

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 3860 of 2015

Md. Mainul Islam

...Appellant

-Versus-

The State

...Respondent

Mr. Md. Zillur Rahman, Advocate

...For the appellant

Mr. Md. Akhtaruzzaman, D.A.G with

Mr. Sultan Mahmood Banna, A.A.G with

Mr. Mir Moniruzzaman, A.A.G with

Ms. Farhana Abedin, A.A.G with

Mr. Md. Kaium, A.A.G

...For the State

Heard on 26.05.2025 and 28.05.2025

Judgment delivered on 29.05.2025

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the impugned judgment and order dated 01.06.2015, passed by Special Tribunal No. 2, Chapai Nawabganj in Special Tribunal Case No. 205 of 2014, convicting the accused Md. Mainul Islam under Section 25B(1)(b) of the Special Powers Act, 1974, and sentencing him thereunder to suffer rigorous imprisonment for 2(two) years and fine of Tk. 2,000, in default, to suffer imprisonment for 2(two) months.

The prosecution's case, in short, is that the informant A.S.I. Md. Eshahak Ali of Shibganj Thana, along with the police force, was on duty on 03.05.2014 at 6.30 pm near Bayejit Morolpara area under Shibganj Thana. On receipt of secret information to the effect that the Indian phensedyl was being sold in the house of Layesh Uddin, they went in front of the house of Md. Mainul Islam, son of Layesh Uddin. The police personnel detained the accused Md. Mainul Islam and searching his house, recovered 11(eleven) bottles of Indian phensedyl kept under the cot of his house and prepared the seizure list in the presence of witnesses.

S.I. Md. Shafiqul Islam of Shibganj Thana took up the investigation of the case. 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 seized phensedyl. After completing the investigation, he found the prima facie truth of the allegation against the accused and, after completing the investigation, submitted charge sheet on 30.06.2014 against the accused Md. Mainul Islam under Section 25B(b) of the Special Powers Act, 1974.

After that, the Chief Judicial Magistrate, Chapai Nawabganj, sent the case to the Sessions Judge, Chapai Nawabganj, who took cognizance of the offence against the accused under Section 25B(b) of the Special Powers Act, 1974 and sent the case to the Special Tribunal No. 2, Chapai Nawabganj, for disposal of the case. During the trial, the Special Tribunal No. 2, Chapai Nawabganj framed charge against the accused under section 25B(b) of the Special Powers Act, 1974, which was read over and explained to the accused present in court, and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 7(seven) 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. Mainul Islam filed the instant appeal.

P.W. 1 A.S.I. Md. Esahak Ali is the informant. He stated that on 03.05.2014 at 6.30 pm, based on secret information, he went to Morolpara of Arjid, Shyampur. When he reached in front of the house of the accused, sensing their presence, the accused attempted to flee. Following his instruction, the informant entered the house of the accused and recovered 11 bottles of Phensedyl kept in a plastic bag in

his hand. He seized the alamat and took the signature of the witnesses. He proved the seizure list as exhibit 1 and his signature on the seizure list as exhibit 1/2, and the FIR as exhibit 2 and his signature on the FIR as exhibit 2/2. He proved 11 bottles of Phensedyl kept in a bag as material exhibit 1 series. During cross-examination, he stated that the seizure list was prepared while sitting in the chair in the house. “18.30 has been written, erasing by fluid”. He could not say how many huts were in the house. He did not inquire about the owners of the house. He denied the suggestion that on that day, he did not arrest two persons or that an altercation took place on the road and maliciously filed the false case against the accused.

P.W. 2 Constable Md. Amirul Islam stated that on 03.05.2014, at the time of searching the Morolpara area of Shyampur, 11 bottles of phensedyl were recovered from the house of the accused. He signed the seizure list. He proved his signature on the seizure list as Exhibit 2/2. The occurrence took place at 6/7 pm. At the time of recovery of the goods, he was present outside the house. He signed without saying anything. He is not aware whether two other persons were arrested on that day. He denied the suggestion that the accused was arrested.

P.W. 3 Md. Shakirul Islam stated that the occurrence took place a few years ago. He is not aware of the occurrence. After that, he was declared hostile. He denied the suggestion that on 03.05.2014 at 6.30 pm in his presence, 11 bottles of Phensedyl were recovered from the dwelling house of the accused.

P.W. 4 Md. Masud Karim stated that the occurrence took place about 1 year ago in the house of the accused. Police came along with the car and detained three accused persons. Police investigated the case, and he deposed to the police. The lady was known to him, but the other two people were not known to him. He could not say who detained the accused.

P.W. 5 Showkat Ara stated that 1 year ago, at 2.30 am, the occurrence took place in the house of Raisuddin. At about 2.30 am,

hearing the hue and cry, he went and saw that the police arrested Mainur along with two other persons. They did not say anything. During cross-examination, he stated that the police did not talk to him.

P.W. 6 Shukuruddin stated that the occurrence took place about 1 year ago at about 2.30 am. Police detained Mamun along with two other persons from Dhaka. They could not say anything. During cross-examination, he stated that the two persons from Dhaka were the guests.

P.W. 7 S.I. Md. Shafiqul Islam is the Investigating Officer. He stated that during the 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 submitted charge sheet. He proved the sketch map and index as exhibits 3, 3/1, and 4. During cross-examination, he stated that alamat is not produced in Court. Due to a mistake, "18.30 has been written by fluid," which is not mentioned in the charge sheet. He denied the suggestion that, without recording the statement of witnesses, he submitted charge sheet against the accused.

Learned Advocate Mr. Md. Zillur Rahman, appearing on behalf of the appellant, submits that there is a contradiction in the evidence of P.W. 1 and the statement made in the FIR regarding the manner of recovery of the alleged phensedyl and P.W. 3 Md. Shakirul Islam, P.W. 4 Md. Masud Karim, P.W. 5 Showkat Ara, and P.W. 6 Shukuruddin did not corroborate the statement of P.W. 1 as to the recovery of the alleged phensedyl from the possession of the accused. He further submits that 11 bottles of phensedyl were allegedly recovered and P.W. 1 also produced 11 bottles of phensedyl in the trial Court, which proved that the alleged phensedyl was not sent to the chemical examiner. The prosecution failed to prove the charge against the accused beyond all reasonable doubt, and the trial Court, without any report of the chemical examiner, illegally held that

Phensedyl made in India was recovered from the possession of the accused. He prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Assistant Attorney General Mr. Sultan Mahmood Banna appearing on behalf of the state submits that 11 bottles of phensedyl were recovered from the house of the accused kept in a bag under the cot and the evidence of P.W. 1 as to the recovery of phensedyl from possession of the accused is corroborated by P.W. 2. He further submits that P.Ws 3 to 6 are locals and they did not corroborate the evidence of P.W. 1 due to undue influence of the accused. In support of his submission, he cited a decision made in the case of the State Vs. Badal Kumar Paul reported in 12 LM (AD) 423 judgment dated 01.02.2022. He prayed for the dismissal of the appeal.

I have considered the submissions of the learned Advocate Mr. Md. Zillur Rahman, who appeared on behalf of the appellant, and the learned Assistant Attorney General Mr. Sultan Mahmood Banna, who appeared on behalf of the State, perused the evidence, impugned judgment and order passed by the trial Court, and the records.

P.W. 1 stated that on 03.05.2014 at 6.30 pm, while they were going through the house of the accused, he attempted to flee and 11 bottles of phensedyl kept in a bag made of plastic bag in his hand were recovered. During cross-examination, he admitted that he did not make any enquiry about the owner of the house. P.W. 2 Constable Md. Amirul Islam corroborated the evidence of P.W. 1 as to the recovery of the 11 bottles of phensedyl, but he did not disclose the time when the said phensedyl was recovered from the house of the accused. P.W. 3 Md. Shakirul Islam was declared hostile. P.W. 4 Md. Masud Karim stated that about 1 year ago at night, police arrested three persons from the house of the accused. The lady was known to him, but two other persons came from Dhaka. P.W. 5 Showkat Ara stated that the occurrence took place about 1 year ago at 2.30 am.

Hearing hue and cry, he went to the house of Raisuddin and saw that the police arrested two persons. During cross-examination, she stated that she did not make any statement to the police. P.W. 6 Shukuruddin stated that the occurrence took place 1 year ago at 2.30 am. Police arrested Mamun along with two other persons who came from Dhaka. During cross-examination, he stated that two people were the guests. P.W. 7 S.I. Md. Shafiqul Islam is the Investigating Officer. He proved the sketch map as exhibit 3 and his signature as exhibit 3/1, and the index as exhibit 4.

In the FIR, it has been stated that the informant-P.W. 1 under the leadership of the Officer-in-Charge of Shibganj Thana along with three other constables of the police arrested the accused, but the prosecution only examined P.W. 1 and 2. It has been alleged that 11 bottles of Phensedyl were recovered from the possession of the accused, and during the trial, P.W. 1 produced 11 bottles of Phensedyl to the trial Court. No statement is made by P.W. 1 that the recovered phensedyl was sent to the chemical examiner for a report to ascertain that the phensedyl was kept in the bottles. No report of the chemical examiner is proved in the case.

The issue involves the Rule whether the report of the chemical examiner is required to prove an offence under section 25B(1)(b) of the Special Powers Act, 1974.

On a bare reading of section 25B of the said Act, it transpires that if any person brings any goods into Bangladesh which is prohibited by or under any law for the time being in force is an offence. To prove an offence under said provision, the prosecution has to prove that the goods are prohibited and illegally brought into Bangladesh from any other country. In the instant case, 11 bottles of Phensedyl were allegedly recovered from the possession of the accused. The phenseyl is therapeutic drug containing codeine phosphate and contraband goods. Therefore, the prosecution is

required to prove that the phensedyl was recovered from the possession of the accused.

In the case of Raju Ahmed and Ors Vs. The State, Criminal Appeal Nos. 137 and 194 of 2000, the trial Court convicted the appellants under Section 25B(2) of the Special Powers Act, 1974, and sentenced them to suffer rigorous imprisonment for 7(seven) years and fine of Tk. 5,000, in default, to suffer rigorous imprisonment for 6(six) months. The High Court Division by judgment and order dated 11.07.2001 (Md. Abdul Matin, J) set aside the judgment and order of conviction and sentence passed by the trial Court, holding that;

“There has been no chemical examination of the phensedyl 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 Abdul Hai Vs. the State and Ors passed in Criminal Revision No. 859 of 2009, judgment dated 14.07.2024, this bench (Md. Shohrowardi, J) set aside the judgment and order of conviction and sentence passed by the trial Court under Section 22(Ga) of the Narcotics Control Act, 1990, holding that;

“In the absence of any report under section 50 of the said act, it cannot be held that the narcotics were found in the bottles allegedly recovered from the house of the accused. Furthermore, the evidence of P. Ws. 2, 3, 5, 6, and 7 as regards the nature of the alleged narcotics is materially contradicted by P.Ws 1 and 8, although they are police personnel.”

In the case of State vs. Miss Eliadah McCord reported in 2 BLC (AD) 1, our Apex Court considered the ‘whole substance as heroin’. Subsequently, in the case of the State Vs. Badal Kumar Paul reported in 12 LM (AD) 423 judgment dated 01.02.2022 the Appellate Division (Obaidul Hassan, J as his Lordship was then) also considered the whole phensedyl as narcotic substance and affirmed

the view made in the case of Miss Eliadah McCord that ‘total amount of substances’ with which the narcotic has been mixed requires to be considered as narcotic substances and the accused will be punished accordingly.”

To prove an offence under Section 25B(2) of the Special Powers Act, 1974, the prosecution is required to prove that the import prohibited goods have been brought into Bangladesh from any other country. In the FIR, it has been alleged that 11 bottles of Phensedyl made in India were recovered from the possession of the accused. Nothing has been stated by P.W. 1 that the alleged Phensedyl were brought from India into Bangladesh. P.W. 1 simply stated that at the instance of the accused 11 bottles of Phensedyl were recovered, kept in a bag made of plastic from his house.

A report of a chemical examiner is sine qua non to prove an offence both under section 25B(1)(b) of the Special Powers Act, 1974 or under section 19(1) serial 3(Ka) of the Narcotics Control Act, 1990. It is found that the Phensedyl allegedly recovered from the house of the accused was not sent to the chemical examiner. In the absence of any report from the chemical examiner, it cannot be said that the phensedyl was found in the bottle allegedly recovered from the possession of the accused.

In view of the above evidence, findings, observation, and the proposition, I am of the view that the prosecution failed to prove the charge against the accused Md. Mainul Islam beyond all reasonable doubt and in the absence of any report of the chemical examiner regarding the alleged phensedyl, the trial Court illegally convicted the accused Md. Mainul Islam under Section 25B(1)(b) of the Special Powers Act, 1974.

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 the accused Md. Mainul Islam is hereby set aside.

Send down the lower Court's records at once.