

(1989) 10 GUJ CK 0016
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Luhar Mithu @ Harun Ismail

RESPONDENT

Date of Decision : 20-10-1989

Acts Referred:

Bombay Police (Gujarat Amendment) Act, 1977 — Section 11
Bombay Police Act, 1951 — Section 142, 142, 56, 56

Citation : (1990) 1 GLR 377

Hon'ble Judges : K.J. Vaidya, J

Bench : Single Bench

Judgement

K.J. Vaidya, J.—The above acquittal appeal arises out of the judgment and order dated 2nd December, 1980, in Criminal Case No. 407 of

1980, passed by the learned J.M.F.C, Anjar-Kachchh, whereby the respondent-accused Luhar Mithu @ Harun Ismail who came to be tried for

the offence u/s 142 of Bombay Police Act, 1951 (for short hereafter referred to as "Police Act") came to be acquitted.

2. The accused was admittedly externed out of the area of Kachchh district and all adjoining districts by the externment order dated 16th October,

1979, passed u/s 56 of the Police Act by the learned Sub-Divisional Magistrate, Anjar for two years. The accused had also admittedly entered

Anjar town without and prior permission and was arrested on 6th August 1980, by P.S.I. Mr. V.S. Patel. Thus, for the alleged breach of

extemment order, a complaint came to be filed for offence u/s 142 of the Police Act against the accused, who was ultimately chargesheeted for the

same to stand the trial.

3. At the trial, the accused pleaded not guilty and further submitted that he had come to Anjar town from Palanpur on receiving information that the

health of his father was bad.

4. The trial Court after recording and appreciating the evidence, acquitted the accused mainly relying upon a Full Bench decision in the case of

Sabuddin Shaikh Mansur v. J.S. Thakar reported in (1968) 9 GLR 142 (for short hereafter referred to as F.B. Decision Supra).

5. Hence, this acquittal appeal by the aggrieved State.

6. Mr. D.K. Trivedi, learned Addl. P.P. appearing for the State submitted that the impugned order of acquittal on face of it is illegal as the said

F.B. decision (Sabuddin's case) (supra) is not applicable at all to the instant case as the same is with reference to the unamended Section 56 of the

Police Act, where the word "specially empowered" was very much in existence. Submits Mr. Trivedi that the word "specially" earlier appearing in

Section 56 of the Police Act, subsequently appears to have been deleted by an amendment by virtue of Section 11 of the Bombay Police (Gujarat

Amendment) Act, 1977--that is Gujarat Act No. 16 of 1978 (for short referred as the said Amending Act).

7. As against this, Mr. B.R. Parikh, learned Advocate (appointed) has supported the order of acquittal. He in the alternative further submitted that

if it is held that the trial Court has committed an error in relying upon the F. B. decision (Sabuddin's case) (supra), even then it will be too harsh to

convict and sentence the accused after 9 years.

8. Now, in order to appreciate the correctness and legality of the submission made by Mr. Trivedi, let us advert first to Section 142 of the Police

Act, for which the accused came to be tried. This Section 142 in substance pertains to the penalty for entering without permission to the area from

which a person is directed to remove himself or for over-staying. It also provides for punishment on being convicted. That part of Section 142 of

Police Act reads as under:

Section 142. Without prejudice to the power to arrest and remove a person in the circumstances and in the manner provided in Section 62, any

person who-

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

shall, on conviction, be punished with imprisonment for a term which may extend

to two years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine.

9. Now let me next advert to that part of the prosecution evidence which refers to the complained a breach of the said externment order dated

16th October, 1979, passed u/s 56 of the Police Act. The prosecution, in this regard, has examined one Mr. B.M. Bhatt, P.W. 6 who was Sub-

Divisional Magistrate, Anjar, at the relevant point of time. He has stated that he has been empowered by the State Government to pass the order

of externment u/s 56 of the Police Act by virtue of a Notification dated 30th September, 1978 Ex. 20, issued by Home Department (Special)

Government of Gujarat, Gandhinagar, for the ready reference the said Notification is reproduced as under:

Notification

Home Department (Special)

Sachivalaya, Gandhinagar.

Dated the 30th Sept. 1978

Bombay Police Act, 1951 : No. GH/G/78/207/SB. I/EXT-1075-5392 :- In exercise of the powers conferred by Secstion 56, 57 and 63 of the

Bombay Police Act, 1951 (Bom. XXII of 1951) and in suppersession of all Government Notifications issued from time to time under the said

sections before the coming into operation of the Bombay Police (Gujarat Amendment) Act, 1977 (Guj. 16 of 1978). The Government of Gujarat

hereby empowers the Sub-Divisional Magistrates placed in-charge of the sub-divisions specified in column 1 of the Schedule appended here to in

the districts respectively specified against column 2 of the said Schedule, for the purposes of the said sections.

Schedule

Name of Sub-Division Name of District

(1) (2)

Bhuj Kachchh

Anjar ... "" ...

Nakhatrana ... "" ...

By order and in the name of the Governor of Gujarat,

Fateh Singh Jasol

Deputy Secretary to the Government.

No. SB. I/EXT/1075-5392,

Home Department (Special)

Sachivalaya, Gandhinagar

Dated the 30th Sept. 1978.

forwarded with compliments to:-

All District Magistrates,

respective Sub-Divisional Magistrates,

Sd/-

(K.R. Gosai)

Section Officer,

Home Department (Special)

10. Now in cross-examination, said learned Sub-Divisional Magistrate admitted that the Govt. has not empowered him by and in his name to

exercise power of extemment. He further after seeing the said Notification Exh. 20 admitted that he is not so empowered by his name. The trial

Court on the basis of the aforesaid meaningless admission and without appreciating the fact that the word ""specially"" had already been deleted from

Section 56 of the Police Act by virtue of Section 11 of the said Amending Act, has readily relied upon the F. B. decision (Sabuddin's case)

(supra) and acquitted the accused. The said Section 11 of the said Amending Act, amending Section 56 of the Police Act reads as under:

In the principal Act, in Section 56 the word "specially" shall be deleted.

Thus, in view of the fact that word "specially" stands already deleted from Section 56 of the Bombay Police Act, the so called admission elicited in

cross examination of the learned S.D.M. namely that the Notification dated 30-9-1978 had not empowered him to exercise the power u/s 56 of

the Police Act, namewise is absolutely futile, meaningless and misleading. None unfortunately has looked into the contents of Exh. 20 and of the

said Amending Act. Further the trial Court while acquitting the accused has relied upon the F.B. decision (Sabuddin's case) (supra), but this

decision also in view of the fact that the word "specially" stands deleted by

Section 11 of the Amending Act, ceases to have any applicability

whatsoever. Its indeed unfortunate that the desired care is not taken by all concerned. The learned P.P. with little more vigilance could have

cleared the confusion while arguing the case pointing out the effect of the said Amending Act. Had the learned P.P. read the contents of Exh. 20

Notification, acquittal would not have been recorded. The learned S.D.M. also, in his turn when he was placed with a misleading question in cross

examination could have immediately volunteered the correct reply pointing out that in view of the Amending Act it was not necessary to be so

specifically"" empowered to exercise the power u/s 56 of the Police Act. This was certainly expected from the witness who had himself passed the

order of externment and was conscious of the said Amending Act. Above all this officers the trial Court at least should have exercised more care

and ought to have been vigilant in this matter. It had got to pierce through the deceptive veil of arguments. What was required to be done by all

concerned was just to read Exh. 20 Notification where the reference is made to the Amending Act. Unfortunately but for this darkness at noon the

case would have once and for all ended on 2nd December, 1980 under the circumstances, legal and natural consequences of the above discussion

is that the accused requires to be convicted for the alleged offence u/s 142 of the Police Act.

11. This necessarily takes me to the last submission of Mr. Parikh that it will be indeed too harsh to convict and sentence the accused after about 9

years. It is not possible to accede to this submission of Mr. Parikh. It is true that these days the hearing of appeal takes considerably longer time

but the fact remains that the judicial system in the country has come to such a critical pass and is passing through such a severe bottle-neck of the

time and as it is so apprehended in certain quarters that the accelerating pressure of work and time gap between the date of offence, filing of the

charge-sheet, examination of witnesses before the Court, delivery of judgment and order (acquittal or conviction as the case may be), the filing of

appeal, placing the same for admission and in case of admission the final hearing of the said appeal before the High Court is not likely to be

lessened or shorten up in foreseeable future unless something radical happens in the matter may be so for the temporary, as the same cannot be a

permanent feature. I have a feeling that vexed problem of delayed-denied justice must be present to the mind of people's Government not only that

but further I am quite optimistic that something will be done in the matter by responsible Government so that the Constitutional promise of justice

and speedy trial do not turn out to be as it a lifeless cold-print in grave yard of book. Any way, if on the evidence brought on the record, the

appellate Court feels satisfied that the accused has been illegally acquitted then in that case it is bounden duty of it to pass necessary legal order of

conviction. As against that to accept the submission of the learned Advocate Mr. Parikh that to record an order of conviction after 9 years is too

harsh is fraught with two serious consequence namely: (i) the same will be tantamount to writing-off powers of High Court in passing the order of

conviction in acquittal appeals as provided in the Code of Criminal Procedure, 1973, once it is shown that offence as become state having been

committed number of years back, (ii) same in its turn-out to be a boon of paradise to the accused. This simply is not done and hence cannot be

permitted. It is true that the protracted proceedings before the Court in many cases do hang like a sword of Democies on the head of the accused

and till the said legal proceedings are terminated the tale of woe of the physical, psychological and financial suffering of the accused does not end.

It is also quite true that in a given case in the event of the acquittal appeal being allowed and the accused is convicted after number of years after

the date of offence, there is every likelihood that with the passage of time much water passes by and many and marked changes run through the

lives of the accused, for example.... (i) the warring factions after the alleged incident had come to terms and become friendly and peaceful citizen

and/or (ii) the accused is otherwise has become peaceful, law abiding unit of the society and his stability has started gethering roots in, and/ or (iii)

the accused gets married and/or minor children are to be reared up, and/or (iv) the accused has to shoulder some another responsibilities, and/or

(v) the accused has abandoned to live and thrive on life of crimes and has turned a new lead in his life, and/or (vi) that the offence is of a technical

or a trivial nature. Under such circumstances though as warranted by law, the accused is required to be convicted, but then the list of aforesaid

circumstances are the circumstances which are required to be taken into consideration by the Court for determining the just and proper sentence. It

is true that the order of sentence is not to be passed by way of vengeance, but at the same time the principles of penology has its own place in

Criminal Jurisprudence depending upon the facts and circumstances of the each case. For these reasons though I disagree with Mr. Parikh that the

order of conviction in the facts and circumstances of the case cannot be passed as it would be harsh. I do see a reason in submission of Mr. Parikh

that at the time while awarding the sentence the factum of the protracted proceeding, hangover for 9 years and turn of events in the life of accused

during this 9 years can be taken into consideration.

12. In the result, therefore, this acquittal appeal deserves to be allowed and is allowed accordingly. The impugned judgment and order of acquittal

passed by the trial Court is quashed and set aside. Accordingly, further the accused is hereby convicted for the offence u/s 142 of the Police Act,

and notice is hereby made returnable on 6th September, 1989 to be issued to the respondent accused to hear him on the point of sentence.

20-10-1989

13. After recording the order of conviction on 11th August, 1989, notice was issued to the accused to remain present on 6th September, 1989.

However, it appears that for one reason or another, the notice was not served on the accused and the matter could not be taken up on the dates

earlier fixed. Today Mr. B.R. Parikh, the learned Advocate for the respondent-accused and Mr. D.K. Trivedi, learned Addl. P.P. for the State are

present. Heard both of them on the point of sentence. Mr. Parikh learned Advocate appearing for the accused has stressed following

circumstances to be taken into consideration for taking a reasonable view of the matter while finally imposing sentence on the accused. He further

submitted that having regard to the facts and circumstances of the case, this is a case wherein the Court can justly award a sentence less than six

months. They are - (i) that the Criminal Case under appeal is of the year 1980; (ii) that technically the accused did commit an offence u/s 142 of

the Bombay Police Act by committing breach of the conditions under the externment order passed by the learned Sub-Divisional Magistrate,

Anjar, against him, but the same was committed under helpless emergent situation namely his father was seriously ailing and was bed-ridden and

therefore he appears to have risked the breach of condition by coming to see him

at Anjar; (iii) that there is nothing on the record to show that after committing breach of the said condition and entering Anjar he committed any one offence; (iv) that the accused was already in jail for about 3 months and 4 days after he was so arrested on 29th August, 1980; (v) that he had also undergone the pain and agony of the sword of pending appeal hearing.

14. There is a considerable force in the aforesaid submissions of Mr. Parikh. Thus, in peculiar facts and circumstances of the case, it appears to me that the ends of justice will be fully met if so far as the question of the sentence of substantive imprisonment is concerned, the sentence, of imprisonment for 3 months and 4 days already undergone in jail by the accused pending the trial is held to be sufficient. The question yet remains to be considered is whether the sentence of fine should be imposed accused or not? On this point, the learned Addl. P.P. was fair enough to point me out from the report of the D.S.P. Kutch that the accused was living a wandering life and hence it can reasonably be inferred that he had no means of livelihood.

15. Under the circumstances, it would not be just to punish the poverty by making the accused to pay fine. In the result, the acquittal appeal is allowed and the respondent-accused is sentenced as aforesaid.