

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 1617 of 2018

Md. Momen

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Khandker Khaliqur Rahman, Advocate

.....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 28.04.2024 and

Judgment on 07.05.2024

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Momen is directed against the judgment and order of conviction and sentence dated 16.01.2018 passed by the learned Judge, Special Tribunal No.3, Meherpur in Special Tribunal Case No. 86 of 2011 arising out of G.R No. 416 of 2011 corresponding to Meherpur Police Station Case No. 27 dated 30.07.2011 convicting the accused-appellant under section 25B(2) of

the Special Powers Act, 1974 and sentencing him there under to suffer rigorous imprisonment for a period of 4(four) years and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 02 (two) month more.

The prosecution case, in short, is that one, Md. Anisur Rahman, Sub Inspector, Detective Branch, Meherpur as informant on 30.07.2011 at about 22:15 hours lodged an Ejahar with Meherpur Police Station against the accused appellant stating, inter-alia, that on 30.7.2011 while the informant along with other police forces were on special duty got a secret information that a man will go to Dhaka with phensidyls and accordingly the informant party rushed Keya Paribahan counter situated at Hotel Bazar Moor and then sensing the presence of police the accused person tried to escape but the informant with the help of constable, Md. Kamal Hossain apprehended the accused and on interrogation he disclosed his name is Md. Momen and also disclosed that he kept wheat in his bag and thereafter, police team in presence of the witnesses opened the bag and on search recovered 46 bottles of Indian phensidyl from his bag and thereafter, the informant party seized those phensidyl syrups by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Meherpur Police Station Case No. 27 dated 30.07.2011, under section 25B(2) of the Special Powers Act, 1974 was started.

Police after completion of usual investigation submitted charge sheet No. 136 dated 25.08.2011 under section 25B(2) of the Special Powers Act, 1974 against the accused appellant.

Thereafter, in usual course the case record was sent to the court of learned Sessions Judge and Special Tribunal No.1, Meherpur wherein it was registered as Special Tribunal Case No. 86 of 2011. Ultimately, the learned judge, Special Tribunal No.1 transferred the case to Special Tribunal No.3, Meherpur for trial before whom the accused-appellant was put on trial 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 this case.

At the trial, the prosecution has examined as many as 09(nine) 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 has been falsely implicated in the case.

On conclusion of trial the learned Judge, Special Tribunal No.3, Meherpur by the impugned judgment and order dated 16.01.2018 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 4(four) years and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 02 (two) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 16.01.2018 the accused-appellant preferred this appeal.

Mr. Khandker Khaliqur Rahman, the learned Advocate appearing for the convict-appellant in the course of argument takes me through the F.I.R, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence dated 16.01.2018 and then points out that practically this is a case of no evidence inasmuch as in this case the prosecution examined in all 9 witnesses out of which none of them testified any single word that the contraband phensidyl syrups were

recovered from the exclusive possession and control of the convict-appellant. He adds that the seized phensidyls were not examined by the chemical examiner to prove that seized goods were actually contraband goods. He further submits, there is nothing on record to show that the appellant kept those phensidyls under his control for the purpose of sale and therefore at any rate the accused-appellant is entitled to get the benefit of doubt but the learned tribunal judge without considering all these vital aspects of the case mechanically passed the impugned judgment and order of conviction under section 25B (2) of the Special Powers Act, 1974 and as such, the same is liable to be set-aside.

Ms. Kohenoor Akter, the learned Assistant Attorney-General for the State after placing the FIR, charge sheet, deposition of witnesses and impugned judgment submits that the prosecution has been successfully proved its case beyond reasonable doubt that the contraband Indian phensidyl syrups were recovered under the absolute possession and control of the accused appellant, who kept the same under his possession for the purpose of sale. Finally, she referring a decision reported in 18 MLR 491 submits that brand name phensidyl is a contraband goods which is a prohibited drugs and thus it is not at all necessary to

obtain chemical examination for proving that the phensidyl syrup is a contraband drugs. Besides in the case during trial no one raised any question that seized phensidyl syrups were not actually contraband drugs and thus the learned Judge, Special Tribunal No. 3, Meherpur justly found that the accused-appellant guilty for the offence under section 25B(2) of the Special Powers Act, 1974 and sentenced him thereunder to suffer rigorous imprisonment for a period of 4(four) years and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 02(two) months more.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the record including the first information report, charge sheet, deposition of witnesses and other materials on record, the only question that calls for my consideration in this appeal is whether the 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 accused-appellant was apprehended along with a plastic bag and on search police recovered total 46 bottles of phensidyl from the plastic bag and thereafter police seized those phensidyl syrups by preparing seizure list in

presence of the witnesses. Police after completion of investigation having found prima-facie case and 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 9 witnesses out of which informant, S.I. Md. Anisur Rahman himself was examined as PW-1, who stated in his deposition that on 30.07.2011 during special duty along with other police forces got a secret information as to phensidyl and then police team rushed to the place of occurrence and apprehended the accused along with a bag and thereafter, police opened the bag and found total 46 bottles of phensidyl syrup kept inside the wheat's bag and thereafter, seized those phensidyl syrups by preparing seizure list in presence of the witnesses. This witness stated in his cross-examination that- “কাউন্টারে চউগ্রামের যাত্রীরা সহ আরো অন্যান্য লোকজন ছিল। কাউন্টারের ভিতরে প্যাসেঞ্জারের বসার জায়গার নিচে বস্তাটা পেয়েছিলাম। আসামীকে কাউন্টারের ভিতর দাড়ানো অবস্থায় পাই। আমাকে কেউ বলেনি যে বস্তাটা আসামীর।” PW-2, Md. Takibur Rahman stated in his deposition that- “হোটেল বাজার মোর কেয়া পরিবহনের কাউন্টারের সামনে মোমিন নামে একজন লোক ছিল। তার কাছে গমের বস্তা ছিল। সন্দেহ হলে চেক করে গমের বস্তার মধ্যে ৪৬ বোতল ফেন্সিডিল পাই।” This witness stated in his cross-examination that accused person standing with wheat bag and accused himself

opened the bag. PW-3, PW-4, PW-5 all are police witnesses, who also gave evidence in support of the prosecution and made similar statements like P W 1 and 2. PW-6, Md. Abu Sayeed examined as seizure list witness, who stated in his deposition that police obtained his signature on a paper. This witness also stated that from whom phensidyls were recovered he does not know and he did not see any phensidyls. This witness in his cross-examination stated that he did not see the occurrence and police did not examine him. PW-7, Inspector Md. Nazmul Huda, who investigated the case and submitted charge sheet against the accused-appellant. This witness proved the sketch-map as “Ext.-3” and his signature thereon as “Ext.-3/1”, index as “Ext.-4” and his signature thereon as “Ext.-4/1”. This witness also stated that he examined the witnesses under section 161 of the Code of Criminal Procedure. This witness in his cross-examination stated that-“এজাহারের সাক্ষীদের ছাড়া অন্য কাউকে সাক্ষী মানি নাই। ”কেয়া কাউন্টারের” চারদিকে প্রায় শতাধিক দোকান আছে। দোকানদারদের সাক্ষী মানি নাই।” PW-8, constable Abu Tarik stated in his deposition that-“কাউন্টারের সামনে আসামী মমিন একটি প্লাস্টিকের বস্তা নিয়ে দাড়িয়ে ছিল। তাকে জিজ্ঞেস করলে সে বলে এতে গম আছে। বলে যে গম ঢাকায় যাবে। তখন সন্দেহ হলে স্যার সাক্ষীদের সামনে বস্তা তল্লাশী করে তার ভিতর থেকে ৪৬ বোতল ফেন্সিডিল উদ্ধার করেন।” PW-9, Shahabuddin stated

in his deposition that on the date of occurrence the accused was standing with a plastic bag and he asked the helper of the transport to get up the bag in transport and then police asked to accused Momin about the bag and thereafter police checked the bag and recovered total 46 bottles of phensidyl in presence of the witnesses and then accused Momin stated that he is the owner of the phensidyls in question and thereafter, police prepared seizure list in presence of the witnesses. The defence cross-examined this witness but failed to find out any contradiction in the evidence of PW- 9.

On an analysis of the above quoted evidence of PWs together with F.I.R, it appears that PW-2, PW-3, PW-4, PW-5 and PW-8 as member of the reading party stated in their respective evidence that bag in question was recovered from the accused Momin and on search they recovered 46 bottles of phensidyl although the informant of the case as PW-1 stated in his cross-examination that- “কাউন্টারে চট্টগ্রামের যাত্রীরা সহ আরো অন্যান্য লোকজন ছিল। কাউন্টারের ভিতরে প্যাসেঞ্জারের বসার জায়গার নিচে বস্তাটা পেয়েছিলাম। আসামীকে কাউন্টারের ভিতর দাড়ানো অবস্থায় পাই। আমাকে কেউ বলেনি যে বস্তাটা আসামীর।” but police witnesses namely, PW-2, PW-3, PW-4, PW-5 and PW-8 stated that the wheat’s bag was recovered from accused, Momin and on search police recovered total 46 bottles of phensidyl

from the said wheat's bag. It further appears that PW-6, seizure list witness stated in his cross-examination that he did not see occurrence. This witness also stated in his cross-examination that - “পুলিশ সই নেওয়া ছাড়া পরে জিজ্ঞেস করে নাই। কাগছে লিখা ছিল কিনা পড়ে দেখি নাই।” PW-9, counter master categorically stated in his evidence that the accused-appellant was apprehended along with bag and police recovered total 46 bottles of phensidyl from that bag.

As to recovery of phensidyl the informant Md. Anisur Rahman, Sub Inspector, Detective Branch, Meherpur as PW-1 stated in his cross examination that- “কাউন্টারে চট্টগ্রামের যাত্রীরা সহ আরো অন্যান্য লোকজন ছিল। কাউন্টারের ভিতরে প্যাসেঞ্জারের বসার জায়গার নিচে বস্তাটা পেয়েছিলাম। আসামীকে কাউন্টারের ভিতর দাড়ানো অবস্থায় পাই। আমাকে কেউ বলেনি যে বস্তাটা আসামীর।” and it is on record other police witnesses as well as PW-9 made contradictory statement as to recovery of phensidyl syrups. PW-6 as seizure list witness stated that he did not see the occurrence. Moreover, in this case seized phensidyl syrups were not chemically examined. It is thus difficult to believe that the alleged seized goods were actually contraband in nature. 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 Md. Momen beyond any reasonable doubts. Before convicting the appellant the Court must give finding that the phensidyl found in his possession was a contraband item smuggled into Bangladesh for sale. The learned Judge of the Special Tribunal failed to evaluate the evidence on record thereby reaching a wrong decision in finding the accused- appellant guilty of the offence under section 25B(2) of the Special Powers Act which occasioned a miscarriage of justice . In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove charge of smuggling against accused Md. Momen beyond reasonable doubts. Furthermore, in this case none of the prosecution witnesses testified any single word as to the fact that the accused-appellant brought those seized phensidyl syrups from India by way of smuggling and kept the same under his possession and control for the purpose of sale and in that view of the matter it is difficult to hold the appellant guilty of the offence under section 25B (2) of the Special Powers Act. In that light, it creates a doubt in the case of the prosecution about the accused being involved in the alleged crime. It is trite law that if any benefit of doubt arises, then the benefit should be given to accused. In that light, the trial Court ought to

have acquitted the accused by giving the benefit of doubt. In that light, the judgment of the trial Court is to be interfered with. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned order of conviction and sentence passed by the learned Judge, Special Tribunal No.3, Meherpur in Special Tribunal Case No. 86 of 2011 arising out of G.R No. 416 of 2011 corresponding to Meherpur Police Station Case No. 27 dated 30.07.2011 against accused appellant, Md. Momen is set aside and he is acquitted of the charge levelled against him.

Convict appellant, Md. Momen is discharged from his bail bond.

Send down the lower Court records at once.