

(2018) 05 GAU CK 0052
In the Gauhati High Court
Case No : Crl.A. 209, A(J) 69 of 2017

AMIRUL ISLAM

APPELLANT

Vs

THE STATE OF ASSAM and ANR

RESPONDENT

Date of Decision : 04-05-2018

Acts Referred:

Explosive Substances Act, 1908 — Section 2, 4, 5, 7
Indian Penal Code, 1860 — Section 120(B)
Arms Act, 1959 — Section 25(i)(a)

Citation : (2018) 05 GAU CK 0052

Hon'ble Judges : MIR ALFAZ ALI

Bench : Single Bench

Final Decision : Allowed

Judgement

[1] Both these appeals being against the common judgment and order dated 04.05.2017 passed by learned Sessions Judge, Silchar in Sessions Case

No.31/2016, are taken together for hearing and disposal. By the said judgment, learned Sessions Judge convicted both the appellants under Section 5

of the Explosives Substance Act and Section 120 (B) IPC and sentenced them to RI for 10 years and fine of Rs.5,000/- with default stipulation under

both the sections. Both the sentences were to run concurrently.

[2] An FIR was lodged by one Kumar, a Subedar of 11th Field Regiment stating that on 10.08.2009 at about 17.30 hours, one R.C. IED weighing

30 kg, 12 V92 AH Battery and a power convertor were recovered from the accused Moni Khan of village Lalpani. It was also stated in the FIR, that

the arms /ammunitions/explosives recovered were already destroyed. On the basis of the said FIR, police registered a case being Lakhiur PS Case

No.235/2009 under Section 120(B) IPC read with section 4/5 of the Explosives

Substances Act and after the usual investigation, laid charge-sheet

against both the appellants, who eventually stood trial before the Court of Sessions.

[3]Â Learned Sessions Judge framed charges under Section 5 of the Explosives Substance Act as well as under Section 120(B) IPC, to which both

the appellants pleaded not guilty. In order to establish the charge, the prosecution examined 6 (six) witnesses and on appreciation of evidence, learned

Sessions Judge convicted both the appellants under Section 5 of the Explosives Substance Act and under Section 120(B) IPC and awarded sentence

as indicated above.

[4]Â Aggrieved by the judgment of conviction and sentence, the appellant preferred the instant appeal.

[5]Â I have perused the evidence and materials brought on record and considered the submissions made by learned senior counsel Mr. HRA

Choudhury and learned Amicus Curiae Mr. SK Agarwala as well as Ms. S Jahan, learned Addl. PP, Assam.

[6]Â Mr. HRA Choudhury, learned senior counsel submits that there was no prosecution sanction against the appellant Amirul Islam and as such, the

conviction and sentence of the accused/appellant Amirul Islam was illegal and without jurisdiction. Further contention of the learned defence counsel

are that before lodging the FIR, the alleged explosive substances were destroyed without examining the same by forensic expert and as such, there

was no legal evidence of recovery of any explosive substance, from the appellant and on this count also the conviction and sentence of the appellants

were bad and requires to be set-aside. It is also submitted by the learned counsel, that even the seizure of the alleged explosives substances was not

proved beyond doubt.

[7]Â Section 7 of the Explosives Substances Act put a restriction on the trial of offence under the said act without consent of the District Magistrate.

The provision of section 7 reads as under:

â??No Court shall proceed to the trial of any person for offence against this act except with the consent of the District Magistrate.â??

[8]Â Thus the provision of Section 7 makes it abundantly clear that the trial of any offence under the explosives substance act against any person is

prohibited without the consent of the District Magistrate. The prosecution in the

instant case, proved Exhibit-8, being the sanction/consent of the district Magistrate, by which the District Magistrate accorded sanction for prosecution and trial of the accused/appellant Moni Khan alone.

Admittedly, there was no consent or sanction by the District Magistrate for trial of the accused/appellant Amirul Islam for any offence under the

Explosives Substance Act, and as such, the trial against Amirul Islam evidently stood vitiated for want of consent by the District Magistrate as

contemplated under Section 7 of the Act. Having held so, it would now be appropriate to go through the evidence and the facts of the case inasmuch

as, apparently, there was prosecution consent for trial of the appellant Moni Khan.

[9] Out of the 6 (six) witnesses examined by the prosecution, PW-2 and PW-4 turned hostile. PW-1 pleaded ignorance and his entire evidence was

hearsay and therefore, not admissible in evidence. Thus, the entire prosecution case hinges on the oral testimony of PW-3 and PW-5 as well as the

documentary evidence adduced.

[10] Before scrutinizing the evidence of PW-3, let me go through the evidence of PW-2 & PW-4 who turned hostile, inasmuch as, the testimony of

witnesses does not get washed off, merely because of his being declared hostile. If the evidence of the hostile witnesses are found to be reliable and

consistent with the other evidence adduced by the prosecution, there is no bar in relying on the testimony of the hostile witnesses. PW-2 is the wife of

accused Amirul Islam, whose testimony is confined to the fact, that noticing the police she fled away out of fear. Though she was cross-examined by

the prosecution, except confronting her with the previous statement made before the police, nothing material could be elicited, which could be of any

help for the prosecution. PW-4 was one Demana Gouda, Habildar working in 11th Field Regiment Uttarkhand, who was posted at Silchar at the

relevant time. He was shown as an witness to Exhibit-3 seizure memo, prepared by informant. PW-4 stated in his evidence, that the signature

appearing in Exhibit-3 was his signature. But he could not remember seizure of any article, nor he could remember, as to for what purpose the exhibit-

3 was prepared. This witness being a member of the police party, belonging to army, there is no point for doubting his integrity. The cross-examination

of this witness also failed to demonstrate anything worthy for the prosecution. Thus the testimony of the PW-2 and PW-4 are of no use for the

prosecution.

[11] PW-6 was an I.O who took up investigation at the later stage, and according to him, the entire investigation was carried out by PW-5. He only submitted charge-sheet after arresting the accused. Therefore, the prosecution was left with only testimony of PW-3 and PW-5 as well as the documentary evidence.

[12] PW-3 stated in this evidence that he was posted at Poilapool, in the district of Cachar at the time of occurrence. According to him, while they were proceeding on patrolling duty, received information about some antisocial activities and accordingly, cordoned the house of the accused/appellant Amirul Islam of Chandrapur. He further stated that they were accompanied by state police party. According to him, the house of accused Amirul

Islam was cordoned by army personnel and the other party consisted of the local police entered into the house and brought out the accused Moni

Khan with a box of explosives substance and some accessories like battery, power converter etc. He also stated that subsequently those items were

destroyed and the accused Moni Khan along with the other items recovered were handed over to police and police seized the recovered items. He

also stated to have been present at the time of destruction of the explosives substances. This witness also proved Exhibit-3, seizure list prepared by

himself. According to him, police seized the exhibit-3 seizure list from him vide Exhibit-

2. During cross-examination he admitted that the explosives substances were recovered from suspected PULF cadre Moni Khan. He again stated

that the said explosives were recovered from the house of other accused Amirul Islam. He further stated that as he was not aware of the other

accused, his name was not mentioned in the FIR. Though he denied that the seized explosives were destroyed before lodging the FIR, the FIR lodged

by PW-3, himself shows, that the explosives alleged to have been seized were destroyed even before lodging the FIR, inasmuch as, it has been clearly

mentioned in the Exhibit-1 FIR that the arms/ammunitions/explosives were destroyed and the remaining articles were handed over to police. What

therefore, crystallizes from the evidence of PW-3 is that, even before lodging the FIR and even without examining the so called explosives substances

by forensic expert to ascertain whether such substances were explosive

substances or not, the articles were destroyed.

[13]Â Learned senior counsel Mr. HRA Choudhury placing reliance on the decision of this Court in CrI.A 180/2011 submits that without ascertaining

whether the seized articles were explosive substance or not, the conviction was bad.

[14]Â A division bench of this Court in the said CrI.A 180/2011 held that the prosecution, though has proved the seizure of one alleged bomb, the

prosecution, however, did not send the same for the opinion of the expert to find out whether it is infact an explosive. In the absence of any such

evidence, it cannot be said that the article was seized as bomb, is an explosive. Hence, the convection of the accused/appellant under Section 25(i)(a)

of the Arms Act and under Section 4 & 5 of the Explosive Substances Act also cannot be maintained.

[15]Â The prosecution, however, proves exhibit-4 being destruction certificate issued by one Captain D.K. Singh showing destruction of the seized

articles. When the seized articles alleged to be explosive substances, were destroyed even before lodging the FIR and without getting the same

examined by the expert to ascertain whether such articles were explosives within the definition of section 2 of the explosives substances act, the very

basis of the prosecution case falls to the ground.

[16]Â Though, PW-3 stated in his evidence that the house of the accused Amirul Islam was cordoned by the army and the state police party entered

the house and recovered the articles, such evidence of PW-3 was denied by PW-5, inasmuch as, PW-5 stated that after the alleged recovery and

seizure of the articles, the army personal told him that, they have already recovered a bomb from the house of Amirul Islam, where from they also

apprehended Moni Khan. Interestingly, the PW-3 neither stated in FIR nor in evidence regarding the recovery of any bomb. There was no mention in

the FIR regarding recovery of any articles from the house of accused Amirul Islam. However, while deposing in Court, PW-3 stated that it was

recovered from the house of Amirul Islam and as he did not know the name of the accused Amirul Islam, it was not mentioned in the FIR. But the

FIR and the seizure list shows that recovery was allegedly made from Moni Khan. Therefore, the prosecution is coming with two versions, one in the

FIR, Exhibit-1 according to which, the recovery of the so called explosive

substances was made from suspected PULF cadre Moni Khan, but while deposing in Court the same person, who lodged the FIR, stated that such recovery was made from the house of Amirul Islam. Thus the above self contradictory and mutually destructive evidence on material facts i.e, recovery of the incriminating article, rendered the prosecution case regarding recovery of any incriminating articles totally unreliable and unworthy of trust. The seizure witness is also found to have not supported the seizure in the instant case.

[17]Â The failure of the prosecution to prove as to from whom the alleged explosive substances were recovered, destruction of the seized articles without obtaining any opinion from the expert as to whether the seized article was explosive substance or not, and lack of evidence to prove the seizure itself rendered the prosecution case highly doubtful, and as such, the accused persons were atleast entitled to the benefit of doubt in the instant case. So far the accused Amirul Islam is concerned, admittedly there was no prosecution sanction, which is mandatory under Section 7 of the Explosive Substance Act, and as such, the conviction of Amirul Islam was apparently illegal for want of consent under section 7 of the Explosives Substance Act. No doubt offence under Section 120B is an independent offence but absolutely no evidence was brought on record to prove that the accused conspired to do any illegal act or a lawful act by illegal means.

[18]Â The totality of the evidence and materials brought on record crystallizes that the prosecution evidence was grossly inadequate to bring home the charges against the appellants under Section 5 of the Explosives Substances Act or under Section 120(B) IPC beyond reasonable doubt and as such, the impugned judgment of conviction and sentence cannot be maintained. Accordingly, the appeal is allowed and the conviction and sentence of both the accused/appellants are set-aside.

[19]Â The appellant, who is in jail, be released forthwith, if not required in any other case.

[20]Â Appreciating the assistance rendered by Mr. SK Agarwal, learned Amicus Curiae, I hereby provide that he will be entitled to fees as Legal

Aid Counsel, as per the norms fixed by the Legal Services Authority Regulation. Upon production of a copy of this judgment, Guwahati High Court

Legal Services Committee, shall pay the fee to Mr. S.K. Agarwal.

[21]Â Send back the LCR.