

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 377 OF 2015

Vipul Agarwal
Age 38 years, presently res. at
Joint Director's Bungalow,
Gujarat Police Academy,
Karai, Gandhinagar,
Gujarat.

..Applicant (Accused no.24)

v/s.

1. Central Bureau of Investigation,
SCB, Mumbai

2. State of Maharashtra.

..Respondents

Mr. M.V.Thorat for the Applicant.

Mr.Sandeep Shinde, Addl.PP a/w. Y.M.Nakhwa, for the Respondent no.1.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 17th OCTOBER, 2015.
DATED : JULY 22, 2016.**

JUDGMENT.

1. The applicant herein, who was the superintendent of Police at Banaskantha, District Gujarat, has been arrayed as accused No.24 in Sessions Case No. 177/2013 @ 178/2013 @ 577/2013 @ 312/2014 for offences under sections 120B r/w. 302 and 201 of the IPC. The applicant had filed an application at Exh.509 for dropping the proceedings for want

of sanction under section 197 of the Cr.P.C. By another application at Exh.549 the applicant had prayed for discharge on the ground that there was no prima facie material to show his involvement in the crime. The learned Sessions Judge having examined the matter did not find any merit in any of the contentions raised by the applicant and consequently dismissed both these applications by a common order dated 7.4.2015. The applicant has not challenged the dismissal of his discharge application, but by this application he has challenged the order of dismissal of application at Exh. 509.

2. Learned Counsel Shri Thorat for the applicant has submitted that the applicant being a Superintendent of Police is a public servant and that an offence has been registered against him for the acts committed by him in discharge of his official duty. He contends that in terms of Section 197(2) of Cr.P.C. the learned Sessions Judge could not have taken cognizance of the offence without prior sanction of the Government. Learned Counsel Shri Thorat has relied upon the decisions in the case of :

(1) D.T.Virupakshappa Vs. C. Subhash AIR 2015 SC 2022

(2) Omprakash & Ors. v/s. State of Jharkhand (2012) 12 SCC 72.

(3) State of H.P. v/s. M.P.Gupta (2004) 2 SCC 349.

(4) State of Maharashtra Vs. Dr. Buddhikota Subharao.(1993)3SCC 339.

3. The Learned PP Shri Shinde has submitted that in exercising powers under section 227 Cr.P.C. the learned Sessions Judge upon consideration of the record of the case, and the documents submitted therewith, and after hearing the submissions of the applicant and the prosecution in this behalf, has held that there is sufficient ground for proceeding against the applicant for the offence of criminal conspiracy. He has submitted that the Applicant having failed to challenge the said findings cannot now contend that the acts attributed to him were committed in discharge of his official duty. Relying upon the judgment of ***Rajib Ranjan & ORs. Vs. Vijaykumar (2015) 1 SCC 513*** the learned PP Shri Shinde contends that a public servant who enters into a criminal conspiracy or indulges into criminal misconduct while discharging his official duties is not entitled for protection under Section 197(2) of the Cr.P.C.

4. I have perused the records and considered the submissions advanced by the learned counsel for the Applicant and the learned PP for the State.

Before considering the rival contentions it would be advantageous to refer to Section 197 of the Code which reads as under:

“Prosecution of Judges and public servant. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) In the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) ...”

5. A plain reading of this provision makes it clear that Section 197 Cr.P.C. postulates that if any offence is alleged to have been committed by a public servant who cannot be removed from the office except by or with the sanction of the Government, the Court is precluded from taking cognizance of such offence except with the previous sanction of the competent authority specified in this provision. The sanction, however, is necessary if the offence alleged against public servant is committed by him "while acting or purporting to act in the discharge of his official duties".

6. In ***Devinder Singh & Ors vs State Of Punjab Through CBI on 25 April, 2016***, the Apex court after considering the previous pronouncements including State of H.P. v. M.P.Gupta, Omprakash v. State of Jharkhand, State of Maharashtra Vs.Dr. Buddhikota and Veerupaksha v. C. Subhash has summarized the principles emerging from its previous decisions as under :

I. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

II. Once act or omission has been found to have been committed by public servant in discharging his duty it must be

given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent [Section 197](#) CrPC has to be construed narrowly and in a restricted manner.

III. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under [section 197](#) Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

IV. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under [Section 197](#) CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of [Section 197](#) CrPC would apply.

V. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

VI. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

VII. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

VIII. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

IX. In some case it may not be possible to decide the question

effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.

7. In the light of the above principles the question, which falls for determination, is whether the acts attributed to the applicant are directly related to the official duties of the applicant.

8. The present case pertains to fake encounter of Tulsidas Prajapati, who was a key witness in Sohrabuddin murder case. The case of the prosecution in brief is that some police officers from Gujarat & Rajasthan had entered into a criminal conspiracy to nab and kill one Sohrabuddin. In furtherance of the said conspiracy, some of the police officers from Gujarat went to Hyderabad and with the aid of some police officers from Hyderabad, they intercepted a luxury bus in which Sorabuddin, his wife Kausarbi and Tulsiram Prajapati were traveling. They took all the three into their custody. Sorabuddin was allegedly killed in a fake encounter on 26.11.2004. Some days later, Kausarbi was also killed and her body was disposed off.

9. Rubabuddin, the brother of Sohrabuddin wrote a letter dt.14.1.2006 to the Hon'ble the Chief Justice of India to direct an enquiry into his brother's death and disappearance of his sister-in-law Kausarbi, The Hon'ble Supreme Court of India directed the Director General of Police, Gujarat to enquire into the matter. Pursuant to the directions of the Apex Court, an enquiry was conducted and it was revealed that Sohrabuddin was allegedly killed in a fake encounter and that some days later his wife Kausarbi was also killed. The case was investigated by Gujarat police and a charge sheet was filed on 16.7.2007 against 13 persons.

10. Tulsidas Prajapati was a close associate of Sohrabuddin. He was allegedly used to locate and abduct Sohrabuddin and his wife Kausarbi, and was thus being a material witness against the Police personnel he was kept under control by arresting him in Crime No.214 of 2004 at Hatipur Police Station, Udaipur. It is alleged that the accused were monitoring the movements of Tulsiram Prajapati and were in touch with each other. On 10.12.2005 Gujarat Police in C.R.No.1124 of 2004 (popular builder firing case) took Tulsiram Prajapati on production warrant to Ahmedabad. During the police remand, Mr. D.G.Vanzara (A2), who was one of the main

conspirators in eliminating Sohrabuddin, personally interrogated Tulsiram Prajapati. It is alleged that Tulsiram Prajapati had questioned the accused Vanzara about the fake encounter of Sohrabuddin and that Vanzara (A2) had threatened to eliminate him if he broached the said incident before anyone. It is alleged that Tulsiram Prajapati apprehended that he would be killed in a fake encounter. He expressed his apprehension to his nephew Kundan Prajapati, the Addl. Judicial Magistrate, Udaipur, the District Collector, Udaipur and National Human Rights Commission.

11. It is alleged that since the accused were aware that Tulsiram Prajapati was a material witness, in order to shield themselves from the grave implication of abduction and murder of Sohrabuddin and his wife, they hatched a conspiracy to abduct and murder Tulsiram Prajapati. In furtherance of the said criminal conspiracy, on 26.12.2006, the Special Police deputed to escort Tulsiram Prajapati brought him to Ahmedabad and lodged him in Sabarmati Central Jail. After the video conference his custody was handed over to the escort party headed by Narayan Singh (A8) and others. These accused handed over the custody of Tulsiram to two unknown persons and they proceeded to Udaipur and conveyed that

Prajapati had escaped from their custody. They also lodged a false report in respect of the said incident. It is alleged that Mr.Dinesh Kumar, SP Udaipur had called the applicant and informed him about the alleged fleeing of Tulsram Prajapati.

12. On 28.12.2006 the deceased Prajapati was brought by two unknown persons to the scene of offence in handcuffed position. The accused no.7 Ashish Pandya fired at him with his service revolver and thereafter fired a shot on his left arm by country made revolver and placed the said revolver near the body of Tulsiram. Subsequently, Ashish Pandya lodged FIR No. 115 of 2006 against Tulsiram Prajapati and two unknown persons. Thus during the pendency of investigation in Sohrabuddin encounter case, Tulsidas Prajapati was killed in an alleged fake encounter within the jurisdiction of Ambaji Police Station in District Banaskantha, Gujarat.

13. In the meantime, not being satisfied with the investigation in Sohrabuddin murder case conducted by CID Crime- Gujarat, Rubabuddin filed a writ petition before the Apex Court with a request to direct the CBI to investigate the crime afresh. He also sought registration of an offence

and investigation by the CBI into the alleged encounter of Tulsiram, By order dated 12.1.2010 in W.P.No.6 of 2007 the Hon'ble Supreme Court directed the CBI to investigate into the matter. In the said decision, the Apex Court expressed that the alleged killing of Tulsiram Prajapati could be the part of the same conspiracy and directed the CBI to unearth the larger conspiracy. Pursuant to the said directions, the CBI Authorities took over the investigation of the said crime and registered a fresh FIR on 1.02.2010. After conducting further investigation, CBI filed a charge sheet on 23.07.2010, in which in addition to 13 accused named in the charge sheet filed by Gujarat police another 6 accused were named as accused being part of a larger conspiracy. By order dated 27.9.2012 in transfer application filed by CBI, the Apex Court transferred Sohrabuddin murder case to Mumbai.

14. In the meantime, the statement of the applicant was recorded by State CID in Tulsiram Prajapati encounter case and sometime on 30.4.2010 the Investigating Officer filed a report before JMFC, Danta Court stating that Prajapati was killed in a fake encounter case. The applicant came to be arrested by CID Crime, Gujarat in the said crime on 3.5.2010. The CID Crime Gujarat filed chargesheets on 30.7.2010 and 31.07.2010 against the

applicant and the other police personnel for entering into criminal conspiracy and causing death of Tulsiram Prajapati.

15. Narmadabai, the mother of Tulsiram Prajapati had filed a petition (Criminal Writ Petition No.115 of 2007) before the Apex Court alleging that the officials of Rajasthan and Gujarat police had killed her son on 27/28th.10.2006 in a fake encounter and sought for transfer of investigation to CBI. The applicant herein was one of the respondents in the said writ petition. The Hon'ble Supreme Court by order dated 8.4.2011 in Writ Petition (Cri) No. 115 of 2007 entrusted the investigation to CBI and directed the CBI to investigate the case relating to the killing of Tulsidas Prajapati. Pursuant to the directions of the Apex Court, CBI Authorities registered a fresh FIR in Tulsidas Prajapati murder case and took over the investigation of the said crime. During the course of the investigation CBI recorded statements of several witnesses and after completing the investigation filed a charge sheet on 4.9.2012. The Apex Court, by order dated 8.4.2013 in writ petition no 149 of 2012 filed by Amitbhai Anilchandra Shah v/s. CBI quashed the second FIR and directed that the charge sheet filed in pursuance of the second FIR should be treated as

supplementary charge sheet in the first FIR.

16. The imputations against the applicant are that he had entered into a criminal conspiracy to cause death of Tulsiram Prajapati. It is a well settled that the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. In the present case, while deciding the application for discharge, the learned trial judge has enumerated the following circumstances which are relied upon by the prosecution to prima facie prove the involvement of the applicant in the crime.

- i) The accused at the instruction of Mr. D.G. Vanzara, the applicant herein had sent a message to Ashish Pandya, the main shooter of Tulsiram Prajapati, to cancel his leave and join duty.
- ii) Mr. Ashish Pandya, in consultation with Vanzara and in presence of the applicant, had lodged a false report being FIR No.115 of 2006 at Ambaji Police Station stating that Tulsiram Prajapati was killed in a genuine encounter.
- iii) In order to avoid blame of shoddy investigation, the

accused intentionally instructed Mr. Mayur Chawda, Dy. Suptd. on probation, such action was against settled norm that a trainee officer should not be assigned the duty to supervise investigation in serious cases.

iv) During the pendency of the writ petition filed by Narmadabai Prajapati, before the Apex Court for handing over the investigation to CBI, the accused ordered destruction of relevant leave record of Ashish Pandya, thereby causing disappearance of material evidence.

17. The learned Trial Judge after perusal of the records held that there is prima facie material to show that the applicant had contacted Ashish Pandya at the instance of D.G. Vanzara. The statement of Pw266 Jayprakash Patel indicates that Pandya was on sick leave from 28.10.2006 to 6.11.2006 and that his leave records were not available as the same were destroyed as per the order dated 2.1.2008 passed by the applicant/accused. The learned trial Judge while negating the contention of the Applicant that the records were destroyed in a routine manner as per the instructions of the State Government, held that the applicant being a senior police officer was

aware that there were serious allegations that the accused Vanzara had asked Ashish Pandiya to resume duties while he was on leave and that upon resuming duties Ashish Pandya had allegedly killed Tulsidas Prajapati on 29.12.2006 in a fake encounter. The learned trial judge further held that the statement of PW230 Arvindbhai Patel also reveals that Ashish Pandya had lodged the FIR regarding encounter of Tulsiram Prajapati in consultation with Mr. D.G. Vanzara and the Applicant herein. It took about two hours to record the said FIR, which was allegedly false. The learned trial judge further held that the material on record also prima facie reveals that on the night on 28.12.2006 i.e. prior to encounter of Tulsiram Prajapati the Applicant personally patrolled the said area. The learned trial Judge further held that the applicant instead of monitoring the investigation of such a serious case, did nothing but entrusted the investigation to Mayur Chawda, Dy.S.P. on probation against settled norms. The learned Judge therefore held that the said circumstances prima facie raise a strong suspicion that the applicant was a party to the criminal conspiracy to eliminate Tulsiram Prajapati and to cause disappearance of material evidence.

18. It may be mentioned that the Ind. trial judge has rendered a prima facie finding that the applicant had entered in to a criminal conspiracy to kill Tulsiram Prajapati. The applicant has not challenged the said finding, based on which the application for discharge was dismissed but has merely challenged the dismissal of the application for dropping the proceedings against him on the ground that the acts and omissions attributed to him were in fact the acts committed by him in discharge of official duties and hence he is protected by section 197 Cr.PC.

19. The contention that the applicant had merely acted in discharge of duty cannot be accepted as the records prima facie reveal that Sohrabuddin, his wife Kausarbi and Tulsiram Prajapati were brought to Valsad Gujarat and on 26th November 2005 Sohrabuddin was killed in a fake encounter. Kausarbi was also murdered and her body was disposed of. Pursuant to the letter of Rubabuddin, the brother of Sohrabuddin, the Apex Court had ordered to inquire into the matter. The case was inquired and later investigated and interim reports were filed before the Apex court between 11.9.2006 till 22.1.2007. Tulsidas Prajapati was a sole witness to the abduction of Sohrabuddin and Kausarbi and being a key witness in the said

murder case the then Investigating Officer had sought permission to record his statement. In this backdrop a conspiracy was hatched to eliminate Prajapati, with a motive to destroy the evidence with regard to abduction of Sohrabuddin and Kausarbi and thus shield the accused involved in Sohrabuddin and Kausarbi murder. The applicant who is arrayed as an accused in Tulsiram Prajapati murder case, was at the relevant time posted as a Superintendent of Police at Banaskantha.

20. In furtherance of this conspiracy, Prajapati was brought to Ahmadabad in connection with Case no.1124 of 2004 and on the return journey on the intervening night of 26/27.12.2006 from Ahmadabad to Udaipur, he was shown to have escaped the custody. Dinesh M.N. .the SP Udaipur, had telephonically informed the applicant about the alleged escape. On 27.12.2006 at 23.30 hrs the Udaipur police had sent a fax letter to the applicant (SP Banaskantha) stating that the call details of Prajapati show that Prajapati was hiding somewhere at Banaskantha. The call details do not reveal that the said phone was used after the evening of 26.12.2006, hence there was no reason for Udaipur police to inform the applicant that Prajapati was hiding at Banaskantha. Prima facie it appears that the letter

was apparently sent to the applicant as SP Banaskantha only as an attempt to provide opportunity to stage manage an encounter.

21. The imputations in the charge sheet further indicate that Ashish Pandya was on leave from 27.12.2006 and the co-accused Vanjara had conveyed a message to him through the applicant to resume duty. It is alleged that Ashish Pandya had killed Prajapati on 28.12.2006 at Ambaji Village, District Banaskantha, within the jurisdiction of the applicant. The records also reveal that Ashish Pandya had lodged a false report in consultation with Vanjara, in presence of the applicant herein.

22. It is also pertinent to note that the investigation in Sohrabuddin as well as Prajapati murder case was being monitored by the Apex Court. Furthermore, Narmadabai had already filed a petition before the Apex Court seeking direction to the CBI to register the FIR and to investigate the fake encounter of her son. The applicant was therefore well aware that the leave records of Ashish Pandya were relevant for investigating the crime, despite which the applicant ordered to destroy the records under the cloak of official duties. The aforesaid acts prima facie constitute offence of

criminal conspiracy. Needless to state that the acts, which constitute offence of criminal conspiracy or illegal acts committed under a cloak of official duty are not protected by section 197 Cr.P.C.

23. It is to be noted that in ***Rajib Ranjan v. Vijay Kumar 2015 (1) SCC 513***, the Apex Court after considering the decision in ***Buddhikota Subbarao (1993) 3 SCC 339, Raghunath Anant Govilkar (2008) 11 SCC 289 and Shambhunath Mishra (1997) 5 SCC 326*** , has held that :

"the ratio of the aforesaid cases which is clearly discernable is that even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in discharge of his official duties and therefore provisions of Section 197 of the Code will not be attracted."

21. In the instant case the imputations leveled against the applicant, as reflected in the charge sheet, constitute offence of criminal conspiracy. The defence of the applicant that while conveying the message to Ashish Pandya he had only obeyed directions of the accused Vanjara being his superior or that he had destroyed the

leave records of Ashish Pandya in routine course of duty cannot be considered at this stage. Consequently, the proceedings against the applicant cannot be dropped at this stage for want of sanction. As held by the Apex Court, question of sanction can be raised at any stage. Hence, dismissal of this application will not preclude the applicant from establishing his defence and raising the issue at a later stage. In the event the applicant succeeds in proving that there was a reasonable nexus of the incident with discharge of official duty, the trial court shall re-examine the question of sanction and take decision in accordance with law.

22. Under the circumstances, and in view of the discussion supra, the application is hereby dismissed.

(ANUJA PRABHUDESSAI, J.)