

Present
Mr. Justice Sheikh Abdul Awal
Criminal Appeal No. 7443 of 2015

Md. Uzzal Hossain

.....Convict-appellant.

-Versus-

The State.

.....Respondent.

Mr. Md. Emran Khan, 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 13.05.2024 and

Judgment on 16.05.2024

Sheikh Abdul Awal, J:

This criminal appeal at the instance of convict appellant, Md. Uzzal Hossain is directed against the judgment and order of conviction and sentence dated 09.09.2015 passed by the learned Judge, Special Tribunal No.7, Jashore in Special Tribunal Case No. 163 of 2008 arising out of S.G.R No. 8 of 2008 corresponding to Chouhacha Police Station Case No. 27 dated 31.01.2008 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 Taka 2,000/- (two thousand) in default to suffer rigorous imprisonment for 03 (three) months more.

The prosecution case, in short, is that one, Md. Abul Kalam Azad, Sub Inspector, Chowgacha police station, Jashore as informant on 31.01.2008 at about 18:15 hours lodged an Ejahar with Chowgacha Police Station against the accused-appellant stating, inter-alia, that on 31.01.2008 during special duty as per G.D. No. 1140 the informant along with other police forces at 17:05 hours apprehended the accused from Hakimpur Bazar Bust Stand and on search recovered total 44 bottles of Indian phensidyl from 2 cloth bags, which valued at Taka 13,200/- and thereafter, the informant party seized those phensidyl syrups by preparing seizure list in presence of the witnesses.

Upon the aforesaid First Information Report, Chowgacha Police Station Case No. 27 dated 31.01.2008, under section 25-B(1)(B) of the Special Powers Act, 1974 was started.

Police after completion of usual investigation submitted charge sheet No. 47 dated 28.03.2008 under

section 25-B(1) (B) of the Special Powers Act, 1974 against the accused appellant.

Thereafter, in usual course the case record was sent to the court of learned Sessions Judge and Senior Special Tribunal, Jashore, wherein it was registered as Special Tribunal Case No. 163 of 2008. Ultimately, the case was transmitted to Special Tribunal No.7, Jashore for trial before whom the accused-appellant was 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 has examined as many as 05(five) 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 has been falsely implicated in the case.

On conclusion of trial, the learned Judge, Special Tribunal No.7, Jashore by the impugned judgment and order dated 09.09.2015 found the accused appellant guilty under section 25-B(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 Taka 2,000/- (two 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 09.09.2015 the accused-appellant preferred this criminal appeal.

Mr. Md. Emran Khan, the learned Advocate appearing for the convict-appellant in the course of argument takes me through the F.I.R, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence dated 09.09.2015 and then submits that the accused-appellant is innocent, who has been made scapegoat in this case, in-fact no incriminating phensidyl syrups were recovered from the exclusive possession and control of the convict-appellant. He adds that in this case the prosecution examined in all 5 witnesses out of which seizure-list witnesses namely, PW-3 and PW-4 in their respective deposition stated nothing against the convict-appellant. The learned Advocate further submits that the seized phensidyls were not examined by the chemical examiner to prove that seized goods were actually contraband in

nature. He further submits, there is nothing on record to suggest that the appellant kept those phensidyls under his control for the purpose of sale and therefore at any rate the accused-appellant is entitled to get the benefit of doubt but the learned tribunal judge without considering all these vital aspects of the case mechanically passed the impugned judgment and order of conviction under section 25B (2) of the Special Powers Act, 1974 against the appellant and as such, the same is liable to be set-aside.

Ms. Sabina Perven, the learned Assistant Attorney-General for the State after placing the FIR, charge sheet, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence dated 09.09.2015 and then submits that in this case the prosecution has been successfully proved its case beyond reasonable doubt that the contraband Indian phensidyl syrups were recovered under the absolute possession and control of the accused appellant, who kept the same under his possession for the purpose of sale. Next, the learned Assistant Attorney-General referring a decision reported in 18 MLR 491 submits that brand name phensidyl is contraband item which is a prohibited drugs and thus it is not at all necessary to obtain chemical examination for

proving that the seized phensidyl syrups were contraband drugs. Besides in the case during trial no one raised any question that seized phensidyl syrups were not actually contraband drugs and thus, the learned Judge, Special Tribunal No. 7, Jashore justly found that the accused-appellant guilty for the offence 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 Taka 2,000/- (two thousand) in default to suffer rigorous imprisonment for 03(three) months more.

Having heard the learned Advocate and the learned Assistant Attorney General, perused the record including the first information report, charge sheet, deposition of witnesses and other materials on record, the only question that calls for my consideration in this appeal is whether the tribunal judge 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 as per FIR the accused-appellant was apprehended along with total 44 bottles of phensidyl kept in 2 (two) cloth bags and thereafter, police seized those phensidyl syrups by preparing seizure list in presence of the witnesses. Police after completion of investigation having found prima-

facie case and submitted charge sheet against the accused-appellant under section 25B (1)(B) of the Special Powers Act, 1974. It further appears that the prosecution to prove its case examined in all 5 witnesses out of which police witnesses namely, PW-1, PW-2 and PW-5 in their respective evidence stated that the accused-appellant was apprehended with 44 bottles of phensidyl syrup kept inside the cloth bags in presence of the witnesses. It further appears that seizure-list witnesses namely, PW-3 and PW-4 in their respective evidence stated nothing as to recovery of phensidyl from the possession and control of the accused-appellant. PW-5, investigated the case, who stated in his deposition that during investigation he prepared sketch-map, index and examined the witnesses under section 161 of the Code of Criminal Procedure and having found prima-facie case against the accused and thus, submitted charge sheet. This witness proved the sketch-map as "Ext.-3" and his signature thereon as "Ext.-3/1", index as "Ext.-4" and his signature thereon as "Ext.-4/1".

On an analysis of the above quoted evidence of PWs together with F.I.R, charge sheet, it appears that in this case the prosecution could not show any chemical examination report to prove that the seized goods were contraband goods. 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 beyond any reasonable doubts. Before convicting the accused the Court must give finding that the seized phensidyls found in the possession of the accused were contraband items smuggled into Bangladesh for the purpose of sale. In the facts and circumstances of the case, the learned Judge of the Special Tribunal failed to evaluate the evidence on record thereby reaching a wrong decision in finding the accused- appellant guilty of the offence under section 25B(2) of the Special Powers Act which occasioned a miscarriage of justice. 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. Uzzal Hossain beyond reasonable doubts. Furthermore, in this case none of the prosecution witnesses testified any single word as to the fact that the accused-appellant brought those seized phensidyl syrups in Bangladesh from India by way of smuggling and kept the same under his possession and control for the purpose of sale and in that view of the matter it is difficult to hold the appellant guilty of the offence

under section 25B (2) of the Special Powers Act and the creates a doubt in the case of the prosecution about the accused being involved in the alleged crime. It is trite law that if any benefit of doubt arises, then the benefit should be given to accused. In that light, the tribunal Judge ought to have acquitted the accused by giving the benefit of doubt. Therefore, the judgment of the trial Court is to be interfered with. Consequently the appeal succeeds.

In the result, the appeal is allowed and the impugned order of conviction and sentence passed by the learned Judge, Special Tribunal No.7, Jashore in Special Tribunal Case No. 163 of 2008 arising out of S.G.R No. 8 of 2008 corresponding to Chowgacha Police Station Case No. 27 dated 31.01.2008 against accused appellant, Md. Uzzal Hossain is set aside and he is acquitted of the charge levelled against him.

Convict appellant, Md. Uzzal Hossain is discharged from his bail bond.

Send down the lower Court records at once.