any single word that the accused persons brought those seized phensedyl by way of smuggling from India for the purpose of sale. On a query from the Court the learned Deputy Attorney General admits that there has been no chemical examination of the phensedyl in question. It is thus difficult to believe that alleged seized phensedyl 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 phensedyl 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 phensedyl 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,

As, I have already indicated that in this case the prosecution could not produce any evidence 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. Therefore, I find no difficulty whatever in holding that the impugned judgment and order of conviction and sentence does not deserve to be sustained.

In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove the charge of smuggling against accused, Md. Reazul Islam beyond reasonable doubts. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence passed by the learned Judge, Special Tribunal No.4, Thakurgaon in Special Tribunal Case No. 75 of 2012 arising out of G.R No. 224 of 2012 (T) corresponding to Thakurgaon Police Station Case No. 21 dated 23.03.2012 against convict-appellant, Md. Reazul Islam is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Reazul Islam is discharged from his bail bonds.

Send down the lower Court records at once.