

Present:

Mr. Justice Md. Emdadul Huq

And

Mr. Justice Mohammad Ullah

CRIMINAL APPEAL NO. 3061 OF 2002

Md. Mahfuzur Rahman and another
..... Accused appellants.

-Vs-

The State
..... Respondent.

Mr. Md. Asaduzzaman, Advocate
.... For the Accused Appellants.

Mr. Md. Abdur Rahman Howladar, AAG
.... For the State.

Hearing on 16.11.2011, 17.11.2011 and 22.11.2011

And

Judgment on 28 November 2011.

Mohammad Ullah, J.

This appeal is directed against the judgment and order dated 15.09.2002 passed by the Special Tribunal No.4, Jhenidaha in Special Tribunal Case No. 65 of 2000 convicting the 2 (two) appellants along with 2 (two) others under section 25 B(2) of the Special Powers Act, 1974 and sentencing each of them to suffer

rigorous imprisonment for 5 (five) years with a fine of Tk. 1000, in default, to suffer rigorous imprisonment for 2 (two) months more.

The prosecution case, in brief, is that the Informant Md. Kalam Khan, Sub Inspector of Police of Fazilpur Police Camp under Sailakupa Police Station, Jhenidaha, on 29.6.2000 lodged the First Information Report (**shortly the FIR**) stating that he received an information over wireless from A.K.M Razul Karim S.I of Police that a gray colour private car violating the signal of the police personnel was proceeding towards Hat Fazilpur from Hat Gopalpur. So the informant along with other police personnel of the Hat Fazilpur Police Camp laid an ambush near Kumiradah village on the Road, named as Hat Gopalpur-Sailakupa Road. At about 13.05 p.m. the said car reached the place of their ambush. They managed to stop the car by creating a barricade. Then the informant, in presence of the witnesses, searched into the car and found India made 176 bottles of phensedyl kept in the backside of the car. The appellants and 2 (two) others were in the car, who on query disclosed that they had bought the said bottles from one Muklashur Rahman of Kaligong Rail Station Para for selling the

same at Faridpur. So the informant seized the car and the bottles in terms of a seizure list, arrested the appellants and their companions and lodged the FIR.

Police investigated into the matter and submitted charge sheet against the appellants and three others under item No. 7 (ka) of the Table of Section 19(1) of the Madok Drabbo Niantran Ain, 1990, read with Section 25 B of the Special Powers Act, 1974.

The case was ultimately transferred to the learned Assistant Sessions Judge-cum-Special Tribunal No. 4, Jhenidaha who framed charge under Section 25 B of the Special Powers Act, 1974.

To prove the charge, the prosecution produced 11 witnesses of whom P.W. 9 was tendered and P.W. 10 was declared hostile and cross-examined by the prosecution.

Defense did not produce any evidence, but cross-examined all the P.W's except P.W. 9 and 10. The defense pleas, as it appears from the trend of cross examination of the prosecution witnesses, are that they were innocent and the police implicated

them falsely in the instant case for not giving the money demanded by the police.

The trial court, on consideration of the evidence on record and on hearing the learned Advocates of both the sides, found the 2 (two) appellants along with 2 (two) other co-accused guilty of the offence under Section 25 B(2) of the Special Powers Act, 1974 and sentenced them as stated above.

Co-accused Mokhlesur Rahman, after being released on bail, absconded and the trial was held in his absence. The trial court acquitted him on the finding that the charge was not proved against him.

Mr. Asaduzzaman, the learned Advocate for the appellants submitted that the impugned judgment and order is liable to be set-aside for the following reasons:

- 1) The charge framed by the trial court is defective in that it speaks of importation of the seized goods from India, but according to the FIR, the goods were seized within the territory of Bangladesh.
- 2) The conviction is based on insufficient evidence, as all the three seizure list witnesses being P.W.2, 4 and 10

stated that they had not witnessed the fact of search and seizure. More over P.W. 2 and 4 stated that the seizure list was prepared at the Fazilpur Police Camp, but P.W. 10 the other seizure list witness stated about preparation thereof at the Sailakupa Police station. So requirements of section 103 of the Code of Criminal Procedure, 1898 (shortly the Code, 1898) was not complied with.

- 3) P.W. 7, being one of the police witnesses, stated that he had stated under section 161 of the Code that the place of occurrence was at Baroihuda.
- 4) The prosecution did not produce S.I. A.K.M. Rezaul karim, who allegedly informed the informant about the running car violating the police signal at Hat Gopalpur.
- 5) P.W. 11, being the Investigating Officer, stated that he came to know during investigation that the appellants were the helper and driver of the car and the other two co-accused were the passengers.
- 6) The bottles allegedly containing phensedyl or any sample thereof were not examined by any expert and therefore these goods cannot be treated as phensedyl or

as contraband goods so as to attract section 25B(2) of the Special Powers Act.

The learned Assistant Attorney General, Mr. Md. Abdur Rahman Hawlader on the other hand, submitted that the seized 176 bottles of phensedyl, being the material exhibit “ka”, were produced before the trial court containing the words “phensedyl” and “Made in India” and that the prosecution has proved that the same were legally seized from the possession of the appellants and their companions.

The learned AAG further submitted that the informant, the investigating officer and other police witnesses had no enmity with or grudge against the accused persons and they had no reasons to file a false case against them. Moreover the seizure list witnesses and other local witnesses fundamentally corroborated the evidence of the police witnesses and thus the prosecution case has been proved beyond reasonable doubt.

Before discussion on the sustainability of the impugned judgment of the trial court, we need to look into evidence on record.

P.W. 1 Kalam Khan, stated that on the date of occurrence he was working as a Sub Inspector of Police attached to Fazilpur Police Camp, under P.S Sailakupa, Jhenidaha. He stated about lodgement of the F.I.R and he proved the F.I.R and the seizure list as Exhibits 1 and 2 and his signature therein as Ext. 1/1 and Ext. 2/1 respectively. He re-iterated the facts as stated in the FIR. He also identified the bottles of phensedyl as Material Exhibit 'Ka' and stated that the bottles were seized from the possession of the appellants and other co-accused persons. He also stated that the seized goods were of Indian origin.

In cross-examination he stated that, out of the persons standing on the dock, he could not say who were the driver and the helper of the car.

P.W. 2 Md. Amzad Hossain Chowkidar, is a seizure list witness. He stated that, on 29.6.2000 at about 1.p.m, police captured some bottles of phensedyl kept in a bags (বস্তাসহ ফেন্সিডিল বাহির করে) near Fazilpur Bazar. Police asked him to put his signature on the seizure list and accordingly he put his signature (Exhibit-2/2). He also stated that he heard from the local people that some phensedyl were captured from the possession of the

accused persons, but he could not exactly state whether the bottles produced in court were the bottles seized at that time. In his cross-examination he stated that he could not state the contents of the seizure list.

P.W. 3, Shyamol Kumar Biswas, being a local school teacher, stated that, near his school, at about 1 pm, he found a gray colour private car and also found some police personnel and three persons along with some bottles of phensedyl which were seized by the police and kept on the car. But he could not identify the accused persons on the dock. However he identified the phensedyl bottles that were recovered from the place of occurrence. In his cross-examination he stated that phensedyl bottles were kept on the roof top of the car.

P.W. 4, Jamirul Islam, is a seizure list witness of the locality. He stated that, at about 1 p.m. on 29.06.2000, he found some people assembled near the police camp and also found a private car and some bottles of phensedyl at that place. He was present at the time of seizure of the bottles of phensedyl from the car and identified his signature (Exhibit-2/3) on the seizure list.

But in his examination he stated that he put his signature on a blank paper at the instance of the Daroga.

P.W. 5, Md. Zinna Mollah, another witness of the locality, stated that he found some people assembled at Fazilpur Police Camp and he heard that 176 bottles of phensedyl were captured from some persons. P.W. 5 identified the said phensedyl bottles, (Material Exhibit- Ka), but he could not say the names of those persons.

P.W. 6 Anwar Hossain, S.I. of police, on the date of occurrence was attached to Fazilpur Police Camp. In his examination-in-chief he made statements similar to those of the informant (P.W. 1) about the date, time, place and manner of the occurrence. In his examination in cross P.W. 6 stated that on obtaining the information from Hat Gopalpur Police Camp they laid an ambush at Kumiradah and found the car coming towards to them and thereafter they managed to arrest the 4 (four) accused persons staying in the car in presence of local witnesses. Then they took the said car to the police camp afterwards. However he could not say as to whether the seizure list was prepared in front of the camp or inside the camp office.

P.W. 7, Md. Abdur Razak, stated that on 29.6.2000, he was attached to Fazilpur Police Camp. In examination-in-chief, he made statements similar to those of P.W. 1 and 6 about the seizure of the phensedyl bottles from the possession of the 4 accused persons. In his examination in cross P.W. 7 stated that they laid an ambush on a road of Baroihuda and arrested the accused persons with the bottles of phensedyl, but he could not say who made the seizure list.

P.W. 8 Md. Nurul Islam is another police personnel who also attached to Fazilpur Police Camp on the date of occurrence. In examination-in-chief he made statements similar to those of P.W. 1, 6 and 7 about the date, time, place and manner of occurrence at Kumiradah. In his examination in cross P.W. 8 stated that there was no house near the place of their ambush and that they created a barricade by a rickshaw van to stop the car and that O.C. Shahadat took the seized car to the police station.

P.W. 9 Habilder Md. Raza Mia, was tendered but not examined by the prosecution and defense declined to cross examine this witness.

P.W. 10 Md. Faridul Islam, a local witness, stated that he put his signature (Exhibit 2/4) on the seizure list, but he was not present at the place of occurrence. However he heard that some persons were arrested with phensedyl. He did not see the accused persons, but at the instance of the Daroga he put his signature in the seizer list at the police station. At this stage he was declared hostile and cross examined by the prosecution, whereupon he denied the prosecution suggestion that he put his signature in the seizure list at the place of occurrence and that he deposed falsely to protect the accused persons. He was not cross examined by the defence.

P.W. 11, Sub Inspector Md. Hafiz Iqbal, investigated into the case. He stated that, during investigation, he visited the place of occurrence, prepared the sketch map with index thereof (Exhibit 4 and 5), seized the documents of the car in terms of a seizure list (Exhibit-3), examined the accused persons and witness under section 161 of the Code, 1898 and submitted charge sheet against the five accused persons. He indentified them and also the seized phensedyl bottles of Indian origin.

In his examination in cross, P.W-11 stated that accused Rafiqul Islam and Mafujul Islam were the driver and helper of the car respectively. He stated that he did not send any sample of the phensedyl for chemical examination and he also stated that sometimes it might not be possible on the part of the passengers to know as to whether any materials or goods were lying in the backside of the car.

Apart from the oral evidence, the prosecution produced some documentary evidence, namely the FIR, (Exhibit-1), the seizure list (Exhibit-2), another seizure list of the car (Exhibit-3) and the sketch map and index of the map of the place of occurrence (Ext. 4 and 5).

On perusal of these documents we find that the contents of the FIR –Exhibit -1 are the same as stated by the maker thereof being the informant, P.W-1.

The seizure list –Exhibit -2 states about seizure of 176 bottles of phensedyl containing the words “PHENSEDYL, RHONE POULENC Made in India” kept in two plastic bags in the backside (bonette) of a car being Dhaka Metro Ga -11-2653

at a place at village Kumiradah, contiguous to Hat Fazilpur Bazar on 29.06.2000 at 13.05 p.m.

The said seizure list contains the signature of three witnesses, being P.W, 2, 4 and 10.

There is another seizure list –Exhibit 3 –prepared about seizure of the said car.

The Sketch Map and index thereof –Exhibits 4 and 5, shows the location of the place of occurrence.

The principal fact in issue in this case is whether the phensedyl bottles in question were captured from the possession of the appellants, namely from the car in question.

On this fact in issue, the police witnesses, namely P.W. 1,6,7 and 8, being members of the raiding party ,unequivocally and in the same voice, stated about the date, time, place and manner of seizure of the phensedyl bottles from the car wherein the two appellants and their two companions were staying .

However P.W-7, one of the police personnel, stated in cross examination that the place of occurrence was Baroihuda.

We do not find any material on record to disbelieve the testimony of the police witnesses. The variation in the statement

of P.W-7 about the place of occurrence to be at Baroihuda appears to be a misstatement and do not tally with other evidence on record including the statements of the local witnesses, namely P.W-2,3,4,5 and 10. None of them stated about Baroihuda. So the said variation in the statement of P.W-7 may be safely ignored.

With regard to the defence suggestion that the police personnel falsely implicated the appellants and their companions because the later did not pay the bribe demanded by the former appears to be a mere suggestion without any supporting evidence or even without any particulars about the place, reason or otherwise. Such suggestion does not negate the credibility of the testimony of the police witnesses.

There is nothing on record to show that the police witnesses had any previous grudge or enmity with the appellants or their companions. It is not believable that the police witnesses would implicate the appellants or their companions by implanting 176 bottles of phensedyls.

The seizure list witnesses admitted their signatures on the seizure list –Exhibit -2 by which the phensedyl bottles were seized. But there are some variations in their statements with

regard to their witnessing the fact of search and about the place where they signed the seizure list and also their knowledge about the contents of the seizure list.

While P.W.10 Faridul Islam, a witness declared as hostile by the prosecution, stated his ignorance of the search and seizure, P.W-2 and 4 stated that they saw the phensedyl bottles, the arrested accused persons, and capture of the bottles from the car. However both of them stated that the search and seizure was conducted near the Fazilpur Police Camp.

P.W-3 a resident of Kumirapara and a school teacher, stated about the scenario immediately after the arrest of the accused persons. He witnessed the search and seizure and thus fully corroborated with the statement of the police witnesses.

The testimony of the Police witnesses and those of the local witnesses considered as a whole lead us to believe the prosecution case that the phensedyl bottles were seized from the car in which the appellants and two other accused persons were staying.

It is evident from the evidence on record that the fact of search and seizure took place on a road known as the Hat

Gopalpur to Sailakupa Road and that the police personnel had to stop a running car in which the bottles were kept.

In such a situation all the formalities of complying with the requirements of section 103 of the Code, 1898, as pointed out by the learned advocate for the appellant was not humanly possible. Such non-compliance does not render the result of search and seizure unlawful.

The mode of search and seizure contemplated in the said section 103 does not fit in a situation like this.

We have perused the Judgment in the Case of *Habibur Rahman alias Jane Alam vs. the State* 47 DLR (1995), 323 with regard to the compliance of section 103 of the Code, 1898. The fact of that case are totally different and the observation made therein and as referred to by Mr. Assduzzaman the learned Advocate are not applicable in this Case.

With regard to the statement of P.W-11 to the effect that he during investigation came to know that the present appellants were the driver and helper of the car does not negate the fact of their collective possession over the seized phensedyl bottles.

With regard to the absence of any chemical examination report on the contents of the seized phensedyl bottles, as pointed out by the learned Advocate for the appellants, we hold that no chemical examination report is necessary in the present Case.

It is in evidence that the seized bottles contain labels with the words “PHENSEDYL RHONE POULENC Made in India” and such a description about the contents of the bottles is sufficient to prove that those were Indian made phenedyl.

That “Phensedyl” is a contraband item is clearly spelt out in section 8 of the Drug Control Ordinance, 1982 read with SL.No.52 of schedule III of the Ordinance. The said section is quoted below.

8. –Prohibition of Manufacture, etc., of certain medicines.-(1) *On the commencement of this ordinance, the registration or license in respect of all medicines mentioned in the schedules shall stand cancelled, and no such medicine shall, subject to the provisions of sub-section (2), be manufactured, imported, distributed [, stoked, exhibited or sold] after such commencement.*

(2) *Notwithstanding anything contained in sub-section (1),-*

(a)

(b)

(c) *The medicine specified in schedule III may be manufactured, imported, distributed and sold for a period of [eighteen months] after the commencement of this Ordinance, and thereafter there shall not be any*

manufacture, import, distribution [, stock, exhibition or sale] of such medicines.

Section 8(2)(c) clearly prohibits the manufacture, importation, distribution, and sale of the items mentioned in Schedule III after eighteen months of the commencement of Ordinances, 1982. Again SL. No.52 of Schedule III specifies “Drug Admin Code No. 004-62-40, name of produce Phensedyl”.

Thus the aforesaid provision has clearly identified phensedyl as a contraband item. So the possession of phensedyl for the purpose of sale falls within the purview of section 25 B (2) of the Special Powers Act, 1974, which prohibits possession of contraband goods for the purpose of sale.

In the absence of any explanation from the appellants, the very number of bottles being 176 clearly indicates that, those were kept for sale.

It is noted that, the trial Court mentioned in the Charge the accusation of importation of the phensedyl bottles from India. The exact wordings are as follows: “গাড়ী তল্লাশী করিয়া ১৭৬ বোতল ভারতীয় ফেন্সিডিল উদ্ধার করেন যাহা আপনারা অবৈধভাবে ভারত হইতে বাংলাদেশের অভ্যন্তরে আনিয়া ফরিদপুরের উদ্দেশ্যে লইয়া যাইতেছিলেন। আপনারা অবৈধভাবে নিজেদেরকে লাভবান করিবার উদ্দেশ্যে উক্ত ফেন্সিডিল আমদানী করিয়াছেন।”

The language of the charge contains an indication of the offence of smuggling as provided in subsection 25B(1), which provides for a penalty of minimum 2 (two) years up to life imprisonments.

But in the impugned Judgment the trial court rightly and lawfully found the appellants guilty of the offence of possession

of contraband goods for sale under sub-section 25 B(2) of the Special Powers Act, 1974.

So the argument advanced by the learned Advocate for the appellants with regard to defect in the charge is not acceptable to us. The trial court can find an accused guilty and sentence him under a section with lower penalty.

In view of the above we hold that the prosecution could prove beyond reasonable doubt that the appellants committed offence under section 25 B(2) of the Special Powers Act, 1974. We find no illegality or infirmity in the findings or decision of the trial Court.

We have noticed that the appellants are the driver and the helper of the car respectively and 176 bottles of phensedyl were recovered from the collective possession of 4 (four) accused persons. So considering the quantum of the phensedyl and the absence of any previous conviction we hold that the ends of justice will be met if the sentence of 5 (five) years imprisonment is reduced to 1 (one) year, and the fine is reduced to TK. 1000/- in default, a sentence of 1 (one) month more.

In the result, the appeal is dismissed with modification in quantum of sentence imposed by the Special Tribunal No.4, Jhenidaha in Special Tribunal Case No. 65 of 2000 to the effect that the appellants are sentenced to suffer rigorous imprisonment for 1(one) year, instead of 5(five) years, and also to pay a fine of Tk.1000/- in default to suffer rigorous imprisonment for 1(one) month more. The period of their custody prior to the pronouncement of the Judgment by the trial Court (on 15.9.2002)

will be deducted from the said period of imprisonment of 1 (one) Year.

The appellants are directed to surrender before the trial Court to serve out the remaining period of imprisonment, if any.

Send down the lower Court records, along with a copy of this Judgment.

Md. Emdadul Huq, J.

I agree.

H.K.