

(2015) 04 GUJ CK 0028
In the Gujarat High Court

Case No : Criminal Revision Application (Against Acquittal) No. 167 of 1986

State of Gujarat

APPELLANT

Vs

Visheswar Subramaniam Bhattaram and Others

RESPONDENT

Date of Decision : 13-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377, 387, 394
Penal Code, 1860 (IPC) — Section 161
Prevention of Corruption Act, 1988 — Section 5(2), 6(1)(b)

Citation : (2015) 04 GUJ CK 0028

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : J.D. Jhaveri, A.P.P., for the Appellant; S. Tripathy, Advocates for the Respondent

Judgement

S.G. Shah, J.—Heard Ms. Jirga D. Jhaveri, learned APP for the applicant, Mr. S. Tripathy, learned advocate for respondent No. 1 and Mr. Dharmesh V. Shah, learned advocate for respondent No. 2.1.

2. The applicant herein is Investigating and Prosecuting Agency, whereas, respondent No. 1 is original accused No. 1 and original respondent No. 2 is original accused No. 2 but at present since original respondent No. 2 has already died, respondent No. 2.1 is his widow. She is joined as such pursuant to an order dated 2.9.2011 in Criminal Miscellaneous Application No. 11552 of 2011.

3. Applicant - State has challenged the judgment and order dated 26.8.1985 below Exh.49 in Special Case No. 1 of 1984 by the Special Judge, Vadodara, whereby, chargesheet against both the accused under Section 5(2) and 34 of the Prevention of Corruption Act read with Section 161 of I.P.C. was quashed and both the accused were discharged holding that the prior sanction for prosecution against the accused No. 1 was illegal and, therefore, in absence of statutory sanction to prosecute a Government servants, the charge cannot be sustained against them. However, in the operative order of the impugned order, the Special

Judge has categorically confirmed that prosecution can file a chargesheet against accused after getting a valid sanction as per the provision of Section 6(1)(b) of the Prevention of Corruption Act. Thereby, though the impugned order is for discharging both the accused, the fact remains that the order of discharge is not absolute but it is a conditional order, which permits the complainant to resubmit the chargesheet after sanction is accorded to prosecute them.

4. The perusal of record shows that accused No. 1 was serving as Professor in Forensic Medicine with SSG Hospital at Vadodara in its Medico-Logical Department as its Head, whereas, accused No. 2 was serving as Junior Clerk in the same department. It is alleged that on 21.2.1983, when complainant has approached them for his treatment certificate, they have initially demanded Rs. 100/- towards illegal gratification i.e. bribe and asked the complainant to come with Rs. 50/- on 22.2.1983. The complainant was in need of a medical certificate since he met with an accident on 18.12.1980. Since he does not want to pay the bribe, as usual, he has initiated the proceeding by lodging a complaint and hence trap was held, wherein, it is alleged that accused No. 2 was caught red handed for accepting an amount of Rs. 50/- for and on behalf of accused No. 1. Hence, the chargesheet was filed under Sections as referred hereinabove.

5. Perusal of record confirms that the prosecution has examined as many as seven eye witnesses and produced several material documents on record. If we peruse further statement of the accused which is submitted by him as a written statement at Exh.44, it becomes clear that the defence of the accused is not the denial of the incident, but accused No. 1 has tried to emphasize that they have already issued the injury certificate but while accepting the certificate, complainant has signed it in a different name and, therefore, he had scolded the complainant that you are not the real person and that you are committing a forgery. Therefore, he has conveyed his staff being one Mr. Vyas, the original accused No. 2 in the case, to handover the complainant to the Police and thereupon complainant had run away from the place. Thereby, it is his say that he has never demanded Rs. 100/- or any other amount as alleged, but after couple of days, complainant has again approached him and offered the money where he has stated that don't talk about the money and give an application to my clerk. It is further stated by him that thereafter, the accused No. 2 came to his office and handed over him Rs. 50/- which was asked by him as a change and when he has put such amount in his pocket, red was conducted and it was found that anthracene powder was applied on the note and, thereby positive evidence against him, but he has neither demanded nor accepted the amount as bribe.

6. Whereas accused No. 2 has, on the contrary, came forward with some different story, though he has no option but to admit the incident, when he states that in his written statement at Exh.45 that when he refused to issue certificate to the complainant for want of proper name and identification, complainant had been to the accused No. 1 and, thereupon accused No. 1 has called him, accused No. 2 to inquire that why certificate is not being issued by

me and at that point of time, he has conveyed accused No. 2 that the complainant is not the person who is actually injured and, thereupon accused No. 1 conveyed him to call the police and to get the appellant arrested. Thereupon, the complainant has run away.

7. However, so far as presence of tainted currency notes are concerned, it is his say that he has accepted only Rs. 16/- from the complainant towards legal charges for issuance of such certificate, but at that time he recollected to pay Rs. 50/- to accused No. 1 since he has received it for getting change and since accused No. 1 has to go to Karjan, he had been to accused No. 1 leaving the issuance of receipt and at that time, complainant has asked him that where you are going and he conveyed that he has to pay Rs. 50/- to accused No. 1, hence, complainant has offered him Rs. 50/- since he is not having the change and, therefore, he has accepted that amount, and then he went to the office of the accused No. 1 and offered him Rs. 50/- where C.P. Rana and Dr. Padakiya were also sitting and after making payment of Rs. 50/-, he had returned back to his place and before he pay Rs. 50/- to the complainant, police has raided the placed and they were caught.

8. Considering the above defence it is clear that appellants could not prove any evidence in rebuttal from any of the witnesses and when there is admission regarding exchange of money as alleged, but with an only defence that the FIR may be with some ulterior motives, trial Court should not have discharged the accused.

9. If we peruse the impugned judgment, the trial Court has explained the factual details and story of incident disclosing that, initially, Rs. 100/- was demanded, but when complainant has shown his inability to pay Rs. 100/-, accused have demanded Rs. 50/-. The trial Court has narrated the entire episode and activities during investigation in detail in the impugned judgment and, therefore, I do not find it necessary to reproduce the same, more particularly, when accused were discharged for want of legal and valid sanction.

10. If we peruse Paragraph 8 onwards of the impugned judgment, the trial Court has narrated reasons for considering the sanction which is already produced on record as illegal contending that since it is not signed by the Health Minister, it is not a valid sanction. To arrive at such conclusion, the trial Court has mainly relied upon the decision between H abibulla Kalyani v. State of Gujarat, reported in 1985 GLH 425, wherein, it is held that when sanction was signed by Additional Chief Secretary, Finance Department on behalf of the Governor of Gujarat, such sanction is not legal and valid and it must be signed by the concerned Minister. Thereby, the High Court has allowed the application of the accused and proceeding of special case was quashed and set aside discharging the accused. Therefore, Mr. S. Tripathy, learned advocate for respondent No. 1 is heavily relying upon such judgment of this High Court.

11. However, barring such judgment, respondent could not show anything from

record to confirm that there is a good case for discharging the accused as done by the Special Judge in the impugned judgment and order.

12. For the purpose, I have perused the original record which is in the form of all the police papers as well as all the original evidence. It is a matter of surprise that when Special Judge has recorded full evidence of all the accused and when such evidence is confirming the guilt of accused, after full fledged trial, how and why the accused are discharged from the case solely for the want of legal sanction. In that case, the trial Court should have acquitted the accused if there is no evidence. Therefore, when in impugned judgment, the trial Court has not acquitted the accused and simply discharged them from the charges with an observation that prosecution can file a fresh chargesheet after recording valid sanction under Section 6(1)(b) of the Prevention of Corruption Act, there is substance in the revision application that the order of discharge by the impugned judgment is not proper. Therefore, if we have to concentrate on the legality and validity of the sanction, the fact remains that the Special Judge has mainly relied upon the judgment of Habibulla Kalyani (Supra) to consider that sanction is not valid since it is not signed by the concerned Minister. Therefore, if we scrutinize the decision in Habibulla Kalyani (Supra) in proper perception, then it has been noticed that in-fact that said judgment has already been overruled by the Hon"ble Supreme Court when it is challenged before it by the State in the case between the State of Gujarat v. Habibulla Kalyani in unreported judgment dated 4.3.1987 in Criminal Appeal No. 594 of 1986 wherein Hon"ble Supreme Court has overruled the decision of this High Court in the case reported in 1985 GLH 475. The judgment of Hon"ble the Supreme Court has been referred and relied upon by the Division Bench of this High Court in the case between Nanjibhai Ratnabhai Chaudhari Vs. State of Gujarat, . Since I am relying upon an unreported judgment of the Hon"ble Supreme Court judgment, which is referred by the Division Bench, it would be appropriate to reproduce the relevant portion so as to avoid any controversy, wherein, Paragraph Nos. 10 and 11 reads as under, wherein, relevant discussion of the Hon"ble Supreme Court is reproduced by the Division Bench.

"Paragraph No. 10: Before the trial Court the learned Advocate appearing on behalf of the defence relied upon the overruled decision of this Court in the case of Habibulla Kalyani v. State of Gujarat, 1985 Cri.LR 475(Guj.)ENDLAWFINDER Fortunately it was noticed by the learned Public Prosecutor that this judgment was overruled by the Supreme Court in Criminal Appeal No. 594 of 1986 decided on 4th March 1987 and the Supreme Court in that case held that when the relevant file of the Government was produced before the Court by the prosecution, it was surprising to find that the High Court had observed that the Finance Minister should have been examined as a witness and that they did not think that it was at all necessary. Mr. Barot, however, submitted that in that case after the file went to the Minister, the Minister had discussion with the Commissioner of Sales Tax and it was only thereafter that he had accepted the recommendation of the Additional Chief Secretary and, therefore, the Supreme

Court has overruled the decision of this Court. In the present case, in our view, as stated above, the note is eloquent. It shows that the entire material was placed before the Secretary and the Secretary has culled out the relevant part and has placed the entire file before the concerned Minister and the Minister had placed his signature approving the proposal to prosecute the accused. It is not necessary that even if the Minister is agreeing with the proposal, he should have any discussion with the concerned Officer. The relevant discussion of the Supreme Court in the case of Habibulla Kalyani (*supra*) is as under:

"In this appeal by Special Leave, the only question is whether there was a valid sanction for the prosecution of two respondents who were Officers of the Department of Sales Tax, for alleged offences punishable under Sec. 5(1)(d) of the Prevention of Corruption Act, 1947 and Sec. 161 of the Indian Penal Code, 1860. Admittedly, there is an order passed by the State Government granting sanction for the prosecution of the respondents. The Additional Chief Secretary Shri R.V. Chandramouli entered the witness box and testified that he after perusal of the records and on being satisfied that there was *prima facie* case, recommended the grant of sanction for the prosecution and put up the file to the Finance Minister. The High Court by a curious process of reasoning and by unnecessarily lengthy and dubious judgment, has quashed the prosecution on the ground that the grant of sanction by the Finance Minister was without due application of mind. There is no basis whatever for holding that the Finance Minister had not applied his mind before granting sanction. Despite fact that the concerned Government file had been produced in Court in evidence on the side of the prosecution, we are surprised to find that the High Court has observed that the Finance Minister should have been examined as a witness. We do not think that it was at all necessary. We are satisfied that it was not a proper or correct approach. The notings in the file prove beyond doubt that the Additional Chief Secretary has applied his mind and had gone through the relevant papers including the statements of the prosecution witnesses as well as the report of the Director, Anti-Corruption Bureau. After he was satisfied that there existed a *prima facie* case he recommended the grant of sanction for the prosecution. After the file went to the Minister, the Minister had a discussion with the Commissioner of Sales-Tax and it was only thereafter that he accepted the recommendations of the Additional Chief Secretary." Paragraph No. 11: Apart from the aforesaid discussion, this point is also covered by the decision of the Supreme Court in the case of *The State of Rajasthan Vs. Tarachand Jain*, . In that case it was observed that where the facts constituting the offence appear on the face of the sanction accorded by the Chief Minister, it is not necessary for the prosecution to lead separate evidence to show that the relevant facts were placed before the Chief Minister. The Supreme Court further held that the fact that Chief Minister signed the sanction for the prosecution on the file and not the formal sanction produced in the Court, which bears the signature of Special Secretary to the Government, makes no material difference. In the present case taking into consideration the sanction order Ex. 29 and the note Ex. 56 which is signed by

the concerned Minister, it is apparent that all the material was placed before the Minister and he had accorded sanction to prosecute the accused. Once the facts appear on the face of the sanction order, it is not necessary for the prosecution to lead evidence of the competent authority who has accorded sanction. Hence it cannot be said that the prosecution has failed to prove valid sanction to prosecute the accused."

Therefore, when judgment in H abibulla Kalyani (Supra) reported in 1985 GLH 425 has been overruled by the Hon"ble Supreme Court as well as of the Division Bench by this High Court, it is not a good law which can be followed, as done by the Special Judge in the impugned judgment.

13. Therefore, now it is clear and certain that there is no necessity of signature by a Minister while according a sanction. Otherwise also it is clear position that whenever there is an order by Minister of any State, such orders are never signed by the Governor, but it is always signed for and on behalf of the Governor. For the purpose, the original sanction has been examined from the record which is at page in paper book, which confirms that such sanction at Exh.38 is signed by Additional Chief Secretary to the Government of Gujarat, Health and Family Welfare Department by order and in the name of Governor of Gujarat. There is specific disclosure to that effect in such sanction itself. Therefore, relying upon the decision by the Hon"ble Apex Court in the State of Gujarat (Supra), when decision of Habibulla Kalyani (Supra) is held not to be a good law, the impugned judgment cannot sustain, since what is held by the Special Judge in the impugned judgment is only to the effect, for discharging the accused, that sanction is granted by the Superintendent of Hospital and, therefore, it is not valid. Whereas, as aforesaid in-fact, sanction at Exh.38 is accorded by the Governor and as per rules of business, Governor acts upon advice of the Ministry and, therefore, it cannot be said that sanction is not accorded by the Governor and, thereby, it is invalid because respondent No. 1 is a Class-I Gazetted Officer and his appointing authority is State Government. Further, the Special Judge has, unnecessarily placed reliance on Exh.40 a letter whereby a Medical Superintendent of SSG Hospital has also accorded a sanction for prosecuting the accused No. 2. Thus, when there is a valid sanction at Exh.38 by order and in the name of Governor of Gujarat discarding such evidence on record is not proper and it goes to the root of the matter to quash and set aside the impugned judgment and order.

14. In view of above facts and circumstances, the impugned judgment cannot sustain in law and needs to be quashed and set aside. However, before putting an end, few things are needed to be clarified.

12.1 Since by impugned judgment and order, both the accused were discharged, now that order of discharge is quashed and set aside and, therefore, now the Special Judge has to proceed further to scrutinize the evidence for conclusion that whether evidence is sufficient to convict the accused or not.

12.2 Since such exercise cannot be carried out in present application which would otherwise prejudice the right of appeal of the accused if at all they are convicted.

12.3 Thereby, when this revision application is allowed, now it is for the Special Judge to initiate the proceeding further from the relevant stage on record and to pass appropriate judgment in accordance with law considering that the sanction is not invalid.

15. However, so far as respondent No. 2 is concerned, at present before this Court respondent No. 2.1 namely; Malti Ashwinkumar Anirudha being widow of late Ashwinkumar Anirudha, who was original accused No. 2 is a Junior Clerk in the office of respondent No. 1; but now, when he has expired pending revision which can be treated as a continuation of proceeding/trial though awarding of sentence to him may result into curtailing of some financial benefit, it is not possible to pass an order of conviction against him when he could not be heard on merits of this Revision Application being a deceased. For the same reason, now, when he is no more, there cannot be an order of conviction of his wife being respondent No. 2.1. In-fact irrespective of proposed order of conviction of accused No. 2, on the date of filing of revision application and till date, practically accused No. 2 is discharged from the charges and during the period of discharge, when he expired, practically, revision application shall stand abated against him.

16. Though provision of Section 394 of Code of Criminal Procedure is with reference to an appeal, which provides that every appeal under Section 377 or Section 387 shall finally abate on the death of the accused and though sub-section 2 provides that every other appeal under Chapter XXIX (except an appeal from a sentence of fine) shall finally abate on the death of the appellant, there is no doubt that same principle would certainly apply to the accused in revision also.

17. It cannot be ignored that in present case, accused are discharged by the trial Court and, thereby now until the decision in revision is in favour of the prosecution, there is only charge against them i.e. they are not convicts and, therefore, even if revision is allowed against co-accused, widow of deceased-accused cannot be prosecuted and no sentence can be awarded upon her though proviso to sub-section (2) of Section 394 permits the joining of legal heirs in certain cases. However, it is only in the cases of appeal against conviction and sentence of death or imprisonment and not in all cases.

18. Therefore, so far as respondent No. 2.1 is concerned, since his wife is joined as legal heir, the revision application is dismissed against her confirming that revision is abated against original respondent No. 2 when he died.

19. In view of the above facts and circumstances, the revision application is partly allowed as aforesaid. The Registry shall forward the original record to the Special Judge to proceed further as aforesaid. Rule is made absolute accordingly.