

admitted that the engagement ceremony of the prosecutrix with appellant No.1 accused was already performed and thereafter, they ran away and got married. In that view of the matter, the learned trial court has committed a manifest error in convicting appellant Nos.2 and 3 under Section 6 read with Section 17 and Section 4 read with Section 17 of the POCSO Act which is not sustainable in law and deserves to be quashed and set aside. a

10. So far as the conviction of appellant No.1 accused is concerned, his conviction is also not sustainable on law in view of clear pronouncement of Hon'ble Supreme Court in *Independent Thought (supra)* as the learned trial court punished the appellant accused for commission of marital rape which has already been saved in view of exception-2 to Section 375 of IPC. Consequently therefore, his conviction under Sections 4 and 6 of the POCSO Act is also not sustainable in law and deserves to be quashed and set aside. b c

11. For the reasons recorded above, the appeal succeeds. Judgment and order dated 01.03.2019 passed by learned Special Judge (POCSO) and 3rd Additional Sessions Judge, Junagadh in Special POCSO Case No. 40 of 2017, convicting appellant No.1 for the offence punishable Sections 4 and 6 of the POCSO Act and appellants Nos. 2 and 3 for the offence punishable Section 6 read with Section 17 and Section 4 read with Section 17 of the POCSO Act, is hereby quashed and set aside. The appellants - accused are acquitted of the charges levelled against them. Bail bonds stand cancelled. Fine, if any, paid by them be refunded to them. d e

12. Record & Proceedings, if any, be sent back to the trial Court concerned forthwith. e

Result:- Appeal Allowed. f

ABC 2019 (III) 90 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT

(A.Y. Kogje, J)

R/Criminal Misc Application No 10283 of 2018 With R/Criminal Misc. Application No. 11937 of 2018 With R/Criminal Misc. Application No. 12591 of 2018 With R/Criminal Misc. Application No. 12235 of 2018 With R/Criminal Misc. Application No. 17304 of 2018
Decided on 24 June 2019 g

STATE OF GUJARAT

- Applicant(s). h

Versus

GOVINDBHAI KANABHAI CHANDAPA & ORS.

- Respondent(s).

Law Covered:- Code of Criminal Procedure, 1973 – Section 439 (2) – Indian Penal Code, 1860 – Sections 120(B), 406, 409, 465, 467, 471 and

September 2019

- a 114— *Prevention of Corruption Act, 1988 – Sections 13(1)(d)(g) and 13(1)(2) – Cancellation of Anticipatory Bail – Construction of toilets carried out not as per the norms – allegation of – The respondents were called by the investigating officer – statements recorded – Investigation based on the documentary evidence – such documents are already in custody of the investigating agency – no custodial interrogation may be necessary – Role of the accused can be easily brought on record even on the basis of the documents – not a case where there is absolutely no work was carried out – the degree of involvement of the individual accused persons to be viewed – No criminal history – bail granted in similar nature of illegality – applications dismissed. (Para 12 & 13)*

- c **Facts:-** *The offence was in connection with the Scheme floated by the Government for construction of toilets and such scheme was to be implemented through the local authorities like the Municipality. An FIR came to be registered by the ACB against 19 accused which included the Officers of the Municipality, the Office bearers of the non-governmental organization, the Charitable organizations which were engaged in carrying out the construction of the toilets as per the Scheme on behalf of the local authority - Okha Municipality. In connection with the aforesaid First Information Report, anticipatory bail applications were filed by the respondents before the Special ACB Court. By the impugned order, the anticipatory bail applications were allowed. The aforesaid order was challenged by the State, I the present applications, praying for cancellation of anticipatory bail. The applications were dismissed.*

- e **Law of relief:-** *Custodial investigation is not a substitute for investigation.*

- f **Held:-** *From the record, it appears that the respondent accused were subjected to inquiry wherein the respondents were called by the investigating officer and their statements have been recorded. It also appears that during the investigation, the documents in the nature of work order, the bills, documents regarding completion of work, the inspection carried out and the documents pertaining to passing of bills have been received. Therefore, the nature of investigation appears to be such that it would be based on the documentary evidence. It appears that all such documents are either from the government record or from the offices of the NGO, Charitable Trust which were given the responsibility and such documents are already in custody of the investigating agency. Therefore, no custodial interrogation may be necessary. (Para-12)*

- h *The offence undoubtedly is wide spread involving many individuals who have played their role which may be termed to be 'his part' in commission of the offence. However, such role can be easily brought on record even on the basis of the documents which are now part of the investigation and therefore, also custodial interrogation may not be necessary. The Special Court has dealt with the statements of both the sides and has observed it is not a case where there is absolutely no construction of*

toilets and only money in the name of the toilets are siphoned and from the records of the case, it appears to be only to the extent that construction of toilets is carried out not as per the norms. Therefore, the degree of involvement of the individual accused persons will have to be viewed with that consideration. The respondent accused are not having any criminal history. (Para-13) a

Counsel:- *For Applicant(s):* Mr. H S Soni, Adv. b
For Respondent(S): Mr. Premal S Rachh, Mr. Vaibhav A Vyas, Mr. Nikunj Kanara, Mr. Sanat B Pandya, Mr. Premal S Rachh, Adv.

ORDER

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A.Y. KOGJE, J.: - 1. All these applications are filed under Section 439(2) and 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as 'the Code') with a prayer to cancel the anticipatory bail granted by the Sessions Judge (Special Judge ACB, Devbhumi Dwarka) at Khambhalia in connection with an offence being registered as C.R. No.I-2018 with ACB Police Station, Jamkhambalia, Devbhumi Dwarka Police Station. d

2. All these applications are filed by the State against the respondent/s who are the accused of the aforesaid C.R. and are the employees of the Okha Municipality and were employed either as a Chief Officer, Engineer or Office Bearer for the purpose of construction of 'Shauchalaya' (Toilets) under the Okha Municipality. e

3. Considering the similarity in the contentions raised on behalf of the State and the identical role alleged against the respondent accused, all these applications are taken up for joint hearing and disposal with consent of the concerned Advocates. However, the facts are taken from Criminal Miscellaneous Application No.10283/2018. f

4. A First Information Report being C.R. No.1/2018 came to be filed by the Police Inspector, Jamnagar, ACB Police Station, Jamnagar for the offences punishable under Sections 120(B), 406, 409, 465, 467, 471 and 114 of the Indian Penal Code and under Sections 13(1)(d)(g) and 13(1)(2) of the Prevention of Corruption Act, 1988. The gist of allegations as stated in the First Information is that vide order of Chief Police Officer and Director, Anti-corruption Bureau, Gujarat State, Ahmedabad bearing No. Inq/D/Kh.T./Devbhumi Dwarka/1/544, dated: 01/03/2017, Devbhumi Dwarka S.B. Police Station received the application of the applicant District Municipal Officer, Collector and the Office of District Magistrate dated: 02/12/2016 against the Officer of Okha Nagarpalika and the Trust/organization constructing the toilets alleging corruptions committed under the scheme of Nirmal Gujarat Individual Toilet Construction scheme for making open defecation free cities of the state pursuant to Mahatma Gandhi Swachchhata g
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a Mission in the year 2014-15 in the area of Okha Nagarpalika. Vide order of Chief Police Officer and Director, Anti-corruption Bureau, Gujarat State, Ahmedabad bearing No. Inq/D/Kh.T./Devbhumi Dwarka/1/1841, dated: 19/06/2017, Devbhumi Dwarka ACB Police Station received the application of the applicant Devram Vala Ghoda, residing at: Devpara, Surajkaradi, Ta-Dwarka, dated: 16/02/17 commonly alleging against the aforesaid alleged persons. The later application was kept with the previous application and b the order was passed to conduct open inquiry.

c a) Pursuant to the Resolution of Government of Gujarat, Department of Urban Development and Urban Housing, Sachivalaya, Gandhinagar bearing No.NML/102008/1305/Gh, dated: 24/10/2008, this scheme was implemented for the purpose of making the open defecation free by 2010 according to the Swarnim target of the government. In this connection, like other Nagarpalikas of the District, the toilet less families were identified in Okha Nagarpalika on the basis of 2011-census, and the order was passed by the Government to pay Rs.8000/- and thereafter d Rs.12000/- to construct the toilets.

e b) For the implementation of toilet scheme by the Nagarpalikas, the list of total 216 voluntary organizations was prepared and the same was sent to the Nagarpalikas. As mentioned in the order of Municipal Finance Board, any of 216 voluntary organizations was to be opted or the Nagarpalikas were permitted to allot the construction work of the toilets to any of the voluntary organization of its choice.

f c) Thus, on the basis of orders of the Government and Municipal Finance Board, the work orders were given by Okha Nagarpalika to total-7 voluntary organizations for the construction of total 6752 toilets from the year-2011-12 to 2014-15.

g d) Though these organizations did not construct the toilets at the above mentioned details as per the rules and regulations of the government and though it has been clearly instructed in the resolutions of the Government and Municipal Finance Board that, if such organizations are not found functioning as per the norms or if any irregularity is found, the same is to be reported to the Municipal Finance Board and such organizations shall be relieved from the work with immediate effect and though the complaints of irregularities were received against these organizations, the above instructions were not followed or the ongoing construction works were not supervised by the Class-I Officer. Thus, the organizations constructing the toilets, city h engineers, the then Chief Officer and the then Presidents of Okha Nagarpalika approved the fake bills and made payments thereof though the toilets were not constructed by the above organizations. Thus, the above organizations were paid Rs. 2,75,00,600/- and they were financially benefited. The financial loss of such amount was caused to the government and the power delegated by virtue of public servant was misused. They misappropriated the

government money in connivance with one another by hatching conspiracy. The then city engineer of Okha Nagarpalika made his counter initials in the check list authenticating the details filled in the check list as true as per the rules and regulations, work orders and contracts of the Government, and forwarded the bill to the Co-ordinator of the organization for approval. And few material was provided to the beneficiaries by the organization and the signatures of the beneficiaries were obtained in the certificates that, complete toilets have been constructed by taking benefit of illiteracy of the beneficiaries though the toilets of the beneficiaries were not constructed. The signatures were obtained in such false certificates and total 1 to 42 organization wise bills alongwith the certificate and check list issued by the city engineer were submitted to the Nagarpalika for approval. Those bills were submitted before the then Chief Officer and President. Though there was clear government provision, they did not physically verify and both these officers/incumbents issued the Cheques of total amount of bills of Rs. 2,75,00,600/- in favour of respective organizations which were prepared on the basis of such false certificate and check list. The cheques were presented in the bank by the administrators of the organizations and the money were withdrawn and the misappropriation of such a large amount of government money was committed. It clearly appears that, they have misused their power of Public servant and thereby committed the offence.

e) The above accused persons and the officers/employees who may reveal during the investigation have hatched criminal conspiracy in connivance with one another and they have misused their power in the work allocated to them for getting the personal financial benefit. Thereby, they have committed the offence of criminal misappropriation and cheating with the government."

5. In connection with the aforesaid First Information Report, anticipatory bail applications were filed by the respondents before the Special ACB Court at Khambhalia. By the impugned order, the anticipatory bail applications were allowed while imposing certain conditions. The aforesaid order is challenged by the State praying for cancellation of anticipatory bail.

6. Learned Additional Public Prosecutor submits that the offence pertains to construction of toilets under the benevolent Scheme of the State which was to be executed through the Municipality all over the State. The Okha Municipality was also required to implement the Scheme. However, the accused persons have conspired with each other to receive financial benefits under the name of implementation of the Schemes whereas on ground, there is no proper execution of the scheme, but by creating bills and other documents, the payment is received as if the Scheme is duly executed. It is submitted that while scrutinizing government records, the irregularities came to light and it was found that these irregularities are widespread and

a therefore, intensive interrogation would be necessary for which custodial interrogation of the accused persons is a must. It is submitted that the entire offence is not restricted to role of an individual but many persons are involved which include private Contractors, Consultants and also employees of the Government and Municipality.

b 7. Learned Additional Public Prosecutor further submits that the impugned order is not a reasoned order which would justify the grant of anticipatory bail as the Special Court has failed to examine the role attributed by the investigation to the respondent accused and the need of the custodial interrogation of such accused.

c 8. It is also submitted that investigation is involving intricate facts and is complicated and only the accused persons will be able to throw light on how the entire scam was conspired by the accused persons.

d 9. As against this, the learned Advocates appearing for the respective accused submitted that from the investigation done so far, nothing is coming on record to suggest that there is absolutely no construction of toilets and only on proper bills, documents are created and monies are received. It is submitted that at the best, the case of the prosecution can be that construction of toilets have taken place which are not as per the norms prescribed under the Scheme. It is submitted that the respondent accused have done their part as per their duty and have procured the construction material and have actually carried out construction for which bills have been raised and the on-site inspection was also carried out. It is submitted that e entire activity of construction of toilets was concluded long back and thereafter after a period of 3-4 years, the present First Information Report is sought to be registered. It is submitted that the entire offence is based on f documents as the respondent accused have submitted all their bills and evidence of construction with the authority and have received the payments also by cheques and therefore, custodial interrogation is not necessary. It is further submitted that the respondent accused have co-operated with the investigation, their statements were also recorded and therefore, it can be g said that the respondent accused have joined the investigation.

h 10. I have considered the rival submissions of the parties and the documents on record including the impugned order. The offence appears to be in connection with the Scheme floated by the Government for construction of toilets and such scheme was to be implemented through the local authorities like the Okha Municipality. In the present case, it appears that an First Information Report came to be registered on 25.03.2018 by the ACB Police Inspector against 19 accused named in the First Information Report which included the Officers of the Municipality, the Office bearers of the non-governmental organization, the Charitable organizations which were engaged in carrying out the construction of the toilets as per the Scheme on behalf of the local authority - Okha Municipality. From the First

Information Report, it appears that the period during which the offence was committed was between the years 2011 to 2015, whereas the First Information Report came to be registered in the month of March 2018. From the allegations made in the First Information Report, it appears that a complaint was made by an individual in the year 2017 which was received by the ACB Police Station, which undertook the open enquiry and thereafter, the First Information Report came to be registered alleging conspiracy of the accused persons alleging that payments were made without due verification on the basis of the bills raised which were falsely created or wrongly made causing financial loss to the State.

11. From the investigation carried out and the summary submitted to this Court in a tabular form, the allegations which are supported by some evidence are as under :-

Name of the Accused	Role of the accused in the offence
Shri Hiteshbhai N. Joshi, Residing at: Bhanvad The Coordinator Ganesh Education Charitable Yuva Mandal, Bhanvad	The accused, in the capacity of Coordinator of the organization, did not construct toilets in Okha Nagarpalika Area, which were required to be made as per the resolution of the government and he provided only toilet building materials to several beneficiaries and he had not made toilets of several beneficiaries. Despite that, he produced bills of all toilets in Okha Nagarpalika, deposited its cheques in the bank accounts of the organization and withdrawn the said amount and thus, he has caused revenue loss to the government.
Shri Manojbhai Devshankarbhai Pandya The President Ganesh Education Charitable Yuva Mandal, Bhanvad	The accused, in the capacity of President of the organization, did not construct toilets in Okha Nagarpalika Area, which were required to be made as per the resolution of the government and he provided only toilet building materials to several beneficiaries and he had not made toilets of several beneficiaries. Despite that, he produced bills of all toilets in Okha Nagarpalika, deposited its cheques in the bank accounts of the organization and withdrawn the said amount and thus, he has caused revenue loss to the government

<p>a</p> <p>b</p> <p>c</p> <p>d</p>	<p>Shri Lakhabhai Jugal, Residing at: Kalyanpur (1) The Coordinator, Bhagwati Foundation, Upleta (2) The Coordinator, Vikas Bharti, Kheralu</p>	<p>The accused, in the capacity of Coordinator of two different or- ganizations, did not construct toi- lets in Okha Nagarpalika Area, which were required to be made as per the resolution of the gov- ernment and he provided only toilet building materials to several beneficiaries and he had not made toilets of several beneficiaries. De- spite that, he produced bills of all toilets in Okha Nagarpalika, de- posited its cheques in the bank accounts of both the organizations and withdrawn the said amount and thus, he has caused revenue loss to the government.</p>
<p>e</p> <p>f</p> <p>g</p> <p>h</p>	<p>Shri Kishorekumar Narandas Devmurari (1) The President, Jan Seva Man- dal, Kathrota (2) The President, Maruti Charita- ble Trust, Rajkot (3) ---</p>	<p>The accused, in the capacity of president of three different organ- izations, did not construct toilets in Okha Nagarpalika Area, which were required to be made as per the resolution of the government and he provided only toilet build- ing materials to several beneficiar- ies and he had not made toilets of several beneficiaries. Despite that, he produced bills of all toilets in Okha Nagarpalika, deposited its cheques in the bank accounts of the organizations and withdrawn the said amount and thus, he has caused revenue loss to the gov- ernment.</p>

12. From the record, it appears that the respondent accused were subjected to inquiry wherein the respondents were called by the investigating officer and their statements have been recorded. It also appears that during the investigation, the documents in the nature of work order, the bills, documents regarding completion of work, the inspection carried out

and the documents pertaining to passing of bills have been received. Therefore, the nature of investigation appears to be such that it would be based on the documentary evidence. It appears that all such documents are either from the government record or from the offices of the NGO, Charitable Trust which were given the responsibility and such documents are already in custody of the investigating agency. Therefore, no custodial interrogation may be necessary.

13. The offence undoubtedly is wide spread involving many individuals who have played their role which may be termed to be 'his part' in commission of the offence. However, such role can be easily brought on record even on the basis of the documents which are now part of the investigation and therefore, also custodial interrogation may not be necessary. The Special Court has dealt with the statements of both the sides and has observed it is not a case where there is absolutely no construction of toilets and only money in the name of the toilets are siphoned and from the records of the case, it appears to be only to the extent that construction of toilets is carried out not as per the norms. Therefore, the degree of involvement of the individual accused persons will have to be viewed with that consideration. The respondent accused are not having any criminal history.

14. This Court in the case of another Municipality where the offence came to be registered for similar nature of illegality in construction of toilets has examined the Scheme for building toilets for the poor citizens under the local body or Municipality and have granted bail to the accused persons who are also the Office Bearers of the Municipality as well as the employees. This Court in its order dated 10.04.2017 in Special Civil Application No.2743/2017 pertaining to construction of toilet under the Jasdan Nagar Palika has granted anticipatory bail to the President of the Nagar Palika. Having considered the observations of this Court in the aforementioned order, and the similarity in the factual matrix, the Court can draw support from the observations made therein :-

"6.1. The entire scenario coming out as above an aspect could not be lost site of that the accused NGOs were the agencies to whom the contract was given. It was the municipal authorities and the officers who identified the beneficiaries, fixed number of units to be constructed for them and after construction was over, certified about the construction having been completed. Not only that, the third party investigating agency played final role to approve about the completion of the work to make the final part of the payment. In the process of this certification, a direct role of the trustee or office bearer of the NGO was not possible to be exacted. The further aspect of the matter is that when the F.I.R. was filed, the same was on the basis of the report of the Deputy Collector dated 16th October, 2016. The Deputy Collector was asked to inquire and give report pursuant to

a the complaints of irregularities in the construction of toilet units were received. In other words, the report of the Deputy Collector was in the nature of investigative report which contain the gist of the details regarding allegations.

b 6.2. In above view, the imperativeness for custodial interrogation could not be spelt out. Custodial investigation is not a substitute for investigation. When the investigation could be carried out by other modes, custody and arrest by the police for the said purpose has to be kept at a bay. The valuability of personal liberty has to be recognised in such circumstances and the forced arrest of the accused persons cannot be permitted. In this case, it could also be said that the entire investigation, even if the same may proceed further, would be mainly rest on the documentary material. The prosecution could not establish nor could show any aspects for which custodial investigation may be necessary at the cost of personal liberty of the accused.

c 6.3. In the facts and circumstances obtained and for the reasons recorded above, personal liberty of the applicant - accused deserves to be accorded primacy over his forced arrest. The investigational needs could be balanced by imposing appropriate conditions to be observed by the applicant-accused including the condition of keeping the right of the police open to ask for remand of the applicant accused, if required. Looking to the totality of the facts, a more stringent conditions for furnishing higher amount of the personal bond and solvent surety would serve the ends of justice."

d 15. This Court finds in the impugned order that the Special Court has assigned proper reasons and has also imposed appropriate conditions so as to protect the interest of the investigation. In view of the aforesaid, no case is made out for interference with the impugned order.

e 16. In view of the above, the applications deserve to be dismissed and are hereby dismissed.

f **Result:-** Applications dismissed.

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