

(2016) 10 GUJ CK 0005

In the Gujarat High Court

Case No : Criminal Revision Application (Against Order Passed By Subordinate Court) No. 335 of 2014.

Abdul Azziz Mohammad Shafi Rangwala - Applicant @HASH State of Gujarat

Date of Decision : 04-10-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, Section 397, Section 401

Citation : (2016) 4 Crimes 514 : (2016) 4 Crimes 583

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : Party-In-Person, for the Applicant No. 1; Mr. K.P. Rawal, APP, for the Respondent No. 1

Final Decision : Disposed Off

Judgement

S.G. Shah, J. - The applicant herein is one Abdul Aziz Mohammad Shafi Rangwala, who has preferred this Revision Application as party-in-person. The record shows the development in Revision Application from the year 2014 till date and therefore, I do not want to reproduce the history and minute details of proceedings before the trial Court as well as before this Court and directly coming to the issue raised in this Revision Application. The Revision Application is mainly against the prosecuting agency being the State, wherein the applicant has prayed for following reliefs:-

"(B) The Hon'ble Court may also be graciously pleased to call for Record and Proceedings of Sessions Case No.266 of 2009 pending in the Hon'ble City Sessions Court No.9, Ahmedabad and examine the same for the purpose of satisfying itself as to the correctness, legality and propriety and quash and set-aside the impugned order dated 11.2.2014 passed below Exh.22 and 24 therein and restore arm-protection to all witness and applicant for fearless submission.

(C) The Hon'ble Court may also be graciously pleased to remand the case to the learned trial Court for giving an opportunity of leading evidence and to give deposition on oath to bring material facts and truth and of hearing in favour of

the applicant in accordance with law on the principle of natural justice considering the principle of Equality to Law under the Constitution of India;

(D) The Hon''ble Court may also be graciously pleased to stay or suspend the operation and implementation of the impugned order dated 11.2.2014 passed below Exh.22 and 24 in Sessions Case No.266 of 2009 by the Hon''ble City Sessions Court No.9, Ahmedabad and further be graciously pleased to stay and/or suspend the trial pending the hearing and final disposal of the present application;"

2. Therefore, the basic fact is only to the effect that applicant wants to disclose certain facts with reference to the incident for which Sessions Case No.266 of 2009 is pending before the City Sessions Court of Ahmedabad. Though applicant has disclosed so many facts and details supported by documentary evidence that how and why he is concerned with the case on hand. However, at this stage, when prima facie material specifically proves that applicant is certainly concerned with such Sessions Case No.266 of 2009, discussion of all such details would otherwise prejudice the trial and therefore, reproduction and discussion of such details have been avoided at this stage, except to recollect that it is specific case of the applicant herein that on the day and date of incident of Godhra Carnage in the year 2002 i.e. in the morning of 27.2.2002, he and his family members had telephoned to police control room from his landline phone No.079- 22147221, requesting to restore police protection, which was withdrawn from his area for which his family members gave statement before the concerned Police Inspector, but no attention was given and it was denied to record their statement in writing by the concerned P.I. It is further submitted that on next day i.e. on 28.2.2002, in the noon, when applicant was at home, the mob from surrounding area came to their street and assaulted on the residents of the street as a result of such assault, as many as 50 families of the street have left their residence and shifted to nearby Masjid of Sarangpur, near Rosy Cinema to save their lives. It is further contended that at that time, six houses and three shops were set on fire and robbed by committing criminal trespass by the members of the mob. It is further contended that the applicant had given complaint to the police officer in writing as eye-witness and B.D. Sihoni took the applicant as prosecution witness before the Nanavati Commission on 31.7.2003, where applicant had deposed on oath being eye-witness to the said incident. It is further stated that applicant had disclosed the motive of miscreants before the Nanavati Commission so also the fraudulent management of the Government and even WAKF property as well as encroachment and unauthorised construction and conversion of residential property to commercial houses by antisocial miscreants under the name of Ekta Complex at Sarangpur Serkiwad in utter disregard of the Disturbed Area Act, 1991. There are several other information disclosed by the applicant in his Revision Application, which is supported by affidavit and there is nothing on record to confirm that such information is either incorrect or not concerned with the Sessions Case No.266 of 2009. However, I do not wish to reproduce all such facts for the aforesaid reason that applicant has yet to prove all such facts before

the concerned trial Court and therefore, its discussion and determination on such fact would otherwise prejudice the trial.

3. But, the fact remains that when the applicant has filed an application at Exh.24 before the Sessions Court, praying to examine him as a witness because investigating agency has selectively not added his statement in the charge-sheet and thereby, not shown him as a witness, may be because of the fact that he would be a good and positive witness to adduce specific evidence, such application at Exh.22 has been dismissed by the Session Judge vide impugned order dated 11.2.2014. Such impugned order is practically deciding two applications i.e. application at Exh.22 whereby the applicant has prayed to examine him as a witness and application at Exh.24 whereby the applicant has tried to produce certain documentary evidence with a prayer of protection and to examine other witnesses whose names are not disclosed in the charge-sheet.

4. Before verifying the irregularity and illegality, if any, in such impugned order, if we peruse the development pending this Revision Application, one glaring and surprising, but at the same time, unfortunate and disturbing fact has been revealed on record, as disclosed by the applicant that though the trial Court has refused to examine him as a witness, even after he has disclosed that he is aware about the certain facts of the incident, the trial Court has examined one witness as prosecution witness No.11, namely, Islamuddin Kamruddin Shaikh on 9.1.2013, in fact, such person has expired long back before such deposition i.e. on 10.3.2004. Thereby, practically, the prosecuting agency has while examining the witnesses on record, committed a blunder by examining the prosecution witness No.11 at Exh.42 as one Islamuddin Kamruddin Shaikh on 9.1.2013 though such person had died on 10.3.2007. The death certificate of such person is at page No.365 of the application, which confirms that Islamuddin Kamrudding Shaikh has expired on 10.3.2007. If it is so, the deposition at Exh.42 as PW-11 in the name of such person is nothing, but grave & material irregularity, which certainly amounts to illegality for which no further comments are necessary inasmuch as it is clear that the deposition of dead person is recorded and thereby, somebody has impersonated himself as such dead person before the Sessions Court. Copy of such deposition at Exh.42 is at page No.324 on record, which confirms that he has turned hostile and therefore, he was cross-examined by the public prosecutor. Thereby, it becomes certain and clear that the deposition of a victim is recorded by impersonating a person, who has already died and deposition is recorded in favour of the accused, wherein such impersonating witness has deposed before the Court that he does not know anything about the incident and that he has not seen anything. But, the fact remains that the person has no option, but to state that incident has taken place and because of such disturbance, he has left his house of Sarangpur and went to stay at Danilimda. Fortunately, the story of his statement has been brought on record during the cross-examination of the witness by the learned APP wherein there is categorical disclosure that what happened and how and who were present at the relevant time. Thereby, when witness has expired, prosecution

and probably the accused have forgotten to realise that when witness could not come forward to depose, there would be no evidence against the accused, but to secure the acquittal, probably accused have managed to impersonate a witness and to depose in his favour, but in such exercise, both the prosecuting agency and the Court have failed to take necessary steps to see that there may not be any such incident where deposition of dead person is recorded as a live person.

5. The above fact is now admitted position on record pursuant to affidavit filed by Mr. Kanubhai Devshibhai Khambhala, P.I. of Khadiya Police Station of Ahmedabad city, wherein he has stated as under:-

"(1) I say and submit that I am filing this affidavit as per court's order dated 21.1.2015, 22.6.2016 and 31.8.2016, wherein it has been directed that before the trial court one dead person namely Ismailuddin Kamruddin Shaikh as PW11 at Exh.42 has been examined and therefore, respondent State is called upon to explain on oath that how deposition of said Islamuddin Kamruddin Shaikh is recorded as Exh.42 as prosecution witness no. 11 on 9.1.2013, when he has expired on 10.3.2007.

(2) I say and submit that with regards to the direction given by this Hon'ble Court, I have made inquiry for the direction given by the Hon'ble Court and pursuant to the direction, PSI Shri P.D. Parmar has been directed to inquire about this. I say and submit that statement of son of the deceased, Mohmed Azaruddin Islamuddin Shaikh, residing at D/2, Super Royal Flats, Dariapur, Ahmedabad was recorded and it transpires from the statement that PW13 Islamuddin Kamrudding Shaikh, who was examined before trial court is his father and he is not aware as to whether he was a witness before the trial court and summons has not been issued either to the son or to his family member. As per the statement of Mohmed Azaruddin Islamuddin Shaikh, son of the deceased Islamuddin Shaikh has passed away on 10.3.2007 and he has produced the death certificate in his support. Further it has been stated by the son Mohmed Azarudding that they have sold their house situated in Sarkivad at Sarangpur, Khadia in the year 2011 and started living in Dariapur.

(3) I say and submit that statement of Unarmed Head Constable, Arjunsinh Chatursinh Solanki has been recorded who has served the summons of the Sessions Court in the year 2012 and 2013 and has confirmed that he has received the said summons issued by trial court to the served upon PW13 Islamudddin Kamruddin Shaikh residing at 64/1, Sarkiwad, Sarangpur, Ahmedabad and according to him he made inquiry about Islamudding Kamruddin Shaikh at that time from one Musefuddin and Unarmed Head Constable Arjunsinh Chatursinh Solanki came to know from him that said person i.e. Islamuddin Kamruddin Shaikh has been admitted into the Nadiad Hospital for the purpose of treatment of his eye. Thereafter, to get next date, Unarmed Head Constable Arjunsinh Chatursinh Solanki has sent back the summons on 14.12.2012 with his endorsement. I say and submit that documents pertaining to the endorsement made on summons are not obtained from court and in this regard after getting

the paper from record of this Hon"ble High Court, I will produced the same. I say and submit that thereafter I will be able to verify original record under what circumstances, the depositions of dead person has been recorded before the trial court. I say and submit that at Created On Tue Dec 06 14:10:33 IST 2016 the end of inquiry action will be taken against the defaulter. I say and submit that the complete report will be submitted before this Hon"ble Court within a period of fifteen days.

(4) I say and submit that pursuant to the direction given by this Hon"ble Court earlier, the police protection has been continued to the petitioner and order has been passed by the Commissioner of Police on 2.9.2016."

In above affidavit-in-reply, in two places instead of PW11, it has been wrongly typed as PW13.

6. Thereby, practically, the grievance of the applicant has been proved on record, which shows that there is material irregularity and illegality in the proceeding before the trial Court and therefore, irrespective of challenging the impugned order, this Court has got ample jurisdiction to exercise revisional powers to modify or to quash and set-aside any order, which is not proper and legal. The provision of Section 401 of the Criminal Procedure Code specifically provides that in case of any proceeding, the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 of the Cr.P.C. Section 391 of the Cr.P.C. permits the appellate Court to take further evidence or direct it to be taken when it thinks that additional evidence is necessary.

7. Section 311 of the Cr.P.C. is also quite clear which permits the Court to examine any person at any stage of any inquiry or trial or other proceedings under Cr.P.C. either by summoning him as a witness or examining any person in attendance, though not summoned as a witness, Therefore, when applicant is in attendance before the Court by filing an application, there is no reason to deny to examine him. Even otherwise, his evidence would be subject to scrutiny of judicial eye and cross examination by the accused.

8. Therefore, this is a fit case to exercise jurisdiction to allow the Revision Application and hence, though this is a Revision Application by third party to examine himself before the Sessions Court and Revision Application by party-in-person, rule be issued to the prosecuting agency so also to the original accused to show cause as to why this order should not be made final considering the fact that as provided under Sub-Section (2) of Section 401 of the Cr.P.C., no order in revision can be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleaders in his own defence.

9. It is also made clear that the prosecuting agency has already realised its mistake and therefore, they are going to proceed further in accordance with their

disclosure in affidavit by Mr. Kanubhai Devshibhai Khambhala and as observed in order dated 9.9.2016.

10. Therefore, the applicant as well as respondents are directed to disclose the name and details of the original accused in Sessions Case No.266 of 2009 within a week without fail. On receipt of such information, rule be issued upon such accused, which is to be served through the concerned Sessions Court in pending Sessions Case No.266 of 2009, making it returnable on 21.10.2016.

11. Applicant has to provide full set of pleadings for service to accused.

12. Yadi of this order be sent to the concerned Sessions Court.

13. Respondent is directed to submit final report as per paragraph 3 of the affidavit by Mr.Kanubhai Devshibhai Khambhala, P.I. of Khadiya Police Station of Ahmedabad city.