Babubhai Bhimabhai Bokhiria & Another

v.

State Of Gujarat & Others

(Supreme Court Of India)

HON'BLE MR. JUSTICE T.S. THAKUR HON'BLE MR. JUSTICE FAKKIR MOHAMED IBRAHIM KALIFULLA

Criminal Misc. Petition No. 20502 Of 2008 & Criminal Misc. Petition No. 24292 Of 2011 In Petition(S) For Special Leave To Appeal (Crl) No(S).9184 Of 2008 | 30-01-2013

T.S. THAKUR, J.

1. This special leave petition arises out of an order dated 11th December, 2008 passed by the High Court of Gujarat at Ahmedabad whereby Special Criminal Application No.638 of 2008 filed by the petitioner- Babubhai Bhimabhai Bokhiria has been dismissed and order dated 29th March, 2008 passed by the Additional Sessions Judge, Porbandar affirmed. The Additional Sessions Judge, Porbandar had by the said order summoned the petitioner as an accused person in exercise of his power under Section 319 of the Cr.P.C. in Sessions Case No.5 of 2007 for offences punishable under Sections 302, 201 read with Sections 34, 120-B, 465, 468 and 471 of the Indian Penal Code, Section 25 of the Arms Act and Section 135 of the Bombay Police Act.

2. The incident that provides the genesis of the case aforementioned took place on 16th November, 2005 in which one Mulubhai Modhwadiya was gunned down resulting in registration of Criminal Case No.I 170 of 2005 at Kamlabaug Police Station, Porbandar for the offences mentioned earlier. Upon completion of the investigation, the jurisdictional police filed a charge sheet on 15th February, 2006 before a Magistrate who committed the same to the Sessions Court to be registered as Case No.5 of 2007.

3. The police charge-sheet cited a large number of witnesses out of whom as many as 134 have been examined by the prosecution. It was, at this stage, that an application was filed by the son of the deceased on 17th March, 2008 in

which the applicant prayed for adding the petitioner- Babubhai Bhimabhai Bokhiria as an accused in exercise of the Courts power under Section 319 of the Cr.P.C. The Sessions Judge allowed the said application and added the said Shri Babubhai Bhimabhai Bokhiria as a co- accused in the case vide order dated 29th March, 2008. Aggrieved by his addition as an accused the petitioner preferred Special Criminal Application No.638 of 2008 before the High Court of Gujarat which, as noticed earlier, has been dismissed by the High Court in terms of the order impugned in this special leave petition.

4. When the special leave petition came up before a Bench comprising of P. Sathasivam and H.L. Dattu, JJ., this Court referred the matter to a larger Bench in view of a similar reference made in Hardeep Singh v. State of Punjab (AIR 2009 SC 483). The Court at the same time granted permission to the accused persons to move an application for bail before the competent Court. The matter then came up before a Bench of three Judges who formulated five different questions and referred the same to a Constitution Bench, for an authoritative pronouncement.

5. Criminal Miscellaneous Petition No.24292 of 2011 was at that stage filed by the applicant-Veja Prabhat Bhutiya in which he prayed for his addition as a party to the present proceedings and for vacation of order dated 17th December, 2008 by which further steps in the case were stayed. In the alternative the applicant prayed for grant of bail to him. By an order dated 8th December, 2011 a three-Judge Bench of this Court allowed the prayer for impleadment but directed that the prayer for grant of bail be considered by the regular Bench. That is precisely how Criminal Miscellaneous No.24292 of 2011 seeking vacation of the stay order and/or grant of bail and Criminal Miscellaneous No.20502 of 2008 filed by the petitioner in the special leave petition has come up before us for hearing.

6. Appearing for the applicant Mr. U.U. Lalit, learned Senior Counsel, strenuously argued that the applicant has been in custody for over six years. Even so there are no prospects of the Constitution Bench taking up the reference in the near future which implies that unless this Court either vacates the said order passed on 17th December, 2008 or grants bail to the applicant, there is no chance of the applicant or other persons who are similarly languishing in jail for years seeing the end of their trial and resultant agony. It was also urged that

although the special leave petition has been filed on behalf of the petitioner in the main petition only and although the prayer for stay made in Criminal Miscellaneous No.20502 of 2008, he had simply asked for stay of the judgment and final order passed by the High Court. The order passed by this Court on 17th December, 2008 was, however, understood as though the trial itself was stayed in toto. This was, according to Mr. Lalit, not only depriving the applicant of his fundamental right of a speedy trial but also depriving him of his personal liberty with hardly any chances of an early conclusion of the trial in the near future. He submitted that even if the order passed by the trial Court and affirmed by the High Court was eventually upheld and the addition of the petitioner in the special leave petition was declared to be justified, the said petitioner could be tried separately as there was no legal bar to such a trial. Reliance in support was placed by learned Counsel upon the decisions of this Court in Shashikant Singh v. Tarkeshwar Singh and Anr. (2002) 5 SCC 738, Michael Machado and Anr. v. Central Bureau of Investigation & Anr. (2000) 3 SCC 262 and Rajendra Singh v. State of U.P. & Anr. (2007) 7 SCC 378

7. On behalf of the respondents, Mr. A.M. Singhvi, Senior Advocate, argued that the vacation or modification of the stay granted by this Court would have the effect of splitting the trial of those who have been accused in the charge-sheet and the petitioner Babubhai Bhimabhai Bokhiria the newly added accused which was legally impermissible. Mr. Singhvi made a strenuous effort to distinguish the decisions relied upon by Mr. Lalit and argued that they were different fact situations and could not be said to be laying down a binding principle of law that splitting of the trial, was permissible. Reliance was, in that regard, placed by learned counsel to the expression "could be tried together" appearing in Section 319 of the Cr.P.C. It was also submitted by Mr. Singhvi that the applicant could have approached the trial Court for grant of bail, if so advised, and that the present application seeking enlargement on bail pending disposal of the reference before the Constitution Bench was incompetent.

8. Learned Counsel for the petitioner in the special leave petition argued that the petitioners had not asked for stay of the trial. All that his application prayed for was a stay of the operation of the impugned judgment of the High Court which implied that the addition of the applicant as an accused could remain stayed pending disposal of the special leave petition by this Court.

9. In CRLMP No.20502 of 2008 filed by the petitioners, the petitioners had made the following prayer :

"1. That this Hon'ble Court be pleased to stay the impugned ?judgment and final order dated 11.12.2008 passed by the High ?Court of Gujarat at Ahmedabad in Special Criminal Application ?No.638 of 2008 during the pendency of the Special Leave ?petition; and

2. Pass any other order (s) and or directions as this Hon'ble ?Court may deem fit and proper."

10. This Court had upon consideration of the said prayer passed the following order on 17th December, 2008:

"List on 5.1.2009.

Further steps in the case are stayed till then."

11. It is evident from the above that while the prayer was simply for stay of the operation of the High Court's order, the direction issued by this Court stayed further steps in this case. "Further steps" would mean not only stay of the addition of the petitioner Babubhai Bhimabhai Bokhiria but also stay of any further action in relation to the trial which had by that time concluded before the trial Court. Be that as it may, learned counsel for the petitioner had no objection to the order passed by this Court being modified so as to confine its operation to the petitioner- Babubhai Bhimabhai Bokhiria only. So long as the petitioner was not tried, pursuant to the order passed against him, he had no objection to the trial Court proceeding to conclude the proceedings against the remaining accused persons. Such being the position, we see no reason why order dated 17th December, 2008, even assuming the same was intended to suspend further proceedings before the trial Court, should not be modified so as to limit the effect thereof to the addition of the petitioner only. We say so because if the petitioner as dominus litis has no objection to the continuance and conclusion of

the trial in his absence qua other accused persons and is not, therefore, asking for stay of the trial qua everybody; there is no justification for granting to him a relief larger than what is being prayed for by the petitioner.

12. Time now to deal with the contention urged by Mr. Singhvi, that the expression "could be tried together" appearing in Section 319 of the Cr.P.C. means that the newly added accused must be tried along with the accused already sent up for trial. The question is no longer res integra in the light of the judgment of this Court in Shashikant Singh v. Tarkeshwar Singh and Anr. (2002) 5 SCC 738, where this Court was examining a similar contention that failed to impress this Court and was rejected in the following words:

"9. The intention of the provision here is that where in the ?course of any enquiry into, or trial of, an offence, it appears ?to the court from the evidence that any person not being the ?accused has committed any offence, the court may proceed against ?him for the offence which he appears to have committed. At that ?stage, the court would consider that such a person could be ?tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such ?person is that, the proceedings right from the beginning have ?mandatorily to be commenced afresh and the witnesses reheard. In ?short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the ?rights of a person so brought before the court. It would not be ?sufficient to only tender the witnesses for the cross- examination of such a person. They have to be examined afresh.

Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held ?to be "must be". The provision cannot be interpreted to mean ?that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the ?court when order under Section 319(1) was passed, the order ?would become ineffective and inoperative, nullifying the opinion ?earlier formed by the court on the basis of the evidence before ?it that the newly added person appears to have committed the ?offence resulting in an order for his being brought before the court."

13. The Court distinguished the earlier decisions rendered in Municipal Corporation of Delhi v. Ram Kishan Rohtagi (1983) 1 SCC 1 and Michael Machado v. Central Bureau of Investigation (2000) 3 SCC 262 in the following words:

"13. Reliance by learned counsel for Respondent 1 has been ?placed on Municipal Corpn. of Delhi v. Ram Kishan Rohtagi in ?support of the contention that Respondent 1 could be tried only ?with Chandra Shekhar Singh and his trial having concluded, ?Respondent 1 cannot be now tried pursuant to order under Section ?319(1) of the Code. This Court in the cited decision was not ?concerned with the issue which has fallen for consideration ?before us. The same is the position in respect of Michael ?Machado v. Central Bureau of Investigation. There this Court ?considered the scope of the provision as to the circumstances ?under which the court may proceed to make an order under Section 319 and not the question as to the effect of the conclusion of the trial after passing an order under Section 319(1). None of these decisions have any relevance for determining the point in issue."

14. To the same effect is the decision of this Court in Rajendra Singh v. State of U.P. & Anr. (2007) 7 SCC 378, where too a similar question arose for consideration. Relying upon the decision of this Court in Shashikant Singh's case (supra) this Court held:

"11....The mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by learned Sessions Judge on 26.5.2005 infructuous".

15. In the light of the above two decisions rendered by co-ordinate Benches of this Court, we have no hesitation in holding that even if the addition of the petitioner Babubhai Bhimabhai Bokhiria is held to be justified by the Constitution Bench of this Court, the mere fact that the trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial Court.

16. There is another angle from which the matter can and must be examined. The prosecution has already examined as many as 134 witnesses at the trial. In terms of the ratio of the direction of this Court in Shashikant Singh's case (supra) with the addition of the petitioner as accused all those witnesses shall have to be recalled for a fresh examination. If that be so, the trial would go on for a few more years having regard to the number of witnesses that have to be examined. This would in turn mean that the right of the accused to a speedy trial, that they have laboured to complete within six years or so, will be in serious jeopardy on account of the entire process being resumed de novo. Such a result is manifestly unjust and unfair and would be perilously close to being in violation of the fundamental rights guaranteed to the accused persons who cannot be subjected to the tyranny of a legal process, that goes on endlessly for no fault of theirs. This Court has in several pronouncements emphasised the need for speedy trials in criminal cases and recognised the same as an integral part of the right to life itself. In Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 91, this Court held that an expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. In A.R. Antulay v. R.S. Nayak (1992) 1 SCC 225, this Court declared that speedy trial is not only the right of the accused but is also in public interest and that the right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial. In Sher Singh v. State of Punjab (1983) 2 SCC 344, this Court sounded the following note of caution against delay of criminal trials:

"16... The essence of the matter is that all procedure, no ?matter what the stage, must be fair, just and ?reasonable...Article 21 stands like a sentinel over human misery... It reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the ?sentence."

17. To the same effect are the decisions of this Court in Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra (1985) 1 SCC 275 and Triveni Ben v. State of Gujarat (1989) 1 SCC 678. Even in cases where the accused had been enlarged on bail the right to a speedy trial was held to be a part of the fundamental right under Article 21 of the Constitution. The decisions of this Court in Biswanath Prasad Singh v. State of Bihar 1994 Supp. (3) SCC 97 and Mahendra Lal Das v. State of Bihar and Ors. (2002) 1 SCC 149 may be referred to in this regard.

18. It is in the light of the settled legal position no longer possible to question the legitimacy of the right to speedy trial as a part of the right to life under Article 21 of the Constitution. The essence of Article 21 of the Constitution lies not only in ensuring that no citizen is deprived of his life or personal liberty except according to procedure established by law, but also that such procedure ensures both fairness and an expeditious conclusion of the trial. It is in that backdrop not possible to countenance a situation where addition of Babubhai Bhimabhai Bokhiria as an accused to the case at hand would lead to an indefinite suspension of trial and eventual recall of 134 witnesses already examined against the applicant who has been in jail for over six years now. There is, therefore, no reason for a blanket stay against the progress of the trial before the courts below qua other accused persons.

19. In the totality of the above circumstances, therefore, we are inclined to modify our order dated 17th December, 2008 by which further proceedings before the trial Court were brought to a halt. We make it clear that while the stay of the trial against Babubhai Bhimabhai Bokhiria the petitioner in SLP No.9184 of 2008 shall continue qua the said petitioner, the trial court shall be free to proceed with the trial qua the other accused persons. Criminal Miscellaneous Petition Nos.20502 of 2008 and 24292 of 2011 are allowed in part and to the above extent.