

(2011) 09 GUJ CK 0087
In the Gujarat High Court

Case No : Special Criminal Application No. 2440 of 2011

Vishalbhai Vallabhhai Madam

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 397(2), 482, 482

Citation : (2011) 09 GUJ CK 0087

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : N.D. Nanavaty, with Mr. Ashish M. Dagli s, for the Appellant; H.L. Jani, Assistant Public Prosecutor for Respondent(s) : 1, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Rajesh H. Shukla

1. Rule. Learned APP Mr. HL Jani waives service of rule for the respondent-State.
2. The present petition has been filed by the petitioner-original accused under Art. 14, 19, 226 & 227 of the Constitution of India as well as under sec. 482 of the Code of Criminal Procedure for the prayer that the order passed by the Sessions Court, Jamnagar, in Criminal Revision Application No. 67 of 2011 dated 17.9.2011 may be quashed and set aside on the grounds stated in the memo of petition, inter alia, contending that the issue is pending before the Full Bench of the High Court and there are different views expressed by different Benches and therefore the revision itself was not maintainable. It is also contended that the petitioner is not named in the FIR and there is no role attributed to the petitioner except that he has been behind the incident and the charge of conspiracy is levelled.
3. Learned Sr. Counsel Mr. ND Nanavaty appearing with learned advocate Mr. Dagli for the petitioner submitted that the petitioner was arrested on 2.9.2011

and produced before the Magistrate on 4.9.2011. Thereafter, an application for remand was made before the trial court and the same was rejected as per the order passed by the trial court. Thereafter, Criminal Revision Application No. 67 of 2011 was preferred before the Sessions Court for grant of 10 days remand and the impugned order came to be passed at p. 101 which is under challenge.

4. Learned Sr. Counsel Mr. Nanavaty submitted that the order refusing grant of remand is an interlocutory order and therefore the revision would not be maintainable and he has also submitted that different views are expressed by different Benches of this High Court and the issue is pending before the Full Bench for consideration. He has referred to the judgment of the co-ordinate Bench (Coram: H.N. Devani, J.) in Special Criminal Application No. 1590 of 2009 as well as other orders and submitted that the questions have been formulated and it was referred to the learned Chief Justice for placing it before the larger Bench.

5. Learned Sr. Counsel Mr. Nanavaty ha also referred to and relied upon the judgment of the Hon"ble Apex Court reported in State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate, in the case of State represented by Inspector of Police v. NMT Joy Immaculate and referring to the observations therein it has been emphasised that due to the bar created under sub-sec. (2) of sec. 397 of the Code, revision would not be maintainable against the order of remand. He has also referred to other judgments of this Court including the judgment in the case of Pragnesh Hariprasad Parikh Vs. State of Gujarat and Others, He has also referred to and relied upon the judgment in the case of K.K. Patel and Another Vs. State of Gujarat and Another,

6. Learned Sr. Counsel Mr. Nanavaty has pointedly referred to the impugned order and submitted that reference made to the order of the High Court including the judgment reported in 2010 (0) GLHEL-HC 24282 in the case of CBI v. Amit Shah is misconceived as the High Court was exercising the jurisdiction under sec. 482 which has not been appreciated by the Sessions Court and there is a failure to appreciate the judgment and the observations made by the High Court in that case to which he has pointedly referred. It was submitted that it was incumbent upon the Sessions Court to refer to this aspect making a note of the fact that there are different views of the High Court and the matter is pending for consideration of the same issue by the Full Bench. Learned Sr. Counsel Mr. Nanavaty submitted that as a judicial officer he is required to follow discipline and if he is required to decide a matter following any one judgment which is also binding, then he has to assign reasons for granting remand.

7. Learned Sr. Counsel Mr. Nanavaty, therefore, strenuously submitted that the learned Sessions Court has not assigned any reasons for the impugned order as to how he is satisfied for the grant of remand of the accused. He has submitted that while considering the merits of the matter, there has to be justification for grant of remand. He submitted that it is required to be mentioned that (i) the petitioner is not named in the FIR, (ii) he was not present at the scene of offence

and, therefore, there is no question of any role or use of any weapon by him.

8. Learned Sr. Counsel Mr. Nanavaty, therefore, submitted that there is no role attributed in the entire incident. The application for remand only refers to his involvement that he was behind the entire episode and on the charge of conspiracy remand is asked for. Learned Sr. Counsel Mr. Nanavaty submitted that the remand could not be asked only for recovery and discovery of the weapon used by others or any such muddamal. He has also pointedly referred to the observations made in the judgment in the case of *Jairajsinh Temubha Jadeja Vs. State of Gujarat*, to emphasise his submission that remand cannot be granted to obtain confessional statement, remand cannot be granted to discover the material used by the other accused or for arrest of the other accused. Therefore, Learned Sr. Counsel Mr. Nanavaty submitted that the present petition may be allowed.

9. Learned APP Mr. HL Jani submitted that the maintainability of the revision is not finally decided as there are different views, for which the matter is pending at large before the Full Bench of this High Court and, therefore, at this stage it cannot be said that the revision is not maintainable and therefore the impugned order is without jurisdiction. Learned APP Mr. Jani referred to the papers of the investigation and submitted that the learned Magistrate has not referred to the relevant aspects like the fact that he was in-charge magistrate and the case diary was produced and therefore the observations in the order of the trial court were not justified. Similarly, he has not taken note of the fact that warrant under sec. 70 was issued and the petitioner was not traceable.

10. Learned APP Mr. HL Jani has also referred to the antecedents that there are a number of cases against the petitioner and submitted that he is a habitual offender and it is required to be mentioned that the charge is for offence of conspiracy that he has been behind the entire the episode. Learned APP Mr. HL Jani pointedly referred to the fact that it is also referred by learned Sr.Counsel Mr. Nanavaty that he was behind the incident. Therefore, Learned APP Mr. HL Jani submitted that it is required to be appreciated that the say was that he was not present at the scene of offence, but if he has been the main perpetrator of the entire crime, then he cannot escape remand/custodial interrogation as, otherwise, the investigation would not proceed and it will cause prejudice to the investigation. He has also submitted than the reasons are mentioned with regard to the custodial interrogation, to elicit information about other persons involved, how it was planned and the weapon used are to be traced. Learned APP Mr. HL Jani therefore submitted that the present application may not be entertained.

11. In view of rival submissions, it is required to be considered whether the present petition can be entertained or not.

12. The first aspect which is required to be considered is with regard to the maintainability of the revision application. The very contention has been raised time and again and, therefore, in view of different views of the coordinate

benches of the High Court, the matter is pending for consideration by the Full Bench of this High Court. However, as rightly contended, when there are divergent views, it cannot be concluded finally either way.

13. This High Court in the case of Gopalbhai Chaturbhai Amin v. State of Gujarat as well as in the judgment in the case of Pragnesh Hariprasad Parikh Vs. State of Gujarat and Others, has clearly observed that though the order is in the nature of interlocutory under sec. 167, if the application for remand is rejected, it would adversely affect the rights of the investigating agency it cannot be said to be interlocutory and revision application would be maintainable. On the other hand, in the judgment of this High Court in the case of Jairajsinh Jadeja (supra) it has been observed that it is an interlocutory order. Therefore, taking note of this, while passing the order in Special Criminal Application No. 1590 of 2009 (Coram: HN Devani, J.), considering these aspects including the judgment of the Hon'ble Apex Court in the case of NMT Joy Immaculate (supra), the court has requested the learned Chief Justice for referring the matter to a larger Bench.

14. It is in these circumstances when the issue is not concluded and even after the judgment of the Hon'ble Apex Court in the case of NMT Joy Immaculate (supra) the issue as to whether an application rejecting the remand can be said to be an interlocutory order is required to be considered and decided. The moot question which will have to be considered in such a situation is the scope of sec. 397(2) of the Code and whether the order can be said to be an interlocutory order. In other words, the test is whether such an order passed can be said to be an interlocutory order. The obvious consideration for deciding whether the order is interlocutory, it will have to be considered with reference to the consequences, whether it would result in culminating the proceedings and/or whether it will have a bearing on the finality of the proceedings if the order passed has the effect of concluding the issue or the finality, then, it would not fall under sec. 397(2) of the Code. Where the investigating agency in a given case may not be able to proceed further with the investigation in the absence of custodial interrogation of the accused it would certainly have no clue and the investigation may not proceed further. The custodial interrogation is a tool for investigation to elicit information from the accused. It is required to be mentioned that certain methods may not be approved of which may result in violation of the rights of the accused guaranteed under Art.20 of the Constitution. On the other hand, if the investigating agency is not permitted even such interrogation, then it will affect the progress of the entire investigation. In other words, it will have a bearing on the further investigation and the finality for the purpose of investigation and it cannot be said to be an interlocutory order.

15. A useful reference can be made to the observations of the Hon'ble Apex Court to the judgment in the case of Nandini Satpathy Vs. P.L. Dani and Another, wherein, in context of Art. 20(3) and the provisions of CrPC, the Hon'ble Apex Court has considered the rival claims of the police or the investigating agency for custodial interrogation on one hand and the right of the accused to silence on the

other hand. The Hon''ble Apex Court has dealt with this aspect at length and quoting Lewis Mayers, it has been specifically observed,

To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that "at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny." As the century has unfolded, the danger has increased.

Conspiracies to defeat the law have, in recent decades, become more widely and powerfully organized and have been able to use modern advances in communication and movement to make detection more difficult. Law-breaking tends to increase. During the same period, an increasing awareness of the potentialities of abuse of power by law-enforcement officials has resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the rights of the accused, the suspect, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement.

In this very judgment it is also observed with regard to the views of both the sides and it has been observed that it has to be justified depending on the facts of the case.

16. The contention with regard to the period of limitation for such custodial interrogation would not have any application as the petitioner was absconding for which warrant under sec. 70 was issued.

17. Therefore, the moot question which is required to be considered is whether the grant of remand by the Sessions Court is justified in the facts of the case from the accusation made and the material. It is required to be mentioned that custodial interrogation is the method of investigation and as discussed above the balance has to be struck between the individual liberty or rights under Art. 20 and the right of the prosecuting agency on the other hand which will have to be balanced with care.

18. Therefore, as observed in the judgment reported in Gopalbhai Chaturbhai Amin (supra) referring to the judgment of the Hon''ble Apex Court reported in NMT Joy Immaculate (supra) that if the remand is rejected and the remand of the accused is not given it would adversely affect the right of the prosecution to carry out further investigation and in a given situation the investigation may not be able to make any progress and therefore considering the aforesaid observations of the Hon''ble Apex Court in the case of Nandini Satpathy (supra), it cannot be said that the order passed by the Sessions Court is without jurisdiction. However, while considering it on merits so far as justification for grant of remand of 10 days is concerned, it would certainly be unreasonable

inasmuch as considering the application and the grounds mentioned in the application for remand, it would be sufficient if the remand is restricted to 7 days instead of 10 days, meaning thereby up to 23.9.2011.

19. Accordingly, the present petition stands allowed partly to the extent that the impugned order granting remand/custodial interrogation for 10 days shall stand reduced/modified to a period of 7 days starting from 17th September 2011 for interrogation. Rule is made absolute to the aforesaid extent. DS permitted.