

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 5441 of 2015

Md. Anwar Hossain

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Md. Noor us Sadik, 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.

Judgment on 29.04.2024.

Sheikh Abdul Awal, J.

This criminal appeal at the instance of the convict appellant, Md. Anwar Hossain is directed against the judgment and order of conviction and sentence dated 08.07.2015 passed by the learned Judge, Special Tribunal No. 4, Thakurgaon in Special Tribunal Case No. 169 of 2013 arising out of G.R. No. 750 of 2013 (P) corresponding to Pirogonj Police Station case No. 16 dated 31.08.2013 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 3(three) years and to pay a fine of Tk. 3,000/- (three thousand) in default to suffer rigorous imprisonment for 03(three) months more.

The prosecution case, in short, is that one, Md. Rayhan Ali, S.I. Pirgonj Police Station, Thakurgaon as informant on 31.08.2013 at about 23:25 hours lodged an Ejahar with Pirgonj Police Station, Thakurgaon against the accused appellant, inter-alia, that on 31.08.2013 while the informant along with other police forces were on special duty against anti drug activities got a secret information as to sale and purchase of phensedyl in front of Godagari Government Primary school and thereafter, police team rushed there and at 10:35 hours police apprehended accused, Md. Anwar Hossain and thereafter, on search recovered 26 bottles Indian made phensedyl syrups kept in a plastic bag in hand of the accused appellant, which valued at Tk. 13,000/- (thirteen thousand). Thereafter, police seized those phensedyl syrups by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Pirgonj Police Station case No. 16 dated 31.08.2013 under Section 25B(2) of the Special Powers Act, 1974 was started.

Police after completion of usual investigation submitted charge sheet being charge sheet No. 114 dated 28.09.2013 under section 25B(2) of the Special Powers Act, 1974 against the accused appellant.

Ultimately, the accused appellant was put on trial before the learned Judge, Special Tribunal Court No. 1, Thakurgaon to answer a charge under Section 25B(1)(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 examined in all 08(eight) witnesses to prove its case, while the defence examined none.

The defence case as 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 was innocent and he has been falsely implicated in the case.

On conclusion of trial, the learned Judge, Special Tribunal No. 4, Thakurgaon by the impugned judgment and order dated 08.07.2015 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 3(three) years and to pay a fine of Tk. 3,000/- (three thousand) in default to suffer rigorous imprisonment for 03(three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 08.07.2015, the accused-appellant preferred this criminal appeal.

Mr. Md. Noor us Sadik, the learned Advocate appearing for the appellant submits that in this case no chemical examination was held and as such it is very difficult to believe that seized phensedyl Syrups were actually contraband goods although the trial Court below without considering this vital aspect of the case mechanically found the accused appellant guilty under Section 25B (2) of the Special Powers Act, 1974 and as such, the impugned judgment and order of conviction and sentence is liable to be set-aside.

Ms. Sabina Perven, the learned Assistant Attorney General, on the other hand, supports the impugned judgment which was according to her just, correct and proper.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of Appeal, deposition of witnesses and other materials on

record including the impugned judgment, only the question calls for 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 one, Md. Rayhan Ali, S.I. Pirgonj Police Station, Thakurgaon as informant on 31.08.2013 at about 23:25 hours lodged an Ejahar with Pirgonj Police Station, Thakurgaon against the accused appellant on the allegation that the accused appellant was apprehended along with 26 bottles of Indian Phensedyl syrups, which valued at Tk. 13,000/- (thirteen thousand). Police seized those phensedyl syrups by preparing seizure list in presence of witnesses. Police after completion of investigation submitted charge sheet against the accused appellant under Section 25B(2) of the Special Powers Act, 1974. At the trial the prosecution side examined in all 8 witnesses to prove its case out of which PW-1, Md. Rayhan Ali, S.I. Pirgonj Police Station, Thakurgaon as informant of the case stated in his deposition that on 31.8.2013 while the informant along with other police forces were on special duty against anti-drug activities got a secret information as to sale and purchase of phensedyl in front of Godagari Government Primary school and thereafter,

police team rushed there and at 10:35 hours police apprehended accused, Md. Anwar and thereafter, on search recovered 26 bottles Indian made phensedyl syrups kept in a bag in hand of the accused appellant. Thereafter, police seized those phensedyl syrups by preparing seizure list in presence of local witnesses. Rest police witnesses namely PW-2, PW-3, PW-4 corroborated the evidence of PW-1 in respect of all material particulars. PW-5, Adibur Rahman, S.I, Investigating Officer, who during investigation visited the place of occurrence, prepared sketch map, examined the witnesses under Section 161 of the Cr.p.c. This witness after completion of investigation submitted charge sheet against the convict-appellant under section under Section 25B(2) of the Special Powers Act, 1974. It further appears that seizure list witnesses namely PW. 6 and PW.7 were declared hostile. Moreover, in this case prosecution side having failed to obtain any chemical report as to phensedyl syrups in question. It is thus difficult to believe that the alleged seized goods were actually contraband in nature. In view of the attending facts and circumstances of the case and the evidence on record, I am constrained to hold that the prosecution has failed to prove the charge against accused Md. Anwar Hossain beyond any reasonable doubts

In the case of Md Akram vs the State reported in 1LM (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.

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 phensedyl 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 as ingredients of section 25B(2) of the Special Powers Act, 1974 are not exist in this case. Consequently the appeal succeeds.

In the result, the appeal is allowed, the impugned judgment and order of conviction and sentence dated 08.07.2015 passed by the learned Judge, Special Tribunal No. 4, Thakurgaon in Special Tribunal Case No. 169 of 2013 arising out of G.R. No. 750 of 2013 (P) corresponding to Pirogonj Police Station case No. 16 dated 31.08.2013 against the accused appellant, Md. Anwar Hossain is set-aside and he is acquitted of the charge levelled against him.

Accused appellant, Md. Anwar Hossain is discharged from his bail bonds.

Send down the lower Court records at once.