

(1985) 08 GUJ CK 0028
In the Gujarat High Court

Patel Varyabhai Jesangdas

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 23-08-1985

Acts Referred:

Constitution of India, 1950 — Article 22

Criminal Procedure Code, 1973 (CrPC) — Section 301, 301(2), 493

Citation : (1986) 1 GLR 538

Hon'ble Judges : D.C. Gheewala, J

Bench : Single Bench

Judgement

D.C. Gheewala, J.—The present revision application is directed against the order passed by the learned. JMFC Vijapur, in Criminal Case No. 1104 of 1983, rejecting the complainant's prayer that his private Advocate Mr. M.M. Shah, be permitted to conduct the case behalf of the prosecution. The learned Magistrate was of the opinion that such a request cannot be granted. He, therefore rejected the said application and the said order is being sought to be challenged before me.

2. Mr. M.M. Shah, the learned advocate appearing for the complainant petitioner, drew my attention to Section 301 of the Criminal Procedure Code, which reads as under:

301(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case pay appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs, a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

Adverting to the phrasleology employed in Sub-section (2) of Section 301, Mr. Shah urged that while the Assistant Public Prosecutor shall always be in charge of the prosecution, in the instant case what was prayed by the complainant-petitioner was not to handover the charge of the conduct of the case to a private advocate but he had only prayed that while the charge of the conduct of the case remained in the hands of the prosecutor, private advocate shall be permitted to act on behalf of the complainant under the directions of the Prosecutor. In this behalf, Mr. Shah, drew my attention to a case reported at 1959 AP 659 Medichetty Ramakistiah and Ors. v. The State of Andhra Pradesh where the Division Bench of the said High Court was expounding upon the word "Act" occurring in Section 493 of the Code of Criminal Procedure (Old), which is equivalent to Section 301 extracted above of the New Code. The Division Bench observed as under:

The word "Act" in Section 493 is not to be understood in the technical sense as meaning something distinct and different from the word "elead". It does not mean something other than examining or cross-examining witnesses or addressing the court and is not used in any technical sense in distinction from the words "appear and plead" in the opening part of the section. When Section 493 authorises a privately engaged pleader to act in the case under the directions of the Public Prosecutor he may do everything in the case provided that it is done under the control and direction of the Public Prosecutor.

3. Mr. Shah also drew my attention to a case reported in Roop K. Shorey, Film Producer Vs. The State, Roop K. Shorey v. The State, wherein also the learned Single Judge of the said court observed in para 5 as under:

The word "act" in Section 493 Criminal Procedure Code, is not used in its technical sense in contradistinction to appear and plead. In the context this expression means and includes the power to examine and cross-examine witnesses and address the Court.

4. Mr. Shah also urged that even u/s 302 of the Code, the Magistrate was empowered to permit the prosecution to be conducted by any person other than, a Public Officer...and Sub-section (2) of the said section provides that any person conducting the prosecution may do so personally or by a pleader. The application was given u/s 301. Section 302 in the instant case does not come into operation at all and Mr. Jani the learned advocate appearing for opponent No. 2 that is, original accused, urged that the point raised by Mr. Shah is covered by a Division Bench judgment of our High Court consisting of Poti, C.J. and S.B. Majmudar J. in Special Criminal Application No 1092 of 1983 decided on 15th December 1983. In the said case the constitutionality of Sections 35, 301 and 302 of the Code of Cr. P. was challenged on the ground that the said sections are violative of Article 22 of the Constitution of India and Article 14. While the facts of the said case are not relevant for our purpose, the challenge was directed against those sections on the ground that the complainant was placed at a disadvantage and was discriminated on account of this particular section inasmuch as while the accused

was permitted to engage a private advocate of his choice the complainant could not be denied that right. The Division Bench repelled the said contention in the following words:

Now, we go to Sections 301 and 302. Section 301 does not envisage any power in the Public Prosecutor either to consent to or to object to appearance by a private lawyer in a case in which he is in charge. In fact, that only lays down the eligibility of a Public Prosecutor and Assistant Public Prosecutor in charge of a case to appear and plead without any written authority. Sub-section (2) of that section limits the extent to which a pleader instructed by any private person can assist in conducting the prosecution. That does not enable any such pleader to appear in the case.

5. Mr. Jani also drew my attention to a case decided by myself being Criminal Revision Application No. 638 of 1982 and which decision is reported at 24(1) Gujarat Law Reporter, page 522. There of course, the petitioner wanted that a private advocate should be allowed to appear before the Court of Sessions at the time of framing the charge. The petitioner, who was practising advocate submitted an application and urged that he should be heard so that he can satisfy the court that there was sufficient material to frame a charge. I had an occasion to observe in para 10 of the judgment as under:

As soon as the case is committed to the Court of Sessions, as provided in Section 225 of the Criminal Procedure Code, the Public Prosecutor shall be in charge of the case. The only right which a private complainant or his advocate may have, would be to sit by the side and assist the Public Prosecutor and at best as provided in Section 301, Sub-clause (2), he may submit written arguments if the Court permits at the close of the evidence. The objects and reasons incorporated in Clauses 231 to 243 (Section 225 to 237) would make it further clear. This would go to show that in any proceedings commencing after the committal by the Magistrate and its further progress from that state before the Sessions Court, it is only Public Prosecutor who has to be in charge of the conduct of proceedings and the private complainant cannot have any right to participate and the only limited exception thereto is carved out in Section 301(2). The reason seems to be that it is the State which is custodian of the Public peace and the private complainant cannot be heard to object that had been in charge he would have exacted a greater toll of private vendetta.

Mr. Shah also tried to distinguish that particular decision on the ground that it was pertaining to a trial where only Public Prosecutor will have a right to represent the State and the said decision would not be applicable to the facts of the present case where the trial was before the Magistrate, and the ratio of the said decision was that it was only Public Prosecutor who would be in charge of the conduct of the case, once the case was committed to the Court of Sessions. While Mr. Shah would be right in saying that the said decision was pertaining to a Sessions Trial, I feel that in the instant case also the said observation would be applicable *mutatis mutandis* and once again when the point is covered by the

Division Bench, judgment of this Court, the prayer of the petitioner that the private advocate should be placed in-charge of the conduct of the case cannot be countenanced. Mr. Shah urged that the private advocate does not want to take away the conduct, and the conduct shall always remain with the Prosecutor. This is only a verbal gloss. The private advocate even if he is appearing he can only assist the Public Prosecutor in-charge of the case, who has to conduct the prosecution and if the Court permits the maximum latitude, then at best a private advocate can be permitted to submit written arguments. Mr. Jani drew my attention to a case reported in Aswin Shambhuprasad Patel and Others Vs. National Rayon Corporation Ltd., which is pertaining to Order 3 Rules 1 & 2 of the Civil Procedure Code. However, in para 3 of the said judgment Chagla C.J. (as he then was) repelled the contention that pleading would be included in the expression appearance, application or act in or to any Court. Those observations can be extracted with advantage:

The contention put forward by Mr. Bengeri before me is that "pleading" is included in the expression "appearance, application or act in or to any court". In my opinion it is clear that "pleading" would not be included in any of these expressions. The right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses, are all parts of pleadings with which Order III does not deal at all. It deals with restricted class of acts in connection with the litigation in Court and it is with regard to that restricted class of act that Order III permits recognised agents to be appointed. If authority was needed for this proposition, there is ample authority. There is the decision of the Full Bench of the Madras High Court in M. Krishnammal Vs. T. Balasubramania Pillai, Power of Attorney Agent of M. Krishnammal, , and there are also two decisions of the Calcutta High Court in In Re: Eastern Tavoy Minerals Corporation,Ltd., . Both the Madras High Court and the Calcutta High Court held that an agent with a power of attorney has no right of audience in Court. Mr. Bengeri has drawn my attention to a recent decision of the East Punjab in G.G. in Council v. Bhagwan Sahai AIR 1948 R.P. 61(D). There the learned Judge Mr. Justice Teja Singh took the view that a recognised agent had the right on behalf of the party to examine & cross-examine witnesses. The learned Judge conceded that pleading was quite different from acting and that Order III did not deal with pleading. But he took the view that examining and cross-examining witnesses was part of acting and not part of pleading. With respect, I find myself unable to agree with the learned Judge. But as far as the right of audience is concerned, there can be no doubt that it is a part of pleading and not a part of acting.

6. While the above observations were made in connection with Order 3, Rules 1 and 2 of the Civil Procedure Code, the distinction made in the connotation of the words "pleading", "appearance" and "acting" would be applicable for coming to the conclusion that the words "shall act" occurring in Section 301(2) of Criminal Procedure Code would not include to plead, or to examine or cross-examine the witnesses and it would also be clear from the very language of the section that even for advancing written arguments permission of the court would be needed.

Hence private advocate assisting Public Prosecutor engaged by the private person shall not have any right whatsoever even to be heard and make oral submissions by way of arguments. A very limited right seems to have been given to an advocate instructed by a private person and that is to assist the Public Prosecutor or Assistant Public Prosecutor. The language of the section, therefore, cannot be stretched.

7. While great reliance was placed by Mr. M.M. Shah on the Andhra Pradesh High Courts judgment reported in *Medichetty Ramakistiah and Others Vs. The State of Andhra Pradesh*, , Mr. Jani drew my attention to another decision reported in the same volume where another Division Bench of the same Court in a case reported in *In Re: Bhupalli Malliah and Others*, , had an occasion to expound upon Section 493 Cri. P. Code and Krishna Rao J. speaking for the Division Bench in para 28 of the Judgment, observed as under:

The Public Prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry trial or appeal; and, if any private person instructs a pleader to prosecute in any Court any person in any such case. The Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall "Act therein under his directions". In such cases the Public Prosecutor shall conduct the prosecution, and the pleader instructed by the private person shall only act therein under his directions. It is clear from these sections that the pleader engaged by the private persons cannot plead although he can act under the directions of the Public Prosecutor.

8. From the above discussion of the decided cases it appears that the word shall act have been interpreted by the High Courts and while some decisions favour the interpretation solicited by Mr. M.M. Shah in a large majority of cases, the word shall act occurring in Section 301(2) have been construed as not including the power to plead or to examine witnesses and cross-examine the witnesses. As observed above, the language of Sub-section (2) of Section 301, favours interpretation distinguishing, the connotation of the word act and the word to plead and as the Division Bench of our own High Court has taken a similar view, it shall have to be held that the order passed by the learned JMFC, Vijapur, does not suffer from any infirmity or illegality which requires to be corrected in the exercise of revisional jurisdiction of this court.

9. This-petition is, therefore, dismissed and the rule is discharged, Interim stay vacated.