

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION NO. 3141 of 2016**

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VANRAJSINH @ BABBHA JATUBHA JADEJA

Versus

STATE OF GUJARAT

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Appearance:

MR K S CHANDRANI for the PETITIONER(s) No. 1,10,11,2,3,4,5,6,7,8,9

MR RONAK RAVAL, ADDL.PUBLIC PROSECUTOR for RESPONDENT No.1

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI**Date : 17/06/2016****ORAL ORDER**

1. By way of present petition preferred under Articles 226 and 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, the petitioner seeks to challenge the framing of charges by the learned Sessions Judge in Sessions Case No.79 of 2013.

2. The principal contention raised in this petition is to the effect that without opening the case under section 226 of the Code of Criminal Procedure, the charges ought not to have been framed by the concerned Court. It is emphasized that it would mainly hamper the defence of the

petitioner-accused. The purpose as to why section 226 of the Code is on a statute book is for the accused to know the details of the evidence which have been proposed for proving his guilt. He has, therefore, urged that the charges framed without compliance of statutory provisions needs to be quashed.

2.1 It is the say of the learned counsel for the petitioners that the petitioner-accused were not represented by their lawyer and the charges came to be framed.

2.2 In support of his submissions, he has relied upon the following three authorities :

(i) ***Devilal v. State of Rajasthan***¹.

(ii) ***State of Bihar v. Ramesh Singh***².

(iii) ***Avchal Shankar Koli v. State of Gujarat***³.

3. Shri Ronak Raval, learned Additional Public Prosecutor, has severely disputed this fact.

1 (1971) 3 SCC 471

2 (1977) 4 SCC 39

3 *Unreported decision of this Court (Coram : Sharad D. Dave, J.) rendered on May 09, 2003, while dealing with Criminal Revision Application No.197 of 2003.*

According to him, the matter is of the year 2013. The charges were framed with much difficulties on March 15, 2016. As could be noticed from some of the papers, there was an ample opportunity with the petitioners to raise all the contentions before the Court concerned. It is not the stage where there is any need for the presence of any lawyer as cognizance is taken by the Court while framing the charges and it is, therefore, expedient to dismiss the present petition.

4. Having heard both the sides, at the outset, two issues raised in the present petition deserve consideration, essentially on the aspect of liability. Firstly, whether non-opening of the case by the prosecution prior to framing of the charges and non-representation of the accused through the lawyer at the time of such framing of charges would necessitate quashing of the charges.

5. Chapter XVIII of the Code of Criminal Procedure, is under the title "*Trial*". Section 225 of the

Code prescribes for trial by a public prosecutor, where it enumerates that every trial before the Court of Sessions, the prosecution shall be conducted by the Public Prosecutor. Section 226 of the Code speaks of opening of the case of the prosecution, which states as under :

"226. Opening case for prosecution : When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."

6. Once the committal of the case is done under section 209 of the Code to the Court of Sessions, when the offence is triable exclusively by it, after compliance of the provisions of sections 207 and 208 of the Code, the committal Court requires to send record of the case, documents and articles, if any produced in evidence. Once that stage is over and when the accused appears or is brought before the Sessions Court in pursuance of such

committal, the Public Prosecutor is required to open the case by prescribing the charge brought against the accused and he needs to state by what evidence he proposes to prove the guilt of the accused. This, in fact, is a stage which makes it clear to the Court and to the defence the case of the prosecution and it also narrates the evidence in a nutshell for them to know, through which he proposes to prove the guilt.

7. Section 227 of the Code makes a provision for discharge if upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in this behalf, the Presiding Officer is of the opinion that there is no sufficient ground for proceeding against the accused, is required to be discharged by recording reasons and section 228 of the Code speaks of framing of the charges after consideration and hearing. When the Court is of the opinion that there is a ground of presuming that the accused has committed an offence, the Court shall frame the charges in writing. At the

time of framing of the charges, the Court needs to look at the material produced before it and consider as to whether there is a ground that exists for presuming that the person has committed an offence. Once that opinion is formed, the framing of charges is contemplated under section 228 of the Code. Once the charges are framed, they are to be read and explained to the accused and he shall be asked as to whether he pleads guilty to the charges or claims to be tried. For both the provisions of sections 227 and 228 of the Code to be effectively dealt with, the statute has provided the provision of section 226 of the Code, requiring the prosecution to open its case by describing the charge brought against the accused and also stating the evidence that would be substantiating such charge and proving his guilt.

8. It is noticed that over the period of time, this practice of opening the case for prosecution by the learned Public Prosecutor is not being followed. Ordinarily, after committal, the

application for discharge is being moved by the accused and the Court after considering such application either discharges the accused or chooses to frame the charges on considering that the ground exists for such framing of the charge. It is always desirable essentially because it is provided under the statute to spell out a case of the prosecution and the evidence with which the prosecution proposes to prove such charges against the accused. Not only it gives clarity to the prosecution itself, more particularly when there is a plethora of evidence and when there are more than one accused facing trial, but it also gives a lot of clarity to the Court which is required to consider the record of the case and the documents submitted at the time of hearing the submissions of the accused and the prosecution at the stage of discharge and even at the time of framing of the charges before the Court presumes that the accused has committed an offence which would require framing of the charges. The Court needs to consider the

material on record as the responsibility of framing of the charges is that of the Court, whereas it is expected to consider such questions judicially. However, to say that once such opening of the case for prosecution is not adhered to, the same would give rise to quashment of all the subsequent questions, including framing of the charge by the Court, is not the proposition which could be accepted. The stage is not so sacrosanct as would lead to causing of serious prejudice to the accused in meeting with his case during the course of the trial.

9. This Court (*Coram : Sharad D. Dave, J.*) in the case of **Avchal Shankar Koli** (*supra*) referred to the decision in the case of **Devilal** (*supra*), to hold that it is undoubtedly the duty of the prosecution to lay before the Court all the material evidence available to it as it is necessary for unfolding its case. This was in reference to the accused giving an application before the concerned Fast Track Court to mandate the opening of the case of the prosecution under

section 226 of the Code, which was rejected by the Court. In this background, this Court had allowed the Revision Application by holding that the lower Court must follow the decision of the Apex Court in the case of **Devilal (supra)**. The Court held that it is not necessary for the prosecution to give full details regarding the evidence, including the documents by which it intends to prove its case, but he would be expected to give brief summary of the evidence and the particulars of the witnesses by which he proposes to make a case against the accused.

10. In the decision of the Apex Court in the case of **Devilal (supra)**, the Apex Court was dealing with an appeal from judgment and order of conviction under section 302 read with section 34 of the Indian Penal Code, wherein the appellant was sentenced to undergo rigorous imprisonment for life. After a detailed discussion, the Court upheld the say of the appellant that the accused did not know as to what the case of the prosecution was. In criminal trials, it is of prime importance for

the accused to know as to what actually the case of the prosecution is. If the pivot of the prosecution case is not accepted, a new prosecution case cannot be made to imperil defence. In the case before the Apex Court, two of the accused were held both by the trial Court and by the High Court not to have been anywhere near the scene of occurrence and, therefore, the Court held that the whole case would fall like the pack of the cards.

11. In the opinion of this Court, this judgment in the case of **Devilal (supra)** does not speak anywhere of section 226 of the Code. It is also premature for the accused to say that there is a change of the case from the original case of the prosecution. It is too premature to say any of those things at this stage. Corollary to this is the question as to whether at the stage of framing of the charges, the presence of defence lawyer is a must. It is often noticed that on one ground of delay in framing the charges, the accused chooses not to engage the lawyer and under the pretext of engaging lawyer takes a

very long time. It is for the accused to choose either to engage a lawyer at the stage of giving the application for discharge or to do so at the time of taking cognizance whether presence of lawyer is necessary. Once this stage is over, taking of cognizance since is exclusively within the domain of the Court, absence of a representation of the lawyer at the stage of framing of the charges, despite the availability of the opportunity may not be held fatal to the cause of the prosecution. The Court at the stage of framing of the charges has to ascertain *prima facie* case on the basis of the evidence led by the prosecution even if there may be reasonable defence available to the accused.

12. As held by the Apex Court in the case of **Ramesh Singh (supra)**, at the beginning and the initial stage of the trial, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The Apex Court in the said case has also stated with regard to section 226 of the Code to the effect that while opening the case for the

prosecution, the prosecutor has to describe the charge against the accused and produce all the evidence that he thinks which would prove the guilt of the accused. Thereafter, at the initial stage, it is the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused. Thereafter, the Court has to pass an order either under section 227 or section 228 of the Code. If the Court considers that there is no sufficient ground for proceeding against the accused, he shall discharge him and record his reasons for so doing. On the other hand, if the Court is of the opinion that the accused has committed the offence, which is exclusively triable by his Court, he shall frame the charges in writing as provided under section 228 of the Code.

It would be apt to reproduce the relevant observations of this Court in the case of **Ramesh Singh (supra)**, which read as under :

"4. Under [section 226](#) of the Code while opening the case for the prosecution the

Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. 'The Judge has to pass thereafter an order either under [section 227](#) or [section 228](#) of the Code. If "the Judge consider that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by [section 227](#). If, on the other hand, "the Judge is of opinion that there, is ground for presuming. that the accused has committed an offence which-

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused'-', as provided in [section 228](#). Reading the two provisions together in juxta position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable

defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under [section 227](#) or [section 228](#) of the Code. At that stage the Court is not to 'see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the 260 initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the, initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to

be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the, trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But, if, on the other hand, it is so at the initial stage of making an order under [section 227](#) or [section 228](#), then in such a situation ordinarily and generally the order which will have to be made will be one under [section 228](#) and not under [section 227](#)."

13. In view of aforesaid findings of the Apex Court, it transpires that none of these

decisions contemplates that non-opening of the prosecution case would render framing of the charges contrary to the law or in breach of the right of the defence. It is although expected of the Sessions Court to follow this stage as discussed hereinabove, its exclusion may not be fatal to the cognizance taken at the stage of framing of the charges. In view of the same, this Court is not inclined to interfere with the findings of the trial Court.

14. For the foregoing reasons, the present petition fails and is, accordingly, dismissed *in limine*.

(MS SONIA GOKANI, J)

Aakar