

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 2410 of 2019

=====

JAYRAJSINH MADHUBHA GADHVI
Versus
STATE OF GUJARAT

=====

Appearance:

MR ASHISH M DAGLI(2203) for the Applicant(s) No. 1
NOTICE SERVED BY DS for the Respondent(s) No. 2
MS MAITHILI MEHTA, APP for the Respondent(s) No. 1

=====

CORAM: HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 22/08/2022
ORAL ORDER

1. Rule returnable forthwith. Ms. Maithili Mehta, the learned APP waives service of notice of rule for and on behalf of the respondent-State.

2. By way of present writ-application the writ-applicant has prayed for the following reliefs :-

“(A) YOUR LORDSHIPS may be pleased to admit this Special Criminal Application;

(B) YOUR LORDSHIPS may be pleased to allow this Special Criminal Application by issuing appropriate writ or order or direction, thereby directing expunction of para 6 and direction no. 2 in the operative order of the order dt. 27.11.2018 passed in Cr.M.A. No. 961 of 2018 passed by Ld. Addl.

Sessions Judge, Bhuj-Kachchh;

(C) Pending admission, hearing and final disposal of the present petition, YOUR LORDSHIPS may be pleased to stay the effect, execution and operation of para 6 and direction no. 2 in the operative order of the order dt. 27.11.2018 passed in Cr. M. A. No. 961 of 2018 passed by Ld. Addl. Sessions Judge, Bhuj-Kachchh;

(D) Grant such other and further relief(s) in favour of petitioner as may be deemed just and proper by this Hon'ble Court in the interest of justice.”

3. The Court below while passing order dated 27.11.2018 rejecting the bail to the accused in Criminal Misc. Application No.961 of 2018 directed qua the writ-applicant in para-6 and direction No.2 of the operative part of the order which reads thus :-

“(6) Considering the statements of the witnesses produced in the charge-sheet, the names of accused No.1 – Ashok Manka, accused No.4 – Mahesh Manka and accused No.5 – Laxman Manka have been disclosed. Their names have been removed from the charge-sheet on the basis of the affidavit of the complainant only, which is completely illegal and cannot be legally ratified. Investigating Officer J. M. Gadhvi, who was performing duty at Samkhiyali Police

Station at the relevant time has removed wrongfully the names of the accused No.1, 4 and 5 from the charge-sheet filed by him and filed the charge-sheet falsely. Thus, he has committed a serious offence under Section – 218 and 219 of IPC and an offence under Section – 225 by not arresting the accused persons. The present case pertains to the offence under Section – 302, which provides for punishment to the extent of death penalty. This offence can be considered as a serious offence. Therefore, since it appears just and appropriate to order the DSP, East Kutch to initiate a procedure to register an offence against the Investigating Officer, I hereby pass the following order.

-:: O R D E R ::-

(1) *The present bail application of the applicant / accused is hereby dismissed.*

(2) *The DSP, East Kutchh is ordered to initiate a procedure of registering an offence under Section – 218, 219, 221 of IPC against Investigating Officer J. M. Gadhvi and report this court in 20 (twenty) days.”*

4. Being aggrieved by the impugned order dated 27.11.2018 passed by the Additional Sessions Judge, Bhuj-Kutchh in Criminal Misc. Application No.961 of 2018, the writ-applicant is constrained to approach this Court seeking expungement of

para-6 of the direction No.2 in the operative part of the order dated 27.11.2018 has filed the present writ-application.

5. Mr. Ashish Dagli, the learned advocate appearing for the writ-applicant submitted that the learned Judge by impugned order dated 27.11.2018 though dismissed the application seeking regular bail filed at the instance of one of the accused before the learned Sessions Judge, Bhuj-Kutchh which came to be registered as Criminal Misc. Application No.961 of 2018, however, the Court below made certain unilateral observations against the writ-applicant herein wherein the writ-applicant being Investigating Officer, illegally removed the names of three accused persons relying on the affidavit filed by the complainant and has thus committed offence under Sections 218 and 219 of the Indian Penal Code.

5.1 Mr. Dagli, the learned advocate further submitted that in the operative part of the order rejecting the bail application, direction is given to the DSP, Kutchh to file FIR against the present writ-applicant under Sections 218, 219 and 221 of the Indian Penal Code and report the same before the learned Judge.

5.2 Mr. Dagli, the learned advocate submitted that such direction in para-6 of the impugned order is wholly

impermissible and that the same is required to be expunged. He further submitted that in respect of the said three accused, the writ-applicant verified about (i) call details, (ii) cell phone tower locations, (iii) statements of other witnesses, (iv) CCTV footages, (v) previous enmity between the complainant and these three accused, (vi) plea of alibi, (vii) confession of offence by other two accused, (viii) evidence against other two accused, (ix) lack of evidence against these three accused, (x) lack of eye-witness of the incident, (xi) likelihood of false involvement of these accused, (xii) threat by the complainant and his brothers to falsely name these three accused to one witness namely Ramji Umar Manka, (xiii) complainant's own affidavit. Considering above mentioned materials, the writ-applicant herein found that in fact the offence was committed by two accused, i.e. Piyush Manka and Vanraj Manka, whereas three accused, i.e. (i) Ashok Manka (A- 1), (ii) Mahesh Manka (A-4) and (iii) Lakhman Manka (A-5), were wrongly named by the complainant. Mr. Dagli, the learned advocate submitted that the writ-applicant herein derelicted his duties as police officer to ensure that no innocent person is falsely involved due to enmity or any other reasons between the parties.

5.3 Mr. Dagli, the learned advocate submitted that 'C' Summary report is filed and the complainant has been issued notice to put up his case.

5.4 Mr. Dagli, the learned advocate submitted that merely because a person is named in the FIR does not necessarily mean that the person is in fact involved in commission of the offence and the police officers are not bound to file charge-sheet against those named persons in the FIR even if no material is found against such person.

5.5 In support of above submissions Mr. Dagli, the learned advocate relied on the decision in the case of the State of Maharashtra & Ors., vs. Tasneem Rizwan Siddiquee, reported in AIR 2018 SC 4167. Relying on the aforesaid ratio Mr. Dagli, the learned advocate submitted that the direction passed by the Court below are absolutely in contravention to the decision of the Hon'ble Supreme Court as referred above and such remarks and directions against the writ-applicant herein are required to be quashed and set aside.

6. Ms. Maithili Mehta, learned APP appearing for the respondent – State was not in a position to controvert the submissions advanced by Mr. Dagli, the learned advocate appearing for the writ-applicant.

7. It appears that the writ-applicant herein took up investigation of CR No.I-41 of 2017 registered with

Samakhiyali Police Station, East Kutchh, Gandhidham for the offences punishable under Sections 143,144, 147, 148, 149, 302 of the Indian Penal Code and Section 135 of the Gujarat Police Act. The aforesaid FIR came to be filed by one Lagdhirbhai Kesharbhai Manka against five persons viz. (i) Ashok Manka (ii) Piyush Manka (iii) Vanraj Manka (iv) Mahesh Manka and (v) Lakhman Manka on 23.9.2017. Since the writ-applicant came to be transferred to Samakhiyali Police Station, the investigation with regard to the aforesaid complaint came to be entrusted to the writ-applicant herein. It appears that during the investigation out of the five accused, three accused i.e. (i) Ashok Manka (A-1) (ii) Mahesh Manka (A-4) and (v) Lakhman Manka (A-5) were in fact not involved in the offence and from very beginning of the investigation, they had taken a plea of alibi and according to them, two of them were present at Rapar and Adhoyi which is at a distance of 50-60 k.m. from the scene of offence. The writ-applicant conducted investigation and filed charge-sheet against two accused persons whereas 'C Summary Report' came to be filed against the other three accused before the Court of learned Magistrate, Bhachau, who had issued notice to the complainant. Out of two accused who were charge-sheeted, one of the accused moved regular bail application before the learned Sessions Judge, Bhuj, Kutchh which came to be registered as Criminal Misc. Application No.961 of 2018 which came to be rejected by the learned

Judge by order dated 27.11.2018. However, certain unilateral observations were made against the writ-applicant herein that the writ-applicant being the Investigating Officer has illegally removed the names of the three accused only on the basis of affidavit of the complainant and, therefore, the writ-applicant herein has committed an offence under Sections 218 and 219 of the Indian Penal Code.

8. It is apposite to refer to the ratio as laid down in State of Maharashtra & Ors., vs. Tasneem Rizwan Siddiquee, reported in AIR 2018 SC 4167, paragraphs 10 and 11 read thus:-

“(10.) Reverting to the prayer for expunging the scathing observations made in the impugned judgment, in particular paragraphs 4-6, reproduced earlier, it is submitted that the said observations were wholly unwarranted as the concerned Deputy Commissioner of Police who was present in Court, could not have given concession to release Rizwan Alam Siddiquee in the teeth of a judicial order passed by the Magistrate directing police remand until 23rd March, 2018. Moreover, it is evident that the High Court proceeded to make observations without giving any opportunity, whatsoever, to the concerned police officials to explain the factual position on affidavit. The writ petition was filed on 18th/19th March, 2018 and was moved on 20th March, 2018

when the Court called upon the Advocate for the appellants to produce the record on the next day i.e. 21st March, 2018. The impugned order came to be passed on 21st March, 2018, notwithstanding the judicial order of remand operating till 23rd March, 2018. The High Court, in our opinion, should not have taken umbrage to the submission made on behalf of the Deputy Commissioner of Police that the respondent's husband could be released if so directed by the Court. As aforesaid, the DCP has had no other option but to make such a submission. For, he could not have voluntarily released the accused who was in police custody pursuant to a judicial order in force. The High Court ought not to have made scathing observations even against the Investigating Officer without giving him opportunity to offer his explanation on affidavit.

(11.) Suffice it to observe that since no writ of habeas corpus could be issued in the fact situation of the present case, the High Court should have been loath to enter upon the merits of the arrest in absence of any challenge to the judicial order passed by the Magistrate granting police custody till 23rd March, 2018 and more particularly for reasons mentioned in that order of the Magistrate. In a somewhat similar situation, this Court in State represented by Inspector of Police and Ors. Vs. N.M.T. Joy Immaculate, 2004 5 SCC 729 deprecated passing of disparaging and strong remarks by the High Court against the Investigating Officer and about the investigation done by them. Accordingly, we have no hesitation in

expunging the observations made in paragraphs 4 to 6 of the impugned judgment against the concerned police officials in the facts of the present case.”

9. At this stage, it is apposite to refer to Sections 218, 219 and 221 of the Indian Penal Code which read thus :-

“SECTION 218 : Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture :-

Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

SECTION 219 : Public servant in judicial proceeding corruptly making report, etc., contrary to law :-

Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding,

any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

SECTION 221 : Intentional omission to apprehend on the part of public servant bound to apprehend :-

Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say: with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death; or with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with

[imprisonment for life] or imprisonment for a term -which may extend to ten years; or with imprisonment of either description for a term which may extend to two years, with

or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.”

10. In view of this Court, the impugned order dated 27.11.2018 passed by the Court below directing the DSP, East Kutchh to register offence against the writ-applicant under the aforesaid provisions within a period of 20 days is wholly unjustified. The Court below could not have passed the impugned order without issuance of notice to the writ-applicant herein and without giving an opportunity to the writ-applicant herein to explain the factual position.

11. The Court below has proceeded to direct the DSP, East Kutchh to lodge complaint against the writ-applicant under Sections 218, 219 and 212 of the Indian Penal Code, as referred above. The aforesaid sections invoked by the Court below against the writ-applicant would result in imprisonment for a period of 03 years or fine or both under Section 218 of the Code, imprisonment that would extend upto 07 years or fine or both for the offence committed under Section 219 of the Code and imprisonment for term which would extend upto 10 years under Section 221 of the Code. The aforesaid sections have been invoked without initiation of any inquiry or any material on record and in absence of any evidence and the

same amounts to prejudice to the writ-applicant causing irreparable injury to the writ-applicant and the same would also amount to adversely affect and prejudice the career of the writ-applicant.

12. In view of the aforesaid, it is directed to expunge the para 6 and direction No.2 in the operative part of the order of the order dt. 27.11.2018 passed in Criminal Misc. Application No. 961 of 2018 passed by Ld. Addl. Sessions Judge, Bhuj-Kutchh.

13. The present application stands allowed accordingly. Rule is made absolute to the aforesaid extent.

K.K. SAIYED

(VAIBHAVI D. NANAVATI,J)

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT

WEB COPY