

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7603 of 2011

Md. Sukkur Ali

...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

...For the State

Heard on 02.01.2024, 11.01.2024 and
14.01.2024**Judgment delivered on 15.01.2024**

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the judgment and order dated 31.10.2011 passed by Special Tribunal No. 1, Thakurgaon in Special Tribunal Case No. 50 of 2010 convicting the appellant under Section 25B(2) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for 3(three) years and fine of Tk. 5,000, in default, to suffer rigorous imprisonment for 3(three) months.

The prosecution case, in short, is that on 18.05.2010 at 10.00 am based on secret information Naik Subedar Md. Shafiuddin of Molani Border Outpost along with his force started for village Molani Merdapukur by a pickup and reached the house of accused Md. Fazar Ali of the said village. Sensing the presence of the member of the B.G.B personnel his son Md. Sukkur Ali fled away. The members of the raiding party searched the house of the accused Md. Fazar Ali in the presence of the respectable locals and recovered 48 bottles of Indian phensedyl kept in a trunk, one old share, one old bedsheet and one old towel. Thereafter along with the recovered goods went to Thana and lodged the FIR.

P.W. 9 S.I Md. Rejaul Islam took up investigation of the case. During 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 investigation, he found the prima facie truth of the allegation made in the FIR against the accused persons and submitted charge sheet against them.

During the trial, the charge was framed on 09.09.2010 under Section 25B(2) of the Special Powers Act, 1974 which was read over and explained to the accused present in court and they pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 9(nine) witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any D.W. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which the accused Md. Sukkur Ali filed the instant appeal.

P.W. 1 Md. Shafiuddin is the Naik Subedar of the Molani Border Outpost, B.G.B. He stated that based on secret information, he along with Naik Oliul Islam, Sepoy Hafizur Rahman, Sepoy Zahangir Alam, Sepoy Zahidul Islam and Medical Assistant Shahin Reja encircled the house of the Md. Fazar Ali in the presence of the locals. Sensing the presence of the B.G.B personnel, the accused Fazar Ali fled away. Searching the house of accused Fazar Ali, the members of the raiding party recovered 48 bottles of phensedyl kept in a trunk from the house of Fazar Ali. The members of the raiding party also recovered one old share, one old bedsheet and a towel. A seizure list was prepared at the place of occurrence and he took the signature of Md. Abdul Aziz and Md. Yousuf Ali. At the time of recovery, the accused Fazar Ali and Sukkur Ali were absconding. He along with the goods went to Thana and lodged the FIR. He proved the FIR as exhibit

1 and his signature on the FIR as exhibit 1/1. As per his instruction, the Sepoy Hafizur Rahman prepared the seizure list and he signed the seizure list. He proved the seizure list as exhibit 2 and his signature on the seizure list as exhibit 2/1. He proved 48 bottles of phensedyl as material exhibit I. He also produced old share, old bedsheet and old towel. During cross-examination, he stated that he along with five other BDR personnel were present and they saw Fazar Ali in his house and at the time of searching the house, he fled away. He affirmed that Sukkur Ali was not present at the time of searching the house and Fazar Ali was not known to him earlier. There were many houses beside the house of the Fazar Ali. Witnesses Yousuf Ali and Abdul Aziz are locals. They started from the camp at 10.00 and while they were present at camp received the information through the source. The place of occurrence is situated one kilometre away from the camp. He went to Thana at 10.00 pm to lodge the FIR. The FIR was written by the Sepoy Hafizur Rahman who was a member of the raiding party. The phensedyl, towel, and bedsheet were recovered from the house of Fazar Ali. He denied the suggestion that the phensedyl was not recovered from the house of the accused persons.

P.W. 2 Sepoy Md. Zahangir Alam was tendered.

P.W. 3 Naik Md. Oliul Islam stated that on 18.05.2010 he was posted at Molani Border Outpost. On that day, based on a secret information under the leadership of Naik Subedar Md. Shafiuddin having received secret information went to the house of the accused Fazar Ali and Sukkur Ali situated at village Molani Maddapukur and in the presence of the locals recovered 48 bottles of phensedyl from the house of Sukkur Ali and also recovered a old sharee, old towel and a bedsheet. A seizure list was prepared and the signature of the witnesses was taken on the seizure list. The seized alamats were produced before the Court. Sensing the presence of the BDR personnel, the accused persons fled away for which the members of the raiding party could not detain them. Thereafter, Naik Subedar Md. Shafiuddin lodged the FIR.

During cross-examination, he stated that they had started from the camp at 10.00 am and reached the place of occurrence at 10.30 am. The place of occurrence is situated about one kilometre away from the camp. Abdul Aziz and Yousuf are the witnesses on the seizure list. The locals informed that the accused are the owner of the house from where the phensedyl was recovered. There are houses to the north and south side of the house of Fazar Ali. The witnesses signed at the house of Fazar Ali. He denied the suggestion that accused Sukkur Ali is a minor boy. He affirmed that the accused Sukkur Ali deals with the business of phensedyl. They stayed about one hour at the place of occurrence. From the place of occurrence, they returned to the camp.

P.W. 4 Constable Md. Hafizur Rahman stated that on 18.05.2010, he was posted at Molani B.O.P, Harirampur. On that day at 10.00 am, under the leadership of Naik Subedar Md. Shafiuddin based on secret information went to the house of the accused Md. Fazar Ali situated in Maddapukur and encircled the house. Sensing the presence of the B.G.B personnel, accused Fazar Ali fled away. Searching the house of Sukkur Ali recovered 48 bottles of phensedyl kept in a trunk. They also recovered an old share, an old bedsheet, and a towel in the presence of witnesses. Naik Subedar prepared the seizure list and took the signature of witnesses and thereafter, the goods were handed over to Thana and Naik Subedar Shafiuddin lodged the FIR. He identified the recovered goods in Court. At about 10.00 am, he started from the camp. The FIR was written at the camp and the seizure list was prepared at the place of occurrence. He denied the suggestion that the accused persons are not the owners of the house from where the alamt was recovered. Sensing the presence of the B.G.B personnel, the accused fled away. He denied the suggestion that the accused persons were falsely implicated in the case.

P.W. 5 Sepoy Md. Shahin Reja stated that on 18.05.2010 he was posted at Molani Company Sadar. On that day, based on secret information under the leadership of Naik Subedar Shafiuddin, he went

to the house of Fazar Ali situated at village Maddapukur. In the presence of the locals raided the house of Fazar Ali and recovered 48 bottles of phensedyl from the house of Sukkur Ali. They also recovered one old share, an old bedsheet and an old towel. A seizure list was prepared at the place of occurrence and witnesses signed the seizure list. Thereafter, the recovered alamats were handed over to the Thana. He identified the seized alamats. Hafizur Rahman wrote the seizure list. There were two houses at the place of occurrence. There were many houses besides the place of occurrence. The locals informed that the accused Fazar Ali is the owner of the place of occurrence. He denied the suggestion that the accused Sukkur Ali was not the owner of the place of occurrence.

P.W. 6 Constable Zahid Hasan stated that on 18.05.2010, he was posted at Moulani B.O.P. On that day at 10.00 am under the leadership of Naik Subdedar Md. Shafiuddin went to the house of accused Fazar Ali situated at village Maddapukur and in the presence of witnesses searched the house of accused Sukkur Ali and recovered 48 bottles of Indian phensedyl, one old share, and one old bedsheet. A seizure list was prepared at the place of occurrence and the witnesses signed the seizure list. Naik Subedar went to Thana along with the alamats and lodged the FIR. He identified the recovered alamats. There were two houses at the place of occurrence and there were also other houses beside the place of occurrence. The accused persons live in separate houses. The alamats were recovered from the house of Sukkur Ali. Sensing the presence of the B.G.B personnel, the accused persons fled away. He denied the suggestion that the accused persons are not the owner of the place of occurrence.

P.W. 7 Md. Abdul Aziz stated that the occurrence took place on 18.05.2010 at 10.30 am. On the way to the house from the bazaar, a sepoy of Molani BDR Camp instructed him to go inside the camp. He did not see the recovery of any goods. BDR personnel prepared a seizure list and took his signature. He proved the seizure list as exhibit

2 and his signature as exhibit 2/2. P.W. 7 was declared hostile. During cross-examination, he stated that the accused persons are known to him. He denied the suggestion that he along with the informant went to the house of the Fazar Ali. He also denied the suggestion that the 48 bottles of phensedyl, one old share, and one old bedsheet kept in a trunk were recovered from the house of Sukkur Ali. During cross-examination on behalf of the defense, he stated that the house of the accused persons was situated one kilometre away from his house. Police did not record his statement. He did not see the recovered goods and the seizure list was prepared at camp. The accused Sukkur Ali is a hotel boy.

P.W. 8 Md. Yousuf Ali stated that the occurrence took place on 18.05.2010. On that day, he was going through the BDR Camp and the BDR personnel called him to go to the camp and BDR personnel took his signature on a paper. He proved his signature on the seizure list as exhibit 2/3. He was declared hostile by the prosecution. During cross-examination on behalf of the prosecution, he stated that the accused persons are known to him. He affirmed that he signed the seizure list. He denied the suggestion that 48 bottles of phensedyl was recovered in his presence from the house of Sukkur Ali. During cross-examination on behalf of the defence, he stated that his house is situated 40/50 yards away from the house of accused-persons. He affirmed that the accused persons are hardcore poor and they did not sell phensedyl.

P.W. 9 S.I Md. Rejaul Islam is the Investigating Officer. He stated that the Officer-in-Charge of Harirampur Thana Md. Humayun Kabir lodged the FIR. During the investigation, he visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898, and prepared the seizure list. During the investigation, he found the prima facie truth of the allegation made against the accused persons and submitted charge sheet against them. He proved the FIR form as exhibit 3 and the signature of O.C Humayun Kabir as exhibit 3/1. He

proved the sketch map and index as exhibit 4 and his signature on the sketch map and index as exhibit 4/1. During cross-examination, he stated that Molani Talukderpara is situated one kilometre away from the place of occurrence. He denied the suggestion that the place of occurrence is not the house of the accused persons.

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 P.Ws. 1 to 6 stated that 48 bottles of Indian phensedyl were recovered from the house of accused Md. Sukkur Ali and the prosecution witnesses proved the charge against the accused to the hilt 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.

In the FIR, it has been alleged that the informant obtained secret information that the phensedyl was selling in the house of accused Md. Fazar Ali and raided the house of Fazar Ali in the presence of the locals and sensing the presence of the members of the BDR personnel, the owners of the house fled away and searching their house recovered 48 bottles of phensedyl kept in a trunk and prepared the seizure list. P.W.1 is the informant. He deposed that searching the house of Fazar Ali recovered 48 bottles of phensedyl kept in a trunk and prepared the seizure list at the place of occurrence. P.W. 2 Sepoy Md. Zahangir Alam was tendered by the prosecution and declined by the defense. P.Ws. 3, 4, 5 and 6 stated that 48 bottles of phensedyl were recovered from the house of Sukkur Ali. The prosecution produced the 48 bottles of phensedyl in Court and proved the phensedyl as material exhibit I.

The Investigating Officer did not send any phensedyl to the chemical examiner for his opinion. P.Ws 7 and 8 are the witnesses of the seizure list. They stated that at the instruction of the BDR

personnel, they went to B.G.B Camp and they did not see the recovery of phensedyl from the house of accused Sukkur Ali. At the time of recovery of the alleged phensedyl, the accused Sukkur Ali was not present at the place of occurrence. There is a contradiction in the evidence of P.W. 1 and the evidence of P.Ws. 2 to 6 as regards the alleged place of recovery of phensedyl. In the absence of any report from the chemical examiner regarding the recovered goods, it cannot be held that the phensedyl was kept in the bottles. Furthermore, P.Ws. 7 and 8 who are the seizer list witnesses did not corroborate the evidence of P.Ws. 3 to 6 regarding the recovery of alleged phensedyl from the house of Sukkur Ali. P.W. 1 stated that phensedyl was recovered from the house of accused Fazar Ali.

Because of the above facts and circumstances of the case, evidence and proposition, I am of the view that the prosecution failed to prove the charge against the accused Md. Sukkur Ali 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 against accused Md. Sukkur Ali are hereby set aside.

Send down the lower Court's records at once.