

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 1828 of 2018

Md. Arman Ali

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Nurul Huda for

Mr. A.H.M. Mushfiqur Rahman, 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 04.03.2024 and 05.03.2024

Judgment on 11.03.2024

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Arman Ali is directed against the impugned judgment and order of conviction and sentence dated 06.02.2018 passed by the learned Judge of Special Tribunal No. 06, Dinajpur in Special Tribunal Case No. 214 of 2008 arising out of G.R. No. 43 of 2008 corresponding to Ghoraghat Police Station Case No. 02 dated 03.04.2008 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 02(two)

years and to pay a fine of Tk. 2,000/= (two thousand) in default to suffer simple imprisonment for 02(two) months more.

The prosecution case, in brief, is that one Md. Matiur Rahman, S.I. Ghoraghat Police Station, Dinajpur as informant on 03.04.2008 lodged an Ejahar with Ghoraghat Police Station, Dinajpur against the accused appellant and another stating, inter-alia, that on 03.04.2008 at about 00:30 a.m. the informant along with other police forces during checking of public transport in front of check post at Khetab Mor of Gobindapur-Dinajpur High way found a plastic Bag in left side box of Nabil transport being No. Dhaka Metro Ba 14-1865 and at that time accused Md. Arman Ali came down from his seat No. 3 of the bus and demanded that plastic bag and thereafter, police opened it in presence of driver and supervisor of the bus and found 50 bottles of Indian made Phensedyl syrups therein. Police seized those phensedyl syrups by preparing seizure list in presence of witnesses. On a query the accused disclosed that he collected those Phensedyls from accused No. 2, Md. Arshed and at the time of search accused Arshed somehow managed to escape from there. The accused also disclosed that they used to bring phensedyls by way of smuggling from India for business.

Upon the aforesaid First Information Report, Ghoraghat Police Station Case No. 02 dated 03.04.2008 under Section 25B (2) of the Special Powers Act, 1974 was started against the accused appellant and another.

Police after completion of investigation submitted charge sheet against the accused appellant and another, vide charge sheet No. 55 dated 30.05.08 under Section 25B (2) of the Special Powers Act, 1974.

Ultimately, the accused appellant and another were put on trial before the learned Judge, Special Tribunal No. 06, Dinajpur 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 side examined in all 6(six) witnesses to prove its case and exhibited some documents, while the defence examined none.

On conclusion of trial, the learned Judge, Special Tribunal No. 06, Dinajpur by the impugned judgment and order dated 06.02.2018 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 02(two) year and to pay a fine of Tk. 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 06.02.2018, the accused-appellant preferred this criminal appeal.

Mr. Md. Nurul Huda, the learned Advocate appearing for the convict-appellant submits that as per FIR version no incriminating Phensedyl Syrups were recovered from the possession and control of the convict appellant, who has been made scapegoat in this case. The learned Advocate further submits that in this case PW-5, supervisor of the bus was declared hostile by the prosecution, PW-6, Driver stated in his deposition that he put his signature on a blank paper. PW-3 was tendered and rest PWs. namely PW-1, PW-2 and PW-4 are members of the reading party, who inconsistently deposed before the trial Court as to recovery of Phensedyl Syrups from the bus. Besides, in this case the investigating officer having failed to produce any chemical report which creates serious doubts whether the seized goods are actual contraband goods or not although the learned tribunal Judge without considering all these vital aspects of the case mechanically held that accused appellant is guilty under Section 25B (2) of the Special Powers Act, 1974 and as such, the impugned judgment and order of conviction and sentence dated 06.02.2018 is liable to be set-aside.

Ms. Shahida Khatoon, the learned Deputy Attorney General, on the other hand, supports the impugned judgment which was according to her just, correct and proper. She

submits that chemical report is not necessary as the brand name Phensedyl is a contraband drug and in the attending facts and circumstances of this case, the evidence of police personnel is very much reliable and safe and thus, the learned Judge, Special tribunal No. 6, Dinajpur justly passed the impugned judgment and order of conviction and sentence dated 06.02.2018 which should not be disturbed.

Having heard the learned Advocate and the learned Deputy Attorney General, perused the memo of Appeal, deposition of witnesses and other materials on record including the impugned judgment, now only the question 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. Matiur Rahman, S.I. Ghoraghat Police Station, Dinajpur as informant on 03.04.2008 lodged an Ejahar with Ghoraghat Police Station, Dinajpur against the accused appellant and another stating, inter-alia, that on 03.04.2008 at 00:30 during checking of public transport in front of check post at Khetab Mor of Gobindapur-Dinajpur Highway police team found a plastic Bag kept in left side box of Nabil transport being No. Dhaka Metro Ba 14-1865 and at that time accused Md. Arman Ali came down from his seat No. 3 of the bus and demanded that

plastic bag and then police opened it in presence of driver and supervisor and found 50 bottles of Indian made Phensedyl syrups. Police seized those phensedyl syrups by preparing seizure list in presence of witnesses. On a query, the accused disclosed that he collected those Phensedyls from accused No. 2, Md. Arshed and at the time of search accused Arshed somehow managed to escape from there and police after completion of investigation submitted charge sheet against the accused appellant and another under 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 PW-1, Md. Matiur Rahman as informant stated in his deposition that he along with his police team on 03.04.2008 at 00:30 hours apprehended the accused appellant and recovered total 50 bottles of Phensedyl from the side box of Nabil Paribahan kept in a plastic bag. This witness proved the FIR as exhibit-1 and his signature thereon as exhibit-1/1 and proved the seizure list as exhibit-2 and his signature thereon as exhibit- 2/1. This witness also proved Phensedyl as material exhibit. PW-2, Ahmed Ali, member of the raiding party, stated in his deposition that on 03.04.2008 during search of Nabil Paribahan they recovered 50 bottles of Phensedyl contained in a plastic bag from left side box of the bus. This witness in his cross-examination stated that “ আমি বাদির অধীনে চাকুরীতে ছিলাম তখন। দুজন কঙ্গঃ আমি ও বাদি ছিলাম

ঘটনাস্থলে। এ গাড়ীতে যাত্রী ছিল সেদিন অনুমান ৩০-৩৫ জন। আই/ও আমাকে জিজ্ঞাসাবাদ করে। মামলার ২ দিন পরে। মাল পাওয়া যায় সাইড বাক্স হতে।। এই আসামীর নিকট হতে কোন মাল উদ্ধার হয় নাই এবং আসামী এই মালের দাবিদার না।” PW-3, Md. Nazrul Islam, Constable was tendered by the prosecution. PW-4, Aviranjan Deb, Sub Inspector of police, who investigated the case and submitted charge sheet against the accused appellant and another. This witness in his deposition stated that he examined the witnesses under section 161 of the Code of the Criminal Procedure. PW-5, Md. Kajal, Supervisor of Nabil Paribahan, was declared hostile by the prosecution. This witness in his cross-examination stated that-“সাদা কাগজে আমার সই নিয়েছিলো। স্বাক্ষরের নীচে কোন তারিখ নাই। আই,ও আমাকে কোন দিন জিজ্ঞাসাবাদ করেনি।” PW-6, Bokul, Driver of Nabil Paribahan, who stated in his deposition that-“তল্লাশীকালে পুলিশ বক্স হতে নম্বর দেয়া টোকেনসহ একটি বস্তা নামায় এবং টোকেন হতে যাত্রী চিহ্নিত করে সুপারভাইজার এর মাধ্যমে যাত্রীকে বাস হতে নামিয়ে নেয়। এ সময় পুলিশ আমার কাছে একটা কাগজে সই নেয়। এই সেই কাগজ যাতে সাক্ষী হিসেবে প্রথম ক্রমিকের স্বাক্ষরটি (প্রদঃ ২/৩) আমার।” This witness in his cross-examination stated that-“সই করার সময় কাগজে কোন লেখা ছিলনা। সই করার সময় আমি কোন তারিখ দিই নি। বস্তার ভিতর কি মাল পুলিশ পায় তা আমাকে বলে নি। বক্সে মালামাল উঠায় (যাত্রীদের) আমাদের বাসের হেলপার। ঘটনার বিষয়ে কোন পুলিশ কর্মকর্তা আমাকে কোনদিন জিজ্ঞাসাবাদ করেনি। সত্য নয়, টোকেনে প্রদত্ত সীট নম্বর অনুসারে কোন যাত্রীকে নামানো হয়নি।”

On a close analysis of the above quoted evidence, it appears that PW-1, PW-2 and PW-4 are police witnesses as

well as members of the raiding party, they testified that police recovered phensedyl syrups from a plastic bag kept in left side box of a public transport namely Nabil paribahan. PW-5, Supervisor and PW-6, Driver of the Bus stated nothing against the accused appellant. PW-5 was declared hostile. PW-3 was tendered by the prosecution. Besides, in this case the prosecution having failed to submit any chemical examination report as to the seized goods. It is thus difficult to believe that alleged seized goods were actually contraband in nature.

In this case it is found that the prosecution witnesses stated nothing as to the fact that the accused-appellant brought those phensedyl syrups from India by way of smuggling and kept the same under their possession 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, PW-5, Supervisor and PW-6, Driver of the Bus both of them in their respective deposition 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 Md. Arman Ali beyond any reasonable doubts. The learned trial Judge has not properly assessed the evidence of the case and failed to consider the gross discrepancies, contradictions and omissions as well as admission of PWs on vital points and as such, it is not

safe to maintain order of conviction and sentence on the evidence on record of the case.

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 06.02.2018 passed by the learned Judge of Special Tribunal No. 06, Dinajpur in Special Tribunal Case No. 214 of 2008 arising out of G.R. No. 43 of 2008 corresponding to Ghoraghat Police Station Case No. 02 dated 03.04.2008 against the accused appellant is set aside and he is acquitted of the charge levelled against him.

The bail bonds of the appellant, Md. Arman Ali who was ordered to be released on bail, shall stand discharged.

Send down the lower Court records at once.