

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 2208 of 2009

Md. Nasimuzzaman

-Vs-

The State

None appears

..For the appellant

Mr. S.M. Golam Mostofa Tara, DAG with

Mr. A. Monnan, AAG

.....for the respondents

Heard on 22.08.2023 and 08.10.2023

Judgment on 15.10.2023

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the impugned judgment and order dated 31.03.2009 passed by the Special Tribunal No. 03, Manikgonj in Special Tribunal Case No. 28 of 2008 arising out of Shibaloy Police Station Case No. 07 dated 13.05.2008 corresponding G.R No. 75 of 2008 convicting the appellant under section 25B of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for 1 (one) year and to pay a fine of Tk 5,000 (five thousand), in default, to suffer rigorous imprisonment for three months more.

The prosecution case, in short, is that S.I. Md. Moniruzzaman along with A.S.I. Md. Salauddin, Constable No. 373 Md. Idris Ali, Constable No. 340 Md. Ziaur Rahman of DB, Manikgonj along with accused Nasimuzzaman came to Thana and lodged the FIR on 13.05.2008 at 6.15 pm alleging, inter alia, that on 13.05.2008 based on GD No. 75 dated 13.05.2008 at the time of searching 3.25 pm at Arichaghat found that a young boy aged about 25 years was carrying goods keeping those in a school bag and sensing the presence of informant, he tried to flee away in presence of the witnesses. When the informant wanted to know about the goods kept in the bag, he admitted that 13

bottles of Indian Phensedyl were kept in the bag and handed over those phensedyl to the police. He saw that phensedyl made in India was written on the bottles. In the presence of the witnesses, he seized those phensedyl. On interrogation, he disclosed his name as Md. Nasimuzzaman and admitted that he brought those phensedyl from India.

Police took up investigation of the case and during the investigation, the investigating officer visited the place of occurrence, prepared the sketch map and index, and recorded the statements of witnesses under section 161 of the Code of Criminal Procedure, 1898. After completing the investigation, the investigating officer found prima facie truth of the allegation made against the accused under section 25B of the Special Powers Act, 1974 and submitted charge sheet on 14.06.2008 against the accused.

After that, the case record was sent to the Senior Special Tribunal, Manikgonj and the charge was framed on 24.09.2008 under section 25B of the Special Powers Act, 1974 against the accused and the charge framed was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following law. Thereafter, the case record was sent to the Special Tribunal No. 3, Manikgonj for trial. During the trial, the prosecution examined 07 witnesses to prove the charge against the accused. After examination of prosecution witnesses, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and the defence declined to adduce any witness.

P.W. 1 Md. Moniruzzaman is the A.S.I. of Detective Branch, Manikgonj. He stated that on 13.05.2008 at 3:25 pm he was engaged in anti-drug operation at Arichaghat and found that a young man of about 25 years was carrying goods keeping those in a school bag beside the BRTC bus counter of Arichaghat. On interrogation, he admitted that phensedyl was kept in the bag and searching the bag in the presence of the witnesses 13 bottles of phensedyl were recovered from the bag. He disclosed that he brought those phensedyl from India to sell at Dhaka. He took the signatures of the witnesses

in the seizure list. Thereafter, the accused was arrested and handed over to Thana. He proved the FIR as exhibit-1 and his signature as exhibit-1/1. He proved the seizure list as exhibit-2 and his signature as exhibit-2/1. He proved 13 bottles of phensedyl recovered from the bag as material exhibit-I.

P.W. 2 Md. Ratan Mridha is a witness on the seizure list. He stated that on 13.05.2008, 13 bottles of phensedyl were recovered from the bag kept in the hand of the accused at the BRTC counter, Arichaghat. He proved his signature as exhibit-2/2. He affirmed that the alamats were recovered in his presence. During cross-examination, he stated that he is a reporter for the Human Rights Society. He admitted that after detaining the accused, he saw the witnesses and went to the place of occurrence. There were 8/9 people. He denied the suggestion that he is involved with the Narcotics business. He denied the suggestion that he came to the place of occurrence later for which he saw nothing.

P.W. 3 is the A.S.I. Md. Salah Uddin. He stated that at the time of occurrence, he was discharging his duty in the office of Detective Branch, Manikgonj. On 13.05.2008, he was discharging his duty at Arichaghat. The accused Nasimuzzaman was carrying a school bag and searching the said bag at 3:25 pm found 13 bottles of phensedyl and in the presence of witnesses seized those alamats. The recovered goods were produced in court. During cross-examination, he stated that the place of occurrence is situated beside the BRTC counter and none was called at the place of occurrence. Many people were present at the place of occurrence. He denied the suggestion that there was no bag in the possession of the accused. He admitted that the accused was a student of Dhaka College. He also admitted that he could not say whether any quarrel took place between the accused and the staff of the BRTC counter. He denied the suggestion that no phensedyl was recovered from the possession of the accused.

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

P.W. 5 Constable Md. Ziaur Rahman was tendered by the prosecution and declined by the defence.

P.W. 6 Md. Tapon stated that the occurrence took place on 13.05.2008 beside the BRTC bus counter, Arichaghat. There was a school bag in the hand of accused Md. Nasimuzzaman and there were 13 bottles of phensedyl. The constable of DB detained him and prepared the seizure list. He signed the seizure list. He proved his signature as exhibit-2/3. During cross-examination, he stated that his name is Mehedi Kamruzzaman Tapan and Tapan is his nickname. He stated that there was a shop of fruits beside the BRTC bus counter. The accused was not known to him earlier. He denied the suggestion that the seizure list was not prepared in his presence. He also denied the suggestion that phensedyl was not recovered from his possession.

P.W. 7 Md. Moniruzzaman is the investigating officer. He stated that he visited the place of occurrence, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, 1898, and prepared the sketch map and index. He proved the sketch map as exhibit-3 and his signature as exhibit-3/1. During the investigation, he found the prima facie truth of the allegation against the accused and submitted charge sheet. He proved the information slip as exhibit 4. During cross-examination, he stated that he is the informant as well as the investigating officer. He affirmed that none searched the accused.

None appears on behalf of the accused.

The learned Deputy Attorney General Mr. Md. S.M. Golam Mostofa Tara appearing along with the learned Assistant Attorney General Mr. A. Monnan on behalf of the State submits that while P.W. 1 along with P.W. 3 was conducting an anti-smuggling operation at Arichaghat found that the accused was carrying a bag and in presence of witnesses recovered 13 bottles of phensedyl from the said bag. P.W. 2 Md. Ratan Mridha and P.W. 6 Tapan who are witnesses of the seizure list corroborated the evidence of P.Ws. 1 and 3 as regards the recovery of 13 bottles of phensedyl from the possession of the

accused. The prosecution 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 Deputy Attorney General, perused the evidence, impugned judgment and order passed by the trial court and the records.

On perusal of the FIR, it reveals that the informant along with the police personnel and the accused came to Thana but no statement was made in the FIR who was present at the time of conducting the anti-smuggling operation. P.W. 1 stated that 13 bottles of phensedyl were recovered from the bag carried by the accused Md. Nasimuzzaman and he produced 13 bottles of phensedyl which were exhibited as material exhibit-I. The informant was examined as P.W. 1 and as investigating officer, he was examined as P.W. 7. No statement was made by P.Ws. 1 and 7 that he sent the alleged phensedyl for the report of the chemical examiner to ascertain ingredient of narcotics in the recovered bottles.

Furthermore, P.W. 1 proved 13 bottles of phensedyl as material exhibit-1 which proved that the alleged phensedyl was not sent to the chemical examiner for report of the chemical examiner under section 50 of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০. During cross-examination, P.W. 2 affirmed that after detaining the accused, he saw that the people assembled at the place of occurrence and 8/9 persons were present there which indicates that he went to the place of occurrence after recovery of the alleged phensedyl. There is a contradiction in the evidence of P.W. 1 as regards the time of his presence at the place of occurrence. P.W. 6 stated that the occurrence took place on 13.05.2008 but he did not say anything as regards the time of occurrence. He stated that the constable of the Detective Branch arrested the accused and he signed the seizure list. He did not say that he was present at the time of recovery of the phensedyl. P.W. 7 is the investigating officer. During cross-examination, he stated that nobody searched the body of the accused and the accused brought phensedyl from the bag. During cross-examination, P.W. 3

affirmed that the accused Md. Nasimuzzaman is a student of Dhaka College. It is admitted facts that nobody searched the body of the accused. Surprisingly, a student of Dhaka College brought out the phensedyl from the bag kept in his custody to hand over to the police. Furthermore, P.Ws. 4 and 5 were tendered by the prosecution.

In the absence of any report from the laboratory established under section 51(1) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০, it cannot be held that the codeine phosphate or any ingredient of narcotics was found in the bottles allegedly recovered from the possession of the accused. The alleged phensedyl was recovered from the place situated beside the BRTC bus counter at Arichaghat. Neither the staff of the bus counter nor any passenger of the bus or locals present at the place of occurrence was examined by the prosecution.

In view of the above facts and circumstances of the case, evidence, discussion made hereinabove and the proposition, I am of the view that the prosecution failed to prove the charge against the accused Md. Nasimuzzaman to the hilt beyond all reasonable doubt by adducing legal evidence.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial court is hereby set aside.

Send down the lower Court's record at once.

