

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 4823 of 2018

Md. Hosen

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Sharafatullah, 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 04.06.2024, 05.06.2024 and
06.06.2024, Judgment on 10.06.2024.**

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Hosen is directed against the impugned judgment and order of conviction and sentence dated 22.04.2018 passed by the learned Judge, Special Tribunal No. 2, Meherpur in Special Tribunal Case No. 123 of 2015 arising out of G.R. No. 45 of 2015 corresponding to Meherpur Police Station Case No. 35 dated 31.01.2015 convicting the accused-appellant under Section 25B(2) of the Special Powers Act, 1974

and sentencing him thereunder to suffer imprisonment for a period of 01(one) year and to pay a fine of Tk. 1,000/= (one thousand) in default to suffer imprisonment for 03(three) months more.

The prosecution case, in brief, is that one Md. Ziaur Rahman, A.S.I. District Detective Branch, Meherpur as informant on 31.01.2015 at 18. 30 hours lodged an Ejahar with Meherpur Police Station against the accused appellant stating, inter-alia, that on 31.01.2015 at 16.05 hours while the informant along with other police forces were on mobile duty at Buripota Mor got a secret information that the accused is bringing phensedyl to his house by way of smuggling from India for purpose of sale and then the informant along with his police team rushed to the place of occurrence and ambushed therein and within a few minutes they found the accused appellant with a bag in the courtyard of his house and on search recovered 10 bottles of phensedyl kept in that bag, which valued at Tk. 3,000/-(three thousand) and thereafter, informant party arrested the appellant and seized those phensedyls by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Meherpur Police Station Case No. 35 dated 31.01.2015

under Section 25B(2) of the Special Powers Act, 1974 was started against the accused.

Police after completion of usual investigation submitted charge sheet against the accused appellant, vide charge sheet No. 80 dated 11.03.2015 under Section 25B(2) of the Special Powers Act, 1974.

Ultimately, the accused appellant was put on trial before the learned Judge, Special Tribunal No. 2, Meherpur 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 examined in all 06 (six) 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 under section 342 of the Code of Criminal Procedure that the accused-appellant is innocent, who has been falsely implicated in the case. The accused declined to adduce any witness.

On conclusion of trial, the learned Judge, Special Tribunal No. 2, Meherpur by the impugned judgment and order dated 22.04.2018 found the accused appellant

guilty under Section 25B(2) of the Special Powers Act, 1974 and sentenced him thereunder to suffer imprisonment for a period of 01(one) year and to pay a fine of Tk. 1,000/= (one thousand) in default to suffer imprisonment for 03(three) months more.

Aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 22.04.2018, the accused-appellant preferred this criminal appeal.

Mr. Md. Sharafatullah, the learned Advocate appearing for the convict-appellant submits that in this case the appellant is out an out innocent who has been falsely implicated in this case. He further submits that the prosecution to prove its case examined in all 6 witness out of which public witnesses namely PW-4 and 5 stated nothing against the appellant. PW-6 was tendered and police witnesses namely PW-1, PW-2, PW-3, who deposed inconsistently as to recovery of 10 bottles phensedyl syrup from the possession of the accused appellant before the learned Tribunal Judge. Moreover, in this case the prosecution having failed to examine the Investigating Officer and non-examination of vital witnesses namely Investigating Officer creates serious doubts as to truthfulness of the prosecution case. Finally, the learned Advocate submits that in this case the seized articles were not chemically examined

and therefore, it cannot be said that the seized goods were actually contraband goods in nature and benefit of this defect, lacuna must go to the accused although in this case the learned Judge, Special Tribunal No. 2, Meherpur without considering all these aspects of the case from a correct angle mechanically held that the accused appellant guilty of the offence under Section 25B(2) of the Special Powers Act, 1974.

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. it is no record that the accused appellant was apprehended along with Indian made phensedyl at the time of bringing the same inside Bangladesh by way of smuggling from India and the witnesses also testified in one voice that the accused appellant was apprehended with 10 bottles of Indian made phensedyl and accordingly, the trial Court committed no wrong in passing the impugned judgment and order of conviction and sentence.

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, the only 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. Ziaur Rahman, A.S.I. District Detective Branch, Meherpur as informant on 31.01.2015 at 18. 30 hours lodged an Ejahar with Meherpur Police Station against the accused appellant on the allegation that the appellant was appended along with 10 bottles of Indian made phensedyl, which valued at Tk. 3,000/-(three thousand) and police after completion of investigation submitted charge sheet against the accused appellant under section Section 25B(2) of the Special Powers Act, 1974. It further appears that the prosecution to prove its case examined in all 6 witnesses out of which public witnesses namely PW-4, Khairul Islam and PW-5, Md. Shapan stated nothing against the accused appellant that the seized phensedyls were recovered from the possession of the accused appellant. PW-6, A.S.I. Monir Hossen, was tendered. PW-1, Shafiul Alam, PW-2, Hadiuzzaman and PW-3, A.S.I, Ziaur Rahman all are members of the raiding party, who stated in their respective evidence that accused appellant was

apprehended with 10 bottles of Indian made phensedyl. It further appears that in this case the prosecution having failed to examine Investigating Officer and the siezed phensedyl were not chemically examined by the prosecution which creates doubt whether the seized phensedyls were the actually contraband goods in nature or not.

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 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. 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. Hosen beyond any reasonable doubts.

The learned Special Tribunal failed to evaluate the evidence on record as adduced before him 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. Hosen 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 22.04.2018 passed by the learned Judge, Special Tribunal No. 2, Meherpur in Special Tribunal Case No. 123 of 2015 arising out of G.R. No. 45 of 2015 corresponding to Meherpur Police Station Case No. 35 dated 31.01.2015 convicting the accused-appellant under Section 25B(2) of the Special Powers Act, 1974 is set aside and he is acquitted of the charge levelled against him.

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

Send down the lower Court records at once.