



Star LAW report



LAW week



Absence of legal regime contributes to drug abuse

High Court Division (Criminal Appellate Jurisdiction)
The Supreme Court of Bangladesh
Badal Kumar Paul (Appellant)
Vs
State (Respondent)
Before Mr. Justice Md Abdur Rashid and
Mr. Justice Siddiqur Rahman.
Date of judgement: March 12th, 2003.

Background

Md Abdur Rashid J: This appeal was presented by the sole appellant Badal Kumar Paul under section 410 of the Code of Criminal Procedure against judgement and order dated 13-11-2000 passed by the Sessions Judge at Jessore in session case No. 39 of 1999. The judgement convicted him under section 19(1) Table 3 (kha) of the Narcotics Control Act, 1990, and sentenced him to imprisonment for life.

The prosecution case, in short, is that on 5-11-97 at about 9-10 AM the police found 250 bottles of phensidyl, each contained 100 ml and 72 pieces of Indian woolen mufflers worth of Taka 32,200 in the possession of the appellant in front of Mallick Bari at village Tahapur under Chougacha Police Station, Jessore. The police seized the phensidyl and mufflers in presence of witnesses and arrested the appellant and lodged a FIR under aforesaid section of the Act.

In the trial, the appellant along with co-accused Nowsher Ali were charged under sections 19(1) Table 3(kha), 19(4) and 25 of the aforesaid Act to which both of them pleaded not guilty and claimed for trial.

The prosecution examined eight witnesses while the defence none. Their common defence was of innocence and that no phensidyl was recovered from their possession.

PW 1 Inspector Sheik Abdur Razaque testified that on 5-11-97 he was posted in the Directorate of Narcotics Control at Circle Benapole. At a tip-off, he along with ASI Abdul Hannan, Habibur, Harun-or-Rashid, Mohiuddin and Abdur Rahim reached in front of Mallick Bari at village Tahapur under Chougacha Police Station and waited in an ambush. At about 8-50/8-55 A.M they found two persons were coming towards them along the road carrying jute bag over the head of one. When they reached in front of Mallick Bari, they came out from both sides of the road and asked them what was inside the bag. At about 9-00-10-00 AM, by opening the bag they found 250 bottles of phensidyl in five paper cartons and 72 pieces of woolen mufflers. They seized the articles in presence of witnesses and sent one bottle of phensidyl for chemical analysis.

They arrested the appellant Badal Kumar Paul but co-accused Nowsher Ali managed to flee away. Then, he lodged a first information report under aforesaid provisions of law.

PW 2 ASI Abdul Hannan, PW 3 constable Mohiuddin and PW 7 constable Harun-or-Rashid corroborated PW 1 Sheik Abdur Razaque.

PW 4 was a resident of the house near Mallick Bari. He testified that on 5-11-1997 at about 9-00/9-30 AM he saw people gathered on the road. He went there. They asked him to sign a paper. He saw the seized articles inside the car but he did not know what were the articles. He also identified his signature on the seizure list. He did not see the accused not did he see the arrest of Badal Kumar with the articles.

He denied that he witnessed the arrest of the accused with the goods and now, was deposing falsely under the influence of the accused.

PW 5 Raju Ahmed testified that on 5-11-97 he found many people gathered near Mallick Bari. One official asked him to sign on a seizure list but he declined. Then, his signature was taken forcibly. He however identified his signature on the seizure list. At this stage, he was declared hostile and cross-examined by the prosecution.

In such cross-examination he denied that having witnessed seizure of 72 pieces of mufflers and 250 bottles of phensidyl he signed the seizure list. He denied that he witnessed the arrest of the accused with the goods and now, was deposing falsely under the influence of the accused.

He stated that it was not true that being neighbour and old acquaintance of the accused he was concealing the truth.

PW 6 Abdul Awal, a chemical examiner, was posted in the CID, Dhaka. He stated that on 12-11-97 a sealed parcel was received in the office of the Narcotics Control Directorate at Jessore from constable Harun-or-Rashid.

close scrutiny, we could not find any reason to take any view different from that of the Adalat that the prosecution successfully proved the seizure of 250 bottles of phensidyl and 72 pieces of woolen muffler from the possession of the appellant.

However, no charge was made against the appellant for possession of 72 pieces of woolen mufflers nor do we find any charge of smuggling was levelled. Both the accused were charged only under item No 3 (Kha) of the Table following Section 19(1) of the Narcotics Control Act, 1990 for unauthorised possession of phensidyl. The main issue now facing us is whether the carrying of the phensidyl is an offence under the Act. More precisely, whether phensidyl is contraband within the mischief of the Act.

The Act was promulgated with the object to control narcotics and to provide for treatment and rehabilitation of narcotic (drug) addicts. It is intended to regulate and control manufacture, marketing, trade, use, etc of the narcotics as described in schedule-1 to the Act. Section 2 (Tha) of the Narcotics Act declares the substance or articles described in the first schedule to the act as narcotics. Schedule-1 comprises of three categories of narcotics. In Serial 3 of (Ka) class of narcotics, we find mention of opium derivatives, namely, Morphine, Codeine, Thebaine, Nascapaine, Narcotine, Papavarine, etc and their alkali.

Sub-section (1) of section 9 prohibits cultivation, production, processing, carrying, transportation, import, export, supply, purchase, sale, possession, preservation, storing, exhibition or use of all narcotics except alcohol. Sub-section (2) prohibits cultivation, production, processing, carrying, transportation, import, export, supply, purchase, sale, preservation, conservation, storing, exhibition and use of any substance or plant that may be used in the manufacture or production of any narcotics.

Sub-section (3) provides, however, notwithstanding anything contained in sub-sections (1) and (2), any narcotic, substance or plant mentioned in said sub-sections that is necessary for manufacture of medicine permitted under any law or for scientific research under the Act can be

(Ka) Produced, processed, imported, exported, purchased, sold, conserved, stored and exhibited under licence;

(Kha) used under permit

(Ga) carried or transported under permit

Under sub-section 3 of section 9 of the Act, it appears that use of the schedule narcotics was never intended to be outright banned. Under licence or permit any of them could be used for manufacture of medicine or scientific research. Even under clause (Kha) individual use or consumption of such narcotics appears to be allowed but under permit.

The Act appears to be harsh and the sentence prescribed thereunder is very severe. Promulgation of the law is no doubt felt and intended for public health and for the good of the people. In interpretation of such law, the court is always required to be very conscious of the purpose of the law. It must first have a clear understanding of the schedule narcotics under the Act, which are prohibited for use, purchase, sale, import, export, transportation, carrying etc without licence or permit.

At the outset, we must record that we find no mention of phensidyl either in schedule-I or in the table following section 19 of the Act. Possession or carrying of such phensidyl therefore cannot be said to be a punishable offence under the Act.

A bottle containing 100 ml of phensidyl was sent for chemical analysis and report. PW 6 Abdul Awal, a chemical examiner, deposed that on examination, he found presence of Chlorpheniramine maleate and codeine phosphate in the liquid of the bottle. He, however, did not mention the amount or proportion of any of such substances in 100 ml of the bottle.

Mr Awal submitted that when codeine was prohibited as a narcotic, phensidyl containing any derivative from such codeine must also be held to be a schedule narcotic. Possession or carrying of phensidyl is therefore a punishable offence under serial No. 3 (ka) or (kha) of the table.

In order to understand what is codeine phosphate, we must understand first what is codeine. Codeine phosphate is no doubt a derivative from codeine. Codeine is always available in the nature as alkaloid of opium. Such alkaloid is nothing but a poison just like venom of a snake. A derivative from any such substance namely, codeine, is extracted by chemical process either by synthesis or methylation.

Opium and morphine are extracted from a plant popularly known as poppy. By methylation or chemical process opium and morphine are extracted from one type of poppy. Both opium and morphine are found as compound. In opium, presence of codeine is from 0.8 to 2.5% and in morphine 10 to 15%. Codeine is obtained from morphine through methylation. It may also be obtainable from opium.

Codeine phosphate is commonly used as a derivative of codeine. A derivative is also a compound obtained by methylation or synthesis. Properties and/or use of derivative of a substance or chemical would be different. Say, sodium chloride, in chemistry, is written as NaCl, is used in our daily life as common salt. Sodium and Chlorine in particular proportion make sodium chloride, which is definitely different from sodium and chlorine. Neither sodium nor chlorine will individually meet the needs of our common salt.

Similarly, codeine phosphate is a derivative of codeine. In both United States Pharmacopoeia and British Pharmacopoeia, we find use of codeine phosphate as medicine in form of tablets, capsules, elixir, injection, or syrup; (Cf United States Pharmacopoeia, page 416 and 417, Asian Edition, 1995 and British Pharmacopoeia, 1980, Vol 1 page 122 and 123). An addendum, 1986 of British Pharmacopoeia, 1980 use of codeine phosphate as codeine linctus. It is described as small colourless crystals or a white, crystalline powder odourless.

Further, we find that under section (iii) of the drug policy declared in 1982, the use of codeine in any combination was sought to be not allowed as it causes addiction. But the Drugs (Control) Ordinance, 1982 promulgated on 11 June 1982 has not included any such prohibition in the use of codeine phosphate. We find use of codeine phosphate in our country as cough suppressant in indication of dry or painful cough; diarrheas; pain. We also find use of Chlorpheniramine maleate as sedative antihistamines (Cf Bangladesh National Formulary (BNF), 2001, pages 127 and 129 respectively published by the Directorate of Drug Administration in association with the Bangladesh Medical Association and the Bangladesh Pharmaceutical Society). In these drugs, codeine phosphate is used in prescribed quantity. Say, Codeine Linctus contains in 5 ml 15 mg of codeine phosphate. Its main use as analgesic; hypnotic; sedative in medicine. It need not be mentioned that any such drug may be misused by overuse by exceeding the prescribed limit.

During our research, we found that heroin is also obtained from morphine and acetyl chloride. Its chemical name is Diacetylmorphine. Its properties are white, odourless, bitter crystals or crystalline powder; poisonous; habit forming drug; soluble in alcohol. It is derived from morphine by acetylation. It was earlier used in medicine, mainly, as narcotic, analgesic. Because of its addiction liability, the importation or manufacture of Diacetylmorphine and its salt is now forbidden in the USA; (Cf Merck Index, an Encyclopedia of Chemicals and Drugs, Eight Edition, 1968 page 337 and the Condensed Chemical Dictionary, fifth edition, page 352). Import, export, transportation, carrying, use of heroin in Bangladesh is also prohibited.

We find in (Ka) class of narcotics under schedule-I of the Act amongst



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others,

i. Opium poppy or any sticky substance extracted from it;

ii. Refined, unrefined, manufactured opium or any substance made with opium.

iii. Opium derivatives, viz Morphine, Codeine, Thebaine, Noscappaine, Papavarine, etc. and their alkalis.

iv. Any substance containing more than 0.02% of morphine.

In view of the above categorisation, a decision as to whether any substance is a schedule narcotic under the Act cannot therefore be said to be divorced from a consideration of its purity or potency. When a drug is very costly propensity for contamination cannot also be excluded. In prescribing punishment, we think, the weight of such narcotic weighed heavily with the legislature. As Court of record, the responsibility on us is no less little.

Be that as it may, the case in hand is different, not covered by the above decision. In view of item No. 4 of class (ka) schedule-I of the Act, absence of any finding of the percentage or quantity of codeine phosphate in 100 ml of phensidyl has made the submission on behalf of the State altogether devoid of any substance.

Decision

As stated above, codeine as a derivative of opium is included as a narcotic within class (ka) of schedule-I and violation of any provision of sub-section (1) or (2) of section 9 of Act in respect of opium, cannabis resin or narcotics derived from opium is made punishable under serial 3 (ka) or (kha) of the Table following section 19 of the Act. Notwithstanding the prohibition, sub-section 3 of section 9 of the Act has allowed use of any such substance, namely, codeine phosphate, in medicine. Codeine phosphate is no doubt a derivative of codeine, which in turn comes from opium. In the absence of any law declaring phensidyl contraband, presence of Chlorpheniramine maleate and/or codeine phosphate in phensidyl will not make it contraband as a schedule narcotic. We have already seen both the substances are being used in medicine as analgesic, antihistamine, cough suppressant etc. even in our country. Therefore, carrying or possession of the phensidyl seized is not a punishable offence under serial 3 (ha) or (kha) of the Table following section 19 (1) of the Act.

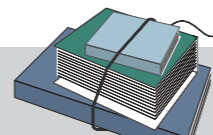
Before parting, we must record that the axiom that the ignorance of law is no defence requires the law, particularly such harsh law claiming life, should be simple and flawless for easy understanding of the people on the street. If the Government thinks that use or consumption of phensidyl is hazardous or harmful to public health, it should come out with proper legislation. Without the backing of a law, it has got no right to prosecute and harass a citizen.

In such view of the matter, we do not find any basis for conviction and sentence of the appellant for possession or carrying of 250 bottles of phensidyl.

In the result, the appeal is allowed. Order of conviction and sentence is hereby set aside and the appellants are acquitted of all charges levelled against him.

M Shamsul Hoque, Advocate for the Appellant. Sk A Awal, Deputy Attorney-General with Saifuddin Md Amirur Rahim, Assistant Attorney-General for the state.

LAW lexicon



Literal construction

A form of construction which does not allow evidence extrapolated beyond the actual words of a phrase or document but, rather, takes a phrase or document at face value, giving effect only to the actual words used. Also known as "strict" or "strict and literal" construction. Contrasts with liberal construction (which allows for the input from other factors such as the purpose of the document being interpreted).

Livery

Delivery. An archaic legal word from the feudal system referring to the actual legal transmission of possession of an object to another. For example, a knight would obtain an estate in land as tenure in exchange for serving in the king's army for 40 days a year. The king would give exclusive possession of the land, (i.e. "livery") to the knight. A writ of livery also developed which allowed persons to sue for possession of land under the feudal system. Livery (or "delivery") of the land was important in completing legal possession or, as it was known in the feudal system, seisin.

Locus

Latin for "the place." For example, lawyers talk of the "locus delicti" as the place where a criminal offense was committed or "loco parentis" to refer to a person who stands in the place of a parent such as a step-parent in a common law relationship.

Long arm statutes

Each court is bound to a territorial jurisdiction and does not normally have jurisdiction over persons that reside outside of that jurisdiction. For example, a court in Scotland would not normally have jurisdiction over a resident of Ireland. Long-arm statutes are a tool which gives a court jurisdiction over a person even though the person no longer resides in the territory limits of the court. For example, UIFSA allows a court to have jurisdiction over a non-resident support payer.

Govt. asked to comply with HC ruling

The Appellate Division of the Supreme Court has directed the government to comply with the High Court Division directive that bars detention of anyone arrested on suspicion. The Appellate Division gave this direction while the government had sought permission to appeal against the High Court verdict of 11 May 2003. The verdict directed the government to amend CrPC's sections 54 dealing with arrest on suspicion and 167 dealing with remand within six months as it observed that these sections were inconsistent with fundamental rights. The government attorney argued that the process of remand as embedded in the sections concerned are not inconsistent with the fundamental rights and so there is no need to amend the laws as there are provision to check misuse of the sections. He also argued that according to the Constitution, the High Court Division cannot not direct the government to amend or introduce any law. However, the court allowed the government to appeal against the verdict though it did not allow government's appeal seeking stay of the directives. - *Janakantha, 3 August.*

DCC commissioner sentenced

The Speedy Trial Tribunal-3, Dhaka Division sentenced Dhaka City Corporation (DCC) commissioner of ward 57, Khwaja Habubullah alias Habib and two others, to 27 years rigorous imprisonment as the three were found guilty of illegally possessing firearms and ammunition. It was alleged that during the 'Operation Clean Heart' on 30th November 2002, the joint forces arrested them from Irti Maath at New Palton of Labagh area and recovered four pistols, one revolver and 156 rounds of ammunition from their possession and filed the arms case with the Labagh Police station. - *Bhorer Kagoj, 3 August.*

Rule issued over Bogra ammo haul

The High Court Division has issued rule upon the government to show cause why it should not be directed to convene an inquiry on arms haul in Bogra last month. The rule came following a writ where it is submitted that about one lakh rifle bullets and 200 kg explosives were recovered from different places in Kahlal and Dupachia of Bogra; the matter involves not only a cognizable offence but also the question of security of the country as well as accountability and transparency of the govt. agencies. But the government has kept the people in dark on such a matter of vital importance which people have right to know. - *Bangladesh Observer, 3 August.*

Formation of Gram Sarkar commenced

Despite a rule nisi issued by the High Court challenging legality of the Gram Sarkar Act, the formation of gram sarkar has started. The President assented to the Act on 27 February after its passage in the Jatiya Sansad. However, this is not the first introduction of such type. The gram Sarkar Act was passed in the light of abolished Swanirvar Gram Sarkar Provision of 1980, the Gram Parishad Act of 1997 and the recommendation of a Local Government Commission formed on 1992. However, on 6 July a writ petition was filed challenging the legality of the Gram Sarkar Act, 2003 upon which the High Court Division asked the govt to explain why the Act should not be declared illegal and beyond the Constitution. The Government's contention is that the court has only issued rule asking explanation, it has not stayed the installation of the Gram Sarkar, and, therefore, there prevails no legal bar to its implementation. - *Law Desk, 3 August.*

Chargesheet in Frigate purchase Case

After a yearlong investigation, the Bureau of Anti-Corruption (BAC) has submitted the chargesheet in the Frigate purchase case. The chargesheet included former Prime Minister Sheikh Hasina, former chief of staff of Bangladesh Navy Rear Admiral (ret'd) Nurul Hossain, former chief of staff (operation) of Bangladesh Navy Commodore (ret'd) AKM Azad, Former director (Naval Plan) Commodore (ret'd) Haroon-or-Rashid, Chairman of the Trans World Engineering and trading Company Limited Abdul Awal Mintu and Commodore (ret'd) M Shahabuddin. The case was filed with the Teigaon Police station on August 7 last year accusing the six for misappropriation of public money and misuse of power in purchasing the DW 2000H Frigate. It was alleged that the purchase made the public exchequer count Tk 511.17 crore in losses. The chargesheet was submitted to the court under Section 409/418/109 of the Penal Code and section 5(2) of the Anti-Corruption Act of 1974. - *Prothom Alo, 4 August.*

Govt. asked to place IR on launch disasters

A High Court Division bench has directed the government to submit inquiry reports (IR) and recommendations made by the committees constituted following the launch disasters. It also warned that it would not extend time in this regard. The court said that none of the inquiry reports were made public, but the people have the right to know the findings of the inquiry and recommendation to prevent the disasters. The government's lawyer after giving details of measures taken by the government for safety and security of launch passengers submitted that in view of government measures no direction was necessary. But the court pressed that there should be transparency in the government machinery and directed for submission of inquiry reports. - *News Today, 4 August.*

Corruption case against RAJUK officials

The Bureau of Anti-Corruption filed 12 cases with Kotoali thana against 10 government officials on charge of siphoning off about Tk 5.58 crore from Uttara town extension Project under RAJUK. These officials by abusing their powers, fraudulently and giving false and wrong information had granted the false landowners taka 6,30,91,512.72 instead of taka 73,08,845.90. The cases were filed against them for providing opportunity to misappropriate which is punishable under Penal Code. - *Daily Arthaneeli, 5 August.*

1795 cases in 18 months by BAC

From January 2002 to June 2003, Bureau of Anti-Corruption (BAC) has filed 1765 cases of which 1042 cases has been chargesheeted, 938 crore has been disposed of through trial in the courts, 438 accused have been punished and 500 accused have been acquitted. The numbers of allegation disposed of are 6226 and the allegations enlisted are 4499 while 17092 allegation are under investigation. - *Inqilab, 5 August.*

Advocacy for amendment of labour law

Speakers at a workshop stressed the need for amendment to the labour laws to introduce updated and practical labour laws. The four-day workshop titled 'Workplace Development Plan' was held at Chittagong regional office of Bangladesh Garments Manufacturers and Export Association (BGMEA) under a BGMEA-ILCO-GOB partnership Project. At the certificate giving ceremony on the concluding day, the speakers also called for proper implementation of compliance in the garments sector through work place development plans. ILO Chief Technical advisor Senji Lee was the chief guest at the seminar. - *The Daily Star, 6 August.*

Hearing of Mig 29 case started

Hearing of the sensational Mig 29 case started in the International Court of Arbitration in Paris. Barrister Rafiqul Haque represented Bangladesh. It may be mentioned that in 1999 Awami League government purchased eight Mig 29 fighter plane from Russian Aircraft Corporation (RAC) paying half of the price. According to the contract rest of the amount was to be paid in instalment within 2006. So far two installations are arrears. And for this the RAC has gone to International Court of Arbitration. The Government claimed that the purchase made a great loss of Bangladesh and as such it has decided to contest in the case. - *Jugantor, 6 July.*

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In the parcel, 100 ml of liquid was in a glass bottle. He held the chemical examination. The bottle was found properly sealed and signed. He also identified his signature. He found Chlorpheniramine Maleate and Codeine Phosphate in the sample.

Said Sheik Abdur Razaque was again examined as PW 8 as the investigating officer. He testified that he investigated the case and after receipt of the chemical examiner's report he submitted a charge-sheet.

After close of the prosecution evidence, both the accused were examined under section 342 of the Code of Criminal Procedure and both of them claimed to be not guilty.

Upon the aforesaid evidence, the learned judge found the appellant only guilty and accordingly, convicted and sentenced him and co-accused Md Nawsher Ali not guilty and acquitted him.

Deliberation

We have perused the entire record and heard the learned advocates at length. We have also examined the Act and Ordinance.

In the trial, seven witnesses were examined. Of them PW 1 to 3, 6 and 7 were police officers while PW 4 and 5 were locals, who witnessed the seizure by signing their names on the seizure list prepared. PW 2, 3 and 7 in one voice corroborated PW 1 Sheik Abdur Razaque over seizure of aforesaid articles. PW 4 and 5 though identified their signatures on the seizure list but denied to have witnessed any seizure of the articles. In view of the facts and circumstances of the case and the evidence on record it did not appear to us that the seizure list witnesses were telling the truth in the trial. After