

(2007) 07 GUJ CK 0051
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No's. 1509, 1511, 1513, 1515, 1516, 1566, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1635, 1752, 1754, 1867, 1898, 1900, 2026, 2028, 2029, 3025, 3027, 3028 and 3421 of 2007

Kailash Govindram Rathi and Others	Vs	APPELLANT
The State of Gujarat and Another		RESPONDENT

Date of Decision : 26-07-2007

Acts Referred:

Bombay Prohibition Act, 1949 — Section 116(2), 43, 65, 66(B), 81
Criminal Procedure Code, 1973 (CrPC) — Section 161, 482
Evidence Act, 1872 — Section 25
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42

Citation : (2008) 1 GLR 750

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : H.S. Mulia, in CR.MA. Nos. 1509, 1511, 1513, 1515, 1516, 1566 to 1575, 1625, 1752, 1754, 1761, 1867, 1898, 1900, 3025, 3027 and 3028/07, Anil S. Dave, in CR.MA. Nos. 3421/07, Adil R. Mirza, in CR.MA. Nos. 2026, 2028 and 2029/07, for the Appellant; M.R. Mengdey, Assistant Public Prosecutor in CR.MA. Nos. 1509, 1511, 1513, 1515, 1516, 1635, 1752, 1898, 1900, 3421, 2026, 2028 and 2029/07 and R.C. Kodekar, Assistant Public Prosecutor in CR.MA. Nos. 1566, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1754, 1867, 3025, 3027 and 3028/07, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—Mr. Adil Mirza, learned Advocate appearing on behalf of the applicants in Criminal Misc. Application No. 2026 of 2007 does not press the present application qua the applicant No.1 and restricts the application for applicant Nos. 2 and 3 only. Permission is accordingly granted.

2. As common question of law and facts arise in this group of petitions, they are being disposed of by this common judgment and order.

In all the cases different criminal complainants are filed with different Police Stations against the respective applicants - original accused for the offences punishable under Sections 66(b), 65(a)(e), 81, 43 read with Section 116(2) of the Bombay Prohibition Act, 1949. It is to be noted that by and large in all the cases huge quantity of English liquor has been recovered from the persons who were transporting the same from various places out of State of Gujarat to the State of Gujarat and by and large in all the cases accused who were already arrested are Drivers, Cleaners etc. At the time of recording the statement and/or filing the complaint itself names of respective applicants are disclosed by the accused who were already arrested and the allegations against the applicants are that either they are the suppliers who have supplied either from Rajasthan and/or out of Gujarat and/or to whom liquor was to be supplied and/or for whom all the accused who were arrested. It is required to be noted that in almost all the cases, respective applicants are wanted and hailing from out of Gujarat. On the basis of the statements of the accused who are already arrested which is recorded herein above implicating the applicants, the concerned Investigating Officer of the respective Police Stations have initiated investigation; and at that initial stage the applicants have approached this Court and in most of the cases they have obtained stay of further investigation mainly on the ground that except the statements of the co-accused there is no evidence and/or material against the respective applicants. Therefore, the statements of the co-accused is inadmissible in evidence more particularly considering Section 25 of the Indian Evidence Act and Section 161 of the Criminal Procedure Code and therefore, respective complaints filed against the respective applicants are required to be quashed and set aside.

3. Mr. H.S. Mulia, learned Advocate and Mr. Adil Mirza, learned Advocate appearing on behalf of the respective applicants - original accused have vehemently submitted that the statements of the co-accused is inadmissible in evidence as per the provisions of the Indian Evidence Act and there cannot be any conviction on the basis of the statements of the co-accused and in the complaint there is no evidence and/or material against the applicants, therefore, the impugned complainants are required to be quashed and set aside. It is also further submitted that as the statements of the co-accused are inadmissible in evidence, on the basis of the statements of the co-accused there cannot be any conviction and as there are blink chances of conviction, to continue the criminal proceedings against the applicants by way of criminal complainants would be exercise in futility. Therefore, it is requested to quash the complainants. The learned Advocates appearing on behalf of the respective applicants have relied upon Section 25 of the Indian Evidence Act and also Section 161 of the Criminal Procedure Code. The learned Advocates appearing on behalf of the respective applicants have relied upon the decision of this Court in the case of New India Assurance Co. Ltd. Vs. Ketanbhai Bhagvandas Shah and Others, , decision of this Court in the case of Jinabhai Kalabhai Rajput v. State of Gujarat reported in 1999(1) GLH 246 and also decision of this Court in the case of Suresh Chhotalal

Verma Vs. State of Gujarat, in support of their above submissions and requested to quash the impugned complaints.

4. On the other hand Mr. R.C. Kodekar, learned APP as well as Mr. M.R. Mengdey, learned APP appearing on behalf of the State while opposing the present applications have submitted that the question whether on the basis of the statements of the co-accused the criminal proceedings against the petitioners should be continued or not is not required to be considered at this stage as the investigation was at initial stage and at that stage the applicants have approached this Court and have obtained stay of further investigation. It is submitted by them that in fact the statements of the co-accused can be basis for further investigation and after investigation is concluded appropriate report will be submitted by the Investigating Officer and/or charge-sheet will be filed and at that stage if it is found that except the statements of the co-accused there is no further material and/or evidence, the submissions of the applicants are required to be considered and the investigation cannot be stalled at initial stage solely on the ground that at present there is only the statements of the co-accused. It is also submitted by them that the contention on behalf of the petitioners that there are blink chances of conviction, is also not required to be considered at this stage as the investigation is yet to be carried out and therefore, all these aspects are required to be considered either at the stage of framing of charges and/or filing of appropriate report and/or at the time of trial. It is submitted that there is no material and/or evidence against the applicants cannot be considered at this stage as the investigation is not proceeded further in view of the stay granted by this Court more particularly, when by and large all the applicants are absconding. The learned APPs have heavily relied upon the decision of the Hon'ble Supreme Court in the case of Mohd. Malek Mondal v. Pranjal Bardalai and Anr. reported in 2005(10) SCC 608 wherein the Hon'ble Supreme Court has confirmed the order passed by the High Court declining the prayer to quash the complaint at the initial stage when the submission was made on behalf of the accused that there was no material against them except inadmissible retracted statements allegedly made by the co-accused. Therefore, it is requested to dismiss all the applications at this stage and permit the Investigating agency to proceed further with the investigation which is statutory right of the Police.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. At the outset it is required to be noted that against all the respective applicants, the complainants are filed before the different Police Stations for the offences punishable under Sections 66(b), 65(a)(e), 81, 43 read with Section 116(2) of the Bombay Prohibition Act, 1949. It is also required to be noted that in almost all the cases the accused who were caught are Drivers, Cleaners etc., transporting English liquor from the places out of Gujarat to the State of Gujarat. It is also required to be noted that there is prohibition in the State of Gujarat. It is also required to be noted that in almost all the cases allegations against the respective applicants on the basis of the statements of the persons who are

arrested are that the applicants are either suppliers of the liquor and/or liquor was to be supplied to them for the purpose of sell within the State of Gujarat. In almost all the cases the allegations is that the applicants are absconding and most of them are from out of the State of Gujarat. Now on the basis of the allegations and averments in the complaints, and on the basis of the statements of the co-accused who are arrested, the Investigating Officer started to initiate investigation against the applicants, at that initial stage all the applicants have approached this Court by way of present application for quashing and setting aside the respective complainants against them solely on the ground that except the statements of the co-accused there is no material and/or evidence against them. This Court granted stay of further investigation in almost all the cases. Now the question which is required to be considered at this stage is whether the investigation is to be commenced and/or proceeded on the basis of the statements of the co-accused and whether the Investigating Officer should be permitted to further investigate the case and/or whether at this stage even before the investigation is concluded respective complainants are required to be quashed.

7. Learned Advocates appearing on behalf of the applicants have relied upon the decision in the case of New India Assurance Co. Ltd. (supra) have submitted that in the aforesaid decision, this Court has taken a view that on the basis of the statements of the co-accused there cannot be any conviction. In one of the cases Jinabhai Kalabhai Rajput (supra) the accused was convicted and in the case of Suresh Chhotalal Verma (supra), the accused was discharged. Now it is required to be noted at this stage that in the case of Jinabhai Kalabhai Rajput (supra) the question came to be considered at the time of appeal and accused was convicted solely on the basis of the statements of the co-accused and it was found that there was no other material and/or evidence against the accused. Now so far as the case of Suresh Chhotalal Verma (supra) is concerned in that case the question came to be considered at time of discharge after charge-sheet was submitted and it was found considering the charge-sheet papers that except the statements of the co-accused there was no material and/or evidence against the accused and considering the same accused came to be discharged. Thus, the stage at which this Court intervened was the stage at the time of discharge i.e. after the investigation was completed and charge-sheet was filed. Under the circumstances both the decisions are not applicable to the facts of the present cases.

8. Identical question came to be considered by the Hon''ble Supreme Court in the case of Mohd. Malek Mondal (supra) reported in (2005) 10 SCC 608 and the case before the Hon''ble Supreme Court was that an application was submitted u/s 482 of the Criminal Procedure Code to quash the complaint and one of the ground canvased on behalf of the accused was that there was no material against the petitioners except the inadmissible retracted statement allegedly made by the co-accused. The Hon''ble Supreme Court confirmed the order passed by the High Court refusing to quash the complaint on that ground at the

stage of investigation and the Hon''ble Supreme Court has held that the question about corroborative nature of evidence has to be considered at the appropriate stage and the High Court rightly declined the prayer to quash the complaint at the initial stage when only cognizance had taken and the accused was still to be interrogated. Relevant paragraph No.6 of the said judgment is reproduced as under:

6. The proceedings of the complaint are at the initial stage after the cognizance has been taken. The petitioner could not be interrogated since he has been avoiding to appear before the NCB officer despite issue of various notices as per the averments made in the complaint. The allegations in the complaint are grave. The recover, according to the prosecution, is of 2.050 kg of heroin which, according to the statement of Dilip Das, belonged to the petitioner. The question whether Section 42 of the NDPS Act has been complied or not being a question of fact has to be gone into on appreciation of evidence that may be adduced before the Special Judge. Prima facie, the High Court has come to the conclusion that there has been compliance. This is not the stage for in-depth examination of this question. The contention that there is no material against the petitioner since the only material on record was inadmissible retracted statement allegedly made by the co-accused Dilip Das, also cannot be accepted, at this stage, when only cognizance has been taken and the petitioner is still to be interrogated. The question about corroborative nature of evidence may also have to be gone into at the appropriate state. The only other contention urged is about the lack of power of the Special Judge to issue warrant of arrest.

Now considering the decision of the Hon''ble Supreme Court in the case of Mohd. Malek Mondal (supra) and considering the facts of the present case, stage at which the proceedings are pending i.e. at the initial stage of the investigation, the contention on behalf of the respective applicants that the complaints are required to be quashed and set aside on the ground that except statements of the co-accused there is no material and/or evidence against the applicants, cannot be accepted.

9. It is required to be noted that investigation was at the initial stage and the investigation was to be initiated/proceeded further on the basis of the statements of the co-accused and the allegations and averments in the complainants. Before even the investigation is carried out, the applicants have approached this Court and the Police Officers are restrained from further investigation. It is also required to be noted that in almost all the cases, the applicants are absconding and/or residing outside State of Gujarat. Unless and until the investigation is proceeded further; the respective applicants are interrogated and till the investigation is completed, it cannot be said that there is no material and/or evidence against the applicants. All these things are required to be considered after the investigation is completed and appropriate report and/or charge-sheet is submitted against the applicants and thereafter, the question is required to be considered whether the applicants are to be prosecuted or not. At the initial

stage of investigation the respective complaints cannot be quashed and set aside solely on the ground that at this stage there are only statements of the co-accused which is inadmissible in evidence. Corroborative nature of evidence during the course of investigation and statements of co-accused can be considered at an appropriate stage. Under the circumstances, at the initial stage complainants cannot be quashed. It cannot be disputed that it is statutory right of the Investigating Officer to investigate the complainants and the offences and the Investigating Officer cannot be restrained from further investigation solely on the ground that at this stage only statements of the co-accused is available. In fact as per this Court statements of the co-accused, allegations and the averments in the complainants to that effect can be the basis for initiation of further investigation.

10. Under the circumstances, the prayer of the applicants at this stage to quash the complainants and stall the investigation at the initial stage cannot be accepted. All those submissions are required to be considered at an appropriate stage and not at the stage of investigation. The submission of the learned Advocates appearing on behalf of the applicant relying upon Section 25 of the Indian Evidence Act and Section 161 of the Criminal Procedure Code are also not required to be considered at this stage, the same can be considered at an appropriate stage after the investigation is completed and appropriate report/charge-sheet is filed and/or even at the time of trial.

11. It is reported that in some of the cases charge-sheet is filed, however, it is not known whether the charge-sheet have been filed against the applicants and/or accused who were arrested. If the charge-sheet are filed against some of the applicants, in that case, it will be open for the applicants to move an appropriate application for discharge and the same shall be considered in accordance with law and on merits. If the charge-sheet is filed against the co-accused and not against the applicants, and if it is the contention on behalf of the applicants that from the charge-sheet papers there is no case made out against the applicants and/or there is no material against the applicants, in that case it is required to be noted that so far investigation against the respective applicants is not initiated in view of the stay granted by this Court. After interrogation of the respective applicants there might be some material found which can be the basis for filing appropriate report/charge-sheet. Under the circumstances, even on that ground investigation is required to be proceeded further against the respective applicants. It will not be open for the applicants to contend that on the basis of the charge-sheet filed against the co-accused there is no material against the applicants and the said submission is required to be considered only after investigation against qua the respective applicants and after interrogating them.

12. For the reasons stated above, all these petitions fail, and are required to be dismissed and accordingly they are dismissed. Rule is discharged in respective petitions. Ad-interim relief granted earlier in each of the petitions are hereby vacated forthwith. Office is directed to issue Writ in each of the petitions to the

concerned Police Stations immediately, informing vacating of ad-interim relief.