

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 4883 of 2018

Md. Khatub Uddin alias Khotob

.....Convict-appellant.

-Versus-

The State

.....Respondent.

Ms. Nusrat Yeasmin, 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 26.05.2024, 27.05.2024 and

Judgment on 28.05.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Khatub Uddin alias Khotob is directed against the judgment and order of conviction and sentence dated 30.04.2018 passed by the learned Judge, Special Tribunal No.4, Lalmonirhat in Special Tribunal Case No. 143 of 2015 arising out of G.R No. 106 of 2015 corresponding to Hatibandha Police Station Case No. 07 dated 15.06.2015 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 2(two) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer R.I. for 03(three) months more.

The prosecution case, in brief, is that one, Md. Anisur Rahman, Sub-Inspector, Hatibandha police station, Lalmonirhat as informant on 15.06.2015 at about 14:45 hours lodged an Ejahar with Hatibandha Police Station against the accused appellant stating, inter-alia, that on the basis of a secret information the informant along with a contingent of police force rushed in-front of Hatibandha Filling Station while sensing the presence of police the accused tried to run away leaving his bicycle and the informant party on chase apprehended the accused-appellant along with his bicycle and on search, recovered 16 bottles of phensidyl syrup in presence of witnesses. Thereafter, on interrogation the accused confessed that he used to deal with phensidyl business by way of smuggling and thereafter, the informant party seized those phensidyls by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Hatibandha Police Station Case No. 07 dated 15.06.2015 under section 25B (2) of the Special Powers Act, 1974 was started.

Police after completion of investigation submitted charge sheet No. 86 dated 30.06.2015 under section 25-

B(1)(B) of the Special Powers Act, 1974 against the accused-appellant.

Thereafter, the case record was sent to the Court of learned Sessions Judge and Special Tribunal No.1, Lalmonirhat, wherein the case was registered as Special Tribunal Case No. 143 of 2015. Subsequently, the case was transmitted before the Special Tribunal No.4, Lalmonirhat for trial of the accused appellant 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 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 and the defence declined to adduce any witness.

On conclusion of trial the learned Judge, Special Tribunal No.4, Lalmonirhat by the impugned judgment and order dated 30.04.2018 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 2(two) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer simple imprisonment for 03 (three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 30.04.2018, the accused-appellant preferred this appeal.

Ms. Nusrat Yeasmin, the learned Advocate appearing for the convict-appellant in the course of his argument takes me through the F.I.R, deposition of witnesses and other materials on record including the impugned judgment and then submits that the convict-appellant is innocent, who has been falsely implicated in this case, in-fact, no phensidyl syrups were recovered from the direct possession and control of the convict-appellant. She further submits that in this case the prosecution to prove the allegation as to recovery of 8 bottles of Indian phensidyl examined in all 8 witnesses out of which independent seizure list witnesses namely, PW-2 stated nothing as to recovery of phensidyl syrups from the possession and control of the convict-appellant, PW-3 and PW-4 were declared hostile and rest police witnesses inconsistently deposed before the trial Court as to recovery of phensidyl syrups from the possession of the convict-appellant. She further submits that to prove the charge under section 25B (2) of the Special Powers Act, 1974, it is the duty of the prosecution to prove that the seized articles are recovered from the exclusive possession

of the accused and those were contraband goods and the accused kept the same for the purpose of sale although in this case the prosecution side having failed to prove that the appellant brought those phensidyl syrups from India by way of smuggling and kept the same for the purpose of sale. He further submits in this case there being nothing on record to show that the seized phensidyl syrups are contraband goods and as such, the impugned judgment and order of conviction under section 25B (2) of the Special Powers Act, 1974 cannot be sustained in law. The learned Advocate to fortify her arguments has relied on the decision reported in 5 BLC 248, 55 DLR 7 and 16 BLC 465.

Ms. Kohenoor Akter, the learned Assistant Attorney-General, on the other hand, supports the impugned judgment and order of conviction and sentence dated 30.04.2018, which was according to her just, correct and proper. She submits that in this case the prosecution has been successfully proved that the contraband 16 bottles of Indian phensidyl syrup were recovered from the possession and control of the accused appellant beyond reasonable doubts. She further submits that police witnesses in their respective deposition stated in one voice that the convict-appellant was apprehended along with phensidyl syrups and accordingly, the learned Judge, Special Tribunal No. 4, Lalmonirhat justly found that 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

2(two) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer simple imprisonment for 03(three) months more.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of appeal, the first information report, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction.

On scrutiny of the record, it appears that one, Md. Anisur Rahman, Sub-Inspector, Hatibandha police station, Lalmonirhat as informant on 15.06.2015 at about 14:45 hours lodged an Ejahar with Hatibandha Police Station against the accused-appellant on the allegation that the accused appellant was apprehended along with 16 bottles of Indian phensidyl syrup. Police after completion of investigation submitted charge sheet No. 86 dated 30.06.2015 under section 25-B(1)(B) of the Special Powers Act, 1974 against the accused-appellant. The prosecution to prove its case examined in all 08(eight) witnesses out of which public witnesses namely, PW-3 and PW-4 were declared hostile and other public seizure list witnesses namely, PW-2 and PW-5 stated nothing as to recovery of phensidyl from the possession and control of the accused-appellant. It further appears that police witnesses namely, PW-1, PW-6, PW-7 and PW-8 in their respective evidence stated nothing that the accused-appellant brought those

phensidyl syrups from India by way of smuggling and kept the same 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,

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 as well as carrying and possessing the contraband goods for the purpose of sale against accused, Md. Khatib Uddin alias Khotob beyond reasonable doubts. 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.4, Lalmonirhat in Special Tribunal Case No.143 of 2015 arising out of G.R No. 106 of 2015 corresponding to Hatibandha Police Station Case No. 07 dated 15.06.2016 against convict-appellant, Md. Khatib Uddin alias Khotob is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Khatib Uddin alias Khotob is discharged from his bail bonds.

Send down the lower Court records at once.