

(2011) 09 GAU CK 0030
In the Gauhati High Court
Case No : Criminal Appeal No. 269 of 2001

Sri Prabin Saikia

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Explosive Substances Act, 1908 — Section 5
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 1 GLD 372

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : J.M. Choudhury, Mr. P. Kataki and Mr. N. Borkakoti, for the Appellant;
A.C. Buragohain, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—This appeal is presented against the judgment dated 3.8.2001 in Sessions Case No. 1/1989 rendered by the learned Sessions Judge, Shillong, whereby the appellant is convicted u/s 5 of the Explosive Substance Act, 1884 and sentenced to undergo R.I. of 3 years and a fine of Rs. 2000/-, in default, to further R.I. for 1 year. I have heard Mr. R Kataki, learned counsel appearing for the appellant and Mr. AC Buragohain, learned counsel appearing for the CBI.

2. The criminal process in this case was set in motion with the lodging of an FIR on 6.4.1981 with the Jorhat Police Station by one P.C. Borah, Special Assistant to the Commissioner, Upper Assam Division, where it was informed that when Shri ES Parthasarathy (IAS), Commissioner, Upper Assam Division entered his office and took his seat at about 10-30 a.m. an explosion occurred resulting in complete destruction of the chair and the Commissioner was thrown down on the floor with severe bleeding injuries. On the basis of the FIR, Jorhat PS Case No. 16(4)/1981 was registered and subsequently when the case was handed over to the CBI and a fresh case i.e. RC 3/1981 was registered by the Central agency u/s 302, IPC and Section 5 of the Explosive Substance Act (hereinafter referred to as

the" Explosive Act").

3. In course of the investigation it came to light that accused Niren Sarma had procured two hand grenades from another accused Pradeep Hazarika and one of those hand grenades was handed over to the appellant Prabin Saikia. As recovery of the hand grenade with a cap 22 fuse and detonator was made on the basis of the custodial statement given by the accused Prabin Saikia, a charge sheet against the appellant Prabin Saikia and Pradeep Hazarika was submitted u/s 5 of the Explosive Act. Be it mentioned that in respect of the offence of murder, separate charge sheet(s) were submitted by the prosecution and the petitioner was not charged u/s 302, IPC.

4.1. The Chief Investigation Officer of the CBI Mr. Murari Lal (hereinafter referred to as the "Chief LO.") interrogated the appellant on 17.7.1981 and the following statement of the accused was recorded by the Chief LO. on 17.7.1981.

On interrogation by Sri Murari Lal, Dy. SP/CBI and in the presence of S/Sh P.V. Ravindran, J.E. (E) and Kailash Ram, JE (Civil), I state that one grenade along with its 22 cap fuse and detonator which was given to me by Sr. Niren Sharma s/o late Suryadhar Sharma r/o Dagaon, p.s. Dhekargora, Jorhat, has been concealed by me underground under the granary of my house at Seujipam, which I can point out and get the same recovered. The grenade and its parts are wrapped with a khaki paper duly covered by a polythene bag.

4.2. The statement marked as Ext. P-35 was witnessed by two independent witnesses PV Ravindran (PW 27) and Kailash Ram (PW 40). On the basis of the accused statement, the Chief LO. rushed to the Seujipam village, residence of the accused, at Sibsagar district where the appellant directed the police party to the granary located within the compound of the accused's residence (West side). Then the accused pointed out the spot where the grenade was concealed at a depth of about 6" under the earth and the hidden article kept in a polythene bag was recovered. The police found that a grenade with a detonator and fuse wire and 22 cap were kept inside the hidden plastic bag. A recovery memo was prepared by the Chief LO. and the PW 27 and PW 40, who accompanied the police team from Jorhat to Seujipam village at Sibsagar were made the witnesses of the recovery memo (Ext. P-36).

5. Basing on the evidence of PW 40, PW 49 (a Sub Inspector of the CBI assisting the Chief I.O.) and the PW 54 (the Chief I.O.) and also the evidence of the hostile witness (PW 27), the learned Sessions Judge concluded that the hand grenade marked as Material Exhibit-7 was recovered on the basis of the custodial statement given by the accused from its hiding place shown by the accused and accordingly by considering the corroborating evidence of PW 40, PW 49 and PW 54, the Court held that the charge u/s 5 of the Explosive Act has been established against the appellant and accordingly he was convicted under the said Section.

6.1. Mr. P. Kataki, learned counsel submits that the hand grenade (Ext.P-7) was

never recovered from the residence of the appellant at Seujipam village and a false recovery memo (Ext. P-36) has been prepared by the Chief I.O. and accordingly the conviction cannot be sustained. He submits that the prosecution failed to establish beyond reasonable doubt that the hand grenade in question, was recovered from the possession of the accused and accordingly the impugned conviction is assailed as unsustainable by the learned counsel.

6.2. Challenging the genuineness of the recovery memo, Mr. Kataki points out that the Chief I.O. had not recorded the time when the recovery memo (Ext.P-36) was prepared. The counsel submits that no local villager of Seujipam village was made a witness of the seizure memo and the same being doubtful it cannot be used to prove that the grenade was recovered from the possession of the accused appellant.

6.3. The appellant also contends that the recovered articles were not sent for examination by the Explosive Expert and accordingly it cannot be said with absolute certainty that they are "Explosive Substance" within the meaning of the Explosive Act.

6.4. Referring to the evidence of the Chief I.O., Mr. Kataki projects that one Sri B. Barua, S.1. of Assam Police was all along present during the investigation of the case under the Explosive Act and this police officer, though a vital witness, was withheld by the prosecution. Therefore he contends that veracity of the story projected by the prosecution cannot be accepted to be correct.

6.5. Assailing the correctness of the custodial statement (Ext. P-35), Mr. Kataki submits that the Chief I.O. had testified that the accused gave his statement partly in English, partly in Assamese and partly in Hindi. But it is not mentioned who had translated the Assamese part of the statement which was reduced into English by the Chief I.O. himself. Accordingly, the counsel contends that the statement leading to the discovery has not been proved beyond reasonable doubt in the present case.

6.6. The learned counsel also submits that after the recovery was made, the recovered articles were not sealed at the spot and tampering of the articles cannot therefore be ruled out and accordingly the conviction is contended to be unreasonable.

7.1. Defending the impugned judgment, Mr. AC Buragohain, learned counsel refers to the recovery memo (Ext. P-36) to project that Explosive Substance was recovered from the possession of the accused after he led the police to the hiding place beneath the granary of his house and since the possession of grenade (Ext.P-7) itself is unlawful, the Court had rightly convicted the accused u/s 5 of the Explosive Act

7.2. Mr. Buragohain, learned counsel contends that since the recovery was made on the basis of the statement given by the accused while in custody, the evidence is admissible u/s 27 of the Evidence Act and considering the recovery of

the explosive substance, the conviction should be upheld by this Court.

7.3. The CBI counsel submits further that independent witnesses were present when the accused gave the statement and also at the time when recovery of the explosive substance was made from the village house of the accused and accordingly he argues that evidence are sufficient to uphold the conviction of the appellant.

8. In so far as the statement given by the accused (Ext.P-35) regarding concealment of the grenade beneath the granary of his house at Seujipam village, the statement was recorded by the Chief I.O. in English. In his cross-examination, the Chief I.O. had stated that, accused gave a part of his statement in Assamese. But it is not reflected anywhere as to who had translated the Assamese portion of the statement and it is also not clear as to which portion of the Ext. P-35 statement was given in vernacular. It is also noteworthy that the two persons who witnessed the accused's statement were not familiar with Assamese and the only person, who knew Assamese and was present throughout i.e. the S.I. of the Assam Police Shri B. Barua, was withheld by the prosecution. Under such circumstances, independent inputs in the statement (Ext.P-35) beyond what was stated by the accused can entirely be ruled out and accordingly I hold that the Ext.P-35 cannot be made the basis for proving the recovery of the offending article.

9. As regards the recovery made from beneath the granary of the accused in his Seujipam village, the Chief I.O. stated that the village people gathered when they took the accused to make the recovery. PW 49 Ashwani Kumar, who accompanied the police team, stated that they reached the village at around noon time. Yet the police did not bring any local villager to witness the recovery of the grenade. On the other hand, PW 40 had stated that they reached the place of recovery (Seujipam village) at night-and that is why no local villagers could be made to witness the recovery memo. These discrepancies naturally cast doubt on the veracity of the evidence of the Chief I.O. (PW 54) and the S.I. of the CBI (PW 49) who had testified that they reached the village during day time and at that time many villagers had gathered near the residence of the accused when the recovery was made. Considering the discrepancy on the evidence of witnesses on the timing of the recovery and noting the absence of time in the recovery memo and finding that local villagers were not made witness of the recovery memo, I feel that the story projected by the prosecution suffers from glaring infirmity and the recovery memo is found to be unproved, beyond reasonable doubt.

10. It must also be noted that the grenade was wrapped with paper and was packed inside a polythene bag and then hidden beneath the granary in the accused's house. The recovery memo stated that after the polythene bag was dug out from the pit, when it was unpacked the grenade was discovered inside the wrapping paper. But surprisingly one of the witnesses P.V. Rabindran (PW 27) had stated that he does not remember whether the recovery memo (Ext.P-36) was prepared in his presence. He also stated that he had never the explosive

materials till he came to give evidence in the Court. Similarly, the second witness Kailash Ram (PW 40) had also stated that after the polythene bag was brought out from its hidden place was carried in a jeep in the same condition to the Circuit House at Jorhat and was opened only at Jorhat by the Chief I.O. Therefore, the evidence of the independent witness suggests that recovery memo was not prepared at Seuqipam village, Sibsagar and was prepared subsequently by the Chief I.O. at Jorhat. Under such circumstances, the evidentiary value of the recovery memo (Ext.P-36) gets considerably diminished and accordingly, I feel that the same cannot be made the basis for sustaining the conviction.

11. That apart, it shouldn't be overlooked that the appellant has not been charged for murder. No allegation is made that the grenade was to be used for any particular crime. Considering that the recovered article was not sealed and was not sent for examination by Explosive Expert, I find scope for doubting ether the recovered articles were actually explosive substance within the meaning of the Explosive Act. In the absence of any evidence to show that Ext. P-Z is capable of being-I feel that it may be unsafe to uphold the conviction given u/s 5 of the Explosive Act.

12. Since the prosecution had withheld vital witnesses like the Assam Police S.I. Sri B. Barua, who was present throughout the investigation, and had kept out the local villagers of Seuqipam village from being witnesses to the recovery and since the recovered articles were not sealed at the spot, the possibility of the recovered articles being tempered subsequently cannot entirely be ruled out and this would naturally affect the weight of the evidence of Ext. P-36.

13. According to me, non-sealing of the seized articles at the spot was a serious lapse and consequently, following the ratio of the Apex Court in Amarjit Singh Alias Babbu -Vs- State of Punjab, 1995 Supp (3) SCC 217 and the decision in Sahib Singh v. State of Punjab, reported in (1996) 11 685, and noting the infirmities discussed in the preceding paragraphs, I hold that the appellant is entitled to benefit of doubt. I therefore, allow this Appeal and set aside the conviction and sentence of the appellant. Since the accused is on bail, he is discharged from his bail bonds. The Registry to return the LCRs.