

(2019) 06 GAU CK 0081
In the Gauhati High Court
Case No : Criminal Appeal No. 219 Of 2016

Mijink Basumatary @ Mainao

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 28-06-2019

Acts Referred:

Explosive Substances Act, 1908 — Section 2(a), 2(b), 4, 4(b), 6
Indian Penal Code, 1860 — Section 121, 121A
Unlawful Activities Prevention Act, 1967 — Section 10, 13
Explosives Act, 1884 — Section 4(d)
Explosive Rules, 2008 — Rule 6(12), 6(12)(7), 12(6), 128, 128(1), 128(2), 128(3), 129, 129(1)

Citation : (2019) 06 GAU CK 0081

Hon'ble Judges : Achintya Malla Bujor Barua, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : R De

Final Decision : Allowed

Judgement

AM Bujor Barua, J

1. Heard Mr. SC Biswas, learned counsel for the appellant and Ms. S Jahan, learned Additional Public Prosecutor appearing for the State of Assam.
2. This is an appeal against the judgment and order dated 05.08.2016 of the learned Sessions Judge, Chirang, Kajalgaon, Assam passed in Sessions Case No.46(RKT)/2016, whereby the accused/appellant was convicted and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs.10000/- and in default, simple imprisonment for another 06(six) months for committing the offence under Section 4(b) of the Explosive Substances Act, 1908.
3. The prosecution case in brief is that an ejahar dated 07.12.2015 was lodged by Sub Inspector of Police namely Paul Lalhlimsang of Shantipur Police Post of Runikhata Police Station stating that based upon a secret information regarding presence of one NDFB(S) lady cadre namely Smti Mijing Basumatary at

Dwigudung village, the informant along with police personnel and personnel of the 7th Sikh Army Camp, Khungring conducted a search operation at Dwigudung village at about 13.30 hours and apprehended one Smti Mijing Basumatary @ Mainao from the house of Smti Nani Muchahary at Dwigudung village. It was stated in the ejahar that on interrogation at the spot, the person arrested had confessed that she had kept one hand grenade and had lead the search party to the place where the grenade was concealed and accordingly the grenade was recovered and seized. It was further stated that on preliminary investigation, it was found that the person arrested is a trained NDFB(S) lady cadre and is actively involved in unlawful activities in the BTAD Area.

4. Accordingly, Runikhata Police Station Case No.66/2015 was registered under Sections 121/121(A) of the IPC read with Section 4 of the Explosive Substances Act, 1908 and Sections 10/13 of the Unlawful Activities Prevention Act, 1967. Upon completion of the investigation, the matter was sent for trial, and charge was framed against the appellant Mijing Barumatary @ Mainao that on 07.12.2015 at about 13.30 hrs, she was apprehended by the police and the army personnel at Dwigudung village and one 36 H.E grenade was recovered on being lead by her and accordingly was charged of committing an offence under Section 4 of the Explosive Substances Act, 1908.

5. We have taken note of that although the FIR was registered under Sections 121/121(A) of the IPC read with Section 4 of the Explosive Substances Act, 1908 and Sections 10/13 of the Unlawful Activities Prevention Act, 1967, but the charge was framed only under Section 4 of the Explosive Substances Act, 1908.

6. In course of the trial, the in-charge of the Shantipur Police Out Post of Runikhata Police Station deposed himself as PW-1 and stated as to in what manner the search was conducted in the Dwigudung village by the police personnel along with the army personnel of the 7th Sikh Light Infantry. The witness also deposed that in course of the search operation, the accused/appellant Mijing Basumatary @ Mainao upon being found in the house of Nani Muchahary was arrested. Upon interrogation, it could be learnt that the accused/appellant had joined the NDFB(S) in April, 2013 and that she had undergone training in Myanmar and after returning from the training, she had been working along with other NDFB(S) cadre in Silikhaguri village under Runikhata Police Station and that in October, 2014 she was married to one NDFB(S) cadre Jaola Basumatary, who subsequently died in an army encounter on 13.11.2015. It was also deposed that in course of the interrogation, the accused/appellant revealed that a hand grenade was kept concealed in a jungle at Dwigudung village and on being lead by her, the police personnel and the army authorities had seized the grenade in front of the villagers.

7. In cross-examination, the witness stated that some other villagers were also present when the accused/appellant had made her confession, but the names of such villagers could not be found out.

8. PWs-2 and 3, who are agriculturists and were present when the police and army personnel had brought the accused/appellant to the jungle deposed that the police had seized a grenade and had obtained their signatures in the seizure list.

9. PW-4 Bimal Ch Roy, who was a constable in the unarmed branch of Runikhata Police Station had deposed that he also was a member of the police party involved in the search and arrest of the accused/appellant. He also deposed that when a senior police officer had questioned the accused appellant, she stated that she was a NDFB(S) cadre and that a hand grenade was in her custody which was kept hidden in a jungle.

10. PWs-5 and 6 being the mother-in-law of the accused/appellant and the person from whose house she was arrested merely deposed that on the given day the accused appellant was apprehended by the police.

11. PW-8, who was an Army personnel posted at Kungring camp of the 7th Sikh Light Infantry and who had also participated in the search and arrest operation deposed that the house of the accused appellant was at Dwigudung and upon enquiry by the police personnel, the accused appellant came out and had lead them to her hide out in a jungle which was located at a distance of about 500 meters from the house of her in laws. The witness deposed that near the hide out, she had shown them one grenade which was kept concealed under the ground and covered with a black polythene bag.

12. PW-9 Abhijet Bhattacharjee deposed that on 17.12.2015 he was working as a RSI in the office of the Superintendent of Police, Kokrajhar and on that day the Superintendent of Police, Chirang vide Memo No.CHR/Crime/ 91/2015/8078 dated 17.12.2015 with reference to the order of the Judicial magistrate 1st Class, Chirang, Kajalgaon dated 17.12.2015 was asked to destroy a 36 H.E grenade and accordingly he had destroyed it. The grenade was seized in connection with Runikhata Police Station case No.66/2015 under Sections 121/121(A) of IPC read with Section 4 of the Explosive Substances Act, 1908 and Sections 10/13 of the Unlawful Activities Prevention Act, 1967 and after destruction of the grenade, he had issued the Exhibit-4 destruction certificate.

13. It is taken note of that although the said witness had stated that the police station case number was pursuant to the aforementioned sections, but as already noted; charge was framed only under section 4 of the Explosive Substances Act, 1908. He also stated that a photograph was taken at the time of destruction of the grenade, but the said photograph was not available on the record and that he had not submitted the copy of the order issued by the department authorizing him to destroy the bomb.

14. PW-10 Lakshman Kr Das, who was working as the 2nd Officer at Runikhata Police Station stated that upon the ejahar being lodged by Sub Inspector Paul Lalhimsang, he had undertaken the investigation of the matter and had examined the informant Sub Inspector. He stated that on the following day he

visited the place of occurrence and drew a sketch map, which was exhibited as Exhibit-5. He deposed that the place of occurrence is a jungle and he had examined the residents of the village about 1 km away from the place of occurrence and also recorded their statements. The PW-10 Investigating Officer also deposed that the informant had handed over the seized grenade along with a seizure list and he had got the grenade and the seizure list seen by the learned Chief Judicial Magistrate, Chirang and after arresting the accused person, she was forwarded to the Court. PW-10 further deposed that the seized grenade was destroyed by engaging an expert and he had collected the destruction certificate. After collecting the prosecution sanction order against the accused/appellant for committing offence under Section 4 of the Explosive Substances Act, 1908 from the District Magistrate, Chirang, the Exhibit-7 charge-sheet was submitted.

15. Apart from the above, no further relevant evidence had been rendered by the prosecution. According to the prosecution, there was a search and arrest operation against the accused/appellant and upon being lead by her, a grenade bearing 36 H.E was seized and the same was destroyed as per the order of the Superintendent of Police, Chirang and the order of the Judicial Magistrate, Chirang for which a destruction certificate was retained and accordingly, the accused appellant was charged under Section 4 of the Explosive Substances Act, 1908. It is not understood as to why the other sections under which the FIR was registered namely Sections 121/121(A) IPC and Sections 10/13 of the Unlawful Activities Prevention Act, 1967 were not retained and charged against the accused/appellant. Evidence had been led that the accused appellant was an active member of the extremist organization NDFB(S), who was indulging in unlawful activities and if the accused/appellant being a part of the said organization was also involved in unlawful activities, we find no reason as to why no charge was framed against the accused/appellant under the Unlawful Activities Prevention Act, 1967. Further, Section 121 of the IPC being a charging section for waging or attempting to wage war or abetting the waging of war against the Government of India and Section 121(A) being a conspiracy to commit offence punishable under Section 121, we find no reason as to why no charges were framed under the said two sections when it is an acceptable proposition of which judicial notice can be taken that the activities of the organization NDFB(S) also include waging war against the Government of India.

16. What is taken note of is that the accused/appellant was charged under Section 4 of the Explosive Substances Act, 1908. Section 4 of the Explosive Substances Act 1908 is as follows:-

"4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.- Any person who unlawfully and maliciously-

(a) does any act with intent to cause by an explosive substance or special category explosive substance, or conspires to cause by an explosive substance or special category explosive substance, an explosion of a nature likely to endanger

life or to cause serious injury to property; or

(b) makes or has in his possession or under his control any explosive substance or special category explosive substance with intent by means thereof to endanger life, or cause serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property in India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished,-

(i) in the case of any explosive substance, with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

(ii) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

17. A reading of Section 4 of the Explosive Substances Act, 1908 shows that any person who unlawfully and maliciously does any act with the intent to cause by an explosive substance or special category explosive substance, or conspires to cause by explosive substance or special category of explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property; or makes or has in his possession or under his control any explosive substance or special category explosive substance with intent by means thereof to endanger life or cause serious injury to property or to enable any other person by means thereof to endanger life or to cause serious injury to property in India shall irrespective of whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished, in case of explosive substance with imprisonment for life or with imprisonment of either description for a term, which may extend to ten years with further liability to pay fine and in case of special category explosive substance to a rigorous imprisonment for life or rigorous imprisonment for a term, which may extend to ten years with fine.

18. The very provision of Section 4 presupposes either an of causing an explosion or an act to intent by means of any explosive substance in possession or under his control. Without it being established that an explosive substance was used or was in possession for the purpose of either causing an explosion or any intent to cause danger to life, in our view the provisions of Section 4 of the Explosive Substances Act, 1908 would not be attracted.

19. Whether the prosecution had established the existence of an explosive substance or as a matter of fact a special category explosive substance would have to be examined from the materials made available on record. As we have already indicated the relevant provisions of the evidence led by the prosecution as described hereinabove do not reveal that the existence of an explosive substance or special category explosive substance had been established through means acceptable under the law. All that the prosecution witnesses stated in

their depositions is that a grenade was seized and further upon preparing the seizure list etc, and under the orders of the Superintendent of Police, Chirang and also under the orders of the appropriate Judicial Magistrate, the same had been destroyed. There is no material to indicate that the item that was seized by claiming it to be a grenade 36 H.E and the item that was destroyed of which a destroy certificate is also available was in fact an explosive substance or a special category explosive substance.

20. Explosive substance is defined under Section 2(a) of the Explosive Substances Act, 1908, which is an inclusive definition to include any material for making any explosive substance which also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion with any explosive substance.

21. Special category explosive substance is defined under Section 2(b) to include certain categories of explosives like research development explosive (RDX), penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluene (TNT), low temperature plastic explosive (LTPE), composition exploding (CE) etc or a combination thereof with remote control device for causing the explosion.

22. Section 4(d) of the Explosives Act, 1884 defines explosive to mean gunpowder, nitroglycerine, nitroglycol, gun-cotton, di-nitro-toluene, tri-nitro-toluene, picric acid, di-nitro-phenol etc or any other substance either as a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect and includes fog-signals, fireworks, fuses, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined.

23. Section 2 (a) of the Explosive Substance Act, 1908, Section 2 (b) of the Explosive Substance Act, 1908 and Section 4 (d) of the Explosive Act 1884 are as follows :-

(a) the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;

(b) the expression "special category explosive substance" shall be deemed to include research development explosive (RDX), penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluene (TNT), low temperature plastic explosive (LTPE), composition exploding (CE) (2, 4, 6 phenyl methyl nitramine or tetryl), OCTOL (mixture of high melting explosive and tri nitro toluene), plastic explosive kirkee -1 (PEK-1) and RDX/TNT compounds and other similar type of explosives and a combination thereof and remote control devices causing explosion and any other substance and a combination thereof which the

Central Government may, by notification in the Official Gazette, specify or the purposes of this Act.

(d) "explosive" means gunpowder, nitroglycerine, nitroglycol, gun-cotton, di-nitro-toluene, tri-nitro-toluene, picric acid, di-nitro-phenol, tri-nitro-resorcinol (styphnic acid), cyclo-trimethylene-tri-nitramine, penta-erythritol-tetranitrate, tetryl, nitro-guanidine, lead azide, lead styphnate, fulminate of mercury or any other metal, diazo-di-nitro-phenol, coloured fires or any other substance whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect; and includes fog-signals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined in this clause;

24. Reading of Section 2 (a) of the Explosive Substance Act, 1908, Section 2 (b) of the Explosive Substance Act, 1908 and Section 4 (d) of the Explosive Act, 1884, it is understood that explosive substance would include any material for making any explosives as defined under the Explosive Act of 1884, which means gun powder, nitroglycerine, nitroglycol, gun-cotton, etc. Again Section 2 (b) of the Explosive Substance Act, 1908, provides that special categories explosive substance comprises of research development explosive (RDX,) penta erythritol tetra nitrate (PETN), high melting explosive (HMX), tri nitro toluene (TNT) etc. Accordingly, whenever any item, which may otherwise be also called 36-HE hand grenade, is being projected in a proceeding to have been in possession of the accused persons for bringing such persons within the purview of an offence under the Explosive Substance Act, 1908, the first and foremost requirement to be established would be that the item relied upon, which otherwise may be called 36-HE hand grenade do contain any of the elements stated in Section 4 (d) of the Explosive Act, 1884 or under Sections 2 (a) and 2(b) of the Explosive Substance Act, 1908. In the absence of the aforesaid aspect being examined, confirmed and established, it cannot be accepted that merely because the item projected looks like 36 HE hand grenade or if it projected to be a 36 HE hand grenade, the same by itself would bring the accused within the purview of the Explosive Substance Act, 1908. Having said so, a question would necessarily arise as to what the authorities are required to do upon the seizure of an item, which according to them would be a 36 HE hand grenade.

25. Rule 128 (1) of the Explosive Rules, 2008, inter alia provides that any authorities specified in column 1 of the table contained therein may within his jurisdiction seize, detain or remove any explosive or ingredients thereof.

26. Rule 128 (2) of the Explosive Rules, 2008 again provides that whenever any officer other than the Chief Controller of Explosive or Controller of Explosive seizes, detains or removes any explosive, such officer shall forthwith report the fact of such seizure, detention or removal by telegram to the Chief Controller of Explosive or Controller of Explosive under whose jurisdiction, the place from where the seizure was made falls.

27. Rule 128 (3) of the Explosive Rules, 2008 further provides that whenever any explosives are seized they shall be stored at a place under adequate guard until its examination by the Chief Controller of Explosive or Controller of Explosive and till such time of receipt of instructions from him as to their disposal.

28. When we look into the question as to how an examination is to be done by the Chief

Controller of Explosive or Controller of Explosive, reference be made to the provisions of Rule 6 (12), which provides that whenever the Chief Controller of Explosive or Controller of Explosive, either on his own accord or at the request of any manufacturer or importer is required to verify the approved composition and characteristic of the explosive, he may subject such explosive to the required test at the departmental testing centre.

29. Rules 128 (1), (2) and (3) and Rule 12 (6) of the Explosive Rules, 2008 are as follows :-

128. Powers of search and seizure --- (1) Any authority specified in column (1) of the Table may within the jurisdiction specified in the corresponding entry in column (2) of the Table---

(a) enter, inspect and examine any place, aircraft, train, carriage, vessel or any mode of transport in which an explosive is being manufactured, possessed, used, sold, transported, exported or imported under a licence granted under these rules, or in which he has reason to believe that an explosive has been or is being manufactured, possessed, used, sold, transported, exported or imported in contravention of the Act or these rules ;

(b) search for explosives or ingredients thereof;

(c) take samples of any explosive or ingredients found therein on payment of the value thereof, if such payment is demanded at the time of the sample are taken ;

(d) seize, detain and remove any explosive or ingredients thereof found therein together with connected documents thereof in respect of which he has reason to believe that any of the provisions of the Act or these rules have been contravened.

6(12) The Chief Controller, may on his own accord once in a year or on the request of manufacturer or importer or exporter or consignor, subject any explosive to the tests enumerated in clause (ii) of sub-rule (7) to verify the approved composition and characteristics of the explosives at the Departmental Testing Station and as a result of the characteristics of the tests or otherwise, if the Chief Controller is satisfied that the explosives is no longer safe for manufacture, handling, storage, transport or use, or unfit for continuation of authorisation, may delete such explosive from the authorised list after giving the applicant or licensee an adequate opportunity of being heard."

30. Reading of Rule 128(3) and Rule 6 (12) of the Explosive Rules, 2008 in a

conjoint manner, we are to understand that storage of the seized explosive until examination by the Chief Controller of Explosive or Controller of Explosive would also mean an examination conducted at the departmental centre. We are of the view that if any item is seized by the investigating authority in course of their investigation and such item is sought to be relied upon to attribute an offence on the person accused to have committed an offence under the Explosive Substance Act, 2008, such seizure would have to comply with the procedural requirement of Rule 128 (1), (2) and (3) as well as Rule 6 (12) of the Explosive Rules, 2008. Only upon the seized item being subjected to the procedure of Rule 128 (1), (2), (3) of the Explosive Rules, 2008, it can be established that the seized item is or comprises of an explosive substance.

31. As regards the destruction of an item established to be an explosive, the procedure thereof is provided under Rule 129 of the Explosive Rules, 2008, which again has to be related to the provisions of Rule 128(3) Explosive Rules, 2008 providing that the seized explosive is to be stored in an isolated place until receipt of such instruction from the Chief Controller of Explosive or Controller of Explosive as to their disposal. Provisions of Rule 128(3) of the Explosive Rules, 2008 again brings us to the requirement that the disposal of the seized explosive would also have to be initiated only upon an instruction from the Chief Controller of Explosive or the Controller of Explosive. In other words, such destruction of the seized explosive cannot be done at the instance of the authority, who was involved in such seizure, but can be done only at the instance of the Chief Controller of Explosive or the Controller of Explosive.

32. The procedure for destruction of explosive is provided under Rule 129 of the Explosive Rules, 2008 which provides that in respect of an explosive other than military ammunition of Indian or Foreign origin, the Chief Controller of Explosive or the Controller of Explosive shall destroy such explosive if the manufacture, possession or import of it is absolutely prohibited under Section 6 of the Explosive Act, 1908, or if the explosive belongs to Class-5 (fulminate) and is being manufactured, possessed, used, sold, transported, exported or imported illegally without a license under the Rules. On the other hand, rule-129 provides that if the explosive is of military ammunition of Indian or Foreign origin, the Chief Controller of Explosive or the Controller of Explosive may destroy or render harmless in the event the said authorities have reason to believe that the provision of the Act or the Rules have been contravened or which in his opinion are no longer fit for storage, transport or use and the matter appears to be urgent and fraught with serious danger to the public.

33. Rule 129 of the Explosive Rules, 2008 further provides that whenever the Chief Controller of Explosive or the Controller of Explosive destroys the explosive or ingredients thereof or render it harmless under sub-Rule (1) as indicated above, he shall take and keep the sample thereof, provided, in his opinion such sample can be taken, transported and kept safely for the period required without any danger to life or property.

34. The provisions of Rule 129 of the Explosive Rules, 2008 are as follows :-

"129. Power to destroy explosives and ingredients thereof.-(1) The Chief Controller or a Controller -

(a) shall destroy any explosive other than military ammunition of Indian or foreign origin, whenever found ---

(i) the manufacture, possession or import of which has been prohibited absolutely under section 6 of the Act; or

(ii) if the explosive belongs to the Class 5 (Fulminate) and is being manufactured, possessed, used, sold, transported, exported or imported illegally without a licence under these rules ;

(b) may destroy or render harmless any other explosives coming within the purview of these rules, or ingredient thereof in respect of which the Chief Controller or Controller has reasons to believe that any of the provisions of the Act or these rules have been contravened or which in his opinion are no longer fit for storage, transport or use and the matter appears to be urgent to such controller and fraught with serious danger to public.

(2) Whenever the Chief Controller or a Controller destroys any explosive or ingredient thereof or renders it harmless under sub-rule (1), he shall take and keep a sample thereof.

Provided that if in his opinion such sample can be taken, transported and kept safely for the period required without any danger to any life or property and if required, he may give a portion of the sample to the person owning the explosive or having the same under his control at the time of seizure.

(3) Where any explosive or ingredient thereof is destroyed by a Controller he shall report all the facts to the Chief Controller. The explosives shall be destroyed or rendered harmless as provided under this rule at the expense of the occupier of factory, magazine, storehouse or the place or owner of the explosive."

35. Reading of Rule 129 of the Explosive Rules, 2008 clearly shows that if the explosive in the nature of military ammunition is of Indian or foreign origin, it would be at the discretion of the Chief Controller of Explosive or the Controller of Explosive to destroy or render it harmless, if in their opinion, the provision of the Explosive Act, 1884 or the Rules thereof have been contravened or in their opinion such explosive is no longer fit for storage, transport or use and the matter appears to be urgent and fraught with serious danger to public. Even, if such discretion to destroy or render such explosive harmless, is exercised in respect of a given seized explosive, a sample thereof be kept safely for the required period without causing any danger to any life or property. It is therefore, the requirement that the sample of such explosive is not required to be kept only when in the opinion of the Chief Controller of Explosive or the Controller of Explosive, keeping of the sample itself may also be danger to life or

property.

36. When we look into the aforementioned provisions of the Explosive Act, 1884, the Explosive Rules, 2008 and the Explosive Substance Act, 1908, we are of the view that, if any item has been seized by any authority in course of investigation, which is sought to be projected to be an explosive and be used to charge any person from whom such seizure is made under the Explosive Substance Act, 2008, the aforementioned procedure under the Explosive Act, 1884, the Explosive Rules, 2008 and the Explosive Substance Act, 1908 would have to be adhered to and it be established that the seized item is infact an explosive substance. In the absence of it being established that a seized item is an explosive substance, the person from whom such item had been seized cannot be said to have committed an offence under the Explosive Act, 1908.

37. In the aforesaid requirement of law, when we examine the materials available on record in the instant appeal, it is taken note that as per the deposition of PW-8, that an item which was believed to be a grenade was seized from the possession of the accused appellant, which was kept hidden in a jungle located 500 meters from her in-laws house. Further, the evidence as discernible from the deposition of PW-9 shows that he being working as a R.S.I. in the office of the Superintendent of Police, Kokrajhar was asked to destroy a 36 HE grenade as per the order of the Superintendent of Police, Chirang vide Memo No. CHR/Crime/91/2015/8078 dated 17.12.2015, which again was with reference to the order of the learned Judicial Magistrate, First Class, Chirang, Kalaigaon dated 17.12.2015. Upon such instruction being received, PW-9 had destroyed the 36 HE hand grenade, which apparently was seized from the possession of the accused appellant as deposed by PW-8. Further deposition of PW-9 is that after destroying the 36 HE hand grenade, he had issued the Ext.4 destruction certificate.

38. Apart from the above, no further material is available on record as to what else the investigating agency had done with the seized item, which is projected to be a 36 HE grenade. We have also perused the case diary of Runikhata P.S. Case No. 66/2015, which also does not indicate as to what other steps had been taken by the investigating agency with regard to the seized item projected as hand grenade other then it being destroyed by PW-9.

39. We also look into the order of the learned Judicial Magistrate, First Class, Chirang dated 08.12.2015, which reflects that the Investigating Officer had prayed for passing of an order for destroying the seized 36 HE hand grenade by the department's bomb expert in presence of the superior officer authorized by the Superintendent of Police, Chirang. Upon such prayer being made, by order dated 08.12.2015, the learned Judicial Magistrate, Chirang had allowed the prayer of the Investigating Officer by observing all formalities.

40. Although, PW-9 had referred to an order dated 17.12.2015 of the learned Judicial Magistrate, but record does not reveal any such order dated 17.12.2015

and in the circumstances, the relevant order is understood to be the order dated 08.12.2015.

41. In any view of the matter, even the order dated 08.12.2015 refers to a prayer being made by the Investigating Officer that the 36 HE hand grenade had destroyed by collecting and retaining the residue for it being send to the Forensic Science Laboratory, Guwahati for its examination and expert opinion, but the materials on record does not reveal that the Investigating Officer had collected and retained any such residue of the destroyed hand grenade for it to be sent for examination and expert opinion, if not, at least, of the Forensic Science Laboratory, Guwahati. Secondly, we have also taken note of the order of the learned Judicial Magistrate, First Class, Chirang which had allowed the prayer of the Investigating Officer for destruction of the 36 HE hand grenade by observing all formalities, meaning thereby, that the required procedure under the law for such destruction would have to be followed. Situated thus, we cannot otherwise but conclude that the investigating agency by taking advantage of the order of the learned Judicial Magistrate, First Class had destroyed the seized 36 HE hand grenade, firstly without collecting and retaining the residue for it to be examined in the forensic departmental laboratories and secondly by not following the required procedure of law under Rule 128 and 129 of the Explosive Rules, 2008.

42. We have also taken note that even if the requirement of Rule 129 of the Explosive Rules, 2008 for retaining a sample had been duly complied with, it would have been sufficient for the prosecution to establish that the seized item from the accused, which is sought to be projected as a 36 HE hand grenade was and/or did contain an explosive substance. In view of such procedural aberration and non-compliance of the requirement of law, we are in a situation, where the entire seized object was completely destroyed without retaining any part of it for facilitating an examination for an expert opinion that it was in fact an explosive substance.

43. The only evidence available on record is that the seized item, which was projected to be 36 HE hand grenade was seized from the possession of the accused appellant and further the accused appellant was a member of declared unlawful terrorist organization and that she was a active member of it. We have also taken note of that although the evidence on record relates the accused appellant to be a member of an unlawful organization, whose stated intention is to wage an war against the Government of India, but there is no charge against the accused appellant either under Sections 121/121(A) IPC nor is there any charge under the Unlawful Activities Prevention Act.

44. The only charge against the accused appellant is under Section 4 of the explosive Substance Act, 1908. In the absence of it being established by the prosecution that the seized item projected to be 36 HE hand grenade was itself an explosive substance or it contained explosive substance, the core requirement of an offence under Section 4 of the Explosive Substances Act that the person charged had done any act with an explosive substance or special category

explosive substance, or conspired to do an act with an explosive substance or special category explosive substance, is itself not satisfied. Once the core requirement of doing the act or intention to do such act by an explosive or special category explosive is itself not proved, no offence can be found to have been committed by the accused appellant under Section 4 of the Explosive Substances Act, 1908.

45. In view of such conclusion, we have no other option but to disagree with the judgment and order dated 05.08.2016 of the learned Sessions Judge, Chirang in Sessions Case No. 46(RKT)/2016 convicting the accused appellant under Section 4(b) of the Explosive Substances Act, 1908. Accordingly, the conviction of the accused appellant under Section 4(b) of the Explosive Substances Act, 1908 and the sentence of imprisonment for life and pay fine of Rs. 10,000/- in default thereof, further simple imprisonment for six months is accordingly set aside. The accused appellant be set at liberty if not required for any other offence.

46. Send back the LCRs immediately.