

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 3692 of 2014

Md. Sumon

.....Convict-appellant.

-Versus-

The State

.....Respondent.

Ms. Nargis Tanjima, Advocate

.....For the appellant.

Ms. Shahida Khatoon, D.A.G with

Ms. Sabina Perven, A.A.G with

Ms. Kohenoor Akter, A.A.G.

.... For the respondent.

Heard on 24.07.2024, 25.07.2024 and
Judgment on 25.07.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Sumon is directed against the judgment and order of conviction and sentence dated 03.06.2014 passed by the learned Judge, Jananirapatta Bighnakari Aparadh Damon Tribunal and Special Tribunal, Rajshahi in Special Tribunal Case No. 07 of 2013 arising out of G.R No. 217/2012 (Charghat) corresponding to Charghat

Police Station Case No. 08 dated 06.08.2012 convicting the accused-appellant under section 25B(2) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 2,000/- (two thousand) in default to suffer rigorous imprisonment for 01(one) month more.

The prosecution case, in brief, is that one, Utpal Sarker, A.S.I, Charghat police station, Rajshahi as informant on 06.08.2012 at about 16:15 hours lodged an Ejahar with Charghat Police Station against the accused appellant stating, inter-alia, that while the informant was on duty under charghat police station as per GD entry No. 268 dated 06.08.2012 for executing warrant of arrest got a secret information that a person is carrying Indian made Phensidyl for the purpose of sale at Eskabadol Moor, village Shibpur under Charghat police station and thereafter, the informant and other police forces rushed there and found 2 persons were coming through a motorcycle towards them and then the informant party gave signal to stop the motorcycle, while the rider of motorcycle and another tried to run away leaving their motorcycle and ultimately the informant party apprehended them on chase and thereafter, on search recovered 4+4= 8 bottles of phensidyl syrup from the left

and right side pockets of the pant of accused No.1 Md. Sumon and thereafter, the informant party seized those phensidyls by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Charghat Police Station Case No. 08 dated 06.08.2012 under section 25 B (1) (B)(2) of the Special Powers Act, 1974 was started.

Police after completion of investigation submitted charge sheet No. 258 dated 20.10.2012 under section 25 B(1)(B)(2) of the Special Powers Act, 1974 against the accused-appellant and another.

Thereafter, the case record was sent to the Court of learned Sessions Judge and Special Tribunal No.1, Rajshahi, wherein the case was registered as Special Tribunal Case No. 7 of 2013. Subsequently, the case was transmitted before the learned Judge, Jananirapatta Bighnakari Aparadh Daman Tribunal and Special Tribunal, Rajshahi for disposal before whom the accused appellant and another were put on trial to answer a charge under section 25B (2) of the Special Powers Act, 1974 to which the accused-appellant pleaded not guilty and claimed to be tried stating that he has been falsely implicated in this case.

At the trial, the prosecution side has examined as many as 6(six) witnesses to prove its case, while the defence examined none.

The defence case as it appears from the trend of cross-examination of the prosecution witnesses and examination of the accused-appellant under section 342 of the Code of Criminal Procedure that the accused-appellant is innocent, who has been falsely implicated in the case. The defence declined to adduce any witness.

On conclusion of trial the learned Judge, Jananirapatta Bighnakari Aparadh Daman Tribunal and Special Tribunal, Rajshahi by the impugned judgment and order dated 03.06.2014 found the accused appellant guilty under section 25B(2) of the Special Powers Act, 1974 and sentenced him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 01 (one) month more while acquitted another accused from the charge levelled against him.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 03.06.2014, the accused-appellant preferred this criminal appeal.

Ms. Nargis Tanjima, the learned Advocate appearing for the convict-appellant in the course of her argument takes me through the F.I.R, deposition of witnesses and other materials on record including the impugned judgment and then submits that the convict-appellant is innocent, who has been made scapegoat in this case, in-fact, no phensidyl was recovered from the direct possession and control of the convict-appellant. She further submits that in this case the prosecution to prove the allegation as to recovery of 4+4= 8 bottles of Indian phensidyl examined in all 6 witnesses out of which independent seizure list witnesses namely, PW-2 and PW-3 stated nothing as to recovery of phensidyl syrups from the possession and control of the convict-appellant and rest police witnesses inconsistently deposed before the trial Court as to recovery of phensidyl syrups from the possession of the convict-appellant. She adds that the seized phensidyls was not examined by the chemical examiner and thus it is thus difficult to believe that the alleged seized goods were actually contraband in nature. She further submits that to prove the charge under section 25B (2) of the Special Powers Act, 1974, it is the duty of the prosecution to prove that the seized articles are recovered from the exclusive possession of the accused and those were

contraband goods and the accused kept the same for the purpose of sale although in this case the prosecution side having failed to prove that the appellant brought those phensidyl syrups from India by way of smuggling and kept the same for the purpose of sale and as such, the impugned judgment and order of conviction under section 25B (2) of the Special Powers Act, 1974 cannot be sustained in law.

Ms. Kohenoor Akter, the learned Assistant Attorney-General, on the other hand, supports the impugned judgment and order of conviction and sentence dated 03.06.2014, which was according to her just, correct and proper. She submits that in this case the prosecution has been successfully proved that contraband Indian phensidyl syrups were recovered from the possession and control of the accused appellant beyond reasonable doubts. She further submits that in the facts and circumstances of the case the learned tribunal judge justly found that the accused-appellant guilty under section 25B(2) of the Special Powers Act, 1974 and sentenced him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 2,000/- (two thousand) in default to suffer simple imprisonment for 01(one) month more.

Having heard the learned counsel for the parties and having gone through the materials on record, the only question that calls for our consideration in this appeal is whether the trial Court committed any error in finding the accused- appellant guilty of the offence under section 25B(2) of the Special Powers Act, 1974.

On scrutiny of the record, it appears that the prosecution to prove its case examined in all 06(six) witnesses out of whom PW-1, informant of the case stated in his deposition that on 06.08.2012 while he and other police forces were on special duty for executing warrant of arrest got a secret information that the accused persons are carrying phensidyls for the purpose of sale and thereafter they rushed to village Shibpur under Charghat police station and apprehended the accused persons and on search recovered total 8 bottles Indian phensidyl from the accused Sumon (appellant) and thereafter police prepared seizure list in presence of the witnesses. This witness proved the seizure list and his signature thereon as "Ext.- 1, 1/1", Ejahar and his signature thereon as "Ext.-2, 2/1", seized phensidyl as "material Ext.-I series". This witness also identified the accused on dock. The defence cross-examined PW- 1 but failed to find out any contradiction in the evidence of PW- 1. PW-2, Shamsul Haque, seizure list witness stated

nothing against the accused-appellant. This witness simply stated that police obtained his signature on a blank paper. He identified the same as “Ext.-1/2”. This witness in his cross-examination stated that- “আমি শুধু মোটর সাইকেল দেখিয়াছি।”. PW-3, Md. Hashem Ali also a seizure list witness. This witness stated nothing against the accused-appellant, who simply stated that police obtained his signature on a blank paper. He identified the same as “Ext.-1/3”. PW-4, Constable Md. Anisur Rahman and PW-5, A.S.I. Kawser Ali both of them are members of the raiding party, who gave evidence in support of the prosecution case and made similar statements as like PW-1. PW-6, Sub Inspector Md. Shahinur Alam investigated the case. This witness stated in his deposition that he examined the witness under section 161 of the Code of Criminal Procedure, prepared sketch map, index map and proved the same as “Ext. Nos. 3, 3/1, 4, 1/4” and after completion of investigation submitted charge sheet against the accused-appellant and another.

On an analysis of the above quoted evidence, it appears that seizure list witnesses namely, PW-2 and PW-3 stated nothing against the accused-appellant. Besides, there is nothing on record to suggest that prosecution side having examined the seized phensidyls

for the purpose of a report whether it was contraband or not. It is thus difficult to believe that alleged seized phensydils were actually contraband in nature or the same were brought into Bangladesh from India by way of smuggling.

In the case of Raju Ahmed and others Vs. The State reported in 7 MLR 112, it has been held as follows:

“There has been no chemical examination of the phensydil in question which is serious lacuna on the part of the prosecution whose duty it was to establish that the seized goods are contraband goods.”

In the case of Nannu Mia alias Habibur Rahman Vs. The State reported in 55 DLR7, it has been held as follows:

“Before convicting the appellant the court must give findings that the phensydil in question found in his possession was a contraband item smuggled into Bangladesh for sale”.

In the case of Md. Akram vs. the State reported in 1 LM (AD) 581, it has been held as follows:

Normally this Division does not interfere with the judgment of the High Court Division on appeal if it is found that the judgment is based on proper appreciation of the evidence. It cannot reassess the evidence afresh as a court of appeal to examine whether or not the High Court Division has

properly appreciated the evidence while believing the recovery of the contraband goods from the possession of the petitioner. Learned counsel appearing for the petitioner is also conscious on the question of finding of fact and does not argue that the prosecution has failed to prove the recovery beyond reasonable doubt. He however argues that on the admitted facts no offence discloses against the petitioner at all and therefore, of the High Court Division has erred in law in maintaining the conviction petitioner. In this connection the learned counsel has drawn our attention to the evidence on record and section 25B (2) of the Special Powers Act, 1974.

Sub-section (2) of section 25B reads thus:

"Whoever sells, or offers or displays for sale, or keeps in his possession or under his control for the purpose of sale, any goods the bringing of which into Bangladesh is prohibited by or under any law for the time being in force shall be punishable with imprisonment for a term which may extend to seven years and shall not be less than one year, and shall also be liable to fine."

This sub-section lays down the constituents of the constitution of an offence of second degree smuggling and its sentence. It provides that if any person is found (i) in selling or (ii) offering or displaying for sale, or (iii) keeps in his possession or under his control for the purpose of sale, any goods the bringing of which into Bangladesh prohibited by law, he will be guilty of the offence. Now taking these three conditions in mind, it is to be examined whether any of these

preconditions has been proved by the prosecution against the petitioner. The first two conditions are not attracted in this case since it is not the prosecution case that the petitioner was selling or offering for sale or displays for sale of a bottle of phensedyl. He was found in possession of a bottle of phensedyl which he was carrying on his way by driving a motorbike. Therefore, he may be charged with for violating the last subject to the condition that he has kept it in his possession or has carried it for the purpose Of sale. Neither in the FIR nor in the evidence of P.W.1 or in the evidence of other witnesses, there is any allegation that the petitioner has kept or carried one bottle of phensedyl for the purpose of sale. It is the consistent case that the phensedyl bottle was recovered from his possession while the petitioner was approaching towards Dupchanchia. Only possession of contraband goods does not constitute an offence of smuggling within the meaning of section 25B (2). It is only if any person keeps in his possession for the purpose of sale of the contraband goods the bringing of which is prohibited by law, an offence of the second category of smuggling will be attracted.

From a plain reading of the above quoted decision of our Apex Court, it appears that only possession of contraband goods does not constitute an offence of smuggling within the meaning of section 25B (2) of the Special Powers Act, 1974,

As I have already indicated that in this case the prosecution could not produce any evidence oral or documentary to show that the convict-appellant brought those phensidyl syrups from India by way of smuggling and kept the same under his possession and control for the purpose of sale. Therefore, I find no difficulty whatever in holding that the impugned judgment and order of conviction and sentence does not deserve to be sustained.

In the facts and circumstances of the case and the evidence on record, it must be held that the prosecution failed to prove the charge of smuggling against accused, Md. Sumon beyond reasonable doubts. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence passed by the learned Judge, Jananirapatta Bighnakari Aparadh Daman Tribunal and Special Tribunal, Rajshahi in Special Tribunal Case No. 7 of 2013 arising out of G.R No. 217 of 2012 (Charghat) corresponding to Charghat Police Station Case No. 08 dated 06.08.2012 against convict-appellant, Md. Sumon is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Sumon is discharged from his bail bonds.

Send down the lower Court records at once.