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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23.03.2023
Pronounced on: 28.03.2023

\+ **CRL.REV.P. 141/2023 & CRL.M.A. 3810/2023**

STATE ..... Petitioner

Through: Mr. Sanjay Jain, Additional Solicitor General, Mr. Rajat Nair, Special Public Prosecutor, with Mr. Madhukar Pandey, Mr. Ashima Gupta, Mr. Dhruv Pandey and Mr. Arkaj Kumar, Advocates with DCP Crime, Mr. Amit Goel, ACP/ISC Mr. Ramesh Chander and Inspector Kamal Kumar, ISC Crime Branch

versus

MOHD. QASIM & ORS. ..... Respondents

Through: Mr. M.R. Shamshad, Mr. Abubakr Sabbaq, Mr. Arijit Sarkar and Ms. Nabeela Jamil, Advocates for respondent nos. 1, 2, 3 and 6
Ms. Kajal Dalal and Ms. Aparajita Sinha, Advocates for R-4
Mr. Javed Hashmi, Mr. Farid Ahmad,Mr. Shahnawaj Malik, Advocates for R-7
Mr. Talib Mustafa, Mr. Ahmad Ibrahim and Ms. Ayesha Zaidi, Advocates for R-8
Ms. Sowjhanya Shankaran, Mr. Siddharth Satija and Mr. Abhinav Sekhri, Advocates for R-9

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Mr. Ayush Shrivastava, Advocate for R-5 and R-10
Ms. Rebecca John, Senior Advocate with Mr. Ritesh Dhar Dubey, Ms. Praavita Kashyap, Ms. Anushka Baruah, Mr. Chinmay Kanojia, Mr. Pravir Singh and Ms. Adya R. Luthra, Advocates for R-11

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

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SWARANA KANTA SHARMA, J.

1. The present case before this Court raises questions which go to the root of the concepts of Indian Criminal Jurisprudence: the law that restrains the society from violent protest and whether it is consistent with the Indian Constitution which ensures right to free speech and expression, which includes right to peaceful protest and the right of law enforcing agency to prosecute individuals who indulge in violent protest. More specifically, this Court will deal with the question of admissibility of statements obtained from police witnesses and

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individuals at different stages of investigation. It will examine whether there is any necessity to lay down a procedure for the investigating agency to put the entire investigated material before the Court and inform the Court that they have concluded the investigation before arguments on charge are heard.

2. This Court starts the discussion with the premise that this Court is not innovating jurisprudence of procedure to be adopted at the stage of framing of charge by the Courts, which is well established extensively by way of various precedents of the Hon'ble Apex Court and this Court. The application of principles laid down in such legal precedents have long been recognized and applied in varying settings of criminal cases. This Court in the present case has undertaken a thorough examination of the principles so laid down and reaffirmed it.

3. Arguments in this case were heard where judicial interpretation was also sought about the right of prosecution to file repeated supplementary charge-sheets to fill in the lacunae at any stage. This Court witnessed spirited legal debate from both sides. This Court also had occasioned to analyse well thought scholarly material and legal precedents tracing the law on riots and its ramifications before arriving at its conclusion.

4. The State has filed the present revision petition under Section 397 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') seeking setting aside of the impugned order dated 04.02.2023 passed by learned Additional Sessions Judge-04, Special Judge (NDPS), South-East District, Saket Courts, New Delhi in Sessions case bearing no. 318/2022 titled as '*State v. Mohd. Ilyas @ Illen*' whereby learned

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Trial Court discharged the respondents herein and proceeded to frame charges only against accused no.1 Ilyas @ Illen, in FIR bearing No. 296/2019 registered at Police Station Jamia Nagar for offences punishable under Sections 143/147/148//149/186/353/332/ 308/427/435/323/341/120B/34 of Indian Penal Code, 1860 (hereinafter 'IPC') and Sections 3/4 of Prevention of Damage to Public Property Act, 1984 (hereinafter 'PDPP Act').

FACTUAL MATRIX

5. To concisely outline the facts of the present case, it is the case of prosecution that an information was received on 12.12.2019 that some students/ex-students of Jamia Milia Islamia University (hereinafter 'Jamia University'), would be gathering at Gate No. 1 of the University on 13.12.2019 and will be protesting against National Register of Citizens (hereinafter 'NRC') and Citizenship Amendment Bill (hereinafter 'CAB'). It was also informed that these protesters were to march towards the Parliament of India from Jamia University. Upon receiving such information, necessary police staff was deployed to maintain peace and public order, and roads near Gate No. 1 of Jamia University were barricaded. It was alleged that at approximately 3:30 PM, large gathering of people from Gate No. 1 and 5 began to converge on the police barricades, while simultaneously protesting and chanting slogans against the NRC and CAB. Although police had repeatedly urged the gathering to maintain peaceful demonstration, the protesters persisted in raising incendiary and antagonistic slogans against the government and law enforcement agencies. Despite

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multiple warnings and instructions issued by the police that the protesters lacked authorization to proceed to the Parliament House, and that they could stage their demonstration without breaching the barricades, the protesters and the surrounding crowd insisted on pushing forward. Given the overall tenor and conduct of the assembly, the police apprehended that permitting the mob to breach the barricades could provoke a significant disturbance to the law and order situation in New Delhi. Allegedly, despite repeated warnings, the protesters refused to disperse and instead escalated their aggression by throwing stones at the police, and despite use of non-lethal methods such as mild force and gas shells to disperse the crowd, the protesters/rioters reportedly moved into the University area and continued their assault on the police. Following an intense and prolonged confrontation, the police were ultimately able to quell the violent mob and restore order, and thereafter, the present FIR was registered.

6. During the course of investigation, first chargesheet dated 30.03.2020 was filed qua accused Mohd Ilyas@Allen and prosecution had sought time to file supplementary chargesheet in due course of investigation. Subsequently, *first* supplementary chargesheet dated 22.07.2020 was filed before the Trial Court whereby a complaint under Section 195 Cr.P.C was obtained from DCP South-East qua accused Mohd Ilyas @ Allen. After that, *second* supplementary chargesheet dated 01.09.2021 was filed before the Court concerned against 11 other accused persons i.e. respondents herein, who were chargesheeted under Sections 143/147/149/186/ 353/332/333/323/341/

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308/427/435/120B/34 of IPC read with Sections 3/4 of PDPP Act. Thereafter, *third* supplementary chargesheet was filed on 01.02.2023, whereby certain statements of witnesses and other evidence was placed on record by the prosecution.

7. The learned Trial Court proceeded to frame charges only against accused number 1 i.e. Mohd Ilyas@Allen and discharged remaining 11 accused persons i.e. respondents herein *vide* impugned order dated 04.02.2023. The concluding portion of the impugned order is reproduced as under:

> " 44. There were admittedly scores of protesters at the site. It cannot be gainsaid that among the multitude, some anti-social elements within the crowd created an environment of disruption and did create havoc. However, the moot question remains: whether the accused persons herein were even prima face complicit in taking part in that mayhem? The answer is an unequivocal 'no'. Marshalling the facts as brought forth from a perusal of the chargesheet and three supplementary chargesheets, this Court cannot but arrive at the conclusion that the police were unable to apprehend the actual perpetrators behind commission of the offence, but surely managed to rope the persons herein as scapegoats.
>
> 45. The prosecution has ex facie been launched in a perfunctory and cavalier fashion against the abovementioned persons, except qua Mohd Ilyas@Allen. To allow the persons charge-sheeted to undergo the rigmarole of a long drawn trial, does not augur well for the criminal justice system of our country. Furthermore, such a police action is detrimental to the liberty of citizens who choose to exercise their fundamental right to peacefully assemble and protest. Liberty of protesting citizens should not have been lightly interfered with. It would be pertinent to underscore that dissent is nothing but an extension of the invaluable

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fundamental right to freedom of speech and expression contained in Article 19 of the Constitution of India, subject to the restrictions contained therein. It is therefore a right which we are sworn to uphold. As laid down in *P Vijayan (supra),* this Court is duty bound to lean towards an interpretation which protects the rights of the accused, given the ubiquitous power disparity between them and the State machinery.

46. The desideratum is for the investigative agencies to discern the difference between dissent and insurrection. The latter has to be quelled indisputably. However, the former has to be given space, a forum, for dissent is perhaps reflective of something which pricks a citizen's conscience. "Conscience is the source of dissent, asserts Gandhi. When something is repugnant to our conscience, we refuse to obey it. This disobedience is constituted by duty. It becomes our duty to disobey anything that is repugnant to our conscience"1. Recently, the Hon'ble Chief Justice of India, Hon'ble Justice D Y Chandrachud observed that "The destruction of spaces for questioning and dissent destroys the basis of all growth - political, economic, cultural and social. In this sense, dissent is a safety valve of democracy,". The subtext is explicit i.e. dissent has to be encouraged not stifled. However, the caveat is that the dissent should be absolutely peaceful, and should not degenerate into violence.

47. In the present case, the investigative agencies should have incorporated the use of technology, or have gathered credible intelligence, and then only should have embarked on galvanizing the judicial system qua the accused herein. Else, it should have abstained from filing such an ill-conceived chargesheets qua persons whose role was confined only to being a part of a protest

48. In view of the above in extenso analysis, considering the fact that the case of the State is devoid of irrefragable evidence, all the persons charge-sheeted barring Mohd

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> Ilyas@Allen are hereby discharged for all the offences for which they were arraigned. They be set at liberty, if not wanted in any other case. Photographs of Mohd Ilyas@Allen have been clearly shown in a newspaper, hurling a burning tyre, an overt act has been ascribed to him, and he has been duly identified by Ct Dharmender and some other police witnesses. Therefore, charges levelled in the chargesheet be framed qua accused Mod Ilyas@Allen only. Needless to say, the investigative agency is not precluded from conducting further investigation in a fair manner, with the leave of the Court, in order to bring to book, the actual perpetrators, with the adjuration not to blur lines between dissenters and rioters, and to desist from henceforth arraigning innocent protesters."

THE GRIEVANCE OF REVISIONIST

8. Mr. Sanjay Jain, learned Additional Solicitor General (ASG), argues on behalf of revisionist i.e. State that the impugned order suffers from material infirmities and irregularities, and at the stage of framing of charges, Trial Courts cannot indulge in conducting a mini trial by determining the pros and cons of the case and as to whether it would warrant a conviction or not. It is stated that credibility of evidence, especially the statements of witnesses cannot be gone into at the stage of framing of charge, as the same can only be tested as the stage of trial. It is argued by learned ASG that there is sufficient evidence against all the respondents herein for the purpose of framing charges and conviction can take place even solely on the basis of testimony of police witnesses. A reference has also been made to the 'Memo of Evidence' against respondents provided in the present petition.

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9. Learned ASG argues that the learned Trial Court has taken contradictory stands in so far as third supplementary chargesheet is concerned, since on the one hand, the Court observed that the said chargesheet was an afterthought and ought not to be considered, whereas the Court has conveniently relied upon its contents to arrive at a finding that no case was made out against the respondents. It is stated that even otherwise, it is a statutory right of investigating agencies to conduct investigation and file supplementary chargesheet if material is found, and its non-consideration/selective consideration for the reasons stated in the impugned order makes the said order perverse.

10. It is further submitted on behalf of the State that reliance placed upon the decision of Hon'ble Apex Court in ***Masalti v. State of Uttar Pradesh*** *(1964) 8 SCR 133* by learned Trial Court, at the stage of framing of charges, is incorrect in law for the reasons that *firstly*, the said decision is a post-trial decision, and at the stage of charge, only prima facie view is to be taken as far as fulfilment of ingredients of an offence under Section 149 IPC is concerned, and in the present case, the respondents were active members of the assembly which turned unlawful and violent. *Secondly*, the test of ***Masalti v. State of Uttar Pradesh*** *(supra)* regarding number of witnesses, if at all applicable to the present case, was clearly met in the present case as the concerned police officials who had got injured during the said incident, had categorically identified the present respondents, whose statements were filed before the learned Trial Court alongwith the third supplementary chargesheet.

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11. Mr. Jain, arguing on behalf of State, also submits that the learned Trial Court has overstepped its jurisdiction in passing disparaging remarks against the investigating authorities and has casted grave aspersions on the investigation and such remarks ought to be deleted/expunged from the record.

12. During the course of arguments, learned ASG also tendered the videos of the incident dated 13.12.2019 to this Court, which also form part of the Trial Court record, and stated that seven of the respondents were identified from the video clip number 3 and 9.

COMMON ARGUMENTS OF RESPONDENTS

13. Besides the specific arguments addressed on behalf of each of the accused person who stands discharged by the learned Trial Court, which have been dealt with in the later part of this judgment, learned counsels for the respondents primarily submit that since the respondents have been discharged by the learned Trial Court by way of a detailed order dated 04.02.2023, it is for the State i.e. revisionist to first point out the material defects and illegalities in the impugned order. It is argued that the learned Trial Court has meticulously considered all the evidence placed on record by the prosecution and it is only after examining the same, the Court has reached a conclusion that no ground was made out for framing charges against the respondents in the present case.

14. It has been contended on behalf of all the respondents that the prosecution has failed to bring on record any evidence to show that present accused persons were either involved in any kind of violence

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that took place on 13.12.2019 outside Jamia University campus, or to show that any conspiracy existed among them to commit any criminal acts. It is argued that only a grave suspicion against an accused can warrant framing of charge and same cannot be done merely on the asking of prosecution.

15. It is also stated that learned Trial Court has rightly observed that the respondents, who could have been mere bystanders in a protest, were roped in as accused in the present case. It is also contended that reliance placed on Call Detail Records of the respondents to prove their location at place of incident is of no consequence since all the respondents were either students or ex-students of Jamia and/or were living either in the campus of Jamia or in its vicinity, and thus, their mobile location would definitely point out to that area only.

16. It has been further contended on behalf of all the respondents that prosecution cannot arbitrarily pick and choose people and arraign them as accused from a mob of thousands of persons while levelling no allegations against other persons who were part of the mob. Learned counsels also argue that there was no prohibitory order under Section 144 Cr.P.C. imposed at the spot of incident i.e. near Jamia University.

17. This Court has heard the arguments, at length, addressed by the learned counsels appearing on behalf of both State and the respondents. The order assailed before this Court and the Trial Court Record has been carefully perused and examined. The Court has also gone through the written submissions and case laws filed by all the parties to buttress their respective arguments.

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LAW ON FRAMING OF CHARGE

18. Before delving into the merits of the case and the contentions and issues raised before this Court, it will be germane to summarily discuss the position of law qua framing of charge and discharge.

19. As provided under Section 228 Cr.P.C., for a Sessions case, the Court shall proceed to frame charges against an accused if in its opinion, there are grounds for presuming that the accused has committed an offence. Section 228 Cr.P.C. read as under:

> "**228**. Framing of charge.
>
> (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-
>
> (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;
>
> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
>
> (2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

20. However, an accused can also be discharged as per Section 227 Cr.P.C., for which, there must be lack of sufficient grounds to believe that the accused has committed an offence. Section 227 Cr.P.C. reads

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as under:

> "**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."

21. The Hon'ble Supreme Court, in case of ***Sajjan Kumar v. C.B.I.*** *(2010) 9 SCC 368*, held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima facie case is made out or not at the time of framing of charge, and charges can be framed if it is of the opinion that the accused might have committed the offence. The relevant portion of the judgment is reproduced herein-under:

> "21. On consideration of the authorities about scope of Sections 227 and 228 of the Code, the following principles emerge:
>
> (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out **whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case**.
>
> (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and

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the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) **If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence**.

(v) At the time of framing of the charges, **the probative value of the material on record cannot be gone into** but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

(Emphasis supplied)

22. In ***Amit Kapoor v. Ramesh Chander*** *(2012) 9 SCC 460*¸ the Hon'ble Apex Court,while explaining the scope of Section 227 and 228 of Cr.P.C., had made the following observations:

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> "17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. **The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case.**There is a fine distinction between the language of Sections 227 and 228 of the Code. **Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.**"
>
> (Emphasis supplied)

23. The aspect as to whether a Trial Court is permitted to marshall the evidence or conduct a mini-trial was dealt with by the Hon'ble Apex Court in ***Asim Shariff v. National Investigation Agency*** *(2019) 7 SCC 148* with the following observations:

> "18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power

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> to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. **It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record**."
>
> (Emphasis supplied)

24. The issue of standard of proof *versus* prima facie view was discussed by Hon'ble Supreme Court in ***Bhawna Bai v. Ghanshyam*** *(2020) 2 SCC 217*, in the following manner:

> "13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

<u>THIRD SUPPLEMENTARY CHARGESHEET</u>

25. Learned ASG appearing for the State had argued that learned Trial Court had erred in disregarding the third supplementary chargesheet and that it was a statutory right of investigating authorities to carry out investigation in terms of Section 173 Cr.P.C.

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26. As perused from the impugned order dated 04.02.2023, learned Trial Court was not pleased to accept the third chargesheet for two broad reasons: *firstly*, because the prosecution did not take leave of the Court to file third supplementary chargesheet and the same was filed at a belated stage, and *secondly,* because the prosecution had presented the same mundane facts under the guise of 'further investigation' through third supplementary chargesheet.

27. During the course of arguments, learned counsels for the respondents, including learned senior counsel for respondent no. 11 and learned counsel for respondent no. 1, 2, 3 and 6, conceded to the fact that there was no bar as such for the prosecution to have filed the third supplementary chargesheet in the present case, but stated that the learned Trial Court was essentially pained from the fact that the same was done at belated stage when the arguments on charge had already been heard extensively and the same were to be concluded on the next date of hearing. It is further submitted that especially in the circumstances of the present case, when the investigation agency was aware of the view of the learned Trial Court and about the defence of the respondents, they had filed a third supplementary chargesheet to fill in those lacunae. Mr. M.R. Shamshad, learned counsel for respondent no.1, 2, 3 and 6 also stated that this Court needs to lay down some guidelines in this regard so that the investigating agencies do not file chargesheets at their own sweet will at any stage of trial and take the accused persons by surprise.

28. It is important for this Court to first consider the precedents of Hon'ble Supreme Court in relation to filing of supplementary

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chargesheet. Recently, in ***Luckose Zachariah v. Joseph Joseph and Others*** *2022 SCC OnLine SC 241*, the Hon'ble Apex Court had discussed the position of law qua filing of supplementary chargesheets as under:

> "10. In the judgment of this Court in Vinay Tyagi (supra) it has been held that a further investigation conducted under the orders of the court or by the police on its own accord would lead to the filing of a supplementary report. The supplementary report, the Court noted, would have to be dealt with "as part of the primary report" in view of the provisions of sub-Sections 3 to 6 of Section 173.
>
> 11. Section 173(8) specifically provides as follows:
>
> > "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."
>
> 12. In terms of sub-Section 8 of Section 173, in the event of a further investigation, the report has to be forwarded to the Magistrate upon which, the provisions of sub-Sections (2) to (6) shall (as far as may be) apply in relation to such report or reports as they apply in relation to a report forwarded in sub-section (2). In this backdrop, while interpreting the above provisions, in Vinay Tyagi (supra) this Court held thus:
>
> > "42. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the

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> documents annexed thereto to which the court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the court shall discharge an accused in compliance with the provisions of Section 227 of the Code."

13. The decision in Vinay Tyagi (supra) was noticed together with other decisions of this Court in the judgment of a three-Judge Bench in Vinubhai Haribhai Malaviya v. State of Gujarat. This Court held:

> "42. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440], Samaj Parivartan Samudaya [Samaj Parivartan Samudaya v. State of Karnataka, (2012) 7 SCC 407 : (2012) 3 SCC (Cri) 365], Vinay Tyagi [Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762 : (2013) 4 SCC (Cri) 557], and Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86]; Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under

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> Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding..."

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16. In view of the clear position of law which has been enunciated in the judgments of this Court, both in Vinay Tyagi (supra) and Vinubhai Haribhai Malaviya (supra), it is necessary for the Magistrate, to have due regard to both the reports, the initial report which was submitted under Section 173(2) as well as the supplementary report which was submitted after further investigation in terms of Section 173(8). It is thereafter that the Magistrate would have to take a considered view in accordance with law as to whether there is ground for presuming that the persons named as accused have committed an offence..."

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29. In ***Virubhai Haribhai Malaviya v. State of Gujarat*** *(2019) 17 SCC 1* also, Hon'ble Apex had observed as under in relation to the scheme of Section 173 Cr.P.C: .

> "15. The erstwhile Code of Criminal Procedure, 1898 did not contain a provision by which the police were empowered to conduct a further investigation in respect of an offence after a police report under Section 173 has been forwarded to the Magistrate. The Forty-First Law Commission Report (The Code of Criminal Procedure, 1898) forwarded to the Ministry of Law in September 1969 (hereinafter referred to as the "Law Commission Report"), therefore, recommended the addition of sub-section (7) to Section 173 as it stood under the Code of Criminal Procedure, 1898 for the following reasons:
>
> > "23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the 17 magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."
>
> 16. What is interesting to note is that the narrow view of some of the High Courts had placed a hindrance in the way

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of the investigating agency, which can be very unfair to the prosecution as well as the accused.

17. Article 21 of the Constitution of India makes it clear that the procedure in criminal trials must, after the seminal decision in Mrs. Maneka Gandhi v. Union of India & Anr. (1978) 1 SCC 248, be "right, just and fair and not arbitrary, fanciful or oppressive" (see paragraph 7 therein). Equally, in Commissioner of Police, Delhi v. Registrar, Delhi High Court, New Delhi (1996) 6 SCC 323, it was stated that Article 21 enshrines and guarantees the precious right of life and personal liberty to a person which can only be deprived on following the 18 procedure established by law in a fair trial which assures the safety of the accused. The assurance of a fair trial is stated to be the first imperative of the dispensation of justice (see paragraph 16 therein).

18. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that must needs inform the interpretation of all the provisions of the CrPC, so as to ensure that Article 21 is followed both in letter and in spirit.

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31. Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. (2004) 5 SCC 347 is an important judgment which deals with the necessity for further investigation being balanced with the delaying of a criminal proceeding. If there is a necessity for further investigation when fresh facts come to light, then the interest of justice is paramount and trumps the need to avoid any delay being caused to the proceeding. The Court therefore held:

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"11. Coming to the question whether a further investigation is warranted, the hands of the investigating agency or the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at the truth. 12. Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted. 13. In Ram Lal Narang v. State (Delhi Admn.) [(1979) 2 SCC 322: 1979 SCC (Cri) 479 : AIR 1979 SC 1791] it was observed by this Court that further investigation is not altogether ruled out merely because cognisance has been taken by the court. When defective investigation comes to light during course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice. We

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> make it clear that we have not expressed any final opinion on the merits of the case."

30. In the aforesaid circumstances, this Court takes note of the first chargesheet dated 30.03.2020, which mentions as under:

> मुकदमा हजा मे पुलिसकर्मियों के अलावा जिन प्रदर्शनकारी छात्रो आदि की MLCs बनी है। उनको व अन्य suspects को interrogate किया जा रहा है और मुकदमा हजा के दंगे मे इनके रोल को verify किया जा रहा है तथा मुकदमा हजा के दंगे मे शामिल अन्य मुल्जिमान की पहचान के लिए लगातार प्रयास किए जा रहे है। जिनका पता चलने पर इनके खिलाफ हस्ब ज़ाब्ता कानूनी कार्यवाही अमल मे लायी जाएगी। फिलहाल कोरोना वायरस के चलते मुकदमा हजा मे तफ्तीश लगातार नहीं की जा रही है। जो आइंदा मुकदमा हजा मे तफ्तीश पूरी होने पर माननीय अदालत मे supplementary chargesheet दाखिल की जाएगी।

31. Thereafter, the first supplementary chargesheet dated 22.07.2020 also mentions as under:

> "...The further investigation in this case is being conducted the outcomes will also be filed separately through supplementary chargesheet"

32. It is also noted that the second supplementary chargesheet dated 01.09.2021 mentioned at the end, that if any fresh evidence is brought out during investigation, the same shall be filed by way of another supplementary chargesheet. The relevant portion of second supplementary chargesheet reads as under:

> व गवाहों को समन के द्वारा सूचित करके चालान की proceedings शुरू की जाये। यदि मुकदमा हजा में कोई अन्य तथ्य सामने आते है तो माननीय अदालत में supplementary chargesheet दाखिल की जाएगी।

33. In the present case, it was mentioned at the time of filing of first

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chargesheet that the investigating agency could not find eye witnesses and news channels who had video-graphed and photographed the incident and that they were given reminders to provide the footage. The first chargesheet also mentions that the suspects were being interrogated and MLCs of the injured were being collected, and that the police was trying to apprehend and identify the accused persons and a supplementary chargesheet would be filed once the same is established. It is very clearly mentioned in the first chargesheet that at that point of time, the police was not able to investigate the matter due to Covid-19 pandemic and after completion of investigation, it would file a supplementary chargesheet. This Court acknowledges that soon after the incident in question, the unfortunate period of lockdown had begun in the country. During this time, all government authorities, including the Delhi Police, were preoccupied with making arrangements and fulfilling their duties to address the unprecedented and unfortunate events occurring. The working of the Court as well as the investigating agency were also affected, therefore, the exclusion of the said period for being termed as unexplained delay by the Delhi Police has to be excused.

34. In the present case, it remains undisputed that the Trial Court had previously accepted both first and second supplementary chargesheets without any demur or indication for the investigating agency to furnish any further chargesheet within the prescribed time frame or prior to hearing the arguments on charge. Notably, the second supplementary chargesheet explicitly indicated the possibility of filing a third supplementary chargesheet, given the ongoing

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investigation. In such circumstances, the learned Trial Court could have either passed a direction to inform the Court as to whether any supplementary chargesheet against the accused persons in question was to be filed so that it could proceed to hear arguments on charge, however, no such directions have been passed and though it was mentioned in the second supplementary chargesheet that the investigation is still under way, arguments on charge were addressed by both the parties.

35. It is to be noted and given weightage that this chargesheet involved investigation of riots involving thousands of people when the Covid pandemic was at its peak and the investigation was not being carried out continuously and this is duly mentioned in the first chargesheet and it should have been taken note of by the learned Trial Court also. While the Courts have given weightage of this fact while granting relief to the accused(s) by granting them bail as trials and investigations were being delayed, the same grace has to be shown to the prosecution also as they were not only maintaining law and order during one of the most difficult periods of this country in recent time, the same police force was also performing many other duties related to Covid-19 pandemic, and they were at all places in the society trying to help everyone as they could.

i. **Fresh Evidence in Third Supplementary Chargesheet**

36. The observations of the learned Trial Court that no fresh evidence was placed on record by way of third supplementary chargesheet do not find favour with this Court.

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37. The learned Trial Court had already accepted the second supplementary chargesheet wherein the Court was informed by the prosecution as to on which points the investigation was still pending. By way of third supplementary chargesheet, further evidence qua respondent no. 9 Asif Iqbal Tanha was brought on record as he had posted photographs of the incident dated 13.12.2019 on his Facebook account on 13.12.2022 and had written as to how he alongwith several others had been arrested on the date of incident while they were marching towards the Parliament, which was a new fact informed to the Court. Even at the time of filing of third supplementary chargesheet, information from Facebook was still awaited as the police had informed the Court that a notice under Section 91 Cr.P.C. had been issued to Facebook regarding the authenticity of the same. Learned Trial Court itself had given permission to send the DVD of videos to FSL for obtaining opinion which was still awaited and was, therefore, part of the evidence relied upon by the prosecution which was also a new fact. The prohibitory orders under Section 144 Cr.P.C. were imposed on 11.11.2019 in New Delhi district which were effective from 13.11.2019 to 11.01.2020 were also filed along with the third supplementary chargesheet. Statements of police witnesses who were on duty on the day of incident and had suffered injuries were also recorded after showing them the videos and photographs of the incident and the same were filed alongwith the third supplementary chargesheet as well.

38. Though, the Court could have passed a direction order for expeditious investigation and the slow investigation in the present case

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could have been asked to be expedited however, the fact remains that the right of the prosecuting agency as the law stands today, does not bar filing of supplementary chargesheets, especially in cases where the previous chargesheet already mentions the prayer of the prosecuting agency that investigation is still underway and they will be filing supplementary chargesheet and it is duly accepted without any further direction by the Court. The statements which had been filed along with the third chargesheet had to be taken cognizance of by the learned Trial Court as it was still at the stage of considering charge and filing supplementary chargesheet. The right to file supplementary chargesheet was neither closed nor could it have been anyway in view of the law as it stands today. Whether the filing of the statements along with the third chargesheet was an afterthought or were untrue could not have been decided or adjudicated upon by the learned Trial Court at the stage of charge itself.

39. It should not have escaped by the parties as well as the Court that the investigating agency had yet not concluded its investigation, the FSL report was still awaited and that the statements of the witnesses were still being recorded by the police. The Court could have asked the investigating agency to inform it as to when they will conclude the investigation against the present accused persons.

40. As per Section 173(8) Cr.P.C., there is no bar for the police to file a supplementary chargesheet. In the present case, the second supplementary chargesheet already stood accepted wherein it was clearly mentioned that the third chargesheet will be followed and it was duly accepted by the learned Trial Court. The third chargesheet

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could not be discarded in law.

41. However, as far as propriety of doing so, when arguments on charge had been part heard is concerned, **this Court also holds a view** that at the stage of framing of charge, the Court's may put a question after filing of the chargesheet and before hearing arguments, and the prosecution will inform the Trial Courts as to whether the case was ripe for hearing arguments on charge and as to whether the chargesheet has been finally filed against the accused, against whom a Court is proceeding to hear arguments on charge.

UNLAWFUL ASSEMBLY AND RIOTING

i. Scheme of Indian Penal Code, 1860.

42. Since the respondents herein were chargesheeted under several provisions of law, this Court deems it apposite to briefly discuss some of them in order to appreciate the facts of the case in correct perspective.

> "**141**. Unlawful assembly.—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—
> *First*.—To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or
> *Second*.—To resist the execution of any law, or of any legal process; or
> *Third*.—To commit any mischief or criminal trespass, or other offence; or
> *Fourth*.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any

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property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Being member of unlawful assembly.—Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. Punishment.—Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

****

146. Rioting.—Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Punishment for rioting.—Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Rioting, armed with deadly weapon.—Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

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> **149.** Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

43. At the outset, this Court takes note of the decision of Hon'ble Apex Court in ***Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel*** *2018 7 SCC 743* whereby the intent of aforesaid provisions was summed up in the following manner:

> "25. Section 141 IPC declares an assembly of five or more persons to be an unlawful assembly' " if the common object of such assembly is to achieve any one of the five objects enumerated in the said section. One of the enumerated objects is to commit any offence [See Yeshwant v. State of Maharashtra, (1972) 3 SCC 639]. The words falling under Section 141, clause third "or other offence" cannot be restricted to mean only minor offences of trespass or mischief. These words cover all offences falling under any of the provisions of the Penal Code or any other law [*Manga v. State of Uttarakhand, (2013) 7 SCC 629*]. The mere assembly of 5 or more persons with such legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 IPC. **It is not necessary that any overt act is required to be committed by such an assembly to be punished under Section 143** [See *Dalip Singh v. State of Punjab, AIR 1953 SC 364*].
>
> 26. If force or violence is used by an unlawful assembly or any member thereof in prosecution of the common objective of such assembly, every member of such assembly is declared under Section 146 to be guilty of the offence of

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rioting punishable with two years' imprisonment under Section 147. **To constitute the offence of rioting under Section 146, the use of force or violence need not necessarily result in the achievement of the common object** [See *Sundar Singh v. State, 1954 SCC OnLine All 30*] In other words, the employment of force or violence need not result in the commission of a crime or the achievement of any one of the five enumerated common objects under Section 141.

27. Section 148 declares that rioting armed with deadly weapons is a distinct offence punishable with the longer period of imprisonment (three years). There is a distinction between the offences under Sections 146 and 148. To constitute an offence under Section 146, the members of the "unlawful assembly" need not carry weapons. But to constitute an offence under Section 148, a person must be a member of an unlawful assembly, such assembly is also guilty of the offence of rioting under Section 146 and the person charged with an offence under Section 148 must also be armed with a deadly weapon [See *Sabir v. Queen Empress, ILR (1894) 22 Cal 276*: *Choitano Ranto, In re. 1915 SCC OnLine Mad 541*].

28. Section 149 propounds a vicarious liability [*Shambhu Nath Singh v. State of Bihar AIR 1960 SC 725*] in two contingencies by declaring that (;) if a member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly, and (i) **even in cases where all the members of the unlawful assembly do not share the same common object to commit a particular offence, if they had the knowledge of the fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object**."

(Emphasis supplied)

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44. To term an assembly of five or more than five persons as an unlawful assembly, a common object, as envisaged under Section 141 of IPC is required to be shown. The common object can also be formed at the spot and in every case, pre-deliberation as to committing an offence is not essential. This is has also been held by Hon'ble Supreme Court in case of ***Inder Singh v. State of Rajasthan*** *(2015) 2 SCC 734*, relevant observations of which are as under:

> "18. ...It is settled law, as held in the case of *Roy Fernandes v. State of Goa & Ors. (2012) 3 SCC 221*, that to determine the existence of common object, the court is required to see the circumstances in which the incident had taken place, the conduct of members of unlawful assembly as well as the weapon of offence they carried or used on the spot. It is also established law, as held in the case of *Ramchandran & Ors. v. State of Kerala (2011) 9 SCC 257*, that common object may form on spur of the moment. Prior concert by way of meeting of members of unlawful assembly is not necessary."

45. Further, an assembly which may be lawful at the inception may turn unlawful due to acts of violence, etc. at a later stage, as provided in the explanation to Section 146 IPC. This view is also supported by the decision of Hon'ble Apex Court in ***Moti Das v. State of Bihar*** *1954 Cri LJ 1708*, wherein it was held as under:

> "8. Now an assembly which was lawful when it assembled can become unlawful subsequently. That is the Explanation to Section 141 of the Indian Penal Code. The law on this point has, in our opinion, been correctly set out in the 18th edition of Ratanlal's Law of Crimes at page 333 in these words:

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> "An assembly which is lawful in its inception may become unlawful by the subsequent acts of its members. It may turn unlawful all of a sudden and without previous concert among its members. But an illegal act of one or two members, not acquiesced in by the others, does not change the character of the assembly".
>
> 9. Previous concert is not necessary. The common object required by Section 141 differs from the common intention required by Section 34 in this respect."

46. Similar observations were made in ***Chandrika Prasad Singh v. State of Bihar*** *(1972) 4 SCC 140* by the Hon'ble Apex Court. The relevant portion of this decision is reproduced herein-under:

> "4. ...The argument that no overt act has been proved against the appellants 2 to 5 and, therefore, they are entitled to be acquitted is difficult to sustain. As observed by the High Court, most of the appellants had indulged in overt acts and had assaulted Ram Sajjan Singh. If the other appellants were members of the assembly, the unlawful common object of which developed at the spot and they continued as its members, then, they are clearly liable to be proceeded against and convicted..."

47. The essential ingredients of the offence of rioting under Section 146 of IPC were enunciated by the Hon'ble Apex Court in the case of ***Lakshman Singh v. State of Bihar*** *(2021) 9 SCC 191,* as under:

> "14. On a fair reading of the definition of "rioting" as per Section 146 IPC, for the offence of "rioting", there has to be
> (i) an unlawful assembly of 5 or more persons as defined in Section 141 IPC i.e an assembly of 5 or more persons and such assembly was unlawful;
> (ii) the unlawful assembly must use force or violence. Force is defined in Section 349 IPC; and

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> (iii) the force or violence used by an unlawful assembly or by any member thereof must be in prosecution of the common object of such assembly in which case every member of such assembly is guilty of the offence of rioting.
>
> 15. "Force" is defined under Section 349 IPC. As per Section 349 IPC, "force" means "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other…..
>
> ****
>
> 17. Thus, once the unlawful assembly is established in prosecution of the common object i.e. in the present case, "to snatch the voters list and to cast bogus voting", each member of the unlawful assembly is guilty of the offence of rioting. The use of the force, even though it be the slightest possible character by any one member of the assembly, once established as unlawful constitutes rioting. It is not necessary that force or violence must be by all but the liability accrues to all the members of the unlawful assembly. As rightly submitted by the learned counsel appearing on behalf of the State, some may encourage by words, others by signs while others may actually cause hurt and yet all the members of the unlawful assembly would be equally guilty of rioting. In the present case, all the accused herein are found to be the members of the unlawful assembly in prosecution of the common object i.e. "to snatch the voters list and to cast bogus voting" and PW 5, PW 8, PW 10 & PW 12 sustained injuries caused by members of the unlawful assembly, the appellant-accused are rightly convicted under Section 147 IPC for the offence of rioting."

48. It is noteworthy that the word 'force' is defined under Section 349 of IPC but the word 'violence' has not been defined. The word 'violence' has been defined in Black Laws Dictionary, sixth edition, p.1570, as "unjust or unwarranted exercise of force". The word

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'criminal force' has been defined under Section 350 of IPC. Therefore, there is a difference between the word 'force' defined under Section 349 of IPC and word 'criminal force' defined under Section 350 IPC. What is noteworthy is that for the commission of offence of rioting under Section 146 IPC, there has to be use of 'violence' or 'force' as against 'criminal force'.

49. As mentioned above, Section 141 defines an 'unlawful assembly' whereas Section 146 defines 'rioting'. The difference between unlawful assembly and rioting lies in the fact that to be a part of unlawful assembly, there need to be at least five persons whose common object to be achieved is one of those mentioned under the said provision. When this unlawful assembly employs use of force or violence to achieve its common object, such a situation would fall under the ambit of 'rioting' as defined under Section 146 IPC.

50. The **Delhi High Court Rules, Volume III Chapter 4** also deals with 'Trial of Riot Cases', the relevant extract of the same is reproduced hereinunder for reference:

> "7. An unlawful assembly, its common object and use of violence must be proved—A charge of rioting presupposes the existence of an unlawful assembly with a common object as defined in Section 141 of the Indian Penal Code. No charge of rioting can be sustained against any person unless it is proved that he was a member of such an unlawful assembly, and that one or more members of the assembly used force or violence in prosecution of its common object. It is, therefore, advisable to refer to the unlawful assembly, its common object, and the use of force or violence in the charge, so that the essential ingredients of the offence are not lost sight of. A lucid statement of the law of unlawful

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> assembly and riot by Plowden, J., will be found in 4 P.R. 1889.
>
> 8. Joint liability of accused—Section 149 of the Indian Penal Code, which makes every member of an unlawful assembly constructively liable for offences committed by other members, in prosecution of the common object of the assembly, deserves careful study. Before Section 149 can be called in aid, the Court must find with certainty that there were at least five persons sharing the common object. It is not essential that five persons must always be convicted before Section 149 can be applied. In this connection please see 1954 Supreme Court Reports 145, A.I.R. 1954 SC 648 and I.L.R. 1954 Punjab 813. If there is uncertainty as to the required number having participated in the crime, joint liability may still arise by virtue of Section 34 of the Indian Penal Code, if it is found that the act constituting the offence was committed in furtherance of the common intention of all. As regards the precise scope and effect of Section 149 and Section 34 Indian Penal Code, 1954, Supreme Court Reports 904 and I.L.R. 1954 Punjab 813 may be consulted, when no joint liability can be established, each accused person can be held responsible only for his own acts."

51. The respondents have also been accused of commission of offences under Sections 186 and 353 of IPC, which read as under:

> **"186.** Obstructing public servant in discharge of public functions.—Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.
>
> **353.** Assault or criminal force to deter public servant from discharge of his duty.—Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with

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> intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person to the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

52. Section 353 uses the terms 'assault' and use of 'criminal force'. The term 'criminal force' has been defined under Section 350 of IPC and 'assault' has been defined under Section 351, which are reproduced herein-under:

> "**350**. Criminal force.—Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.
>
> **351**. Assault.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
>
> *Explanation*.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault."

53. The distinction between an offence under Section 186 and Section 353 was explained by the Hon'ble Apex Court in case of ***Durgacharan Naik v. State of Orissa*** *(1966) 3 SCR 636* in the

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following manner:

> "5. ...it cannot be ignored that ss. 186 and 353, Indian Penal Code relate to two distinct offences and while the offence under the latter section is a cognizable offence, the one under the former section is not so. The ingredients of the two offences are also distinct. Section 186, Indian Penal Code is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions but under s. 353, Indian Penal Code the ingredient of assault or use of criminal force while the public servant is doing his duty as such is necessary. The quality of the two offences is also different. Section 186 occurs in Ch. X of the Indian Penal Code dealing with Contempts of the lawful authority of public servants, while s. 353 occurs in Ch. XVI regarding the offences affecting the human body…"

ii. **Analysis of Video Clips and other Evidence**

54. In the present case, as stated in second supplementary chargesheet, an information was received that some students of Jamia University, some ex-students and some other persons of political organisations would be gathering at Gate No. 1 of the University campus and would protest against NRC and CAB and would also march towards the Parliament of India. Therefore, since specific information had been received by the police, they had barricaded both the sides of road around Gate No. 1 of Jamia University to ensure that law and order situation was maintained. However, at about 3-3:30 PM, a large gathering of persons who were protesting and raising slogans against NRC and CAB had come up from Gate No.1 and 5 to the first line of barricades which had been put by the police. The chargesheet

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clearly mentions that the police had repeatedly made announcements to the gathering to keep their protest peaceful, however, they kept on raising anti-government and anti-police slogans and kept on saying "police go back". Despite repeated warnings and being told that they did not have permission to go to the Parliament and they could protest peacefully without crossing the barricades, the protesting students and the crowd insisted on going to the Parliament. Considering the behaviour of the entire crowd, the police feared/anticipated that in case the mob was allowed to cross the barricades, they could affect the law and order situation in Delhi. Further as per the chargesheet, the crowd had started pushing and breaking the barricades and despite repeated announcements by the loud-hailer not to indulge in violence and to keep their protest peaceful, the crowd had started becoming more violent and had also climbed the barricades and had started breaking them. Once again, they were informed through loud-hailers that their protest was turning violent and specific warning was given to them that their assembly had been declared unlawful assembly and they were informed by way of written banners that Section 144 Cr.P.C. was imposed in 'that' place and the crowd had no permission to gather and protest in 'that' area, *'that'* area being the New Delhi district.

55. As per prosecution, despite the aforesaid warnings, the violent crowd not only tried and succeeded in breaking the first line of barricade, they also started pelting stones at the police force, and violently came up to the second line of barricade. Many policemen were injured during the incident, but the crowd did not stop at that and

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also went on to break the grill/iron divider and kept on proceeding towards the Parliament. In the meantime, the crowd also set on fire, some private and government vehicles and also pelted stones and damaged private cars and some other vehicles. Some of them also removed tyres of the vehicles parked at the spot and put them on fire and the signboard of Police Station Jamia Nagar was also removed/pulled out. This incident was also photographed and video-graphed.

56. This Court after taking note of the above case of prosecution has also gone through the video clips placed on record in this regard.

57. The eleven video clips which have been filed on record support the version of the prosecution. In the video clips, the crowd can be very clearly seen turning violent and pelting stones at the police, raising anti-police slogans such as "*Delhi Police murdabad*", also putting private and public vehicles on fire and hitting the barricades against the police persons who had declared their assembly as unlawful and had told them that since they wanted to proceed to the Parliament and Section 144 Cr.P.C. was imposed there, they could not have gone there to protest. They were also told that they could protest peacefully without crossing the first barricade, and that there was no infringement of their right to protest at that spot. The repeated announcements which were also heard by this Court in the video clips point out that the crowd was repeatedly told not to turn violent or else action would have to be taken against them. Despite stones being pelted on the police persons, repeated requests were being made at the spot.

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58. A perusal of material placed on record would show that the common object of this assembly was to march to the Parliament of India for registration of their protest against the Government policies of NRC and CAB. As per prosecution, Section 144 Cr.P.C. was already imposed in the area near Parliament, and therefore, making efforts to reach a curfew imposed area and carry out protest therein was an unlawful object itself. The same was also brought to the notice of the crowd repeatedly by the concerned police officers by way of repeated announcements which can be clearly seen and heard in video clip number 2.

59. Even otherwise, the mob was stopped by the police by creating a line of barricades, but the assembly had become so large and was pelting stones, was armed with tyres and *dandas,* and were shouting, standing on the barricades and violently pushing the same, and if at all they were trying to exercise the fundamental right of freedom of expression, by their unlawful acts of violence as discussed above their assembly had turned unlawful. Thus, the very means of achieving the object of reaching the Parliament, where prohibitory order under Section 144 Cr.P.C. was in place, were not lawful also.

60. Thus, as contended on behalf of State and visible from the video clips, the common unlawful object which was created at the spot was reaching curfew bound area and using force and violence against the police officers to achieve said object. The main aim of their initial protest against the government policy was lost in the violence and in their persistence to break the law to reach a curfew bound area by use of violence and force against people and objects. Use of force and

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violence by the mob is sufficient, at *prima facie* stage of framing of charge, for constituting the offence of unlawful assembly and rioting.

61. The witnesses whose statements were recorded and filed along with the first chargesheet itself reveal that all the protesters had common object and common motive, who kept on insisting on going to the Parliament for which there was no permission due to imposition of Section 144 Cr.P.C., and later, despite being requested and warned not to cross the barricade, they had turned violent and had started kicking, hitting and breaking the barricades and destroying them. Thus, the common object of the members of the unlawful assembly and their actions was *prima facie* conveyed and reflected through the statements of about 24 witnesses recorded under Section 161 Cr.P.C. filed along with the first chargesheet dated 30.03.2020, apart from the subsequent chargesheets filed.

62. Nowhere in the video clips, the police officers are seen announcing that the protesters cannot protest, rather they were told to protest peacefully which was their right. However, the police was duty bound to stop them from proceeding to a place where Section 144 Cr.P.C was imposed and also considering their violent behaviour, the apprehension and the fear that such violent mob while marching to the Parliament could be a threat to law and order situation in Delhi, cannot be found at fault at this stage as the behaviour of the crowd even in the video clips will show that such apprehension was not purely unfounded.

63. It is also clear from the video clips that the *mob was trying to stop the public servants i.e. the police officers from discharging their*

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duty of maintaining law and order and were breaking the barricades and cross over them, on which human chain of police were trying to hold on to so that the mob could not proceed to a curfew bound area and therefore, there were doing their duty and they were stopped from doing so by pelting stones and by pushing the barricades against all of them. Had the crowd of thousands of protesters been able to push the barricades against the police officers, in which they partly succeeded to, they would have caused grievous injuries to them considering how heavy the barricades are.

64. Before considering the respective case of each of the respondents, this Court has also perused the statements of the independent witnesses in the present case recorded under Section 161 Cr.P.C. The statement of one *Mr. Bilal Ibnu Shahul* recorded by the police reveals that he too was a student of Jamia University, and was present at the University on 13.12.2019 and had appeared for his examination on the same day from 2:00 PM to 4:30 PM and was not part of the protest and therefore, has not been arrested but has been made a witness. He, being a student of the same University, had identified some of the accused persons. The statement of *Mr. Nizam* under Section 161 Cr.P.C. also reveals that he clearly mentions that he was able to identify the accused persons since they frequently visit the canteen. He is working as a caretaker in the Ambedkar Hostel, Jamia University. He said that he was present in the University on 13.12.2019 and 15.12.2020 for the entire day, however, he had not gone to the place of protest and rioting. He identified some of the accused persons on the basis of videos and photographs shown to him

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who were then chargesheeted, however, those whom he could not identify could not be sent for trial. Similar is the statement of *Mr. Salauddin* who is working as a peon in the Ambedkar Hostel, Jamia University who also identified some of the respondents herein.

ROLE OF EACH RESPONDENT: ARGUMENTS AND FINDINGS

i. Respondent no. 1, 2, 3, 6 and 7: Mohd. Qasim, Mahmood Anwar, Shahzar Raza Khan, Umair Ahmed and Mohd. Bilal Nadeem.

65. Mr. M.R. Shamshad, learned counsel had addressed arguments on behalf of respondent no. 1, 2, 3 and 6, whereas Mr. Javed Hashmi had done so on behalf of respondent no. 7. Since these five respondents are similarly placed in the video clips, their contentions are being dealt with together.

66. Learned counsel for respondent no. 1, 2, 3 and 6 had argued that all these respondents namely Mohd. Qasim, Mahmood Anwar, Shahzar Raza Khan and Umair Ahmed were present at the protest site at around 3-3:30 PM and had left thereafter, however, the violence had started much later in the evening and the respondents had already left the spot by that point of time. It was stated that all these 4 accused persons were bonafide students of Jamia University and their CDR locations would also point out their presence at the university campus. It was argued by learned counsel that there was no evidence against these respondents that they had either incited the mob or had done any

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overt act to be part of an unlawful assembly.

67. Similarly, learned counsel for respondent no. 7 had also stated that accused Mohd. Bilal Nadeem was only found standing near a barricade and was doing nothing of violent nature. It was stated that he was a mere bystander among several other protesters.

68. To appreciate the contentions raised by learned counsels on behalf of respondent no. 1, 2, 3, 6 and 7, this Court has seen the video clip number 3 wherein the said respondents have been identified from.

69. Prima facie, in the situation which is visible in the video clips including video clip number 3, the respondents in question are clearly visible being in the first line of the mob, pushing the barricades against the police officers and raising slogans. It is difficult to explain in words, the entire action being unfolded as it is clearly visible in the said video clip, the force used by Delhi Police is only of trying to hold on to the barricades against the violent mob which is also raising slogans of *"Delhi Police Murdabad"* and*"Delhi Police Doob Maro"* and are very violently pushing the barricades against the handful of policemen who were holding of the barricades.

70. They were consciously part of the assembly which had turned violent and consciously did not leave the place of such violence and chose to remain part of it by insisting on going to a curfew imposed area. They would have also known that while they were pushing the barricades against those few policemen, in case they would have succeeded, grievous injuries would have been caused to the police officers. They were, therefore, with the violent mob of protesters and it cannot be distinguished that they did not have the object collectively

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as that of the entire mob. Even otherwise to reiterate, the law of rioting envisages vicarious liability of each participant of an unlawful assembly.

71. Two independent witnesses i.e. Mr. Nizam and Mr. Salauddin in their initial statements recorded under Section 161 Cr.P.C. identified respondent no. 1 and 3 to be a part of the violent mob, and further identified respondent no. 1, 2, 3, 6 and 7, from the photographs developed from the video clips, in their supplementary statements recorded under Section 161 Cr.P.C. The respondent no. 1 and 6 were also identified by one witness namely Mr. Bilal Ibnu Shahul, who was a student of Jamia University. All of them were further identified by several police witnesses, statements of whom are annexed with the third supplementary chargesheet.

ii. **Respondent no. 4 and 5: Mohd. Abuzar and Mohd. Shoaib.**

72. Learned counsel for respondent no. 4, Ms. Kajal Dalal, and learned counsel for respondent no. 5, Mr. Ayush Shrivastava, argued that there was no evidence against these respondents to show that they were a part of the mob or assembly that had turned violent and unlawful. It was stated that they were detained under Section 65B of Delhi Police Act at Police Station Badarpur, but no action was taken against them and their name do not find mention in the first chargesheet. It was stated that they were only peaceful protesters and that there is no video or photograph to show their presence at the place of incident on 13.12.2019.

73. A perusal of record reveals that both Mohd. Abuzar and Mohd.

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Shoaib were detained by the police under Section 65B of Delhi Police Act and taken to PS Badarpur on 13.12.2019. Statement of Inspector Vijay Pal Dhaiya, the then SHO of PS Badarpur was recorded under Section 161 Cr.P.C. who stated that 42 persons were detained from the place of incident at around 5-5:30 PM in order to maintain peace. The CDR locations of respondent no. 4 and 5 also confirm the fact that they were present at the spot of incident.

74. Thus, these respondents were detained by the police due to them being members of unlawful assembly. However, the statements as perused from all the chargesheets will reflect that there is no clear indication that they were violent or had damaged property. But, it is indicated from the statements that they were part of the unlawful assembly after it was so declared at the spot by the senior officers of the police by loud-hailers and continued to be part of it consciously. They do not dispute that they had been detained by the police, and the statements produced before this Court reveal that the persons, detained on that very day, were from the unlawful assembly itself, who were shouting and raising slogans. To maintain peace in the area, they had been detained and taken to the police station for one and a half hours and were later let off also. Thus, this Court cannot rule out their involvement in the unlawful assembly at the very threshold.

75. Therefore, in this Court's opinion though *prima facie* it is clear that they were part of the unlawful assembly, the very essential of crossing the threshold of being part of unlawful assembly and thereafter stepping into area of being defined as a rioter by using violence or force is not reflected qua respondent no. 4 and 5.

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iii. **Respondent no. 8: Sharjeel Imam.**

76. Mr. Talib Mustafa, learned counsel addressed arguments on behalf of respondent no. 8 and stated that there was nothing on record to show that Sharjeel Imam was part of the alleged rioting mob on the day of incident as there was no photographs or video or any eye witness to support the case of prosecution. It was argued that respondent no. 8 only campaigned in favour of peaceful protests and not violence, and he was himself a victim of violence on the day of incident as his spectacles were broken during the course of protests. It was also contended that he had left the place of incident within a short period of time and was not a part of the assembly which may have turned unlawful later on as can also be inferred from his CDRs. On the issue of speeches delivered by respondent no. 8, it was submitted that the speech on 13.12.2019 was delivered at around 7:30 PM which was much later than the incident of violence and the same was a subject matter of another FIR and could not be considered in the present case, and further that the speech delivered on 16.01.2020 at Aligarh Muslim University would only show that he campaigned in favour of *chakka jaam* which is not a violent means of protest.

77. During investigation, the second supplementary chargesheet clearly mentions that accused Sharjeel Imam had on 13.12.2019 given a provocative speech at Jamia University. The relevant portion of the said speech which has been relied upon by the prosecution in the chargesheet, has been reproduced as under:

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तो हम हैं | Constitutionality अलग चीज है, constitution अलग चीज है | यह याद रखिएगा constitutionalityका मतलब हम प्रॉपर्टी नहीं जलाएंगे, ठीक है ? हम लोगों को नहीं मारेंगे, ठीक है ? मगर भाई हम disrupt तो कर सकते हैं ? (बिल्कुल-बिल्कुल) एक छोटी सी चीज है | Disrupt करना कौन सा मुश्किल काम है? उसके लिए organise होना है | यह तो आज हुआ है, यह चिंगारी थी इसमें 4000 लोग-3000 लोग थे | अगर organised way में हो, और लोग आएंगे |ये तो थोड़ा जल्दी हुआ है, आपको भी पता है, अगर ये ही एक हफ्ते बाद जुम्मा को रखा जाए, तो आपको भी पता है और लोग आएंगे | क्योंकि खबर पहुंचेगी | हम लोग मस्जिदों में पर्चे बांट रहे हैं 2 हफ्ते से | अभी बांटते रहेंगे | जुम्मा में, असर में, मगरिब में, हर वक्त बटेगा | (इंशाल्लाह) और अच्छा एक बात और बात ये खौफ सही है, कि वह हमें हिंदुओं की बनिस्बत ज्यादा मारेंगे | इसमें कहीं शक नहीं है | लेकिन यह भी याद रखिएगा कि हमें असम की बनिस्बत कम मारा जाएगा | अगर आपको यह समझ में नहीं आ रहा तो बहुत अफसोस की बात है |(देश की राजधानी है) जो लोग गुमराह कर रहे हैं, अरे ये दिल्ली है भाई | ये flyover गिरे जरा, पूरी दुनिया को खबर होगी | समझ रहे हैं ना ? और तीसरी चीज, के भैया लाठी खाने से ना डरे |(बिल्कुल बिल्कुल)| किसी का हाथ टूटा है, तो वो अलग बात है | किसी का पैर टूटा है, तो अलग बात है | (गर्दन कटेगी तो ?)| लाठी खाने से ना डरे | Tear gas से किसी को एलर्जी हो सकती है, तो आगे सही बात है | लाठी को एलर्जी ना समझे | लाठी 2-4 तो पड़ेगी | और लाठी खाने की कला भी सीख ले, समझ रहे हैं ना आप ?किस तरह कम चोट पड़े, impact कम हो, पहन के क्या आना चाहिए ? समझ रहे हैं ? एक पट्टा हो बीच में | जब तक यह सब नहीं करेंगे, यह सारा बेअसर रहेगा | यह चिंगारी कहां जाएगी ? आग कैसे लगेगी ? आग लगाने के लिए दो काम करना होगा | लाठी खाने के लिए तैयार रहना होगा अव्वल | नंबर दो organise होना होगा | अगर आपकी ख्वाहिश है कि हमें Disrupt करना है तो हम खुद organise होंगे | भले हम पांच लोगों से शुरुआत करें | यह पार्टियां भाड़ में जाए | (बिलकुल) | जो पार्टियां आपको बोल रही हैंकि जंतर-मंतर पर जमा होकर रोना-गाना करते रहो, आप उनको दो टूक में जवाब दीजिए, इससे कुछ हासिल नहीं होगा | (बिल्कुल नहीं होगा) | अगर आप हमारे यहां आ रहे हैं तो आइए, याद रखेंगे हम | ठीक है ना ? नहीं तो देखा जाएगा |(बिल्कुल) | तो यह है सब | मेरी जानिया के सारे तुलबा से यह गुजारिश है कि organise हो जाइए, AISA के भरोसे ना रहें | आम

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आदमी पार्टी के भरोसे ना रहे |(कैसे organise होना है, फिर कैसे ऑर्गेनाइज होना है) और कांग्रेस और आआपा में फर्क करना छोड़े | (बिल्कुल बिल्कुल सही है) | यह चीज याद रखनी है | अब करना क्या है ? जो बातें मैंने बोली, आप अपने हॉस्टल में बोलिए, के हमें चक्का जाम करना है, ठीक है ? हर हॉस्टल, हर मोहल्ला, जहां-जहां स्टूडेंट रहते हैं यार | मुझे जामिया का जोग्राफी ज्यादा पता नहीं, जहां जहां स्टूडेंट रहते हैं | आप एक तो नुमाइंदा सामने कर सकते हैं, जो इस बात पे मुतहिद है ये लोग, और इनका नुमाइंदा है कि हमें चक्का जाम करना है | (बिल्कुल) | आप लोग खुद ग्रुप बनाइए ना भाई, ग्रुप बनाइए और इसमें कोई ननमुटाव नहीं होना है |(वो नहीं सुनेंगे हमारी) | ठीक है, कोशिश करो | इसमें कोई ideological बात नहीं होनी, इसमें बात होनी है चक्का जाम की | और कौन तैयार है, और कौन नहीं ? दो ही बात है भाई | कौन तैयार है कौन नहीं ? और जो तैयार हो उनको जमा कीजिए | ये आप ही को करना होगा यार | लीडर पैदा थोड़े ही होता है | कल ही किसी दोस्त ने मुझे पढवाया इकबाल अहमद का, एक वह था, इकबाल अहमद बिहार से पाकिस्तान हिजरत किए थे,1947 में बच्चे ही थे,वो पार्टीशन की कहानी लिख रहे हैं कि कारवां हमारा निकला यूपी में कहीं से और लाहौर जाना था | शुरुआत में एक अफीम खाने वाला जोकि अफीम को लेकर परेशान रहता था कि हमको कोई अफीम देदे | वह पहले 3दिन अफीम ढूंढ रहा था, ठीक है | इकबाल अहमद लिखते हैं कि सातवें दिन तक कारवां को लीड कर रहा था और अफीम को वह भूल चुका था | और क्या-क्या हुआ cholera....., लोग मारे गए रास्ते में, पंजाब में मारा, पता नहीं कहां-कहां मारा |इस बात को याद रखिएगा लीडर कहीं से भी आ सकता है |ये लोग, ये दलाल है, लीडर नहीं है | लीडर हालात पैदा करता है,बस आपको ईमान से काम करना है |(बेशकतालियां) | एक दूसरे से ही करवाएंगे या पार्टी के पीछे जाएंगे | अल्लाह जानता है कुछ हासिल नहीं होने वाला है | मेरी बस एक गुजारिश है यही बात मैंने पहले कही थी और अब मैं रिपीट कर रहा हूं की आप लोग organise हो जाए | Hostel, department, जो आपको समझ में आए वो आपकी यूनिवर्सिटी है | लेकिन goal क्या है ?हमें चक्का जाम करना चाहते हैं |दिल्ली के मोहल्लों में दूध बंद करना चाहते हैं, पानी बंद करना चाहते हैं | खुलकर बोलिए यार (बिल्कुल) | और आपको पता है कितने लोग ?55 हजारतो डिटेंशन कैंप में है, मुझे पता नहीं मुसलमान कितने हैं,55हजार, जामिया28 हजार, हो जाए arrest 28 हजार | अरे भाई इंसान की जान की कीमत बराबर है कि अलग-अलग है ?(बराबर है बराबर है) | इस पर ध्यान दीजिए थोड़ा | आसाम जल रहा है,यहाँ कुछ कीजिए | बस मैं इसी बात पर खत्म करूंगा, एक शेर है जो मैं पढ़ दूंगा | 46 में बहुत हमला हुआ मुसलमानों पर,46 में बिहार में बहुत हमला हुआ, दो हजार देहातों को खत्म कर दिया | उस पे एक शेर जो अखबारों में बार-बार आता था, वह कुछ दिनों से मैं लगातार रिपीट कर रहा हूं | वो ये है कि "इस्लाम की फितरत में कुदरत ने लचक बख्शी है (बेशक), इस्लाम की फितरत में कुदरत ने लचक बख्शी है (बेशक), इतना ही ये उभरेगा,जितना के दबाओगे |"(नारा ए तकबीर अल्लाह हू अकबर)

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78. The said speech indicates that Sharjeel Imam had stated that they were distributing the pamphlets regarding protest, and further that he himself talked about 'destruction' and also said that those who were protesting should know as to what they should do for the protests and should be ready to take blows of *lathis.* He can be clearly seen instigating the mob and preparing them for further action, and he says that on 13.12.2019, there were 3000 to 4000 persons gathered at the spot as they had been distributing pamphlets for last two weeks, and thus, it can only be imagined as to how many people could gather on the day of *jumma* next week. It is, thus, clear that he had common intention and that he was part of the overall intent and object of the unlawful assembly.

79. Further on 16.01.20220, respondent no. 8 had also delivered a provocative speech at Aligarh Muslim University, wherein he had admitted about his presence at Jamia University on 13.12.2019. The relevant portion of the said speech is reproduced as under:

> है। उसके बाद 4-5 लड़के, जामिया मे violence अभी हुआ, जामिया मे violence उसी वक्त हुआ Sunday night को जामिया मे violence हुआ। Friday night को तो हल्का फुल्का violence हुआ था, मेरा भी चश्मा टूटा था और tear gases चले थे। लोग पुलिस वालों से scuffle कर रहे थे, लेकिन जो major violence है वो Sunday night का है, तो Sunday night को हम लोग बैठे हैं रोड पर, जामिया की खबर आ चुकी है उसी वक्त पुलिस भी आई है कि आप वो side खाली कीजिये। जैसे ही हमने, बस बस

80. Though respondent no. 8 is not seen at the spot in the video clips submitted by the prosecution, he himself admits to the same in his speech of 16.01.2020 that he was present at the spot. The speech delivered by him on the evening of 13.12.2019 is also part of the chargesheet, which has not been disputed by him. The CDR location

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of his mobile phone also points to his presence at the spot. Further, he himself does not dispute his presence during the incident in question on 13.12.2019 and states that his spectacles had got broken during the incident. It is also to be noted that present respondent was not even a student of Jamia University, as mentioned in the chargesheet, and was rather a student of Jawahar Lal Nehru University and a resident of hostel of the said university. His presence on 13.12.2019 in another university is not illegal, however, his speech at Jamia University which was provocative shows that he was also part of the mob which was instigating and provoking which he also admits on 16.01.2020 in his speech at Aligarh Muslim University. In case he was a victim of the violence, there is no complaint lodged by him in this regard.

iv. **Respondent no. 9: Asif Iqbal Tanha.**

81. Arguments on behalf of respondent no. 9 i.e. Asif Iqbal Tanha were addressed by learned counsel Ms. Sowjhanya Shankaran, who stated that even if all the evidence placed on record by the prosecution is accepted as true, no grave suspicion will be made out against him for commission of any of the alleged offences. It was argued that respondent no. 9 was detained under Section 65B of Delhi Police Act at Police Station Badarpur, but no action was taken against him and his name does not find mention in the first chargesheet which points out that he was not an aggressor or part of the violent mob, and was rather a bystander and a peaceful protester. It was stated that there is no allegation of rioting against Asif Iqbal Tanha levelled by any of the witnesses, and he was also not a part of the videos and photographs

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relied upon by the prosecution on the basis of which other seven respondents were identified by the witnesses.

82. A perusal of record reveals that Asif Iqbal Tanha was detained by the police under Section 65B of Delhi Police Act and taken to PS Badarpur on 13.12.2019. Statement of Inspector Vijay Pal Dhaiya, the then SHO of PS Badarpur was recorded under Section 161 Cr.P.C. who stated that 42 persons were detained from the place of incident at around 5-5:30 PM in order to maintain peace. Further, ASI Dhaniram in his statement under Section 161 Cr.P.C. stated that around 40-45 persons were picked up from the Jamia riots on 13.12.2019 and identified respondent no. 9 as he was the loudest among all the detainees and was shouting and arguing with him. The identification was done in presence of HC Vikas Kumar, whose statement has also been recorded under Section 161 Cr.P.C.

83. However, it is further the case of prosecution that during investigation, it was revealed that Asif Iqbal Tanha had posted photographs on his Facebook account on 13.12.2022 i.e. third anniversary of Jamia violence incident whereby he had written that he was detained at PS Badarpur along with his associates on 13.12.2019 and had himself admitted that they were stopped by police while they were marching to Parliament, and he had also posted a photograph showing that he was in custody of police in a bus. The said post, containing photographs and videos of the day of incident, is still visible on the Facebook account of respondent no. 9. In the photographs posted by himself, respondent no. 9 can be seen to be a part of unlawful assembly, which he does not deny, therefore, the

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observation of the learned Trial Court or the contention of the learned counsel for respondent in this regard regarding he being chargesheeted at later stage is explained at this stage that such active participation with the crowd by his own admission became available to the police by way of such social media post also, as the police were still investigating and trying to get the accused and participants as well as injured identified. The third supplementary chargesheet also mentions that further investigation qua Asif Iqbal Tanha was underway and more evidence could be brought on record against him at a later stage.

84. Respondent no. 9 is placed similarly as respondent no. 4 and 5, as he was also detained by the police due to being a member of the unlawful assembly, after it was so declared at the spot by the Senior Officers of the police by loud-hailers and continued to be part of it consciously. But there is no clear indication by way of any statement of any witness or any video or photograph to show that he was a part of any violent mob or had damaged property.

85. Thus, considering the fact that he had to be detained at the spot itself at around 5-5:30 PM and taken to police station so as to maintain peace, and taking note of his Facebook post whereby he had himself admitted that he was apprehended while he was marching towards the Parliament, this Court cannot reach a conclusion that no case at all is made out against the present respondent.

v. **Respondent no. 10: Chanda Yadav.**

86. Mr. Ayush Shrivastava, learned counsel argued on behalf of respondent no. 10 i.e. Chanda Yadav, that respondent no. 10 was a

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mere bystander at the site of protest and had not indulged in any kind of violence. It was stated that as visible from the photographs and video clips, the said respondent was standing peacefully on a top of barricade along with a police officer and she had climbed the barricade out of fear of being run over by a mob of protesters who were pushing her from behind. It was also stated that since Chanda Yadav was a student of Jamia University, her mere presence there alongwith thousands of other protesters cannot be the basis to frame charge for any offence.

87. This Court has seen video clip number 3, in which respondent no. 10 i.e. Chanda Yadav can be seen standing on a barricade and is part of the unlawful assembly which is raising slogans against the Delhi police. The violent mob of hundreds and thousands of persons can also be seen pushing the barricades, against which the policemen were trying to defend.

88. The video clip number 3 as well as other videos also show the distinction between the rioters and the bystanders, as several bystanders who may be students as they carrying bags etc., are seen on the other side of the road quietly standing as well as leaving the area, whereas the rioting mob is clearly visible which is raising slogans and pushing the barricades violently. Many of the members of the mob are standing on the barricades and the policemen being clearly outnumbered by the mob, which had probably taken them by surprise, were not able to hold on to one or two barricades which is also visible in video clip number 3. The intensity and the force with which the barricades were being pushed indicate that the assembly of the persons

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at the spot, even if it may have started with lawful purpose, but with their violent means and behaviour had turned into an unlawful assembly. The law on the point regarding riots is clear, as it has been laid down in the case of ***Lakshman Singh v. State of Bihar*** *(supra)* that in case of rioting, every member of unlawful assembly is vicariously liable for the acts of the other members even if he may have not used the force himself.

89. In the present case, prima facie, Chanda Yadav is not standing as a mere bystander which is visible in the video itself as she is standing on a barricade among the members of a violent mob. Had she been just a bystander, she could have left the spot as many others were doing so. Respondent no. 11 has been identified by three public witnesses, namely Mr. Nazim, Mr. Salauddin and one Mr. Bilal Ibnu Shahul. She has also been identified by police witnesses namely Ct. Shaitan Singh, HC Deendayal, HC Ram Kishor, HC Narender Kumar, ASI Narender Singh and Ct. Dharmendra Jat in their respective statements and supplementary statements recorded under Section 161 Cr.P.C., besides being also named by seven co-accused persons.

vi. **Respondent no. 11: Safoora Zargar.**

90. Ms. Rebecca John, learned Senior counsel addressed arguments on behalf of respondent no. 11 i.e. Safoora Zargar, and stated that respondent no. 11 was neither named in the FIR nor in the chargesheet dated 30.03.2020 or first supplementary chargesheet dated 22.07.2020, but was arraigned as an accused in present case *vide* second supplementary chargesheet dated 01.09.2021 wherein it was alleged

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that she was seen standing near the barricades, outside Jamia University and was one of the rioters. Three-fold arguments were addressed by learned Senior counsel. It was *firstly* contended that prosecution has to cross the 'threshold of identification' and the present respondent has been allegedly identified by the witnesses from video clip number 9, but a bare perusal of that video would show that a person, whose face is covered, has been identified as Safoora Zargar, whereas it is impossible for anyone to recognize with certainty the person shown in the video and it is difficult even to decipher as to whether the said person is a man or a woman. *Secondly*, it was argued that respondent no. 11 has been identified from the video clips by two independent witnesses namely Nizam and Salauddin, who were not present at the spot of incident and they have not averred as to how they were able to identify a person whose face was covered. It was further stated that as far as the statements of co-accused persons are concerned, the same cannot be relied upon. *Thirdly*, it was contended that the CDR location of the present respondent was inconsequential as she was an M.Phil. student of Jamia University and used to reside only around 300 meters from the place of incident, and thus, her location would be of that area only.

91. In order to appreciate the aforesaid arguments and the case of prosecution against respondent no. 11, this Court has seen video clip number 9 since the contention of the learned Senior counsel was that the woman, who is seen in a muffled face as part of the mob, could not have been identified by anyone as her face is not clearly visible. Learned Senior counsel, however, has not stated that the said woman

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in the video is not a part of the violent mob.

92. This Court, while keeping in mind the law on the point of charge, has gone through the statements of two independent witnesses i.e. Mr. Nizam and Mr. Salauddin, who are the caretaker and peon posted in Ambedkar hostel of Jamia University respectively. It is admitted case of respondent no. 11 that she is a student of the university in question. A caretaker in the University campus and the other employee whose designation has been reflected as peon, have stated in their statements under Section 161 Cr.P.C. that since they see the students frequenting the canteen regularly, they were able to identify her, though she was wearing a mask and had her face covered. A person who meets or watches a person day in and day out on a regular basis cannot be said to be not in a position to have identified a person who is wearing a mask since identification can be based also on the physical appearance among several other things. Since two independent witnesses supported the prosecution case that the woman who is part of the violent mob is respondent no. 11, the case of prosecution cannot be thrown out discarding the two statements of independent witnesses at the threshold of the trial which is yet to commence.

93. While discarding statements recorded under Section 161 Cr.P.C. of independent witnesses, the Courts so adjudicating have to give reasons as to why they are disbelieving at the threshold i.e. at the stage of charge, such statements recorded by the police even before the prosecution has been given an opportunity to examine the said witnesses even on point of identification of accused who is seen

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wearing a mask. Needless to say, such question will have to be asked to the witnesses when their testimonies will be recorded and they will be tested on the touchstone of cross-examination. Holding at this stage that the independent public witnesses have given false statements will be against the settled principles of law at the stage of charge.

94. Furthermore, a perusal of the video clip number 9 would also show that this is not a case where no overt act can be attributed to the present respondent as the video clip clearly reveals that the woman who is in mask, identified by the public witnesses who are employees of the concerned university to be respondent no. 11, can be seen to be at the forefront of a violent mob which is pushing and throwing the barricades including her, which by no stretch of imagination can be said to be a protest by peaceful means. The commotion and the number of stones pelted, which can be seen in the video clips, point out that the protest was anything but peaceful.

95. The stones were pelted, as is clear from the video clips, from the side of the violent mob and it is difficult while adjudicating a case of rioting to point out specifically at times, as to who had stone in his hand and who pelted it. The law on riots is clear as laid down in the case of ***Lakshman Singh v. State of Bihar*** *(supra)*. Going by the principles explained therein by the Hon'ble Apex Court, even if it is presumed for a moment that respondent no. 11 is only seen walking in close association with other members of the rioting mob and pushing the barricade while others also had *dandas*, stones and tyres in their hands, the same being adequately visible in clip number 9, the liability of the said respondent cannot be denied.

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ANALYSIS AND FINDINGS

i. Prima facie case of Unlawful Assembly and Rioting

96. The video clips of the incident tendered by the State to this Court, and also filed before the learned Trial Court, will reveal that an uncontrollable mob allegedly of students who had turned violent and had *dandas* in their hands, were pelting stones continuously, were pushing and pulling barricades, climbing barricades, were forcibly trying to go beyond the barricades which had been put up by the police to enforce rule of law, had pulled out and damaged the iron grill which was the road divider had pulled out and damaged the sign board of Police Station Jamia Nagar and the conscious presence and participation of the accused therein would point out towards their being part of unlawful assembly and rioting.

97. The video clips also reveal that a human chain of policemen were holding on to the barricades from one side, and a large number of rioters were pushing the barricades against them forcibly including respondent no. 1, 2, 3, 6, 7 and 10. They did not even consider and must be having knowledge that considering the weight of the barricades, in case the barricades would turn upon the policemen it will cause injuries to police officials and other public persons including media persons standing on the other side.

98. It was State's duty to prevent rioting and violent action. If no timely action was taken and the police force would have allowed the public property being put on fire and rioters being allowed to flout orders of Section 144 Cr.P.C. and reach the place where curfew had

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been imposed, the State would have been accused of dysfunctional and ineffective Government machinery who could not control eruption of violent collective action. The videos will prima facie reveal that the level of opposition which was encountered by the law and enforcing agency was probably not expected by them.

99. As already discussed at length in preceding paragraphs, the assembly that gathered on 13.12.2019 was ***not peaceful*** as is also indicated by the number of bricks and stones pelted at the police force which was also collected from the spot and is case property. The burnt tyres, damaged vehicles, etc., are also part of the case property which will have to be produced during the trial to test the veracity of the statement of the witnesses as well as the prosecution story. The ropes which were burnt by the rioters mentioned in the first chargesheet had turned into ashes and therefore, could not be recovered; the iron grill which was broken by the protesters/rioters was also complained against as well as Police Station Jamia Nagar signboard which had been broken was also informed to the concerned authorities.

100. As far as the argument that a *person who is a mere bystander, without having done any overt act cannot be held guilty even prima facie to be part of unlawful assembly* is concerned, this Court in the preceding paragraphs has specifically mentioned and described the overt acts seen in the video clips pertaining to the respondents, and for those who are not visible in the video clips, their role is clear from the transcript of the provocative speeches or other material evidence placed on record. Further, as laid down in the case of ***Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel*** *(supra),* it is not

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essential that each and every member of the unlawful assembly must commit an offence in furtherance of the common object of assembly and *mere knowledge of the likelihood of commission* of such an offence by the members of the assembly is sufficient. Similarly, in case of rioting, as held by a 4-judge bench of Hon'ble Apex Court in case of ***Mahadev Sharma v. State of Bihar*** *(1966) 1 SCR 18*, every member of unlawful assembly is guilty of the offence of rioting *even though he may not have himself used force or violence*, thus confirming the principle of vicarious liability. Thus, it may follow that use of force by any member of an unlawful assembly, especially in the present case where they had turned violent for a common object of violating Section 144 Cr.P.C. and indulging in violence and damage to public property, will attract Section 146 of IPC. It is to be noted that the term 'violence' may not be restricted to the force against living beings but also will extend to usage of force against non-living objects as in the present case, breaking of barricades and iron grills, and putting the public and private property and vehicles on fire [See ***Lakshmi Ammal v. State of Bihar***, *AIR 1968 Mad 310*].

101. As far as the contention of the learned counsels for respondents that *only 11 persons were picked up from a mob of thousands of protesters* is concerned, the chargesheet clearly mentions that they have been identified by the witnesses who were present at the spot and the rest could not be identified. Merely because some persons could not be identified and have not been chargesheeted at present does not give a right of discharge to others who have been identified and connected with the offence in question. The non-arrest of several

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others cannot be a ground for discharge of the present accused persons. Essentially with the mob of thousands of people who were pelting stones at the police force, the making of videos and finding of witnesses can be difficult. Many of them could not have been arrested probably as they could not have been identified and if the present accused persons have their identifications and want to disclose their identity to the Delhi Police, they may do so as they have every right to do that.

102. The lacunas in investigation may be pointed out at the relevant stage of trial by the learned Trial Court and not by this Court while adjudicating as to whether charges are made out against the accused persons or not.

103. It is also not open to this Court to question the prosecution, at the state of charge, regarding *veracity of the statements of public or police witnesses.* At the stage of charge, the argument addressed before this Court that veracity of the statement could have been gone into since they were filed at a belated stage, is not in consonance with the law at the stage of charge. In this regard, the decision of ***Sajan Kumar v. C.B.I.*** *(supra)* is clear on the point, whereby the Hon'ble Apex Court had declined to interfere with the order of framing of charge against the petitioner therein who had been named by an eye witness after a period of 23 years.

104. The contention of the learned counsels for the respondents that *all the statements of police witnesses recorded under Section 161 Cr.P.C. are similar,* cannot be taken against the prosecution. All the witnesses were present at the spot and were trying to control violent

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mob and rioters at the spot. They were part of the same police team who were receiving the same instructions and were doing the same duty as each other. Since they were witnessing the same incident, at this stage, their statements cannot be held against them and tested as to whether they are false or concocted which can be ascertained only after they are cross-examined in the Court, during trial. It is to be noted that the statements under Section 161 Cr.P.C. are the prosecution case as put forth before the Court alongwith the chargesheet and has to be considered at the stage of charge in a limited manner to hold a view as to whether on the basis of such statements and material, charge is made out against the accused persons or not, i.e. if a strong suspicion arises against the accused persons regarding commission of said offence and whether on the basis of such statements and material, charge can be framed. It is to be noted that the statements of the witnesses can be put to questions which can be put *essentially* during cross-examination at the stage of trial and not through arguments on charge or at any stage before it.

105. Argument of learned counsels for the respondents that there was *no question of the police apprehending that the crowd will march to Parliament* is bereft of any merit. The chargesheet filed by the prosecution also reveals that specific information was received by the police regarding a large number of persons gathering at the spot and wanting to go to the Parliament. The recent Facebook post dated 13.12.2022 of respondent no. 9 Asif Iqbal Tanha also reveals that the protesters had decided to march to the Parliament on 13.12.2019 for protesting against the Government policies of NRC and CAB. The two

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speeches of respondent no. 8 Sharjeel Imam also point out the same.

106. In case, the protesting mob did not want to march to Parliament though the same has been stated by two of the respondents themselves, by one in his speech and other on his Facebook account, it is unclear as to why were they throwing and breaking barricades and using force against the police for being permitted to march ahead. They were in any case, permitted to protest at the place where they were, as is clearly audible from the video clips as conveyed by the police through loud-hailer. Even if the purpose of their assembly was initially lawful to protest against the Government policy, had it been confined to the same by peaceful means and there would have been no insistence of use of force and violence in order to march to a curfew bound area, the case would have been different. In the present era of independent social media, in case the violent mob would have been allowed to march to the streets of Delhi to the Parliament which was a curfew bound area, there was apprehension that more persons could have gathered, endangering the law and order situation in Delhi.

107. The contention of learned counsel for respondents that *word 'yahan' had been tried to be changed to 'wahan' is an afterthought and points out towards falsity of the statement of the witnesses* is also bereft of any merit. A perusal of the first chargesheet dated 30.03.2020 itself reveals that 24 statements under Section 161 Cr.P.C. have been filed alongwith it. The statement of Inspector Upender Singh mentioned in the first chargesheet that the word *'yahan'* instead of *'wahan'* was a typographical error in some statements of the witnesses will have to be explained during trial. The statement of all the

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witnesses which were annexed alongwith the first chargesheet reveal that it is mentioned by all the witnesses in their statements that the protesters were clearly told that they did not have permission to go to the Parliament House as Section 144 Cr.P.C. had been imposed, and that they could carry on their protest peacefully without crossing the barricades, however, they kept on insisting on going to Parliament House. This reveals that it was conveyed to the protesters that they could carry on with their peaceful protest at the spot beyond the barricades and not move towards the road leading to the Parliament House. It means that there was *no indication* that Section 144 Cr.P.C had been imposed *at the spot* as in case that was so, and it was so understood, the police would have asked them to disburse from the spot itself saying that they have no permission to assemble at the place where they were protesting in large number, as in such a case five or more persons could not have gathered at the spot where Section 144 Cr.P.C. is in operation.

108. In this regard, one can read the statements of ASI Jafrudin, ASI Ashok Kumar, ASI Narender, Ct. Ram Kishore, SI Subhash Singh, SI Mahesh, SI R.S. Dagar, Ct. Ajay, Ct. Vipin, ASI Yogesh, Ct. Anuj, and Ct. Vikash, recorded under Section 161 Cr.P.C. and filed alongwith the first chargesheet itself. Further, the discrepancies in this regard, if any, will be tested during cross-examination.

109. Statement of ACP Guru Sewak Singh, recorded on 24.12.2019 was also filed alongwith first chargesheet, which clearly mentions that the crowd was informed through loud-hailer that they did not have permission to go towards Parliament House as Section 144 Cr.P.C.

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was imposed in the New Delhi district. This statement had been filed alongwith the first chargesheet itself and not in the subsequent chargesheets which should have been taken note of by the learned Trial Court. Similar statements qua imposition of Section 144 Cr.P.C. in New Delhi district were also given by ACP Jagdish Yadav, HC Subhash, Insp. Satish Rana, HC Deendayal and Ct. Dharmender which have been filed alongwith the first chargesheet.

110. The fact that all the witnesses in their statements under Section 161 Cr.P.C., filed alongwith the first chargesheet, have categorically stated that Section 144 Cr.P.C. was imposed in the New Delhi area and this fact was announced to the protesting mob should not have been suspected and should have been given due weightage. However, learned Trial Court made it one of its grounds for discharging the accused persons on the premise that the said written order under Section 144 Cr.P.C. had not been placed on record and was placed on record with the subsequent chargesheet only. There were 24 witnesses out of which, 19 stated the similar fact about imposing Section 144 Cr.P.C. in the New Delhi area and that there was no permission to go to Parliament House in the first chargesheet itself and this fact having been conveyed to the mob, therefore, it could not have been ignored only on the basis of non-filing of the said order at the time of filing of first chargesheet.

111. The police had already informed the Court that they will be filing subsequent chargesheets. Moreover, as far as the identity of the accused(s) is also concerned, *the witnesses also stated that they had seen the persons who had caused injuries to the policemen*, had

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deliberately attacked the police and had beaten and injured them whom they can identify when produced before them. The same statement has been made by Sub-Inspector Manish Tyagi, Head Constable Subhash, Inspector Satish Rana, Head Constable Deen Dayal and Constable Dharmender. In their first statement, at the time of filing of the first chargesheet itself, it is stated that the crowd was informed by the loud-hailer that Section 144 Cr.P.C. had been imposed in New Delhi area, the witnesses also state that they were injured by many members of the protesters whom they can identify, if produced before them.

112. Another contention of the learned senior counsel for respondent no. 11 was that in statements under Section 161 Cr.P.C., ACP Guru Sewak Singh and ACP Jagdish Yadav have stated that *they can identify the 'boys' who had indulged in violence* and had attacked and injured the policemen and had stopped them from performing their duty, and therefore, no female was involved in the incident. In this regard, this Court is of the opinion that in contrast to this, statements of Ct. Subhash and Insp. Satish Rana can be perused which would reveal that in the first chargesheet itself in their statements, they have stated that they can identify the 'accused(s)'. The word 'accused' does not differentiate between any gender.

113. This Court has also gone through the statement of Head Constable Nemi Chand recorded under Section 161 Cr.P.C. and filed alongwith the first chargesheet, who states that when the crowd had turned violent, SHO Jamia Nagar had called the duty officer of Police Station Jamia Nagar to send riot equipments to Jamia University, Gate

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No.1 and pursuant to same, Head Constable Nemi Chand had taken 31 Helmets, 92 ropes, 10 Kenchies, 70 body protectors etc. to Jamia University, Gate No.1 and distributed it to the police staff. It also points out that even the police did not anticipate that the assembly for peaceful protest will turn violent and into unlawful assembly and thereafter, turn into a mob of rioters. The witness also states that out of the anti-riot equipment sent at the spot, all the ropes were burnt by the rioters, a lot of riot equipments were broken, 25 barricades were also broken which are part of the record. There is also statement of one Sh. Yasin Khan who states that though he had been present at the spot for the purpose of videography and photography of the protest march at about 10:00AM, it was only at about 3:00 PM that members of the assembly had starting pelting stones at the police and had also put the private vehicles on fire and he had videographed and photographed the same. This witness is a public witness who has also handed over the videography and photographs to the police, who also states that the protesters had turned violent.

114. The statement of Sh. Shokat Ali Khan also supports, at this stage, the case of prosecution, who has also stated that he was a resident of Jamia Nagar and was present at the spot to appeal to the protesters who had turned violent not to indulge in violence and maintain peace.

115. There can be no denying that violence and damaging public property and humans will lead to necessary consequences. It is not the conspiracy or prior meeting of the mind in the present case, but it is the culmination of the actions on the spot with specific intent by

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knowing the implications of such actions which attracts the elements of the offences alleged. A person may join unlawful assembly at any point of time when it is in progress and will be held responsible for all he must have done. A previous criminal concert is not essential to be established. In case such intent or participation is reflected from the material on record, the Court will be justified in framing charges against the accused persons.

116. In the present case, the participation of the respondents is in different ways and therefore they are being dealt with as such which is clear in the preceding paragraphs of this judgment. There are people who have used force and violence while participating. There are those who are consciously participating in the protest when the assembly had turned violent but did not use force. There are those who instigated by their speeches and actions and were present at the spot. The Court also notes that there were some protesters who left the spot when the assembly was turning violent which is also visible in video clip and statement of one of them is also on record under Section 161 Cr.P.C. who had appeared for his examination in the University. Thus, each respondent has been charged according to the extent of his/her role as visible from the material on record.

ii. Right to Protest: Peaceful Protest vs. Violent Protest

117. Protecting and promoting freedom of speech and expression is not only a fundamental constitutional right but every court is duty bound to protect the same. The ***student community*** is not a different group in itself who enjoys any extra right in this regard but being

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citizens of India they have equal right to freedom of speech and expression and protest as all other citizens of this country. No doubt they can also express their views even if views are unpopular as others citizens, however the law protects the right to express one's views and protest peacefully but the law does not protect or guarantee the right to protest and demonstrate violently, threaten the safety of others and damage the public property or threaten and damage their own campus and personal safety of others including the law enforcing agency.

118. The eruption of ***violent collective action*** which is visible in the video clips which have been shown to the Court or were circulated on social media and various news channels, still available on record, conform to the claim of the prosecution that though one material issue of the right of the protesters to protest peacefully against something may remain of much importance, the violent collective action which is visible in the videos and the slogans raised as well as the placards shown in the video clips reveal that this collective action was triggered by feeling against a policy of the government. However, since the peaceful protest which is unfortunately not visible in any of the videos filed by the prosecution nor any videos produced by the respondents to controvert the claim of the prosecution that they were part of a peaceful protest necessitated the State's duty to enforce rule of law as public property was being put on fire and the mob was resorting to violent means of protest which have been discussed in detail in the preceding paragraphs.

119. In this case, the police was being targeted by pelting stones. As there is no confusion about rights of the individuals to express

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themselves and to assemble lawfully for lawful purpose, however, the assembly of such persons cannot be permitted to violate laws of the land or regulations. The police can be seen trying to reason with the protesters repeatedly by announcing that Section 144 Cr.P.C. had been imposed in the area and a placard had been also displayed at the spot. It is true that as per prosecution story, Section 144 Cr.P.C. was imposed in the area where they were proceeding i.e. in the New Delhi district as they wanted to go to the Parliament. The students therefore knew that they were trying to violate the law by insisting on moving towards that area and breaking barricades and putting property on fire, pelting stones at the spot of Jamia area. Protest by violent means can never be part of democracy.

120. Though, in a democracy, *there can be no question of dissent being suppressed or fundamental right of freedom of expression by peaceful means being infringed, however, at the same time, there is no place of violent collective action* to register one's anguish against ideological differences or resistance to a Government policy. The video analysis will also reveal that the acts of resistance being presented as normal by the present respondents were not peaceful resistance but violent protest which had turned into riots.

121. In the present case, *argument of the respondents was that it was a **peaceful protest*** and at best respondents were either bystanders or were part of peaceful protest which is lawful under the constitution. This Court, however, notes as discussed in the preceding paragraphs of this judgment that the crisis at the spot emerged when the protesters turned violent and insisted on violating the law and marching to

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curfew bound area which in law they could not have done. The protesters turned violent and started pelting stones, breaking barricades, standing on the barricades, pushed the barricades against the police officers due to their enormous power of presence and large number, they succeeded in crossing first barricade which in itself prima facie shows the crisis or emerging of situation which could have affected the population and constituted a threat to the organized life of the citizens which the State is bound to protect.

122. Therefore, essentially, though the fundamental right of the assembly that the accused were part of, had to be respected and protected, the State could not have compromised with its fundamental duty to protect other citizens of their human rights and their commitment to ensure rule of law with the aid of constitutional and other legal provisions governing the exercise of such powers by the State.

123. The beginning of pelting of stones, pushing, kicking and breaking of barricades, violent insistence on marching to a curfew bound area marked the ***beginning of the end for the peaceful protest*** for the group of people of assembly. It is clear from the statement of witness i.e. HC Nemichand who states that SHO had called him to come to the spot with riot gear and instruments as the State did not engage in prior restraint nor had restrained the protesters to protest at the places where they had gathered to express their thoughts and convey their dissent. The protesters were asked to restrain from going to curfew bound area only.

124. The emergency powers had to be used to tackle the immediate

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urgent crisis which is visible in video clips to save lives of not only the Investigating Agency but also of the young students and others person at the spot. Whether the limit of legitimate dissent and protest or expression was breached or not has to be tested on different touchstone at the time of trial and Court has to reach a conclusion at that stage.

125. As a ***rule***, peaceful assemblies have to be facilitated without restrictions, however, it may be necessary to impose restrictions while following requirements set out in human rights law and the restrictions should have foundation based on law to achieve legitimate aim and to promote substantial public interest. Mere fear, suspicion or presumption not based on actual reality will not warrant imposition of prior restrictions on assemblies, but case of threat to law and order or national security would invite the same. In the present case, the crowd turning violent and marching towards curfew bound area had given rise to such apprehension and fear which necessitated restricting their movement to the area where they had assembled and they were told that they can peacefully protest there. The public safety concerns had arisen at the spot due to presence of large number of violent protesters and their conduct which had created a significant and imminent danger of injury to bystanders, media persons, public authorities, passersby and damage of public and private property.

126. The primary duty of the police force is to maintain law and order. *The State was also duty bound to ensure that while some persons want to exercise their fundamental right to free speech and expression, the* ***fundamental right to life of others was not infringed***.

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It was the behaviour of the crowd which gave rise to such apprehension, therefore, the argument that the protest was peaceful and is not covered under Section 141 IPC is a claim belied by the video clips and statements of the witnesses.

127. Needless to say, *assemblies cannot be aimed at destroying the rights of others to achieve their own*. Therefore, the right to freedom of peaceful assembly cannot be aimed at destruction of rights and freedom of others who were not part of that protest. The violent intention and behaviour of the assembly was difficult to discern ahead of their so turning violent. Though, the State has to be accountable for their action in case they infringe the fundamental right of freedom of speech and expression and use of excessive force, if any, disproportionate to the threat at the spot, the protesters also are accountable under the Constitution and the duty which runs parallel to their fundamental rights to ensure that the assembly had to be peaceful, by peaceful means and not in violation of law of the land.

128. Though the right of freedom of expression cannot be criminalized, the threat to life of others and public and private property preventing public servants from doing their duty, the actions of violence and damaging property will certainly attract criminal law.

129. Noting the role of internet and social media, the challenge the law enforcing agency will face when provocative actions and speeches are delivered on the spot or slogans are raised, violent acts are committed, they have tendency to spread within seconds threatening the law and order situation in the concerned area. The scale of presence of persons in the assembly who had turned violent and aimed

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at disrupting peace or violating a law as in the present case, the mob which has turned violent at the spot wanted to violate the law by marching to the curfew bound area and indulged in violent acts, it continued occupying the college campus gates and outside of it while continuing to pelt stones, bottles and tubes as one can hear in the announcements made through loud-hailer indicate that it was not a peaceful assembly to attract protection under the Constitution. Assembly which means, gathering of large number of individuals in a publicly accessible place for achieving common expressed purpose and is a planned and organized assembly may turn into unplanned and spontaneous violent and unlawful assembly.

130. The term 'peaceful' would mean conduct of the assembly, lack of violence or use of language or action to incite violence. In the present case, when the case is judged *prima facie* at this stage from the view point of a human right based approach and use of force by law enforcement agency, the video clips on record and the transcript of the speech of one of the respondents namely Sharjeel Imam who was part of the unlawful assembly, who had delivered a provocative speech on 13.12.2019 in the Jamia University campus itself, and the subsequent violent conduct of the unlawful assembly and its members forced the police to ask the assembly to disburse, however, to no avail.

131. This Court also notes that freedom to choose the location or route of the assembly in a public accessible place may, on most of occasions, be legitimate right and their use may be protected by right to freedom and peaceful assembly or expression, subject to relevant rules, regulations and necessary permissions in this regard. However,

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they have equal duty to ensure that they should not infringe the right of other individuals to life and protection of their life and property. The peaceful assembly has no right to damage public or private property and disrupt organized day to day life of other citizens who are not part of the protest.

iii. **Remarks against Investigating Agency**

132. The State is also aggrieved by the observations and remarks passed by the learned Trial Court in the impugned order while discharging the present respondents.

133. Learned ASG for the State argued that it was entirely uncalled for the Trial Court to have given such a discourse and to have recorded such disparaging observations against the investigating agency and its officers, thereby also prejudicing the case of prosecution against the accused against whom charges have been framed. The revisionist i.e. State assails and seeks deletion of following remarks, as highlighted below, from the impugned order:

> " 44. There were admittedly scores of protesters at the site. It cannot be gainsaid that among the multitude, some anti-social elements within the crowd created an environment of disruption and did create havoc. However, the moot question remains: whether the accused persons herein were even prima face complicit in taking part in that mayhem? The answer is an unequivocal 'no'. **Marshalling the facts as brought forth from a perusal of the chargesheet and three supplementary chargesheets, this Court cannot but arrive at the conclusion that the police were unable to apprehend the actual perpetrators behind commission of the offence, but surely managed to rope the persons herein as scapegoats**.

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45. **The prosecution has ex face been launched in a perfunctory and cavalier fashion against the abovementioned persons, except qua Mohd Ilyas@Allen.** To allow the persons charge-sheeted to undergo the rigmarole of a long drawn trial, does not augur well for the criminal justice system of our country. **Furthermore, such a police action is detrimental to the liberty of citizens who choose to exercise their fundamental right to peacefully assemble and protest**. Liberty of protesting citizens should not have been lightly interfered with. It would be pertinent to underscore that dissent is nothing but an extension of the invaluable fundamental right to freedom of speech and expression contained in Article 19 of the Constitution of India, subject to the restrictions contained therein. It is therefore a right which we are sworn to uphold. As laid down in *P Vijayan (supra),* this Court is duty bound to lean towards an interpretation which protects the rights of the accused, given the ubiquitous power disparity between them and the State machinery.

****

47. In the present case, the investigative agencies should have incorporated the use of technology, or have gathered credible intelligence, and then only should have embarked on galvanizing the judicial system qua the accused herein. **Else, it should have abstained from filing such an ill-conceived chargesheets qua persons whose role was confined only to being a part of a protest.**

48. In view of the above in extenso analysis, considering the fact that the case of the State is devoid of irrefragable evidence, all the persons charge-sheeted barring Mohd Ilyas@Allen are hereby discharged for all the offences for which they were arraigned. They be set at liberty, if not wanted in any other case. Photographs of Mohd Ilyas@Allen have been clearly shown in a newspaper, hurling a burning tyre, an overt act has been ascribed to him, and he has been duly identified by Ct Dharmender and some other police witnesses. Therefore, charges levelled in the

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> chargesheet be framed qua accused Mod Ilyas@Allen only. **Needless to say, the investigative agency is not precluded from conducting further investigation in a fair manner, with the leave of the Court, in order to bring to book, the actual perpetrators, with the adjuration not to blur lines between dissenters and rioters, and to desist from henceforth arraigning innocent protesters**."
>
> (Emphasis supplied)

134. During the course of arguments, learned counsels for the respondents submitted that though the observations were made by the Court only after taking note of the conduct of investigating agency, they have no objection if the said remarks are expunged from the record.

135. The law with regard to deletion of remarks passed by a court against police officers and investigating agencies can be traced in various judicial precedents.

136. The Hon'ble Apex Court in ***Dr. Dilip Kumar Deka and Anr. v. State of Assam and Anr.*** *(1996) 6 SCC 234*, while dealing with the tests to be applied for deciding the question of expunction of disparaging remarks against authorities, observed as under:

> "6. The tests to be applied while dealing with the question of expunction of disparaging remarks against a person or authorities whose conduct comes in for consideration before a court of law in cases to be decided by it were succinctly laid down by this Court in State of U.P. v. Mohd. Naim [AIR 1964 SC 703 : (1964) 1 Cri LJ 549 : (1964) 2 SCR 363] . Those tests are:
> (a) **Whether the party whose conduct is in question is before the court or has an opportunity of explaining**

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> **or defending himself**;
> (b) **Whether there is evidence on record bearing on that conduct justifying the remarks**; and
> (c) **Whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct**.
>
> ***
>
> 7. We are surprised to find that in spite of the above catena of decisions of this Court, the learned Judge did not, before making the remarks, give any opportunity to the appellants, who were admittedly not parties to the revision petition, to defend themselves. It cannot be gainsaid that the nature of remarks the learned Judge has made, has cast a serious aspersion on the appellants affecting their character and reputation and may, ultimately affect their career also. Condemnation of the appellants without giving them an opportunity of being heard was a complete negation of the fundamental principle of natural justice."
>
> (Emphasis supplied)

137. The Hon'ble Supreme Court in ***State of West Bengal v. Mir Mohammad Omar & Ors*** *(2000) 8 SCC 382* had directed the Courts to ordinarily desist from castigating the investigation even while ordering acquittal. The relevant observations read as under:

> "41. Learned Judges of the Division Bench did not make any reference to any particular omission or lacuna in the investigation. Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely fool proof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavory criticism

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> against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation. Courts should bear in mind the time constraints of the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward for giving evidence in criminal cases which are realities the police force have to confront with while conducting investigation in almost every case. Before an investigating officer is imputed with castigating remarks the courts should not overlook the fact that usually such an officer is not heard in respect of such remarks made against them. In our view the court need make such deprecatory remarks only when it is absolutely necessary in a particular case, and that too by keeping in mind the broad realities indicated above."

138. Section 6 of Chapter 1, Part H ('The Judgment') of the Delhi High Court Rules for "Practice in the Trial of Criminal Cases" pertains to criticism on the conduct of Police and other officers and warns against such an action by the Courts. The same is reproduced as under:

> "6. Criticism on the conduct of Police and other officers - It is undesirable for Courts to make remarks censuring the action of police officers unless such remarks are strictly relevant of the case. It is to be observed that the Police have great difficulties to contend with in this country, chiefly because they receive little sympathy or assistance from the people in their efforts to detect crime. Nothing can be more disheartening to them than to find that, when they have worked up a case, they are regarded with distrust by the Courts; that the smallest irregularity is magnified into a grave misconduct and that every

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> allegation of ill-usage is readily accepted as true. That such allegations may sometimes be true it is impossible to deny but on a closer scrutiny they are generally found to be far more often false. There should not be an over-alacrity on the part of Judicial Officers to believe anything and everything against the police; but if it be proved that the police have manufactured evidence by extorting confessions or tutoring witnesses they can hardly be too severely punished. Whenever a Magistrate finds it necessary to make any criticism on the work and conduct of any Government servant, he should send a copy of his judgment to the District Magistrate who will forward a copy of it to the Registrar, High Court, accompanied by a covering letter giving reference to the Home Secretary's circular Letter No. 920-J-36/14753, dated the 15th April, 1936."

139. This Bench also, in ***Ajit Kumar v. State (NCT of Delhi)*** *2022 SCC OnLine Del 3945* as well as in ***Sanjay Kumar Sain v. State of NCT of Delhi*** *2023 SCC OnLine Del 1260* had delved into the issue of judicial restraint to be exercised by the Courts and refrain from passing of unwanted, disparaging and scathing remarks against investigating agencies and police officers.

140. The remarks by the learned Trial Court at the stage of charge, regarding the dissent being suppressed by the State should have been avoided as at this stage it would not have been clear to the learned Trial Court itself also as to whether it was the peaceful dissent suppressed by the State or State was trying to curb the menace of violence and spreading of violence and disturbance in the area concerned and working to protect others from violent protesters and ensure rule of law to those who were not part of this violent protest.

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141. Moreover, such scathing remarks or observations pointing out lacunae in investigation can surely be made in certain cases, where the same is totally essential for the decision of the case, that too by keeping in mind the judicial precedents in this regard.

142. Learned counsel for all the respondents also stated that the said remarks may be expunged from the record. Keeping in mind the aforesaid discussion, the remarks as reproduced in para number 133 above are thereby expunged from paragraph number 44, 45, 47 and 48 of the impugned order.

CONCLUSION

143. While there is no denial of right to freedom of expression to every citizen of this country and the obligation of the judiciary to apply these constitutional rights can never be ignored. This Court remains aware of its duty to ensure that the rights which are declared in words in the constitution should not get lost in reality. This Court has tried to therefore, decide the present case in light of constitutional and human rights of the individuals qua the offences alleged to have been committed by them and their grievance against their alleged false implication by alleged overzealous and mala fide police practices in this case. Asserting one's right to raise issues in a democratic set up is not a crime in India. Though protesting has constitutional protection through right of freedom of speech and expression, it is essentially subject to peaceful assembly and peaceful association. It is also subject to legal parameters relevant to protest and the right to peaceful

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assembly like all constitutional rights is subject to "reasonable limits". Thus, the State can restrict the rights including the right to protest by certain ways without violating the fundamental rights of individuals. A protest cannot be allowed to endanger others, damage property, restrict essential services and such a protest cannot receive constitutional protection. The acts of violence and violent speech that instigates violence and endangers rule of law, damage public property and peace are not protected under the Indian Constitution.

144. Though the protesters in a democracy have every right to protest and freedom of expression and to protest against any government policy, however, at the same time the rights so exercised by a group of people being aggrieved by anything cannot infringe the right of others who want public peace and tranquility as community in general and freedom from any disturbance, need for security from violence, security of the public property for which they pay taxes and their own property which they make by their own hard earned money, thus the protests are subject to non-infringement of the same and also non-infringement of law of the land.

145. The decision of the Court has to guarantee procedural protection to the respondents to ensure their fundamental constitutional right of free expression and ensure that they are not put to trial for no offences. However, when there is *prima facie* evidence as in the present case from the statement and material collected and the electronic evidence, the Court has to recognize that adequate warning was given to the protesters from turning violent and that their assembly in view of the violence had been declared unlawful and their conscious decision to

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remain part of violent mob, which was pre-requisites to let the member make a conscious choice of disbursing and not be part of the violence. The circumstances surrounding the present incident which has been captured in the electronic evidence in the video clips and multiple statements of the witnesses who were present at the spot indicate that the protesters were clearly informed that the privilege of peaceful protest and protection guaranteed under Article 19 of Constitution of India would come to an end in case of persisting violence and the protesters indulging in violating the law under various sections of Indian Penal Code and other relevant provisions of law in force.

146. This Court is not expressing that peaceful protest are impermissible but questions the line crossed between the peaceful protest permissible under the law and duty of the law enforcement agency to ensure non violence and rule of law.

147. At the stage of charge, while continuing to follow the rules laid down by the Hon'ble Apex Court, the totality of circumstances and the material on record has to be considered depending on facts of each case. The fine points of such guidelines as laid down in the judicial precedents mentioned in the preceding paragraphs are clear which are designed to guard against mala fide prosecution based on insufficient, inadmissible, inadequate material on record at the stage of charge. True, at the stage of charge, the order cannot be based on one sided appraisal of the material of the competing interest. The method and extent to do so has been laid down in the judicial precedents. The Court is not open to testing admissibility or veracity of the witnesses

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at the stage of charge by oral cross-examination of such statements through oral arguments of the respondents. This is permissible only through cross-examination of the witnesses when they appear in Court at the relevant stage of trial.

148. To allow questioning of veracity of statement or to hold that the statements of all the witnesses examined by the prosecution under Section 161 of Cr.P.C are false will amount to allowing to prejudge whether the statements are false and inadmissible or information gathered and produced before the Court is of no consequence.

149. This Court, while deciding the present case has not relied on the admissions and confessions of the respondents, though it was argued that they were voluntarily and freely made, how so ever incriminating they may be, as this Court has long read the Constitution and laws to not rely on confession made in the police custody. The Court has relied on material which has been discussed in detail and does not agree with learned Trial Court that only the confessional statements which are non-admissible in law were available on record against the present respondents. Though the concern of the Court is with those who have been confined by law, the modern technology as in the present case has helped to bring evidence on record, prima facie to believe that there is strong suspicion against respondents regarding commission of offences as pointed out in the next para.

150. Therefore, in view of the foregoing discussion and for the reasons stated in para number 65 to 95 of this judgment, this Court holds as under:

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i. Respondent number 1, 2, 3, 6, 7, 8, 10 and 11 are charged for commission of offences punishable under Sections 143/147/149/186/353/427 of IPC and Section 3 of PDPP Act, and not under other sections of law mentioned in the chargesheet since there is not enough material against them to implicate them under those sections of law;

ii. Respondent number 4, 5 and 9 are charged for commission of offence punishable under Section 143 of IPC, and not under other sections of law mentioned in the chargesheet since there is not enough material against them to implicate them under those sections of law.

151. As far as Section 308 and 323 are concerned, the specific statements of the witnesses are against accused Mohd. Iliyas, against whom charges have been framed, that he had consciously with intention to cause injuries to them had hit them with a brick. Such statements are missing qua present respondents that they had hit or caused specific injuries to the police officials present at the spot. For Section 308 or 323 IPC, there has to be a specific overt act of a person with intention to cause injuries to be covered under said sections and the vicarious liability in this regard cannot be fixed for want of specific and clear intention or knowledge. However, in case any evidence comes on record against any of the accused persons during trial regarding the offences they have been discharged of, the Trial

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Court may proceed as per law against them.

152. The learned Court has however stated that the police can further investigate the matter and bring to book any other accused if so identified involved in the violence. The said finding is not disturbed by this Court, however, the impugned order is set aside in entirety regarding discharge of respondents herein.

153. Accordingly, the present petition stands disposed of in above terms. Pending applications, if any, also stand disposed of.

154. It is, however, clarified that this Court has not returned any finding on the merits of the case and the observations made hereinabove are only for the purpose of deciding present petition.

155. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MARCH 28, 2023/ns

Click here to check corrigendum, if any

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