

(2014) 12 GUJ CK 0127
In the Gujarat High Court

Case No : Special Criminal Application (Quashing) No. 2623 of 2014

Tushar Haribhai Gondalia and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Constitution of India, 1950 — Article 227 — Criminal Procedure Code, 1973 (CrPC) -
Section 151, 161, 164 — Dowry Prohibition Act, 1961 - Section 4, 7 — Penal Code,
1860 (IPC) - Section 114, 304B, 306, 417, 498A

Citation : (2015) 1 GLH 721

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Ashish M. Dagli, Advocate, for the Appellant; A.N. Shah, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J. By this application under Article 227 of the Constitution of India, the petitioners original accused persons seek to question the legality and validity of the order passed by the learned 2nd Additional Sessions Judge, Rajkot, dated 19th June, 2014 below Exhibit 145 in Sessions Case No. 120 of 2011, by which the objections raised by the defence Counsel on behalf of the applicants herein as regards the admissibility of a part of the evidence of a witness was overruled. The facts giving rise to this application may be summarized as under:--

"(a) The applicants before me are original accused in Sessions Case No. 120 of 2011. They are being tried in the Court of the 2nd Additional Sessions Judge, Rajkot, of the offence punishable under Sections 304B, 306, 498A read with Section 114 of the Indian Penal Code and Sections 4 and 7 of the Dowry Prohibition Act. The applicant No. 1 before me is the husband of the deceased who committed suicide and the other applicants are the family members of the husband i.e. the father-in-law, mother-in-law and sister-in-law."

2. It appears that the mother of the deceased namely Smt. Bhanuben Bhatti was in the box and she was being cross-examined by the defence Counsel. The mother of the victim was confronted by the defence Counsel with an omission in her Police statement to the effect that she had not stated before the Police that she proposed to distribute the sale proceeds pursuant to the sale of a plot, the ownership of which was of her husband, equally amongst her daughters after her demise. The witness agreed to the same by deposing that she had not stated such a fact before the Police in her statement. However, at that point of time, she tried to explain as to why she had missed to state such a fact before the Police in her statement recorded in the course of the investigation.

3. It appears that the learned trial Judge thought fit to permit the witness to clarify and such clarification was also incorporated in the evidence of Smt. Bhanuben.

4. The defence Counsel raised a serious objection to such a procedure adopted by the trial Judge, on the ground that once a witness is sought to be contradicted with his or her Police statement, the witness is expected to either deny or agree with the same. However, according to the defence, the witness should not be permitted to clarify as to why she was not able to state such a fact before the Police in her Police statement, the fact which she therefore deposed for the first time before the Court in her cross-examination.

5. It appears that such objection was raised by the defence Counsel before the trial Court substantially on the ground that if such explanations are permitted to be tendered and made a part of the deposition, then the defence would be seriously prejudiced of the right of the accused to effectively cross-examine such a witness and would get infringed. It was submitted before the trial Court on behalf of the defence Counsel while raising an objection that if a witness is put to a question of fact and if any explanation comes from such a witness to such a factual question, the same could be considered. But, in so far as the question pertaining to the contradiction and omissions are concerned, then in that regard the witness should not be permitted to make inadvertent statement of her own and the same should be treated as inadmissible.

6. It appears from the impugned order that such objection was overruled by the trial Court by observing that the same would be dealt with in the final judgment. However, the trial Court thought fit to pass a reasoned order discussing the legality and validity of the objection raised and the same is the subject matter of challenge before me.

7. The learned Judge, while overruling the objection raised on behalf of the defence, made the following observations:--

"7. The following portion of the deposition (Ex. 145) was read before this Court.... Gujarati Portion" ...Thus, the learned Advocate maintain that the portion namely,.... Gujarati Portion...is a voluntary statement.

8. Mr. Desai has relied on Webster's New Collegiate Dictionary to rely on the dictionary meaning of word "explanation". In the said dictionary, the term has been explained as follows:--

"(1) the act or process of explaining (2) something that explains, (3) a mutual discussion designed to correct a misunderstanding or reconcile differences".

He also relied on the legal glossary 1988 Edition of Government of India to explain the word "explanation". The said dictionary gives the following meaning to the word " explanation".

"That which explains" [art. 25(2)(b), expln. (1), Const.]"

Relying on the same he tried to distinguish explanation from clarification. He submitted the voluntary statements are clarifications and, therefore, ought not to be admissible.

9. He therefore, drew attention of this Court to the following portion of the deposition of that very witness, which reads thus:--

...Gujarati Portion...."

Reading the aforesaid portion, the learned Advocate submitted that of the aforesaid portion, the following text constitutes voluntary statement.... Gujarati Portion...."

10. The learned Advocate thus, submitted that in the cross-examination, it is not admissible for a witness to state voluntary statement, but the witness can only give a simple "yes" or "no" response in the cross-examination. He stated that only if the witness gives a plain "yes" or "no" answer, could the suggestion given at the behest of the accused can come on record. He submitted that if as a result of such suggestion there remains ambiguity that the prosecution is free to reexamine the witness. He submitted that in the portion quoted hereinabove, the question only pertains to the word "dowry", namely that whether the said word was mentioned by the witness in her statement or otherwise. He submitted that no explanation could be tendered in response to such a question and the same is untenable in law as any explanation given by the witness would cause serious prejudice to the accused. He lastly mentioned two citations, the said citations are as follows: [1] 1971 (3) SCC 436 being the case of Yudhishtir v. State of Madhya Pradesh, and [2] (1969) 10 GLR 361 being the case of Natwarlal Damodardas v. State of Gujarat.

13. This Court also laboriously researched the subject and has stumbled into certain Authorities, which shall referred to at appropriate place in this order. It would be appropriate to first deal with the case law given by the learned Advocate for the accused. The learned Advocate for the accused while relying on the case of Udhishtir (supra) has chosen to emphasis the Head Note prepared by the said Journal. The item (ii) of the said Head Note reads thus:--

"(ii) When a particular fact deposed to by witnesses does not find mention both

in the FIR and in statements recorded under Sec. 161 Cr.P.C. it is an improvement and it cannot be considered."

With profound respect to the author of the said Journal, this Court has not found the exact phrase used in the said Head Note in the text of the said judgment. Nowhere does the judgment state that when the witness is confronted with his Police statement, he is barred from making any explanation. On the contrary, in the facts of the said case, the stand of PW1 & 6 before the Court was that they saw accused No. 1 and Rajkumar pressing neck of Surajkumar and that the accused No. 2 thrust cloth in the mouth of Surajkumar nor about Shivkumar catching hold of Surajkumar.

In the statement under Sec. 151 of Cr.P.C. they had stated that after coming out of the house, they show several persons outside but, they went away. These omissions in the Police statement were brought to the notice of the said witness PW1 & 6 but, no satisfactory explanation, save that the Police had not satisfactorily recorded their statements, was given in the Court. Thus, the inference that this Court would draw from the above is that an explanation per se is not barred. It is only when that explanations are not consistent with the evidence on record that the Court would disbelieve it and in that eventuality the Court would consider those explanations as improvement. Not allowing witness to tender an explanation is quite different from not believing an explanation by treating it as material improvement. Thus, the reliance placed by the learned Advocate on the ratio of Udhishtir (supra) is improper and the said Authority cannot be treated as an Authority for the proposition that no explanation could be given by the witness under the cross-examination.

15. Thus, what the Hon"ble High Court observed was that the third party, which is neither a accused nor a owner, cannot make voluntary statement to his liking (emphasis added). The crux of the aforesaid observation is that a witness would only reply the questions from the point of view to prove guilt of the accused, as put to him by the prosecution. He cannot put his own story namely as to his claim to the muddamal articles. However, such system would not mean that even when the witness is asked questions in the cross-examination, he cannot tender his explanation. There would be hundreds of questions which can never be replied in simple "yes" or no- A clever lawyer may frame such question and if answered in "yes" or "no", both such replies would be equally incriminating. For instance, if a question is put to a witness, namely, "have you stopped beating your wife?" Then the question would imply that the witness has been beating his wife and a further question that whether he has stopped beating her? Thus, no matter whether the answer by the witness is affirmative or negative, it would still imply that the witness has been beating his wife. In such circumstances, it would only be appropriate if the witness clarifies that he never used to beat his wife. Thus, taking the stray observation of the Hon"ble High Court, that too totally out of context, the learned Advocate has chosen to contend, that a explanation cannot be given by a witness in the cross-examination.

20. Thus, on the aforesaid discussion, the proposition that the accused cannot give any explanation whilst being in cross-examination is exaggerated and absurd, in fact so much so that such a proposition has not even arisen or contended before any Court in this country. It is unthinkable that the witness under cross-examination should be compelled to answer in affirmative or negative and, thereafter, if an ambiguity remains, the witness ought to be reexamined. Equally disturbing is the attempt of learned Advocate to use stray observation of the Hon"ble High Court of this State to construe meaning that voluntary statement cannot be made by a witness. It would be preposterous to treat an explanation (tendered in terms of the law of the land to a contradiction or omission viz a viz Police statement) as voluntary statement and be treated as barred or inadmissible. No such proposition of law barring explanation exists. Explanation, if inconsistent can be discarded as not believable while appreciating the evidence, but the same cannot be barred from being taken on record. Hence, the objections of the learned Advocate taken during deposition are unsustainable and rightly rejected."

8. Mr. Dagli, the learned Advocate appearing on behalf of the applicants, original accused, vehemently submitted that in our system of criminal jurisprudence a witness is not permitted to depose anything of his own. The Indian Evidence Act provides that witness is to be examined in chief, then cross-examined and then reexamine at any stage. The witness has no right to make any statements in the manner he would deem fit. According to Mr. Dagli, this important aspect of the basic principles was lost sight of by the trial Court. In support of his submission, he has placed reliance on an unreported order passed by a learned Single Judge of this Court, dated 22nd March, 1979 in Criminal Revision Application No. 340 of 1978 (Soni Ghanshyambhai Sahubhai v. State of Gujarat and others). He submits that a very simple question was put to the witness by the defence and the defence wanted to contradict the witness with her Police statement. Although, the witness admitted that she had not stated such a fact in her Police statement, yet, she on her own tried to explain as to why she could not bring such a fact to the notice of the Police. This would amount to "Volunteering" evidence or "irresponsive" testimony.

9. In such circumstances, Mr. Dagli submits that the impugned order deserves to be quashed and the part of the evidence recorded by the trial Court overruling the objection deserves to be deleted from the evidence of the witness.

10. On the other hand, Mr. P.P. Majmudar, the learned Advocate appearing on behalf of the original informant, has opposed this application submitting that the order passed by the learned Judge is an interlocutory order and this Court, in exercise of powers under Article 227 of the Constitution of India, should not interfere with the same. Mr. Majmudar submits that the admissibility of the evidence could be looked into by the trial Court at the final stage as explained by the Supreme Court in the case of Bipin Shantilal Panchal v. The State of Gujarat reported in 2000(2) GLH, 545. Mr. Majmudar, therefore, prays that there being

no merit in this application, the same be rejected.

11. Mr. A.N. Shah, the learned APP appearing on behalf of the State of Gujarat has also vehemently opposed this application submitting that the impugned order is an interlocutory order and, therefore, should not be interfered with at this stage. He, therefore, prays that there being no merit in this application, the same be rejected.

12. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the learned Judge committed any error in passing the impugned order.

13. A short but an important question which has arisen before me for my consideration is regarding the right of a witness to depose on his own, or to put it in other words, the right of a witness to clarify before the trial Court while being confronted with his/her Police statement and sought to be contradicted with his/her Police statement.

14. I may quote with profit a passage from a book titled "Principles and Digest of the Law of Evidence" authored by the then Chief Justice M. Monir, revised by Justice Deoki Nandan new addition:--

"A witness cannot in cross-examination be asked whether he is a spy or an informer. A witness may not foist into his answer statements not in answer to, nor explanatory of his answers to, questions put to him. This is denominated "volunteering" evidence or "irresponsive" testimony, and the opposite party's Counsel should be on his guard to check its introduction by objection. (Norton, 2nd Ed., Section 417) This rule is more strictly applied to answers given in the course of cross-examination. An adverse witness will not be permitted to obtrude such irrelevant matter in answer to a question not relating to it, and, if he should do so, the party cross-examining may apply to have the answers struck out of the Judge's notes, after which the witness cannot be re-examined on the subject, (Taylor, & 1475) Professor Wigmore, however thinks that where the witness goes beyond the scope of the question, and makes an answer not responsive, there is nothing per se wrong. If the answer includes irrelevant facts, they may be struck out; if it furnishes relevant facts, then they are none the less admissible, though they were not specifically asked for."

15. I may also quote a passage from the evidence in trials at Common Law by John Henry Wigmore.

"785. Non responsive answers. Where the witness, either in a deposition or on the stand, goes beyond the scope of the question, and makes an answer not responsive, there is here nothing "per se" wrong. If the answer includes irrelevant facts, they may be struck out, and the jury directed to ignore them (18 supra). If it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for:--

Peacock's case, 9 Co. Rep. 70 b (1612):- Peacock, being examined on

commission "would have declared the whole truth, which J.H. being a commissioner chosen by the plaintiff would not suffer him to do, but held him strictly to the interrogatories, so that the truth could not appear": held a great misdemeanor, by the Lord Chancellor, the two Chief Justices, Chief Baron, and the whole Court of the Star Chamber, "for it is the murdering of truth and right"; commissioners "are not strictly tied to the words of the interrogatories, but to everything also which necessarily arise thereupon for the manifestation of the whole truth concerning the matter in question.... If the truth should be by such means suppressed, and falsely certified in the examinations, so the innocent would be oftentimes punished and the guilty escape punishment, and justice and right would be utterly subverted; for as is commonly said, the suppression of truth is the oppression of the innocent."

Powers, J., in *Underwood v. Cray*, *Cray v. Underwood*, 94 Vt. 58, 60, 108 Atl. 513, 514 (1920): It is not every irresponsible answer given by a party that will support an exception; not only must such an answer be improper in substance, but it must be apparent that the party intends to go beyond the question and to gain an advantage.

The only ground of complaint for non responsive answers is that, in the case of a deposition (for the reason above noted), such an answer may entitle the opponent to additional cross-examination on the new matter - a rule dealt with elsewhere (1392 *infra*). Courts ought to cease repeating the novel and unwholesome assertion that "where an answer is not responsive to the question put, it is the duty of the Court to strike it out, on motion."

This topic of responsiveness has somehow become in modern times beset with crude misunderstandings that tend to suppress truth and turn the inquiry into a logomachy:--

"(1) Sometimes it is said that the party questioning may object on this ground, but not the opposing party. But there should be no such distinction; if the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by Justice.

(2) That a party waives objection to a responsive answer, by the very asking of the question, is noticed *supra* 18.

(3) That an opponent is entitled to the striking out of an answer which is non responsive and inadmissible, is noticed *supra* 18; but this is merely a rule excusing him from not having objected before the answer."

16. I am of the view that a witness is entitled to add to the answer called for by the question put to him at the time when such witness is sought to be contradicted by his Police statement in order to make it complete. Such an answer is also evidence and must be considered along with the other evidence in the case. The witness is not necessarily bound to confine his/her eventual

statement at the trial to the statement already made by him/her, either under Section 161 of the Code or under Section 164 of the Code. A witness is free to add or subtract from such previous statement, whatever may be the criticism that such addition or deletion may attract. Such addition or deletion may, for example, be characterized as an attempt to introduce an improvement. It may also have an impact on his credibility as a witness, or may even affect the authenticity of the testimony. However, that does not mean that if such witness on his own offers any explanation as regards the contradiction, he should not be permitted and that part of his explanation should not be accepted in his oral evidence. It is for the trial Court to exercise its discretion so far as accepting such explanation and at least such explanation should be noted down in the evidence. The evidentiary value of such explanation can always be gauged while appreciating the entire evidence at the final stage.

17. In my view this principle more or less has been well explained by the Supreme Court in the Case of Bipin Shantilal Panchal(supra). I may quote with profit paragraphs Nos. 13, 14, 15, and 16 of the judgment.

"13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

14. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

15. We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence.

16. Now, for disposal of the present application we may state that there is no

point in our granting further time to the trial Court to complete the trial. It is for the trial Court to complete it as early as possible. But we would not do anything to deprive the accused in custody of his right to move for bail on account of the delay thus far occasioned. The bail application would be disposed of by the Court concerned on its own merits. With the above observations we dispose of this application."

18. I may also quote with profit a decision of this Court in the case of *State of Gujarat v. Ashulal Nanji Bisnoi and others*. The learned Single Judge of this Court made the following observations in paragraphs Nos. 7, 8, 9, 10 and 11:--

"7. True it is that the Courts must admit the evidence in the manner and method which is prescribed by the Indian Evidence Act. No Courts can hold different procedure than laid down by the Indian Evidence Act, only relevant and admissible evidence can be proved and inadmissible or irrelevant evidence cannot be proved. Indian Evidence Act nowhere lays down that when objection about the irrelevancy and admissibility was raised, is to be decided by the Court then and there and to proceed further thereafter for recording of evidence. There is no express or implied mandate in this respect laid down by the Indian Evidence Act. By phrase "admissible and relevant", it clearly means that admissible for the consideration of the judge, "admissible and relevant" for the consideration of the Judge to pronounce the judgment. It cannot be laid down therefore that the statements or documents which are not admissible or relevant, cannot be taken on the record. It is nowhere provided by the Indian Evidence Act that the material which the Judge thinks not relevant or inadmissible, cannot be brought on record. Evidence and material which may not be relevant or admissible cannot be precluded from placing on record. On the contrary it is more desirable to preserve it on record because as said by the Supreme Court in *Bipin Shantilal Panchal's* case that how Appellate or Revisional cannot come to the conclusion without that material on record, whether the Trial Court has rightly exercised the discretion. Therefore, the conducive procedure must be to record the evidence and put a note of objection raised and decide the same at the final judgement and that is what decided by the Supreme Court and directed in the above said *Bipin Shantilal Panchal's* case (supra). The procedure as prescribed and directed by the Apex Court is in consonance with the provisions of the Indian Evidence Act. The principle that the Judge should take into consideration only the admissible and relevant evidence cannot be combated with and the Supreme Court in the above said decision of *Bipin Shantilal Panchal* has not discussed this aspect. The Supreme Court has only laid down that for the speedy trial, it is necessary that the Judge should record the evidence completely including the objection raised and decide at final stage that what material could be admitted and said to be relevant for pronouncement of the judgment and therefore in this view of the matter the order of the learned Addl. Sessions Judge closing down the evidence and to conclude at the recording of the evidence stage that those statements were inadmissible in evidence is clearly in breach of the direction of the Apex Court in *Bipin Shantilal Panchal's* case (supra)."

"8. The facts go to show that the witness is yet to be examined fully, the prosecution has not been given chance to lay down the foundation to declare that PW16 is an expert witness. What is stated by PW16 is her qualification and the fact that the accused were brought before her and one of the accused consented to go for the Lie Detection Test. Now at this juncture before the witness proceeds further the defence and the Court jumped to the conclusion that the statements recorded by PW16 were inadmissible and, therefore, her evidence was closed by the learned Addl. Sessions Judge. Even, the statements which were held irrelevant and inadmissible were not allowed to be brought on the record and, therefore, as has been apprehended by the Supreme Court in Bipin Shantilal Panchal's case has taken place in this case that this Court is deprived of the material which is held inadmissible by the Trial Court. The order, therefore also, is required to be quashed and set aside."

"9. The law is now well established that the orders which affects the rights of the parties ultimately are the final orders may have been passed at the interlocutory stage, Revision Application is maintainable against such orders. Order which is impugned certainly goes to the root of the matter and since the evidence of PW16 is closed by the learned Addl. Sessions Judge, the same affects the rights finally of the prosecution and, therefore, the order impugned cannot be said to be an interlocutory order."

"10. The arguments advanced on merits in view of what is discussed above in respect of whether the statements are relevant or irrelevant as Extrajudicial confession requires no adjudication by this Court at this juncture. It will be for the trial court to decide as directed by the Apex Court."

"11. In this view of the matter while setting aside the order impugned, the trial court is directed to resume the evidence of PW16 from the stage where it has been closed. The trial court shall give an opportunity to the prosecution to lay down foundation for PW 16 to be an expert witness in Lie Detection Test. The Trial Court shall also give an opportunity to the prosecution to place on record data and material in respect of Lie Detection Test. If the prosecution projects the witness as an expert, then it will be the duty of the prosecution to lay necessary foundation for the same. If any objection in respect of the recording of the evidence or in respect of any document which may be produced by this witness or prosecution, is raised by any of the parties, the Trial Court shall decide the same as directed by the Apex Court in Bipin Shantilal Panchal's case."

19. The learned trial Judge has taken pains to explain the correct position of law in his own way, and in my view, while passing the impugned order, has taken sufficient precautions to protect the interest of the defence.

20. In Paragraph No. 13 of the impugned order, the learned Judge has observed "not allowing the witness to tender an explanation is quite different from not believing, an explanation by treating it as a material improvement".

21. In my view no illegality could be said to have been committed by the learned

trial Judge in passing the impugned order. I may only clarify that it would be open for the defence to argue before the trial Judge as regards the evidentiary value of the explanation offered by the witness, while contradicting the witness with her Police statement. Such evidentiary value shall be considered by the trial Judge at the final stage, while appreciating the entire evidence on record.

22. For the forgoing reasons this application is rejected. In view of the order passed in the main petition, the connected Criminal Misc. Application No. 11851 of 2014 has become infructuous, and the same is accordingly, disposed of.