Babubhai Bhimabhai Bokhiria & Anr vs State Of Gujarat & Ors on 3 April, 2014

Equivalent citations: AIR 2014 SUPREME COURT 2228, 2014 AIR SCW 2152, AIR 2014 SC (CRIMINAL) 1068, (2014) 138 ALLINDCAS 221 (SC), (2014) 2 BOMCR(CRI) 720, (2014) 4 MH LJ (CRI) 218, (2014) 2 ALLCRIR 1725, (2014) 3 CURCRIR 608, 2014 (2) SCC (CRI) 644, (2014) 4 KCCR 344, (2014) 3 GUJ LR 2139, (2014) 2 GUJ LH 238, 2014 CRILR(SC&MP) 447, (2014) 2 CRILR(RAJ) 447, (2014) 2 ORISSA LR 159, 2014 (4) SCALE 361, 2014 ALLMR(CRI) 1901, 2014 CRILR(SC MAH GUJ) 447, (2014) 2 PAT LJR 388, 2014 (2) KER LT 25.1 SN, (2014) 2 ALLCRILR 118, (2014) 4 CRIMES 513, (2014) 2 RECCRIR 915, (2014) 2 MAD LJ(CRI) 193, (2014) 4 SCALE 361, (2014) 2 JLJR 271

Bench: Chandramauli Kr. Prasad, Pinaki Chandra Ghose

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.735 OF 2014
(@SPECIAL LEAVE PETITION (CRL.) No.9184 of 2008)

BABUBHAI BHIMABHAI BOKHIRIA
& ANR. ..... APPELLANTS

VERSUS

STATE OF GUJARAT & ORS. .... RESPONDENTS

J U D G M E N T

Chandramauli Kr. Prasad Before we proceed to consider the case, we must remind ourselves the maxim “judex damnatur cum nocens absolvitur” which means that a Judge is condemned when guilty person escapes punishment. But, at the same time, we cannot forget that credibility of the justice delivery system comes under severe strain when a person is put on trial only for acquittal.

By Order dated 8th December, 2011, Veja Prabhat Bhutia was added as petitioner no. 2. He was an accused in the case and his grievance was that due to pendency of the present petition filed by

petitioner Babubhai Bhimabhai Bokhiria, his trial has been stayed and he is unnecessarily rotting in jail. This judgment shall, therefore, will have no bearing on him and the expression "petitioner/appellant" in this judgment would mean petitioner no.1/appellant no.1 Babubhai Bhimabhai Bokhiria.

Shorn of unnecessary details, facts giving rise to the present petition are that one Mulubhai Gigabhai Modhvadiya was murdered on 16th of November, 2005 and for that a case was registered at Kalambaug Police Station, Porbandar, under Section 302, 201, 34, 120B, 465, 468 and 471 of the Indian Penal Code and Section 25 of the Arms Act. Police after usual investigation submitted the charge-sheet and the case was ultimately committed for trial to the Court of Session. When the trial was so pending, the wife of the deceased filed an application for further investigation under Section 173(8) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), alleging petitioner's complicity in the crime, inter alia, stating that the petitioner was a business rival of the deceased whereas one of the main accused is his business partner with whom he conspired to kill the deceased. It was alleged that petitioner was a Minister earlier from the party which was in power in the State and therefore, he was let off during investigation. It was also pointed out that a letter written almost a year ago by the deceased was recovered from his purse in which it was stated that in the event of his death, the petitioner shall be held responsible as he intended to kill him. In reply to the said application, the Investigating Officer filed his affidavit stating therein that during the course of investigation, nobody supported the plea of the wife that the deceased was apprehending any threat from the petitioner or for that matter, any other person. In another affidavit filed by the Investigating Officer, a firm stand was taken that no material had surfaced to show the complicity of the petitioner in the offence. It was pointed out by the Investigating Officer that the deceased filed an application for arms licence and in that application also he did not disclose any threat or apprehension to his life from any person, including the petitioner herein. Notwithstanding the aforesaid affidavit of the Investigating Officer, the Sessions Judge directed for further investigation. In the light of the aforesaid, the investigating agency submitted further report stating therein that the call records of the period immediately preceding the death of the deceased do not show any nexus between him and the petitioner and the deceased did not have any threat from the petitioner. In this way, the police did not find the complicity of the petitioner in the crime.

During the course of trial of other accused, 134 witnesses were examined and at that stage, an application was filed by the son of the deceased praying for arraigning the petitioner as an accused in exercise of power under Section 319 of the Code. Said application was allowed by the learned Sessions Judge on its finding that prima facie strong evidence exists to summon the petitioner as the letter recovered from the deceased incriminated him. It was also observed that the veracity of the letter recovered from the deceased was established by two witnesses who confirmed that the letter was in the handwriting of the deceased.

Aggrieved by the aforesaid order, the petitioner preferred Special Criminal Application No. 638 of 2008 before the High Court of Gujarat. The High Court by its order dated 11th December, 2008 dismissed the said application inter alia observing as follows:

"7. In view of the material placed before the Court, selected by the parties, and in absence of comprehensive and panoramic view of the entire evidence led before the Court in respect of the heinous crime wherein Section 120-B of I.P.C. is clearly alleged, it would be hazardous to record an opinion different from the opinion formed by the Court conducting the case. It is emphasized in the most recent judgment dated 07.11.2008 of the Supreme Court in Hardeep Singh v. State of Punjab [Criminal Appeal No. 1750-1751/2008], after reference to most of the previous judgments on the issue and reiterating the ration in Bholu Ram v. State of Punjab (2008) 9 SCC 140, that the primary object underlying Section 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously. Justice and convenience both require that cognizance against the newly added accused should be taken in the same case and in the same manner as against the original accused. In view of the principles laid down by the Supreme Court as adumbrated hereinabove and in view of the further guidelines called for by the recent referring judgment, it would be improper to interfere with the impugned order, particularly when even the State and the prosecution has supported the application at Ex. 225 below which the impugned order was made." It is in these circumstances, the petitioner has preferred this special leave petition and assails the aforesaid order.

Leave granted.

Before we proceed to deal with the evidence against the appellant and address whether in light of the evidence available, power under Section 319 of the Code was validly exercised, it would be expedient to understand the position of law in this regard. The issue regarding the scope and extent of powers of the court to arraign any person as an accused during the course of inquiry or trial in exercise of power under Section 319 of the Code has been set at rest by a Constitution Bench of this court in the case of Hardeep Singh v. State of Punjab, 2014 (1) SCALE 241. On a review of the authorities, this Court summarised the legal position in the following words:

"98. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent

> that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C……." Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher.

Having summarised the law on the degree of satisfaction required by the courts to summon an accused to face trial in exercise of power under Section 319 of the Code, we now proceed to consider the submissions advanced by the learned counsel. It is common ground that the only evidence that the trial court has relied to summon the appellant to face the trial is the note written by the deceased in his own handwriting apprehending death at the appellant's hand. The same reads as follows:

> "Date: 18.11.2004 I, Mulubhai Modhvadiya write this note that the then Irrigation Minister Babubhai Bokhiriya @ Babulal want to kill me due to personal differences with me. Therefore I inform to the State and to the police by this note that whenever I die, then I request to do thorough investigation because phone calls are coming threatening to kill me. If I will make complaint today then he will by using his influence destroy the complaint, therefore I am keeping this note in my purse and I am clearly stating that If I will die due to murder then my murder will be done by Babu Bokhiriya only, if dumb government listen to my note than take strict action against Babu Bhokhiriya and my soul will be pleased. I am also giving my finger print on this letter and also signing under it. Therefore you have no doubt about it.
>
> Yours sincerely Sd/-
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> (Mulubhai Modhvadiya)" It is an admitted position that all those who were put on trial have now been acquitted by the trial court.
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> Mr. V.A. Bobde, learned Senior Counsel appearing on behalf of the appellant submits that in the course of trial of an offence, when it appears from the evidence that any person, not being the accused, has committed any offence for which such person could be tried together with the accused facing trial, the court may proceed against such person for the offence which he appears to have committed. He points out that the power under Section 319 of the Code can be exercised when it appears from the evidence that any person not being the accused, has committed any offence. In his submission, the evidence would obviously mean the evidence admissible in law. He submits that the note allegedly recovered from the deceased expresses mere apprehension of death and, therefore, it is inadmissible in evidence and does not come within the ambit of Section 32 of the Evidence Act (hereinafter referred to as

"the Act"). He further submits that the note does not relate to the cause of death nor it describes any circumstance that led to his death. It has also been pointed out that the note recovered is also not relevant under Section 32 of the Act as it has no proximity with the event of his death, as the same was written over a year ago.

Dr. A.M. Singhvi, learned senior counsel appearing for Respondent No.2, however, submits that any statement – written or verbal, made under an expectation of death is relevant under Section 32 of the Act and need not necessarily be followed by death immediately. He submits that the letter recovered from the deceased discloses a relevant fact as the same has been made under apprehension of death and relates to its cause. Though he admits that the letter was written over a year ago, it is his contention that it can still be taken into consideration as it is not necessary to have immediate nexus between the words written and the death. In support of the submission, reliance has been placed on a decision of this Court in the case of Rattan Singh v. State of Himachal Pradesh, 1997 (4) SCC 161 wherein it has been held as follows:

"15. ……..The collocation of the words in Section 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not necessarily be a direct nexus between "circumstances" and death. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death……." We have given our thoughtful consideration to the rival submissions and the first question which falls for our determination is whether the note in question is admissible in evidence or in other words, can be treated as a dying declaration under Section 32 of the Act. Section 32 of the Act reads as follows:

"32.Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

1) when it relates to cause of death.-When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

> xxx xxx xxx" From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay.

Any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.

The Privy Council had the occasion to consider the meaning of the expression "circumstances of transaction" used in Section 32 of the Act in the case of Pakala Narayanswami v. Emperor, AIR 1939 PC 47 and on page 50 held as follows:

> ".....The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible....." Aforesaid view had been approved by this Court in Shiv Kumar v. State of Uttar Pradesh, (Criminal Appeal No. 55 of 1966, decision dated 29th July, 1966), wherein it was held as under:
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> "It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed, but general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence. For instance, a statement made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be a circumstance of the transaction, and would be so whether the person was unknown, or was not the person accused. The phrase "circumstances of the transaction" is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae' [See Pakala Narayana Swami v. The King

Emperor, AIR 1939 PC 47]. As we have already stated, the circumstance must have some proximate relation to the actual occurrence if the statement of the deceased is to be admissible under s.32(1) of the Evidence Act……." (underlining ours) This Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra, 1984 (4) SCC 116, after review of a large number of decisions of the Privy Council, various High Courts and the Supreme Court, endorsed the view taken by the Privy Council in Pakala Narayanswami (supra) in the following words:

"21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice." All these decisions support the view which we have taken that the note written by the deceased does not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death and therefore, is inadmissible in law.

Now we revert to the authority of this Court in Rattan Singh (supra) relied on by Dr. Singhvi. In the said case, the deceased immediately before she was fired at, spoke out that the accused was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice her life snuffed off. In the said background, this Court held that the words spoken by the deceased have connection with the circumstance of transaction which resulted into death. In the case in hand, excepting apprehension, there is nothing in the note. No circumstance of any transaction resulting in the death of the deceased is found in the note. Hence, this decision in no way supports the contention of Dr. Singhvi.

The other evidence sought to be relied for summoning the appellant is the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing has come during the course of trial regarding the content of the conversation and from call records alone, the appellant's complicity in the crime does not surface at all.

From what we have observed above, it is evident that no evidence has at all come during the trial which shows even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the trial court summoning the appellant, as affirmed by the High Court, cannot be allowed to stand.

To put the record straight, Mr. Bobde has raised various other contentions to show that the appellant cannot be put on trial, but in view of our answer to the aforesaid contentions, we deem it

inexpedient to either incorporate or answer the same.

In the result, we allow this appeal and set aside the order of the trial Court summoning the appellant to face trial and the Order of the High Court affirming the same.

……J (CHANDRAMAULI KR. PRASAD) .....J (PINAKI CHANDRA GHOSE) NEW DELHI, APRIL 3, 2014.