proceedings arising from the impugned F.I.R. are hereby quashed and set aside. RULE is made absolute.

Result:- Petition allowed.

ABC 2019 (I) 251 GUJ

ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(G.R.Udhwani, J.)

R/Criminal Revision Application No. 1524 Of 2018

Decided on 27 December, 2018

IRFAN ABDUL MAJID MEMON & ANR. ***- Petitioner(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 227 — Discharge — Indian Penal Code, 1860 — Sections 307, 120-B & 34 — Arms Act, 1959 — Sections 25(1B)A & 27 — Statement of co-accused & call details connecting the two accused with conversation — relied on by court while frame — Held, legal misconception & slender evidence — Discharged. (Para 11)***

(B) Code of Criminal Procedure, 1973 — Sections 226, 227 & 228 — Opening case for prosecution, Discharge & Charge — Held, there must exist a material worth charging the person accused with the offence before commencement of the evidence — In absence of such worthy material, the discharge of the accused would be the only consequence. (Para 5.1)

(C) Code of Criminal Procedure, 1973 — Sections 226 & 227 — Opening case for prosecution & Discharge — Stages of exercising — The exercise u/s 227 for discharge must precede the exercise u/s 226 contemplating opening of the case for prescribing the charge — reason — that no occasion for opening the case describing the charge would arise if sufficient ground for proceeding against the accused is not in existence. (Para 5.1)

(D) Code of Criminal Procedure, 1973 — Section 227 — Discharge — Nonexistence of the sufficient ground — ascertaining of — Held, the record of the case, the documents submitted therewith and the rival submissions must receive the consideration from the court— The consideration cannot be an empty formality. (Para 5.1)

(E) Code of Criminal Procedure, 1973 — Section 228 — Charge — framing of — Standard of proof — Held, the record of the case & the documents submitted therewith — must necessarily be concerned with the offence the person is accused of. (Para 5.1)

(F) Code of Criminal Procedure, 1973 — Section 228 — Charge — framing of — Source of the charge — Held, the source would be the record of case & the documents which may specify the date, time; if any — as also the manner and/or the method of the commission of the offence — the nature of offence committed — the nature of weapons possessed and used by the accused if any — & other such relevant incriminating material and circumstances. (Para 5.1)

(G) Code of Criminal Procedure, 1973 — Section 227 — Discharge — Duty of the Court — Held, the court would not be required to appreciate the material as if ascertaining the nonexistence of the guilt of the accused — Only exercise expected would be to peruse the record of the case & the documents submitted therewith, to find out necessary material leading to the ingredients of the penal provisions the person accused is sought to be charged with. (Para 7)

(H) Code of Criminal Procedure, 1973 — Section 227 — Discharge — stage of — Consideration of evidentiary value of the record placed & sustainability of the charge — is not the test contemplated u/s 227 — Duty of the Court — Held, the court would be merely required to lay its finger on the material constituting the ingredients of the relevant provisions the person accused is charged with. (Para 7)

(I) Indian Penal Code, 1860 — Sections 120-B &/or 34 — Convicting with the aid of — The court below did not find any material concerning the ingredients of sec. 120A and/or 34 — Prosecution is able to lay its finger on meeting of the mind or common intention — accused discharged — Code of Criminal Procedure, 1973 — Section 227. (Para 8)

(J) Arms Act, 1959 — Sections 25(1B)A & 27 — Convicting under — the accused did not possess or use the arms for the commission of the offence — cannot be charged with the offence under the Arms Act. (Para 9)

(K) Code of Criminal Procedure, 1973 — Section 227 — Discharge — Indian Penal Code, 1860 — Sections 120-B &/or 34 — Call details between accused & co-accused — only basis of filing the charge — Held, The mere existence of call details — in absence of the

cogent material evidencing the making of the calls between two accused for the purpose of committing the offence— would not be a sufficient material for trying the accused—discharged. (Para 10)

(L) Criminal trial — Standard of proof — Call details between accused persons — Evidentiary value — Held, the calls between the two accused persons itself is not an offence— There ought to be a material pointing out the incriminating cause between the two accused for the commission of the offence. (Para 10)

(M) Code of Criminal Procedure, 1973 — Section 226 — requirement under — Held, the section requires the prosecution to state the evidence proposed, for proving the guilt of the accused. (Para 10)

Facts:- *The petitioners were accused of having entered into contract with the original accused no. 1 for killing the father of the complainant. In execution of the alleged contract, the accused no.1 allegedly aimed a pistol on the victim on however the aim was missed and the bullet struck the complainant's father on his left shoulder. The court below relied upon the statements of the accused persons and call details between them for framing the charge. The honourable Gujarat High Court did not consider it sufficient evidence against the applicant and discharged him.*

Law of relief:- ***In absence a material worth charging the accused, the discharge of the accused would be the only consequence.***

Held:- Evidently there must exist a material worth charging the person accused with the offence before commencement of the evidence. In absence of such worthy material, the discharge of the accused would be the only consequence. The exercise under section 227 of Cr.P.C contemplating discharge must precede the exercise under section 226 contemplating opening of the case for prescribing the charge, for the simple reason that no occasion for opening the case describing the charge would arise if sufficient ground for proceeding against the accused is not in existence. For ascertaining the non-existence of the sufficient ground, the record of the case, the documents submitted therewith and the rival submissions must receive the consideration from the court. The consideration cannot be an empty formality. It goes without saying that the record of the case and the documents submitted therewith must necessarily be concerned with the offence the person is accused of. The source of the charge would be the record of case and the documents which may specify the date, time; if any as also the manner and/or the method of the commission of the offence, the nature of offence committed, the nature of weapons

possessed and used by the accused if any, and other such relevant incriminating material and circumstances. (Para-5)

This court would hasten to add that under section 227, the court would not be required to appreciate the material as if ascertaining the nonexistence of the guilt of the accused. Only exercise expected would be to peruse the record of the case and the documents submitted therewith, to find out necessary material leading to the ingredients of the penal provisions the person accused is sought to be charged with. The court would not be justified to consider the evidentiary value of the record of the case and the documents; eventual sustainability of the charge is not the test contemplated under section 227 of Cr.P.C. The court would be merely required to lay its finger on the material constituting the ingredients of the relevant provisions the person accused is charged with. (Para-7)

In the instant case the court below was obliged to find out the presence or absence of the material concerning the ingredients of section 120A and/or section 34 of of Indian Penal Code. It did not find any such material; nor the learned APP is able to lay his finger on any material evidencing the meeting of the mind of the accused persons for doing illegal act or any other act which may not be illegal, by illegal means. He is also unable to lay his finger on the material evidencing the common intention and acts of accused herein in furtherance of such common intention. (Para-8)

The petitioners concededly did not possess or use the arms for the commission of the offence and thus cannot be charged with the offence under the Arms Act. (Para-9)

The learned APP however vehemently submitted that the frequent telephonic talks between the accused no. 1 and accused no. 3 as evidenced by the call details, rendered sufficient evidence for charging the accused for the offence in question. He would contend that the mobile phone in question belonged to accused no.2 and it was used in the commission of the offence. The mere existence of call details in absence of the cogent material evidencing the making of the calls between two accused for the purpose of committing the offence under section 120B and/ or section 34 of Indian Penal Code, in the opinion of this court would not be a sufficient material for trying the accused. The calls between the two accused persons itself is not an offence. There ought to be a material pointing out the incriminating cause between the two accused for the commission of the offence. It

may be recalled that section 226 requires the prosecution to state the evidence proposed, for proving the guilt of the accused. The guilt sought to be proved herein is the offence under sections 120B and 34 of Indian Penal Code. Can it be said the call details by itself is sufficient ground for proceeding against the accused. In the opinion of this court the answer should be in the negative. Thus in the considered opinion of this court, there is no sufficient ground for proceeding against the accused; the accused therefore deserves a discharge. (Para-10)

Counsel:- ***For Petitioner(s):*** *Mr Nishith K Joshi For Mr Bn Limbachia, Adv.*

For Respondent(s): *Mr KL Pandya, Adv.*

JUDGMENT

G.R.UDHWANI, J.: - 1. Rule. Learned APP waives for the respondent-State.

2. Order dated 26.09.2018 rendered by the learned Additional Sessions Judge, Valsad in Sessions Case No. 71 of 2009 rejecting the application moved under section 227 of the Code of Criminal Procedure (for short "Cr.P.C') seeking discharge by the accused of the offences punishable under sections 307,120B and 34 of Indian Penal Code and sections 25(1-B)A and 27 of the Arms Act is sought to be assailed in this revision application.

3. The petitioners were accused of having entered into contract with the original accused no. 1 for killing the father of the complainant. In execution of the alleged contract, the accused no.1 allegedly aimed a pistol on the victim on 29.06.2009 however the aim was missed and the bullet struck the complainant's father on his left shoulder.

4. The court below relied upon the statements of accused no. 2 and 3 as also on the call details evidencing the frequent calls between the applicant no.2 and original accused no.1 for finding the material worth for framing the charge, while rejecting the application.

5. For consideration of the case for discharge and framing of charge in sessions trial, sections 226 and 227 of Cr.P.C. are relevant which can be set out herein for ready reference:

> **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.

227. 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 Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

5.1 Evidently there must exist a material worth charging the person accused with the offence before commencement of the evidence. In absence of such worthy material, the discharge of the accused would be the only consequence. The exercise under section 227 of Cr.P.C contemplating discharge must precede the exercise under section 226 contemplating opening of the case for prescribing the charge, for the simple reason that no occasion for opening the case describing the charge would arise if sufficient ground for proceeding against the accused is not in existence. For ascertaining the non-existence of the sufficient ground, the record of the case, the documents submitted therewith and the rival submissions must receive the consideration from the court. The consideration cannot be an empty formality. It goes without saying that the record of the case and the documents submitted therewith must necessarily be concerned with the offence the person is accused of. The source of the charge would be the record of case and the documents which may specify the date, time; if any as also the manner and/or the method of the commission of the offence, the nature of offence committed, the nature of weapons possessed and used by the accused if any, and other such relevant incriminating material and circumstances.

6. Consideration of the case first under section 227 and then under section 226 is the crucial procedure. It is the stage where the court would be in a position to find out the case worth trial. Non-existence of sufficient ground for proceeding with the case would help the court weeding out the worthless case; thus saving the crucial public time which can be invested in the case worth trying; thus expediting the cases worth trying, consequently curtailing the delay. The exercise under section 227 in its letter and spirit would also relieve an apparently innocent person or the person against whom the

material worth trying does not exist, of the agony of the avoidable trial.

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7. This court would hasten to add that under section 227, the court would not be required to appreciate the material as if ascertaining the non-existence of the guilt of the accused. Only exercise expected would be to peruse the record of the case and the b documents submitted therewith, to find out necessary material leading to the ingredients of the penal provisions the person accused is sought to be charged with. The court would not be justified to consider the evidentiary value of the record of the case and the documents; eventual sustainability of the charge is not the test c contemplated under section 227 of Cr.P.C. The court would be merely required to lay its finger on the material constituting the ingredients of the relevant provisions the person accused is charged with.

8. In the instant case the court below was obliged to find out the presence or absence of the material concerning the ingredients of d section 120A and/or section 34 of of Indian Penal Code. It did not find any such material; nor the learned APP is able to lay his finger on any material evidencing the meeting of the mind of the accused persons for doing illegal act or any other act which may not be illegal, by illegal means. He is also unable to lay his finger on the material evidencing the common intention and acts of accused herein in e furtherance of such common intention.

9. The petitioners concededly did not possess or use the arms for the commission of the offence and thus cannot be charged with the offence under the Arms Act.

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10. The learned APP however vehemently submitted that the frequent telephonic talks between the accused no. 1 and accused no. 3 as evidenced by the call details, rendered sufficient evidence for charging the accused for the offence in question. He would contend that the mobile phone in question belonged to accused no.2 and it g was used in the commission of the offence. The mere existence of call details in absence of the cogent material evidencing the making of the calls between two accused for the purpose of committing the offence under section 120B and/ or section 34 of Indian Penal Code, in the opinion of this court would not be a sufficient material for trying the h accused. The calls between the two accused persons itself is not an offence. There ought to be a material pointing out the incriminating cause between the two accused for the commission of the offence. It

may be recalled that section 226 requires the prosecution to state the evidence proposed, for proving the guilt of the accused. The guilt sought to be proved herein is the offence under sections 120B and 34 of Indian Penal Code. Can it be said the call details by itself is sufficient ground for proceeding against the accused. In the opinion of this court the answer should be in the negative. Thus in the considered opinion of this court, there is no sufficient ground for proceeding against the accused; the accused therefore deserves a discharge.

11. The trial court unfortunately proceeded on the legal misconception by relying upon the statement of co-accused as also on the slender evidence of mere call details connecting the two accused with conversation inter se. It thus fell in jurisdictional error in rejecting the application under section 227 of Cr.P.C. In the opinion of this Court, the case is made out for discharge as indicated above. Accordingly impugned order is quashed and set aside and the petitioners are ordered to be discharged from the offences registered at I- C.R. No. 40 of 2009 with Umargam Police Station which culminated into Sessions Case No. 71 of 2009 in the court of learned Additional Sessions Judge, Valsad. Rule is made absolute. Direct service is permitted.

Result:- Petitioners discharged.

ABC 2019 (I) 258 GUJ

ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(A.S. Supehia, J.)

Criminal Misc. Application No. 13637 Of 2016

Decided on 5 December, 2018

ROLASTAR PRIVATE LIMITED THRO' HIS HEMANT CHHAGANLAL SURATI ***- Petitioner(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered:- ***Code of Criminal Procedure, 1973 — Section 482 — Quashing of complaint — Industrial Disputes Act, 1947— Section 25T and 25U — Complaint under — Transfer of employees by company — allegation of unfair labour practice — Held, the complaint is absolutely silent on the aspect that the***