
(1985) 01 GUJ CK 0021
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Manzoorali Alibax and Others

RESPONDENT

Date of Decision : 21-01-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 109, 311, 311, 41
Evidence Act, 1872 — Section 103

Citation : (1985) 2 GLR 994

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

Bench : Single Bench

Judgement

M.B. Shah, J.—Being aggrieved and dissatisfied by the judgment and order dated 4th December 1984 passed by the City Sessions Judge, Ahmedabad, on Ex. 65 in Sessions Case No. 71/84 directing the prosecution to examine as prosecution witnesses (1) Mr. Patil and his associates who might have taken active part in the investigation carried out in Rajasthan, (2) the Executive Magistrate who had held the identification parade and who should be asked to appear before the Court with the identification parade panchnama and (3) the hand-writing expert, whose report has been produced, the State has filed this revision application challenging the said order.

2. It is the prosecution case that the incident took place on 24-2-84 at Ahmedabad wherein one Allauddin was murdered. It is alleged that the accused No. 1 Manzoorali had a motive to do away with the deceased as he was allegedly running gambling dens and was doing business in illicit liquor and was suspecting that the deceased was informing the police about his illegal business and at his instance the police was frequently raiding his premises and lodging cases against him. It is alleged that he in company of other four accused came near the shop of the sons of the deceased. The deceased was sitting on the chair in front of the shop on the footpath. There accused No. 1 exhorted accused No. 2 to kill the deceased and in pursuance thereof accused No. 2 fired shots from the revolver which caused instantaneous death of the deceased. Thereafter all the accused tried to run away but accused No. 2 was apprehended by two plain-dressed

Police Constables while the rest of the accused succeeded in escaping. This incident was witnessed by number of witnesses and the prosecution has examined 13 persons as eye-witnesses.

3. It is the defence of the accused No. 1 that he was arrested by the police attached to Kotda Chhavni in Rajasthan on 18-2-84 for the offences punishable u/s 41 read with Section 109 of the Criminal Procedure Code and other offences. This place is situated on the border of Gujarat and Rajasthan States. After his arrest he was kept in Udaipur jail and was ultimately released on bail on 27-2-84. It is his defence therefore that on the relevant day of the incident i.e. 24-2-84 he was in Udaipur jail and, therefore, he has nothing to do with the murder of Allauddin and he has been falsely implicated.

4. After examining the material witnesses the prosecution filed an application for closing the evidence. Thereafter accused No. 1 filed the aforesaid application Ex. 65 praying as under:

(a) The Hon"ble Court should direct the prosecution to produce the entire original record directly or indirectly pertaining to the investigation carried in Rajasthan including the registers, copies of registers, jail tickets or any other record obtained from Udaipur Jail and/or from different police station of Udaipur including the opinion of the handwriting expert and the original documents which were given to the handwriting expert for the purpose of opinion.

(b) The Hon"ble Court may direct the prosecution to produce the original panchnama regarding identification parade held by the executive Magistrate. Ahmedabad Metropolitan Area, on 23-3-84.

(c) The Hon"ble Court will be pleased to direct the prosecution at least to examine the Executive Magistrate, Ahmedabad Metropolitan Area, who held the identification parade on 23-3-84, and the Jail Officers who had prepared the record in the jail regarding keeping accused No. 1 in Udaipur Jail and handwriting expert, who has given the opinion and the Police Officers of Crime Branch who have taken part in the investigation.

5. The learned Sessions Judge took into consideration the fact that Mr. Patil took over further investigation of the case and he in fact had gone to Rajasthan and carried out certain investigation there wherein he had examined some witnesses from Kotda Chhavni and some from Udaipur. He had also collected registers from Kotda Chhavni and from Udaipur jail. Mr. Patil had also collected bail bonds from Udaipur jail purporting to show that one Manzooralibux (accused No. 1) was released on bail from jail on February 27, 1984. Specimen signatures of Manzooralibux were also obtained and were sent to the handwriting expert and the handwriting expert has given opinion that signatures in the name of Manzooralibux appearing on certain records collected from Rajasthan have been made by the same person who is said to have given specimen signatures. He also took into consideration that during the course of investigation Mr. Patil had requested the Executive Magistrate for the Ahmedabad Metropolitan Area to hold identification

parade wherein accused No. 1 was arraigned in parade and certain persons from Rajasthan were asked to identify from the row of persons the man who according to them was arrested at Kotda Chhavni and was lodged "in Udaipur jail on February 28, 1984. After taking into consideration all these facts the learned Judge arrived at the conclusion that the evidence of these witnesses is material and prosecution is bound to put before the Court all pieces of evidence which it had gathered including the pieces of evidence which might not be favourable to it. The learned Judge, therefore, granted the said application filed by the accused.

6. In this revision application it was vehemently submitted by the learned advocates appearing on behalf of the State that the Court has no jurisdiction to pass an order directing the prosecution to examine certain witnesses as prosecution witnesses. It was fairly conceded by them that the Court has jurisdiction to examine them as Court witnesses and the prosecution has no objection if they are examined as Court witnesses.

7. As against this, the learned advocate for the accused No. 1 submitted that apart from the fact that the Court has power to examine certain witnesses as Court witnesses, the Court has also jurisdiction to direct the prosecution to examine them as prosecution witnesses and, therefore, the order passed by the learned Sessions Judge is legal.

8. Under the Criminal Procedure Code which provides exhaustive procedure for conducting criminal trial, there is no provision which empowers the Court to direct the prosecution to examine certain witnesses as prosecution witnesses. The learned advocate for the accused was not in a position to cite any provision under the Criminal Procedure Code which empowers the Court to compel the prosecution to examine certain witnesses as prosecution witnesses if the prosecution does not want to examine them as prosecution witnesses. As this is a Sessions Case, procedure for conducting Sessions Case is prescribed in Chapter XVIII. of the Criminal Procedure Code. The relevant section i.e. Section 231 of the Code is as under:

231. Evidence for prosecution :- (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Judge may in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

Sub-section (1) of this section provides that on the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution. This subsection does not provide that prosecution is bound to examine those witnesses who may not support the prosecution. It only prescribes that the Judge shall take all such evidence produced in support of the prosecution. Sub-section (2) gives discretion to the Judge for deferring the cross-examination or for recalling any witness for further cross-examination. There is

no other provision which says that the Court is entitled to direct the prosecution to examine witnesses as prosecution witnesses. u/s 233 accused is entitled to adduce any evidence he may have in support of his defence.

9. Section 311 is a general provision which empowers any Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. This section confers a wide discretion on the Court to act as the exigencies of justice require. This section, therefore, empowers the Court to summon a material witness at any stage of the proceedings and where the whole truth is not brought out by the prosecution witnesses, the Court could on its own call those witnesses not called by the prosecution for bringing out the truth, before the Court. Except this provision there is no other provision under the Criminal Procedure Code which empowers the Court to call and examine or to recall certain witnesses for further cross-examination. The learned advocates for the State further submitted that apart from the provisions of the Criminal Procedure Code, in any case it cannot be compelled to prove the plea of alibi of accused No. 1. He relied upon the decision of the Supreme Court in the case of State of Haryana Vs. Sher Singh and Others, , wherein the Court has laid down that plea of alibi is required to be proved by the defence. He submitted that in the present case eye-witnesses in terms depose that accused No. 1 was present at the scene of offence at Ahmedabad at the relevant time and it is the defence of the accused No. 1 that at the relevant time he was in Udaipur jail. This plea is required to be "proved by the accused No. 1. In view of the provisions of Section 103 of the Evidence Act it hardly requires any further consideration that the plea of alibi is required to be proved by the accused.

10. The learned advocate for the accused No. 1, however, submitted that as a general rule it is the bounden duty of the State or prosecution to examine witnesses and so conduct the prosecution fairly and the prosecution cannot hide the relevant material from the Court. As against this, it was contended by the learned advocates for the State that whether to examine certain witnesses as prosecution witnesses is ultimately a matter for the discretion of counsel for the prosecution and the Court cannot compel the prosecution to examine certain witnesses as prosecution witnesses.

11. In the case of Abdul Gani and Others Vs. State of Madhya Pradesh, dealing with the contention of omission on the part of the prosecution to examine certain witnesses the Court referred to and relied upon the decision of the Privy Council in the case of AIR 1946 16 (Privy Council) , and relied upon the following observations of the Privy Council:

It is no doubt very important that as a general rule all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is there is

no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought and no doubt will take into consideration the absence of witnesses whose testimony would be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

12. Further, in the case of *Habeeb Mohammad Vs. The State of Hyderabad*, , the Supreme Court has considered the decision of the Privy Council in the case of *Stephen Senivaratne v. The King* AIR 1936 P.C. 289 and relied upon the following passage from the said judgment:

It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy Vs. Emperor*, , to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of "defence witnesses". Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case.

Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by "cross-examination". Witnesses essential to the unfolding of the narrative on which the prosecution is based, must of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

13. The Court has also not approved the decision of the Calcutta High Court reported in *Ram Ranjan Roy Vs. Emperor*, , by holding that the view of the Calcutta High Court was so widely expressed and was not fully accepted by Their Lordships of the Privy Council and further observed as under:

In a long series of decisions the view taken in India was, as was expressed by Jenkins, C.J. in *Ram Ranjan Roy Vs. Emperor*, , that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly with a full sense of the responsibility attaching to his position and that he should in a capital case place before the court the testimony of all the available eye-witnesses, though brought to the court by the

defence and though they give different accounts, and that the rule is not a technical one but founded on common sense and humanity.

This case of Habeeb Mohammad (supra) is followed in the case of Sardul Singh Caveeshar Vs. The State of Bombay, . In that case handwriting expert was not examined and the contention raised was that this was not fair and that the prosecution was bound to examine the handwriting expert and exhibit his report. Negating the contention of the defence the Court held as under:

It is well settled, however, that the Court cannot normally compel the prosecution to examine a witness which it does not choose to and that the duty of a fair prosecutor extends only to examine such of the witnesses who are necessary for the purpose of unfolding the prosecutory story in its essentials.

The Court further held:

Even if a different view is to be taken as to the duty of the prosecution to examine such a witness, all that can be said normally in such a case is that the defence is entitled to comment upon it and to ask the jury to draw an adverse inference in respect of that portion of the case to which the evidence of the handwriting expert relates.

In the Narain and Others Vs. The State of Punjab, , while dealing with this contention of non-examination of witnesses the Supreme Court relied upon the decision of the Privy Council in the case of Stephen Senivaratne v. The King (supra) and Habeeb Mohammad v. State of Hyderabad (supra) and held that the prosecution is not bound to call witnesses to establish the defence but only witnesses who are material for proving its own case. The relevant observations of the Supreme Court in paragraph (14) are as under:

The fact, assuming it to have been so, that Raghbir would have said in his evidence that the incidents did not happen as the prosecution stated, may no doubt have established a good defence. But if it was so, then he would have been only a witness material for the defence and not a witness essential to the unfolding of the narrative on which the prosecution case is based. The prosecution is not bound to call witnesses to establish the defence but only witnesses who are material for proving its own case.

However, the learned advocate for the accused relied upon the decision of the Allahabad High Court in the case of Abdul Subhan and Another Vs. Emperor, , and relied upon the following observations of the Court:

It is a well established rule of law that it is the bounden duty of the prosecution to place before the trial Court all evidence, relating to the case which is at its disposal and then invite a judicial decision. Prosecution takes a very grave risk if it takes upon itself the duty of withholding evidence relating to the crime. It is not the function of the prosecution to decide which portion of the evidence is true and which portion is false. This does not mean that where conflicting evidence is produced during an enquiry the prosecution cannot elect to rely on the

statements of one set. That power is undoubtedly there. But the duty of the prosecution is that the trial Judge must be informed about the opposite version and then it will be for the Judge to decide whether he should hear the evidence or not. In other words, it is the duty of the prosecution to let the Judge know of the entire evidence at its disposal.

In my view, this decision nowhere lays down that if the prosecution fails to examine witnesses, the Court can direct the prosecution to examine witnesses as prosecution witnesses. Once the material is placed before the Court, the Court has ample power and wide jurisdiction u/s 311 of the Criminal Procedure Code to examine them as Court witnesses. In any case the defence can also examine a defence witness, but it is not the law that the Court can direct the prosecution to examine them as prosecution witnesses.

14. The learned advocate further relied upon the decision of this Court in the case of *Himatsinh Bhaijibhai v. Manharsinh* 20 G.L.R. 23, where the Court has laid down that a Public Prosecutor has an absolute discretion when he drops any witness as a prosecution witness in the course of the conduct of the Sessions trial, but when he holds such a statutory office, he is supposed to use his discretion on well recognised principles, and in the said discretion of any Public Prosecutor, rules of fair play and a keen desire to find out the real truth must necessarily be reflected. In the case of *Stare v. Kalidas Nanjibhai* 21 G.L.R. 533, there are similar observations of the Court but this decision nowhere lays down or considers the Court's jurisdiction to direct the prosecution to examine certain witnesses as prosecution witnesses. It only lays down that Public Prosecutor should act fairly and justly and that he is discharging his statutory duty in the interest of justice. The learned advocate also relied upon the decision in the case of *Madhav Narhari v. State* 18 G.L.R. 896. There the Court has held that the Supreme Court has made legal position crystal clear by holding that the prosecution is not bound to examine all the witnesses simply because of their mention in the charge-sheet and that the Public Prosecutor being not the agent of police but being the agent of the State holding evenly the scales between the administration on one hand and the accused, presumed to be innocent, on the other hand and he being charged with such an important public duty, the power to drop witnesses, assuming that he has any such power, should be exercised by him in a just and fair manner. The learned advocate heavily relied upon one sentence which is used by the Court and submitted that the ultimate power and duty to do justice rests with the Court and whenever the Court finds that the public prosecutor acts unfairly it would come down upon him with a heavy hand and set the things right. In my view these observations in no way deal with the point which is required to be decided.

15. From the aforesaid discussion it can be concluded that it is a matter for the discretion of counsel for the prosecution to decide who and how many witnesses should be examined for proving the prosecution case. The prosecution cannot be compelled to call witnesses irrespective of considerations of number and of

reliability or that a prosecution ought to discharge the functions both of prosecution and defence. In any case it cannot be compelled to examine a witness material "for the defence or to prove alibi and a person not essential for unfolding the prosecution case. If some witnesses are not examined, at the most the Court is entitled to draw in appropriate circumstances adverse inference. This does not - mean that the prosecution can hide the material collected by it during investigation from the Court and in that case it would be open to the Court or to the defence to examine those persons either as Court witnesses or defence witnesses. In this view of the matter, as discussed above and as laid down by the Supreme Court and Privy Council, it cannot be said that the prosecution is bound to examine defence witnesses. There is no provision under the Criminal Procedure Code which empowers the Court to direct the prosecution to examine certain witnesses as prosecution witnesses. On the contrary, Section 311 empowers the Court to examine witnesses as Court witnesses if necessary. Hence the order passed by the learned Judge is illegal and erroneous. In the present case, the learned advocates appearing for the State have fairly conceded that Mr. Patil, investigating officer, would be examined as a prosecution witness and the rest of the witnesses may be examined as Court witnesses. In this view of the matter, the order passed by the learned City Sessions Judge requires to be modified and it is held that the prosecution shall examine Mr. Patil, investigating officer, as a prosecution witness and the rest of the witnesses ordered to be examined by the learned Sessions judge shall be examined as Court witnesses.

16. In the result, the revision application is partly allowed. The impugned order dated 4th December 1984 passed by the learned City Sessions Judge is modified and it is directed that the prosecution shall examine Mr. Patil, investigating officer, as a prosecution witness and the rest of the witnesses ordered to be examined by the learned City Sessions Judge shall be examined as Court witnesses. Rule made absolute to the aforesaid extent.