
(2015) 02 GUJ CK 0064

In the Gujarat High Court

Case No : Special Criminal Application (Quashing) No. 4921 of 2014

Jayeshbhai Shankarbhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 243, 244, 244(1), 244(2)

Evidence Act, 1872 — Section 138

Penal Code, 1860 (IPC) — Section 114, 120B, 34, 463, 464

Citation : (2015) CriLJ 2927 : (2015) GLH 2285

Hon'ble Judges : V.M. Pancholi, J

Bench : Single Bench

Advocate : Kruti M. Shah, for the Appellant; H.B. Punani, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—Rule. Learned Additional Public Prosecutor, Ms. H.B. Punani, waives service of notice of Rule on behalf of respondent No. 1 - State of Gujarat. Learned Advocate Shri. M.B. Gohil waives service of notice of Rule on behalf of respondent No. 2. With the consent of the learned Advocates for the parties, this petition is taken up for final hearing today. This petition is filed under Article 227 of the Constitution of India wherein the petitioner has prayed that the order dated 10th September 2014 passed by the 6th Additional Sessions Judge, Surat, in Criminal Revision Application No. 113 of 2013 may be quashed and set aside. The petitioner also prayed that the order of the trial Court denying to take a document on record may also be quashed and set aside, and allow the petitioner-accused to ask certain questions regarding the document during the cross-examination of handwriting expert Shri J.J. Patel in Criminal Case No. 2238 of 2009.

2. Learned Advocate Ms. Kruti M. Shah for the petitioner submitted that the petitioner is one of the accused in Criminal Case No. 2238 of 2009 in respect of

the complaint, which is registered for the offences punishable under Sections 463, 464, 465, 467, 468, 471, 114 and 120B read with Section 34 of the Indian Penal Code. The said complaint was filed by the present respondent No. 2. The aforesaid private complaint is at the stage of pre-charge evidence, where the complainant has already given her deposition. Thereafter, the complainant has also examined one witness, viz. Shri J.J. Patel as a handwriting expert. After the examination-in-chief of the said witness was over, learned Advocate for the petitioner-accused has started the cross-examination of the said witness. During such cross-examination of the said witness, the petitioner-accused had shown a report of another handwriting expert, Ms. Meghna Sahu, and asked the said witness Shri J.J. Patel certain questions. At that time, learned trial Court has refused to take the said document on record and has also refused to mark the said document. The questions asked by the learned Advocate for the petitioner-accused were also disallowed. Learned trial judge passed the impugned order on 16th January 2013. Being aggrieved by the said order, the petitioner-accused preferred Criminal Revision Application No. 113 of 2013 before the learned District and Sessions Court, Surat. However, said revision application was also rejected by the learned Sessions Court by the impugned order dated 10th September 2014, and therefore, the petitioner has filed the present petition under Article 227 of the Constitution of India.

3. Learned Advocate for the petitioner mainly submitted that both the impugned orders passed by the Courts below are illegal and perverse, and therefore, the same may be quashed and set aside by this Court by exercising the powers vested under Article 227 of the Constitution of India. Learned Advocate submitted that the impugned orders are against the provisions of law, and against the principle of defending the case in a fair manner. It is submitted that both the Courts below have not appreciated the provisions of Sections 244 and 247 of the Code of Criminal Procedure, 1973 (for short "the Code"). It is further contended that both the Courts below have also not properly understood Sections 138 and 168 of the Indian Evidence Act. It is submitted that in the present case, there are two different opinions of handwriting experts for one document, and therefore, the petitioner-accused has tried to ask certain questions upon the document in question, but the learned trial Court disallowed the petitioner-accused to ask any question, which has resulted in miscarriage of justice. It is submitted that because of the impugned orders, the right of the petitioner-accused to defend the case has been adversely affected, and therefore, the impugned orders may be quashed and set aside.

3.1. Learned Advocate for the petitioner further submitted that the trial Court cannot deny to take on record the opinion of a handwriting expert, Ms. Meghna Sahu, and the trial Court ought to have given a mark to the said document considering its relevancy. However, in the present case, the trial Court has refused to take the document on record, and therefore, the impugned order is required to be quashed and set aside.

3.2. Learned Advocate for the petitioner further submitted that even the revisional Court has not properly appreciated the aforesaid submissions, and wrongly observed that the stage at which the deposition of the witness is recorded is a pre-charge evidence stage, and therefore, the accused is having a limited right to cross-examine the witness of the complainant. Such observation made by the learned revisional Court is against the settled principles of law laid down by the Honourable Supreme Court in various decisions.

3.3. Learned Advocate for the petitioner has relied upon the decision rendered by the Honourable Supreme Court in the case of Bipin Shantilal Panchal Vs. State of Gujarat and Another, AIR 2001 SC 1158 : (2001) CriLJ 1254 : (2001) 74 ECC 287 : (2001) 134 ELT 611 : (2001) 3 JT 120 : (2001) 2 SCALE 167 : (2002) 10 SCC 529(1) : (2001) 2 SCR 29 : (2001) 1 UJ 573 : (2001) AIRSCW 841 : (2001) 2 Supreme 65 , and submitted that in the said case, the Honourable Supreme Court has given a direction to the trial Court to make a note of objection, and mark the objected document tentatively as an exhibit, or record the objected part of oral evidence, and decide the objection at final stage. In the present case, it is submitted by learned Advocate for the petitioner-accused that the said direction has not been followed by the trial Court, and therefore, the impugned order may be quashed and set aside.

3.4. Learned Advocate for the petitioner further relied upon the decision rendered by the Honourable Supreme Court in the case of Harinarayan G. Bajaj Vs. State of Maharashtra and Others, (2010) 1 JT 10 : (2010) 1 SCALE 46 : (2010) 11 SCC 520 : (2011) 1 SCC(Cri) 207 : (2010) 1 SCR 171 : (2010) 2 UJ 623 , and submitted that the right to examine a witness under Section 244 of the Code, who is examined before framing of charge, is a very precious right.

3.5. Learned Advocate for the petitioner further relied upon the decision rendered by the Honourable Supreme Court in the case of Ajoy Kumar Ghose Vs. State of Jharkhand and Another, AIR 2009 SC 2282 : (2009) CriLJ 2824 : (2009) 4 JT 245 : (2009) 4 SCALE 267 : (2009) 14 SCC 115 : (2009) 4 SCR 515 : (2009) 3 UJ 1357 , and submitted that in the said case also, the Honourable Supreme Court has held that right of cross-examining prosecution witness before framing of charge is a valuable right available to accused. He has to be afforded this opportunity so that he may argue that no charge should be framed against him, and he should be discharged.

3.6. Learned Advocate for the petitioner has relied upon another decision rendered by the Honourable Supreme Court in the case of Sunil Mehta and Another Vs. State of Gujarat and Another, (2013) 3 AD 134 : (2013) 2 JCC 1155 : (2013) 3 JT 328 : (2013) 3 RCR(Criminal) 238 : (2013) 2 SCALE 686 : (2013) 9 SCC 209 : (2013) AIRSCW 3814 , and submitted that in this decision also the Honourable Supreme Court has held that in a criminal proceeding an accused is having a right to cross-examine the prosecution witness, and if such a right is denied, it would cause prejudice to the accused's right and opportunity. Thus, learned Advocate submitted that the impugned orders passed by the

Courts below may be quashed and set aside in the interest of justice.

4. On the other hand, learned Advocate Shri M.B. Gohil appearing for respondent No. 2 original complainant submitted that the Courts below have not committed any error while passing the impugned orders, nor it can be said to be perverse. No jurisdictional error is committed by the Courts below, and therefore also, this Court may not exercise the jurisdiction under Article 227 of the Constitution of India. Learned Advocate submitted that the scope of judicial review is very limited, therefore, this petition may be dismissed.

4.1. Learned Advocate for respondent No. 2 relied upon the provisions of Section 244 of the Code, and submitted that the accused is having limited right of cross-examination at pre-charge evidence stage, therefore, no illegality is committed by the Courts below. Referring to the impugned orders, learned Advocate submitted that the trial Court has rightly observed in the impugned order that the accused will get a chance to produce his evidence and the witnesses at the stage of further, statement, and at that stage, such documents or evidence can also be produced by the petitioner-accused. Learned Advocate further relied upon the provisions of Section 247 of the Code. He has also relied upon the decision of Kerala High Court in the case of Gopalakrishnan Vs. State of Kerala, (2002) CriLJ 2490 : (2001) 2 DMC 492 : (2001) 3 ILR (Ker) 182 : (2001) 2 KLJ 211 , and submitted that the right of accused to cross-examine prosecution witness during enquiry in a warrant case instituted otherwise than on a police report is not an absolute right. The accused gets opportunity to cross-examine witnesses at trial stage, and therefore, the Magistrate can refuse to allow an accused to cross-examine under Section 244 of the Code. Learned Advocate further relied upon the decision rendered by the Madhya Pradesh High Court in the case of Nandram Khemraj Vs. State of M.P. and Another, (1995) CriLJ 1270 , and submitted that the Madhya Pradesh High Court has also taken the same view that accused have no right to cross-examine a witness before framing of the charge, and therefore, in view of the aforesaid decisions, the Courts below have not committed any error of law. Therefore, this petition filed by the petitioner-accused may be dismissed.

5. Learned Additional Public Prosecutor, Ms. H.B. Punani had adopted the arguments canvassed by the learned Advocate for the respondent No. 2.

6. I have considered the arguments advanced on behalf of the learned Advocates for the parties. I have also gone through the relevant record as also the decisions relied upon by the learned Advocates for the parties.

7. For deciding the issue involved in this petition, certain provisions of law are required to be referred. Chapter XIX of the Code provides for trial of warrant-cases by Magistrates, and in the said Chapter, certain provisions are with regard to cases instituted on a police report, whereas certain provisions are with regard to cases instituted otherwise than on police report. The present case falls under heading "B" of Chapter XIX - cases instituted otherwise than on police report.

Section 244 of the Code provides as under :-

"244. Evidence for prosecution.-

(1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing."

Section 245 provides for as to when accused shall be discharged. It reads as under:-

"245. When accused shall be discharged.-

(1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this Section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Section 246 provides for the procedure where the accused is not discharged under Section 245. It reads as under :-

"246. Procedure where accused is not discharged.

(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under Sub-Section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they shall also be discharged."

Section 247 provides that the accused shall be called upon to enter upon his defence and produce his evidence, and the provisions of Section 243 shall apply to the case.

8. In light of the aforesaid provisions of law, if the case of the petitioner is considered, it is revealed that the complainant has given her deposition before the trial Court, and thereafter, deposition of the witness of the complainant has started. During the course of the cross-examination of the witness of the complainant, the learned Advocate for the petitioner-accused had shown the aforesaid document, i.e. the report of another handwriting expert, viz. Ms. Meghna Sahu, with regard to will Exh. 83. At that stage, objection was taken that defence cannot produce the document, and the petitioner-accused is having a right to produce his evidence or the witnesses at a later stage. It was also stated that the stage at which the witness of the complainant is examined is a stage of pre-charge evidence, and at that stage, petitioner-accused is not having any such right, and therefore, the learned trial Court has not allowed the Advocate of the accused to produce said document on record, and even a tentative mark was also not given to the said document. Learned Advocate for the petitioner-accused was also not allowed to cross-examine the said witness on the basis of the said document.

9. Therefore, the impugned order passed by the trial Court if considered in light of the decisions rendered by the Honourable Supreme Court cited by the learned Advocate for the petitioner, it becomes clear that the trial Court has committed a grave error by not permitting the learned Advocate for the petitioner to produce the said document on record, and the trial Court has also committed a grave error by not allowing the learned Advocate to ask questions relating to the aforesaid document.

10. The Honorable Supreme Court in the case of Ajoy Kumar Ghose Vs. State of Jharkhand and Another, AIR 2009 SC 2282 : (2009) CriLJ 2824 : (2009) 4 JT 245 : (2009) 4 SCALE 267 : (2009) 14 SCC 115 : (2009) 4 SCR 515 : (2009) 3 UJ 1357 ,, held in paragraphs No. 23 and 39 as under :-

"23. Essentially, the applicable Sections are Section 244 and 245 Cr.P.C. since this is a warrant trial instituted otherwise than on police report. There had to be an opportunity for the prosecution to lead evidence under Section 244(1) Cr.P.C. or to summon its witnesses under Section 244(2) Cr.P.C. This did not happen and instead, the accused proceeded to file an application under Section 245(2) Cr.P.C., on the ground that the charge was groundless.

39. The charge is framed under Section 246(1) Cr.P.C., which runs as under :-

"246(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused."

The language of the Section clearly suggests that it is on the basis of the evidence offered by the complainant at the stage of Section 244(1) Cr.P.C., that the charge is to be framed, if the Magistrate is of the opinion that there is any ground for presuming that the accused has committed an offence triable under this Chapter. Therefore, ordinarily, when the evidence is offered under Section 244 Cr.P.C. by the prosecution, the Magistrate has to consider the same, and if he is convinced, the Magistrate can frame the charge. Now here, there is, however, one grey area. Section 246(1) Cr.P.C. is very peculiarly worded. The said grey area is on account of phrase "or at any previous stage of the case". The question is as to whether, even before any evidence is led under Section 244 Cr.P.C., can the Magistrate straightaway proceed to frame a charge."

Thus, the Honourable Supreme Court has recognized the right of the accused to cross-examine the prosecution witness before framing of charge and held that it is a right available to the accused.

11. Similarly, the Honourable Supreme Court in the case of Harinarayan G. Bajaj (supra) held in paragraphs No. 17 and 18 as under :-

"17. This brings us to the question argued by Shri Naphade on the basic right of cross-examination to the accused in the proceedings under Section 244, Cr.P.C. In fact, in view of our interpretation of Section 319(4), it is really not necessary to go into that question. However, since the Learned Senior Counsel argues that there is no right at all to give opportunity of cross-examination to any accused whether brought before the Court initially or by way of Section 319(1), we proceed to consider the question.

18. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him."

From the observations made by the Honourable Supreme Court in the aforesaid decision, it is clear that the accused is having a valuable right to cross-examine

the prosecution witness at the stage of pre-charge evidence, and it is a very precious right given to the accused.

12. In the decision rendered by the Honourable Supreme Court in the case of Sunil Mehta and another (supra), the Honourable Supreme Court observed in paragraphs No. 17, 18 and 19 as under :-

"17. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

18. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

19. Thirdly, because the right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage."

Thus, in view of the aforesaid decisions rendered by the Honourable Supreme Court, it is clear that the accused is having a valuable right to cross-examine the witness of the complainant at the stage of pre-charge evidence, and therefore, the decisions relied upon by the learned Advocate Shri Gohil for the respondent No. 2, which are rendered by the Kerala High Court and Madhya Pradesh High Court are not helpful to him.

13. In the case of Bipin Shantilal Panchal (supra), Honourable Supreme Court has given a direction to the trial Court to make a note of objection, and mark the objected document tentatively as an exhibit, or record the objected part of oral evidence, and decide the objection at final stage. The Honourable Supreme Court in paragraph No. 14 has observed as under :-

"When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)"

In view of the aforesaid provisions of law, and the decisions of the Honourable Supreme Court in different cases, when the trial Court as well as the Sessions Court has committed the error of law and committed illegality, this Court is having ample powers to exercise the jurisdiction vested in it under Article 227 of the Constitution of India. Therefore, though the scope of judicial review is limited, the present case is a case wherein the powers under Article 227 are required to be exercised. Hence, the impugned orders are hereby quashed and set aside. The petitioner-accused is permitted to produce on record the document, i.e. the report of a handwriting expert Ms. Meghna Sahu, and the petitioner is also permitted to ask questions in the cross-examination to the witness of the complainant, viz. Mr. J.J. Patel. The trial Court is also directed to give a mark to the aforesaid document, as per the direction of the Honourable Supreme Court in the case of Bipin Shantilal Panchal (supra). This exercise shall be completed as early as possible.

At this stage, learned Advocate for respondent No. 2 has requested that the trial Court be directed to expedite the trial in view of the fact that respondent No. 2-complainant is aged about 61 years. It is open for the complainant to give necessary application before the trial Court. If such an application is given, the trial Court may decide the same in accordance with law.

The petition is allowed accordingly. Rule is made absolute. Direct service is permitted.