

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 7055 of 2015

Md. Ramzan Ali @ Kohinur and another
.....Convict-appellant.

-Versus-

The State
.....Respondent.

Mr. Suruzzaman, 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 15.07.2024 and
Judgment on 30.07.2024

Sheikh Abdul Awal, J:

This Criminal Appeal at the instance of convict appellant, Md. Ramzan Ali @ Kohinur and another is directed against the judgment and order of conviction and sentence dated 18.08.2015 passed by the learned Judge Special Tribunal No.4, Bogra in Special Tribunal Case No. 189 of 2008 arising out of G.R No. 67 of 2008(Adam) corresponding to Adamdigi Police Station

Case No. 14 dated 27.05.2008 convicting the accused-appellant under section 25 B(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 Taka 5,000/- (five thousand) in default to suffer simple imprisonment for 03(three) months more.

The prosecution case, in brief, is that one, Md. Rayhan Ali, S.I, Adamdigi police station, Bogura as informant on 27.05.2008 at about 23:45 hours lodged an Ejahar with Adamdigi Police Station against the accused appellants stating, inter-alia, that on the basis a of secret information the informant and other police forces ambushed near about Indeyl bridge of Dabla mouza under Adamdigi police station and at one stage police team detained a passengers bus of Mou Paribahan and on search, recovered 19 bottles of phensidyl syrup from under the seat of accused (appellants) 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. 14 dated 27.05.2008 under section 25 B of the Special Powers Act, 1974 was started.

Police after completion of investigation submitted charge sheet No. 75 dated 27.06.2008 under section 25 B(2) of the Special Powers Act, 1974 against the accused-appellants.

Thereafter, the case record was sent to the Court of learned Sessions Judge and Special Tribunal No.1, Bogura, wherein the case was registered as Special Tribunal Case No. 189 of 2008. Subsequently, the case was transmitted before the learned Special Tribunal No.4, Bogura for disposal before whom the accused appellants were put on trial to answer a charge under section 25B (2) of the Special Powers Act, 1974 to which the accused-appellants pleaded not guilty and claimed to be tried stating that they have been falsely implicated in this case.

At the trial, the prosecution side has examined as many as 8(eight) 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-appellants are innocent, who have been falsely

implicated in the case. The defence declined to adduce any witness.

On conclusion of trial the learned Judge, Special Tribunal No.4, Bogura by the impugned judgment and order dated 18.08.2015 found the accused appellants guilty of the offence under section 25B(2) of the Special Powers Act, 1974 and sentenced them thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer simple imprisonment for 3 (three) months more.

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 18.08.2015, the accused-appellants preferred this criminal appeal.

Mr. Suruzzaman, the learned Advocate appearing for the convict-appellants in the course of argument takes me through the F.I.R, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence and then submits that the convict-appellants are innocent, who have been made scapegoat in this case, in-fact, no incriminating phensidyls was recovered from the direct possession and control of the convict-appellant, which

was allegedly recovered from under seat of accused-appellants. He further submits that in this case the prosecution to prove the allegation as to recovery of 19 bottles of Indian phensidyl examined in all 8 witnesses out of whom independent seizure list witnesses namely, PW-7 was declared hostile by the prosecution and other prosecution witnesses inconsistently deposed before the trial Court as to recovery of phensidyl syrups from under the seat of the accused appellants. He adds that the seized phensidyls were not examined by the chemical examiner and thus, it is difficult to believe that the alleged seized goods were actually contraband in nature. Finally, the learned Advocate submits that to prove the charge under section 25B (2) of the Special Powers Act, 1974, it is the prime 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 appellants 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 and sentence under section 25B (2) of the Special Powers Act, 1974 cannot be sustained in law.

Ms. Shahida Khatoon, the learned Deputy Attorney-General, on the other hand, supports the impugned judgment and order of conviction and sentence dated 18.08.2015, which was according to her just, correct and proper.

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-appellants 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 08 (eight) witnesses out of whom PW-1, Md. ABdur Razak, member of the raiding party stated in his deposition that on 27.05.2008 as per secret information police detained Dhaka Metro. Ga-14-2572 Mou Paribahan Bus and on search, recovered total 19 bottles Indian phensidyl from under the seat No. H- 1/2 kept in a bag and thereafter police prepared seizure list in presence of the witnesses. This witness 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, constable Md. Halim, PW-3, constable Kamal Uddin both of them

are members of the raiding party, who gave evidence in support of the prosecution case and made similar statements like PW-1. PW-4, Md. Jahangir Alam, seizure list witness stated in his deposition that police on search, recovered total 19 bottles of phensidyl from under the seat of the accused-appellants being seat Nos. H-1 and H-2. This witness proved the seizure list and his signature thereon as "Ext.-1, 1/1". This witness identified the accused on dock. PW-5, S.I. Md. Raihan Ali, informant of the case stated in his deposition that police as per secret information detained Dhaka Metro. Ga-14-2572 bus of Mou Paribahan and on search, recovered total 19 bottles Indian phensidyl from under the seat of accused appellants being Nos. H- 1 and H-2 and thereafter, police prepared seizure list in presence of the witnesses and obtained their signature. This witness proved the ejahar and his signature thereon as "Ext.-2, 2/1". This witness identified the seized phensidyl and bag as material "Ext.-I". No one cross-examined this witness as the accused persons were absent. PW-6, Emdadul Haque, member of the raiding party, who gave evidence in support of prosecution case. PW-7, Md. Forhad Hossain, supervisor of the bus. This witness was declared hostile by the prosecution. PW-8, Sub Inspector Md. Rayhan Ali, who investigated the case. This

witness stated in his deposition that during investigation he prepared sketch map, index map and proved the same as “Ext. Nos. 3, 3/1” and after completion of investigation submitted charge sheet against the accused-appellants being charge sheet No.75 dated 27.06.2008.

On an analysis of the above quoted evidence, it appears that PW-1-6 stated in their respective evidence that the phensidyl were recovered from under the seat of the accused-appellant from a passenger bus of Mou Paribahan. It further appears, there is nothing on record to suggest that prosecution there has been no chemical examination of the phensedyl in question for the purpose of a chemical examination report. It is thus difficult to believe that alleged seized phensedyl s 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 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 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 phensedyl 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 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,

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 their 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. Ramzan Ali @ Kohinur and another 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, Special Tribunal No.4, Bogura in Special Tribunal Case No. 189 of 2008 arising out of G.R No. 67 of 2008 (Adam) corresponding to Adamdighi Police Station Case No. 14 dated 27.05.2008 against convict-appellants, 1. Md. Ramzan Ali @ Kohinur and 2. Md. Belal Hossain is set-aside and they are acquitted of the charges.

Accused appellants, 1. Md. Ramzan Ali @ Kohinur and 2. Md. Belal Hossain is discharged from their bail bonds.

Send down the lower Court records at once.