State Of Gujarat vs Girish Radhakishan Varde on 25 November, 2013

Equivalent citations: AIR 2014 SUPREME COURT 620, 2013 AIR SCW 6728, (2014) 133 ALLINDCAS 102 (SC), AIR 2014 SC(CRI) 383, 2014 (3) SCC 659, (2014) 1 ALLCRIR 945, (2013) 1 JCR 107 (SC), (2014) 3 MH LJ (CRI) 271, (2014) 1 ALLCRILR 241, (2014) 1 CRIMES 92, (2013) 3 GUJ LH 668, (2014) 2 PAT LJR 152, (2014) 1 RECCRIR 857, (2014) 1 CURCRIR 372, 2014 ALLMR(CRI) 341, (2014) 1 JLJR 505, 2014 CALCRILR 2 394, (2014) 1 BOMCR(CRI) 308, (2013) 14 SCALE 360, (2014) 2 DLT(CRL) 85, (2014) 1 MADLW(CRI) 297, (2014) 1 UC 165, (2014) 84 ALLCRIC 387, 2014 (2) KLT SN 13.1 (SC)

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Bench: Gyan Sudha Misra, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1996 /2013
(Arising out of SLP (Crl.) 734/2012)

STATE OF GUJARAT ..Appellant

Versus

GIRISH RADHAKRISHNAN VARDE ..Respondent

J U D G M E N T

GYAN SUDHA MISRA, J.

Leave granted.

2. This appeal by special leave which was heard at the admission stage itself, is directed against the judgment and order dated 8.4.2011 passed by the High Court of Gujarat at Ahmedabad in Special Criminal Application No.2477/2010 whereby the learned single Judge was pleased to dismiss the application filed by the appellant-State of Gujarat and thus upheld the order passed by the learned Addl. District & Sessions Judge, Deesa who had set aside the order of the Chief Judicial Magistrate by which he had permitted the complainant to add Sections 364, 394 and 398 of the Indian Penal Code ('IPC' for short) into the chargesheet which was submitted after police investigation.

3. The principal question which arises for determination in the instant appeal is whether the learned magistrate by virtue of the powers conferred upon him under Chapter XV of the Code of Criminal Procedure 1973 (for short 'Cr.P.C.') under the Heading of "Complaints to Magistrate" can be permitted to allow the complainant/ informant to add additional sections of the IPC into the chargesheet after the same was submitted by the police on completion of investigation of the police case based on a first information report registered under Section 154 Cr.P.C.

4. In order to appreciate and determine the controversy, it may be relevant to relate the factual background of the matter which disclose that on 27.3.2009 a first information report came to be registered with Deesa City Police Station being I. Cr.59/09 for the offences punishable under Sections 365, 387, 511, 386, 34, 120-B and 506(2) of the IPC and under Section 25 (1) (A) of the Arms Act, 1959. The FIR disclosed that the informant/complainant-Deepakkumar Dhirajlal Thakkar resident of Deesa Taluka was sitting at the temple of Sai Baba against whom a conspiracy was hatched by the accused No.1/respondent along with other accused persons as a result of which the respondent along with accused persons came towards the complainant in one Alto Car bearing registration No. GJ-1 - HP-1 and rushed towards the complainant with countrymade pistol/revolver. On reaching there, the respondent pointed the pistol towards the complainant and demanded money from him. Before the victim-complainant could understand anything with respect to the demand made or could have realised the nature of the situation, the respondent – accused along with the other accused persons caught hold of the complainant and tried to kidnap him. In an instant reaction to this well-planned and deliberated conspiracy hatched by the respondent for robbing and kidnapping the complainant, the complainant raised an alarm as a consequence of which the people standing nearby immediately rushed to the spot of crime. Looking at the assembly of people, the accused persons immediately sat in the car and fled from the scene of occurrence. This was not the first time when such offence was committed by the respondent against the complainant but on a prior occasion also, the respondent had extorted Rs.50,000/- from the complainant by putting the complainant under fear of death. However, the FIR which was registered included sections referred to hereinbefore but failed to include Sections 364, 394 and 398 of the IPC which should have been included as per the prosecution.

5. After the police investigation was complete on the basis of the FIR registered and a chargesheet was submitted by the police before the learned Magistrate, Deesa which included Sections 365, 511, 387, 386, 34, 120-B and 506 (2) as also under Section 25(1) (A) of the Arms Act, the complainant noticed that despite the fact that the respondent-accused robbed Rs.50,000/- from the complainant on one previous occasion and this time again attempted to rob and kidnap the complainant, the offences punishable under Section 364, 394 and 398 of IPC were not included in the chargesheet

which was filed against respondent and other accused persons. In order to rectify the said error the complainant submitted an application before the learned Magistrate, Deesa for adding other Sections 364, 394 and 398 of the I.P.C. who after hearing the parties was pleased to allow the application bearing No.1754/2009 and permitted further additions of Sections 364, 394 and 398 of IPC into the chargesheet.

6. The respondent-accused feeling aggrieved and dissatisfied with the aforesaid order permitting inclusion and addition of sections into the chargesheet, preferred criminal revision before the Additional District & Sessions Judge, Deesa who was pleased to quash and set aside the order dated 7.8.2010 passed by the learned IIIrd Addl. Chief Judicial Magistrate, Deesa and thus allowed the civil revision by order dated 23.9.2010.

7. Since the State of Gujarat was prosecuting the matter, it felt aggrieved of the order passed by the Additional District & Sessions Judge who was pleased to quash the order of the CJM permitting addition of the sections to the chargesheet and hence filed a Special Criminal Application No. 2477/2010 before the High Court of Gujarat.

8. The High Court of Gujarat vide its impugned judgment and order was pleased to uphold the order dated 23.9.2010 passed by the Additional District & Sessions Judge, Deesa which according to the appellant is illegal and perverse as the learned Additional District & Sessions Judge did not assign any cogent and convincing reason while setting aside the order of the Chief Judicial Magistrate who had permitted the addition of three sections of the IPC into the chargesheet before committing the matter for trial.

9. The appellant-State of Gujarat while assailing the judgment and order of the High Court had submitted that the magistrates have been conferred with wide powers to take cognizance of an offence not only when he receives information about the commission of offence from a third person but also where he has knowledge or even suspicion that the offence has been committed. Elaborating this submission, it was further contended that there is no embargo on the powers of the magistrate to entertain a complaint envisaged in Chapter XV of the Cr.P.C. and when on receiving complaint, the magistrate applies his mind for the purpose of proceeding under Section 200 and the succeeding sections in Chapter XV of the Cr.P.C., the magistrate is said to have taken cognizance of the offence within the meaning of Section 190 of the Cr.P.C. It was still further added that the magistrate can even take cognizance on information received by a 3rd party and thus there are no fetter or embargo on the powers of the magistrate when he thinks it proper to include more sections on the basis of the complaint lodged for conducting the trial of the accused and it is open to the magistrate to take cognizance of the offence under Section 190 (1) (c) on the ground that after having due regard to the final report and the police records placed before him if he has reason to suspect that an offence has been committed, it is open to the magistrate to take cognizance of the offence under Section 190 (1) (c). Therefore, if the magistrate found that there were prima facie material against the respondent/accused for the other offences also under Sections 364, 394 and 398 of the IPC, the same were rightly added by the learned magistrate after taking conscious notice of the materials available on record for permitting those sections to be added into the chargesheet.

10. The counsel for the respondent however negatived the contentions and relied upon the reasonings assigned by the High Court which was pleased to uphold the order of the Additional District & Sessions Judge which had set aside the order of the III Addl. Chief Judicial Magistrate, Deesa who had permitted the three sections to be included which were not included at the time of the filing of the chargesheet. The learned single Judge of the High Court however approved the setting aside of the order of the magistrate permitting additional sections into the chargesheet as it took the view that if the trial Judge noticed that some of the sections of the IPC were not referred to in the chargesheet and during trial, the trial court comes to the conclusion that any other offence under the provisions of the IPC is made out, then the trial court is not precluded and has all the powers to pass appropriate order for adding the sections. Therefore, the trial court had committed a grave error in allowing the application of the complainant by permitting the additions of the three sections of the IPC into the chargesheet after the same was submitted.

11. While analysing the controversy raised in this appeal, it is clearly obvious that the entire dispute revolves around the procedural wrangle and the correct course to be adopted by the trial court while taking cognizance but in the entire process it appears that the distinction between a case lodged by way of a complaint before the magistrate commonly referred to as complaint case under Section 190 of the Cr.P.C. and a case registered on the basis of a first information report under Section 154 of the Cr.P.C. before the police, seems to have been missed out, meaning thereby that the distinction between the procedure prescribed under Chapter XII of the Cr.P.C. to be adopted in a case based on police report and the procedure prescribed under Chapter XIV and Chapter XV for cases based on a complaint case lodged before the magistrate has clearly been overlooked or lost sight of. It may be relevant to record at this stage that the term 'complaint' has been defined in the Cr.P.C. and it means the allegations made orally or in writing to a magistrate, with a view to taking action under the Code due to the fact that some person, whether known or unknown, has committed an offence but does not include a police report lodged under Section 154 Cr.P.C. Section 190(1) of the Cr.P.C. contains the provision for cognizance of offences by the Magistrates and it provides three ways by which such cognizance can be taken which are reproduced hereunder:-

> (a) Upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report in writing of such facts--that is, facts constituting the offence--made by any police officer;
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> (c) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such. facts made by any police officer it is a case instituted in the Magistrate's court on a police report. The scheme underlying Cr.P.C. clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the

Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to the court.

12. But the instant matter arises out of a case which is based on a police report as a first information report had been lodged before the police at Deesa Police Station under Section 154 of the Cr.P.C. and, therefore, the investigation was conducted by the police authorities in terms of procedure prescribed under Chapter XII of the Cr.P.C. and thereafter chargesheet was submitted. At this stage, the Chief Judicial Magistrate after submission of the chargesheet appears to have entertained an application of the complainant for addition of three other sections into the chargesheet, completely missing that if it were a complaint case lodged by the complainant before the magistrate under Section 190 (a) of the Cr.P.C., obviously the magistrate had full authority and jurisdiction to conduct enquiry into the matter and if at any stage of the enquiry, the magistrate thought it appropriate that other additional sections also were fit to be included, the magistrate obviously would not be precluded from adding them after which the process of cognizance would be taken by the magistrate and then the matter would be committed for trial before the appropriate court.

13. But if a case is registered by the police based on the FIR registered at the Police Station under Section 154 Cr.P.C. and not by way of a complaint under Section 190 (a) of the Cr.P.C. before the magistrate, obviously the magisterial enquiry cannot be held in regard to the FIR which had been registered as it is the investigating agency of the police which alone is legally entitled to conduct the investigation and, thereafter, submit the chargesheet unless of course a complaint before the magistrate is also lodged where the procedure prescribed for complaint cases would be applicable. In a police case, however after submission of the chargesheet, the matter goes to the magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial in a case which is lodged before the police by way of FIR and the magistrate cannot exclude or include any section into the chargesheet after investigation has been completed and chargesheet has been submitted by the police.

14. The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offence into the chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be

which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.

15. In the alternative, if a case is based on a complaint lodged before the magistrate under Section 190 or 202 Cr.P.C., the magistrate has been conferred with full authority and jurisdiction to conduct an enquiry into the complaint and thereafter arrive at a conclusion whether cognizance is fit to be taken on the basis of the sections mentioned in the complaint or further sections were to be added or substracted. The Cr.P.C. has clearly engrafted the two channels delineating the powers of the magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation under Chapter XII and there is absolutely no ambiguity in regard to these procedures.

16. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which is to deal with a case based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. The affected parties have to apprise themselves that if a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed.

17. Since the instant case is based on the FIR lodged before the police, the correct stage for addition or substraction of the Sections will have to be determined at the time of framing of charge. But the learned single Judge of the High Court in the impugned judgment and order has not assigned reasons with accuracy and clarity for doing so and has made a casual observation by recording that the Trial Court at the appropriate stage will have the power to determine as to which provision is to be applied before the matter is finally sent for trial. The fall out of the Order of the High Court is that the prosecution represented by the appellant -State of Gujarat might be rendered remedy less as setting aside of the order of the Magistrate is likely to give rise to a situation where the prosecution would be left with no remedy for rectification or appreciation of the plea as to whether inclusion or exclusion of additional charges could be permitted. In fact, while upholding the order of the learned Additional District & Sessions Judge, the High Court has further overlooked the fact that the

Additional District & Sessions Judge before whom revision was filed against the order of the Chief Judicial Magistrate, could have allowed the revision on the ground of erroneous exercise of jurisdiction by the Chief Judicial Magistrate who permitted to add three more Sections into the chargesheet. But the Additional District & Sessions Judge instead of doing so has straightway quashed the order passed by the Magistrate instead of confining itself to consideration of the question regarding error of jurisdiction and laying down the correct course to be adopted by the magistrate. In fact, the correct course of action should have been laid down by the High Court as also the learned Additional District & Sessions Judge by permitting the appellant – State of Gujarat to raise the question of addition of charges at the time of framing of charge under Section 228 of the Cr. P.C. and should not have passed a blanket order setting aside the order of the Magistrate without laying down the correct course of action to be adopted by the affected parties with the result that three orders came to be passed by the Chief Judicial Magistrate, Additional District & Sessions Judge and the learned Single Judge of the High Court, yet it could not resolve the controversy by highlighting the appropriate course of action to be adopted by the prosecution-State of Gujarat as also the magistrate which permitted addition of sections after submission of chargesheet missing out that the matter did not arise out of a complaint case lodged before the magistrate but a case which arose out of a police report/FIR in a Police Station.

18. As a consequence of the aforesaid analysis, we although do not approve of the order of the Chief Judicial magistrate who permitted addition of three Sections into the chargesheet after the chargesheet was submitted, we are further of the view that the Additional District & Sessions Judge and the High Court ought to have specified the correct course of action to be adopted by the magistrate and the complainant/prosecution party, failure of which got the matter enmeshed into this litigation impeding the trial.

19. We, therefore, dispose of this appeal by observing and clarifying the order of the High Court to the extent that the appellant State of Gujarat shall be at liberty to raise all questions relating to additions of the Sections on the basis of the FIR and material collected during investigation at the time of framing of charges by the Trial Court since the matter arises out of a police case based on the FIR registered under Section 154 of Cr. P.C. and not a complaint case lodged before the Magistrate under Section 190 of the Cr. P.C. Thus, the High Court although may be correct in observing in the impugned order that the Trial Court was not precluded from modifying the charges by including or excluding the sections at the appropriate stage during trial, it was duty bound in the interest of justice and fairplay to specify in clear terms that the Trial Court would permit and consider the plea of addition of sections at the stage of framing of charge under Section 211 of Cr. P.C. since the matter emerged out of a police case and not a complaint case before the Magistrate in which event the Magistrate could exercise greater judicial discretion. Ordered accordingly.

.....J (G.S. Singhvi) .....J (Gyan Sudha Misra) New Delhi November 25, 2013.
