

GAHC010235462013



2024:GAU-AS:8760

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI
CRIMINAL APPEAL NO. 398/2013

1. Sri Lachit Rabha,
S/o Sri Dinesh Rabha,
Village- Kamarpara,
P.S.- Rongjuli,
District-Goalpara, Assam.

2. Sri Bhabesh Rabha,
S/o Sri Karuna Kanta Rabha,
Village- Letkubari,
P.S.- Rongjuli,
District-Goalpara, Assam

.....Appellants.

-Versus-

The State of Assam,
Represented by the Public Prosecutor, Assam.

.....Respondents/Opposite parties.

Advocates for the appellant: Mr D A Kaiyum.

Advocate for the respondent: Mr B B Gogoi, Addl. PP, Assam.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 03.09.2024
Date of judgment : 03.09.2024

JUDGEMENT AND ORDER(ORAL)

Heard Mr D A Kaiyum, learned counsel for the appellants, 1) Sri Lachit Rabha and 2) Sri Bhabesh Rabha, and heard Mr B B Gogoi, learned Additional Public Prosecutor for the respondent/State.

2. Sri Lalit Rabha and Sri Bhabesh Rabha (hereinafter also referred to as the appellants or A-1 and A-2, respectively), have filed this appeal challenging the Judgment and Order dated 05.11.2013, passed by the learned Sessions Judge, Goalpara, in Sessions Case No. 17/2011, convicting and sentencing the appellants under Section 25 (1-B) of the Arms Act, 1959 (the Act of 1959, for short), to undergo Simple Imprisonment for 1 year and to pay a fine of Rs. 3,000/- with default stipulation and convicting and sentencing the appellants under Section 5 of the Explosive Substances Act, 1908, (the ES Act, for short) to undergo Simple Imprisonment for 5 years and to pay a fine of Rs. 5,000/- each with default stipulation.

3. The case against the appellants is that they were active hardcore extremists of a banned militant organization and they have been indulging in subversive activities.

4. The genesis of the case was that on 01.09.2008, at about 10:30 am, the informant Khargeswar Rabha, acting on a tip off regarding the presence of three accused persons in the

house of the accused Rofi Rabha, immediately, constituted a team of his staff and other security personnel and raided the house of Rofi Rabha and found the appellants inside the house. The appellants were caught red-handed in possession of 15 AK series ammunition and 3 Detonators. Rofi Rabha was not at home at that relevant point of time, but he had harboured the appellants. The seizure list was prepared in presence of Police personnel and on the same day, the In-charge of Darangiri, i.e., Sri Khargeswar Rabha, lodged a written FIR to the OC of Rongjuli Police Station. On receipt of the FIR, the OC of Rongjuli Police Station registered the Rongjuli PS Case No. 60/2008, under Sections 120(B)/121/121A of the Indian Penal Code (IPC, for short), read with Section 25 (1-A) of the Act of 1959 and Section 5 of the ES Act. The informant embarked upon the investigation and he visited the place of occurrence (PO, for short). He prepared the site map of the PO from where the recovery was made and recorded the statements of the witnesses, including the other seizure witnesses. He forwarded the arms recovered for forensic examination. On collection of forensic report, he moved the then District Magistrate with a prayer for sanction. Prosecution sanction was granted and finally, on completion of investigation, charge sheet was laid under Sections 120(B)/121/121A of the IPC, read with Section 25 (1-A) of the Act of 1959 and Section 5 of the Act of 1908. At the time when the charge sheet was laid, all the accused including the appellants were under judicial custody, who were subsequently enlarged on bail. This case was then committed for trial.

5. At the commencement of trial, a formal charge under Sections 120(B)/121/121A of the IPC, read with Section 25 (1-A) of the Act of 1959 and Section 5 of the E S Act, was framed and read over and explained to the appellants, to which the appellants abjured their guilt and claimed innocence. Prosecution adduced the evidence of 5 witnesses, whereas the defence

cross-examined the witnesses to refute the charges. On the incriminating evidence projected by the prosecution, statements of the appellants were recorded under Section 313 CrPC and the appellants' answers to the questions were evasive in manner.

6. It is submitted on behalf of the appellants that all the witnesses except PW-3 are official witnesses. PW-3 is the wife of the accused Rofi Rabha, who had harboured the appellants. Her evidence is not similar. Her evidence reveals that the search operation was conducted at night, whereas all the other witnesses have stated that the search operation was conducted at 10:00 am. Moreover, the evidence of all the witnesses clearly reveals that not a single witness caught the appellants red-handed in possession of the ammunition, which has been recovered in the house of Rofi Rabha. The evidence of PW-3 reveals that the appellants were not caught red-handed in her house, but the appellants were brought by the raiding party from the rubber plantation to their house. This extends the benefit of doubt to the appellants.

7. The learned Additional Public Prosecutor has raised objection stating that the Judgment was correctly passed. The trial Court proceeded in its correct perspective and arrived at a just conclusion, which does not call for interference.

8. To decide this case in its proper perspective, the evidence is re-appreciated.

9. The informant, Sri Khargeswar Rabha deposed as PW-4 that on 01.09.2008, while serving as In-charge of Darangari Police Station, at about 10:00 am, he received a secret information that two extremists of Rabha Viper Army, namely, Lachit Rabha and Bhabesh Rabha, had taken shelter in Rofi Rabha's house. After a GD Entry, he proceeded to the PO. He has proved the GD Entry as Exhibit -2 and Exhibit-2(1) as his signature. PW-4 further

deposed that they surrounded the house of Rofi Rabha at about 10:30 am and searched his house and they found the appellants inside the house and they recovered 15 cartridges of AK series ammunition and 3 Detonators from their possession. These articles were seized vide Exhibit-1. He has proved his signature on the seizure list as Exhibit-1 (3). PW-4 further deposed that after preparing the seizure list, the seized articles along with the arrested appellants were brought to the Rongjuli Police Station and handed over to the Police. He recorded the statements of Constable Anil Basmatary, PW-1, Biva Rabha, PW-3 and Constable Rofiqul Islam, PW-2. He lodged the ejahar with the Police at Rongjuli Police Station. He has proved his signature and the ejahar (FIR) as Exhibit-3 (1) and Exhibit-3 (3) respectively. The Detonators were destroyed.

10. The learned counsel for the appellants has drawn the attention of this Court to the cross-examination of PW-4, who has admitted in his cross-examination that before the search operation was initiated, his body was not searched by the others. PW-4 has also admitted that the seized articles were not sealed at the PO.

11. It has been correctly held by the learned trial Court that the evidence of PW-4 is consistent to the FIR lodged by PW-4.

12. PW-4's evidence is corroborated by the evidence of PW-5, Sri Probhat Bora, who has deposed that on 01.09.2008, he was the OC of Rongjuli Police Station. On that day, PW-1 lodged an ejahar, Exhibit-3. He then registered a case and he embarked upon the investigation. He (PW-5) further deposed that Khargeswar Rabha (PW-4), registered a GD Entry for conducting a search operation in the house of Rofi Rabha and 15 cartridges and 3 Detonators were seized from possession of the appellants. The articles were seized and

handed over to Police and the appellants were arrested and forwarded to custody. He (PW-5) forwarded the articles for forensic examination. He recorded the statements of the informants and other witnesses. He obtained an order from the CJM, to destroy the detonators and he prepared the sketch map of the PO. He (PW-5) has proved the sketch map as Exhibit-4 and his signature as Exhibit-4(1) and Exhibit-5 as his prayer petition to the CJM to destroy the detonators. He has also identified the order of destruction as Exhibit-6 and Exhibit-7 as the certificate and Exhibit-6(1) as the signature of then PSI Roy.

13. The cross-examination of PW-4 and the evidence of PW-5 depicts that the detonators were destroyed as the detonators have posed a threat to the lives and property of the people residing in the nearby area. Exhibit-7 is the certificate issued by Captain Adjutant of 4th Kumaon Regiment, which was at that time, camping at Rongjuli.

14. PW-5 has further deposed that he collected the forensic report and he has proved the forensic report as Exhibit-8 and according to the report, the cartridges are 7.62 mm x 39 Rifle, which may be fired by 7.62 mm Assault Rifle. He has proved the forwarding as Exhibit-9 and Exhibit-10 as the prosecution sanction order. He has identified the signature of the then District Magistrate as Exhibit-10(1) as he is acquainted with the signature of the District Magistrate. He has proved the charge sheet as Exhibit-11 and Exhibit-11 (1) as his signature. He has identified the 15 cartridges which were produced in the Court for identification.

15. The learned trial Court did not rely on the evidence of PW-3 as according to the learned Court, PW-3 tried to topple the evidence. The learned trial Court has held that the evidence of PW-3 is contradictory to the evidence of all the other witnesses, as PW-3 tried to conflict the evidence of the other witnesses. The learned trial Court has relied on the uncontradicted

evidence of PW-1 and PW-2, which clearly depicts that the raid was conducted in the broad daylight and not at night.

16. Learned counsel for the appellants has argued that the cross-examination of PW-5 reveals that 2 independent witnesses were examined and 1 witness, Ranjit Rava was not enlisted as a witness. This argument, however, can be safely brushed aside. The cross-examination of PW-1 also clearly reflects that independent witnesses were not called to the PO as there were threats of cross-firing, which may endanger life. Some discrepancies could be elicited through the cross-examination of PW-1 and PW-2 relating to the entry, search and seizure, but no contradiction as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act, for short) qua Section 162 of the CrPC could be elicited through the cross-examination of the witnesses. The evidence of PW-1, PW-2, PW-4 and PW-5 clearly reveals that the house of PW-3 was searched and both the appellants were found in the house. The arms and ammunitions seized in the house were recovered from the appellants. The learned trial Court has correctly acquitted the other accused, Rofi Rabha, as he was not present in the house at the time of occurrence.

17. It is not possible that all the heavy ammunition could be recovered from personal possession of the appellants. The ammunition has to be kept or stored in a separate place. PW-5 has proved the sketch map as Exhibit-4, which clearly reveals the PO. The evidence of PW-1, PW-2, PW-4 and PW-5 has thus remained uncontradicted and uncontroverted, even through the vigorous cross-examination of the witnesses. Both PW-1 and PW-2 were the members of the raiding party and according to them, they conducted the search operation on 01.09.2008, at about 10/10:30 am. The evidence supports the fact that the arms and

ammunition were recovered from the possession of the appellants. The appellants could not justify the recovery of arms and ammunition from their possession. Their answers under Section 313 CrPC were vague and evasive. It was correctly held by the learned trial Court that although inadvertently, charge was framed under Section 27 of the Act of 1959, the simple recovery of ammunition inside the house of Rofi Rabha scales down the offence from Section 27 of the Act of 1959 to Section 25 (1-B) of the Act of 1959. Prohibited ammunition is defined in Section 2 (1) (h) of the Act of 1959 which reads-

“Prohibited ammunition means any ammunition, containing, or designed or adapted to contain, any noxious liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, [missiles] articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;

(i) *“prohibited arms” means*

(i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing, and includes artillery, anti-aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms.”

18. It was correctly held by the learned trial Court that the appellants are not liable of offence under Section 25 (1-A) of the Arms Act, as the appellants were not carrying prohibited arms or ammunition, as described under Section 2 (i) (h) of the Act of 1959.

19. I, therefore, record my concurrence to the decision of the learned trial Court that the

appellants have committed an offence under Section 25 (1-B) of the Act of 1959, read with Section 5 of the E S Act. The order of conviction is hereby upheld. However, this appeal has been pending for a prolonged period. The appellants will be highly prejudiced if they are forwarded to custody, at this stage. The offence allegedly occurred on 01.09.2008 and the appeal has been heard today and it took about 11 years to arrive at a logical conclusion. Much water has flowed under the bridge. The appellants have already undergone incarceration for more than 19 months. The conviction is upheld, but the sentence is scaled down to the period of detention already undergone by the appellants.

20. Therefore, the appeal is partly allowed. The appellants are convicted under Section 25 (1-B) of the Act of 1959. The Judgment and Order dated 05.11.2013, passed by the learned Sessions Judge, Goalpara, in Sessions Case No. 17/2011, is upheld and the conviction of the appellants under Section 25 (1-B) of the Act of 1959 and Section 5 of the E S Act, is reduced to the period of detention already undergone by the appellants, during investigation and trial. The fine sentence under Section 25 (1-B) of the Act of 1959 and Section 5 of the ES Act is also scaled down to Rs. 1,000/- each. Both the appellants are directed to pay a fine of Rs. 1,000/- each, under Section 25 (1-B) of the Act of 1959 and a fine of Rs. 1,000/- each, under Section 5 of the ES Act and in default of payment of fine to undergo Simple Imprisonment for one month each.

21. Send back the Trial Court Record.

JUDGE

Comparing Assistant