17 SCOB [2023] AD 43

APPELLATE DIVISION

PRESENT:
Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Ms. Justice Krishna Debnath

CRIMINAL APPEAL NO.23 of 2005
(From the judgment and order dated 12.03.2003 passed by the High Court Division in Criminal Appeal No.31 of 2001)

The State **.....Appellant**

-Versus-

Badal Kumar Paul **.....Respondent**

For the appellant	Mr. Biswajit Debnath, Deputy Attorney General with Ms. Abantee Nurul, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.
For the respondent	Mr. Syed Mahbubur Rahman, Advocate-on-Record (Not present).
Date of hearing	The 19th day of January, 2022.
Date of judgment	The 1st day of February, 2022.

Editors' Note
The Appellate Division answered two important questions in this criminal appeal clearing a cloud of confusion as to (i) whether 'Codeine' and a derivative of codeine i.e. 'Codeine Phosphate', are prohibited items as narcotics and whether its presence in any liquid i.e. phensedyl renders the total amount of phensedyl/liquid as narcotics and (ii) whether having possession or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990.
The respondent was arrested for having possession of 250 bottles of Phensedyl each containing 100 ml. totaling 25 liters and 72 pieces of Indian woolen mufflers. The trial Court found the respondent guilty under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990 and sentenced him to suffer imprisonment for life. The High Court Division, however, acquitted him on the ground that "phensedyl" is not a contraband drug under the laws of the land. The Appellate Division taking into consideration the chemical examination report of 'phensedyl' and analyzing relevant laws and judicial pronouncements of the highest Courts of Bangladesh and India came to the conclusion that phensedyl contains 'Codeine Phosphate' which is a derivative of codeine and its presence in the drug renders the total amount of phensedyl as narcotics and, therefore, possessing or carrying phensedyl is a punishable offence under section 19(1) serial 3(Kha) of the Narcotics Control Act, 1990. Thereafter, it set aside the judgment and order of the High Court Division and restored the same of the trial Court.

Key Words:
Section 19(1) Serial 3(Kha), 19(4) and 25 of the Narcotics Control Act, 1990; Phensedyl; Codeine Phosphate; Schedule III of the Drugs (Control) Ordinance, 1982:

Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Narcotics Control Act, 1990:

'Codeine phosphate' is a derivative of codeine and codeine is a scheduled narcotic under Section 19(1) Serial 3 of the Narcotics Control Act, 1990, which is an opium derivative. In schedule-I of the Narcotics Control Act, 1990 three categories of narcotics have been enumerated. The derivatives of opium have been mentioned in serial 3 of 'Ka' class of narcotics, where codeine is one of the derivatives. So, indisputably according to the Narcotics Control Act, 1990 'codeine' is a scheduled narcotic and it is prohibited. Guidelines for evaluation of medical products proposed in Annexure–III of the Report of the Expert Committee for Drugs on the National Drug Policy of Bangladesh, 1982 strictly prohibits the use of codeine in any combination form as it causes addiction. Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Act. (Para 13)

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:

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 need to be counted based on volume or mass. (Para 15)

Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990:

Since in the instant case, total 250 bottles i.e. 25 liters of the Phensedyl containing codeine phosphate have been seized the entire measure of Phensedyl is to be considered as narcotics. As the quantity of seized Phensedyl exceeds 2 kilograms, the accused-respondent will be convicted under Section 19(1) Serial 3(Kha) of the Act. The High Court Division committed a serious error of law holding that in the absence of any law declaring Phensedyl contraband, the existence of codeine phosphate in Phensedyl does not make Phensedyl a schedule narcotic. (Para 17)

Schedule III of the Drugs (Control) Ordinance, 1982:

'Codeine' and 'codeine phosphate' are included in Schedule III of the Drugs (Control) Ordinance, 1982. So, the use of codeine and codeine phosphate is not permitted in our country. Moreover, Phensedyl is also a prohibited drug in Bangladesh under Section 8 Schedule-III of the Drugs (Control) Ordinance, 1982. Since codeine phosphate is one of the ingredients of Phensedyl, the import, manufacture or sale of Phensedyl is punishable under the Act. Again in the Narcotics Control Act, 1990 codeine has been mentioned as schedule of narcotics. Since codeine phosphate is a derivative of codeine, in our unerring opinion it is also a scheduled narcotic. Due to its addictive nature, it cannot be used in any cough syrup or any other liquid substance in any combination form. (Para 25)

It is well settled principle that if the prosecution case is proved otherwise beyond reasonable doubt based on evidence, the accused can be convicted despite the seizure list witnesses denied supporting the prosecution case i.e. recovery and seizure. (Para 41)

JUDGMENT

Obaidul Hassan, J:

1. This criminal appeal is directed against the judgment and order dated 12.03.2003 passed by a Division Bench of the High Court Division in Criminal Appeal No.31 of 2001 allowing the appeal and thereby setting aside the judgment and order of conviction and sentence dated 13.11.2000 passed by the learned Sessions Judge, Jashore (hereinafter referred to as the trial Court) in Sessions Case No.39 of 1999 under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990 (hereinafter referred to as the Act).

2. The prosecution case, in short, is that on 05.11.1997 at about 9:10 am the police found 250 bottles of Phensedyl each containing 100 ml. totaling 25 liters and 72 pieces of Indian woolen mufflers worth of Tk.32,200.00 in the possession of the accused Badal Kumar Paul at the place in front of Mallik Bari at Village-Taherpur under police station- Chougacha, District-Jashore. The police seized the Phensedyl and mufflers in presence of witnesses and arrested the accused-respondent and lodged the First Information Report (FIR).

3. The trial commenced on framing charge against the accused-respondent along with co-accused Nousher Ali under Section 19(1) Serial 3(Kha) 19(4) and 25 of the Narcotics Control Act, 1990. The charge so framed was read over and explained to both the accused when they pleaded not guilty and claimed to be tried. The defence plea as revealed from the trend of cross-examination of prosecution witnesses was of innocence and further that no Phensedyl was recovered from their possession.

4. In course of trial the prosecution examined eight witnesses and the defence examined none. On closure of the prosecution evidence, both the accused were examined under Section 342 of the Code of Criminal Procedure, 1898, drawing attention to the incriminating evidence adduced when both of them repeated their innocence.

5. The trial Court upon consideration of the materials and evidence on record convicted the accused-respondent under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990 and sentenced him to suffer imprisonment for life and the other accused got acquittal.

6. The accused-respondent being aggrieved with the verdict of trial court convicting and sentencing him preferred criminal appeal before the High Court Division and the High Court Division by rendering its judgment and order dated 12.03.2003 allowed the appeal and acquitted the accused-respondent from all the charges of leveled against him.

7. Being aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the appellant preferred a petition for leave to appeal before this Division which was granted accordingly.

8. Mr. Biswajit Debnath, learned Deputy Attorney General, appearing for the appellant took us through the judgment and order passed by the High Court Division, the FIR, the charge sheet, the seizure list, the connected materials on record and submits that the learned Judges of the High Court Division did not consider the evidence of Chemical Examiner

(P.W.6) adduced before the trial Court, who was attached to CID Office, Dhaka to the effect that on examination of a bottle seized containing 100 ml. of Phensedyl sent for Chemical examination it was found to have contained 'Chlorpheniramine Maleate' and 'Codeine Phosphate'. 'Codeine' is a prohibited item as narcotic and codeine Phosphate is a derivative of codeine which is a narcotic substance and that the possession or carrying of Phensedyl containing such narcotic substance is a punishable offence under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990. He further submits that the Narcotics Control Act, 1990 expressly describes any opium derivative *viz* Morphine, Codeine, Heroin, Buprenorphine, Thebaine, Noscapaine, Narcotine, Papavarine, etc. and their alkali as narcotic substance and carrying, possessing, selling etc. of any of these narcotic substances attract penal provision and in the case in hand there was sufficient evidence that explicitly demonstrates that Phensedyl contains narcotic substances, but on an erroneous view of law and facts the learned Judges of the High Court Division acquitted the accused-respondent.

9. The learned Deputy Attorney General also submits that the observation of the High Court Division to the effect that "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 streets. If the Government thinks that use or consumption of Phensedyl 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" is not at all acceptable. Because not only the government, but any prudent person is aware that excessive or regular consumption of Phensedyl containing narcotic substance 'Codeine" can make anybody addict.

10. Though Mr. Sayed Mahbubur Rahman, learned Advocate-on-record filed caveat on behalf of the accused-respondent, but he was not found in the Court at the time of hearing of the case.

11. We have heard the learned Advocate for the appellant and examined the FIR, the testimony of the witnesses, the police report submitted under section 173 of the Code of Criminal Procedure, 1898 recommending prosecution, the seizure list, the judgment and order of conviction and sentence passed by the trial Court, the judgment and order passed by the High Court Division in appeal and the related materials on record.

12. On appraisal of the materials on record it depicts that in the instant case, leave was granted on 06.08.2005 by this Division to consider the following matters:

I. Whether 'Codeine', 'Codeine Phosphate', and a derivative of codeine, are prohibited items as narcotics and whether its presence in any liquid i.e. phensedyl renders the total amount of phensedyl/liquid as narcotics.
II. Whether having possession or carrying phensedyl is punishable under Section 19(1) Serial 3(Kha) of the Narcotics Control Act, 1990.

13. Therefore, two-fold questions have arisen before this Division to be resolved. First of all, admittedly Phensedyl is not any kind of scheduled narcotics by its name. From the chemical examination report, it appears that on examination of 100 ml. Phensedyl the existence of 'Chlorpheniramine Maleate' and 'codeine phosphate' was found in it. Now, the question arises what is 'codeine phosphate'? 'Codeine phosphate' is a derivative of codeine and codeine is a scheduled narcotic under Section 19(1) Serial 3 of the Narcotics Control Act, 1990, which is an opium derivative. In schedule-I of the Narcotics Control Act, 1990 three categories of narcotics have been enumerated. The derivatives of opium have been mentioned

in serial 3 of 'Ka' class of narcotics, where codeine is one of the derivatives. So, indisputably according to the Narcotics Control Act, 1990 'codeine' is a scheduled narcotic and it is prohibited. Guidelines for evaluation of medical products proposed in Annexure–III of the Report of the Expert Committee for Drugs on the National Drug Policy of Bangladesh, 1982 strictly prohibits the use of codeine in any combination form as it causes addiction. Since codeine phosphate is a derivative of codeine, it thus also stands as a 'Ka' class narcotic under Schedule-I of the Act.

14. As opium and opium derivatives (narcotics) are solid substances, Section 19(1) Serial 3 of the Narcotics Control Act, 1990 provides punishment for breach of provision of Section 9 of the Act by any kind of opium and opium derivatives narcotics counting the quantity of these solid substances based on kilograms. Section 19 of the Act provides that:

"১৯। (১) কোন ব্যক্তি নিম্ন টেবিলের কলাম (২) এ উল্লিখিত কোন মাদকদ্রব্য সম্পর্কে ধারা ৯ এর উপ-ধারা (১) বা (২) এর, চাষাবাদ [উৎপাদন, প্রক্রিয়াজাতকরণ, প্রয়োগ ও ব্যবহার] সম্পর্কিত বিধান ব্যতীত, কোন বিধান লঙ্ঘন করিলে, তিনি উক্ত মাদকদ্রব্যের বিপরীতে টেবিলের কলাম (৩) এ উল্লিখিত দণ্ডে দণ্ডনীয় হইবেন, যথা:-

ক্রমিক নং	মাদকদ্রব্যের নাম	দণ্ড
১	২	৩
৩	অপিয়াম, ক্যানাবিস রেসিন বা অপিয়াম উদ্ভূত, তবে হেরোইন ও মরফিন ব্যতীত, মাদকদ্রব্য]	(ক) মাদকদ্রব্যের পরিমাণ অনূর্ধ্ব ২ কেজি হইলে অন্যূন ২ বৎসর এবং অনূর্ধ্ব ১০ বৎসর কারাদণ্ড। (খ) মাদকদ্রব্যের পরিমাণ ২ কেজির ঊর্ধ্বে হইলে মৃত্যুদণ্ড অথবা যাবজ্জীবন কারাদণ্ড।

15. But 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 need to be counted based on volume or mass.

16. In the case of **the State vs. Miss Eliadah McCord [16 BLD (AD) 239]**, heroin was recovered which is a narcotic mentioned in serial 1 of Section 19(1) of the Act and in determining the amount of seized heroin this Division 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 light of the decision rendered in this case, it can be lawfully said that if 'codeine phosphate' is used in any combination, irrespective of the amount of codeine phosphate, the total combination needs to be considered as narcotics substance and accordingly punishment to be awarded depends upon the amount of combination under Section 19(1) Serial 3 of the Act.

17. Since in the instant case, total 250 bottles i.e. 25 liters of the Phensedyl containing codeine phosphate have been seized the entire measure of Phensedyl is to be considered as narcotics. As the quantity of seized Phensedyl exceeds 2 kilograms, the accused-respondent will be convicted under Section 19(1) Serial 3(Kha) of the Act. The High Court Division

committed a serious error of law holding that in the absence of any law declaring Phensedyl contraband, the existence of codeine phosphate in Phensedyl does not make Phensedyl a schedule narcotic.

18. The crucial issues need to be determined in this case are: (i) codeine is a scheduled narcotic, (ii) codeine phosphate is derivative of codeine, (iii) the existence of codeine phosphate in Phensedyl makes the total combination narcotics which causes addiction. But the High Court Division failed to take these aspects into account.

19. We have to keep it in mind that the Act has been promulgated to control narcotics and provide treatment and rehabilitation facilities for narcotics addicts. Zero tolerance should be shown in combating use of drugs to keep the young generation secluded from the curse of drugs. The young generation shall go ahead to keep the society and country enlightened with healthy thoughts. Addiction to narcotics makes the society gravely stained and creates clog to the travel of the humanity. It is high time to take initiatives so that they don't nip in the bud.

20. The Narcotics Control Act, 2018 is very much specific in case of defining 'Ka' class narcotics which are opium derivatives. In Schedule I of the Narcotics Control Act, 2018 it is mentioned that any substance made with opium is capable of creating addiction is to be considered as 'ka' class narcotics. Since codeine phosphate causes addiction, any amount of its combination is capable of making the total amount of any liquid intoxicated. If the provisions of the Narcotics Control Act, 1990 and 2018 are taken together, it is crystal clear that the existence of codeine or its derivative in any substance renders the total amount of the combined product as narcotics substances. In this context, it can be lawfully deduced that though Phensedyl is not contraband by itself as narcotics, the existence of codeine phosphate in it makes it contraband automatically and makes it a prohibited item.

21. Taking into consideration the perilous upshot of narcotics on society, in numerous cases, the Indian Supreme Court has held that codeine-based Phensedyl cough syrup can be considered as narcotics substances under the Narcotic Drugs and Psychotropic Substances Act, 1985 if codeine phosphate is not used for therapeutic practice in permissible dosage.

22. In the case of ***Md. Sahabuddin and others vs. State of Assam [2012(79) ACC 730],*** MANU/SC/0836/2012 opinion has been given by the Indian Supreme Court that the content of codeine phosphate if falls within the permissible limits i.e. codeine phosphate should be less than 10 mg. (per dosage), namely, 5 ml. and if it is used for **therapeutic purpose**, then it would not be narcotics substance but in this case, the person in possession had to show documents for what purposes the drugs containing narcotics substances were being transported. If he fails to do so, he will not get exemption from punishment for having possession of narcotics substances.

23. A question may arise what is 'Therapeutics'. Butter Worths Medical Dictionary Second Edition speaks that:

> "Therapeutics: The branch of medicine which is concerned with treatment of disease, palliative or curative."

24. In India, the permissible limit of codeine in cough syrup has been prescribed as per the declaration of Notification by the Central Government in the exercise of the powers conferred by sub-clause (b) of clause (xi) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985. According to the declaration of the Central Government

of India codeine which is compounded with one or more other ingredients not more than 100 milligrams of the drug per dosage unit and with a concentration not more than 2.5 percent in undivided preparation and which has been used in therapeutic practice cannot be considered as narcotics substance. **[Pankaj Shukla vs. Union of India (2016 (4) CHN (CAL) 233].** But in Bangladesh, codeine-containing cough syrup was banned by the Drugs (Control) Ordinance, 1982 due to its abuse of use particularly by the young generation. Section 8 of the Drugs (Control) Ordinance, 1982 provides that:

> **"8.(1) On the commencement of this Ordinance, the registration or license in respect of all medicines mentioned in the Schedules shall stand cancelled, and no such medicine shall, subject to the provisions of sub-section (2), be manufactured, imported, distributed [,stocked, exhibited or sold] after such commencement.**
>
> (2) Notwithstanding anything contained in sub-section (1),-(a) the medicines specified in Schedule I shall be destroyed within three months from the date of commencement of this Ordinance;
>
> (b) the medicines specified in Schedule II may be manufactured or sold for a period of [twelve months] from the date of commencement of this Ordinance and thereafter their manufacture [stock, exhibition and sale] shall be permitted only if they are registered after change in their formulation in accordance with the direction of the licensing authority;
>
> (c) **the medicines specified in Schedule III may be manufactured, imported, distributed and sold for a period of [eighteen months] after the commencement of this Ordinance, and thereafter there shall not be any manufacture, import, distribution [,stock, exhibition or sale] of such medicines [;**
>
> (d) the medicines specified in Schedule IV may be manufactured, distributed and sold for a period of eighteen months after the commencement of this Ordinance, and thereafter their manufacture, distribution [,stock, exhibition and sale] shall be permitted only if they are registered again with the licensing authority:
>
> **Provided that no fresh import of raw materials for the manufacture of the medicines specified in Schedule III and Schedule IV shall be permitted.]"** (Bold by us)

25. 'Codeine' and 'codeine phosphate' are included in Schedule III of the Drugs (Control) Ordinance, 1982. So, the use of codeine and codeine phosphate is not permitted in our country. Moreover, Phensedyl is also a prohibited drug in Bangladesh under Section 8 Schedule-III of the Drugs (Control) Ordinance, 1982. Since codeine phosphate is one of the ingredients of Phensedyl, the import, manufacture or sale of Phensedyl is punishable under the Act. Again in the Narcotics Control Act, 1990 codeine has been mentioned as schedule of narcotics. Since codeine phosphate is a derivative of codeine, in our unerring opinion it is also a scheduled narcotic. Due to its addictive nature, it cannot be used in any cough syrup or any other liquid substance in any combination form.

26. Dr. Saydur Rahman, a Professor of Department of Pharmacology, Bangabandhu Sheikh Mujib Medical University (BSMMU) in his paper titled "Codeine Cough Mixture Abuse, BANGLADESH an Example," presented in an International Seminar observed that the combination of Phensedyl is as below:

a. Promethizine HCL 3.6 mg. per 5 ml.
b. Codeine Phosphate 9 mg. per 5 ml.
c. Ephedrine HCL 7.2 mg. per 5 ml.

27. In this research, he found that production of this Codeine cough preparation in neighboring country can also be disastrous because so called cough preparation (Phensedyl) which is banned in Bangladesh is number one abused medicine by the addicts in our country.

[Source: http://lists.healthnet.org/archive/cgi-bin/mesg.cgi?a=e-drug&i=200202110229 VAA27280% 40 satellife.healthnet.org.]

28. The UN Office of Drug and Crime (UNODC) published a report in their Journal on 01.01.1958. The author of the write-up was D.Sc. Walter R. Heumann, an Associate Professor of Chemistry, University Montreal, Canada. The main content of this publication reveals that the meheylation of Morphine is one of the key operations of the opium Alkaloid industry as up to 90% of the manufactured Morphine is converted into Codeine. Thus, it can be said that the Morphine can be converted into Codeine and abuse of such Codeine can make a person addicted and as such the observation of the High Court Division regarding cough syrup with composition of Codeine cannot be a banned item is not correct.

29. The United Nation's Office on Drugs and Crime (UNODC) in the year 2010 arranged a seminar in New Delhi jointly with the Government of India. The seminar was on **India-Bangladesh: trafficking and abuse of pharmaceuticals and issue of growing public concern.** In the said seminar one Mr. N.K. Paul, Deputy Drug Controller and Controlling Authority of the State of Tripura attended and he was interviewed by UNODC, wherein a question was put to him that what are the main pharmaceutical abuse in Tripura. Mr. Paul answered that Codeine phosphate, which is contained in cough preparations, is the main drug that is abused in the State of Tripura. Codeine is a narcotic drug and causes addiction when used in large quantities over a period of time. One cough preparation contains Chlorpheniramine Maleate, an anti-histaminic, in addition to codeine phosphate, which causes sedation.....**.** The problem is serious, because pharmaceuticals are more affordable and easily available at retail outlets. They are often used as substitutes by drug users. The problem gets magnified when drug users begin to take them over a long period of time. He also said that the drug still continues to enter the State through illegal channels and is mostly smuggled to Bangladesh.

30. Mr. Paul also said that Phensedyl and other cough syrups are illegally brought into the State with forged documents hiding those under other commodities like in trucks and buses. Once inside, they find their way to Bangladesh, with which Tripura shares two thirds of its border. The drug is generally sent in its original packaging. Since liquor is banned in Bangladesh, the drug became a popular alternative for alcohol. Phensedyl used to contain codeine phosphate along with hydrochloride ephedrine and Promethizine, a unique combination for addiction. This is what made it a popular drug of abuse and unfortunately the trend still continues even after the chemical formulation was changed.

31. In view of above interview it can be concluded herein that the State of Tripura of India is contiguous to Bangladesh and the Drug Traders usually send those Phensedyl in

Bangladesh and the youths become addict after consuming those Phensedyl and as such the observation of the High Court Division that the Phensedyl the Combination of Chlorpheniramine and Codeine is not harmful is not at all correct.

[Source: https//www.unodc.org/southasia/frontpage/2010/April/Abuse-and-trafficting of pharmaceuticals.html]

32. Consequence of drug abuse knows no bound. It rather impacts the family, society. Addiction to drugs creates disintegration of family and normal life. All, these must be kept in kind while dealing with the case involving drug trafficking. The youth throughout the world is vulnerable to drugs. In Bangladesh mostly youngsters choose drugs to satiate their desires. Lack of self confidence is the root cause of addiction of drugs. Phensedyl is a popular drug to the young generation of Bangladesh though now a day's different types of drugs are found available in the underworld market. Since we have already observed that if Codeine phosphate is used in any combination irrespective of the amount of Codeine phosphate total combination has to be considered as narcotics substance, and since Phensedyl contains codeine phosphate it falls under the category of narcotics. But the person, who keeps in possession, carry or sell Phensedyl without physician's prescription or any trade license or use it not for therapeutic purpose he must be held responsible for keeping narcotics/drugs and he cannot evade responsibility and escape the clutch of punishment. It is irrefutably concluded that this group of people is consciously engaged in accomplishing the act of dragging the young people towards addiction of drugs. It is thus necessary to keep drugs off from the young people so that one who is not indulged in it remains far from it. Though preventing the addiction of drugs is a very thorny task there are some steps that can be taken to facilitate stop consumption of drugs. It is indispensible le for existence of healthy society. All individuals who are suffering from mental disorders or are victim of depression and stress must be taken to psychiatrist so that their mental infirmity is cured and they become able to quit drug addiction.

33. As an opioid derivative, Codeine impacts on the body that have more significant implications beyond simply being a drug used to address certain forms of illnesses. Particularly, the fear lies in the fact that Codeine tends to have addictive components that can induce abuse. While it would be unfair to assume that it has this impact on everyone, or that everyone will abuse the drug, the fact that there are chemical components that can lead to this possibility is a risk that society as a whole need to take caution over.

34. Continued use of Codeine creates a form of dependency on the medication that leads to consumers suffering from severe withdrawal symptom that result in ailments like aches, nausea, and insomnia, among others. Addiction on the drug almost makes it unfeasible to carry out daily functions without its support for habituated consumers. The abuse of the drug may also result in death. In a study by Roxburg et al. in 2015, Codeine was found to be the contributing factor to over 1400 deaths in Australia- a nation with a more comprehensive healthcare infrastructure than our own. An analgesic of this strength and impact should

ideally be regulated and certainly should not be accessible to consumers as an over-the-counter medication, especially when alternative form of treatment can be used to fill up the gap. The strength of the drug, similar to morphine, makes it likely to be the easy to reach tool to cope with pain.

35. Phensedyl, being composed of Codeine, does have similar effects. It is equally detrimental and is likely to have the same sort of impact on consumers as a result of containing the same elements. However, the extent of accessibility to the medication currently makes consumers susceptible to form a deadly habit that is deleterious to health. It is thus imperative for us to address the depths of its impact, and consider measures that can be placed to limit the harms.

36. Courts are often tasked with devising measures to step in where existing regulations are proved to be inadequate to address an existing problem. The existing situation permits the use of Codeine without regulations to a point where we are leaving the society prone to developing harmful habits that can have far-reaching implications. Understandably, there should be more research to be conducted to better understand the extent of the use of Codeine and such other drugs and the degree to which it is currently being abused and the implications this has. In the absence of such evidence before us, this court is of the opinion that it is within our ambit and duty to ensure that where protective mechanisms are not in place, we develop them. Regulations of this sort can take years to perfect, and lawmakers are hereby urged to look into the matter. However, in the interim, where a likely problem is evident, it is the duty of the court to ensure that the problem is addressed and measures are taken to limit the harms. The regulation of Phensedyl- a drug composed of Codeine, and the ban of its use without a prescription, hence, seems reasonable for us to impose. There must be effective vigilance mechanism on phensedyl–carrying routs.

37. In consideration of the matters discussed above, we are of the view that since codeine phosphate is a derivative of codeine, it has to be considered as scheduled narcotics and any portion of the mixture of codeine phosphate with any other liquid substance shall render the total amount of liquid substance as narcotics substances and punishment will be imposed based on the quantity of total amount of such combination.

38. In view of reasoned discussion made herein above we want to make it very clear that since the existence of codeine phosphate makes Phensedyl a narcotic combination, the possession of or carrying of Phensedyl is thus a punishable offence under Section 19(1) Serial 3 of the Narcotics Control Act, 1990.

39. The prosecution case tends to demonstrate that Inspector Sheikh Abdur Razzaque along with his team laid an ambush on 05.11.1997 at about 9.10 hours on a road in front of Mallick Bari at village-Taherpur and apprehended the accused-respondent Badal Kumar Paul with a jute bag he carried on his head. On opening the bag, they found 250 bottles, each

containing 100 ml. of Phensedyl in five paper cartons weighing 25 liters and 72 pieces of Indian woolen mufflers. Inspector along with his team then seized the incriminating articles in front of P.W.4 Md. Nowsher Ali and P.W.5 Raju Ahmed and arrested the respondent. The Inspector himself investigated into the case and submitted police report recommending prosecution under Section 19(1) Serial 3(Kha) and 19(4) of the Act against the accused-respondent.

40. Let us eye on what has been narrated by the P.W.s, in brief. During trial, in all eight witnesses were examined. Of them P.Ws.1-3, 7 were police officials and P.W.6 was the chemical examiner. P.Ws. 4 and 5 were the seizure list witnesses. P.W.1 was examined twice-- first, as the informant and next as the Investigating Officer. P.W.1 in his deposition stated that on 05.11.1997 he along with his team laid an ambush and arrested the accused respondent with 250 bottles each containing 100 ml. of Phensedyl and 72 pieces of wooden mufflers in front of Mallick Bari at village-Taherpur. P.W.2, ASI Abdul Hannan, P.W.3 Constable Mohiuddin and P.W.7 constable Harun-or-Rashid in a voice corroborated the deposition of P.W.1 and stated that on 05.11.97 all of them were being the members of the force and joined the raid under his leadership. At about 9:10/9:15 am they arrested the accused respondent with 250 bottles each containing 100 ml. of Phensedyl and 72 pieces of wooden mufflers. P.W.6, Abdul Awal, the chemical examiner, submitted report giving the opinion that the sample i.e. a bottle containing 100 ml. of Phensedyl sent to him for examination contained Chlorpheniramine Maleate and codeine phosphate. Though P.Ws.4 and 5 identified their signatures on the seizure list, they denied having witnessed any recovery and seizure of alleged articles mentioned in the seizure list.

41. It is well settled principle that if the prosecution case is proved otherwise beyond reasonable doubt based on evidence, the accused can be convicted despite the seizure list witnesses denied supporting the prosecution case i.e. recovery and seizure. The trial Court as well as the High Court Division successfully assessed that the prosecution had been able to prove beyond reasonable doubt that 250 bottles of Phensedyl amounting to 25 liters containing Chlorpheniramine Maleate and codeine phosphate have been recovered and seized from the possession of the accused-respondent.

42. Considering all the matters discussed above, we are of the view that the High Court Division committed an error of law not considering Phensedyl as narcotics substances and therefore, setting aside the judgment and order passed by the trial Court and acquitting the respondent. Hence, we are inclined to interfere.

43. On these above findings, the appeal is **allowed.**

44. Judgment and order passed by the High Court Division is set aside.

45. Judgment and order passed by the trial Court is maintained.