

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.449 OF 2017

BHUPESH PRAKASHCHAND GUPTA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Shirish Gupte, Senior Counsel, with Mr.Prem Keswani, with Mr.Ashwin Thool i/b. Ms.Pooja Badekar, Advocate for the Applicant.

Mr.S.S.Pednekar, APP for the Respondent – State.

Mr.Amey Lambhate i/b. Mr.Himanshu Kode, Advocate for Respondent No.2 / Intervenor.

CORAM : A. M. BADAR, J.

DATE : 10th OCTOBER 2017

ORAL JUDGMENT :

1 By this revision petition, revision petitioner / original accused no.9 is challenging the order dated 27th July 2017 passed by the learned Additional Sessions Judge-3, Thane, below Exhibit 220 in Sessions Case No.379 of 2017 between the parties, thereby rejecting the application for discharge filed by him.

2 It is seen from the submission of the Registry dated 26th September 2017 placed before The Hon'ble The Chief Justice that when this revision petition came to be listed before the concerned Hon'ble Judge of this court as per assignment on 7th September 2017, the Hon'ble Judge recused himself from hearing the revision petition and ordered that the same should not be listed before him. From the said submission of the Registry it is seen that when the revision petition came to be listed for hearing before another Hon'ble Judge as per the assignment on 19th September 2017, then the following order came to be passed :

“Not before this Bench. Registry is directed to place this matter before the appropriate Bench.”

Submission of the Registry made to The Hon'ble The Chief Justice on 26th September 2017 further shows that thereafter a praecipe came to be filed by the learned advocate for the revision petitioner on 21st September 2017 stating that the next date for framing the charge before the Trial court is 27th September 2017, and thereafter, the revision petition be listed before any appropriate court for hearing. After considering this submission dated 26th

September 2017 of the Registry, The Hon'ble The Chief Justice was pleased to constitute the Special Bench and assign this revision petition to me. That is how the revision petition came to be listed before this court. The revision petition was heard on 4th October 2017 and on the request of the learned APP, it was adjourned to 9th October 2017. On 9th October 2017, adjournment was sought on behalf of respondent no.2, and therefore, the learned APP insisted that instead of staying the trial, the revision petition be fixed for hearing on 10th October 2017. This court then adjourned the revision petition to 10th October 2017 by recording that on 10th October 2017, endeavour shall be made to decide the petition finally, as suggested by the learned APP. At the time of commencement of hearing of this revision petition, learned advocates appearing for the parties have stated that instead of passing interim order of staying the trial, the revision petition be heard finally. It is further reported that the trial is fixed for framing the charge today itself.

Hence, Rule. Heard forthwith, by consent of parties.

3 Revision petitioner Bhupesh Gupta is arraigned as accused no.9 in Crime No.67 of 2013 registered on 16th February 2013, at Vashi Police Station, District Thane, at the instance of First Informant Surjeet Surjansingh Kalra, Manager of S.K.Builders and Developers, Vashi. Subsequently, the investigation in this crime came to be entrusted to the Crime Branch, Mumbai. Ultimately, on completion of investigation, in all 14 accused persons are made to stand for the trial of offences punishable under Sections 302, 120B, 201 read with Section 34 of the IPC as well as under Section 3/25, 3/27 and 4/27 of the Indian Arms Act vide Sessions Case Nos.281 of 2013 and 379 of 2017, registered in pursuant to the charge-sheet filed on completion of investigation by the police.

4 To understand the prosecution case in better manner, it will be advantageous to name accused persons who are sought to stand the trial by the prosecution in the Sessions Case No.281 of 2013 along with Sessions Case No.379 of 2013. They are -

- Accused No.1 - Venkatesh @ Kumar Ramu Chettiyyar
- Accused No.2 - Emanuel Samuel Amolik
- Accused No.3 - Wajeed @ Zaheer Nambi Ahmed Qureshi
- Accused No.4 - Sumeet Ganpatrao Bachewar
(Subsequently discharged vide order in
(Criminal Revision Application No.383 of
2016)
- Accused No.5 - Mohit @ Altaf Aftab Khan
- Accused No.6 - Mohd. Anis Nasir Ansari @ Bhaijan
- Accused No.7 - Francis Devraj Chauri @ Rajiv
- Accused No.8 - Kailash Balaji Gumane
- Accused No.9 - Bhupesh Gupta
(the present revision petitioner)
- Accused No.10 - Suresh @ Jawahar Chelaram Bijlani
- Accused No.11 - Arif Gulam Dastgir Shaikh
- Accused No.12 - Anurag Shivmohan Garg
- Accused No.13 - Mahesh Chelaram Bijlani
- Accused No.14 - Anil D'souza

According to the prosecution case, an accused named Ashok is still absconding.

5 Facts projected from the police report leading to prosecution of in all 14 accused persons including the one who is already discharged, except one absconding accused named Ashok can be summarized thus:-

(a) Sunil Kumar Lahoria (since deceased) was the proprietor of M/s.S.K.Builders and Developers having its office at Plot No.16, Sector No.28, Vashi, Navi Mumbai. First Informant Surjeet Singh Kalra was in employment of deceased Sunil Kumar Lahoria as Manager. Prosecution witness Ganpat Chawda and Satyendra Pandey were in employment of the firm of deceased Sunil Kumar Lahoria as office boys. Prosecution witness Kokila Yadav was in the employment of the firm of the deceased as maid servant.

(b) On 16th February 2013, in morning hours i.e. at about 8.00 a.m., employees of S.K.Builders and Developers opened the office and started their work. Office boy Ganpat Chawda was cleaning the cabin of Sunil Kumar Lahoria. In the C.C.T.V. at the cabin, Ganpat Chawda saw a person wearing

the dress of a watchman / security staff firing bullets at Sunil Kumar Lahoria just in front of the office. He then started shouting and rushed out of the cabin. Surjeetsingh Kalra (the First Informant), Satyendra Pandey (Office boy) as well as Kokila Yadav (maid servant) followed Ganpat Chawda. This happened at about 8.20 a.m. of 16th February 2013. All of them saw bullets were being fired at their employer Sunil Kumar Lahoria, in front of their office by a assailant wearing the dress of a Security Staff. Another assailant in plain clothes was assaulting Sunil Kumar Lahoria by a sharp edged weapon. As per prosecution case, both assailants also assaulted Sunil Kumar Lahoria by means of a sharp edged weapon.

(c) It is case of the prosecution that both assailants then ran towards area named as Kopar Khairane. Ganpat Chawda, the office boy, chased them and pelted a stone towards them. That stone hit the assailant wearing the dress of a security staff. Then, first informant Surjeet Singh Kalra was successful in nabbing that assailant on the spot itself.

(d) According to the prosecution case, after the assault, while fleeing from the spot, the assailant who was wearing dress of a security staff uttered “बिल्डरोसे पंगा लेके अच्छा नहीं किया. सुरेश बिजलानी, अनुराग गर्ग, भुपेश गुप्ता, सुमित बच्चेवार, एस. पी. अगरवाल, राजू गुप्ता, गजरा, इन लोगेसे पंगा लेके अच्छा नहीं किया. बोला था, नवी मुंबई छोडके जानेके लिये, ये तो होनाही था. इन्होनेही तुमारा काम करवाया है” meaning thereby, “not done good by picking quarrel with Builders; not done good by picking quarrel with Suresh Bijlani, Anurag Garg, Bhupesh Gupta, Sumeet Bachewar, S.P.Agarwal, Raju Gupta, Gajra; told you to leave Navi Mumbai and go; this was to happen, these people have done your work.” That assailant, according to the prosecution case, came to be identified as accused no.1 Venkatesh @ Kumar Ramu Chettiyar. After nabbing him on the spot, he was handed over to the police personnel who rushed to the spot immediately.

(e) According to the prosecution case, Sunil Kumar Lahoria was lying on the footpath in front of his office with severe bleeding wounds on his person. Office boy Satyendra Pandey with the help of Kokila Yadav managed to put him in an auto rickshaw driven by Tejas Janjurne. Satyendra Pandey accompanied injured Sunil Kumar Lahoria and on instructions of the injured, he had taken injured Sunil Kumar Lahoria to Hiranandani Fortis Hospital at Vashi. On the way to the hospital, in the auto rickshaw of Tejas Janjurne, according to the prosecution case, deceased Sunil Kumar Lahoria made an oral dying declaration to Satyendra Pandey, the office boy to the effect that “फॉर्टीस चलो. सुरेश बिजलानी, अनुराग गर्ग, इन्होने मुझे मरवाया. अब मैं नहीं बचुंगा. मुझे लगातार धमकी देते रहे और इन्होनेही मुझे मरवाया” meaning thereby that Sunil Bijlani and Anurag Garg caused assault on him and he will not survive, they were giving threats to him constantly and they have caused assault on him.

(f) Deceased Sunil Kumar Lahoria was admitted to Hiranandani Fortis hospital, Vashi, at about 8.44 a.m. of 16th February 2013. While being taken to the ICU ward located at 5th floor of the said hospital, according to the prosecution case, Sunil Kumar Lahoria has made another oral dying declaration to his son – Sandeep Kumar Lahoria, who by that time had reached to the hospital upon being informed about the incident telephonically by office boy Satyendra Pandey. This oral dying declaration of Sunil Kumar Lahoria made to his son Sandeep Kumar Lahoria is to the effect that “सुरेश बिजलानी, अनुराग गर्ग, सुमित बच्चेवार, एस. पी. अगरवाल, भुपेश गुप्ता, इन सब लोगाने मुझे मरवाया है. अब मैं नहीं बचुंगा” meaning thereby that Suresh Bijlani, Anurag Garg, Sumeet Bachewar (discharged accused), S.P.Agrawal and Bhupesh Gupta (present revision petitioner) caused assault on him and he will not survive. Oral dying declaration to witness Sandeep Kumar Lahoria is reflected in his two police statements.

(g) Ultimately, while taking treatment at Hiranandani Fortis hospital, Sunil Kumar Lahoria came to be declared dead at 10.20 a.m. on 16th February 2013 itself, as seen from the Death Summary issued by Hiranandani Fortis Hospital. In postmortem examination of the dead body, the Autopsy Surgeon opined that Sunil Kumar Lahoria died because of haemorrhage with shock due to multiple fire arm injuries. His postmortem examination came to be conducted at Municipal hospital of Vashi. It reflects presence of atleast five bullet wounds apart from several other wounds on the dead body.

(h) After death of Sunil Kumar Lahoria, his Manager Surjeetsingh Kalra lodged the FIR which came to be recorded at 10.50 a.m. of 16th February 2013 itself at Police Station Vashi, Navi Mumbai. Routine investigation then followed. Apart from drawing spot panchnama and other panchanamas, statement of several witnesses came to be recorded. Seized articles were sent for forensic examination

and ultimately, 14 accused came to be charge-sheeted as indicated in foregoing paragraphs.

(i) According to the prosecution case, as reflected from Column No.16 of the charge-sheet, Sunil Kumar Lahoria was done to death by accused persons by indulging in criminal conspiracy as deceased Sunil Kumar Lahoria was in habit of lodging several reports against Builders with police apart from initiating proceedings against them in various courts of law. He was lodging complaints against Builders with the office of the Navi Mumbai Municipal Corporation and the CIDCO. Several secret meetings were conducted by accused persons in the office of accused no.10 Suresh Bijlani located at Palm Beach Road of Navi Mumbai. The prosecution is alleging that revision petitioner / accused no.4 Sumeet Bachewar is one of the Builders who was attending such secret meetings by visiting office of accused no.10 Suresh Bijlani and as such is a part of conspiracy hatched by the accused persons. After conspiring against Sunil Kumar

Lahoria, accused persons hired contract killers and pursuant to conspiracy, Sunil Kumar Lahoria came to be murdered by them.

(j) It is the case of prosecution that services of accused no.2 Emanuel Amolik were availed by accused no.10 Suresh Bijlani, Sumeet Bachewar (discharged accused no.4), accused no.12 Anurag Garg, accused no.13 Mahesh Bijlani and accused no.9 Bhupesh Gupta (present revision petitioner) and said Emanuel Amolik was paid handsome amount for executing contract killing of Sunil Kumar Lahoria. The planning and preparation of murder of Sunil Kumar Lahoria had been done by accused no.2 Emanuel Amolik by taking help of accused no.5 Altaf Khan, accused no.6 Mohd.Anis, accused no.7 Francis Chauri, accused no.8 Kailash Gumane, accused no.11 Arif Gulam and other accused persons by using their services for keeping a watch and exchanging messages. It is averred that accused no.5 Altaf Khan's Innova vehicle was used for the purpose of

keeping the watch on the spot at the time of executing the killing. Subsequently in order to destroy the evidence of commission of offence, said accused no.5 Altaf Khan had changed the outer look of that vehicle. According to the prosecution case, an amount of Rs.10 Lakh was paid to accused no.2 Emanuel Amolik after executing contract killing of Sunil Kumar Lahoria.

6 During pendency of the Sessions Case bearing no.379 of 2017, revision petitioner / accused no.9 Bhupesh Gupta moved an application for his discharge from the said sessions case. After obtaining the say from the prosecution, by the impugned order passed on 27th July 2017, the learned Additional Sessions Judge, Thane, was pleased to reject the said application at Exhibit 220.

7 I have heard Shri Shirish Gupte, the learned senior counsel appearing for revision petitioner / accused no.9 Bhupesh Gupta. Shri Gupte, the learned senior counsel, submitted that so called evidence against present revision petitioner / accused no.9

Bhupesh Gupta is exactly identical with the one available against Sumeet Bachewar-original accused no.4 and he has been discharged from the said sessions by this court case vide judgment and order dated 1st February 2017 passed in Criminal Revision Application No.383 of 2016. The learned senior counsel submitted that he adopts the arguments which were advanced on earlier occasion on behalf of discharged accused no.4 Sumeet Bachewar as are found in the judgment and order dated 1st February 2017. He argued that revision petitioner/accused no.9 Bhupesh Gupta is having business of Cable T.V. and he is in no way concerned with the business as Builder and Developer. The prosecution alleged that 2½ months prior to the alleged incident of murder of Sunil Kumar Lahoria, present revision petitioner/accused no.9 Bhupesh Gupta met co-accused Suresh Bijlani. Infact, revision petitioner/accused no.9 Bhupesh Gupta was dealing with the deceased and co-accused one year prior to the incident by offering cable connection in buildings constructed by them. The learned senior counsel urged that as case of present revision petitioner/accused no.9 Bhupesh Gupta is exactly

identical with that of Sumeet Bachewar – original accused no.4, who came to be discharged by this court vide judgment and order dated 1st February 2017 passed in Criminal Revision Application No.383 of 2016, with very same reasons, present revision petitioner/accused no.9 Bhupesh Gupta also needs to be discharged. Evidence pressed against the present revision petitioner is same as that was available against the revision petitioner/original accused no.4 Sumeet Bachewar in Criminal Revision Application No.383 of 2016. The learned senior counsel argued that statements of Sandeep Lahoria – son of the deceased shows that he suspected many people in the crime of commission of murder of his father, but all of them are not made as accused. There is no iota of evidence to infer that revision petitioner/accused no.9 Bhupesh Gupta had taken any part in the criminal conspiracy hatched by co-accused. Dying declarations of deceased Sunil Kumar Lahoria are divergent in material particulars and inconsistent in nature. The deceased was not in a fit condition to make dying declarations. Those dying declarations are not implicating present revision petitioner/accused no.9

Bhupesh Gupta. Last dying declaration allegedly made to son named Sandeep Lahoria is coming on record through belated statement of the son and the same is outcome of opinion or suspicion of the declarant. Extra judicial confession allegedly made by accused no.2 Emanuel Amolik to witness Jerald Bowen is pointed out to demonstrate that revision petitioner/accused no.9 Bhupesh Gupta is not attributed any role in the said confession. The learned senior counsel drew my attention to statement of witness Rajubhau Akhade and argued that accused no.1 Venkatesh had not confessed anything by utterances while fleeing from the spot of the incident. There is no evidence on record which even point out grave suspicion against present revision petitioner/accused no.9 Bhupesh Gupta. So called dying declarations does not constitute legally admissible evidence against the revision petitioner.

8 Shri Gupte, the learned senior counsel drew my attention to FIR lodged against revision petitioner/accused no.9 Bhupesh Gupta on 13th August 2012 with an averment that there

was threatening to Sunil Kumar Lahoria (the deceased) to withdraw the case and submitted that the “C” Summary has been filed in that matter. By relying on judgment of the Hon'ble Apex Court in the matter of Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra¹, the learned senior counsel vehemently argued that as held by the Hon'ble Apex Court, if two views are equally possible and when the Judge is satisfied that evidence produced before him gives rise to suspicion only, as distinguished from grave suspicion, he would be fully within his right to discharge the accused. Therefore, in submission of the learned senior counsel, statement of Anil Rishiraj and report lodged prior to the incident in question, are of no assistance to the prosecution as they are not sufficient to raise grave suspicion against revision petitioner/accused no.9 Bhupesh Gupta.

9 The learned senior counsel drew my attention to the impugned order rejecting the discharge application of the present revision petitioner/accused no.9 Bhupesh Gupta and argued that it suffers from total non-application of mind and reasoning given

1 (2008) 10 Supreme Court Cases 394

therein are against the judicial decorum. It is argued that what was considered while rejecting the application for discharge of present revision petitioner/accused no.9 Bhupesh Gupta is case of Sumeet Bachewar – discharged accused no.4. There is no discussion in respect of evidence, if any, available against present revision petitioner/accused no.9 Bhupesh Gupta and its sufficiency for framing the charge.

10 I have heard Shri Pednekar, the learned APP appearing for the respondent / State. He pressed, statement of Sandeep Lahoria, recorded by the Investigator on 24th February 2013, in service, and submitted that, this statement reflects that when in past, the deceased was in police custody, present revision petitioner/accused no.9 Bhupesh Gupta visited the lock up of the police station and threatened deceased Sunil Kumar Lahoria by asking him to withdraw the proceedings filed against Sumeet Bachewar and his group with a further demand of amount of Rupees One Crore. The learned APP drew my attention to the letter dated 22nd September 2012 sent to the police by Chate and

Associates – advocates on behalf of the deceased to demonstrate that revision petitioner/accused no.9 Bhupesh Gupta had, on earlier occasion, pressurized deceased Sunil Kumar Lahoria for withdrawal of cases and for demand of Rupees One Crore. The learned APP further placed reliance on statement of Anil Rishiraj recorded on 6th October 2014 wherein he has stated that once this witness met Sunil Kumar Lahoria (the deceased) and thereafter on one occasion he along with Sunil Kumar Lahoria (the deceased) met co-accused Suresh Bijlani and at that time, co-accused Suresh Bijlani asked Sunil Kumar Lahoria (the deceased) and Mahesh Bijlani (co-accused) to withdraw cases lodged by them against each other. This witness has also stated that he met Sunil Kumar Lahoria (the deceased) in about September 2012 at the court at Belapur and the deceased had told him that co-accused Suresh Bijlani is supporting present revision petitioner/accused no.9 Bhupesh Gupta. With this, the learned APP contended that complicity of present revision petitioner/accused no.9 Bhupesh Gupta is prima facie established in the crime in question. The learned APP by placing reliance on Palwinder Singh vs.

Balwinder Singh and Others² argued that entering into the realm of appreciation of evidence at the stage of framing of charge is not permissible and charges can be framed on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the court at the stage of framing the charge. The learned APP also relied on judgment of the Hon'ble Apex Court in the **State of Tamil Nadu by Inspector of Police vs. N. Suresh Rajan & Others**³.

11 I have heard Shri Amey Lambhate, the learned advocate appearing for respondent no.2 / intervenor Sandeep Lahoria – son of the deceased Sunil Kumar Lahoria at sufficient length of time. He submitted that as the learned advocate on record is on leave for three days, he has been instructed to work out the matter. He is holding for the learned advocate on record. The learned advocate appearing for intervenor – Sandeep Lahoria again pointed out the statement of Anil Rishiraj and argued that this witness has named revision petitioner/accused no.9 Bhupesh

² 2008 (14) SCC 504

³ (2014) 11 SCC 709

Gupta. The learned advocate for the intervenor argued that perusal of statement of Anil Rishiraj goes to show that there was enmity between deceased Sunil Kumar Lahoria and revision petitioner/accused no.9 Bhupesh Gupta and therefore it cannot be said that revision petitioner/accused no.9 Bhupesh Gupta had no motive to eliminate the deceased. It is further argued that deceased Sunil Kumar Lahoria was in custody for sixteen days in cases filed by Sumeet Bachewar and revision petitioner/accused no.9 Bhupesh Gupta. By re-drawing my attention to the letter dated 22nd September 2012 issued by Chate and Associates, the learned advocate for the intervenor argued that revision petitioner/accused no.9 Bhupesh Gupta had pressurized deceased Sunil Kumar Lahoria to withdraw the cases. The learned advocate for the intervenor further drew my attention to record of Crime No.I-317 of 2012 registered at the instance of Sunil Kumar Lahoria (the deceased) against revision petitioner/accused no.9 Bhupesh Gupta and others and submitted that as the dispute was found to be civil in nature, on 20th April 2015, "C" Summary in that case came to be granted. The deceased was threatened to

withdraw this case by revision petitioner/accused no.9 Bhupesh Gupta. The learned advocate for the intervenor further argued that in a complaint bearing no.OMA 212 of 2012, filed by Sumeet Bachewar, Sunil Kumar Lahoria (the deceased) came to be arrested, which resulted in issuance of letter dated 22nd September 2012 by his advocate intimating the fact that revision petitioner/accused no.9 Bhupesh Gupta had pressurized him, while the deceased was in the police custody.

12 The learned advocate appearing for respondent no.2/ intervenor further argued that co-accused had taken name of revision petitioner/accused no.9 Bhupesh Gupta while fleeing from the spot. Witnesses Haroon Shaikh, Faheem Ulbar and Shamsuddin Pirjade are stating that revision petitioner/accused no.9 Bhupesh Gupta had taken active role in conspiracy and he was meeting the co-accused from time to time. Hence, the revision petition needs to be dismissed.

13 I have carefully considered the rival submissions and also perused the affidavit tendered by respondent no.2/ intervenor as well as the entire charge-sheet running into several volumes produced on record by the parties. It is well settled that normally the revisional jurisdiction is exercised rarely when there is glaring defect in procedure and manifest error of law is pointed out, resulting in miscarriage of justice. Perversity in the impugned order can also be a cause for exercising revisional jurisdiction. In the case in hand, bare glance at the impugned order below Exhibit 220 in Sessions Case No.379 of 2013 passed by the learned Additional Sessions Judge-3, Thane, on 27th July 2017 will show that the same is suffering from total non-application of mind. The application at Exhibit 220 for discharge came to be filed by present revision petitioner/accused no.9 Bhupesh Gupta. However, the learned Additional Sessions Judge-3, Thane, considered this application at Exhibit 220 as one filed by Sumeet Bachewar – original accused no.4, who was already discharged from the sessions case. Initially in paragraph 1 and paragraph 3

of the impugned order below Exhibit 220 dated 27th July 2017, the learned Additional Sessions Judge-3, Thane, noted that the application at Exhibit 220 under his consideration is filed by accused no.9 Bhupesh Gupta. In paragraph 6 of the impugned order dated 27th July 2017, the learned Additional Sessions Judge-3, Thane, noted appearance of Shri Sadekar advocate for applicant / accused no.9 Bhupesh Gupta. Arguments advanced by Shri Sadekar advocate for applicant / accused no.9 Bhupesh Gupta were noted in paragraph 6. However, in reasoning part of the impugned order, the learned Additional Sessions Judge-3, Thane, assumed that the application at Exhibit 220 which is under consideration is filed by Sumeet Bachewar – discharged accused no.4 and started giving reasonings for rejecting the same. Following portions reproduced from paragraphs 12, 13 and 18 of the impugned order dated 27th July 2017 by which application for discharge filed by revision petitioner/accused no.9 Bhupesh Gupta came to be rejected needs reproduction as they demonstrate that the learned Additional Sessions Judge-3, Thane, was not alive to the fact that what was under consideration is an application for

discharge filed by applicant / accused no.9 Bhupesh Gupta. Those portions read thus :

“12When complainant and son of deceased specifically uttered against accused Sumit Bachchewar, at this stage, it cannot be said that he was not a member of criminal conspiracy amongst the accused persons. He may not be present on the spot at the time of actual incident. It does not mean or it does not infer that he was not a member of criminal conspiracy. When son of the complainant had stated in his statement before police that his father has given dying declaration statement, at this stage, it cannot be said that deceased Sunilkumar cannot be said that he was not in a position to give his statement. Kokila Yadao might had not stated the name of accused Sumit Bachchewar. However, complainant had specifically stated the name of applicant Sumit Bachchewar.”

“13 By taking clue of this, the Ld. defence counsel Shri Pasbola submitted that the applicant Bachchewar is entitled for discharge on the ground of parity. Once charge-sheet is filed against the accused as they had found sufficient

evidence against the applicant Sumit Bachchewar, without trial applicant Sumit Bachchewar cannot take benefit of the principles of parity. At this stage, it cannot be inferred that role of Sumit Bachchewar and role of S.P.Agarwal, Raju Gupta and Gajanan is one and the same.”

“18He had stated all the incident, though he has not stated the specific name of applicant Sumit Bachchewar. He had also stated that in the said car, Aarif Shaikh and Altaf Shaikh were present.”

14 As the claim of accused / revision petitioners is for their discharge from the sessions case, it is apposite to quote provisions of section 227 and 228 of Code of Criminal Procedure, 1973 (Cr.P.C. for the sake of brevity). Section 227 and relevant portion of section 228 of the Cr.P.C. reads thus:

“Section 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.

Section 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 or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such 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.

15 Bare perusal of provisions of these sections of the Cr.P.C. goes to show that when the judge considers that there is no ground for proceeding against the accused, he is required to discharge the accused by recording his reasons. However, if the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, then he is required to frame charge. By now it is well settled that at this stage detailed scrutiny of material gathered by the prosecution in order to examine whether the same is sufficient for recording the conviction or not is absolutely not essential. What is required is examination of the material from the angle whether the same constitute sufficient ground for proceeding against the accused. Some prima facie material with strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him. The learned APP has rightly placed reliance on paragraph No.20 of the judgment of the Honourable Supreme Court in the matter of State of Tamil Nadu (supra) which reads thus :

“We have bestowed our consideration to the rival submissions and the submissions made by Mr.Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption hat the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for

convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171), in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is

not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.” ”.

16 It will also be necessary to quote a decision of the Hon'ble Apex Court in the matter of **State of Maharashtra vs. Priya Sharan Maharaj and Ors.**⁴ After referring to Section 227 of the Cr.P.C. and power of the Sessions Court to discharge the accused, this is what is observed by the Hon'ble Supreme Court:-

8: The law on the subject is now well-settled, as pointed out in *Niranjan Singh Punjabi v. Jitendra Bijjaya*, (1990) 4 SCC 76 : (AIR 1990 SC 1962), that

4 AIR 1997 SC 2041

at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, 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. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

17 In a later decisions reported in the matter of **Dilawar Babu Kurane v. State of Maharashtra**⁵ the Hon'ble Supreme Court observes thus:

12 : Now the next question is whether a prima facie case has been made out against the appellant. In

5 AIR 2002 SC 564

exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section 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; 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; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge 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 the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

18 At this juncture it is apposite to quote observations in paragraphs 15 and 16 in the matter of Yogesh @ Sachin Jagdish Joshi (supra) which reads thus :

“15 Section 227 contemplates the circumstances whereunder there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of the case, the documents submitted with the police report and after hearing the accused and the prosecution, the Court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.”

“16 It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material 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 a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. [See: State of Bihar Vs. Ramesh Singh and Prafulla Kumar Samal (supra)]

It is, thus, clear that even at the stage of framing the charge, if the evidence produced by the prosecution give rise to suspicion only, then the Judge can discharge the accused.

19 According to the prosecution, first and foremost ground sufficient for proceeding against revision petitioner / accused no.9 Bhupesh Gupta in order to presume that he has

committed offence alleged against him is oral dying declarations of deceased Sunil Kumar Lahoria found from statements of prosecution witnesses recorded by the Investigator during the course of investigation. As case of the present revision petitioner/accused no.9 Bhupesh Gupta to a large extent is based on same set of circumstances and accusations, as were against discharged accused Sumeet Bachewar, I am required to adopt similar reasoning given by me while deciding the case of discharged accused Sumeet Bachewar. Additional material pressed against the present revision petitioner/accused no.9 Bhupesh Gupta will be considered independently. After murderous assault on him at about 8.20 a.m. of 16th February 2013 in front of his office situated in Sector No.28 of Vashi, Navi Mumbai, deceased Sunil Kumar Lahoria was taken to Hiranandani Fortis Hospital by prosecution witness Satyendra Pandey, the office boy, in an auto rickshaw driven by prosecution witness Tejas Janjurne. According to the prosecution case, during the course of his journey to the Hiranandani Fortis hospital, deceased Sunil Kumar Lahoria made statements of relevant facts as to the cause

of his death. Those statements were naturally heard by the auto rickshaw driver namely Tejas Janjurne as well as office boy Satyendra Pandey. Let us see what are those statements.

20 Statement of Tejas Janjurne recorded on 16th February 2013 i.e. immediately on the day of the incident discloses that while being taken to the hospital, deceased Sunil Kumar Lahoria told Satyendra Pandey “ मुझे पाच गोली लगी है ! मेरी सास रूक रही है !” meaning thereby that he has been hit by five bullets and his breathing is being stopped. This statement is not naming assailants and is not implicating the revision petitioner / accused no.9 Bhupesh Gupta.

21 On 24th February 2013 supplementary statement of Tejas Janjurne is recorded wherein he has stated that Sunil Kumar Lahoria told Satyendra Pandey during the course of the journey “बिजलानी ने किया है” meaning thereby that Bijlani has done. This statement of deceased Sunil Kumar Lahoria is also not implicating Gupta, revision petitioner / accused no.9 Bhupesh Gupta.

22 As against these oral dying declarations of Sunil Kumar Lahoria disclosed by Tejas Janjurne, witness Satyendra Pandey in his statement dated 20th February 2013 recorded by Investigator disclosed that while on the way leading to the Hiranandani Fortis Hospital, deceased Sunil Kumar Lahoria told him that “सुरेश बिजलानी व अनुराग गर्ग इन्होने मुझे मरवाया, अब मैं नहीं बचुंगा, मुझे लगातार धमकी देते रहे, और इन्होनेही मुझे मरवाया है” meaning thereby that Suresh Bijlani and Anurag Garg caused assault on him, he will not survive, they were giving threats to him constantly and they have caused assault on him. This statement of deceased Sunil Kumar Lahoria is also not implicating revision petitioner / accused no.9 Bhupesh Gupta in the crime in question in any manner.

23 According to prosecution case, after receipt of telephonic call from Satyendra Pandey regarding assault on his father Sunil Kumar Lahoria, prosecution witness Sandeep Lahoria immediately reached Hiranandani Fortis Hospital and had a talk with his father Sunil Kumar Lahoria. Statement of Sandeep

Lahoria dated 20th February 2013 is reflecting oral dying declaration allegedly made by his father Sunil Kumar Lahoria to the following effect “सुरेश बिजलानी, अनुराग गर्ग, सुमित बच्चेवार, एस. पी. अगरवाल, भुपेश गुप्ता, इन सब लोगाने मुझे मरवाया है. अब मैं नहीं बचुंगा” meaning thereby that Suresh Bijlani, Anurag Garg, Sumeet Bachewar (discharged accused), S.P.Agrawal and Bhupesh Gupta (present revision petitioner) caused assault on him and he may not survive. In his supplementary statement given in English language on 24th February 2013, Sandeep Lahoria stated to the police that upon his arrival to Fortis Hospital at Vashi, his father Sunil Kumar Lahoria informed him that “Beta dekha Suresh Bijlani, Anurag Garg, Sumeet Bachewar, S.P.Agarwal, Bhupesh Gupta in sab logon ne muze marwa diya.....muze nahi lagta ab mai bachunga.....police ko bolo mera statement le.....aisa baar baar bol rahe the.”

24 As at this stage entering into the realm of appreciation of evidence and marshaling of evidence is not permitted, it is not possible to exclude any of the dying declarations from

consideration by holding that those are untrustworthy or unreliable. One will have to accept them as they are by assuming that the deceased was in a fit condition to make those statements. All oral dying declarations will have to be accepted as true at this stage, in view of the law laid down in cases of Palwinder Singh (supra) and Soma Chakravarti (supra).

25 These are five oral dying declarations of deceased Sunil Kumar Lahoria coming on record of investigation as seen from the charge-sheet. Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts, when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Section 32 of the Indian Evidence Act is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicidal or suicidal, provided the statement relates to

the cause of death or exhibits circumstances leading to the death. Let us, therefore, examine whether these statements allegedly made by deceased Sunil Kumar Lahoria can be said to be admissible pieces of evidence and whether those are statements as to the cause of his death or as to any of the circumstances of the transaction which has resulted in his death, so as to form sufficient ground to proceed against revision petitioner / accused no.4 Sumeet Bachewar.

26 In this context, judgment of the Apex Court in the matter of **Pakala Narayan Swami vs. Emperor**⁶ and **Babubhai Bokhiria and Another vs. State of Gujarat**⁷ are relevant. In the matter of **Pakala Narayan Swami (supra)**, there was statement of the widow of the deceased that the deceased had told her that he was going to Behrampur because of the call in writing from wife of the accused. The deceased had disclosed his widow that wife of the accused had told him to come and receive payment of his dues. The Privy Council upon examination of such

6 AIR 1939 PC 47

7 (2014) 5 SCC 568

statement of the deceased as well as provision of section 32(1) of the Evidence Act, observed that, “The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether a particular individual or otherwise and not directly related to the occasion of the death will not be admissible” u/s 32(1) of the Evidence Act.

27 In the matter of Babubhai Bokhiria (cited supra) about one year prior to his death, deceased Mulubhai had written a chit disclosing that if he dies due to murder, then action be taken against Babubhai Bokhiria and his murder will be done by Babubhai only. In the case of murder of Mulubhai, the Honourable Supreme Court examined whether this chit written by the deceased constitutes circumstances of transaction, which resulted in his death. Relevant observations of the Honourable Supreme Court in paragraph No.14 and 15 of this judgment reads thus;

“14. We have given our thoughtful consideration to the rival submissions and the first question which falls for our determination is whether

the note in question is admissible in evidence or in other words, can be treated as a dying declaration under Section 32 of the Act. Section 32 of the Act reads as follows:

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) when it relates to cause of death - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of

his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question.

i) In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.

In the said matter of **Babubhai Bokhiria (supra)**, the Hon'ble Apex Court has also observed thus :

“Before we proceed to consider the case, we must remind ourselves the maxim “*judex damnatur cum nocens absolvitur*” which means that a Judge is condemned when a guilty person escapes punishment. But, at the same time, we cannot forget that credibility of the justice delivery system comes under severe strain when a person is put on trial only for acquittal.....”

28 It is thus clear that general expressions suspecting a particular individual by the deceased are not admissible when the cause of death of the deceased comes into question. In this view of the matter, statements made by deceased Sunil Kumar Lahoria, being his general expression of suspicion, fear and apprehension are not admissible in evidence. It is well settled that at the stage of framing of charges, the court is required to confine its attention to only those material collected during the investigation which can be legally translated into evidence. The requirement of law is to have legally admissible evidence. The material which cannot ultimately be translated into legally admissible evidence cannot be

looked into while framing the charge. The Apex Court in the matter of **Suresh Budhamal Kalani @ Pappu Kalani vs. State of Maharashtra**⁸ and in particular paragraph nos.6 and 7 has observed that at the stage of framing of the charge, the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence that the prosecution may adduce in the trial which would commence only after the charges are framed and accused denies the charges. This judgment of the Hon'ble Supreme Court is followed by this court in cases of **Arun Gawli vs. State of Maharashtra**⁹ and **Laxmi Koli Babita vs. State of Maharashtra**¹⁰. In the case in hand, even if the last oral dying declarations of deceased Sunil Kumar Lahoria allegedly made to his son Sandeep Kumar Lahoria in the morning hours of 16th February 2013 at the Hiranandani Fortis Hospital found in his statement dated 20th February 2013 and 24th February 2013 recorded by the Investigator is accepted as it is, then also the same is not capable of being translated into legal evidence as those

8 1998 SCC (Cri) 1625

9 2007 ALL MR (Cri) 2562

10 2005 ALL MR (Cri) 571

statements are nothing but a general expression indicating apprehension, suspicion and fear of the deceased. It is not constituting circumstances of transaction which resulted in death of Sunil Kumar Lahoria and as such cannot be translated into legal evidence. Therefore, those statements of deceased Sunil Kumar Lahoria cannot constitute a ground for framing the charge against revision petitioner / accused no.9 Bhupesh Gupta.

29 According to the prosecution, the material in the form of confession of co-accused i.e. accused no.1 Venkatesh Chettiyar made while fleeing from the spot after assaulting deceased Sunil Kumar Lahoria forms a sufficient ground for presuming that revision petitioner / accused no.9 Bhupesh Gupta has committed the offence alleged by the prosecuting agency. Utterances allegedly made by accused no.1 Venkatesh Chettiyar while attempting to flee from the spot after committing murderous assault were heard by the first informant Surjeet Kalra and those are reflected in the FIR lodged by him on 16th February 2013. Utterances allegedly made by accused no.1 Venkatesh Chettiyar

are thus :

“बिल्डरोसे पंगा लेके अच्छा नहीं किया. सुरेश बिजलानी, अनुराग गर्ग, भुपेश गुप्ता, सुमित बच्चेवार, एस. पी. अगरवाल, राजू गुप्ता, गजरा, इन लोगेसे पंगा लेके अच्छा नहीं किया. बोला था, नवी मुंबई छोड़के जानेके लिये, ये तो होनाही था. इन्होंनेही तुमारा काम करवाया है”

If freely translated in English, these utterances are to the effect that – “Not done good by taking quarrel with Builders. Not done good by picking up quarrel with Suresh Bijlani, Anurag Garg, Bhupesh Gupta, Sumeet Bachewar, S.P.Agarwal, Raju Gupta, Gajra. Told to leave Navi Mumbai and go. This had to happen. Those persons have done your work.”

30 One may consider these utterances as confession of co-accused Venkatesh Chettiyar against revision petitioner / accused no.9 Bhupesh Gupta. Then, the question will be whether such confession of the co-accused can be called in aid to frame charges against revision petitioner / accused no.9 Bhupesh Gupta, if ultimately it is found that apart from this alleged confession of the co-accused, there is no other evidence against him.

31 On this aspect, it is essential to quote judgment of the Hon'ble Apex Court in the matter of Kashmira Singh vs. State of Madhya Pradesh¹¹. In the said case, the Hon'ble Supreme Court has observed that confession of the co-accused cannot be called in aid to frame the charge against the accused, in absence of any other evidence to do so. This verdict of the Hon'ble Supreme Court is followed by this court in case of Laxmi Koli Babita (supra) which is then followed in Virbhadrām Vyankanna Guggalot vs. State of Maharashtra¹². In order to give finding on this aspect, one will have to consider the remaining part of the evidence pressed in service against revision petitioner / accused no.9 Bhupesh Gupta, which according to the learned APP is regarding indulging in the criminal conspiracy with co-accused for liquidating Sunil Kumar Lahoria.

32 Before adverting to the remaining part of evidence pressed in service against revision petitioner / accused no.9 Bhupesh Gupta, let us accept as it is the alleged confessional

11 AIR 1952 SC 159

12 2008 ALL MR(Cri) 203

statement of co-accused Venkatesh Chettiyar made by him while fleeing from the spot of the incident and heard by the First Informant Surjeet Singh Kalra. If taken at its face value, said utterances of accused no.1 Venkatesh Chettiyar, by no stretch of imagination points out that murderous assault on deceased Sunil Kumar Lahoria was at the instance of revision petitioner / accused no.9 Bhupesh Gupta. General utterance is to the effect that the deceased had not done good by picking up quarrel with Builders. Then, names of some persons such as Suresh Bijlani, Anurag Garg etc. including that of revision petitioner / accused no. 9 Bhupesh Gupta are appearing in the utterance. If such utterances are considered in its totality, then also these utterances allegedly made by co-accused Venkatesh Chettiyar does not reflect that it was revision petitioner / accused no.9 Bhupesh Gupta, on whose instructions, the killing was undertaken and effected. Utterances allegedly made by co-accused Venkatesh Chettiyar are in the nature of the cause for the murderous assault on Sunil Kumar Lahoria. Utterances of the co-accused found in the FIR at the most reflect opinion of the assailant and cannot be construed as

statement of the fact made by him out of his own knowledge. Perusal of the entire charge-sheet does not show that revision petitioner / accused no. 9 Bhupesh Gupta had ever met assailant / accused no.1 Venkatesh Chettiyar who had allegedly taken his name after the incident. Similarly, there is no iota of evidence in the entire charge-sheet to show that this revision petitioner / accused no.9 Bhupesh Gupta had ever contacted another assailants i.e. accused no.3 Wajeed @ Zaheer Ahmed at any point of time. In this view of the matter, it cannot be said that such alleged utterances of accused no.1 Venkatesh Chettiyar amounts to evidence which can ultimately be a legally translatable evidence against the revision petitioner / accused no.9 Bhupesh Gupta during the course of the trial. Even if those utterances of accused no.1 Vyankatesh Chettiyar are held to be forming the material against the revision petitioner / accused no.9 Bhupesh Gupta, then also unless and until existence of some other evidence against him is shown, such confessional statement of the co-accused cannot be looked into for framing

charges against revision petitioner / accused no.9 Bhupesh Gupta in the light of the law laid down by the Hon'ble Apex Court in the matter of **Kashmira Singh (supra)**. Let us, therefore, search whether some other evidence is appearing against him in the charge-sheet.

33 Rajabhau Akhade and Namdeo Gadekar were the Police Constables on the patrolling duty in the area where the incident took place. They immediately rushed on the spot while accused no.1 Venkatesh Chettiyar was still on the spot in injured condition. These police personnel took his custody on the spot itself. They are not disclosing anything about alleged utterances of accused no.1 Venkatesh Chettiyar, as disclosed by First Informant Surjeet Singh Kalra. Similarly, Ganpat Chawda, Satyendra Pandey and Kokila Yadav who rushed on the spot immediately at the time of the incident are also not disclosing anything about alleged utterances of accused no.1 Venkatesh Chettiyar as stated by First Informant Surjeet Singh Kalra. However, without giving any importance to this aspect of the

matter at this stage, let us examine whether there is any other evidence to connect revision petitioner / accused no.9 Bhupesh Gupta to the crime in question, so as to make use of confessional statement of co-accused Venkatesh Chettiyar as per the exposition in the case of **Kasmira Singh (supra)**.

34 According to the prosecution case and particularly as reflected from the statements of Sandeep Lahoria – son of the deceased, deceased Sunil Kumar Lahoria was in profession of building construction and that he had made several complaints against several Builders of Navi Mumbai to various authorities apart from taking out various proceedings in several courts including this court against them. As he had unearthed FSI scam of Builders in Navi Mumbai and therefore, those were having grudge against the deceased. This, according to the prosecution case, constituted a motive for indulging in criminal conspiracy in liquidating Sunil Kumar Lahoria. According to the prosecution case, accused no.10 Suresh @ Jawahar Bijlani and accused no.12 Anurag Garg were the kingpin of the criminal conspiracy. They

along with co-accused – accused no.13 Mahesh Bijlani, revision petitioner / accused no.9 Bhupesh Gupta and Sumeet Bachewar (the discharged accused) indulged in the criminal conspiracy, hired services of accused no.2 Emanuel Amolik for hiring contract killers viz. accused no.1 Venkatesh Chettiyar and accused no.3 Wajeed @ Zaheer and executed the object of the conspiracy by getting Sunil Kumar Lahoria killed through contract killers. For pointing out sufficient ground for proceeding against revision petitioner / accused no.9 Bhupesh Gupta, the learned APP pressed in service statements of prosecution witnesses Haroon Shaikh, Shamsuddin Pirjade, Kisan Bhosale, Anil Rishiraj and Dattashraya Ubale, apart from placing reliance on statements of Sandeep Lahoria and argued that in the backdrop of enmity with the deceased due to his acts of lodging complaints against them, accused persons indulged in criminal conspiracy and revision petitioner / accused no.9 Bhupesh Gupta was one of the conspirators who planned to get Sunil Kumar Lahoria killed.

35 Section 120A of the IPC defines the offence of criminal conspiracy and it reads thus :

120A. Definition of criminal conspiracy - When two or more persons agree to do, or cause to be done -

- (1) an illegal act, or
 - (2) an act which is not illegal by illegal means,
- such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Bare perusal of this definition of criminal conspiracy makes it clear that if circumstances in a case when taken together on their face value are indicating meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal committed by illegal means, then, the

offence of criminal conspiracy punishable under Section 120B of the IPC is made out. In the matter of **John Pandian vs. State**¹³ the Hon'ble Apex Court has held that a few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. As it is alleged that the revision petitioner / accused no.9 Bhupesh Gupta, being one of the conspirators, is liable to be prosecuted for the offence punishable under Section 120B as well as under Section 302 read with 120B or Section 302 read with 34 of the IPC, it is necessary to quote observations of the Hon'ble Apex Court in the matter of **Keharsingh vs. State (Delhi Administration)**¹⁴. Ingredients of the offence of criminal conspiracy are explained by the Apex Court in the following manner in paragraphs 271 and 272 which read thus :

“271. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done

13 JT 2010(130) SC 284

14 AIR 1978 SC 1883

in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Ss. 120-A and 120-B, IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

272. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons

is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299) explains the limited nature of this proposition :

“Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties “actually came together and agreed in terms” to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was “a tacit understanding between conspirators as to what should be done.”

36 What constitutes an offence of criminal conspiracy is further explained by the Hon'ble Apex Court in the matter of State

of Tamil Nadu Vs. Nalini¹⁵ and the relevant observations read thus :-

“The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive action evidencing their joining of conspiracy. It has been said that a criminal conspiracy is a partnership in crime and there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose.”

15 1999 Cri.L.J.124

37 In the matter of Nalini (supra), according to prosecution case, the former Prime Minister Late Shri Rajiv Gandhi was killed in a bomb blast as a result of conspiracy to eliminate him. While allowing the appeal partly, the Hon'ble Supreme Court has considered important points relating to conspiracy which was allegedly hatched by accused persons. It is apposite to cull out those points in order to appreciate as to how the offence of criminal conspiracy can be made out.

(a) Association of accused with one of main accused or even his knowledge about conspiracy would not make him conspirator as agreement is sine quo non of agreement.

(b) Accused harbouring main accused persons knowing fully well their involvement in the commission of offence is itself not sufficient to infer that he was member of conspiracy.

(c) If accused had no knowledge of conspiracy as per evidence produced then his mere association with main conspirator would not make him member of the conspiracy.

(d) If main conspirator is looking after the welfare of the accused who has lost his leg and meeting his medical expenses, then in the absence of any

evidence to the contrary, that would not import accused with the knowledge of conspiracy.

(e) Wireless message showed that only main accused conspirators knew the object of conspiracy. So if accused said that he had strong suspicion that targeted person was Rajiv Gandhi, but it would certainly not make him member of conspiracy without something more.

(f) It is not necessary for the conspirator to be present at the scene of crime. If evidence showed that the accused was in thick of conspiracy then his plea that he derived the knowledge of incident after the explosion is not tenable specially when he himself had purchased the battery which he knew will be used for explosion of human bomb.

(g) Mere association with LTTE hard core militant or the fact that those militants turned out to be the persons responsible for the killing of Rajiv Gandhi, would not make them member of any conspiracy to kill the targeted person.

38 Let us now see what witnesses pointed out by the learned APP are stating and consider whether their recitals taken at the face value reflects prima facie case and constitutes sufficient

ground for proceeding against revision petitioner / accused no.9 Bhupesh Gupta. Haroon Shaikh was one of the driver with accused no.2 Emanuel Amolik. His police statement shows that he had seen accused no.2 Emanuel Amolik, accused no.10 Suresh Bijlani, accused no.13 Mahesh Bijlani, accused no.12 Anurag Garg, accused no.4 Sumeet Bachewar (discharged accused), accused no.9 Bhupesh Gupta (present revision petitioner) and S.P.Agarwal chitchatting in the office of Suresh Bijlani. He further states that he had seen accused no.2 Emanuel Amolik and accused no.12 Anurag Garg smoking cigarettes and chitchatting outside the office of accused no.10 Suresh Bijlani. With this introductory narration, prosecution witness Haroon Shaikh is disclosing the happening of events which took place on 15th February 2013 and on 16th February 2013 i.e. on the day of the incident. As per his version, on 15th February 2013 at about 2.30 p.m., accused no.2 Emanuel Amolik met accused no.10 Suresh Bijlani and accused no.12 Anurag Garg at the office of Suresh Bijlani. He then disclosed further movements of accused no.2 Emanuel Amolik on that day. Then this witness narrated what happened on 16th

February 2013 when he was accompanying his employer accused no.2 Emanuel Amolik. He disclosed that on this fateful day at about 2.30 to 3.00 p.m. he saw accused no.2 Emanuel Amolik going to the office of accused no.10 Suresh Bijlani and then accused no.2 Emanuel Amolik met accused no.10 Suresh Bijlani, accused no.13 Mahesh Bijlani and accused no.12 Anurag Garg at that place. Then this witness is disclosing how consideration for contract killing was paid. However, this witness has not named revision petitioner / accused no.9 Bhupesh Gupta as a person who was in contact with rest of the conspirators on a day earlier to or on the day of the incident. He has not disclosed any complicity of this revision petitioner / accused no.9 Bhupesh Gupta even in payment of the amount as a consideration for murder of Sunil Kumar Lahoria.

39 Shamsuddin Pirzade is dismissed employee of the Police Department who was working with accused no.2 Emanuel Amolik. In the introductory portion of his police statement he has stated that since last one year, accused no.2 Emanuel Amolik was

visiting office of accused no.10 Suresh Bijlani and he has seen accused no.12 Anurag Garg, accused no.9 / present revision petitioner Bhupesh Gupta, accused no.13 Mahesh Bijlani as well as S.P.Agrawal many times in the office of Suresh Bijlani, Thereafter, this witness has disclosed what he had seen on 16th February 2013 i.e. day of the incident, when he was accompanying accused no.2 Emanuel Amolik. He disclosed visit of accused no.2 Emanuel Amolik to the office of accused no.10 Suresh Bijlani at about 2.30 p.m. of 16th February 2013 and meeting of accused no.2 Emanuel Amolik with accused Suresh Bijlani and other accused persons on that day. Statement of this witness does not show that revision petitioner / accused no.9 Bhupesh Gupta was seen by him on that day in company of the co-accused.

40 Kisan Bhosale was working with accused no.13 Mahesh Bijlani. He has stated to police that S.P.Agrawal, accused no.4 Sumeet Bachewar (discharged accused), accused no.9/ present revision petitioner Bhupesh Gupta and Vijay Gajra used to

come to meet accused no.10 Suresh Bijlani at his office at Fairmount. He has further stated that accused no.2 Emanuel Amolik also used to come to meet accused no.10 Suresh Bijlani. Apart from this, Kisan Bhosale stated that office of Suresh Bijlani used to be visited frequently by several Builders of Navi Mumbai, several Officers of Navi Mumbai Municipal Corporation and CIDCO as well as agriculturists who wanted to sell their lands. They all were meeting Suresh Bijlani. He also disclosed that Police Commissioner of Navi Mumbai Shri Sharma used to accompany accused no.12 Anurag Garg for jogging. Thereafter, this witness has disclosed what happened on 16th February 2013 when he was in the office of accused no.10 Suresh Bijlani. This witness stated how money was paid to accused no.2 Emanuel Amolik after murder of Sunil Kumar Lahoria. Nowhere this witness has disclosed complicity of revision petitioner / accused no.9 Bhupesh Gupta even remotely in the conspiracy of killing Sunil Kumar Lahoria.

41 Statement of Anil Rishiraj came to be recorded on 6th October 2014, whereas the incident in question took place on 16th February 2013. He was knowing accused Mahesh Bijlani as well as deceased Sunil Kumar Lahoria. He claims to have met the deceased in September 2012 in Belapur court when Sunil Kumar Lahoria was in police custody. At that time, said Sunil Kumar Lahoria told this witness that accused Suresh Bijlani is supporting Sumeet Bachewar and revision petitioner/accused no.9 Bhupesh Gupta is lodging cases against him (Sunil Kumar Lahoria). Then this witness claims to have met co-accused Suresh Bijlani through co-accused Mahesh Bijlani and convinced co-accused Suresh Bijlani. This witness claims his next meeting with co-accused Suresh Bijlani and Mahesh Bijlani was attended by Sunil Kumar Lahoria (since deceased) also and in that meeting co-accused Suresh Bijlani gave understanding to co-accused Mahesh Bijlani and deceased Sunil Kumar Lahoria not to file cases against each other. This witness is not speaking anything indicating that present revision petitioner/accused no.9 Bhupesh Gupta had any part in criminal conspiracy hatched for eliminating the deceased.

42 Dattashraya Ubale is an employee of the Police Department and was working as official bodyguard to accused no.10 Suresh Bijlani. Introductory part of his police statement is to the effect that accused no.2 Emanuel Amolik, accused no.12 Anurag Garg, S.P.Agrawal and accused no.4 Sumeet Bachewar (discharged accused no.4) are known to him. He stated that accused no.2 Emanuel Amolik used to visit the office of accused no.10 Suresh Bijlani two or three times in a week whereas accused no.12 Anurag Garg and one S.P.Agrawal used to meet Suresh Bijlani regularly. He has not stated that revision petitioner / accused no.9 Bhupesh Gupta ever used to meet accused no.10 Suresh Bijlani even occasionally. Being his official bodyguard, this witness used to be constantly present with accused Suresh Bijlani, but he is not stating that revision petitioner/accused no.9 Bhupesh Gupta used to meet the said accused.

43 It is, thus, seen from statements of these witnesses that several Builders of Navi Mumbai apart from Officers of statutory

bodies such as Municipal Corporation and CIDCO used to visit accused no.10 Suresh Bijlani at his office frequently. Revision petitioner / accused no.9 Bhupesh Gupta also used to visit accused no.10 Suresh Bijlani. All these witnesses, except Dattatraya Ubale and Anil Rishiraj apart from disclosing these casual visits of several persons including revision petitioner / accused no.9 Bhupesh Gupta, have also categorically disclosed prima facie material to infer about criminal conspiracy to eliminate Sunil Kumar Lahoria by disclosing what had transpired on 15th and 16th February 2013 amongst rest of accused persons. However, none of them have even remotely disclosed any incriminating material against the revision petitioner / accused no.9 Bhupesh Gupta. General introductory statements are made by all of them except Dattatraya Ubale and Anil Rishiraj to the effect that apart from other visitors, (which even included one S.P.Agrawal, who is also named in utterances of the co-accused and disclosure of the deceased to his son) revision petitioner / accused no.9 Bhupesh Gupta was also used to be one such visitor to the office of accused no.10 Suresh Bijlani. Apart from occasional casual visits of this

revision petitioner to accused no.10 Suresh Bijlani, nothing more is stated by all these witnesses. By mere visits and meeting with another who may be an accused in a case, such visitor cannot be said to be one of the conspirators. Some thing more is expected to be shown in terms of provisions of Section 120A of the IPC. Such visits by present revision petitioner/accused no.9 Bhupesh Gupta were not even shown to be proximate to the date of incident of murder of Sunil Kumar Lahoria.

44 Apart from the witnesses pointed out by the learned APP, I have scrutinized the entire charge-sheet and come across statements of Shamkant Patil and Sanjay Zhot who are employees of the Police Department and who were working as official bodyguard of accused no.10 Suresh Bijlani. They both are disclosing visits of other co-accused to the house of accused no.10 Suresh Bijlani but have not made any statement to the effect that revision petitioner / accused no.9 Bhupesh Gupta ever visited accused no.10 Suresh Bijlani. In supplementary statement, Sanjay Zhot, Police Nayak, has stated that on the day of the incident i.e.

on 16th February 2013, at about 12 noon, Advocate S.P.Agrawal came to meet Suresh Bijlani at his house and then they went to the office of accused no.10 Suresh Bijlani. There accused no.12 Anurag Garg, accused no.2 Emanuel Amolik and Advocate Sachdev came to meet accused no.10 Suresh Bijlani. Thus, it is clear that revision petitioner / accused no.9 Bhupesh Gupta never contacted any of accused persons though meetings and movements of other accused persons indicating criminal conspiracy are seen from disclosures made by prosecution witnesses.

45 Faheem Ulbar is one of the drivers of accused no.2 Emanuel Amolik. He disclosed meeting of accused persons at about 2.30 – 3.00 p.m. of 16th February 2013 at the office of accused no.10 Suresh Bijlani but has not named revision petitioner / accused no.9 Bhupesh Gupta as one of the persons attending that meeting. His supplementary statement shows meeting of accused persons which took place on 15th February 2013 i.e. a day earlier to the incident. Name of revision petitioner

/ accused no.9 Bhupesh Gupta is not figuring in the statement of Faheem Ulbar as a participant in such meeting.

46 Jerald Bowen is father of Jackson who is partner of accused no.10 Suresh Bijlani. His statement as well as statement of Jackson shows how money was paid as a consideration for executing the contract of killing to accused no.2 Emanuel Amolik. Extra judicial confession of accused no.2 Emanuel Amolik is reflected from their statements. In that extra judicial confession, allegedly made by accused no.2 Emanuel Amolik, no role is attributed to revision petitioner / accused no.9 Bhupesh Gupta. Statement of these witnesses indicates that nothing is shown to have been contributed by revision petitioner / accused no.9 Bhupesh Gupta in the contract killing of Sunil Kumar Lahoria.

47 Apart from statements of these witnesses, no other material in respect of criminal conspiracy could be found except statement of Sandeep Lahoria – son of the deceased.

48 Let us now put on record what Sandeep Kumar Lahoria states in his statement. On 20th February 2013 Sandeep has stated to police that his father deceased Sunil Kumar Lahoria had lodged reports against the accused no.12 Anurag Garg and others at Nerul Police Station and Khargar Police Station. Some proceedings were also taken out in that regard before this court. It is further averred by him that accused no.10 Suresh Bijlani had called his father twice and asked him to withdraw cases against accused no.12 Anurag Garg and Sumeet Bachewar (discharged accused no.4). His father was called at the office of the Fine Art in October 2012 where Vijay Gajra, S.P.Agrawal, Sumeet Bachewar (discharged accused no.4), accused no.9/present revision petitioner Bhupesh Gupta, accused no.12 Anurag Garg were present apart from accused no.2 Emanuel Amolik and at that time accused no.10 Suresh Bijlani asked his father to withdraw the cases. It is further averred that S.P.Agrawal had installed secret cameras in front of the office of his father and he transmitted details of movements of his father to assailants. Then, detail

statement of Sandeep Lahoria is seen to have been recorded on 24th February 2013 by Unit No.I of the Crime Branch wherein apart from reciting the oral dying declaration of his father, he gave details of correspondence made by his father to police as well as initiation of various proceedings by his father before police authorities and courts. Allegations are made against several Builders and persons such as S.P.Agrawal, Vijay Gajra and Pramod Mittal apart from accused persons. In his supplementary statement dated 24th February 2013, Sandeep Lahoria alleges that with the help of co-accused Suresh Bijlani, Agarwal (who is not made accused), Sumeet Bachewar (discharged accused) and others plotted a plan to harass his father by implicating his father in false and fabricated cases. He further alleged that when his deceased father Sunil Kumar Lahoria was in police custody, present revision petitioner/accused no.9 Bhupesh Gupta threatened his father to withdraw proceedings against Sumeet Bachewar and his group, apart from demanding Rupees One Crore. He alleged that by lodging complaint against his father, present revision petitioner/accused no.9 Bhupesh Gupta got police

custody of his father extended. Careful analysis of this statement does not show anything tangible to infer that the present petitioner was a part of conspiracy to murder the deceased. Allegation that the petitioner contacted the deceased in the police lockup are totally absurd and undigestable.

49 A communication dated 22nd September 2012 came to be issued addressed to the Senior Police Inspector, Vashi Police Station, Navi Mumbai, and Commissioner of Police, Navi Mumbai, by Advocates Chate and Associates. By this letter, it is informed that revision petitioner/accused no.9 Bhupesh Gupta is visiting Vashi Police Station and using his links to frame Sunil Kumar Lahoria and he is pressurizing for withdrawal of the complaint dated 13th August 2012 due to which Crime No.317 of 2012 for offences punishable under Sections 420, 406, 465, 467, 468, 471, 120B, 409 and 34 of the IPC came to be registered. It needs to be noted that this communication itself shows that at the relevant time, the deceased was in the lockup of the police. Nothing from the charge-sheet is pointed out to demonstrate that this complaint

yielded in a finding upon an inquiry that the deceased was threatened while in the lockup by a person who is not belonging to the police force. The incident alleged in this letter allegedly took place in the mid of September 2012. The incident in question took place on 16th February 2013 i.e. after about five months. Ultimately, the police had filed "C" Summary Report after investigation of Crime No.317 of 2012 by reporting to the learned J.M.F.C., Vashi, that on investigation of Crime No.317 of 2012 registered on the basis of FIR lodged by Sunil Kumar Lahoria (the deceased) the transaction is found to be that of a civil nature and it is not found that the amount was paid in respect of the plots of land mentioned in the FIR. At the instance of deceased Sunil Kumar Lahoria, the crime vide Miscellaneous Case No.9 of 2012 for offences punishable under several sections of IPC came to be registered against present revision petitioner/accused no.9 Bhupesh Gupta but in that matters also the police submitted "B" Summary Report categorizing the report lodged by the deceased as false and malicious. However, in the FIR No.352 of 2012 lodged by revision petitioner/accused no.9 Bhupesh Gupta, the

charge-sheet bearing no.I-185 of 2012 came to be filed on 12th November 2012 in the court of the JMFC, Vashi, for offences punishable under Sections 386, 388 read with 34 of the IPC. It was alleged by the revision petitioner in the said Crime No.352 of 2012 that Sunil Kumar Lahoria (the deceased) and Sunil Bhanushali by threatening him, obtained eight duly signed blank cheques, documents of title of the property and indulged in extortion. All these facts indicate that revision petitioner/accused no.9 Bhupesh Gupta was not even charge-sheeted in pursuant to the reports filed by the deceased. However, the deceased was charge-sheeted on the report of the revision petitioner. Those reports were lodged months earlier to the incident in question. Though the charge-sheet clearly reflects how the conspiracy came to be hatched by giving details thereof and how killing of the deceased was executed, through statement of various witnesses, there is no reference of the instant revision petitioner/accused no.9 Bhupesh Gupta in those events. Those material witnesses, though are stating specific role played by the co-accused, are not incriminating the revision petitioner in any manner. In this

situation, this material is not even sufficient to raise suspicion against revision petitioner/accused no.9 Bhupesh Gupta.

50 If statement of all witnesses recorded by the prosecution in respect of its case regarding criminal conspiracy are considered, then it is seen that averments regarding revision petitioner / accused no.9 Bhupesh Gupta are only in respect of his casual occasional visits to main accused Suresh Bijlani. There is no material even to suggest remotely that prior to the incident or after the incident, he contacted accused no.10 Suresh Bijlani or other accused. Though witnesses are pointing out some material in respect of criminal conspiracy against other accused persons, they are not attributing any role to revision petitioner / accused no.9 Bhupesh Gupta. Perusal of the entire charge-sheet does not show anything to suggest even remotely that there was a tacit understanding between the revision petitioner / accused no.9 Bhupesh Gupta and other co-accused such as Suresh Bijlani, Anurag Garg and Mahesh Bijlani in respect of killing of Sunil Kumar Lahoria. There is no iota of evidence regarding

transmission of thoughts and sharing the unlawful design between revision petitioner / accused no.9 Bhupesh Gupta and other co-accused. For suggesting even prima facie material to infer criminal conspiracy, it is necessary for the prosecution to point out as to how it was hatched. That can be inferred from the circumstances specially declaration, acts and conduct of conspirators. Need of meeting of minds of conspirators for doing illegal act is sine-quo-non. What is prima facie required to show is revision petitioner / accused no.9 Bhupesh Gupta was having object to accomplish and hence a plan or scheme was framed by accused persons including revision petitioner / accused no.9 Bhupesh Gupta for accomplishing that object and that there was agreement or understanding between them for accomplishment of the object by executing the same in the manner decided by them. In the case in hand, accepting statements of Sandeep Lahoria as they are, what can at the most be inferred is only a faint motive with revision petitioner / accused no.9 Bhupesh Gupta. However, that by itself, without there being any other evidence, cannot form a ground for presuming that he was member of a criminal

conspiracy hatched by accused persons to eliminate Sunil Kumar Lahoria. At this juncture, observations of the Hon'ble Apex Court in the matter of **State of Uttar Pradesh vs. Sanjay Singh**¹⁶ can be quoted with advantage. Paragraphs 18 and 20 of that judgment read thus :

“18. At the highest, the prosecution can only suggest from the circumstances what is or may be the motive for any particular act. However, motive is not a sine qua non for bringing the offence of murder or of any crime home to the accused. At the same time the absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person but to eke out a case by proof of a motive alone that too suspicion of motive apparently tending towards any possible crime, is not only a very unsatisfactory but also a dangerous process, because circumstances do not always lead to particular and definite inferences and the inferences themselves may sometimes be erroneous.

20. This Court in *Century Spinning & Manufacturing Co. Ltd. v. State of Maharashtra*

¹⁶ 1994 SSC (Supp) (2) 707

while examining the scope of Section 251(A) sub-sections (2) and (3) of the old Code corresponding to Sections 239 and 240 of the new Code has made the following observation: (SCC p. 291, para 17: AIR p. 552, para 16) "... If on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the State Of U. P vs Dr. Sanjay Singh on 27 January, 1994 plain language of the section or on its judicial interpretation or on any other recognised principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecution authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the Court and it has

to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution."

51 It is, thus, clear that even if it is accepted that there is material to infer a faint motive with revision petitioner / accused no.9 Bhupesh Gupta, it is not possible in absence of other evidence to conclude that there is ground for presuming the commission of offence by criminal conspiracy by him. Mere assumption of motive with revision petitioner / accused no.9 Bhupesh Gupta is not adequate to infer conspiracy and his being a member of the criminal conspiracy. There is no material on record to indicate tacit understanding or agreement amongst him and other co-accused as to what had to be done. Thus, from whatever angle, the entire material placed on record by the prosecution is considered, no prima facie case can be said to have been made out to demonstrate that revision petitioner / accused no.9 Bhupesh Gupta was one of the conspirators in a plan hatched for eliminating Sunil Kumar Lahoria.

52 At this stage it needs to put on record that whatever material is appearing against revision petitioner / accused no. 9 Bhupesh Gupta is by and large also appearing against S.P.Agarwal, Raju Gupta and Gajra who are not charge-sheeted and arraigned as an accused in the sessions case.

53 It is, thus, clear that there is no prima facie material demonstrating sufficient ground for proceeding against revision petitioner / accused no.9 Bhupesh Gupta in respect of offences alleged against him. There is nothing even to create grave suspicion against revision petitioner / accused no.9 Bhupesh Gupta in respect of his complicity in the offence alleged against him. The entire material found against the revision petitioner / accused no.9 Bhupesh Gupta if taken at its face value does not disclose existence of all ingredients constituting the alleged offence. As there is no ground for presuming that he has committed the alleged offence, the so called confession of accused no.1 Venkatesh Chettiyar cannot be called in aid to frame charges

against him, leave apart the fact that the said confession nowhere discloses that that the killing was under the directions of the revision petitioner / accused no.9 Bhupesh Gupta. As no prima facie case is made out against the revision petitioner / accused no.9 Bhupesh Gupta even to create some suspicion against him, a charge cannot be framed against him for offences alleged against him.

54 For the above reasons, I am of the opinion that the learned Additional Sessions Judge while rejecting the application for discharge of revision petitioner / accused no.9 Bhupesh Gupta has committed manifest error of law resulting in miscarriage of justice. Therefore, case of revision petitioner / accused no.9 Bhupesh Gupta is a fit case for exercise of revisional jurisdiction of this court in as much as the court below has overlooked the fact that the ingredients of offence as alleged against the revision petitioner / accused no.9 Bhupesh Gupta are not even prima facie satisfied from the entire material gathered by the prosecution. The learned Additional Sessions Judge ought to have exercised

the jurisdiction vested in him under Section 277 of the Code of Criminal Procedure and ought to have discharged the revision petitioner / accused no.9 Bhupesh Gupta from the sessions case as there are no sufficient grounds for proceeding against him. However, as stated in earlier paragraphs, the learned Additional Sessions Judge-3, Thane, was even not alive to the fact that he is considering the case of present revision petitioner/accused no.9 Bhupesh Gupta and not that of discharged accused no.4 Sumeet Bachewar. In this view of the matter, the impugned order so far as rejecting the application for discharge moved by the revision petitioner / accused no.9 Bhupesh Gupta needs to be termed as perverse as the same suffers from total non-application of mind to the material collected by the Investigator. The same, therefore, cannot be sustained.

55 In the light of foregoing discussion, I proceed to pass the following order :

ORDER

- i) The Revision Petition bearing filed by revision petitioner / accused no.9 Bhupesh Prakashchand Gupta is allowed.

- ii) The impugned order dated 27th July 2017 passed below Exhibit 220 in Sessions Case No.379 of 2017 between the parties (clubbed with original Sessions case no.281 of 2013) rejecting his application for discharge passed by the learned Additional Sessions Judge-3, is quashed and set aside.
- iii) The Revision Petitioner / accused no.9 Bhupesh Prakashchand Gupta is discharged from the Sessions Case No.379 of 2013 (clubbed with original Sessions case no.281 of 2013) pending on the file of the Sessions Court at Thane, arising out of Crime No.I-67 of 2013 registered with Vashi Police Station on 16th February 2013 for the offences punishable under Sections 302, 120B, 201, 34 read with Sections 3/25, 3/27 and 4/27 of the Indian Arms Act.

(A. M. BADAR, J.)