

Present

Mr. Justice Obaidul Hassan
And
Mr. Justice Md. Ashrafal Kamal

Criminal Appeal No. 2707 of 1999

Md. Anowarul Mustakin and another
..... Appellants.

... Versus...

The State

..... Respondent.

No one appears.

..... For the Appellants.

Mr. Biswajit Deb Nath, D.A.G with
Mr. Nizamul Hoque Nizam, A.A.G and
Mr. Shaikat Basu, A.A.G

Heard and Judgment on: 24.04.2011.

Obaidul Hassan, J.

This appeal has been preferred by the appellants against the Judgment and Order of conviction and sentence dated 31st October, 1999 passed by the learned Judge, Special Tribunal No. 4, Rajshahi in Special Tribunal Case No.15/99 convicting the appellants under section 25B (2) of the Special Powers Act, 1974 and sentencing each of them to suffer rigorous imprisonment

for 1 (one) year and 6(six) months with a fine of Tk. 1,000/-, in default to suffer rigorous imprisonment for a further period of 3 (three) months.

The prosecution case, in short, is that the informant and Md. Quamruzaman were on duty in the bus terminal on 13.11.98 from 8:15 a.m. At about 14.00 hours they received a secret information that Indian made phensedyl will be sent to Dhaka by Modern Enterprise Bus. Getting this information the informant went to the bus counter with Md. Rezaul, Belal & some other persons. At about 14.30 hours the accused brought 7 seven molasses balls to the Modern Bus stand by a van and after unloading the molasses balls, the accused persons were trying to leave the place. When the informant asked about the ownership of molasses balls the accused persons claimed the ownership and introduced themselves as businessmen of molasses. On suspicion the informant brought the accused persons with molasses balls to the terminal police box and the molasses balls were broken into pieces before

the local people and 135 bottles of Indian made phensedyl were found inside the balls. Thereafter a seizure list was made by the officer-in-charge, Md. Manirul Islam.

On the basis of the said *ejahar* Boalia Police Station Case No. 13 dated 13.11.98 was started.

After investigation the Investigating Officer submitted charge sheet against the convict appellants.

In order to substantiate the allegation against the appellants the prosecution in all examined as many as 11 witnesses who were cross-examined by the defence.

After completion of taking evidence the convict appellants were examined under section 342 of the Code of Criminal Procedure (the Code). During investigation they again expressed their innocence and refused to examine any witness in their favour.

The defence case as it transpires from the trend of cross-examination is that the accused persons are innocent. They were not the owners of molasses and nothing was recovered from them and they have been

falsely implicated in this case as they did not meet the demand of police.

After completion of trial the learned Judge of the Special Tribunal No. 4, and Additional Sessions Judge, Rajshahi convicted the appellants under section 25 B (2) of the Special Powers Act, 1974 and sentenced each of them to suffer rigorous imprisonment for 1 (one) year and 6(six) months with a fine of Tk. 1,000/-, in default to suffer rigorous imprisonment for a further period of 3 (three) months.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence the appellants preferred the instant appeal.

No one appears for the appellant. Since it is an old appeal of 1999, we are inclined to dispose of the same on merit.

Mr. Shaikat Basu, learned A.A.G appearing on behalf of the State took as to the Judgment delivered by the learned Judge of the Special Tribunal No. 4,

Rajshahi and the evidence adduced by the prosecution witnesses and other materials on record and submits that the prosecution became successful to prove the case beyond reasonable doubt, particularly in respect of time, manner and place of occurrence. He further submits that although the local witnesses did not support the prosecution case but the other witnesses particularly the police personnels corroborated one another in proving the case and as such the appeal is liable to be dismissed.

Now let us see whether the learned Judge passed the impugned judgment on proper appreciation of the evidence adduced by the P.Ws.

Out of 11 prosecution witnesses, P.Ws. 1, 2, 7, 8 and 9 were declared hostile by the prosecution and they were cross-examined by the prosecution as well as the defence.

P.W. 3, is the informant, who apprehended the appellants and prepared seizure list. P.W. 4 is a police personnel, who accompanied P.W. 3 at the time of seizing 135 bottles of phensedyl. P.W. 5 and 6 were the local witnesses. P.W. 5 at the relevant time was a call man of Rajonighodha bus counter whereas P.W. 6 was an owner of 'pan' shop of modern counter at the relevant time. P.Ws. 1, 2, 5, 6, 7 and 8 categorically stated that they did not see anything regarding the incident. They also stated that they did not know anything whether any incident took place at the place of occurrence on 13.11.1998. Only P.W. 3 and 4, who were the police personnels in their deposition stated that on suspicion they challenged the appellants and found Molasses from their possession and after breaking the cube/ balls of molasses they recovered phensedyl.

P.W.3, in his deposition stated that the molasses

and phensedyl were not produced before the Court. He could not say how many bottles of phensedyl were inside of each ball of molasses. He further stated that he did not apprehend the van puller, who carried the balls of molasses. In cross-examination he stated that he did not take any information from which Godown the molasses were brought to the place of occurrence.

P.W. 4, at the relevant time was an accompanied police personnel of P.W. 3. In his deposition he stated that on the date of occurrence in presence of so many persons, 7 cubes/ balls of molasses were taken to the police box. After breaking those balls 135 bottles of Indian phensedyl were recovered. In cross examination he stated that he could not say how many bottles were in one cube/ ball of molasses. He further stated that he did not know the names of the persons came at the place of occurrence.

P.W. 10 Assistant Sub-Inspector of Police in his deposition stated that the bottles of phensedyl were deposited to the office of Deputy Director of Narcotics Control Department, 'A' circle. In cross-examination he stated that he did not receive the seized articles. He further stated that there was no label on the body of any bottle. He further stated that there was no any signature of this witness on the label. In cross-examination he denied the suggestion that the bottles were not recovered in connection with this case rather those were collected by the police to file the case against the appellants.

P.W. 11 the Investigating Officer in his deposition stated that he visited the place of occurrence, prepared sketch map with index of the place of occurrence and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. He identified the bottles of

phensedyl as material Ext.-1 and his signature in it as Ext. 1/3. He also proved the sketch map with index as Ext. 3, 4, and 3/1. In cross-examination this witness stated that the accused Mostakim is a student of Rajshahi University in the Department of Business Administration and he is a good student and a good player. On the other hand the accused Alauddin was a BDR personnel. He further stated that he did not give any mark on the bottles to show that these seized bottles were recovered on the date of occurrence.

We have gone through the judgment, considered the evidence of P.Ws, submissions of the learned A.A.G and other materials on record. From the above evidence it appears to us that only P.W. 3 and 4, the two police personnels supported the prosecution case. In their deposition they stated that in presence of P.Ws. 2, 5 and 6 the bottles were recovered, but P.Ws. 2, 5 and 6 did not support the prosecution case during their

deposition before the Court. P.W. 1 and 2 were declared hostile as they did not support the prosecution case. P.Ws. 4, 8 and 9 were also declared hostile because they did not support the prosecution case.

In such circumstances, we are not hesitant to say that the judgment and order of conviction and sentence was awarded relying the evidence of P.W. 3 and 4 only, who's evidence were not at all corroborated by the local witnesses. We are also not hesitant to say that it is a case of no evidence. The prosecution totally failed to prove the case beyond reasonable doubt against the appellants particularly in respect of time, place and manner of occurrence. Thus the appeal succeeds.

Accordingly, the appeal is allowed.

The judgment and order of conviction and sentence dated 31st October, 1999 passed by the learned

Judge, Special Tribunal No. 4, Rajshahi in Special Tribunal Case No.15/99 convicting the appellants under section 25 B (2) of the Special Powers Act, 1974 and sentencing each of them to suffer rigorous imprisonment for 1 (one) year and 6(six) months with a fine of Tk. 1,000/-, in default to suffer rigorous imprisonment for a further period of 3 (three) months is hereby set-aside.

Let the appellants (1) Md. Anowerul Mustakin and (2) Md. Alauddin be acquitted of the charge levelled against them under section 25 B (2) of the Special Powers Act, 1974 and be set at liberty at once if they are not wanted in connection with any other case.

Since the appellants were enlarged on bail on 23.11.1999 they may be discharged from their respective bail bonds.

Send down the lower Court records with a copy of this judgment immediately.

Md. Ashraful Kamal, J.

I agree.

Bilkis