

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7120 of 2011

Md. Alamgir

-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 12.10.2023, 16.10.2023

Judgment on 19.10.2023

This appeal under Section 30 of the Special Powers Act, 1974 is directed challenging the legality and propriety of the impugned judgment and order of conviction and sentence dated 15.11.2011 passed by the Special Tribunal No. 06, Noakhali in Special Tribunal Case No. 02 of 2009 arising out of Begumgonj Police Station Case No. 02 dated 04.03.2008 corresponding G.R No. 247 of 2008 convicting the appellant under section 25B(2) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for 4 (four) years and to pay a fine of Tk 5,000 (five thousand), in default, to suffer simple imprisonment for 06(six) months.

The prosecution case, in short, is that S.I. Md. Farid Uddin Khandaker, Begumgonj Thana, Noakhali and the police force got secret information that accused Md. Alamgir who is an accused of a warrant of arrest was staying in his house. After that, on 04.03.2008 at 03.00 am the members of the raiding party raided the house of the accused Md. Alamgir situated at village- Pourohajipur. At that time, accused Md. Kamal and Masuda Khatun fled away to the north side of the house through the

window. At the time of arresting the accused Mominullah and Md. Alamgir search was conducted in different places. On 04.03.2008 at 3:30 am the members of the raiding party found a white plastic bag under the cot of their north bhiti hut of the accused persons and in the presence of the witnesses (1) Delwar Hossain and (2) Sumon recovered 17 bottles of phensedyl. At that time, the accused persons disclosed that they brought those phensedyl into Bangladesh through the Cumilla, Sonagazi border from India to sell in Bangladesh.

P.W. 5 Sub-Inspector Md. Mamunur Rashid took up the investigation of the case. During the investigation, he visited the place of occurrence, prepared the sketch map and index, seized the alamats from the informant and recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure, 1898. After completing the investigation found prima facie truth of the allegation against the accused persons and submitted charge sheet against four accused persons, namely, 1. Md. Alamgir 2. Mominullah 3. Masuda Khatun and 4. Md. Kamal. After that, the case record was sent to the Special Tribunal, Noakhali and cognizance was taken against the accused persons under section 25B(1)(B) of the Special Powers Act, 1974. Subsequently, the case was transferred to the Special Tribunal No. 6, Noakhali for trial.

During the trial, the charge was framed under section 25B(2) of the Special Powers Act, 1974 against accused persons which was read over and explained to them and they pleaded not guilty to the charge and claimed to be tried following law. The prosecution examined 05 witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses, the accused persons were examined under section 342 of the Code of Criminal Procedure, 1898 and they declined to adduce any DW.

P.W. 1 Moniruzzaman Mridha stated that on 03.03.2008, he was discharging his duty at Chowmuhani Police Fari of Begumgonj Thana and on that day at 3:00 am he along with 4 constables were on night duty. Sub-

Inspector Khandaker Farid Uddin went to the house of the accused Md. Alamgir situated at Pourahajipur. He was accused of a warrant of arrest. The police personnel knocked on the door of the accused. At that time, sensing the presence of the police personnel and the locals, the accused persons opened the door and the members of the raiding party searched the house and found the accused Md. Alamgir in a room situated to the north side and found 17 bottles of phensedyl kept in a plastic bag under the cot. Sub-Inspector Farid Uddin seized those Phensedyl and prepared the seizure list. The father of the accused was present there along with the accused Md. Alamgir. P.W. 1 proved the seizure list as exhibit-1 and his signature as exhibit-1/1. During cross-examination, he stated that he went to the place of occurrence at 3:00 am. He could not say who opened the door. There were four rooms in the house, but he could not say how many doors were there. Before opening the doors, 10/15 persons assembled there but he could not remember the name of those persons. He affirmed that 3/4 other persons signed the seizure list. He denied the suggestion that 17 bottles of phensedyl were not recovered from under the cot.

P.W. 2 Constable Md. Ful Miah was tendered by the prosecution and declined by the defence.

P.W.3 Constable Md. Abdul Mannan was tendered by the prosecution and declined by the defence.

P.W. 4 Md. Farid Uddin Khandaker is the informant. He stated that on 03.03.2008 he was posted at Begumgonj Thana. On that day, he along with the police force was on night duty. He received secret information that accused Md. Alamgir who is an accused of a warrant of arrest is staying at his house. The informant along with his force and another force of police on duty at Chowmuhani Bazar at 3:00 am raided the house of the accused Md. Alamgir situated at Uttar Pourahajipur and detained accused Md. Alamgir and accused Mominullah. The members of the raiding party also found a plastic bag under the cot of the north bhiti hut and in the presence of the

witnesses recovered 17 bottles of phensedyl. He seized those phensedyl and prepared the seizure list. At the time of the search, the accused Md. Kamal and Most. Masuda Khatun fled away through the window of their bhiti hut. Subsequently, he along with the seized goods and accused persons lodged the FIR. P.W. 4 proved the FIR as exhibit-2 and his signature as exhibit-2/1. He proved the seizure list as exhibit-1 and his signature as exhibit-1/2. He proved the alamat as material exhibit-I. He stated that the Hindi language was written on the bottles and in English made in India was written. During cross-examination, he stated that total 08 police personnel raided the west-facing bhiti hut of the accused. He could not say how many rooms were there in the bhiti hut. He and other members of the police force entered the house and other police personnel were standing outside the bhiti hut. The phensedyl was recovered from the north bhiti hut. He found accused Mominullah and Aminullah in the bhiti hut and 02 others fled away through the window. The accused Md. Alamgir was accused of a warrant of arrest. The place of occurrence was known as the house of Tarik Member. The witnesses mentioned in the seizure list are the neighbours. He prepared the seizure list sitting in the bhiti hut. There was a level in some bottles and there was no level in other bottles. He denied the suggestion that no phensedyl was recovered from the possession of the accused and that accused Mominullah came to the house of his son.

P.W. 5 S.I. Mamunur Rashid is the investigating officer. He stated that during the investigation, he visited the place of occurrence, prepared the sketch map and index, and recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898. After completing the investigation, he found the truth of the allegation against the accused persons and submitted charge sheet. He proved the sketch map and index as exhibit-3 and his signature as exhibit-3/1. During cross-examination, he stated that he did not examine Constable No. 216 Ishak Miah, Constable No. 483 Md. Khorshed Alam and Constable No. 161 Rafiqul Islam who were the members of the raiding party. He did not cite Abdur Rashid and

anyone of the adjacent people as witness. He denied the suggestion that no alamat was recovered from the house of the accused or he did not go to the place of occurrence.

None appears on behalf of the appellant.

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 accused Md. Alamgir is the accused of warrant of arrest and P.W. 4 along with police personnel raided his house and arrested him and at the time of searching the house of the accused, P.W. 4 recovered 17 bottles of phensedyl from the bhiti hut of accused Md. Alamgir. He also submits that the evidence of P.W. 4 Md. Farid Uddin is corroborated by P.W. 1 and 5. 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, the impugned judgment and order of conviction and sentence passed by the trial court and the records.

On perusal of the records, it appears that the FIR was lodged against the accused Md. Alamgir, his father Mominullah, his mother Mahmuda Khatun and brother Mominul and the charge sheet was submitted against them. P.W. 1 Habilder Moniruzzaman Mridha stated that at the time of searching the house, they found accused Md. Alamgir in the north bhiti hut and recovered 17 bottles of phensedyl from a plastic bag kept under the cot. At that time, the father of the accused was also present along with the accused Md. Alamgir. During cross-examination, P.W. 1 stated that before opening the door, 10/15 persons assembled at the place of occurrence. P.W. 4 stated that searching the house of the accused Md. Alamgir, he (P.W.4) arrested him and accused Mominullah and recovered 17 bottles of phensedyl kept in a plastic bag under the cot of the north bhiti hut. During cross-examination, P.W. 4 affirmed that the occurrence took place in the

west-facing bhiti hut and the phensedyl was recovered from the north room. He affirmed that he found Mominullah and Amiullah in the house and other 02 persons fled away through the north window and the place of occurrence is known as the house of Tarik member. The investigating officer P.W. 5 Mamunur Rashid Patwary affirmed that none of the adjacent people was cited as a witness in the case. P.W. 1 affirmed that the father of the accused was also present at the time of recovery of 17 bottles of phensedyl from the north room. During cross-examination, P.W. 4 stated that he also found Mominullah and Aminullah in the room and 02 other persons fled away, but the trial court acquitted the accused Mominullah and Aminullah who were present at the place of occurrence, although, both of them were present at the time of alleged recovery of 17 bottles of phensedyl.

On perusal of the seizure list (exhibit-1), it reveals that Md. Delwar Hossain and Sumon are the inhabitants of north Pourahajipur and Constable Moniruzzaman Mridha and constable Ful Miah are the witnesses of the seizure list. P.W. 2 Constable Md. Ful Miah and P.W. 3 Constable Md. Abdul Mannan was tendered. The prosecution did not examine Md. Delwar Hossain, Sumon and Moniruzzaman Mridha who are witnesses on the seizure list.

On perusal of the evidence of P.Ws. 1, 4 and 5, it reveals that the alleged phensedyl was not sent to the chemical examiner. A report under section 50 of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ is indispensable to prove the recovery of narcotics against the accused. In the absence of any report from chemical examiner under section 50 of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০, it cannot be held that the narcotics was found in the recovered bottles as defined in section 2(1) of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০.

In the case of the State vs. Miss Eliadah McCord, reported in 16 BLD (AD) 239 it has been held that;

“In the instant case, when it has been proved that the seized packets contained heroin then whole of the contents must be treated as heroin for punishment. It is not necessary for the prosecution to prove the "actual and real heroin content" for the purpose of a conviction under 1(b) of the Serial.”

In the case of The State vs. Badal Kumar Paul, reported in 17 SCOB (2023)(AD) 43 our Apex Court has held that:

“Phensedyl is a liquid substance with which a solid substance i.e. codeine phosphate is found mixed. In this circumstance, we are of the view that when any kind of narcotic is found mixed with other substances whether it is liquid or solid, for the purpose of imposing punishment the 'total amount of substances' with which the narcotic has been mixed requires to be considered as narcotic substances and the accused will be punished accordingly. In this situation, if the substance with which the narcotic has been found mixed is liquid, the total amount of narcotic substance needs to be counted based on volume or mass.”

In the instant case, the phensedyl allegedly recovered from the house of the accused Md. Alamgir was not sent for the report of the chemical examiner. It is only the chemical examiner who is competent to ascertain that any ingredient of narcotics was found in the bottles recovered from the alleged possession of the accused. Therefore, in the absence of any report under section 50 of the মাদক দ্রব্য নিয়ন্ত্রণ আইন, ১৯৯০ it cannot be held that the

phensedyl or any ingredient of narcotics was recovered from possession of the accused.

Because of the above evidence, facts and circumstances of the case and the proposition, I am of the view that the prosecution failed to prove the charge against the accused Md. Alamgir beyond all reasonable doubt.

I find merit in the appeal.

Accordingly, the appeal is allowed.

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

Send down the lower Court's records at once.