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**(2016) 06 GUJ CK 0035**

**In the Gujarat High Court**

**Case No :** Criminal Revision Application (Against Order Passed by Subordinate Court) No. 423 of 2016

Akbar Amirali Kasambhai Jesani APPELLANT

Vs

State of Gujarat RESPONDENT

**Date of Decision :** 21-06-2016

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 227
Motor Vehicles Act, 1988 — Section 177, Section 184
Penal Code, 1860 (IPC) — Section 279, Section 304A

**Citation :** (2017) CriLJ 1464 : (2017) 2 Crimes 438 : (2016) 4 GLR 3320

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

**Bench :** Single Bench

**Advocate :** Mr. Hardik A. Dave, Advocate, for the Applicant No. 1; Mr. Manan Mehta, A.P.P, for the Respondent No. 1

**Final Decision :** Allowed

# Judgement

Mr. S.G. Shah, J. (Oral)—Rule. Mr. Manan Mehta, learned APP waives service of rule for respondent-State.

2. Heard learned advocate Mr. Hardik Dave for the applicant and learned APP Mr. Manan Mehta for the respondent-State.

3. Since applicant is ready with the compilation of papers of charge-sheet, which are already supplied to the other side, by consent of both the parties, matter is taken up for final disposal, considering the fact that admitting such matters and keeping it pending for final decision would unnecessarily disturb the pending trial before the Sessions Court, more particularly, when facts and circumstances are so clear, which otherwise requires admission of the present revision application, thereby to protect the applicant in the form of stay against the further proceedings, which is not advisable.

4. The applicant has challenged the order dated 18.4.2016 below Exh.7 by the

5th Addl. District and Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad in Sessions Case No.99 of 2015. Such application at Exh.7 was preferred by the present applicant being accused No.2 in such sessions case, which has arisen out of Bagodara police station C.R. No. I-8 of 2011 dated 27.5.2011 u/ss.279 and 304 of the Indian Penal Code r/w. Sections 177 and 184 of the Motor Vehicles Act, seeking discharge under section 227 of the Criminal Procedure Code.

5. The Sessions Court has, after discussing the factual details, observed that the act or omission committed by the present applicant, does not entitle him to be discharged totally from the offence under section 304 of the IPC and therefore, in one line it is stated that considering the police papers on record, applicant is not entitled to be discharged for the alleged offence.

6. Before discussing the factual details of the case, let us recollect the settled legal position so far as provision of discharge is concerned. It is certain that there must be a very strong suspicion to form a presumptive opinion regarding the existence of factual ingredients constituting the offence alleged and thereby prima-facie sufficient ground to sustain the charge, for framing the charges so as to start the trial against the accused persons. It is also well settled that while framing the charge or while considering the request for discharge, inquiry must necessarily be limited to decide if the facts emerged from such material constitute the offence for which the accused could be charged. At such stage, the Court may peruse the record for that limited purpose, but it is not required to marshal the evidence with a view to decide the reliability thereof. Thereby the Court has to consider the material at such stage only with a view to find out if there is a ground for presuming that accused has committed an offence or that there is no ground to prosecute him. Thereby, the Court has to sift the evidence, as it cannot be expected even at initial stage to accept all the prosecution story as gospel truth and even if it is opposed to common sense or the broad probabilities of the case, the Court has to consider the material with a view to find out that whether there is any ground to presume that the accused has committed the offence or that there is no ground for proceeding against him.

7. Therefore, before framing the charge the Court must apply its judicial mind on the material placed on record and must be satisfied with the commitment of offence by the accused was possible.

8. Whereas, perusal of charge-sheet and police papers would make it clear that, practically, present applicant has been assigned the work of strengthening of the road by one Classic Network Pvt. Ltd. by its letter dated 5.8.2010, copy of which is part of the charge-sheet. If we peruse such letter, it simply confirms that work order for mastic work for strengthening of road and rehabilitation of major bridge section at Ahmedabad - Bagodara - Rajkot road of National Highway 8A was assigned to him. In such work order, except rate and area where work is to be carried out and which material is to be used, in addition to financial terms and conditions, which we are not concerned at present, the only technical condition is to the effect that - "work shall be carried strictly as per the technical

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specifications and MORTH clause and as directed by Engineer Incharge."

9. Whereas, original work order by the State Authority pursuant to tender proceeding is issued in favour of one Classic Network Pvt. Ltd. by letter dated 11.3.2010 from the office of the Executive Engineer, National Highway Division of Ahmedabad. Even such work order does not confirm any condition upon the contractor except to finish the work within five months and that total work is assigned for Rs. 5,37,94,795.25 against the estimated cost of tender being Rs. 6,57,50,065.50 i.e. 18.18% below the estimated cost.

10. Therefore, because of an accident committed by the accused No.1 while driving a Dumper No. GJ-13V-7205 with another Chevrolet Car No. GJ-5CL-8351, which resulted into death of all the occupants of such passenger car, it cannot be said that the accident had taken place because of any omission on the part of accused No.2 in not placing proper signboard at the place of accident, which falls within the area where work of strengthening of the road is ongoing as per work order, which are referred herein above.

11. It is quite clear that practically, FIR is regarding an incident of vehicular accident, wherein complainant has categorically disclosed that when victims were travelling in such vehicle GJ-5CL-8351 towards Bagodara from Limbdi side, at the place of accident, a heavy dumper used for the work of strengthening the road had dashed with it because of its full speed, and when such heavy dumper turned turtle and fell upon the car, the car got burnt, resulting into death of all its occupants. Therefore, if at all anybody is negligent, then, driver of any one or both vehicles, but not the owner of the company, who has been assigned subcontract by main contractor for restrengthening of the road.

12. Whereas, the charge-sheet shows that the allegation against the applicant is only to the effect that he has not placed proper signboard that some work is in progress or that there is diversion. However, there is no iota of evidence in the charge-sheet papers that confirms such liability or responsibility on the part of the present applicant. On the contrary, the entire papers of charge-sheet simply confirms the negligence of driver of the dumper in driving the vehicle rashly, negligently and speedily at the place where work of restrengthening of road is ongoing.

13. Though there may be proof of commission of any offence, since there is no categorical and specific evidence in the charge-sheet, which can even prima-facie show the involvement of the petitioner - accused in commission of such offence, there is no reason to ask the petitioner to face the trial for couple of years. If at all it is so allowed, practically it would help the original culprit to get free from trial and punishment, because the entire machinery will unnecessarily waste their energy, to prove the case against the present petitioner, even in absence of any prima-facie evidence against him.

14. Therefore, though it is certain that any accused cannot be discharged if there is any prima-facie evidence against him, it is also certain that thereby presence

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of minimum and prima-facie evidence is must to frame charge and, therefore, there is provision regarding discharge of accused in Cr.P.C. that in absence of prima facie evidence against any person, the Court may discharge such person from the alleged offences.

15. In support of such conclusion, reference to certain judgments of the Apex Court are necessary, which are as under.

(1) AIR 1997 S.C. 2041: State of Maharashtra v. Priya Sharan Maharaj -

"It is held that at the stage of framing the charge, the Court has to consider the material with a view to find out if there is ground for presuming that accused has committed an offence or that there is no sufficient ground for proceeding against him and not for the charges by arriving at the conclusion that it is not likely to lead to a conviction."

(2) AIR 2000 SC 665 : 2000 SCC(2) 57 : State of MP v. SB Johari -

"It was held that, the Court at the stage of Section 227 and Section 228 is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. Only prima facie case is to be looked into. The charge can be quashed if the evidence which the prosecutor proposes to prove the guilt of the accused, even if fully accepted, it cannot show that accused committed that particular offence. Thus it is settled law that at the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trial."

(3) 2005 SC 359: State of Orissa v. Debendra Nath Padhi -

"The Apex Court has held that, it is seen from Section 227 of the Code that in a case triable before the Court of Session, if the Court on consideration of the record of the case and the documents submitted therewith and after hearing the submission of the prosecution and the accused if the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused after recording reasons for doing so."

(4) (1997) 4 SCC 393 : 1997 AIR SCW 1833: State of Maharashtra v. Priya Sharan Maharaj -

"Referring to the case of Niranjan Singh Karam Singh Punjabi (supra) held that at the stage of Sections 227 and 228, the Court is required to evaluate the material

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and documents on record with a view to find out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth and even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge, the Court has to consider the material with a view to find out that whether there is any 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."

(5) AIR 2007 SC 2149 : 2007 AIR SCW 3683 - Soma Chakravarty v. State -

"It is held as under: Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible."

(6) AIR 2012 SC 1890 - General Officer Commanding v. CBI

"It is held as under: The cognizance has to be taken of the offence and not of the offender and that it is the duty of the investigating agency to collect and to produce cogent evidence against the accused for framing charge and Court can convict the accused only if such charges i.e. evidence is proved on record without reasonable doubt. Therefore, if there is no chance to prove a commission of offence by the accused, charge cannot be framed."

(7) AIR 2009 SC Supplimentary 1744 - State of M.P. v. Sheetla Sahai

"It is held as under: if the Court arrives at only opinion, there is no evidence against the accused, the Court shall not put accused to harassment by asking him to face a trial."

16. Thus, the law on the subject is now well settled, that at Sections 227 and 228 stage, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, shift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to commonsense or the broad probabilities of the case. Therefore, 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 no 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.

17. However it cannot be ignored that what is to be looked in to is "a very strong suspicion founded upon materials, which leads to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged" therefore only because Apex Court has held so, it can not be said that even if in

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absence of suspicion, presumptive opinion of the commission of offence as alleged charge must be framed. Suffice to say that when enactment/statute provides for discharging accused, basically accused has a right to get discharge, which may be subject to fulfilment of certain criteria, that may be laid down either in the statute as well as its interpretation by the Apex Court and not otherwise. Therefore there can be order of discharge if there is no evidence with charge sheet which gives rise to even little suspicion to presume the commission of offence by the accused. Needless to say that even if there is suspicion regarding commission of offence, what is required to refuse discharge is suspicion of commission of offence by the accused against whom charge sheet is filed. Thus even if suspicion is possible for commission of offence, and if there is no evidence to link such suspicion with the accused, there cannot be a presumption against the accused that he had committed the offence and he may entitled to get discharged from the charges levied against him under the charge sheet. Needless to say that the charges levied against the person is to be considered and not the story or history of incident which results in to the commission of offence. For more clarity, commission of offence alone is not sufficient to frame charge against any person, there must be some suspicion that offence had been committed by the said person and not by any other person., If the suspicion is to the effect that though offence has been committed, probably accused might have not committed such offence but real offender may be some one else, Court has to see that truth comes out whereby the Investigating Agency may not be permitted to put their hands down merely by filing charge sheet against any one suspect or any innocent person. In such cases trial cannot be allowed to continue only upon opinion of the investigating agency that accused had committed the offence as alleged in charge sheet. The Court has to arrive at independent opinion, after considering the available prima facie evidenced on record - which is only in the form of charge sheet, not only tabular charge sheet but list of witnesses and their statement before the investigating agency (police papers). It can not be ignored that the ratio of conviction is quite low only because of the reason that though police papers supports the charge sheet, at the time of trail witnesses does not support their statement; this happens because of the possibility that in most of the crimes against the person/ body under the Penal Code, the statement of witnesses are common to the effect that accused had acted in particular manner. However when crime is pertaining to some documents or properties - intellectual and real, the investigating agency has to find out the real culprit with probable cogent evidenced, rather than only oral evidence that accused had committed crime as alleged. This is the area when its Courts duty to frame independent suspicion regarding not only commission of crime but involvement or roll of the accused against whom charge sheet is filed and if there is no possibility of even little suspicion against the accused regarding commission of offence by him, there is no bar to discharge such person from the charges levied against him. In such cases it would be open for the original complainant and the investigating agency to keep such person under suspicion but to investigate further so as to find out real culprit, else filing

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of charge against a person only on suspicion but without sufficient evidence against him would be a futile exercise and it will not only increase unnecessary workload but crime in the society also, since real culprits are able to secluded them from the trial.

18. In view of above discussion, all citations which confirms rejection of discharge is to be read and understood in its real sense, rather than to consider that only because in given case, order of discharge was refused, there cannot be any order to discharge any accused in any case. If it is so, the statute book would not have the provisions of Section 227 in Cr.P.C. In light of such discussion if we peruse AIR 2008 SC 2991 - Yogesh v. State of Maharashtra on the issue, the relevant observation will make above concept more clear, which are as under:

Following para from the case of Yogesh v. State of Maharashtra reported AIR 2008 ST 2991 are relevant to recollect here:

13. Before adverting to the rival submissions, we may briefly notice the scope and ambit of powers of the Trial Judge under Section 227 of the Code.

14. Chapter XVIII of the Code lays down the procedure for trial before the Court of Sessions, pursuant to an order of commitment under Section 209 of the Code. Section 227 contemplates the circumstances where under there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of the case, the documents submitted with the police report and after hearing the accused and the prosecution, the Court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.

15. It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if un-rebutted, makes a conviction reasonably possible. [See: State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 and Union of India v. Prafulla Kumar Samal and Anr, (1979) 3 SCC 4.]

16. In the light of the afore noted principles, we may now consider whether or not in the present case the High Court was justified in declining to discharge the

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appellant.

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27. For the reasons aforesaid, we are constrained to allow the appeals. Consequently, the impugned orders are set aside and the appellant is discharged from the charges levelled against him in the charge-sheet.

19. Considering the above discussions, both on facts and on law point, it becomes clear that investigating agency, has squarely failed to properly investigate the incident so as to find out the real culprit and to collect cogent and reliable evidence so as to confirm conviction against such culprit.

20. I have scrutinised the prima facie evidence on record which categorically fails to prove the involvement of the accused in commission of crime and that there is no prima facie evidence against him for framing the charges, hence the revision applications deserves to be allowed, thereby allowing the application for discharge by the petitioner.

21. In view of above facts and circumstances, this is a fit case to allow the application seeking discharge by the present applicant, when there is no evidence against him with regard to commission of vehicular accident.

22. The law regarding power to discharge an accused is well settled, wherein it is clear that if there is no prima facie evidence against a person in the papers of charge sheet, then, the Court has got ample jurisdiction to pass an order to discharge such person. Therefore, in the present case, when there is no liability and responsibility of the applicant to place any signboard and when there is no involvement of the applicant in the incident of vehicular accident between two motor vehicles, there is no reason to continue the proceeding against him under the sections for which charges are levelled against him. In view of such facts and circumstances, the impugned order certainly results into illegality and therefore, needs to be quashed and set-aside by allowing such revision application.

23. Therefore, the revision application is allowed. Thereby, impugned order dated 18.4.2016 below Exh.7 by the 5th Addl. District and Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad in Sessions Case No.99 of 2015 is quashed and setaside, which results into allowing such application below Exh.7 by discharging the applicant from the charges levelled against him in such criminal case.

24. However, it is made clear that order of discharge would not preclude the prosecuting agency to avail provisions of Section 319 of the Criminal Procedure Code to add any person including present applicant as an additional accused if there is sufficient material before the trial Court to do so in accordance with law.

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