

**(2011) 07 GUJ CK 0029**

**Gujarat High Court**

**Case No:** Special Criminal Application No. 760 of 2011

State of Gujarat and Another

APPELLANT

Vs

Babubhai @ Babu Bajrangi and  
Another

RESPONDENT

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Date of Decision: July 4, 2011

Acts Referred:

- Bombay Police Act, 1951 - Section 135(1)
- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 173, 482
- Evidence Act, 1872 - Section 45, 73
- Penal Code, 1860 (IPC) - Section 109, 114, 120B, 143, 147

**Hon'ble Judges:** Mukesh R. Shah, J

**Bench:** Single Bench

**Advocate:** J.M. Panchal, Spl. Public Prosecutor s 1, K.G. Menon and Ajay Kumar Choksi, s 2, Vaibhav A. Vyas, s 2, for the Appellant; Pravin Gondaliya and SG Associates for Respondents 1-2, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

M.R. Shah, J.

1 RULE. Shri Gondaliya, learned advocate waives service of notice of Rule on behalf of the Respondents. In the facts and circumstances of the case and with the consent of learned advocates appearing for respective parties, petition is taken up for final hearing today.

2. By way of this petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"), Petitioners State of Gujarat and Special Investigation Team (hereinafter referred to as "SIT"), Godhara Riot Cases, Gandhinagar have prayed to quash and

set aside the impugned order dated 08.03.2011 passed below application Exh.793 in Sessions Case No. 203/2009 by the learned Additional Sessions Judge, Court No. 3, City Sessions Court, Ahmedabad, whereby the application preferred by the investigating agency inter-alia praying to hand over the muddamal parcel containing in DVD and CD produced at Exh.1488 in the case registered as C.R. No. I-67/2002 of Meghaninagar Police Station which is numbered as Sessions Case No. 152/2002 and other cognizable matters, for comparison of voice contained in the said CD with the sample voice of A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel obtained by the FSL, Gandhinagar.

3. Facts for deciding the issue involved in the present petition, in nutshell, are as under:

3.1 Sessions Case No. 203 of 2009 relates to one of the Godhra riot cases i.e. Naroda Gam, in which, Respondent No. 1 - Babu @ Babu Bajrangi Rajabhai Patel is accused No. 23 and Respondent No. 2 - Dr. Jaydip Ambalal Patel is accused No. 58, both belong to Bajrang Dal and Vishwa Hindu Parishad ("VHP" for short) respectively. Both of them are facing trial for the offences punishable under Sections 143, 147, 148, 149, 153(A)(B), 201, 217, 218, 221, 109, 295, 295(A), 297, 323, 302, 307, 114, 120B read with 188 of the Indian Penal Code and 135(1) of the Bombay Police Act. That the said offences are alleged to have been committed on the wake of Gujarat Bandh declared by the VHP and Bajrang Dal in response to setting on fire on Coach No. S-6 of Sabarmati Express Train carrying Kar Sevaks at Ayodhya at the same place after demolition of Babri Masjid and while they were returning in Sabarmati Express Train, the aforesaid S-6 Coach was set on fire at Godhra Railway Station on 27/02/2002 resulting into death of many Kar Sevaks. During Bandh Call, several areas in different parts of State of Gujarat including Naroda Gam (Village), which is subject matter of the present petition, saw the aftermath termed as wrath with vengeance on the person and properties of Muslim Community wherein in all 11 persons have lost their lives and properties of Muslim Community were damaged and set on fire.

3.2 A Special Investigating Team is investigating the aforesaid case and is making further investigation pursuant to the directions issued by the Hon"ble Supreme Court and at present further investigation is going on.

3.3 It is to be noted that investigation of the aforesaid offence was carried out firstly by Police Officer of Naroda Police Station and by Detection of Crime Branch (DCB), Ahmedabad City. However, writ petitions were preferred before the Hon"ble Supreme Court by National Human Rights Commission and other NGOs, wherein the Hon"ble Supreme Court has passed an order by constituting a Special Investigation Team (SIT)- Respondent No. 2 herein and according to the judgment and order passed by the Hon"ble Supreme Court, the aforesaid offence registered with Naroda Police Station, is ordered to be further investigated u/s 173 of the Code of Criminal Procedure.

3.4 It appears that after registration of the offence and before the SIT took over the investigation, charge-sheets were filed against several accused persons and after SIT took over investigation and on conclusion of further investigation including against some more persons SIT filed charge-sheet and supplementary charge-sheet.

3.5 it is the case on behalf of the Petitioners that during the course of investigation a fact came to be revealed that one Mr. Ashish Khaitan of Tanelka News Channel had conducted a Sting Operation in the year 2007 and as per the order passed by the NHRC, who had directed the CBI, Mumbai to seize the Spy Camera, Recorder and Compaq Disk on which the facts of sting operation were recorded by the Tanelka News Channel. It appears that the CBI, Mumbai seized the said articles from Tanelka News Channel and had sent the same for its scientific test to FSL, Jaipur. It is the case on behalf of the Petitioners that the above facts had come to the knowledge of the investigation officer of SIT, statement of aforesaid Mr. Ashish Khaitan of Tanelka News Channel was recorded on 19/1/2009, 24/1/2009 and 12/3/2009 as a witness and he had produced CD on which the facts of sting operation were recorded and he is cited and shown as a Witness No. 178 in the chargesheet. It appears that the articles recovered by CBI, Mumbai were sent to FSL, Jaipur and the same were examined scientifically and the original articles along with the findings of the scientific report were forwarded by FSL, Jaipur to the CBI, Mumbai. It appears that during the course of the investigation, SIT requested CBI Mumbai to hand over original DCV/CB of the string operation conducted by witness Mr. Ashish Khaitan. It appears that the telecast of the sting operation was published on 27/10/2007 by purchasing the rights of the said sting operation by the Company "TV Today Network" and on the TV Channel - "Ajtak" under the caption of "Operation Kalank".

3.6 It appears that the aforesaid Ashish Khaitan, reported to serving in Tanelka News Channel from December, 2006 to September, 2007 impersonated himself as Piyush Agrawal at the instance of one Mr. Tarun Tejpal, Editor in Chief to probe into one ransom occurred in respect of one painting in MS University, Baroda at the behest of members of VHP and to find out at whose behest the said incident took place. That during his mission to probe into the incident, the said Mr. Ashish Khaitan met one Mr. Dhimant Bhatt, Chief Auditor of MS University and during the course of discussion, a talk of riots occurred in 2002 surfaced and therefore, the said witness thought it fit to inquire into and about the said incident of violence occurred in the year 2002 in the State of Gujarat. So, Mr. Ashish Khaitan inquired about the persons who could help him in searching the events leading to the riots of 2002. It appears that he met various members of VHP and Bajrang Dal and gave them belief that he is writing a book on Hindutva and so he is researching on the subject and further he made believed them that after Godhra incident, there is a Hindutva revival in Gujarat and accordingly, various members of VHP and Bajrang Dal were instigated to disclose the information on riots, which was within their special knowledge and more particularly, for three cases i.e. Naroda Patiya, Naroda Gam (Village) and Gulmarg Case. The aforesaid Mr. Ashish Khaitan conducted sting operation through

Spy Camera, whereby conversation which took place between Respondent No. 1 - accused No. 23 and Respondent No. 2 - accused No. 58, respectively, came to be recorded and video graphed.

3.7 The aforesaid DVD/CD, Spy Camera etc. came to be seized by the CBI, Mumbai pursuant to the directions issued by NHRC, which has been recovered by the investigating officer of SIT during the course of the further investigation and therefore, SIT, during the course of the further investigation and further conducting the investigation, submitted application Exh.337 before the Additional Sessions Judge, before whom the aforesaid case is going on, with a prayer to direct the Respondents herein - original accused to accompany investigating officer to take their voice sample.

3.8 That the aforesaid application Exh.337 was opposed by Respondents herein - original accused Nos. 23 and 58. That by order dated 04.03.2010, the learned trial Court rejected the said application holding that investigating officer has no power to obtain voice sample for comparison purpose u/s 73 or Section 45 of the Evidence Act, 1872 or under any other law for the time being in force, pending trial and it is ultimately for the concerned Judge/Court to exercise power of comparison which is vested in the Court only in exercise of powers u/s 73 or Section 45 of the Evidence Act. Being aggrieved and dissatisfied with the order passed dated 04.03.2010 by the learned trial Court rejecting the application Exh.337 in Sessions Case No. 203/2009, Petitioners preferred Special Criminal Application No. 1433/2010 before this Court which came to be allowed by this Court by judgment and order dated 06.12.2010 and this Court quashed and set aside the order dated 04.03.2010 passed by the learned trial Court below application Exh.337 and allowed the said application Exh.337 and allowed the Petitioners SIT/concerned investigating officer to record voice sample of the accused - Respondents herein.

3.9 It appears that thereafter pursuant to the aforesaid order passed by this Court in aforesaid Special Criminal Application No. 1433/2010, the SIT approached the All India Radio, Akashvani Bhavan, Ahmedabad. However, the All India Radio shown their inability and thereafter voice sample of Respondents herein A-23 and A-58 have been recorded at FSL, Gandhinagar on 28.01.2011.

3.10 It appears that it is the case on behalf of the SIT that so far as original DV Ds and C Ds, on which the said sting operation was copied from hard disk, are concerned, the same were seized by the CBI, Mumbai at the instance of NHRC from one Shri Ashish Khaitan as well as Shri Dipak Jamnalal Sharma and the said DV Ds and C Ds were send by CBI, Mumbai to FSL, Gandhinagar for its scientific analysis. According to the prosecution, same were analyzed by FSL, Jaipur and by its report dated 09.02.2009, FSL, Jaipur had opined that no editing, alteration or tampering was detected in the audio-video recordings and their respective voice track recorded in the said DV Ds. According to the Petitioners - investigating agency, during the course of investigation by SIT, the said DV Ds and C Ds were produced by the IO of

the SIT in the Gulbarg Society case after getting it from CBI, Mumbai and the said original DV Ds and C Ds analyzed by the FSL, Jaipur and are at present lying with the Nazir of the trial Court conducting the trial of the Gulbarg Society case. Therefore, the Petitioners preferred an application Exh.793 in Sessions Case No. 203/2009 on 11.02.2011 inter-alia praying to hand over the muddamal parcel containing DV Ds and C Ds produced at Exh.1488 in the case registered as I-C.R. No. 67/2002 of Meghaninagar Police Station, which is numbered as Sessions Case No. 152/2002 and other cognate matters for comparison of voice contained in the said CD and that the voice sample of A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel obtained by the FSL, Gandhinagar, pursuant to the aforesaid judgment and order passed by this Court in Special Criminal Application No. 1433/2010. It appears that the trial Court passed an order dated 01.03.2011 whereby the prosecution was directed to furnish the information/evidence on the points stated therein on oath. That the SIT as per the directions contained in the aforesaid order dated 01.03.2011, submitted an affidavit of the IO dated 04.03.2011. It appears that during the tendency of the said application Exh.793, an application Exh.1547 was also made to the learned Judge trying Gulbarg Society Case, wherein the original DV Ds and C Ds are lying wherein also identical prayer was made to hand over the said DV Ds and C Ds for the purpose of comparison of the voice. It appears that the said application came to be rejected by the learned Judge trying the Gulbarg Society case vide order dated 21.02.2011. However, in the said order, the learned Judge has clarified that if the learned Judge of the Naroda Gam Patiya case passes an order in this regard, then he has no objection to hand over the said DV Ds and C Ds. That thereafter the learned Additional Sessions Judge, Court No. 3, City Sessions Court, Ahmedabad vide impugned order dated 08.03.2011 passed below application Exh.793 in Sessions Case No. 203/2009 has rejected the said application Exh.793. Hence, the Petitioners have preferred the present Special Criminal Application.

4. Shri Jayant M. Panchal, learned Special Public Prosecutor appearing on behalf of the Petitioners has vehemently submitted that impugned order passed by the learned Additional Sessions Judge below application Exh.793 in Sessions Case No. 203/2009 is absolutely illegal and without properly appreciating the facts of the case and material produced before the Court. It is further submitted that as such by passing the impugned order below application Exh.793, the learned Judge has nullified the order passed by this Court in Special Criminal Application No. 1433/2010.

4.1 It is further submitted by Shri Panchal, learned Counsel that by not allowing the investigating agency to have the muddamal parcel containing DV Ds and C Ds produced at Exh.1488 in the case registered as C.R. No. I-67/2002 of Meghaninagar Police Station which is numbered as Sessions Case No. 152/2002 for comparison of voice contained in the said CD with the voice sample of A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel obtained by the FSL,

Gandhinagar, serious prejudice would be caused to the prosecution case. It is submitted that considering the order passed by this Court in Special Criminal Application No. 1433/2010, the learned trial Court ought to have allowed the application Exh.793.

4.2 It is further submitted by Shri Panchal, learned Counsel that the learned trial Court has materially erred in making observation that prosecution is making such an application which is nothing but wastage of time of Court. It is submitted that the aforesaid application Exh.793 was submitted by the prosecution in furtherance of their endeavors to prosecute the real culprits and accused and to prove the case against them, which in any case cannot be said to be wastage of time of the Court.

4.3 Making above submissions, it is requested to allow the present Special Criminal Application.

5. Shri Pravin Gondaliya, learned advocate appearing on behalf of the Respondents herein - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel. In view of the order passed by this Court in Special Criminal Application No. 1433/2010, Shri Gondaliya, learned advocate appearing for Respondents herein has not seriously opposed the present petition. He is not in a position to dispute that the order passed by this Court in Special Criminal Application No. 1433/2010 has attained finality and in furtherance of the aforesaid order, voice sample of the Respondents herein may be required to be compared with other voices contained in DV Ds and C Ds produced at Exh.1488 in the case registered as C.R. No. I-67/2002 of Meghaninagar Police Station which is numbered as Sessions Case No. 152/2002.

6. Heard the learned advocates appearing for respective parties at length.

6.1 At the outset it is required to be noted that earlier the Petitioners submitted application Exh.337 in Sessions Case No. 203/2009 for permitting the IO to have the voice samples of the Respondents herein - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel. That the said application was dismissed by the learned trial Court, which came to be challenged by the prosecution SIT before this Court by way of Special Criminal Application No. 1433/2010 and by judgment and order dated 06.12.2010, this Court allowed the said Special Criminal Application and also granted the application Exh.337 submitted by the SIT permitting them to record the voice samples of the Respondents herein - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel. It appears that pursuant to the said order, the voice sample of A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel have been taken at FSL, Gandhinagar. That thereafter to establish that the voice recorded in DV Ds and C Ds seized as muddamal parcel produced at Exh.1488 in Sessions Case No. 152/2002 with the voice samples recorded of Respondents - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal

Patel, the said DV Ds and C Ds are required to be send to FSL, Jaipur and therefore, application Exh.793 was submitted by the Petitioners which has been rejected. It appears that to prove and/or establish the case against Respondents herein - accused persons, it is necessary to compare the voice sample of A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel with the muddamal parcel contained in DVD and CD produced at Exh.1488 in Sessions Case No. 152/2002. By rejecting the application Exh.793, the learned trial Court has virtually nullified the order passed by this Court in Special Criminal Application No. 1433/20100 and/or has not appreciated the purpose and object of allowing application Exh.337 permitting the investigating agency to have the voice sample of Respondents herein - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel. As stated herein above, learned Counsel appearing for Respondents is not in a position to seriously dispute the above and/or to oppose the present Special Criminal Application. Therefore, to achieve the ultimate goal to book and/or prosecute the real culprit, the learned trial Court ought to have allowed the application Exh.793 and as such no prejudice shall be caused to the accused persons. Under the circumstances, impugned order passed by the learned trial Court below application Exh.793 deserves to be quashed and set aside and the same is required to be allowed.

7. In view of the above and for the reasons stated above, present Special Criminal Application succeeds. Impugned order dated 08.03.2011 passed by the learned Additional Sessions Judge, Court No. 3, City Sessions Court, Ahmedabad below application Exh.793 in Sessions Case No. 203/2009 is hereby quashed and set aside and the said application Exh.793 is hereby granted/allowed and the concerned Court is hereby directed to handover the muddamal parcel containing DV Ds/C Ds produced at Exh.1488 in the case registered as C.R. No. I-67/2002 of Meghaninagar Police Station which is numbered as Sessions Case No. 152/2002 and other cognate matters, for comparison of voice contained in the said CD/DVD with the voice sample of Respondents herein - original accused A-23 Babu @ Babu Bajrangi Rajabhai Patel and A-58 Dr. Jaydipbhai Ambalal Patel, obtained by the FSL, Gandhinagar in a sealed cover, so as to enable them to send it to the FSL, Jaipur. The investigating agency is hereby directed to see that the report from the FSL, Jaipur is received by them at the earliest so that trial of the case is concluded at the earliest. Rule is made absolute to the aforesaid extent.