

**In The Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

PRESENT:

MR. JUSTICE MD. SHOHROWARDI

Criminal Appeal No. 578 of 1998

Mohmmad Usuf Ali

..... Convict Appellant.

-Versus-

The State

..... Respondent.

Mr. Md. Saifuddin Khokon, Advocate with

Mr. Md. Hossain, Advocate

.....For the appellant.

Mr. S.M. Golam Mostofa, D.A.G with

Mr. A. Mannan, AAG

... for the respondent.

Heard on 03.08.2023, 07.08.2023 and 08.08.2023

Judgment delivered on 10.08.2023

Md. Shohrowardi, J.

This appeal under section 30 of the Special Powers Act, 1974 is directed against the judgment and order dated 09.02.1998 passed by Special Tribunal No. 4, Satkhira in Special Tribunal Case No. 30 of 1997 convicting the appellant under section 25B(1)(B) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for 7 years and fine of Tk. 5000, in default, to suffer rigorous imprisonment for 06 months.

The prosecution case, in short, is that on 30.9.1996 at 23.30 the informant JCO No. 3742 Naib Subedar Muhammad Mizanur Rahman received secret information. He along with the other members of the patrol party went to the house of P.W. 8 Md. A. Karim and found the accused Mohmmad Usuf Ali in the house of the PW. 8 Abdul Karim near sacks full of goods. While the

informant wanted to know about the goods kept in the sacks, the accused replied that Indian medicines were kept in the sacks. After that, the informant seized the medicine, arrested the accused and handed over the medicines to customs godown.

P.W. 5 S.I. Masudul Haque 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 the witnesses under section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation found prima facie truth of the allegation made against the accused in the FIR and thereafter submitted charge sheet against him on 30.11.1996 under section 25B of the Special Powers Act, 1974.

After that the case record was sent to the Special Tribunal, Satkhira and the case was registered as Special Tribunal Case No. 30 of 1997. After that, the case was transferred to the Special Tribunal No. 2, Satkhira for trial. During the trial, the charge was framed against the accused under section 25B(1)(b) of the Special Powers Act, 1974 which was read over and explained to the accused present in court and the accused pleaded not guilty to the charge and claimed to be tried in accordance with law. The prosecution examined 8 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 witness but he stated

that while he went to the house of his father-in-law, he was falsely implicated in the case.

P.W. 1 Naib Subedar Muhammad Mizanur Rahman is the informant. He stated that the occurrence took place on 30.09.1996 at 23:30 hours. At that time, he was posted at Satkhira. On the date of occurrence, the informant along with Habilder A. Salam, Naib Tofayel, Sepoy Idris Ali, Sepoy Anamul Haque and S.I. Shahariar went to village Nagarghata, Tala Thana, based on secret information at 23.30 searching the dwelling house of Abdul Karim found 03 sacks and a person was sitting beside the sacks. On interrogation, he replied that he was the owner of the sacks and that Indian medicines were kept in those sacks. Calling the locals, they found that Indian medicines were kept in those sacks. The accused informed the raiding party that he brought those medicines from India and disclosed his name as Mohmmad Usuf Ali. One of the members of the raiding party prepared the seizure list and the informant signed the seizure list. He proved the seizure list as exhibit-1 and his signature as exhibit -1/1. In the presence of P.W. 1, witnesses (1) Abdul Karim and (2) Abdus Salam put their thumb impression on the seizure list. Subsequently, the recovered medicines were handed over to the local customs godown and handed over the accused to the local police station. He proved the FIR as exhibit-2 and his signature as exhibit-2/1. During cross-examination, he stated that there were local respectable persons at the place of occurrence but he could not name those persons and the raiding party searched only

one dwelling house. He affirmed that the door of the house was opened and he called Abdul Karim at the place of occurrence. He was present near the house and the person who prepared the seizure list was a member of the raiding party but he could not name that person. He denied the suggestion that the writer of the seizure list prepared the same sitting at Head Quarter.

P.W. 2 Habilder A. Salam stated that the occurrence took place on 30.09.1996 at 23.30. At that time, he was posted at Satkhira, Head Quarter. Under the leadership of Mizanur Rahman, he along with others went to the village Nagar Kanda based on secret information. They went to the house of Abdul Karim at 23.30pm. All of them entered into the house and found that Indian medicines was kept in three sacks valued at Tk. 3,47,500. The accused was sitting in the dwelling house and his name is Mohmmad Usuf Ali and the raiding party detained him from the dwelling house in the presence of witnesses. The seizure list was prepared. Subsequently, the medicines were handed over to customs godown. During cross-examination, he affirmed that the secret informers were accompanying the raiding party. He could not say how far the Indian border is situated from the place of occurrence.

P.W. 3 Naib Tofayel Ahmed was tendered by the prosecution and declined by the defence.

P.W. 4 Idris Ahmed was tendered by the prosecution and declined by the defence.

P.W. 5 S.I. Masudul Haque is the investigating officer. He stated that on 01.10.1996 he was posted at Tala Thana. The Officer-in-Charge Sohrab Hossain lodged the FIR and he filled up the FIR form. He proved the FIR form as exhibit-3 and his signature as exhibit-3/1. The Officer-in-Charge appointed him as the investigating officer. During the investigation, he visited the place of occurrence and prepared the sketch map and index. He proved the sketch map and index as exhibits- 4 and 5 respectively. He proved his signatures as exhibits-4/1 and 5/1. He recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898. During cross-examination, he stated that senescing the presence of the BDR personnel while the accused tried to flee away, the BDR personnel detained him. At the time of detaining, the accused disclosed that the goods were kept on the road. Ka, Kha, Ga, and Cha marks in the sketch map are the dwelling houses and Abdul Karim is the owner of those houses. Tariqul is the owner of 'Chha' but he was not cited as a witness in the case. At the place of occurrence, he interrogated the witnesses mentioned in the seizure list. On 02.10.1996 he along with a constable went to the place of occurrence. He denied the suggestion that he did not investigate the case properly.

P.W. 6 Md. Abdus Salam is a neighbour of Abdul Karim and also a witness of the seizure list. He stated that the occurrence took place about 10 months ago at about 11/12 pm. He was called to the house of Abdul Karim and saw a van in front of the house of

Tabarak but he did not see any goods. The BDR personnel took his thumb impression on the paper. At that time, he was declared hostile. During cross-examination, he affirmed that accused Abdul Karim is the brother-in-law of accused Mohmmad Usuf Ali and the house of Mohmmad Usuf Ali is situated at Talagachi. He stated that Mohmmad Usuf Ali was detained for keeping those goods. He came to the house of his father-in-law and he was detained one day after the occurrence. He denied the suggestion that the BDR personnel recovered the goods from the house of Abdul Karim. During cross-examination by the defence, he stated that he did not see any accused and that he knew nothing. He heard that the brother-in-law Abdul Karim was suspected.

P.W. 7 Begum Samsunnahar is the Inspector of Customs Godown, Satkhira. She stated that on 01.10.1996 Naib Subader Miazanur Rahman deposited 17,375 Indian tablets to the customs godown which were mentioned in GR. No. 2073/96. One tablet is produced in the Court which has been proved as material exhibit-I. He proved the copy of the register as exhibit-6 and the remaining tablets were kept in the godown. The recovered medicines are import-prohibited in Bangladesh. During cross-examination, he denied the suggestion that nothing has been written on the medicines that those are made in India.

P.W. 8 Abdul Karim is the owner of the house from where the goods were recovered. He stated that the seizure list was prepared at the place of occurrence and he saw the accused and the

goods. The accused is his brother-in-law. During cross-examination, he stated that the occurrence took place on the road and he saw many people at the place of occurrence and he is the owner of the dwelling house. At the date of occurrence, he along with his wife and children were sleeping. Subsequently, BDR personnel called him. He could not say from where the goods were recovered. The accused Mohammad Usuf Ali was sleeping on the baranda of his elder brother Mozid. While he put his thumb impression on the seizure list, the accused Mohammad Usuf Ali was not present.

The learned Advocate Mr. Md. Hossain appearing along with learned Advocate Md. Saifuddin Khokon on behalf of the appellant submits that the occurrence took place on 30.09.1996 at 23.30 hours and the FIR was lodged on 01.10.1996 at 17.30 after about 18 hours but no explanation was given by the informant as regards the long delay of 18 hours. He further submits that the accused was produced in court by forwarding dated 02.10.1996 which is a clear violation of Article 33(2) of the Constitution and the goods were allegedly recovered from the house of P.W. 8 Abdul Karim but he is not an accused in the case. He also submits that the accused was arrested 1 day after the occurrence and he was not present at the place of recovery of the alleged goods and he was falsely implicated in the case. He finally submits that P.W. 8 is the brother-in-law of the accused Mohammad Usuf Ali and the place of occurrence is the house of P.W.8 and nothing was recovered from

the possession of the accused. The prosecution failed to prove the charge against the accused beyond all reasonable doubt.

The learned Assistant Attorney General Mr. Md. A. Mannan appearing on behalf of the state submits that on the date of occurrence, P.W. 1 along with the members of the BDR personnel raided the house of the Abdul Karim and recovered the import-prohibited Indian medicines from the house of Abdul Karim while the accused was sitting beside the sacks wherein the import prohibited medicines were kept. The prosecution witnesses proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Md. Saifuddin Khokon who appeared on behalf of the accused and the learned Assistant Attorney General Mr. Md. A. Mannan who appeared on behalf of the respondent, perused the evidence, impugned judgment and order passed by the trial court and the records.

On perusal of the records, it appears that the accused Mohammad Usuf Ali was arrested on 30.09.1996 at 23.30 and he was produced in Court by forwarding dated 02.09.1996 in two days from the date of occurrence. P.W. 1 Naib Subedar Muhammad Mizanur Rahman is a BDR personnel and a member of a disciplined force. P.W. 1 along with the members of the raiding party recovered the medicine on 30.09.1996 at 23.30 but he lodged the FIR on

01.10.1996 at 17.30 after 18 hours of the alleged recovery of the Indian medicines. No explanation was given by the informant as regards the said delay.

When any prohibited goods are recovered from the house of any citizen he is bound to explain about the possession of the prohibited goods. P.Ws. 1 and 2 stated that P.W. 8 Abdul Karim is the owner of the dwelling house from where the alleged medicines was recovered but he is not accused in the case. The prosecution cited him as a witness in the case. While P.W. 8 stated that 200/300 yards far from his house the alleged goods were recovered from the road. At the time of examination of accused under section 342 of the Code of Criminal Procedure, 1898, the accused stated that he came to the house of his father-in-law and he was falsely implicated in the case. Furthermore, it is found that many respectable persons were present at the place of occurrence at the time of recovery of the alleged medicines but those respectable persons were not examined in the case. P.Ws. 6 and 7 did not corroborate the recovery of import-prohibited goods from the possession of the accused. P.Ws. 3 and 4 were tendered. P.W. 1 stated that one of the members of the raiding party prepared the seizure list but the prosecution did not examine the said member of the raiding party who prepared the seizure list. P.W. 6 stated that the accused was arrested one day after the occurrence.

Because of the above observation, findings, reasoning and proposition, I am of the view that the prosecution failed to prove the

charge against the accused beyond all reasonable doubt by adducing reliable, disinterested or neutral witnesses.

I find merit in the appeal.

As a result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial court is hereby set aside and the accused is acquitted from the charge framed against him.

Send down the L.C.R. at once.

(MD. SHOHWARDI, J.)