

(2008) 03 GUJ CK 0070

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No"s. 11336 and 11339 of 2007

Chandrakant Meghjibhai Daki

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 31-03-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)
Criminal Procedure Code, 1973 (CrPC) — Section 164, 439
Evidence Act, 1872 — Section 10, 120B, 3, 30
Penal Code, 1860 (IPC) — Section 120A, 120B, 134, 143, 147

Citation : (2008) 2 GLR 1146

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : Prakash Thakkar, for Thakkar Assoc. 1, for the Appellant; K.T. Dave, APP for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—Rule. Learned APP Mr. K.T. Dave, waives service of Rule on behalf of the Respondent State in both the matters.

2. Both the petitioners have filed the said application u/s 439 of Cr.P.C., who have been detained in judicial custody since July, 2007, who are in custody in connection with the offence registered at CR No. I-454 of 2006 with Ellisbridge Police Station, Ahmedabad. The offences have been alleged against both the petitioners and some other accused of said C.R. No. I-454/2006 are u/s 147, 148, 149, 302 read with Section 34 as well as read with Section 120B of IPC and Section 135(1) of Bombay Police Act. From the FIR and other material collected by the Investigating Officer and from the charge-sheet, facts of the said matter are as under:

On 15/06/2006, the deceased Pankajbhai Trivedi who had been to Ellisbridge Gymkhana, when came out from Ellis-bridge Gymkhana at about 8.15 pm and went near parking of Ellis-bridge Gymkhana, Ahmedabad city, was assaulted by

four unknown assailants around 8:15 PM. Mr. Pankajbhai Trivedi received serious and fatal injuries which were caused with baseball bat and other deadly weapons, and therefore, he died instantaneously. Therefore, in connection of the said murder of Mr. Trivedi, one Rameshbhai, Vishwakarma has lodged FIR on the same night at about 11:15 PM. The police carried out the investigation and it revealed that deceased Pankajbhai who had criticized particular activities of the leaders of Swadhyaya Parivar, led by Pandurang Athwale Shastri and Dhanshri Talwalkar known as Jaishree Didi. It appears from the papers that the said criticism was made during the lifetime of Athwaleji and due to that reason, huge number of followers had opposed the said conduct with strong resistance against the present deceased Mr. Trivedi and his friend circle. In connection of the said cause, numerous complaints were filed against the deceased Mr. Trivedi in different criminal courts for the cause of defamatory publications issued by him. So he was arrested and then later on released on bail in September-October 2005, and that all criminal proceedings are also still pending. From the perusal of the papers of the investigation, it transpires that certain people hatched conspiracy to commit murder of deceased Pankaj Trivedi and so in the result of such conspiracy, he was assaulted on 15th night during investigation, both the petitioners were arrested and taken into custody.

3. During the pendency of the investigation, and after filing of the chargesheet, certain criminal miscellaneous applications were filed and some of them were allowed. The present petitions have been preferred after filing of the chargesheet.

4. I have heard the learned Counsel Mr. P.M. Thakker, for the petitioners and learned APP Mr. Dave on behalf of the State. Read the affidavit and affidavit in reply filed by both the parties.

5. Learned Sr. Counsel Mr. Thakker has submitted that both the petitioners have been arrested merely on the ground of suspicion and as per his submission, the material which is collected against the present petitioners, prima facie, highlight the involvement of the petitioners. He has further submitted that the allegations regarding the murder of the deceased in furtherance of the common intention and conspiracy hatched, is prima facie, not established. Mr. Thakker has submitted that the circumstances alleged against the petitioners do not have any direct nexus with the said offences. Mr. Thakker has contended and drawn the attention of this Court to the statements of witnesses Ashokbhai, Mansukhbhai and Devendrabhai and contended that said gentlemen have not stated anything to show the involvement of the present petitioners in their statements, but their statements were concocted with the intention to book both the petitioners wrongly in said offences. Mr. Thakker has placed reliance on the decision of Hon"ble Apex Court rendered in the case of Saraswathi Swamigal v. State of Tamilnadu. Referring to Para 10 of the said judgment, Mr. Thakkar argued in connection with Section 30 of the Evidence Act, and also read Section 10 of the Evidence Act and contended that the confessional statements cannot be used against the present petitioners as a prima facie evidence. He has also contended

that from the papers, the Prosecution has failed to establish, prima facie, that both the petitioners have common intention to murder the deceased. It is also contended that confessional statement of the co-accused cannot be considered as an evidence. He has referred and relied upon the decision of the Hon"ble Apex Court which is reported in Kashmira Singh Vs. State of Madhya Pradesh, and contended that confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3 of the Evidence Act and cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is first, to marshal the evidence against the accused, excluding the confession. Mr. Thakker has also placed reliance upon the decision of the Hon"ble Apex Court rendered in the case of Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar, and contended that when the two types of evidence is produced on record, then inference can be drawn as to a doubtful manner against the case of prosecution. In AIR 1949 257 (Privy Council) it has been observed by the Privy Council that confession of a co-accused is obviously evidence of a very weak type and it does not indeed come within the definition of evidence contained in Section 3 of the Evidence Act, and it is a much weaker type of evidence than the evidence of an approver. The learned Sr. Advocate Mr. Thakker has also contended that confessional statement before the police has no evidentiary value and therefore, from the confessional statements against the present petitioners, no case can be made out. Therefore, these are the fit cases for granting bail to the petitioners. Mr. Thakker has read the order of the learned Addl. Sessions Judge who has rejected the bail application of the petitioners and drawn my attention with the reason given by him and submitted that the findings given by the learned Addl. Sessions Judge are not proper and are not in accordance with the provisions of law. He has also contended that the family background of present petitioners has not been considered by the learned Judge and contended that both the petitioners are in Jail since last more than one and a half year. He further submitted that the petitioners shall abide by any stringent condition which may be imposed by this Court upon the petitioners, and prayed to exercise discretion in the petitioners" favour.

6. Learned APP Mr. Dave, appearing on behalf of the State has strongly opposed the said bail applications, and contended that from the contents of the Affidavit in Reply of the Investigating Officer Mr. V.D. Gohil, Police Inspector, it reveals that he has highlighted all allegations which are collected in the form of evidence. He has read the statements of the witnesses and read the provision of Section 143 and other connected provisions regarding the unlawful assembly and conspiracy which is provided in provision of Section 120B of Evidence Act. Mr. Dave has submitted that in the case of NALINI (Rajiv Gandhi's murder case), Hon"ble Apex court has observed statement of the co-conspirator can be admissible in evidence in the light of provision of Section 10 of Evidence Act. It is submitted by learned APP that in the present case, conspiracy to commit an illegal act is prima facie proved against the present petitioners and, therefore, the act of one conspirator becomes the act of another. Conspiracy can be inferred

even from the circumstances giving rise to exclusive or irresistible inference on an agreement between two or more persons to commit the offence. Mr. Dave has drawn the attention of this Court to page-15 onwards of copy of the petition and Order of the learned Addl.Sessions Judge, Ahmedabad City, Court No. 6, dated 24th August, 2007, and drawn my attention regarding the order passed by him in connection of the statements which were recorded u/s 164 of Cr.P.C. in criminal case No. 7850 of 2006 which order was pronounced in Cr.M.A. No. 2966/2007.

7. Heard both the sides. Read the affidavit of the IO as well as affidavit in rejoinder and read the order of learned Addl.Sessions judge, Ahmedabad city. From the aforesaid contentions discussed herein above, it is true that against the petitioners and other accused persons, investigating agency has filed chargesheet for the offences of Sections 120B, 302, 147, 148, 149 read with Section 34 of the IPC and Section 135(1) of B.P.Act.

8. The Indian law prescribes certain provisions in the Evidence Act and so far as the Evidence Act is concerned, relevant section in this regard is Section 10 and from the said provision, it is stipulated that when a conspirator may utter some words before anybody or may be written by him or said by him, it can also be used against the co-conspirators.

9. The provision u/s 10 of the Evidence Act is as under:

10. Things said or done by conspirator in reference to common design. - 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.

10. In the light of the provisions of Section 10 of Evidence Act, confessional statement made by any accused/conspirator can be considered as having been covered under the meaning of (said) Section 10 of Evidence Act. According to Section 10, where there is a reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by anyone of such persons in reference to their common intention after the time which such intention was first entertained by any one of them may be proved, both for purpose of proving the existence of the conspiracy as also for showing that any such person was party to it.

11. It is true that once a conspiracy to commit an illegal act is proved, the act of one conspirator becomes the act of another. There must be meeting of minds of the conspirators to commit the offence. The conspiracy can be inferred even from the circumstances giving rise to exclusive or irresistible inference on an agreement between two or more persons to commit offence.

12. Section 10 of the Indian Evidence Act prescribes a special rule of evidence and renders admissible, in cases of conspiracy, such evidence which is not ordinarily admissible under the English or the Indian law. Before the provisions of that section can be invoked it has to be established from independent evidence that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or any actionable wrong. When this is shown, anything said, anything done or anything written by any one of such persons would be a relevant fact as against each of the other conspirators, provided that it is in reference to their common intention. Such things said, done or written would be relevant, (i) for the purpose of proving the existence of the conspiracy and also, (ii) for showing that any such person was a party to it. The existence or fact of conspiracy must be proved before the evidence can be given of the acts of any persons not done in the presence of the accused. This must, generally speaking, be done by evidence of the party's own acts. But, owing to the difficulties in the way of such proof, a deviation has, in many cases, been made from the general rule, and evidence of the acts and conduct of others have been admitted to prove the existence of a conspiracy previous to the proof of the accused's privity. But in respect of such conduct a distinction has been made between declarations accompanying acts (which are admissible) and more detached declarations and confessions of persons not accused, nor made in the prosecution of the object of the conspiracy, and which being mere hearsay are not evidence even to prove the existence of a conspiracy. There cannot be, strictly speaking, direct evidence of the inception of a conspiracy, if any of the conspirators themselves do not choose to speak of the same. The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design. After the existence of a conspiracy has been established, the particular accused must be proved to have been party to it.

Where it is shown that there is a reasonable ground to believe that two or more persons have conspired 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 becomes a relevant fact. Anything said would include the statements made, speeches delivered, or declarations made. Anything done must be some act done, and not merely the intention or knowledge of the person. Anything written would include (i) a manuscript, whether signed or unsigned, written by the person, and (ii) matter transcribed by him on a typewriter. But the documents of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator in whose possession it is found, had received and preserved it. The possession of a document creates an inference that the possessor was aware of its contents. Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and as such, may be admitted.

13. In the present case, from the papers, at the stage of hearing of the bail is concerned, it appears that prima facie it is produced on record that the ingredients of the criminal conspiracy is concerned, is placed before this Court on record. When the entire set of facts is taken into consideration by keeping in view the provisions prescribed for the alleged offences, the same are falling within the definition of criminal conspiracy as contemplated u/s 120A of IPC. When it is alleged by the investigating agency that all the accused had conspired with a common intention and agreement regarding the main goal of conspiracy to commit a murder, the definition of criminal conspiracy is required to be looked at which is prescribed u/s 120A of IPC, which reads as under:

120A. Definition of criminal conspiracy. ? When two or more persons agree to do, or cause to be done, -

1. an illegal act, or
2. an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

14. In the aforesaid definition, the meaning of criminal conspiracy is made clear. Thus, if the said definition is taken into account, then Agreement can be said to be a relevant or main ingredient in the said offence. The basic formulae of the aforesaid offence is *SActum Contra Actum* or *SPromise against Promise*, meaning thereby, there has to be an agreement between two or more persons for committing any illegal act or committing a legal act by illegal means. Agreement itself can be said to be an act and the base of mutual agreement therein is the commitment of each conspirator, which is a promise against promise and the basic principle terming the agreement itself as an act, is contemplated under the law in the said provision. Learned author Halsbury in Halsbury's Laws of England-IV Edition, Volume-II on para-44, has noted on the aforesaid point as under:

Conspiracy consists of the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court.

14. Now considering the said point, various Hon"ble High Courts and Hon"ble Apex Court have numerous times observed in their judgments regarding the criminal conspiracy that Agreement between two or more persons for committing an illegal act is sufficient and thereafter, it becomes immaterial as to whether the offence has been committed or not. The agreement arrived at for violating the law for criminal conspiracy, is an essential ingredient. To hatch the aforesaid criminal conspiracy, is something special than abatement, and both the points are different, and it has been necessary to consider the impact upon the

facts pursuant to verification of evidence. The Hon"ble Apex Court has also observed on the said aspect that SCriminal conspiracy can be proved on the basis of circumstantial evidence and Sit can also be inferred from the attitude of the conspirators that the agreement had been arrived at. Moreover, it has also been observed by the Hon"ble Apex Court that SThe evidence against one conspirator for committing an illegal act, can also be taken as such against other accused. Moreover, the Hon"ble Delhi High Court has also noted on the said aspect that SAll the circumstances before and after the committal of offence and at the time of offence, are required to be taken into consideration for adjudicating as to whether there was any criminal conspiracy or not.

Now alongwith the said fact, if more reasons are discussed, then the Hon"ble Apex Court has ruled in the case reported in Ram Narain Poply, Pramod Kumar Manocha, Vinayak Narayan Deosthali and Harshad S. Mehta Vs. Central Bureau of Investigation and Others, that SThe principle is that the agreement should be between the conspirators for committing an illegal act, and it is not necessary that the act may have been done. The agreement may not be in public and the direct evidence may also not be available, and the circumstantial evidence can be relied upon and the conspiracy is a continuing process. S The Hon"ble Apex Court has clearly noted in the case reported in State of Gujarat Vs. Raghu @ Raghavbhai Vashrambhai and Others, that SThe principle of wrong once and for all, cannot be applied in criminal proceedings.

15. The word common intention" is prescribed under Criminal Law. In the present case, the investigating agency has applied Section 149 of IPC against the present petitioners and the question of common intention is concerned, direct evidence of common intention is always difficult to obtain and its existence which is an essential ingredient of constructive liability has invariably to be deduced from surrounding facts. Section 34 speaks of common intention while Section 149 speaks of a common object.

16. From the aforesaid discussion and material produced on record by the investigating agency, so far as present both the petitioners are concerned, it appears from the papers that against both the petitioners, prosecution has a prima facie case and in view of the aforesaid discussion of law, I am of the opinion that there is strong prima facie evidence against both the petitioners qua the allegations shown in the charge-sheet. Hence, both the petitions are required to be dismissed. Therefore, both the present petitions are dismissed. Rule issued in both the matters stand discharged.