

Present:

Mr. Justice Raziuddin Ahmed

Criminal Appeal No.2302 of 2005

Sarif

----- Convict-Appellant

-Vs-

The State

----- Accused-Respondents

Mr. Abdul Barek Chowdhury, Senior Advocate

----For the Appellant

Mr. Md. Asad Uddin, D.A.G with

Mr. Md. Habibur Rahman Sarker, A.A.G and

Mr. Kazi Mohammad Moniruzzaman, A.A.G

-----For the State

Heard on 03.05.2026, 17.05.2026 and

Judgment on 21.05.2026

This appeal, preferred under section 30 of the Special Powers Act, 1974, is directed against the judgment and order of conviction and sentence dated 30.05.2005 passed by the learned Metropolitan Special Tribunal No.4, Dhaka in Metro Special Tribunal Case No.1198 of 2000, arising out of Mirpur Police Station Case No.11 dated 03.09.1999, corresponding to G.R. No.3131 of 1999, whereby the accused-appellant was convicted under section 25B(2) of the Special Powers Act, 1974 and sentenced to suffer rigorous imprisonment for 1(one) year and to pay a fine of Tk.500/-, in default, to suffer rigorous imprisonment for a further period of 1(one) month.

The prosecution case, in short, is that S.I. Nurunnabi of the Detective Branch, Dhaka Metropolitan Police, Dhaka, lodged the First

Information Report with Mirpur Police Station on 03.09.1999 stating, inter alia, that on the basis of secret information, he along with Inspector Mahbulul Islam and other members of the police force went to a shop named Sarif Enterprise situated at Sony Super Market, Mirpur, at about 7:55 p.m. on 03.09.1999. It is alleged that the accused-appellant was arrested from the said shop along with 24 pieces of Heineken Lager Beer at the time of selling the same. The informant prepared a seizure list in presence of the seizure list witnesses and seized the said goods as contraband articles. The accused-appellant, according to the prosecution, failed to produce any valid document in support of lawful possession of the said goods. Thereafter, the informant lodged the present case.

Upon investigation, police submitted Charge Sheet No.216 dated 10.04.2000 against the accused-appellant under section 25B(2) of the Special Powers Act, 1974.

The case was subsequently transferred to the Metropolitan Special Tribunal No.1, Dhaka, where it was registered as Metro Special Tribunal Case No.1198 of 2000. Thereafter, the case was transferred to the Metropolitan Special Tribunal No.4, Dhaka for trial.

The prosecution examined 5(five) witnesses in support of its case, while the defence examined none.

Upon consideration of the evidence and materials on record, the learned Metropolitan Special Tribunal No.4, Dhaka convicted and sentenced the accused-appellant to suffer rigorous imprisonment for

1(one) year and to pay a fine of Tk.500/-, in default, to suffer rigorous imprisonment for a further period of 1(one) month.

Being aggrieved by and dissatisfied with the said judgment and order of conviction and sentence dated 30.05.2005, the convict-appellant preferred the instant appeal before this Court, which was admitted on 20.06.2005.

Mr. Abdul Berek Chowdhury, the learned Advocate appearing for the convict-appellant, submits that the prosecution has failed to prove the charge against the accused-appellant beyond reasonable doubt. He submits that the evidence of the prosecution witnesses suffers from material contradictions regarding the place of occurrence. P.Ws.1, 2 and 5 did not properly state the name or particulars of the place of occurrence. Although the informant stated in the First Information Report that the occurrence took place at Sarif Enterprise of Sony Super Market, but in his deposition as P.W.3 he described the place as Sony Enterprise of Sony Cinema Hall Super Market, Mirpur. On the other hand, P.W.4 stated that the occurrence took place at Sahid Enterprise of Sony Market. According to the learned Advocate, such material contradictions regarding the very place of occurrence create serious doubt about the truth of the prosecution case.

The learned Advocate further submits that the prosecution has also failed to prove that the seized goods were contraband or prohibited imported goods within the meaning of section 25B(2) of the Special Powers Act, 1974. None of the witnesses clearly stated that the seized goods were prohibited articles or that their import into Bangladesh was

prohibited by law. The witnesses also failed to give consistent evidence regarding the description, quantity, origin and nature of the seized goods. P.W.1 stated about recovery of a case of beer, P.W.3 stated about recovery of 24 bottles, whereas P.W.4 stated about recovery of 24 cans of beer. Such inconsistencies, according to the learned Advocate, go to the root of the prosecution case.

The learned Advocate also submits that although the learned Tribunal allowed the defence prayer on 30.03.2003 for recalling P.Ws.1 and 2 for cross-examination, those witnesses were not produced before the Court thereafter. Consequently, the accused-appellant was deprived of his valuable right to cross-examine those witnesses. The learned Tribunal, however, relied upon their untested evidence in passing the judgment of conviction, which has caused serious prejudice to the defence.

The learned Advocate finally submits that P.W.5, the only seizure list witness examined by the prosecution, did not support the alleged recovery from the conscious and exclusive possession of the accused-appellant. Rather, he merely stated that after returning from the mosque, a person wearing civil dress asked him to sign the seizure list and he signed it accordingly. Therefore, his evidence does not prove that the alleged goods were recovered from the possession or control of the accused-appellant in his presence. On these grounds, the learned Advocate prays for allowing the appeal and setting aside the impugned judgment and order of conviction and sentence.

Mr. Kazi Md. Moniruzzaman, the learned Assistant Attorney General appearing for the State, opposes the appeal and submits that the prosecution has been able to prove the charge against the accused-appellant beyond reasonable doubt. He submits that the learned Tribunal, upon proper appreciation of the evidence and materials on record, rightly convicted and sentenced the accused-appellant. He further submits that the impugned judgment and order suffer from no illegality, infirmity or misreading of evidence calling for interference by this Court.

Heard the learned Advocates for both sides, perused the memo of appeal, the impugned judgment and order of the learned Tribunal and carefully examined the evidence and materials on record.

The point for determination in this appeal is whether the prosecution has been able to prove, beyond reasonable doubt, that the accused-appellant sold, offered for sale, displayed for sale, or kept in his possession or under his control for the purpose of sale, any goods the bringing of which into Bangladesh was prohibited by or under any law for the time being in force, so as to attract the mischief of section 25B(2) of the Special Powers Act, 1974.

In order to sustain a conviction under section 25B(2) of the Special Powers Act, 1974, the prosecution must prove not merely recovery of certain goods, but also that the goods were of the nature contemplated by the said provision and that the accused had conscious possession or control over the same for the purpose of sale. The burden always lies upon the prosecution to prove its case beyond reasonable doubt, and such

burden never shifts upon the accused. If any reasonable doubt arises from the evidence on record, the accused is entitled to the benefit of such doubt.

On scrutiny of the evidence, it appears that P.W.1 S.I. Shakil Ahmed stated that on 03.09.1999, on the basis of secret information, he along with the accompanying force went to the shop of the accused-appellant and arrested him along with a case of beer at the time of selling the same. He stated that S.I. Nurunnabi was also with him and identified the accused-appellant in the dock. It appears from the record that he was not cross-examined by the defence.

P.W.2 Constable Abdul Jalil stated that on 03.09.1999 he was with Inspector Mahbubul Islam and two Sub-Inspectors and that he saw recovery of the beers. He was also not cross-examined by the defence.

P.W.3 S.I. Nurunnabi, the informant and also the Investigating Officer of the case, supported the First Information Report and stated that after investigation he submitted charge sheet against the accused-appellant. He was not cross-examined by the defence.

P.W.4 Constable Md. Alim Uddin stated that on 03.09.1999 at about 7:55 p.m. he went to the place of occurrence along with Inspector Mahbubul Islam and other members of the force and recovered 24 cans of beer from Sahid Enterprise of Sony Market and arrested the accused-appellant. In cross-examination, he could not properly describe the area of the place of occurrence and could not mention the G.D. number on the basis of which the police allegedly proceeded to the place of occurrence.

P.W.5 Md. Khorshed Alam Liton, the seizure list witness, stated that on 03.09.1999 he was present at the time of preparation of the seizure list. He further stated that after coming back from the mosque, a person wearing civil dress asked him to put his signature on the seizure list and, at his instruction, he signed it. He was not cross-examined by the defence.

It appears from the record that there were three seizure list witnesses, namely Md. Khorshed Alam Liton, Abdur Rob and Md. Mehedi Hasan. Of them, only Md. Khorshed Alam Liton was examined as P.W.5. On careful scrutiny of his evidence, it is evident that he did not state that the alleged beer cans were recovered from the possession or control of the accused-appellant in his presence. He also did not give any description of the seized goods. Rather, his evidence indicates that he merely signed the seizure list at the instruction of a person wearing civil dress. The other two seizure list witnesses were not examined by the prosecution. This omission assumes importance in the facts and circumstances of the present case.

Recovery from the conscious possession or control of the accused-appellant is a vital ingredient for maintaining a conviction under section 25B(2) of the Special Powers Act, 1974. In the present case, other than the police personnel, the only independent witness examined by the prosecution is P.W.5, the seizure list witness. But he did not support the actual recovery in his presence. Therefore, his evidence does not prove that the alleged goods were recovered from the conscious possession or control of the accused-appellant.

It further appears that there are material contradictions regarding the place of occurrence. The First Information Report describes the place of occurrence as Sarif Enterprise of Sony Super Market. But P.W.3, the informant and Investigating Officer, described the place as Sony Enterprise of Sony Cinema Hall Super Market, Mirpur. P.W.4, on the other hand, stated that the goods were recovered from Sahid Enterprise of Sony Market. These contradictions are not minor or insignificant, because the very place from where the alleged recovery was made is a material fact in a case of this nature.

There are also inconsistencies regarding the description of the seized goods. P.W.1 referred to a case of beer, P.W.3 stated about recovery of 24 bottles, while P.W.4 stated about recovery of 24 cans of beer. The prosecution has not adduced reliable evidence to establish the exact nature, origin and legal status of the seized goods. No independent evidence was produced to prove that the seized articles were goods the bringing of which into Bangladesh was prohibited by or under any law for the time being in force. Mere allegation that the accused-appellant could not produce documents is not sufficient to relieve the prosecution of its legal burden.

It is true that the evidence of police personnel cannot be discarded merely because they are police witnesses. But where the prosecution case suffers from material contradictions, the independent seizure list witness does not support the recovery, and the essential ingredients of the offence are not proved by reliable evidence, conviction cannot safely be maintained on such evidence.

It also appears from the record that the defence counsel could not cross-examine P.Ws.1 and 2 due to the sudden death of his mother, and an application was filed along with the death certificate praying for recalling those witnesses for cross-examination. The learned Tribunal allowed the prayer on 30.03.2003, but P.Ws.1 and 2 were not produced before the Court thereafter. In such circumstances, the defence was deprived of the opportunity to cross-examine those witnesses. Since their evidence related to the alleged recovery, reliance upon such untested evidence without securing their attendance for cross-examination has caused prejudice to the accused-appellant.

In the case of *Saiful Islam Md. and another vs. The State*, reported in 10 MLR (HC) 308, it has been held that the legal burden of proof always remains upon the prosecution and that in criminal cases the prosecution must prove the guilt of the accused beyond reasonable doubt. It was further held that presumption, conjecture and surmise cannot take the place of evidence and that conviction on the basis of shaky and unreliable evidence is not proper or legal.

The principle is well settled that where the prosecution case suffers from material contradiction, inconsistency or serious doubt, such evidence cannot safely be relied upon for maintaining a conviction. In the present case, the prosecution failed to examine any independent witness who could prove the alleged recovery from the possession or control of the accused-appellant. The only seizure list witness examined by the prosecution did not support the actual recovery. The evidence on record, therefore, does not establish beyond reasonable doubt that the alleged beer

cans were recovered from the conscious possession or control of the accused-appellant for the purpose of sale.

On an overall consideration of the evidence and materials on record, this Court is of the view that the prosecution has failed to prove the charge against the accused-appellant beyond reasonable doubt. The learned Tribunal failed to properly consider the material contradictions and serious infirmities in the prosecution case and wrongly convicted and sentenced the accused-appellant.

Accordingly, the appeal is allowed.

The judgment and order of conviction and sentence dated 30.05.2005 passed by the learned Metropolitan Special Tribunal No.4, Dhaka in Metro Special Tribunal Case No.1198 of 2000, arising out of Mirpur Police Station Case No.11 dated 03.09.1999, corresponding to G.R. No.3131 of 1999, convicting the accused-appellant under section 25B(2) of the Special Powers Act, 1974, is hereby set aside.

The accused-appellant is acquitted of the charge levelled against him. He is discharged from his bail bond.

Send down the lower Court records at once.

Communicate this judgment and order to the Court concerned immediately.