
(1991) 09 GUJ CK 0009
In the Gujarat High Court

Koli Malde Karsan and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-09-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 145, 145, 25, 32(I)

Citation : (1992) 1 GLR 371

Hon'ble Judges : S.M. Soni, J

Bench : Single Bench

Judgement

S.M. Soni, J.—This revision application is directed against the order dated 20-8-1991 passed by the Addl. Sessions Judge, Junagadh below Exh. 51 filed in Sessions Case No. 24 of 1991 whereby the application of the applicants-accused (hereinafter referred to as the accused) is rejected.

2. Short facts which lead to file Exh. 51 are as under:

There was melee in locality called Vadhia Sherion, Tal. Mangrol between two groups. One group was of Koli Malde Karsan and others. Other group was of Arsi Devsi, Deva Rajde and others. Persons of both groups were injured. One person on Arsi Devsi side succumbed to the injuries. Both the sides filed cross-cases against each other. Complaint filed by Arsi Devsi was registered as C.R. No. 102 of 1990. Complaint filed by Koli Malde Karsan was registered as C.R. No. 103 of 1990. The offences were registered in the same Police Station of Shil, Taluka Mangrol, District Junagadh. On completion of investigation charge-sheet was submitted in both the cases and they were committed to the Court of Sessions. Sessions Case No. 24 of 1991 and Sessions Case No. 71 of 1991 arise from Crime Register No. 102 of 1991 and 103 of 1991 respectively, on the file of Sessions Judge at Junagadh. Thus it is clear that accused in one case are witnesses in the other.

To be precise for the purpose of this revision application, Arsi Devsi and Deva Rajde accused in Sessions Case No. 71 of 1991 are witnesses in Sessions Case

No. 24 of 1991 which is now on trial. As the said Arsi Devsi and Deva Rajde were to be examined as witnesses for prosecution, the defence Advocate gave an application Exh. 51 on 8-8-1991, to direct the Investigating Officer of the case to produce before the Court the statements of Arsi Devsi and Deva Rajde recorded in C.R. No. 103 of 1991, despite they being accused in that case.

3. The learned Judge rejected that application on the ground that the statements on which the defence wants to rely are the statements of the accused in that case and therefore the same cannot be permitted to rely.

4. Learned Advocate Mr. N.D. Nanavati for the applicants has challenged this order on the ground that the said statements cannot be said to be the statements of the accused for the purpose of the present case wherein they are not accused but only witnesses. Those statements are only the previous statements as referred in Section 145 of the Evidence Act and can be used within the scope of Section 145 of the Code though recorded u/s 161 of the Code.

5. Learned A.P.P. Shri Bukhari supports the order of the learned Addl. Sessions Judge contending that the statements on which the defence wants to rely for the purpose of contradiction are recorded at the time when the witnesses were accused in that case and secondly that they are recorded in the case which arose from the same incident are hit by Section 162 of the Code and also by Section 145 of the Evidence Act, and therefore the order passed by the learned Addl. Sessions Judge does not call for any interference.

6. Section 162 of the Code reads as under:

162. (1) No statement made by any person to a Police Officer in the course of an investigation under Chapter, shall if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any enquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (I) of Section 32 of the Indian Evidence Act, 1872 (I of 1872), or to affect the provisions of Section 27 of the Act.

Explanation: An omission to state a fact or circumstance in the statement referred to in Sub-section (1) may amount to contradiction if the same appears

to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amount to a contradiction in the particular context shall be a question of fact.

Section 145 of Evidence Act reads as under:

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Under Section 162(1) of the Code the statement recorded u/s 161 of the Code in the course of investigation ; (a) if reduced in writing, is not to be signed by the person making; (b) if it is recorded in a police diary or otherwise, then the same or any part thereof cannot be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made except provided in proviso to this section. Under proviso to this section the statement if reduced in writing and if duly proved, it may be used by the accused to contradict the witness. It is now settled law that words "any person" referred in the section not only refers to witnesses, but also includes accused. Thus, it can be said that if a statement u/s 161 of any person if recorded in writing, the same cannot be used except for the purpose of contradicting such witness in a manner provided u/s 145 of the Evidence Act by the accused and with the permission of the Court by the prosecution and any part thereof may also be used in re-examination of such witness only for the purpose of explaining any matter referred in cross-examination. Thus, if a person whose statement is recorded, is an accused in that case, he will not be examined by the prosecution as their witness, and the question of user of such statement if recorded and proved, for the purpose of contradicting such witness, i.e., accused will not arise. Such statement if amounts to confession is hit by Section 25 of the Evidence Act. This bar or prohibition as to user of such statement is for the inquiry or trial for which it is recorded. Bar of use of statements recorded u/s 162 of the Code does not come in play for inquiry or trial other than for which they are recorded. Here, in this case, the statements which the defence wants to use u/s 145 of the Evidence Act (for cross-examination of witness as to his previous statement in writing), is a statement of the witness in other case. Defence in this Sessions Case No. 24 of 1991 arising out of C.R. No. 102 of 1991, wants the statements of the persons who are accused in Sessions Case No. 71 of 1991 arising from C.R. No. 103 of 1991 a different case. Thus, the statements in C.R. No. 103 of 1991 are the previous statement in trial arising from C.R. No- 102 of 1991. Thus, the request of the defence For the supply of statement to use u/s 145 of the Evidence Act is fortified as the same is not hit by Section 162 of the Code. Thus the learned Judge has committed error in rejecting the said application and denying the defence make avail the previous statement of witnesses for the user

u/s 145 of the Evidence Act.

7. This view is supported by a judgment in the case of Pulikonda Venkatasubbayya Vs. Maddi Venkata Lakshmayya, where it is observed that "if it is sought to use the statement at a trial in respect of some offence which was not being investigated when the statement was made, there is no statutory bar whatsoever to its use. And of course the proviso only applies to such trials in which there is a statutory bar. It will be apt to refer to an example quoted in that judgment. "If in a investigation of theft A says to the Police that B & C beat him that statement can be produced where D and E are being tried for assault, the trial in no way being in respect of the investigated theft. Though of course, if in any way the assault had been under investigation by the police the statutory bar would apply." Mr. Bukhari, learned A.P.P. in respect of his arguments relied on a Supreme Court judgment in the case of Gajendra Singh Vs. State of U.P., where the relevant observation reads as under:

Mr. Garg drew our attention to the statement of P.W. 13 the investigating officer Jagdish Prasad, where he stated that while investigating the cross-case State v. Sukhendra Singh, he had made inquiries from the witnesses Shyampal Singh, Sukhendra Singh and Kanku as to how Rambeti received injuries but they had showed their ignorance. It was argued on the basis of this statement that the prosecution had deliberately suppressed the manner in which Smt. Rambeti sustained injuries. In the first place this statement is absolutely inadmissible because it was a statement made u/s 161 of the Code of Criminal Procedure during investigation of the cross-case which was not at all admissible in the present case. Secondly, before the attention of Jagdish Prasad could be drawn to the statement it should have been put to the witness Shyampal Singh in this case which was not done. In these circumstances, therefore this statement must be excluded from consideration. Even if we take this statement of Jagdish Prasad into consideration, that does not put the prosecution case out of Court, because we have already pointed out that there were a number of circumstances which went to show that the defence version was not true at all and that what really happened was that Smt. Rambeti sustained injuries accidentally because some of the pellets which by passed the deceased hit her. For these reasons, therefore, the first contention raised by Mr. Garg is overruled.

There in the case before the Supreme Court the statement which was sought to be relied on was the statement recorded in that very case and proved through the investigating officer without drawing attention of and bringing to the notice of the witness itself whose statement was sought to be relied on for the purpose of contradicting his evidence. Therefore, that judgment does not help the prosecution particularly in view of the facts of this case.

8. In view of the above discussion, the order passed by the learned Addl. Sessions Judge is liable to be set aside.

In the result, the application is allowed. Learned Addl. Sessions Judge is directed

that defence be provided with certified copies of the statements of Arsi Devsi and Devsi Rajde in Crime Register No. 103 of 1990 and it be directed that either the Investigating Officer or the Public Prosecutor to keep available with them the original statements before the Court at the time when these two witnesses are examined, to facilitate defence to prove the contradiction if the need so arises. Writ be sent at the earliest. Rule made absolute.