
(1965) 03 GUJ CK 0004
In the Gujarat High Court

Gohel Himatsingh Lakhaji

APPELLANT

Vs

Patel Motilal Garbaldas and Others

RESPONDENT

Date of Decision : 26-03-1965

Acts Referred:

Bar Councils Act, 1926 — Section 14
Bombay Pleaders Act, 1920 — Section 8
Criminal Procedure Code, 1898 (CrPC) — Section 340, 342, 342

Citation : (1965) 6 GLR 531

Hon'ble Judges : J.B. Mehta, J

Bench : Single Bench

Judgement

J.B. Mehta, J.—This revision petition raises an interesting question as to whether an accused can appear as a lawyer for the co-accused.

2. The short facts of this petition are as under; The petitioner Gohel Himatsingh Lakhaji is the complainant who has filed a complaint for defamation against six accused. The first four accused were the original accused in another criminal case No. 1798/ 1962 and at that time the complainant was examined as a witness. In that criminal case accused Nos. 3 and 6 had appeared for those four accused and had cross-examined the complainant. The complainant alleges that those questions which were put to him were defamatory and therefore he has filed the present complaint against the four accused and the two lawyers accused Nos. 5 and 6. Accused No. 5 Patel Rambhai Fakirbhai was the lawyer who had put these questions which are alleged to be defamatory and accused No. 6 Patel Kanubhai Jesangbhai was the other lawyer instructing accused No. 5. During the present complaint these two lawyers accused Nos. 5 and 6 in the present complaint filed their Vakalatnama for accused Nos. 1 2 and 4. The complainant therefore raised an objection that the two accused Nos. 5 and 6 who were themselves accused persons could not appear as lawyers for the co-accused. The learned Judicial Magistrate at Borsad was of the view that it was the right of the accused to select their lawyers and the Court could not interfere unless the party was unwilling to continue them as their lawyers. As no provision of law was cited

before the learned Magistrate he had dismissed the application of the complainant. The complainant has therefore filed the present petition against the said order. I am told by Mr. Patel who appeared for the two lawyers-accused No. 5 and 6 that accused No. 5 is now dead and he appears only for accused No. 6 Patel Manubhai Jesangbhai.

3. When the matter came up for hearing as the matter involved an important question regarding the rights of lawyers I issued a notice to the Bar Council and Mr. Thakore has appeared for the Bar Council.

4. Mr. Shah for the complainant argued that it is a settled principle that there cannot be a mixture of two legal characters. A person who appears before the Court in the capacity as an accused person retains the character of the accused person throughout that proceeding and he cannot take up an altogether different character of a lawyer for the other coaccused. He also argued that the conflict between interest and duty is implicit in such a situation and the accused person would be disqualified from acting as a legal practitioner in that particular cause wherein he himself is concerned. He cannot bring a dispassionate approach to the question being himself personally concerned and he cannot discharge his duty both towards the Court and towards his client. Mr. Thakore also rightly pointed out that the very scheme of the Code is such that such a mixture of these two characters is not contemplated by the Code and is really inconsistent with the scheme of the Code. In this connection Mr. Shah relied upon a decision of the Division Bench of the Madras High Court consisting of Leach C.J. and Gentle J. In *Re Subramania Jarma and others* reported in AIR 1941 Mad 808. An identical question had arisen in that case. The petitioner who was a member of the English Bar and had been enrolled as an advocate of the Madras High Court was himself the accused person with six other accused and he wanted to appear for the two coaccused. The magistrate considered that it would be improper to allow him to do so and consequently refused permission. The petitioner had filed a revision application. The learned Chief Justice pointed out that the accused were all in custody and had been in custody throughout and what the Court was asked to sanction was to permit accused No. 1 to step from the dock to the place reserved for the counsel and appear as a counsel for the two co-accused. The learned Chief Justice held that a counsel could not appear in the same matter both as a counsel and as a party. There was no objection to an advocate who was accused of a criminal offence and who was a party in civil court conducting his own defence or his own cause but he could not be in the Court in the same matter in two different capacities. Two English decisions were relied upon in that case. In the case of *The New Brunswick and Canada Railway and Land Company v. Conybeare* 1862 9 H.L. 711 on the first day of the hearing the leading counsel for the respondent Conybeare suggested that Conybeare might appear as his junior in the cause relying upon an earlier decision where a party had appeared as a counsel at the Bar of the House. The Lord Chancellor (Lord Westbury) said Certainly but not both as party and counsel. The respondent must elect to argue in person or not. There cannot be mixture of the two characters. In the other

case of *Newton v. Chaplin* reported in the Revised Reports Vol. 84 at page 603 the Court of Common Pleas held that a barrister who was a party to the cause could not be allowed to address the Court where he was represented by counsel. Chief Justice Wilde observed: We cannot hear the plaintiff in person and by counsel also: the circumstances of the plaintiffs being a member of the Bar does not place him in a better position in this respect than another person. These two English decisions were based on the principle that there cannot be a mixture of two legal characters and so a person cannot appear both as party and as counsel. It is true that in these cases the lawyer was not appearing for any other person but wanted to appear as counsel for himself. The Madras High Court however treated this as a question of principle and on the basis of these authorities extended this principle even to a case where an accused wanted to appear as counsel even for his co-accused. The principle that no such mixture of legal characters should be permitted applies equally even to such a case.

5. The same principle seems to have been extended even to the cases where a lawyer becomes a witness not merely a purely formal witness so that his conduct is likely to be attacked. Gentle C.J. speaking for the Division Bench of the Madras High Court In the matter of a pleader Madura AIR 1948 Mad 273 held that where a pleader prior to the hearing or trial of a suit knew that he was a necessary witness and would be called as a witness in the suit but he continued to act in an active capacity as counsel and gave evidence without cancelling the vakalat such conduct was improper and deserved condemnation. Gentle C.J. had followed the observations in the earlier Full Bench decision of the Sir Lionel Leach C.J. as under:

A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so his proper course is to retire from the case in his professional capacity.

In the absence of a specific rule to that effect it may not be a misconduct but the conduct of the pleader would be unquestionably improper. There may be no power to take disciplinary proceedings in such a case but the Court has certainly an implied power to require the lawyer to withdraw from the case if he refuses to do so. Beaumont C.J. speaking for the Division Bench consisting of Beaumont C.J. and Wassoodev J. in *Emperor Vs. Dadu Rama Surde*, has succinctly put the entire legal position in such cases. In that case the Magistrate had forbidden Mr. Joshi to appear as a lawyer for the defence in two prosecutions in which the prosecution proposed to call Mr. Joshi as a witness. Beaumont C.J. observed:

The question whether the Court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand an accused person is entitled to select the advocate whom he desires to appear for him and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand the Court is bound to see that the due administration of justice is not in any way

embarrassed. Generally if an advocate is called as a witness by the other side it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate or by so doing he will embarrass the Court or the client. If a Court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate who has been called as a witness by the other side and if notwithstanding the Courts expression of its opinion the advocate refuses to withdraw in my opinion in such a case the Court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself nor can he usefully address the Court as to the credibility of his own testimony and a Court may well feel that justice will not be done if the advocate continues to appear. But in my opinion the prosecution in such a case must establish to the satisfaction of the Court that the trial will be materially embarrassed if the advocate continues to appear for the defence.

In that case however as Mr. Joshi knew nothing and as he was not a material witness it was held that his appearance for the defence would not cause any embarrassment whatever to the trial of the case. The ratio of these decisions seems to be that even though the accused has a right to have counsel of his own choice the Court is also equally entitled to see that the due administration of justice is not in any way embarrassed and it has implied power or jurisdiction to require the advocate to withdraw from a particular case. The material consideration which the Court has to bear in mind in such cases is whether the trial would be materially embarrassed by permitting the accused to appear for an accused. If the Court comes to that conclusion it has always the necessary jurisdiction to refuse the permission to an advocate who persists in putting himself in such a position for in such a case justice cannot be done or would not seem to be done if the advocate continues to appear.

7. A similar question arose before the Division Bench of the Andhra Pradesh High Court consisting of Jaganmohan Reddy and Kumarayya JJ. in *Public Prosecutor, Andhra Pradesh Vs. Kothakapu Etreddy Venkata Reddi and Others*, . There the case of all the accused arose out of the same transaction and with respect to the same incident all of them had been charged together. In respect of the accused who were acquitted the Public Prosecutor had advised the State Government to file an appeal and in fact he had filed appeals on behalf of the State against the acquittals of some of the accused. He had also filed a memo of appearance on behalf of the State in an appeal filed by the convicted accused. However as his engagement as a Public Prosecutor had been terminated before the matter came up for hearing he sought to appear for the convicted accused in the appeals filed by them and it was held by Jaganmohan Reddy J. that it could not be permitted. At page 109 it was held:

The general principle precluding an advocate appearing for one party for appearing for the opposite party apart from any contractual inhibition is one of public, policy based on maintaining public confidence and the highest traditions of the Bar. Even apart from any contractual obligation the Court will in the

exercise of its powers to maintain the highest traditions of the Bar and the profession preclude advocates from appearing for the opposite party if that is likely to embarrass the advocate or raise a suspicion in the mind of the client with respect to the conduct of erstwhile advocate or that it is not gentlemanly conduct or that it is improper to do so or the circumstances are such from which an inference of imparting of confidential nature of information can be raised.

Even in Halsburys Laws of England Third Edition Volume 3 at page 61 in para 93 it is pointed out that there are certain occasions when a Barrister must decline to accept instruction because of special circumstances which would render it difficult for him to maintain his professional independence or would otherwise make acceptance incompatible with the best interests of the administration of justice.

8. The principle underlying these authorities seems to be the well settled maxim that justice should not only be done but manifestly and undoubtedly seem to be done. The lawyer acts as an officer of the Court and he is duty bound to help the administration of justice. He is duty bound to answer all questions to the Court and to make statement of facts on which the Court must implicitly rely. These duties which are inherent in this noble profession both towards the Court and towards his client can be performed independently and fearlessly with a dispassionate; approach only if the lawyer plays an independent role as the officer of Court helping the administration of justice. As Lord Westbury put it even in civil litigation the lawyer cannot be allowed to appear as counsel in his own cause on the principle that there cannot be a mixture of two legal characters. The reasoning would apply with a still greater force where in a criminal trial the lawyer who is an accused person himself wants to appear in the same cause in the trial of the same offence and which arose out of the same transaction for his other co-accused. He can never remain unconcerned or indifferent to the cause in such a case for such a trial is bound to result in embarrassment. Mr. Thakore rightly pointed to out the provision of Section 342 of the Code of Criminal Procedure. Section 342 is as under:

(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary and shall for the purpose aforesaid question him generally on the case after the witness for the prosecution have been examined and before he is called on for his defence.

Under Sub-section (2) the accused does not incur any liability to punishment by refusing to answer such questions or by giving even false answers to them. How could any lawyer in such circumstances play both the roles consistently with his duties and without the trial being embarrassed at every stage? Similarly how could the Court at every stage maintain the distinctions between the various accused so that the statement of one accused is not in any way being utilised against the other? In the particular case in question where the lawyers appearing for the co-accused are being jointly tried for putting defamatory questions along

with their clients as the co-accused the embarrassment is inherent in the situation as it could be open to the clients at any stage to plead that no such instructions were given to the lawyer concerned to put such questions. The fair trial of the accused would be hampered and even the lawyer himself would be embarrassed in the faithful discharge of his duties. The principle evolved by the House of Lords that a person cannot be both party and counsel is thus really embedded in the fundamental principles of the administration of justice and for maintaining the highest traditions of the bar and the legal profession. When the Court precludes an advocate to appear in a criminal trial where he is the co-accused it does so only in the Interests of ensuring a fair trial to the accused without any embarrassment to the advocate or to the other accused persons or to the Court so as to leave no room for suspicion for what is more fundamental is that justice must not only be done but must also seem to be done.

9. Mr. Patel however argued that such a decision depriving the co-accused of his right to appear through a lawyer of his own choice would clearly violate his fundamental right guaranteed under Article 22(1) of the Constitution if such an accused was an accused under arrest. If in such a case the administration of justice was not going to be hampered how would it be hampered in cases where the accused was not under arrest? Mr. Patel also argued that it would be tantamount to depriving the lawyer of his fundamental right under Article 19(1)(g) to practice his legal profession on this particular occasion. There is no substance in any of these contentions. As pointed out by Jaganmohan Reddy J. in *Public Prosecutor, Andhra Pradesh Vs. Kothakapu Etreddy Venkata Reddi and Others*, what is guaranteed to the accused under Article 22(1) is a legal practitioner of his choice who is not otherwise barred or disabled from appearing for him. If the legal practitioner is disabled under any statute or under the general law it is not the purpose of the guarantee to remove any such disability. So also the fundamental right of the lawyer under Article 19(1)(g) to carry on a profession is subject to reasonable restrictions under Sub-clause (6) and therefore the right of the legal practitioner is what is conferred on him by the statutes which confer this privilege to practice neither more nor less and if such a right cannot be found on any particular occasion like this in the four corners of those statutes there is nothing in respect of which the fundamental right guaranteed under Article 19(1)(g) could be invoked.

10. Mr. Patel therefore next argued that u/s 8 of the Bombay Pleaders Act 1920 and u/s 14 of the Indian Bar Councils Act 1926 (as Section 30 of the Advocates Act has not yet come in force) the concerned lawyers were entitled to practice as of right in any criminal Court. But these statutes however nowhere provide that a lawyer will have such a right of appearance both as party and as counsel by creating a mixture of these legal characters so as to result necessarily in embarrassment to the accused. Mr. Patel also argued that in fact Section 340 of the Code provides that any person accused of an offence before a criminal Court or against whom proceedings are instituted under the Code in any such Court may as of right be defended by a pleader. Section 4(1)(r) defines a pleader to

mean a pleader or a mukhtar authorised under any law for the time being in force to practice in such Court and includes an advocate a Vakil an attorney of a High Court so authorised and any other person appointed with the permission of the Court to act in such proceedings. Thus according to Mr. Patel the matter was not one of lawyers right alone but was of the right of every accused to choose his own lawyer for his defence in a criminal trial and no implied power of the Court could be exercised so as to destroy this statutory right. The answer to this argument is already furnished by Beaumont C.J. in the decision which I have already referred to. On one hand there is the right of the accused to select the pleader by whom he desire to be defended but on the other hand the Court is also duty bound to see that due administration of justice is not in any way embarrassed. If the Court comes to the conclusion that the trial would be materially embarrassed by the continuance of a particular advocate for the defence it has always jurisdiction to require the advocate to withdrawn from the case. Such powers have to be implied for effectively exercising the duty cast on the Court for the due administration of justice. The guarantee to the accused u/s 340 also as in Article 22(1) is only to have a pleader of his won choice who is not otherwise barred or disabled form appearing for him. There is no inherent conflict in this situation between the right of the accused and the obligation on the Court as both these safeguards guards in the interest of the accused to ensure him a fair trial. The very foundation of this right of the accused would disappear as soon as the Court comes to the conclusion that the appearance of a particular legal practitioner who is suffering from a disability on the occasion from appearing as the legal practitioner would materially embarrass the trial. It should also be noted that the definition of the word pleader includes not only a person entitled to practice in the Court but also any other person appointed with the permission on the Court to act in any such proceeding. If the co-accused wanted such permission for the appointment of the accused to act for them it would be open to the Court to consider that question and that would have enabled them to effectively exercise their right u/s 342. But that is not what is sought to be done at present. What is insisted in the present case is that an accused person should appear for the co-accused as a legal practitioner which cannot be permitted to be done without materially embarrassing the trial.

11. Finally Mr. Patel urged that when the co-accused have no objection whatsoever why should the Court presume any such embarrassment? If the prejudice is inherent in such a situation it is not for the accused to waive such an objection and in such cases it is the duty of the Court alone to consider whether the advocate who even after he is told of the impropriety inherent in such a situation refuses to withdraw his appearance should be required him to do so.

12. The learned Magistrates order permitting the accused to appear as lawyer for the co-accused is improper and patently erroneous and must therefore be set aside. 1 am told that accused No. 5 is already dead and the order would be necessary only so far as accused No. 6 is concerned.

13. In the result I allow this petition set aside the order of the learned Magistrate and direct that accused No. 6 Manubhai J. Patel should not be permitted to appear as a legal practitioner for the coaccused and he shall be required to withdraw from the case. I leave it open to the learned Magistrate to consider the question of permitting the coaccused to appear through accused No. 6 as a person authorised u/s 4(1)(r) of the Code read with Section 340 of the Code if such a request is made to him by those co-accused. Rule accordingly made absolute.