

State of Gujarat Vs. Butasing Indrasing

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Court : Gujarat

Decided On : Jun-16-1989

Reported in : (1990)1GLR26

Judge : K.J. Vaidya, J.

Appellant : State of Gujarat

Respondent : Butasing Indrasing

Judgement :

K.J. Vaidya, J.

1. In a criminal case under this acquittal appeal, the trial Court rejected an application made by the prosecution for issuing an arrest-warrant for an arrest of a material witness which it wanted to examine, and hence this Court is called upon to decide, 'what are the powers and duties of the trial Court in matter of examining a recalcitrant witness'?

2. To start with the above acquittal appeal arises out of the judgment and order dt. 17th October, 1980, in Summary Case No. 1249 of 1980 rendered by the learned Metropolitan Magistrate, Ahmedabad. Court No. 9 (for short hereinafter referred to as 'the trial Court') wherein accused Butasing Indrasing who came to be tried for the offence punishable under Section 66(1)(b) of the Bombay Prohibition Act. 1949 and came to be acquitted.

3. It was the prosecution case that on 19th August, 1979 PSI Shri J.G. Bihola was serving as Police Sub-Inspector in Special Prohibition Squad Eastern Division, Ahmedabad. On getting trip that a person named Butasing was coming in a train 'Gujarat Queen' with illicit foreign liquor and was to get down at Maninagar Railway Station, he alongwith other Police Personnels and Panchas rushed to the Maninagar Railway Station and was lying in wait for arrival of 'Gujarat Queen' which came at 10-00 hours. On the accused coming out of the station he was stopped and questioned in the presence of the panchas and was asked to open the bag which he was carrying on the head and which he opened with the key taken out from his pocket. It was found that he was carrying 126 bottles of the prohibited liquor. The accused had not any pass or permit and could not give any explanation as regards the possession of the said muddamal. Thereafter, in the presence of the panchas the said bottles were attached and sealed. On the basis of these facts a complaint came to be filed and after the investigation was over the accused came to be charge-sheeted on 22nd August 1979 before the trial Court.

4. At the trial, the accused pleaded not guilty and claimed to be tried. An attempt had been made in cross-examination of PSI Bihola suggesting that the accused was falsely implicated at the instance of one Mr. Gill who was an Inspector in the SRP and against whom the accused had filed some complaint.

5. The prosecution in order to prove its case has examined two witnesses, namely, (1) P.W. 1 Ramkhilavan Bhagwandas Mourya, Ex. 1 and (ii) P.W. 2 P.S.I.J.G. Bihola, Ex. 9.

6. The trial Court after duly appreciating the evidence by a judgment and order dt. 15th October, 1980 was pleased to acquit the accused and hence the present appeal.

7. Mr. S.P. Dave, the learned Additional Public Prosecutor has raised the following two contentions:

(1) That it was patently illegal, erroneous and unjust for the trial Court to reject application dt. 14th October, 1988 (Exh. 8) made by the prosecution praying therein to issue arrest warrant against Panch Natwarlal who was though earlier

duly served with witness summons and then with warrant was not availing himself for examination before the Court. Adds, the learned Additional Public Prosecutor that panch Natwarlal was a material witness and since the first panch had turned hostile it was absolutely necessary to examine him in the interest of justice;

(2) That the trial Court has materially erred in not placing implicit reliance upon the evidence of PS1 Shri Bihola. who seized 126 bottles of liquor from the possession of the accused. This much number of liquor bottles can never be planted and, therefore, even in absence of the corroboration flowing from the independent source the trial Court ought to have accepted and relied upon the evidence of PSI Shri Bihola, and should have accordingly convicted and sentenced the accused for the offences with which he was charged.

8. (1) As against that Mr. Jayant Panchal, the learned Counsel appearing for the accused submitted that the trial Court has given very cogent and convincing reasons while passing the impugned order of acquittal. (2) In support of the contention, he has relied upon a ratio laid down in the case of Solanki Chimmmbhai Ukabhai v. State of Gujarat reported in : 1983 CriLJ822 (3) Mr. Panchal further submitted that when the only panch examined has turned hostile and the evidence of PSI Bihola has not been found favour with because of certain infirmities, this is a case of a reasonable benefit of doubt.

9. Now, in order to appreciate the aforesaid rival contentions, let us first advert to the evidence on the record of the case.

10. Mr. Dave, the learned Addl. Public Prosecutor has first of all taken this Court through the evidence of Panch Ramkhilavan Bhagavandas Mourya, P.W. No. 1, Exh. 8. Now, this panch witness has not supported the prosecution case. According to his panch on 19th August 1979, when he was passing on the road was called by the Police to act as a panch. He did not see any other panch at that point of time. He also did not see there the accused who was present in the Court. At that time, one locked bag was lying in a police-chowky and that he was told by police that it contained prohibited liquor. The panchnama Exh. 3 was prepared which was shown to him and signed by him. This witness has given complete go-bye to the prosecution case and hence it is not helpful to the prosecution. The trial

Court was right in discarding this part of the evidence.

11. It was then contended by the learned Addl. Public Prosecutor that it was patently illegal, and erroneous for the trial Court to reject the application dt. 14-10-1980 at Exh. 8 for examining the second panch as a witness. This submission of the learned Addl. Public Prosecutor does require a little careful and detail consideration for it not only goes to the root of the right of the prosecution to examine the witness on one hand, but also requires to be seen as to have the Court has to exercise its judicial power/discretion and discharge duty under such circumstances. After the first panch was declared hostile on 14th October, 1980 to salvage the situation the learned Public Prosecutor submitted an application Exh. 8 to the trial Court praying for issuance of the arrest warrant on second panch Natwarlal on the ground that though he was earlier duly served with witness summons and then with warrant, yet he was not presenting himself before the trial Court for being examined by the prosecution. This application was rejected by the trial Court in substance holding that 'the prosecution side was given sufficient opportunity to produce and examine witnesses, but only one witness, namely, panch Ramkhilavan Bhagawandas Mourya came to be examined. This witness was declared hostile. So far as Natwarlal was concerned in the beginning the witness summons was issued and since he did not oblige to respond to the same, the Court was constrained to issue a bailable warrant which though served the witness has chosen not to remain present. Under the circumstances, the trial Court took the view that the prosecution was unable to secure presence of the second panch witness in order to support the prosecution case and further since more than sufficient opportunity was already given to the prosecution side and yet it has failed to examine the witness and, therefore, application deserves to be dismissed.' Now, this attitude of the trial Court is too difficult to understand to be approved. It is quite understandable that the prosecuting agency sometime for the reasons known to it is so indifferent inefficient and non-cooperative in the conduct of the trial proceedings that the same may tend to annoy, tire or frustrate for that purpose anybody. Sometime despite the sincere, best and honest efforts by prosecuting agency the prosecution witnesses for whatever reason keep avoiding the Court. Such things though undesirable do happen, but that does not mean that such situation can even be permitted to control and eclips the power and sense of

duty of the trial Court while discharging its duties. As a matter of fact, under such challenging circumstances, in proper cases the judicial conscience has all the more got to assert its will to do justice by insisting upon an unwilling witness to be brought before the Court to stand in the dock. Sometimes such witnesses may or may not help the prosecution or the accused. But then none can be lightly permitted to go with an impression that the law and the administration of justice can be toyed with as one likes. Not for a moment, it is suggested that the power should enter the head of Court, rather this Court believes that such power has got to be exercised with sound judicial discretion, sense of restraint and dignity and care, caution and circumspection. As a matter of fact, the entire core of endeavour of this Court is to focus an attention on the powers and duties of Court in order to make Courts aware and realize that they (Court of law) are not that helpless-left high and cry as to unable to meet with situation like the one in instant case. The overall reasons which constrains this Court to emphasise upon the power and duty of the Court is that the Courts of law are entrusted with a high and holy responsibility of doing justice and for this purpose examination of a witness is necessary. This concept of justice is inseparable from 'Rule of law' and hence it is the duty of every Court to zealously guard the said cherished system of 'Rule of law'. The ultimate success of 'Rule of law' and the goal of justice along with others mainly depends upon the following three viz. (i) the honest independent fearless and efficient judiciary, (ii) the honest, efficient and effective, (iii) the law abiding citizens. Now, the law could be abided, provided, a citizen has got a love and respect for it, or a sanction of fear, behind it (for not obeying the law), that is to say, a citizen must have a love and respect for the constitution of the country, the ordinary law of the land, the rights of fellow citizen and overall sense of duty towards the country. Now, if the citizen is virtuous enough to have love and respect for the law, nothing requires to be done. But if that love is missing then the law has got to be made respected through fear of some punishment, that is to say, by a sanction of fear. Its indeed here, that the power and duty of the Court should display its role in forefront. We know that law regulates human behaviour in the society through the instrumentality of the Court. Now, if the Court instead of playing its just role, remains just passive then it can, neither serve the cause of justice nor rule of law as for it has been rightly said that judicial detachment is a

virtue and not judicial passivity.

12. Of course, primarily, it is the paramount duty of the prosecution to take utmost care to see that the proper and sufficient evidence is led before the Court on the basis of which the trial Court can reach just decision in the matter. But that does not mean that if the prosecution fumbles or fails to perform its part of the duty for whatsoever reason then the trial Court should also react by feeling shy and reluctant withdrawing from performing its part of the duty. The Court has got to do justice as it is meant for doing justice and not to rest contented merely by placing blame either at the door of the prosecution or that of the accused. The Presiding Judge is not as if witnessing the Court proceeding from ivory tower. 'Justice' is a joint venture where all, the prosecution, the defence, the witnesses before the Court, and the Court itself has to vigorously involve and activate themselves interest to cooperate compliment and supplant each other's efforts in making it good. Both - the Courts of law and the executive are but the limbs of the state along with the legislature. If one of the limbs gets suffers from some ailment and is affected and thereby does not function properly, that does not mean that other limb also should refuse to function. Rather when one of the limbs does not function properly, because of ailment, then other limb has got to exert itself and accept added responsibility and function with the added zeal. While doing criminal justice, the Court cannot stop just rest contented by merely finding fault with the prosecution agency. The role of Presiding Judge is something more than merely to be an umpire or a referee in games played. So far as the Court proceedings are concerned, the Court has got to be alert, active and positive to participate and cannot just afford to be a lone by-stander on platform watching the game declaring the points or runs as the impression given in this case while assigning reasons for rejecting application Exh. 14.

13. The aforesaid observation of this Court regarding the necessity and advisability of the positive participation of Courts in trial proceeding finds due support from the legislative wisdom as reflected in (i) Section 311 of the Code of Criminal Procedure, 1973 which pertains to power to summon material witnesses or to examine person present, (ii) Section 350 of Criminal Procedure Code which pertains to summary procedure for punishment for non-attendance by a witness in-

obedience to summons to attend the Court, and (iii) Section 174 of the Indian Penal Code pertains to non-attendance inobedience to an order from public servant. The obvious object of Section 311 is to enable the Court to summon and examine any person at any stage in order to arrive at the just decision of the case. Similarly Section 350 of the Code of Criminal Procedure enables the Criminal Court to summarily try and punish the witnesses for disobeying its summons. And the illustration (b) of Section 174 of the Indian Penal Code indicates how the offence under the Section is committed by witness disobeying summons to appear before the Court.

14. Further, the recalcitrant witnesses are always problematic to Courts of law. They create four sort of problems in the course of dispensing with justice, namely, (i) when witnesses refuse to oblige the witness summons to remain present in the Court, the trial gets unduly protracted and consequently the accused who is in jail as an under trial prisoner has to languish further for no fault of his, further (ii) such disobeying witnesses indirectly tend to make inroads and obstructs the smooth proceedings before the Court, (iii) on the one hand because of delaying tactics of the disobeying witnesses cases get older and older and as a result of this sometimes, even a genuine request by the prosecution to examine such witnesses in the interest of justice, out of sheer exasperation the same is rejected, (iv) under such circumstances, the blame which in the first instance ought to be at the door of a witness for disobeying Court's witnesses summons, and in second instance at the door of the Court (which sometimes in hot haste for disposals rejects requests of the prosecution to examine witness) is cleverly shifted of at the door of the prosecution indicating it of not discharging the burden of proving case beyond the reasonable doubt. This may be quite easy, cheap but it is equally distasteful also for it smacks of patent injustice at the hand of the Court from which nothing but justice is expected.

15. Thus, result of the aforesaid analysis is that whenever any application for witness summons is made for examining any witnesses and or any other recalcitrant witness, then the Court must give its careful and anxious consideration to it and ponder over the seriousness of the offence as to whether the witness to be examined is a material witness; what will be the impact on result of the case,

and what will be the consequences of acquittal on the society as a result of non-examination of the said witness. If this case is not taken care of by the Court, then it has no right whatsoever to subsequently blame the prosecution for its own wrong. All this has to be pointed out to the trial Courts in order to indicate to them as to where lies the salt of wisdom and where lies the salt of conscience while conducting criminal trials.

16. The result of the aforesaid discussion is that, the ground assigned on which the trial Court rejected the application Ex. 3 for arrest warrant is unwarranted, illegal and unjust. But unfortunately for the prosecution this does not any more improve its perdicament. The main difficulty in way of the prosecution is the doubtful evidence of PSI Shri Bihola. Now even if the matter is remanded to the trial Court for examining recalcitrant witness Natwarlal (obviously a selected witness) yet this Court has a reason to feel that even if the witness to be examined supports the prosecution case, he cannot lead any added strength to the prosecution case which suffers from the patent and grass root infirmity namely its genersis itself has become doubtful. Thus on over all consideration and perusalt of the record, this Court feels that remanding the matter will be an exercise in futility.

17. Now let us advert to another point raised by the learned Additional P.P. who in order to make it good, has taken this Court through the evidence of next prosecution witness-PSI Shri J.G. Bihola P.W. 2 whose evidence in substance is already reproduced above in para 3 of the judgment. The learned Advocate appearing for the accused in cross-examination had confronted PSI Bihola with a question whether service of panch Natwarlal was earlier taken by police as a panch in some other case to which he very cleverly directly avoiding to reply said that he did not remember. But when the learned Advocate further persisted in his cross-examination on the point by a point-blank question cornering and confronting him with a copy of the charge-sheet in C.R. 79 of 1978 (Exh. 10) showing that the police had earlier taken the service of said Natwarlal as a panch in fact, the memory of the PSI conveniently revived and returned and he had to admit that such service of said panch Natwarlal was obtained earlier. In his further cross-examination, it was also elicited that the accused who was alleged to have been carrying bag containing 126 bottles was not having on his head any cloth-

ring or a piece of cloth which is usually kept on the head for a grip and balancing in order that bag does not fall before placing such heavy bag over the head. It was also elicited in the cross-examination that he did not attach the lock and the key of the said bag. The aforesaid three circumstances are sufficient to put this Court on the guard before accepting and relying upon the evidence of PSI Shri Bihola. Still further, the muddamal 126 bottles were neither produced nor identified before the Court by PSI Shn Bihola while deposing before the Court. Thus the aforesaid story itself sounds improbable, more particularly because the accused, who was also SRP Constable SRP Group No. 9 at Baroda ordinarily would engage a porter to carry a bag with such heavy weight and not only that but would also take sufficient care to see to be at safer distance from Muddamal till it is disposed of. Thus, the evidence of PSI Bihola as it stands, does not inspire any confidence. There must be a satisfactory and reliable evidence to connect the accused with the crime before the Court can be asked to convict and sentence accused for the alleged offence. While looking to the evidence of PSI Bihola, it simply reads like a news item in a news paper describing the alleged incident involving the accused in a prohibition case possessing 126 bottles of illicit liquor for which the accused had neither any pass, nor permit, nor explanation. The evidence before the Court of law requires much more than above. It requires production and identification of muddamal bottles as one found to be in the conscious and intelligent possession of the accused. Where are these heart beats in prosecution case? That to give evidence before the Court of law is not a joke. Seriousness of giving in a criminal case must be seriously understood and observed as it is likely that innocent may get imprisoned and guilty go scot-free. Now, how the accused can under above circumstances, ever be connected with the alleged crime? Mr. Dave learned Addl. P.P. had no reply to this factual position and could not show or explain anything further contrary to the above findings.

18. Therefore, let it be made clear that evidence of PSI Bihola is not accepted and relied upon merely because he is police officer but because quality of his evidence on the record is such which would tend and prod any body to give if not clean bill to accused, then at least the benefit of reasonable doubt. Under the circumstances, it cannot be said that view taken by the trial Court is in any way illegal or perverse calling for interference.

19. Further still, this Court cannot be oblivious to the fact that it is sitting in an appeal against the order of acquittal and that it is bound by the ratio laid down in the case of Solanki Chimanbhai Ukabhai v. State of Gujarat as reported in : 1983 CriLJ822 which reads as under:

The appellate Court while dealing with an appeal against the order of acquittal has full power to review at large the evidence on which the order of acquittal is founded and to reach a conclusion that upon such evidence, the order of acquittal should be reversed. However, in exercising that power the appellate Court should give proper weight and consideration to the following matters; (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate Court disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses, which finding would not certainly be disturbed if two reasonable conclusion can be reached on the basis of the evidence on record.

20. In view of the aforesaid discussion, it is not possible to persuade this Court that the order of acquittal passed by the trial Court is so perverse and unreasonable that it warrants interference. Hence in the result, the order of acquittal passed by the trial Court is confirmed and appeal filed by the state is dismissed.