
(1963) 02 GUJ CK 0011
In the Gujarat High Court

Jadeja Muraji alias Bhurubhai Modji and Others APPELLANT
Vs
The State of Gujarat RESPONDENT

Date of Decision : 07-02-1963

Acts Referred:

Penal Code, 1860 (IPC) — Section 379

Citation : (1964) CriLJ 238 : (1964) GLR 382

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Judgement

V.B. Raju, J.—This criminal revision application arises out of a police report with respect to. an offence u/s 379, I. P. Code against the applicants. The learned Magistrate, namely the J.M.F.C., Mandyi, Kutch, decided that the case was groundless u/s 251-A, Cri. P. Code. In revision, the learned Sessions Judge, Kutch, held that the learned Magistrate was wrong in holding that the charge against the accused was-groundless. In the opinion of the learned Sessions Judge, the charge against the accused was not groundless. He, therefore, passed the following, order u/s 436, Cri. P. C.

The revision application is accepted. The learned J.M.F.C. Mandvi, is hereby directed and ordered to frame a charge against the accused, and then dispose of the matter in accordance with law.

2. It is true that while exercising jurisdiction u/s 436, Cri. P. C. the learned Sessions-Judge can only direct a further inquiry. Section 436(1), Cri. P. C. reads as follows:

On examining any record u/s 435. or otherwise, the, High Court or toe Sessions Judge other than the Sessions Judge of the Court of Session for Greater Bombay may direct the Judicial . Magistrate to make further inquiry into any complaint which has been dismissed u/s 203 or Sub-section (3) of Section 204, or into the case-of any person accused of an offence who has been discharged.

It is, therefore, clear that only further inquiry can be directed into the case of a

person accused of an offence who has been discharged.

3. But under the old procedure before the-framing of a charge there was an inquiry, but under the new procedure which is applicable to cases instituted on a police report and which is contained in Section 251-A, no evidence is taken before-the framing of a charge and the taking of evidence takes place after the charge is framed. K the Magistrate is of the opinion that the charge-against the accused is groundless he should discharge him, under Sub-section (2) of Section 251-A, Cri. P. C. Otherwise, he should proceed according to the terms of Sub-section (3) of Section 251-A. In the case of cases instituted on private complaints, Sections 252, 233, 254 and 255 continue to be of application.

4. Strictly speaking, while exercising powers u/s 436, Cri. P. C Sessions Judges should direct further inquiry, but in view of new Section 251-A, a new inquiry can only take the form of framing a charge. In view of the new provisions contained in Section 251-A, there is nothing to be done by way of further inquiry except to frame a charge. u/s 253, Cri. P. C. which applies to cases instituted otherwise than a police report, a discharge order can be passed at different stages in the course of the inquiry, and, therefore, if a discharge order has been passed under Sub-section (z) of Section 353, Cri. P. C. it is open to the learned Sessions Judge to direct further inquiry u/s 436, Cri. P. C. and if in such a case further inquiry has been directed, it is not necessary for a Magistrate to frame a charge, because he may have to take evidence before framing the charge and may still refuse to frame a charge after taking fresh evidence and after making a further inquiry. But that procedure is not open in cases instituted on a police report. In a case instituted on a police report, a discharge order comes at the stage, referred to in Sub-section (2) of Section 251-A. If the discharge order is wrong, the next step is only to frame a charge.

5. Therefore, although strictly speaking, u/s 436, a Sessions Judge should only direct further inquiry, the effect of such an order in the case of cases instituted on a police report is to direct the Magistrate to frame a charge. In this case, therefore, strictly speaking, the order of the learned Sessions Judge is wrong, but it makes no difference in its effect, because even if the Sessions Judge had merely directed a further inquiry, the learned Magistrate would be obliged to frame a charge in view of the provisions of Section 251-A, Cri. P. C.

6. The learned couns-1 for the applicants further relies on a judgment of my learned Brother Justice Bhagwati in Criminal Revn. Appln. No. 71 of T962, decided on 6-7-62. That was a case where a discharge order was set aside by the Sessions Judge of Kutch. The learned Sessions Judge set aside the discharge order passed by the Magistrate and he was of the view that even if there was no sufficient material before the learned Magistrate on the basis of which it could be said that there was ground for presuming that the petitioners had committed the offence as charged against them, yet the petitioners should not be discharged because the prosecution might be able to lead proper evidence after the framing of the charge in order to prove the case against the petitioners. My learned

brother observed as follows:

The learned Sessions Judge, it appears, took the view that even if the documents referred to in Section 173 and the examination of the petitioners did not reveal a prima facie case against the petitioners and disclose lacunae in the case against the petitioner, the prosecution could, after the framing of the charge, lead proper evidence and fill in lacunae and show that the petitioners were guilty of the offences charged. This was in my opinion, a wrong, approach adopted by the learned Sessions Judge. The order passed by the learned Sessions Judge must, therefore, be set aside and the matter should be remanded to him for the purpose of deciding whether upon a construction of the documents referred to in Section 173 and the examination of the accused, the learned Magistrate-could be said to have acted unreasonably or improperly in taking the view that the charge against the petitioners was groundless. The question must be adjudged, as I have pointed out above, entirely by reference to the documents referred to in Section 173 and the examination of the accused and not from the standard adopted by the learned Sessions Judge, namely, that even if the material before the learned Magistrate was not sufficient to make out a prima facie case against the petitioners, the petitioners might be able to lead evidence and make out a proper case against the petitioners and that a charge should therefore be framed against the petitioners, so that the prosecution could be afforded an opportunity to lead evidence on various matters.

7. My learned brother therefore remanded the matter back to me learned Sessions Judge.... But in addition my learned brother observed that; the order passed by the learned Sessions Judges directing a charge to be framed was wrong and it did not comply with the provisions of Section 436, Criminal Procedure Code. As my learned brother set aside the order passed by the learned Sessions Judge on one ground, it was not necessary to give another ground for also setting aside the order of the learned Sessions Judge. The observations are therefore, strictly speaking, obiter and not ratio decidendi. But there is no reason to differ from the observations of my learned brother. Strictly speaking, I agree with the observation that the direction to frame a charge is not justified under the provisions of Section 436, Criminal Procedure Code. It was open to the learned Sessions Judge to direct further inquiry and to have observed that in view of the provisions of Section 251-A, Criminal Procedure Code there was nothing to do in the further inquiry except to frame a charge. The direction to frame a charge must, therefore, be set aside, although there will be nothing for the Magistrate to do in the matter of further inquiry except to frame a charge.

8. It is next contended by the learned Counsel for the applicants that there was no evidence to prove that the Government was in possession of the land from which theft is alleged to have been committed. On this point, the approach of the learned Sessions Judge is not quite happy. In para 15 of his judgment, the learned Sessions Judge has observed that

It will thus be seen from the police papers--that some tentative steps were taken for taking" possession. If after recording evidence, the learned Magistrate comes to the conclusion that in spite of these steps, it cannot be said that the Government, or the State, had taken possession of" these quarries, it is open of the learned Magistrate to acquit the accused after framing the charge.

The approach is unhappy, because in such a case-the Magistrate and the Sessions Judge are required to go into the question of possession and to see whether on the documents there is a ground to hold that the Government is in possession of the quarries. The reference to taking some tentative steps for taking possession is not happy. To take some steps in order to take possession would not constitute possession.... But the papers and the documents must show that possession had actually been taken by the Government and not that the Government had taken tentative steps in order to take possession. There must be a finding of the learned Magistrate on the question of possession. There is no ground to believe that the "State had taken possession. Unless the learned Sessions Judge is prepared, to find that on the (documents that view of the learned Magistrate is wrong, he should not interfere with the discharge order.

9. The revision application is, therefore, allowed and the order passed by the learned Sessions judge is set aside. He is directed to go into the question whether upon consideration of the documents referred to in Section 173, Criminal Procedure Code and other matters referred to in Sub-section (2) of Section 25T-A, Criminal Procedure Code there is any ground for presuming that the accused had committed an offence triable under Chapter 21. It is only after giving a clear finding on this point that the learned Sessions Judge can set aside the discharge order. As he has not given such a finding, the matter is remanded to him for re-considering the same.