

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 2226 of 2009

Abdus Sabur alias Bishu Mian

...Appellant

-Versus-

The State

...Respondent

No one appears.

...For the appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G with

Mr. Md. Shaifour Rahman Siddique Saif, A.A.G

...For the State

Heard on 08.08.2023

Judgment delivered on 14.08.2023

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the judgment and order dated 15.03.2009 passed by Additional Sessions Judge, Court No. 3 and Special Tribunal No. 4, Rajshahi in Special Tribunal Case No. 162 of 2007 convicting the appellant under Section 25B(2) of the Special Powers Act, 1974 and sentencing him to suffer rigorous imprisonment for 2(two) years and fine of Tk. 500, in default, to suffer rigorous imprisonment for 1(one) month more.

The prosecution case, in short, is that the S.I. Nurul Hoque was posted at RAB-5, Rajshahi on 19.03.2007. On that day, based on secret information he went to Baneshar passenger shade and at about 1.50 pm he found that accused Abdus Sabur alias Bishu Mia tied 25 bottles of phensedyl kept in a bag made of kraft paper along with his belly by thin rope. On interrogation, in the presence of witnesses, the accused brought out those phensedyl. The informant prepared the seizure list and took the signatures of witnesses. At the time of detaining the accused, he fell on the floor of the passenger shade and was injured.

Police took up investigation of the case and after completing the investigation submitted charge sheet on 30.04.2007 against the accused. During trial, the charge was framed against the accused under Section 25B(2) of the Special Powers Act, 1974 on 09.07.2007 which was read

over to the accused and he pleaded not guilty to the charge and claimed to be tried under the law. The prosecution examined 8 witnesses to prove the charge against the accused. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above on the findings that 25 bottles of Indian phensedyl were recovered from the possession of the accused and the informant had explained as regards the delay in lodging the FIR. The prosecution proved the charge against the accused beyond all reasonable doubt.

P W 1 S.I. Nurul Hoque stated that he was posted at RAB-5, Rajshahi on 19.03.2007. On that day, based on secret information he went to Baneshar passenger shade and at about 1.50 pm he found that accused Abdus Sabur alias Bishu Mia tied 25 bottles of phensedyl kept in a bag made of kraft paper along with his belly by thin rope. On interrogation, in the presence of witnesses, the accused brought out those phensedyl. The informant prepared the seizure list and took the signatures of witnesses. At the time of detaining the accused, he fell on the floor of the passenger shade and was injured. He proved the FIR as exhibit 1 and his signature as exhibit 1/1. He proved the seizure list as exhibit 2 and his signature as exhibit 2/1. He also proved the recovered phensedyl as material exhibit I series. He affirmed that all bottles produced in Court are intact with phensedyl and cork. On the body of the recovered bottles 'PHENSEDYL, MADE IN INDIA' was written. During cross-examination, he stated that the FIR was written at 5.00 pm and he obtained the secret information at 1.00 pm. He went to the place of occurrence at 1.40 pm. He affirmed that a seizure list was prepared at the place of occurrence. He denied the suggestion that the accused was implicated in the case showing the recovery of abandoned goods.

P.W. 2 A.S.I. Tauhidul Islam stated that on 19.03.2007 he was posted at RAB-5, Rajshahi. On 19.03.2007 at 1.50 pm 25 bottles of phenedyl were recovered from the accused while he was present in the Baneshar passenger shade. During cross-examination, he stated that the seizure list was prepared at the place of occurrence and while the accused

tried to flee away, he fell on the ground and was injured. He denied the suggestion that the accused was implicated in the case showing recovery of abandoned goods of others and nothing was recovered from his possession.

P.W. 3 Raju Ahammed, P.W. 4 Nurul Amin and P.W. 5 Badiuzzaman were tendered by the prosecution and declined by the defence.

P.W. 6 Maqbul Hossain is the witness on the seizure list. He stated that about one and half years ago at 1.30 pm he signed at Baneshar passenger shade. A man was sitting beside the RAB personnel who disclosed that the phensedyl was recovered from the possession of the accused for which his signature was taken. The bottles of phensedyl were kept in a packet. He proved his signature in the seizure list as exhibit 2/2. During cross-examination, he stated that he does not know from where the phensedyl was recovered and he did not read the paper.

P.W. 7 Zahangir is also a seizure list witness. He stated that on 19.03.2007 at 1.30 pm the RAB personnel detained the accused along with goods kept in the plastic bag from Baneshar Traffic Lane. Subsequently, he stated that the goods were kept in a packet made of paper. He proved his signature in the seizure list as exhibit 2/3.

P.W. 8 S.I Kazi Farid stated that while he was posted as a Sub-Inspector of Police at Puthia Thana on 19.03.2007, the Officer-in-Charge lodged the FIR and he was appointed as Investigating Officer. During the investigation, he visited the place of occurrence, prepared the sketch map and index and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898. After completing the investigation, he submitted charge sheet on 30.04.2007. He proved the FIR form as exhibit 3 and the signature of the recording officer as exhibit 3/1. He proved the sketch map and index as exhibit 4 and his signature as exhibit 4/1. During cross-examination, he stated that on 19.03.2007 at 5.25 pm he took up the investigation of the case and on the same date, he visited the place of occurrence. He stated that the road is situated to the north side of the place of occurrence and the grocery shop of Boyz Uddin, the local

U.P. Office and the Police Fari are situated beside the said road. A tin shed shop of Abdus Salam and Anisur was situated on the east side of the place of occurrence and the vacant place is situated on the south side of the place of occurrence. He affirmed that there is no shop adjacent to the place of occurrence. He denied the suggestion that the seized goods were not recovered from the possession of the accused and that no alamat was recovered from the possession of accused.

No one appears on behalf of the appellant.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing on behalf of the State submits that the accused Abdus Sabur alias Bishu Mian was arrested from the Baneshar passenger shade along with 25 bottles of phensidyle. P.Ws 1, 2, 3 and 4 are the direct witnesses of recovery and they are reliable and credible witnesses. The prosecution proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submissions of the learned Deputy Attorney General who appeared on behalf of the State, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that P.Ws. 1 and 2 are the direct witnesses of the alleged recovery of 25 bottles of phensedyl. P.W. 1 stated that 25 bottles of phensedyl tied with the belly of the accused were recovered from the accused. P.W. 2 stated that 25 bottles of phensedyl were recovered from the accused while he was in the Baneshar passenger shade. In the FIR, it has been alleged that while the accused was sitting along with other persons in the passenger shade at Baneshar Trafficomor 25 bottles of phensedyl kept in a bag made of craft paper tied by thin rope with the belly of the accused were recovered but the prosecution did not prove the bag made of craft paper and thin rope by which the alleged phensedyl was tied along with the belly of the accused. The prosecution also did not examine the two passengers who were admittedly sitting along with the accused in the passenger shade at Baneshar Trafficomor. The Investigating Officer did not send the alleged phensedyl for expert opinion to ascertain that the phensedyl was found in the recovered bottles.

Although in the FIR, the informant alleged that the phensedyl were kept in the bag made of craft paper and were tied with a thin rope along with the belly of the accused, the informant P.W. 1 did not say that the recovered phensedyl were kept in the bag made of craft paper. In the absence of any expert opinion that the ingredients of phensedyl are found in the bottles recovered from the alleged possession of the accused, it cannot be said that the phensedyl was recovered from the possession of the accused. Furthermore, P.Ws. 3, 4 and 5 were tendered by the prosecution and P.Ws. 6 and 7 who are the witnesses of the seizure list also did not corroborate the prosecution case that in their presence the phensedyl was recovered from the possession of the accused.

In the FIR it has been alleged that at the time of the arrest of the accused, he fell on the floor of the passenger shed and was injured. When the informant was examined as P.W. 1, he did not say anything as regards the injury sustained by the accused. Therefore, the statement made by the informant as regards causing injury at the time of the arrest of the accused is doubtful. The alleged phensedyl was not recovered from the possession of the accused as stated by P.Ws. 1 and 2.

In view of the above the facts and circumstances of the case, evidence, observation, findings and proposition, I am of the view that the prosecution failed to prove the charge to the hilt against the accused beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court is hereby set aside.

The accused is acquitted from the charge framed against him.

Send down the lower Court's records at once.