

(2005) 03 GUJ CK 0061
In the Gujarat High Court

Case No : Criminal Revision Application No. 637 of 2004

Abbasbaig Habibbaig Mirza

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-03-2005

Acts Referred:

Arms Act, 1959 — Section 25(1)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 227, 228, 397
Evidence Act, 1872 — Section 10, 25
Penal Code, 1860 (IPC) — Section 107, 109, 114, 120A, 120B
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15

Citation : (2005) 3 GLR 2418

Hon'ble Judges : M.D. Shah, J

Bench : Single Bench

Advocate : I.A. Shaikh and P.J. Malkan, for the Appellant; K.P. Raval, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M.D. Shah, J.

Heard Mr. P.J. Malkhan for the applicant and learned A.P.P. Mr. K.P. Raval for the respondent-State.

Rule. Mr. K.P. Raval, learned A.P.P. waives service of rule on behalf of the respondent-State. With the consent of the learned Counsel appearing for the parties, the matter is taken up for final hearing and disposal today.

1. This Criminal Revision application filed u/s 397 & 401 of the Code of Criminal Procedure is directed against the judgment and order dated 2-9-2004 passed by the learned Addl. Sessions Judge, Ahmedabad City, in Sessions Case no. 245 of 2004 below Exh.6 whereby the application for discharge preferred by the accused no. 3-the present applicant u/s 227 of the Criminal Procedure Code, 1973 came to be rejected.

2. The facts, shorn of unnecessary details, that are required for disposal of the present Criminal Revision Application are as follows:

2.1 On the day of incident i.e. 31-12-2002 at about 17.00 hrs. on the road leading to Naroda from Galaxy Cinema, Opp. Siddharth Chandan Bungalow, two unidentified persons in the age group of 20 to 25 years came riding on a motor cycle. The pillion rider is alleged to have worn black jeans pant and black jacket while the person driving the motorcycle is alleged to have worn black goggles and black cap. It is further the prosecution case that when a Tata Indica car bearing Registration no. GJ-1 H.E.1574 came to the said spot and slowed down, the pillion rider started firing using a pistol like small weapon at Jaydipbhai Patel who was at the relevant time occupying the back seat in the said car and caused injury to the left eye of Jaydipbhai. In this manner, the assailants had attempted to commit murder of Jaydipbhai Patel and fled away from the scene of incident.

3. Upon investigation of the said incident by the Investigation Officer of Naroda Police Station, the accused no. 1-Salimbhai, the accused no. 2 Mustaq and the accused no. 3-Abbasbaig Habibaig Mirza were arrested and report u/s 173 of the Criminal Procedure Code was submitted to the Court. Thereafter, the accused were charge sheeted in the Court of learned Metropolitan Magistrate, Ahmedabad, for commission of offences punishable under Sections 307 120-B 114 of the Indian Penal Code read with section 25(1) of the B.A. Arms Act.

4. As the offences punishable under the said "Code" and "Act" are exclusively triable by a Sessions Court, the case was committed to the Sessions Court which came to be registered as Sessions Case no. 245 of 2004 for trial.

5. Thereupon, a discharge application was preferred by the accused no. 3 (applicant herein) on the ground that charge could not have been framed against him as there was no evidence direct or indirect even remote that could link the accused no. 3 with the commission of the crime in question. The learned Additional Sessions Judge, Ahmedabad City, on the basis of the material placed before him came to the conclusion that there was sufficient material as would necessitate framing of the charge against the accused no. 3, and thereby, rejected the application of the accused no. 3 for discharge. It is against this order of the learned Additional Sessions Judge that the accused no. 3 (applicant herein) has approached this Court by way of the present Criminal Revision Application.

6. Mr. Malkhan, learned Advocate for the applicant has strenuously argued that except the statement of the co-accused, there is no other material or evidence which would even remotely point out an accusing finger at the accused no. 3 or involve him with the commission of the crime in question. He also argued that alongwith the charge sheet also nothing is produced so as to connect the present applicant with the commission of the crime in question. According to him, looking to Section 25 of the Evidence Act, the statement of co-accused is not admissible in evidence, and therefore, learned Additional Sessions Judge has erred in

coming to the conclusion that there was sufficient material to frame charge against the applicant.

7. In support of his submissions, the learned Counsel for the applicant has placed reliance on the observations made by the Honourable the Supreme Court in the case of *Kehar Singh and Others Vs. State (Delhi Administration)*, wherein at paragraph 255 of the judgment it has been held as under:

"255. It is urged that there was no charge against the accused under S. 109 of IPC and without such a charge, they are liable to be sentenced only for the offence of abetment and not for the murder. Reliance is placed on the provisions of S. 120-B IPC which provides inter alia that a party to a criminal conspiracy shall be punished in the same manner as if he had abetted such offence. The contention in my opinion is ill founded. It overlooks the vital difference between the two crimes; (i) abetment in any conspiracy, (ii) criminal conspiracy. The former is defined under the second clause of S. 107 and the latter is under S. 120-A. Section 107, so far as it is relevant provides:

"107. A person abets the doing of a thing,

Firstly.....

Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.....

Section 109 provides:

"Whoever abets any offence, shall if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

7.1 The learned Counsel for the applicant has next placed reliance on the judgment rendered by the Honourable Supreme Court in the case of *BHAGWAN SWARUP LAL BISHAN LAL v. STATE OF MAHARASHTRA* reported in AIR 1965 SC 682 wherein at paragraph 8 of the judgment it has been held as follows:

"6. Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus:

"When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."

The essence of conspiracy is, therefore, that there should be an agreement

between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from facts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But S. 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators, The said section reads:

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention , after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression " in reference to their common intention" is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law, with the result, anything, said, done or written by a co-conspirator, after the conspiracy was former, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short the section can be analysed as follows: (1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy, (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other, (3) anything said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy

whether it was said, done or written before he entered the conspiracy or after he left it, and (5) it can only, be used against a co-conspirator and not in his favour."

7.2 With respect, I do agree with the principles laid down by the Honourable Supreme Court in the aforesaid two decisions, but I am of the opinion that the ratio of these decisions stand on an entirely different footing as in these cases before the Supreme Court there was full fledged recording of evidence and the judgment was delivered by the trial Court which was challenged before the High Court and the Supreme Court. Reliance placed by the learned Advocate for the applicant on these two decisions therefore do not merit acceptance.

8. The learned Counsel for the applicant has next placed reliance on the decision rendered by the Honourable Supreme Court in the case of Suresh Budharmal Kalani @ Pappu Kalani Vs. State of Maharashtra, wherein it has been held that the Court is not justified in taking into consideration such confession for framing charges against the co-accused on the ground that the prosecution could examine him as a witness for establishing the facts disclosed in his confession. It is true the High Court is very correct in laying down this proposition but in the case before the Supreme Court the statement of two witnesses recorded u/s 161 of the Criminal Procedure Code do not speak of any conspiracy much less of a conspiracy to commit murder and on the basis of that statement, charge u/s 120-B could not have been framed. As far as the instant case is concerned, the co-accused has connected the present applicant as conspirator in committing the crime in question, and hence, Section 10 of the Evidence Act would come into play. In that view of the matter, the authority cited by the learned Counsel for the applicant is not in any manner, applicable to the facts of the present case.

9. The learned Counsel for the applicant has next placed reliance on the judgment rendered by the Honourable Supreme Court in the case of State of Gujarat Vs. Mohammed Atik and others, wherein it has been held that it is well neigh settled that Section 10 of the Evidence Act is founded on the principle of law of agency by rendering the statement or act of one conspirator binding on the other if it was said during subsistence of the common intention . If so once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made in reference to their common intention. In other words, a post arrest statement made to a police officer, whether it is a confession or otherwise, touching his involvement in the conspiracy, would not fall within the ambit of Section 10 of the Evidence Act. It is the contention of the learned Counsel that in the present case also post arrest statement made to a police officer being of a similar nature would not fall within the ambit of Section 10 of the Evidence Act. It is important to note that in the case before the Supreme Court the accused were facing trial under the Terrorists & Disruptive Activities Act and confessional statement u/s 15 of the TADA Act was there on the record of the case and the Supreme Court has held that the prosecution can be permitted to make use of confessional statement recorded u/s 15 of the TADA Act against the accused who were facing trial. That is not so in

the present case. In the present case, the fact whether the accused had entered into a conspiracy is to be determined at the trial, and therefore, the trial is required to be permitted and without framing of the charge, the trial Court cannot evaluate the evidence on record. It is pertinent to note here that the statement of the co-accused was recorded in another case, and hence, the Honourable Supreme Court was of the view that the provisions of Section 10 of the Evidence Act is not applicable to that case. The authority cited by learned Counsel for the applicant would, therefore, be of no help to him.

10. As against that, the learned A.P.P. Mr. K.P. Raval has submitted that the order passed by the learned Additional Sessions Judge, City Civil Court, Ahmedabad, is in accordance with law, after proper appreciation of the material on record which does not call for interference at the hands of this Court. He, therefore, prayed that the Revision be dismissed.

11. To substantiate his above submission, learned A.P.P. has placed reliance on the decision of the Honourable Supreme Court in the case of State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, wherein it has been held as under:

"But the contention that any statement of a conspirator, whatever be the extent of time, would gain admissibility u/s 10 if it was made "in reference to" the common intention, is too broad a proposition for acceptance. We cannot overlook that the basic principle which underlies in Section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10 which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators." This is not a stage where the Court is required to come to a conclusion as to when a person snapped out of any conspiracy. I find considerable force in the submission made by the learned A.P.P. as in the case on hand, the fact whether the applicant-accused no. 3 had entered into a conspiracy or not with the remaining accused can only be ascertained after recording of evidence at the trial. It becomes therefore, necessary that the charge has to be framed so as to enable the trial Court to evaluate the evidence on record. The submission, therefore, merits acceptance."

12. The learned A.P.P. has next relied on the decision of the Honourable Supreme Court rendered in the case of Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, wherein it has been held that at the stage of framing charges, the prosecution evidence does not commence. The Magistrate has therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied

at the stage of Sections 227 and 228. In this context, the learned A.P.P. has also relied on the decision of the Honourable Supreme Court in the case of State of Maharashtra Vs. Priya Sharan Maharaj and Others, wherein at paragraph 8 of the judgment it has been held at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. In the instant case, the accused had pointed out the route taken by Jaydip Patel (the victim) to visit his clinic and had also pointed out the clinic to the other co-accused reference to which has emanated from the statements of the co-accused. It has to be appreciated that question whether the statement made by the co-conspirator is admissible u/s 10 of the Evidence Act is to be adjudicated at the trial and this would depend upon the facts and evidence that would be available during the trial. Thus, when there is sufficient material to proceed against the accused the framing of the charge is necessary. The submission is therefore well founded and requires to be accepted.

13. Apart from this, reference is required to be made to the decision rendered by the Apex Court in the case of OM WATI (SMT) AND ANR. v. STATE THROUGH DELHI ADMN AND ORS., reported in 2001 SCC 685, wherein at paragraphs 7 and 8 of the judgment it has been held that:

"Now no reasons are required to be recorded when the charges are framed against the accused persons. At the stage of passing the order in terms of Section 227 of the Code, the court has merely to peruse the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. If upon consideration the Court is satisfied that a prima facie case is made out against the accused, the Judge must proceed to frame charge in terms of Section 228 of the Code. Only in a case where it is shown that the evidence which the prosecution proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence cannot show that the accused committed the crime, then and then alone the court can discharge the accused. The Court is not required to enter into meticulous consideration of evidence and material placed before it at this stage."

14. Reverting back to the facts of the present case in the light of the ratio of the aforesaid decision, we find that it has come out in the evidence that shots were fired at on the victim Dr. Jaydip Patel causing injuries to him and it is the applicant-accused no. 3 who had not only pointed out the route taken by Dr. Jaydip Patel to visit his clinic but he had also pointed out the clinic itself, and therefore, a strong suspicion can be gathered that the applicant-accused no. 3 had entered into a criminal conspiracy with the other accused in an attempt to commit murder of said Dr. Jaydip Patel. This position is also reflected from the statements of the co-accused. Now this aspect whether the present accused had entered into a criminal conspiracy can only be ascertained at the trial which

necessitates the framing of the charge. The record also shows that the accused was subjected to a lie detector test in reference to which the learned Additional Sessions Judge has formed an opinion that it is possible that the accused was not speaking the truth. The legality, validity or evidentiary value of the lie detector test is again a question which has to be determined at the trial. I am, therefore, of the opinion that, in the present case, there is sufficient material on record which would indicate that the framing of the charge against the applicant is essential.

15. Having given my anxious thought and consideration to facts of the case, the evidence on record and the submissions urged at the Bar by the rival sides, I am constrained to hold that the learned Additional Sessions Judge, Ahmedabad, has correctly appreciated the evidence and arrived at a just and legal conclusion in rejecting the application for discharge filed by the applicant-accused no. 3 by order dated 2nd September 2004 in Sessions Case no. 245 of 2004.

16. As a result of the foregoing discussion, there being no substance in this Criminal Revision Application, the same fails and is dismissed.

16.1 At this stage, learned Counsel for the applicant requests that this order may be stayed for a period of fifteen days so as to enable him to approach the higher forum, however, looking to the peculiar facts of the present case, the request is rejected.