

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7673 of 2011

Nazma Akhter Sumi

...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 11.01.2024

Judgment delivered on 11.01.2024

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the impugned judgment and order dated 20.11.2011 passed by Special Tribunal and Divisional Special Judge, Khulna in Special Tribunal Case No. 203 of 2009 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. 5000, in default, to suffer rigorous imprisonment for 3(three) months.

The prosecution case, in short, is that on 14.09.2009 at 11.20 am P.W. 2 A.H.M. Lutful Kabir was searching the vehicles in front of Bismillah Hotel situated on Rupsha Setu bypass road at Zero Point area under Botiaghata Thana and found the accused Nazma Akhter Sumi. On interrogation, she could not give any satisfactory reply and searching her body through one Reshma Begum recovered 20 bottles of Indian phensedyl from the waist of the accused kept in three pieces of coloured cloth. In the presence of witnesses 1. Md. Abu Jafar, 2. Reshma and 3. Md. Sayed Hossain prepared the seizure list.

After lodgment of the FIR, S.I Arifur Rahman took up the investigation of the case and 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, sent one bottle phensedyl to the chemical examiner for his report. Subsequently, S.I Hafizur Rahman

of Batiaghata Thana took up investigation of the case and he also 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 against the accused and submitted charge sheet on 02.11.2009 against her under Section 25B(b) of the Special Powers Act, 1974.

Thereafter, the case was transferred to the Senior Special Tribunal, Khulna who sent the case to the Special Tribunal and Divisional Special Judge, Khulna for trial and disposal of the case. During the trial, the charge was framed on 16.03.2010 against the accused under Section 25B(2) of the Special Powers Act, 1974 against the accused which was read over and explained to the accused present in court and she pleaded not guilty to the charge and claimed to be tried following law. The prosecution examined 3(three) witnesses to prove the charge against the accused. After that, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and she declined to adduce any witness. After concluding the trial, the trial Court by impugned judgment and order convicted the accused as stated above against which she filed the instant appeal.

P.W. 1 Md. Abu Jafar stated that he signed the seizure list on 14.09.2009. The accused was detained and several bottles of phensedyl were recovered from her. He proved the seizure list as exhibit 1 and his signature on the seizure list as exhibit 1/1. He is an Imam of a Mosque and the accused is present in the dock. He proved the phensedyl as material exhibit I series. During cross-examination, he stated that he had been an Imam since 2002. The occurrence took place from 11.00 am-12.00 pm. At that time, he was present on the road. He is the owner of a small shop and the occurrence took place in front of his shop. He affirmed that he saw that phensedyl was recovered from the accused. He denied the suggestion that the phensedyl was not recovered from the accused and that he signed the white paper.

P.W. 2 A.H.M. Lutful Kabir stated that on 14.09.2009 when he was discharging his duty as S.I of Batiaghata Thana based on the CC No.

160/2009 dated 14.09.2009, he was searching the vehicle at zero point area. Based on secret information, he interrogated the accused Nazma Akhter Sumi in front of the Bismillah Store situated at Rupsha bypass road zero point area. He searched the body of the accused through one Reshma Begum and found 20 bottles of phensedyl kept in three pieces of coloured cloth. He prepared the seizure list. He lodged the FIR. He proved the FIR as exhibit 2 and his signature on the FIR as exhibit 2/1. He proved his signature on the seizure list as exhibit 1/2. He proved the alamat as material exhibit I. During cross-examination, he stated that the place of occurrence is situated 7 kilometres away from Thana and he went to the zero point from Thana. There were six persons along with the driver. They went to the place of occurrence. He could not say the name of the owner of the Bismillah Hotel. Reshma Akhter was not previously known to him. The seizure list was prepared at the place of occurrence. He denied the suggestion that phensedyl was not recovered from the possession of the accused.

P.W. 3 Constable No. 780 Wahidul Islam stated that he along with the informant went to the place of occurrence and 20 bottles of phensidyle were recovered from the accused present in Court. During cross-examination, he stated that he started from Thana after 10.00 am and reached the place of occurrence after 11.00 am and a lady searched the body of the accused. Phensidyle was written on the bottles. He denied the suggestion that no phensedyl was recovered from the possession of the 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 P.W. 2 is the informant and P.W. 1 is a witness of seizure list and P.W. 3 is a constable and in the presence of P.Ws. 1 and 3, searching the body of the accused recovered 20 bottles of phensedyl. The chemical examiner in his report dated 11.10.2009 opined that codeine was found in the sample sent by Constable 980 Kawser Hossain. 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.

In the FIR, it has been alleged that 20 bottles of phensedyl were recovered from the waist of the accused kept in three pieces of coloured cloth. P.W. 1 Md. Abu Jafar stated that several bottles of phensidyle were recovered from the accused and he proved the phensidyle as material exhibit I series. P.W. 2 stated that one Reshma Begum searched the body of the accused and recovered 20 bottles of phensedyl kept in three pieces of coloured cloth. P.W. 2 proved the FIR as exhibit 2. P.W. 3 stated that 20 bottles of phensidyle were recovered from the accused and one lady searched the body of the accused. Nothing was stated by those P.W.s from which part of the body of the accused, 20 bottles of phensedyl were recovered.

It further reveals that S.I Arifur Rahman initially took up investigation of the case and he visited the place of occurrence and prepared the sketch map and index but he was not examined by the prosecution and the prosecution also did not prove the sketch map and index to prove the place of occurrence. The prosecution case is that one Reshma Begum searched the body of the accused Nazma Akhter Sumi but said Reshma Begum was not examined. On scrutiny of the seizure list, it is found that Reshma Begum and Md. Sayed Hossain also witnesses of seizure list and Md. Sayed Hossain was also not examined. Furthermore, S.I Hafizur Rahman who submitted the charge sheet was also not examined by the prosecution.

In the FIR and the sketch map, the place of occurrence has been shown in front of the Bismillah Hotel situated beside the Rupsha Bridge bypass road and in the index, 'Ga' has been mentioned as the Bismillah Hotel of Abu Jafar Howlader. The prosecution did not examine any employee of the said hotel. In the charge sheet, the Investigating Officer cited eleven persons as witnesses but the prosecution only examined three

witnesses. Under Section 50(3) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ the report of the chemical examiner signed by him may be proved during trial. No report of the chemical examiner was proved in the instant case under Section 50(3) of the মাদকদ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০.

In the above backdrop of the prosecution case, I am of the view that the prosecution with an oblique motive did not examine those witnesses for which an adverse presumption is required to be drawn against the prosecution under Section 114(g) of the Evidence Act, 1872 for non-examination of the material witnesses.

Because of the above facts and circumstances of the case, evidence, findings, observation, reasoning and proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt and the trial Court without proper assessment and evaluation of the evidence in a shortcut manner passed the impugned judgment.

I find merit in the appeal.

In the result, the appeal is allowed.

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

Send down the lower Court's records at once.