

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 8697 of 2015

Md. Sumon and another

.....Convict-appellants.

-Versus-

The State

.....Respondent.

Mr Md. Aminul Islam, Advocate

.....For the convict- appellants.

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 06.05.2024 and 19.05.2024,
Judgment on 26.05.2024.

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of appellant Nos. 1. Md. Sumon and 2. Md. Illias is directed against the judgment and order of conviction and sentence dated 11.10.2015 passed by the learned Judge, Special Tribunal No. 4, Khulna in Special Tribunal Case No. 144 of 2012 arising out of G.R. No. 202 of 2012 corresponding to Bathiaghata Police Station Case No. 10 dated 13.07.2012 convicting the accused appellants under Section 25B(2) of the Special Powers Act, 1974 and sentencing them thereunder to suffer rigorous imprisonment for a period of

07(seven) years and to pay fine of Tk. 20,000/ (twenty thousand) in default to suffer simple imprisonment for 01(one) year more each.

The prosecution case, in brief, is that one, Mohammad Ali, DAD, (JCO No. 6604, Nayeb Subeder) BGB, Special Company, Rab-6, Khalishpur Khulna as informant on 13.07.2012 at about 21.05 hours lodged an Ejahar with Bathiaghata Police Station, Khulna against the convict appellants stating, inter-alia, that on 13.07. 2012 while informant along with other forces were on special duty got a secret information at 12.45 hours that some drug peddlers were bringing phensedyls in Khulna City from Satkhira and then at 13:20 hours RAB forces took position in front of Rupa Petroleum and CNG Padma Oil Company Limited under Bathiaghata Police Station and thereafter, they found 2 persons were coming through an engine driven van and then the informant party stopped that van and apprehended the accused persons and on a query, they disclosed their name Md. Sumon and Md. Illias and thereafter, they opened the wooden body of that van and then the informant party recovered total 716 bottles of Indian phensedyl from wooden body of that van which valued at Tk.3,58,000/- (three Lac and fifty eight thousand) and accordingly, they seized those phensedyl syrups by preparing seizure list in presence of witnesses.

Upon the aforesaid First Information Report, Bathiaghata Police Station Case No. 10 dated 13.07.2012 under Section 25B(2) of the Special Powers Act, 1974 was started against the accused appellants.

Police after completion of usual investigation submitted charge sheet against the accused-appellants vide charge sheet No. 190 dated 19.08.2012 under Section 25B (2) of the Special Powers Act, 1974. Ultimately, the accused appellants were put on trial before the learned Judge, Special Tribunal No. 4, Khulna to answer a charge under Section 25B(2) of the Special Powers Act, 1974.

At the trial, the prosecution examined in all 6(six) witnesses and also exhibited some documents to prove its case, while the defence examined none. Most of the prosecution witnesses were not cross-examined as the accused persons after being enlarged on bail became absconding.

On conclusion of trial, the learned Judge, Special Tribunal No. 4, Khulna by the impugned judgment and order dated 11.10.2015 found the accused-appellants guilty under Section 25B (2) of the Special Powers Act, 1974 and sentenced them thereunder to suffer rigorous imprisonment for a period of 07(seven) year and to pay fine of Tk. 20,000/ (twenty thousand) in default to suffer simple imprisonment for 01(one) year more each.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 11.10.2015, the accused-appellants preferred this criminal appeal.

Mr. Md. Aminul Islam, the learned Advocate appearing for the convict appellants submits that the accused appellants have been made scapegoat in this case in fact no incriminating phensedyl syrups were recovered from the direct possession and control of the accused appellants. He adds that in this case in all 6 witnesses were examined by the prosecution, who inconsistently deposed before the trial court as to recovery of phensedyls from the wooden van under the possession and control of the accused appellants and thus, the accused appellants are entitled to get benefit of doubt. He further submits that in this case the prosecution side having failed to produce chemical examination report which creates serious doubt whether the seized phensedyl syrups were actually contraband goods although the learned Judge, Special Tribunal No. 4, Khulna without considering all these vital aspects of the case mechanically came to the conclusion that the accused appellants guilty under section 25B(2) of the Special Powers Act, 1974 and sentenced them thereunder to suffer rigorous imprisonment for a period of 07(seven) years and to pay fine of Tk. 20,000/ (twenty thousand) in default to suffer simple imprisonment for 01(one) year more each and as such, the same is liable to be set-aside. Finally, the learned Advocate submits that in this case although the phensedyl syrups were recovered on the

basis of secret information. Thus the search was prearranged and pre-planned one but it was not made in presence of two respectable persons of the locality, even not in presence of the neighbours which renders the prosecution doubtful.

Ms. Kohenoor Akter, the learned Assistant Attorney General, on the other hand, supports the impugned judgment and order of conviction and sentence, which was according to her just, correct and proper. The learned Assistant Attorney General relying on the decision reported in 18 MLR 490 submits that the proposition of law is by now well settled that brand name phensedyl is a contraband item and it is not necessary to hold chemical examination for proving that seized phensedyls are contraband goods. The learned Assistant Attorney General further submits that the law is by now well settled by a number of decisions that the evidence of police witnesses can be the sole basis of conviction. The learned Assistant Attorney General to strengthen her submission has relied on the decision reported in 51 DLR 83.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the memo of Appeal, F.I.R, Charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence, the only question that calls for consideration in this appeal is whether the trial Court

committed any error in finding the accused-appellants guilty of the offence under section 25B(2) of the Special Powers Act, 1974.

On scrutiny of the record, it appears that one, Mohammad Ali, DAD, (JCO No. 6604, Nayeb Subeder) BGB, Special Company, Rab-6, Khalishpur Khulna as informant on 13.07.2012 at about 21.05 hours lodged an Ejahar with Bathiaghata Police Station, Khulna against the convict appellants on the allegation that the accused appellants were apprehended along with 716 bottles of Indian phensedyl Syrups, which valued at Tk.3,58,000/- (three Lac and fifty eight thousand). Police after completion of investigation submitted charge sheet against the accused appellants under Section 25B (2) of the Special Powers Act, 1974. It further appears that at the time of trial the prosecution examined in all 6 witnesses out of which PW-1, Mohammad Ali, DAD, (JCO No. 6604, Nayeb Subeder), BGB as informant stated in his deposition that on 13.7.2012 while they were on special duty under Bathiaghata Police Station got secret information as to phensedyl business and thereafter, the informant party rushed in front of Rupa Petroleum and CNG Padma Oil Company Limited and after sometimes they saw a engine driven van was coming along with driver and another, when informant party stopped that van and on interrogation driver disclosed his name Md. Sumon and another one Md. Illias and thereafter, on further interrogation they admitted about keeping phensedyl and

accordingly opened wooden box of that van and then informant party recovered total 716 bottles of Indian phendyel syrup and thereafter, seized those phensedyl syrups by preparing seizure list in presence of witnesses. This witness proved the seizure list as exhibit-1 and his signature thereon as exhibit 1/1. This witness also stated that accused persons also admitted that they used to bring phensedyls from India for the purpose of sale and thereafter, police arrested the accused persons and took them in Bathiaghata Police Station with seized phensedyl syrups. This witness was not cross-examined as the accused persons after being enlarged on bail became absconding. PW-2, Constable, Md. Ashraful, PW-3, A.S.I. Md. Mosharof Hossain, PW-4, S.I. Rezaul Karim, all these witnesses were members of the raiding party, who supported the prosecution case in their respective deposition as like as PW-1. PW-5, S.I. Md. Abdul Majid, who investigated the case and submitted charge sheet against the accused appellants. This witnesses in his deposition stated that during investigation he visited the place of occurrence, prepared sketch map and examined the witnesses under section 161 of the Code of the Criminal Procedure and after completion of investigation submitted charge sheet against the accused appellants under section 25B(2) of the Special Powers Act, 1974. PW-6, Constable, Sadananda, member of the raiding party, who also gave evidence in support of the prosecution.

On a close analysis of the above quoted evidence, it appears that all the PWs. are police personnel, who testified in one voice that the accused appellants were apprehended along with 716 bottles of Indian Phensedyl syrup and they could not produce any valid document in support of seized Indian Phensedyl syrups.

In the case of Md. Mahfuzur Rahman and another vs. The State reported in 18 MLR 490, it has been held as follows:

“With regard to the absence of any chemical examination report on the contents of the seized phensedyl bottles, as pointed out by the learned Advocate for the appellants, we hold that no chemical examination report is necessary in the present case. It is in evidence that the seized bottles contain labels with the words “PHENSEDYL RHONE PULENC Made in India” and such a description about the contents of the bottles is sufficient to prove that those were Indian made phenedyl. Than “Phensedyl” is a contraband item is clearly spelt out in section 8 of the Drug Control Ordinance, 1982 read with SL. No. 52 of schedule III of the ordinance. The said section is quoted below:

8.- Prohibition of Manufacture, etc, of certain medicines.- (1) On the commencement of this Ordinance, the registration or licence in respect of all medicines mentioned in the Schedules shall stand cancelled, and no such medicine shall, subject to the provisions of subsection (2), be manufactured, imported, distributed 4 [, stocked, exhibited or sold] after such commencement.

(2) Notwithstanding anything contained in sub-section (1),-

(a)

(b)

(c) the medicines specified in Schedule III may be manufactured, imported, distributed and sold for a period of 7 [eighteen months] after the commencement of this Ordinance, and thereafter there shall not be any manufacture, import, distribution 8 [, stock, exhibition or sale] of such medicines.

Section 8(2)(c) clearly prohibits the manufacture, importation, distribution and sale of the items mentioned Schedule III after eighteen months of the commencement of Ordinances, 1982. Against SL. No. 52 of Schedule III specifies “Drug Admin Code No. 004-62-40, name of produce phensedyl”. Thus the aforesaid provision has clearly indentified phensedyl as a contraband item. So the possession of phensedyl for the purpose of sale falls within the purview of section 25 B(2) of the Special Powers Act, 1974, which prohibits possession of contraband goods for the purpose of sale.

From the above, I find a clear view of law as it stands today that “Phensedyl” is a contraband item is clearly spelt out in section 8 of the Drug Control Ordinance, 1982 read with SL. No. 52 of schedule III of the ordinance and thus, no chemical examination report is necessary in the facts of the present case inasmuch as in this case it is in evidence that the seized bottles contain labels with the words “PHENSEDYL Made in India” and such a description about

the contents of the bottles is sufficient to prove that those were Indian made phenedyl. Moreover, brand name phenedyl is a contraband item.

To meet the argument that none of the local seizure list witnesses have been examined by the prosecution to prove the fact of recovery of the contraband seized goods from the possession of the accused appellants I want to observe that in surrounding circumstances of our society very few local witnesses are available to depose against their powerful neighbours or habitual miscreants. In almost all cases they come to the court to say that they signed blank papers on the asking of the police and disown their presence at the time of recovery of incriminating articles. In such circumstances, absence of evidence from local witness should not be ground to disbelieve the prosecution case. There is no warrant of law that evidence of the members of the law enforcing agencies must have corroboration from other sources. In the absence of any cogent reason there can be no logic to disbelieve the police witnesses simply cause they are members of the prosecuting agency. I think, the seizure list proved by the police officer can safely be acted upon when in most cases local witnesses either for fear of life or acting under undue influence are obliged deny their presence at the time of recovery of the incriminating articles. In such view of the matter, I do not find any reason to hold that the prosecution case must suffer for non-examination of the local seizure list witnesses.

In the case of Abdul Razzak Talukder vs. The State reported in 51 DLR 83, it has been held as follows:

“ পুলিশ সাক্ষীর সাক্ষ্য বিচার বিশ্লেষণ করে যদি তা বিশ্বাস যোগ্য মনে করেন তবে স্থানীয় সাক্ষী অভিযোগকারী পক্ষের সমর্থনে সাক্ষ্য না দিলেও বা সাক্ষ্য দিলে তা সত্য না হলে পুলিশ সাক্ষীর সাক্ষ্যের উপর নির্ভর করে আসামীকে দোষী সাব্যস্ত করতে আইনতঃ কোন বাধা নেই। স্থানীয় সাক্ষীদের হাবভাব ও আচরণ লক্ষ্য করে তাহাদের সাক্ষ্য বা পুলিশ সাক্ষীদের সাক্ষ্যের মধ্যে কোনটা সঠিক সে সম্পর্কে সতর্কতার সাথে বিচার বিশ্লেষণ করে সিদ্ধান্ত গ্রহন করতে হবে। যদি সাক্ষ্য প্রমাণ বিচার বিশ্লেষণ করে দেখা যায় যে আসামীর সাথে শত্রুতার কারণে বা আসামীর শত্রুপক্ষের দ্বারা ন্যায় অন্যায়ভাবে প্রভাবান্বিত হয়ে পুলিশ আসামীকে হয়রান ও জব্দ করার জন্যে তার বিরুদ্ধে মিথ্যা মামলা সাজিয়েছে তখন বিচারক পুলিশ সাক্ষীর সাক্ষ্য অগ্রাহ্য করতে পারেন।”

I fully endorse the above views and take them as settled principals of law.

In the facts of the case and for the reasons stated above, I am clearly of the opinion that the learned Judge, Special Tribunal No. 4, Khulna having decided the case on consideration of the materials on record and in accordance with law, the same calls for no interference. Therefore, I find no substance in either of the contentions as raised by the learned Advocate for the Appellants.

However, considering the law, facts and circumstances as discussed above, particularly the fact that the convict appellants have already faced the agony of the protracted prosecution and suffered mental harassment for a long

period and also having suffered their sentence to some extent (pre and post trial), I think, ends of justice, will be met in the facts and circumstances of the case if the sentence of fine is maintained and the substantive sentence is reduced to the period of 2 (two) years in place of 7(seven) years, as prayed for.

Learned Assistant Attorney General has, of course, been able to defend this case on merits but practically has nothing to say insofar as reduction of sentence imposed upon the appellants are concerned.

In the result, the appeal is dismissed with modification of sentence. The period of sentence is reduced to the period of 2 (two) years in place of 7(seven) years. Sentence of fine is, however, maintained.

Since the appeal is dismissed the convict-appellant appellant Nos. 1. Md. Sumon and 2. Md. Illias are directed to surrender their bail bond within 3 (three) months from today to suffer their sentence in accordance with law, failing which the trial Court concerned shall take necessary steps against the convict-appellant Nos. 1. Md. Sumon and 2. Md. Illias to secure arrest against them.

Send down the lower Court records at once.