

**(2003) 11 GUJ CK 0032**  
**In the Gujarat High Court**

**Case No :** Criminal Miscellaneous Application No's. 2684 and 2686 of 2003

Nadirkhan Babakhan Navabkhan Pathan

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision :** 15-11-2003

**Acts Referred:**

Arms Act, 1959 — Section 25(1)(B), 27  
Bombay Police Act, 1951 — Section 135(1)  
Constitution of India, 1950 — Article 226, 227  
Criminal Procedure Code, 1973 (CrPC) — Section 173(8), 190, 482  
Penal Code, 1860 (IPC) — Section 114, 120B, 143, 147, 148  
Prevention of Food Adulteration Act, 1954 — Section 16, 7

**Citation :** (2004) CriLJ 3200 : (2004) 24 GLH 569

**Hon'ble Judges :** R.P. Dholakia, J

**Bench :** Single Bench

**Advocate :** D.R. Bhatt in Criminal Misc. application Nos. 2684 and 2686 of 2003, for the Appellant; Hansa Punani, APP for Respondent No. 1 in Criminal Misc. Application Nos. 2684 and 2686 of 2003, for the Respondent

**Final Decision :** Dismissed

## Judgement

R.P. Dholakia, J.—Rule. Learned A.P.P., Mrs.Hansa Punani, waives service of rule on behalf of the respondent-State in both the petitions. With the consent of learned counsel appearing for the respective parties, both these petitions are taken up for final hearing.

2. Both these petitions have been filed under Sec. 482 of the Code of Criminal Procedure for quashing and setting aside the First Information Reports being C.R.No.II-3187 of 2002 lodged with the Danilimda Police Station and C.R.No.I-530 of 2002 lodged with Naroda Police Station and for deleting the name of the petitioner from the respective charge-sheets showing him as an absconding accused mainly on the ground that the only evidence available with the investigating agency is the statement of co-accused and also on the ground that the present petitioner is a social worker who has organized relief camp

under the banner of Hajarat Shah-e-Alam Relief Camp at Ahmedabad and who has made grievance against the administration before various authorities and, therefore, mala fide he has been involved in the offences in question.

3. An affidavit-in-reply has been filed by the Investigating Officer, Mr.K.R.Jadav, Assistant Commissioner of Police, "K" Division, Ahmedabad City, in Cri.Misc.Appln.No.2684 of 2003 contending inter alia that the petitioner has started criminal activities in 1996 and as on today, nine criminal cases were registered against him. According to him, in 1996, the petitioner was detained under PASA and in 1999 he was externed from adjoining four Districts of Ahmedabad. It is stated that offences punishable under Secs. 143, 147, 148, 149, 307, 320 of IPC and Sec. 135(1) of Bombay Police Act registered as C.R.No.53 of 1997 with Danilimda Police Station have been registered against the petitioner and other accused. In the said case which is numbered as Case No.214 of 2001 pending before the learned Addl. City Sessions Judge, Court No.7, Ahmedabad City, since the petitioner is not attending Court and is not available for trial, he was issued with a warrant and is absconding. It is further stated that in C.R.No.122 of 2002 registered with Maninagar Police Station for the offences punishable under Secs. 302, 120-B and 114 of IPC, Sec. 25(1) of Arms Act and Sec. 135(1) of B.P.Act also, petitioner is shown as one of the accused and on registration of FIR, petitioner was absconding. It is further stated that present FIR being C.R.No.II-3187 of 2002 was registered for the offences punishable under Secs. 25(1)(B) and 27 of the Arms Act against Mohmed Firoz @ Bakri Mustakin Shaikh and above accused was arrested on 15-6-2002 at 2015 hours during investigation. It is further stated that Mohmed Firoz was behind bars though confession was made by him of C.R.No.122 of 2002 of Maninagar Police Station for the offence under Sec. 302 of IPC wherein present petitioner is one of the accused and the investigating officer, upon noticing the said fact, made an application before learned Metropolitan Magistrate for addition of Sec. 120-B of IPC. It is further contended that since name of the petitioner was revealed in the statement of co-accused Mustak Aalambhai Parmar on 22-8-2002, offences under Secs. 193, 196, 202, 217 and 221 of IPC were added in C.R.No.II-3187 of 2002. It is further contended that the petitioner compelled accused Mohmed Firoz with the help of Police Constable of Danilimda Police Station, Nasimkhan Ajikhhan Pathan to get rid of C.R.No.122 of 2002 registered with Maninagar Police Station and for which, Mohmed Firoz was caught with country made tamancha and one live cartridge in C.R.No.3187/2002 under Secs. 25(1)(B) of Arms Act was registered against him and Mohmed Firoz has confessed to have committed the offence under Sec. 302 of IPC in C.R.No.122 of 2002 of Maninagar Police Station wherein present petitioner is shown as accused and just to save the present petitioner, elibi was created by confession of Mohmed Firoz. It is further contended that this confession of Mohmed Firoz was made in order to get an acquittal order in favour of present petitioner from the trial Court for the offence under Sec. 302 of IPC in Maninagar Police Station C.R.No.I-122 of 2002. It is further stated that commission of offence under Sec.

302 of IPC of Maninagar Police Station C.R.No.I-122 of 2002 took place at 20.30 p.m. on 15-5-2002 which was registered at 3.30 a.m. on 16-5-2003. It is further stated that since accused Mohmed Firoz was behind bar in Danilimda Police Station C.R.No.82 of 2002 under Secs. 143, 147, 148, 149, 336, 337, 435, 436, 188 of IPC and Sec. 135(1) of B.P.Act for the period from 12-5-2002 to 16-5-2002, it is clear that Mohmed Firoz has not committed offence under Sec. 302 of IPC registered as Maninagar Police Station C.R.No.122 of 2002 and though said offence has been committed by the present petitioner, accused Mohmed Firoz has been involved and his elibi was planned to be recorded. It is further contended that it has come out from the record pertaining to accused Mohmed Firoz kept at Sabarmati Central Jail that when the offence under Sec. 302 of IPC of Maninagar Police Station C.R.No.I-122 of 2002 took place on 15-5-2002, accused Mohmed Firoz was behind bars at Sabarmati Central Jail and hence, confession made by Mohmed Firoz was to save the present petitioner. It is further contended that various criminal offences were registered against father of the present petitioner, late Shri Navabkhan and brother of the petitioner, Sharifkhan Navabkhan Pathan, Mahebubkhan Navabkhan Pathan, Nasirkhan Navabkhan Pathan and late Shri Ayubkhan @ Pappukhan Navabkhan Pathan. It is stated that petitioner is a gang operator in Shah-e-Alam area with the help of his family members and other criminal gang. It is ultimately stated that in view of the fact that petitioner is involved in various criminal offences and is avoiding trial, petitioner may be ordered to surrender himself to co-operate in the present case and hence, it is prayed that no relief may be granted in favour of the present petitioner.

4. An affidavit-in-rejoinder has been filed by the petitioner denying the averments made in the affidavit-in-reply filed by the Investigating Officer. It is contended that the averments made by the Investigating Officer in the reply have no connection with the present case as the present petition is for quashing of the FIR. It is further contended that he is regularly attending the Sessions Court till the days prior to 28-2-2002 i.e. before commencement of rioting in the Ahmedabad City. It is stated that since the warrant was issued, he has applied for cancellation of said warrant and warrant was cancelled vide order dated 6-5-2003. It is further contended that he was falsely implicated in Maninagar Police Station C.R.No.122 of 2002 and hence, Cri.Misc.Appln.No.957 of 2003 is filed for getting anticipatory bail and it is pending and hence, it is submitted that there is no substance in the say of Investigating Officer. It is further stated that there is no material with the investigating agency to say that the name of present petitioner has been disclosed by co-accused on 22-8-2002 as said statement has not been annexed with the charge-sheet. Relying upon the judgment dated 10-10-2003 delivered by this Court (Coram: D.P.Buch,J.) in Cri.Misc.Appln.Nos.5483 and 5596 of 2000, it is submitted that when there is no whisper against the petitioner in the FIR or in the charge-sheet papers, present FIR deserves to be quashed and set aside.

5. An affidavit affirmed by the Investigating Officer of C.R.No.I-530 of 2002

registered with Naroda Police Station, Shri G.L.Khunti, Senior Police Inspector, Naroda Police Station, Ahmedabad City has been filed in Cri.Misc.Appln.No.2686 of 2003 stating that he has gone through the affidavit-in-reply filed by Mr.K.R.Jadav, Assistant Commissioner of Police, "K" Division, Ahmedabad City, in Cri.Misc.Appln.No.2684 of 2003 and since the detailed facts of the case and antecedents are given in the said affidavit filed by Mr.Jadav, he is not repeating the same in his affidavit and that he is relying upon the said affidavit.

6. Heard learned Senior Counsel, Mr.Y.N.Oza for Mr.D.R.Bhatt for the petitioner and Mrs.Hansa Punani, learned APP for the respondent No.1-State.

7. As common questions of facts and law are involved in both these petitions and also petitioner in both the petitions are the same, I have heard both these petitions together and are being decided by way of this common judgment.

8. It is mainly argued by Mr.Oza that the petitioner is totally innocent and has been falsely implicated by the respondent No.2 as an absconding accused. It is further argued that there is no iota of evidence connecting the petitioner with the crime in question. It is further argued that even if the affidavit filed by the Investigating Officer is accepted, then also, the only evidence available against the petitioner is the statement of co-accused implicating him with the commission of offence which is inadmissible in evidence.

9. Submitting the draft amendment in the petition, Mr.Oza has argued that the petitioner is an active social worker who had organized relief camp at Shah-e-Alam in Ahmedabad and who had voiced the grievance against the administration to various authorities including the Chairman, National Human Rights Commission and, therefore, he has been wrongly involved in the crime in question by the Investigating Officer with a mala fide intention.

10. It is, therefore, submitted that now since the investigation is over and the charge-sheets are filed in both the cases and also since the involvement of the petitioner is nowhere shown in the entire charge-sheets papers, FIRs and the charge-sheets filed in the cases are required to be quashed and set aside qua the present petitioner and name of the present petitioner be deleted from the respective charge-sheets showing him as an absconding accused.

10.1 He has placed reliance upon the unreported judgments dated 10-10-2000 delivered in Cri.Misc.Appln.Nos.5483 and 5596 of 2000 by this Court (Coram:D.P.Buch,J.) and dated 4-10-2001 delivered in Cri.Misc.Appln.No.900 of 2001 with Cri.Misc.Appln.No.901 of 2001 by this Court (Coram: M.H.Kadri,J.). Relying upon the aforesaid unreported judgments, he has drawn my attention towards the judgment of the Supreme Court reported in 1983 G.L.H. 273 in the case of Somabhai Mathurbhai Patel Vs. New Shorrock Mills and argued that decision of a Single Judge of the High Court is binding on another Single Judge of the same High Court and in case of disagreement, matter should be referred to Larger Bench.

10.2 He has also relied upon M/s Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others, reported in 1998 S.C. 128 more particularly towards head note which reads as under:

"Criminal P.C. (2 of 1974), S.482--Quashing of complaint--powers of High Court--Complaint filed under S. 7/16 of Prevention of Food Adulteration Act--Allegation that complainant was sold bottle of beverage under brand "Lehar Pepsi" which was adulterated--No material showing appellant-accused were either manufacturer or holding licence for manufacture of offending beverage--Complaint and preliminary evidence making out no case against accused--Complaint liable to be quashed."

10.3 He has also relied upon G. Sagar Suri and another Vs. State of U.P. and Ors. reported in 2000(2) G.L.H. 191 S.C. towards head note. Same reads thus:

"(A) Code of Criminal Procedure, 1973--S.482 --Whether High Court can quash criminal proceedings in exercise of powers u/s. 482 when application for discharge is pending--Held, filing of discharge application is no bar to exercise jurisdiction u/s 482--It has to be exercised to prevent abuse of process of any Court or otherwise to serve ends of justice--Case law discussed."

It is, therefore, prayed that since there is no sufficient ground for proceeding against the petitioner, the FIRs are required to be quashed and name of the petitioner is required to be deleted from the charge-sheets as an absconding accused.

11. It has been vehemently argued by Mrs. Hansa Punani, learned Addl. Public Prosecutor for the State that at this stage, due to non-co-operation of petitioner-accused, there is no other evidence except the statement of co-accused available with the investigating agency regarding the involvement of the petitioner in the offences in question and hence, investigating agency should be permitted to investigate further for reaching the roots of the offences. It is submitted that in the midst of investigation, without giving opportunity to the investigating officer, complaint cannot be quashed. It is further contended by her that since the petitioner is not available for investigation and is not co-operating with the investigating agency, his name was shown as absconding accused in the charge-sheets filed in C.R.No.II-3187 of 2002 lodged with Danilimda Police Station and C.R.No.I-530 of 2002 lodged with Naroda Police Station and hence, now it is too early to come to any conclusion for exercising power under Sec. 482 of the Criminal Procedure Code. According to her, it is in the fitness of things that investigating agency be given opportunity to carry out the investigation further qua the petitioner and at the end of investigation if no other material is found connecting the petitioner with the crime in question and if the prosecution decides to proceed further with the criminal case in question on the basis of statement of co-accused only, then it can be considered at that stage. Drawing my attention towards the documents annexed with the affidavit filed by Shri A.R.Jadav, Assistant Commissioner of Police, "K" Division, Ahmedabad City,

showing the petitioner as having involved in various criminal cases, she has contended that petitioner has been involved in as many as ten criminal cases starting from 1996 till the year 2002. It is also contended by her that since petitioner's name was disclosed as an accused in the statement of Mustak Aalambhai Parmar and since investigation qua the petitioner is yet not completed, his name was shown as absconding and, therefore, it cannot be said that present petitioner was involved in the offences in question by the investigating agency mala fide.

12. I have gone through the papers shown to me by the learned counsel appearing for the respective parties including the affidavits with the documents annexed therein filed by the investigating agencies as well as the documents annexed by the petitioner with the petition.

13. It appears from the records and the arguments advanced by the learned counsel for the parties that name of the petitioner has been disclosed in the statement of co-accused namely, Mustak Aalambhai Parmar, dated 22-8-2002 which is also reflected in para 6 of the affidavit filed by the Assistant Commissioner of Police, "K" Division, Ahmedabad City in Cri.Misc.Appln.No.2684 of 2003 and, therefore, police has started investigation in that direction and since the petitioner was not co-operating with the investigating agency and remained absconding, charge-sheet was filed within the stipulated period against the remaining accused who were available with the investigating agency wherein present petitioner was shown as absconding.

14. In view of the above, the argument of the learned counsel for the petitioner that there is no evidence worth the name in the statement submitted with the charge-sheet connecting the petitioner with the crime in question cannot be accepted in view of the fact that when charge-sheets were submitted in the court qua other accused, present petitioner was not available and hence, his names were shown as absconding absconding. It is obvious that there would not be any evidence at that point of time with the investigating agency except the statement of Mustak Aalambhai Parmar because the petitioner was not available for investigation. In this view of the matter, complaints qua the petitioner cannot be quashed as during the course of investigation, investigating officer has received some clue about the prima-facie involvement of the petitioner in the crime in question and, therefore, till the agency completes the investigation qua the present petitioner, it cannot be said that there is no evidence against the petitioner. On the one hand, the petitioner is not extending any co-operation in the investigation and has chosen to remain absconding though claiming to be a law abiding citizen and on the other hand, he is claiming benefit under Sec. 482 of the Code of Criminal Procedure on the ground that investigation is over and charge sheet was filed.

15. It cannot be presumed at this stage that investigation is over and there is no evidence worth the name against the petitioner connecting him with the offences except the statement of co-accused especially when investigation qua the

petitioner has not been completed due to his non-co-operation. Looking to the nature and the seriousness of offences, once the name of the petitioner has been disclosed, investigating agency should be permitted to carry out investigation further for reaching the roots of the offences and thereafter, if any other material involving the petitioner in the crimes in question is made available, then supplementary charge-sheet or appropriate report may be submitted. At that stage, petitioner can submit application u/s 227 of Cr.P.C. in the Court for discharging him without framing charge as per the law laid down by the Apex Court. If at all the petitioner has got some other apprehension, he can recourse to the remedy available to him by preferring appropriate proceedings.

16. Reliance has been placed by the learned counsel for the petitioner upon an unreported judgment of this Court delivered in Cri.Misc.Appln.Nos.5483 and 5596 of 2000 wherein this Court has observed in para 5 as under:

"On going through the police papers, Mr.K.G.Sheth, learned APP states that there is no material against present petitioners at present except the statement of co-accused. It may be that on their arrest further material may be made available to the prosecution agency as well as investigating agency against the present petitioners. But at present there is no material against the present petitioners except the statement of co-accused."

It appears from the aforesaid that the petitioner of that case was not an absconding accused but some other accused of the said case were absconding and, therefore, aforesaid contentions were made by the learned APP. Based on the said contentions made by learned APP, the Court has observed in para 6 as under:

"It is well settled that the statement made by the co-accused cannot be used against the present petitioners. Therefore, it is clear that there is no material against the present petitioners with the prosecuting agency to prosecute the petitioners. In that case, even charge cannot be framed against them. When there is no material against the present petitioners, there is no need for them to appear before the Trial Court and to face the trial. At the same time, if during the course of further investigation, particularly, when the absconding accused persons are apprehended and any material is made available to the investigating agency as well as prosecuting agency, then it may be open to the prosecution to implead the present petitioners again and in that event, the investigating agency may file fresh charge-sheet or supplementary charge-sheet against the present petitioners. When there is no material at present and when the charge sheet has been filed and trial is already pending in the Sessions Court, then in that event, petitions are required to be allowed and the aforesaid Sessions Case qua the petitioners is required to be quashed."

In view of the above, the present petitioner will not be entitled to the benefit out of the aforesaid unreported judgment.

17. Reliance has also been placed by the learned counsel for the petitioner on

another unreported judgment delivered by this Court in Cri.Misc.Appln.No.900 of 2001 with Cri.Misc.Appln.No.901 of 2001. It was stated by the Court in the middle of para 8 of the said judgment as under:

"Learned counsel for the petitioner has contended that no legal evidence admissible under the provisions of Evidence Act is collected by the Investigating Agency against the present petitioner at the time of filing final report u/s 173(8) of the Code."

It is clear from the above that further investigation under Sec. 173(8) of the Code was done in that case. It was observed in para 12 by the Court in the said unreported judgment as under:

"The submission of the learned counsel for the petitioner that the learned Magistrate ought not to have taken cognizance u/s 190 of the Code as the final report submitted u/s 173(8) of the Code does not show any legal evidence against the petitioner and, therefore, the applications deserve to be allowed and the cognizance taken by the learned Magistrate and the charge sheet should be quashed deserves merit."

In that case, the investigating agency has completed the investigation and submitted the final report under Sec. 173(8) of the Cr.P.C. and, therefore, since the investigation was over and the final report was submitted and also since the only evidence available against the petitioner was the statement of co-accused, the Court, after going through the papers, statement and other materials collected by the investigating agency, has held in para 12 as under:

"The papers, the statements and other material collected by the Investigating Agency do not prima facie make out any case against the petitioner and, therefore, in my opinion, the cognizance taken by the learned Magistrate against the petitioner u/s 190 of the Code deserves to be quashed."

18. Whereas in the cases before me, name of the present petitioner has been disclosed as one of the accused from the statement of co-accused, Mustak Aalambhai Parmar, and it can only be said to be a clue. Since the petitioner is not giving any co-operation in the investigation, investigating agency could not investigate into the matters for reaching the roots of the offences. In that view of the matter, it cannot be said that investigation qua the present petitioner is completed. Hence, cases of the present petitioner stand altogether on different footing than the cases in the judgments relied upon by the learned counsel for the petitioner.

19. In view of the fact that petitioner was not available at the time of investigation, charge sheets qua other accused were required to be submitted within the stipulated time into the court. Had this not been done by the investigating agency, it is possible that other accused in the cases may claim default bail and hence, charge sheets qua the other accused were correctly submitted and since the petitioner was not available, his name was shown as

absconding accused. Merely because of the fact that charge sheets were submitted qua the accused who were available for investigation does not mean that investigation qua the present petitioner was completed or he can take benefit by evading investigation. Since the name of present petitioner was shown as absconding accused, it means that he was not available for interrogation or investigation and hence, it would be in the fitness of things that investigating agency be permitted to carry out investigation in the matters for reaching the roots of the offences. Since the only evidence available against the petitioner is the clue given by the co-accused to the investigating officer, it is the duty of the petitioner to help the investigating agency for the same rather than requesting the Court at this stage under Sec. 482 of the Code of Criminal Procedure for quashing the complaints or deleting his name from the respective charge sheets.

20. Reliance is placed on a decision of the Apex Court in the case of State of Kerala and Others Vs. O.C. Kuttan and Others, wherein it has been held in para 6 as under:

"At the outset there cannot be any dispute with the proposition that when allegations in the F.I.R. do not disclose prima facie commission of a cognizable offence, then the High Court would be justified in interfering with the investigation and quashing the same as has been held by this Court in State of West Bengal and Others Vs. Swapan Kumar Guha and Others, . In the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, , this Court considered the question as to when the High Court can quash a criminal proceeding in exercise of its powers u/s 482 of the Code of Criminal Procedure or under Article 226 of the Constitution of India and had indicated some instances by way of illustrations, though on facts it was held that the High Court was not justified in quashing the first information report. This court held that such powers could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. But as an illustration several circumstances were enumerated. Having said so, the Court gave a note of caution to the effect that the power of quashing the criminal proceedings should be exercised very sparingly with circumspection and that too in the rarest of rare cases, that the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. It is too well settled that the first information report is only an initiation to move the machinery and to investigate into a cognizable offence and, therefore, while exercising the power and deciding whether the investigation itself should be quashed, utmost care should be taken by the Court and at that stage it is not possible for the Court to shift the materials or to weigh the materials and then come to the conclusion one way or the other. In the case of State of U.P. Vs. O.P.

Sharma, , a three-Judge Bench of this Court indicated that the High Court should be loath to interfere at the threshold to thwart the prosecution exercising its inherent power u/s 482 or under Articles 226 and 227 of the Constitution of India, as the case may be and allow the law to take its own course. The same view was reiterated by yet another three-Judges Bench of this Court in the case of Rashmi Kumar (Smt) Vs. Mahesh Kumar Bhada, , where this Court sounded a word of caution and stated that such power should be sparingly and cautiously exercised only when the Court is of the opinion that otherwise there will be gross miscarriage of justice. The court had also observed that social stability and order is required to be regulated by proceeding against the offender as it is an offence against the society as a whole."

21. Keeping in mind the parameters laid down by the Apex Court in the aforesaid judgment and on a thorough scrutiny of the records and proceedings of the cases, I am of the opinion that these are not fit cases in which power under Sec. 482 of the Code of Criminal Procedure can be exercised. Hence, both these petitions are required to be rejected.

22. Both these petitions are hereby rejected. Rule discharged.

23. The observations by this Court in this order being made for the purpose of deciding these petitions, same shall not prejudice the parties either in investigation or in trial.

24. Office is directed to keep a copy of this judgment in each petition.