

THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.429 OF 2017

RUBABUDDIN SHAIKH

)...APPLICANT

V/s.

DAHIAJI GOBARJI VANZARA & OTHERS)...RESPONDENTS

Mr.Gautam Tiwari i/b. Probus Legal, Advocate for the Applicant.

Mr.Mahesh Jethmalani, Senior Counsel, a/w. Ms.Gunjan Mangla,
i/b. Mr.Hitesh Shah, Advocate for Respondent No.1.

Shri Anil Singh, Additional Solicitor General of India, a/w.
Mr.Sandesh D.Patil, Ms.Indrayani Deshmukh, Ms.Geetika Gandhi
and Ms.Carina Xavier, Advocate for the Respondent/CBI.

Mrs.Anamika Malhotra, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE :RESERVED ON : 13th July 2018
PRONOUNCED ON : 10th September 2018

JUDGMENT :

1 By this revision petition, petitioner/First Informant
Rubabuddin Shaikh – brother of deceased Sohrabuddin Shaikh is

challenging the order dated 1st August 2017 passed by the learned Special Judge for the CBI, Greater Mumbai, below Exhibit 912, thereby discharging respondent/accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, for want of evidence and absence of material under Section 227 of the Code of Criminal Procedure as well as for want of sanction as envisaged by Section 197 of the Code of Criminal Procedure. The claim for discharge was for offences punishable under Sections 120B, 364, 365, 368, 341, 342, 384, 302 read with 201 of the Indian Penal Code as well as under Section 25 of the Indian Arms Act.

2 In order to have a better understanding of the subject matter, it is necessary to state case of the prosecution against the accused persons in brief. The prosecution case is to the following effect :

- (a) Sohrabuddin Shaikh (since deceased) was a dreaded criminal, against whom offences of murder, abduction and extortion etc. were registered in the States of Gujarat and

Rajasthan. He was an absconding accused in Crime No.214 of 2004 regarding murder of Hamid Lala committed in jurisdiction of Hathipole Police Station of Udaipur in Rajasthan and in Crime No.1124 of 2004 registered at Navrangpura Police Station, Ahmedabad, Gujarat, in respect of firing at the office of the Popular Builder. In the year 1994/95 upon his arrest, Gujarat Police seized 24 AK 56 rifles, large number of hand grenades and a large cache of ammunitions from the well of his farm house, which was supposedly sent to him by Dawood Ibrahim at the instance of ISI for spreading terror in India. Police from States of Gujarat, Rajasthan and Madhya Pradesh were desperately searching for his whereabouts. Kausarbi (since deceased) was wife of deceased Sohrabuddin Shaikh. Tulsiram Prajapati (since deceased) was an aide of deceased Sohrabuddin Shaikh and they both were undertaking criminal activities jointly. Award of Rs.25,000/- and Rs.20,000/- was already declared on Sohrabuddin Shaikh and Tulsiram Prajapati respectively. According to the

prosecution case, in the year 2004, gang of Sohrabuddin Shaikh became very active in Rajsamand, Nathdwara, Sukher and Udaipur districts of Rajasthan i.e. the areas which are known for marble mining and trade including export of the marble. Hamid Lala gang was protecting the marble traders for consideration. Gang of Sohrabuddin Shaikh and Tulsiram Prajapati wanted to take control over the area for financial gains by getting rid of Hamid Lala gang. Accordingly, Hamid Lala was murdered by Sohrabuddin Shaikh and his gang. Sohrabuddin Shaikh also started extorting large sum of money from A.K.Marbles and M/s.Sangam Textiles. In view of criminal background and nuisance of Sohrabuddin Shaikh and Tulsiram Prajapati, the accused persons from Gujarat and Rajasthan Police force entered into criminal conspiracy to eliminate Sohrabuddin Shaikh and then acted in connivance in abduction and killing of Sohrabuddin Shaikh. Acting in furtherance of the conspiracy, they also killed Kausarbi and Tulsiram Prajapati.

- (b) According to the prosecution case, senior police officers from the States of Gujarat and Rajasthan entered into a criminal conspiracy to eliminate Sohrabuddin Shaikh. For this purpose, they sought help from his associate Tulsiram Prajapati for nabbing Sohrabuddin Shaikh by misleading Tulsiram Prajapati that due to political pressure, they need to arrest Sohrabuddin Shaikh for few months, and subsequently, he will be released on bail. Criminal conspiracy to eliminate Sohrabuddin Shaikh came to be hatched by senior officers including the respondent/discharged accused no.1, by being in constant touch with each other. For that purpose, respondent/discharged accused no.1 D.G.Vanzara, Rajkumar Pandiyan and Dinesh M.N. as well as others were in constant touch and were visiting various places in other States. There was meeting of minds between them. Everyone had interest in nabbing Sohrabuddin Shaikh. For achieving this ultimate aim of the criminal conspiracy hatched by the accused persons, teams

of police officers from States of Gujarat and Rajasthan were formed. Police came to know that Sohrabuddin Shaikh along with his wife Kausarbi had gone to Hyderabad for celebrating the festival of Eid with his friend Kalimuddin of Hyderabad. Police received the tip that on 22nd November 2005, Sohrabuddin Shaikh along with his wife Kausarbi was to go from Hyderabad to Sangli for gynecological treatment of Kausarbi, and they were to undertake this journey by luxury bus of Sangita Travels, Ahmedabad, in company of Tulsiram Prajapati. It is alleged that Police therefore, decided to abduct Sohrabuddin Shaikh during this journey.

- (c) According to prosecution case, in pursuant to conspiracy hatched discharged accused no.3 Dinesh M.N. visited Anti Terrorist Squad, Ahmedabad, about two months prior to fake encounter of Sohrabuddin Shaikh. Discharged accused no.3 Dinesh M.N. was at Ahmedabad from 24th November 2005 to 26th November 2005 when Sohrabuddin Shaikh died in fake encounter by teams of Gujarat and Rajasthan

Police. Infact, he was present on the spot of encounter of Sohrabuddin Shaikh. He met respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, for hatching the conspiracy.

- (d) How abduction took place is reflected from CBI statement of Nathuba Jadeja (PW105) and Gurudayal Singh (PW106), recorded by the Investigating Agency i.e. Central Bureau of Investigation (CBI) on 11th May 2010 and 4th March 2010 respectively. These two witnesses at the relevant time i.e. in November 2005, were working with the Anti Terrorist Squad, Ahmedabad, as drivers. The learned counsel for the petitioner has accepted the fact that both these witnesses are accomplice, having role in commission of the crime in question. They are star witnesses of the prosecution. Further part of the prosecution case is therefore, extracted from the CBI statement of PW105 Nathuba Jadeja.

- (e) As reflected from police statement of PW105 Nathuba Jadeja recorded by the CBI, at about 6.00 p.m. of 20th November 2005, discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police with the Anti Terrorist Squad, Ahmedabad, called him and directed him to accompany Police Inspector named N.H.Dhabi on a tour. Accordingly, along with Police Officials named Ajay Parmar, Santaram Sharma and co-driver Gurudayal Singh (PW106), Nathuba Jadeja (PW105) travelled by Qualis vehicle from Ahmedabad to Hyderabad. They reached Hyderabad at about 8.00 – 8.30 p.m. of 21st November 2005 and went to the campus of Central Industrial Security Force, Hyderabad. By that time, discharged accused no.2 Rajkumar Pandiyan had already reached Hyderabad by taking a morning flight by seeking permission of respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat. Police Inspector N.H.Dhabi and Santaram Sharma went to meet discharged accused no.2 Rajkumar Pandiyan at a bungalow in the

campus of the Central Industrial Security Force, at Hyderabad. Police Official Santaram Sharma stayed at that bungalow. Thereafter, Police Officials N.H.Dhabi and Parmar stayed in one room, whereas PW105 Nathuba Jadeja and PW106 Gurudayal Singh stayed in the another room of the guest house in the campus of the Central Industrial Security Force at Hyderabad, for the night halt.

- (f) Statement of PW105 Nathuba Jadeja recorded by the CBI further reflects that on 22nd November 2005, at about 8.30 – 9.00 a.m., Police Officials N.H.Dhabi, Parmar as well as drivers PW105 Nathuba Jadeja and PW106 Gurudayal Singh left the Central Industrial Security Force campus and went to IPS Officers mess, where N.H.Dhabi and Parmar met discharged accused no.2 Rajkumar Pandiyan. Thereafter, Police Officials Parmar and Santaram Sharma, along with PW105 Nathuba Jadeja and PW106 Gurudayal Singh went to Airport for purchasing air ticket for the return journey of discharged accused no.2 Rajkumar Pandiyan. Ajay Parmar

went inside the Airport for purchasing the ticket. Then, they returned to the Officers Mess. Santaram Sharma and Ajay Parmar then bought two number plates. Subsequently, number plates of Qualis came to be changed by substituting it with the number plate having registration number of Andhra Pradesh by PW105 Nathuba Jadeja and PW106 Gurudayal Singh, on instructions of Police Officer Parmar.

- (g) CBI statement of PW105 Nathuba Jadeja shows that at about 7.00 p.m of 22nd November 2005, discharged accused no.2 Rajkumar Pandiyan accompanied by seven to eight other persons left for intercepting the luxury bus in which Sohrabuddin Shaikh was travelling, by two Tata Sumo vehicles. PW105 Nathuba Jadeja was following them by driving the Qualis vehicle. One of the Tata Sumo vehicles was driven by PW106 Gurudayal Singh. During the course of chasing the luxury bus, after a brief halt at the hotel, discharged accused no.2 Rajkumar Pandiyan, Police Officers named N.H.Dhabi and Santaram Sharma along with two

others sat in the Qualis driven by PW105 Nathuba Jadeja. The luxury bus was further chased by those two Tata Sumo vehicles as well as the Qualis vehicle driven by PW105 Nathuba Jadeja. After midnight, discharged accused no.2 Rajkumar Pandiyan directed PW105 Nathuba Jadeja to intercept the luxury bus by overtaking it by the Qualis vehicle. Accordingly, on intercepting it near Zahirabad, the luxury bus stopped. Discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and others approached the bus. Then Sohrabuddin Shaikh, his wife Kausarbi as well as Tulsiram Prajapati were made to alight from the said bus. Sohrabuddin Shaikh and Tulsiram Prajapati were then made to sit in the Qualis vehicle driven by PW105 Nathuba Jadeja, whereas Kausarbi was made to sit in the Tata Sumo vehicle driven by PW106 Gurudayal Singh. During return journey towards Ahmedabad, 2 kilometers after Bharuch, Kausarbi was also shifted to the Qualis vehicle driven by PW105 Nathuba Jadeja. Tulsiram Prajapati was shifted to another vehicle by Rajasthan Police.

He was taken to Udaipur where he was kept in illegal custody for five days. Thereafter, he was shown to be arrested by a team led by PW22 Bhawarsingh Hada, Station House Officer, Hathipole Police Station, Udaipur. Tulsiram Prajapati was then allowed to go by setting him free. He came to be apprehended on 26th November 2005 from the house of Chandan Kumar Jha at Bhilwara by PW38 Sudhir Joshi, Deputy Superintendent of Police, Udaipur, Rajasthan.

- (h) As seen from the CBI statement of PW105 Nathuba Jadeja, after reaching Ahmedabad, on instructions of Police Officials named Parmar and Chaubey, the Qualis vehicle was driven to the farm house at Adluj Road and Sohrabuddin Shaikh along with his wife Kausarbi were kept in the said “Disha Farm House” in night hours of 23rd November 2005. Police Officials named N.H.Dhabi, Parmar and Chaubey stayed at the said farm house. Discharged accused no.2 Rajkumar Pandiyan was dropped at his house. On his instructions, the Qualis vehicle was driven towards the police chowki near Judges bungalow. It was parked in one

of the bungalows by PW105 Nathuba Jadeja. This is how, according to the prosecution case, Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati were abducted from the luxury bus near Zahirabad, while they were undertaking journey from Hyderabad to Sangli and subsequently Sohrabuddin Shaikh and Kausarbi were dumped in the “Disha Farm House” near Ahmedabad.

- (i) According to the prosecution case reflected from the statement of PW105 Nathuba Jadeja, fake encounter of Sohrabuddin Shaikh was done by the accused persons in the night intervening 25th November 2005 and 26th November 2005. At about 1.30 a.m. to 2.00 a.m. of 26th November 2005, PW105 Nathuba Jadeja drove Maruti car which was occupied by Police Officers from Rajasthan Police as well as accused Police Officer N.H.Dhabi. PW105 Nathuba Jadeja was made to stop that Maruti car in between Narol circle and Vishala circle. At about 2.00 a.m. of 26th November 2005, another Maruti car driven by Bhailal (PW107) came

from Narol and stopped there. N.H.Dhabi and Police Personnel from Rajasthan Police alighted from the car. After sometime, PW105 Nathuba Jadeja heard sound of shots being fired. On instructions, he and co-driver Bhailal (PW107) reversed the Maruti car. PW105 Nathuba Jadeja then saw Sohrabuddin Shaikh lying there in injured condition. Discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, and discharged accused no.3 Dinesh M.N. (who is referred as the Superintendent of Police Udaipur by PW105 Nathuba Jadeja) along with other Police personnels namely Chaubey, Santaram Sharma etc. were found to be present there. One motorcycle was also found lying there. Police Officials N.H.Dhabi and Ajay Parmar took Soharabuddin Shaikh to the hospital in Maruti car driven by Bhailal (PW107). In this way, fake encounter of Sohrabuddin Shaikh came to be effected in between Narol circle and Vishala circle, in the

night intervening 25th November 2005 and 26th November 2005, by the accused persons.

- (j) According to the prosecution case reflected from the CBI statement of PW105 Nathuba Jadeja, thereafter, Kausarbi also came to be murdered by the accused persons and her dead body came to be disposed off by burning it at the river bed of the river at Village Ellol. PW105 Nathuba Jadeja was asked by respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, to accompany the tempo along with Police Official Chauhan. Firewood came to be loaded in that tempo and during the journey to Village Ellol, that tempo faced problem of malfunctioning of gear. Another tempo was summoned and firewood came to be shifted in that tempo. Further journey started thereafter and at about 10.00 to 11.00 p.m. of 28th November 2005, that tempo also got stuck in the sand in the bed of the river at Village Ellol. Then, respondent/discharged accused no.1 D.G.Vanzara, discharged accused Rajkumar Pandiyan and discharged

accused N.K.Amin came there. Firewood from the tempo came to be stacked near the river bed. Dead body of Kausarbi was brought there by a jeep. As stated by PW105 Nathuba Jadeja, it was kept on the funeral pyre by him as well as by Chauhan, Chaubey and Rathod. Respondent/ discharged accused no.1 D.G.Vanzara, Deputy Inspector General, burnt it by setting the pyre on fire. Thereafter, ashes and bones came to be collected in a bag and by the jeep, that bag was carried away by Police Officials named Chaubey and Chauhan.

- (k) Prosecution case, as reflected from the statement dated 4th March 2010 of PW106 Gurudayal Singh recorded by the CBI is to the effect that on instructions of N.H.Dhabi, Police Inspector, Anti Terrorist Squad, at 7.30 p.m. of 20th November 2005, he, alongwith N.H.Dhabi, Santaram Sharma and Ajay Parmar started their journey in the Qualis vehicle driven by PW105 Nathuba Jadeja and then after 2.00 a.m., he drove that vehicle. They reached Hyderabad

and stayed in the rooms at the campus of Central Industrial Security Force for the night halt on 21st November 2005. On 22nd November 2005, they went to the IPS Mess where discharged accused no.2 Rajkumar Pandiyan was camping. In the afternoon, he along with Parmar, Nathuba Jadeja (PW105) and Santaram Sharma went to the Airport for purchasing Air tickets for discharged accused no.2 Rajkumar Pandiyan. Parmar went inside the Airport for purchasing the Air ticket. Thereafter, on instructions from N.H.Dhabi, he and PW105 Nathuba Jadeja changed the number plates of the Qualis vehicle by affixing number plates starting with “AP-11”. In the evening of 22nd November 2005, he sat in the Tata Sumo vehicle along with three officers and followed the luxury bus. He has then spoken about intercepting the luxury bus by the Qualis and abduction of three persons including a lady from that bus by discharged accused no.2 Rajkumar Pandiyan and others. As per his version, abducted lady and Santaram Sharma sat in the Tata Sumo in which he was travelling. Thereafter, two kilometer

after Bharuch, that burkha clad lady and Santaram Sharma sat in the Qualis vehicle. This witness further stated that on reaching Ahmedabad, he went to his room in the Anti Terrorist Squad campus, and thereafter, proceeded on leave due to sickness of his nephew. Thus, statement of this witness PW106 Gurudayal Singh shows that while leaving Ahmedabad by the Qualis vehicle, he was not driving it but it was being driven by PW105 Nathuba Jadeja, whereas PW105 Nathuba Jadeja is stating that PW106 Gurudayal Singh was driving it. He has stated that he was one of the member of the police team which travelled from Hyderabad in three vehicles and abducted Sohrabuddin Shaikh and two others, but he was not driving the vehicle during that period. He has not stated that the team was deputed for a mission at Hyderabad on instructions of respondent/ discharged accused no.1 D.G.Vanzara.

- (1) After murdering Sohrabuddin Shaikh in the fake encounter, accused no.7 Police Inspector Abdul Rehman from Rajasthan

Police filed First Information Report (FIR) with Crime Investigation Department, Crimes, (CID Crimes), Gujarat, alleging that absconding accused Sohrabuddin Shaikh was coming by highway from Surat and upon being asked to surrender he opened fire, and therefore, in retaliation the police also opened fire, due to which Sohrabuddin Shaikh came to be killed. Accordingly Crime No.05 of 2005 came to be registered. Accused no.4 Parmar, Police Officer, investigated the FIR and reported the encounter to be genuine and submitted Abate Summary.

- (m) According to the prosecution case though Sohrabuddin Shaikh and others were already nabbed by Gujarat Police in the night intervening 22nd November 2005 and 23rd November 2005, discharged accused Dinesh M.N. travelled to Ahmedabad on 24th November 2005 on the false pretext that he has secret information and he wants to arrest Sohrabuddin Shaikh. He used to meet respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector

General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, as well as discharged accused Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, for conspiring to eliminate Sohrabuddin Shaikh.

- (n) According to the prosecution case apart from active role in eliminating Sohrabuddin Shaikh, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, also played vital role in encountering Tulsiram Prajapati. After arrest of Tulsiram Prajapati from Bhilwara in Rajasthan in November 2005, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, paid visit to Udaipur from 27th December 2005 to 30th December 2005 in furtherance of conspiracy hatched by accused persons. He also telephonically communicated with PW22 Bhawarsingh Hada, Police Inspector, after arrest of Tulsiram Prajapati for ascertaining gang activities of Tulsiram Prajapati.

- (o) According to the prosecution case, Tulsiram Prajapati used to disclose his apprehension of killing in fake encounter by police to inmates of jail at Udaipur, including his nephew PW3 Kundan Prajapati and PW4 Vimal Shrivastava, PW42 Rafique @ Bunty, PW Mohd. Azam and PW37 Sharafat Ali. He had expressed same apprehension of killing in fake encounter to his Advocate PW35 Salim Khan. Tulsiram Prajapati had submitted several applications before the concerned court as well as National Human Rights Commission, New Delhi, expressing apprehension of killing by police in fake encounter. Thus, according to the prosecution case, under the conspiracy hatched by accused persons, Tulsiram Prajapati was systematically eliminated by sending him to Ahmedabad from Udaipur in custody of four selected guards of choice of discharged accused Dinesh M.N.
- (p) According to the prosecution case on 25th December 2006 Tulsiram Prajapati was given in custody of specially formed escort team headed by Assistant Sub-Inspector Narayan

Singh and comprising of Police Constables Dalpat Singh, Kartar Singh and Yaduveer Singh. On instructions of discharged accused Dinesh M.N., Tulsiram Prajapati was produced before the court at Ahmedabad in Popular Builder Firing case on 26th December 2006. The prosecution case indicates that during return journey undertaken on 26th December 2006 from Ahmedabad to Udaipur by Udaipur Express, Tulsiram Prajapati was infact not with the escort team headed by Assistant Sub-Inspector Narayan Singh. At about 3.00 a.m. of 27th December 2006, a show of escape of Tulsiram Prajapati from the custody of the police guards was made. When the train became slow because of turning near Shamalji Railway Station, Tulsiram Prajapati was shown to have escaped from custody of the police guards. It is alleged that two criminals threw chilli powder in eyes of police guards Yaduveer Singh and Kartar Singh when they accompanied Tulsiram Prajapati towards urinal and then along with those two criminals, Tulsiram Prajapati was shown to have escaped from their custody. Farce of trying

to nab him by chasing him and firing bullets was made. According to prosecution, he was actually not in the custody of those guards. Thereafter, he was infact killed in fake encounter at about 5.00 a.m. of 28th December 2006 by one of the accused named Ashish Kumar Pandya, Police Sub-Inspector of Gujarat Police.

- (q) According to the prosecution case, on 25th December 2006, respondent/discharged accused no.1 D.G.Vanzara who was then posted as Deputy Inspector General of Police, Border Range, Bhuj, summoned PW132 Khanji Jadeja, Police Sub-Inspector, and told him to go to the house of accused Ashish A. Pandya at Meghpar and to ask said Ashish A. Pandya to contact him. Along with PW133 Meghjibhai, Head Constable, PW132 Khanji Jadeja then went to house of accused Ashish A. Pandya and informed his wife and parents to tell him to contact respondent/discharged accused no.1 D.G.Vanzara. Thereafter, at about 5.00 a.m. of 28th December 2006, Tulsiram Prajapati was killed in an

encounter by accused Ashish A. Pandya, Police Sub-Inspector. This was done in pursuant to the plan hatched by accused persons.

- (r) Version of other side in respect of encounter of Tulsiram Prajapati reflected from the charge-sheet also needs to be put on record. The FIR of encounter of Tulsiram Prajapati came to be lodged by Police Sub-Inspector Ashish Kumar Pandya (co-accused) on 28th December 2006 while at the Cottage Hospital at Ambaji. He reported that at about 11.00 p.m. of 27th December 2006, information was received from the police control room about escape of Tulsiram Prajapati from custody of Udaipur police. Hence, he along with his staff as well as Assistant Sub-Inspector Narayan Singh, Police Constables Kartar Singh and Yaduveer Singh of the escort team of Udaipur Police from Rajasthan reached Ambaji and searched absconding accused Tulsiram Prajapati by checking various places including guest houses. Then, after 4.30 a.m. of 28th December 2006, they started patrolling on the road leading towards Sarhad Chapri. At

about 5.00 a.m., they saw three persons on the road who were trying to stop the Matador pick up vehicle. That Matador vehicle did not stop. When the police jeep following the Matador vehicle reached at that spot, those three persons tried to stop that jeep. At that time, Assistant Sub-Inspector Narayan Singh of Udaipur Police identified one from those three persons as Tulsiram Prajapati. Then, according to the FIR lodged by Police Sub-Inspector Ashish Kumar Pandya, Tulsiram Prajapati took out a firearm and fired a bullet which hit on left side of mudguard of the police jeep. Thereafter, Tulsiram Prajapati along with those two persons started running away. Police Sub-Inspector Ashish Kumar Pandya further reported that he got down from the jeep and asked those three persons to surrender. At that time, Tulsiram Prajapati turned back and fired one round from the firearm. That bullet hit left upper arm of Police Sub-Inspector Ashish Kumar Pandya (co-accused), and therefore, he fired two rounds from his service revolver. Apart from him, Assistant Sub-Inspector Narayan Singh and

Police Constable Yaduveer Singh also fired from their service weapons causing fall of Tulsiram Prajapati. He was, then, taken to Simji Hospital. Tulsiram Prajapati was declared dead at that hospital. Accordingly, Crime No.115 of 2006 came to be registered at Police Station Ambaji on the basis of this report lodged by Police Sub-Inspector Ashish Kumar Pandya.

- (s) The charge-sheet in the instant case reveals that Police Sub-Inspector Ashish Kumar Pandya (co-accused) was admitted to the Government hospital Palanpur on 28th December 2006 with the history of fire arm injury caused at about 5.00 a.m. of that day. Initially, he had taken treatment at Shri Arasuri Ambaji Mata Devasthan Trust Hospital, Ambaji, on 28th December 2006 itself. Certificate of that hospital shows that Police Sub-Inspector Ashish Pandya had sustained a circle wound (2.5 x 2.5 cm) on upper part of left arm with active bleeding and blackness of skin. Small carbon particles were found near that wound. He had also sustained

an irregular wound (3 x 1 cm) vertical 1 cm, posterior to wound no.1. Bleeding was found present apart from sand particles in that wound. Similar are the findings of the Government hospital Palanpur. Medical Officer had opined that the injury was a fire arm injury. Medical Officer of Palanpur had informed police that entry wound was having inverted margin and blackening of skin in wound and tissues were present. Thus, Ashish Kumar Pandya, Police Sub-Inspector of Gujarat Police (co-accused), had also suffered gunshot injuries in alleged fake encounter of Tulsiram Prajapati.

- (t) Spot of the incident of alleged encounter of Tulsiram Prajapati was inspected. It was found that the shot from the firearm had damaged left side signal light of the jeep of the police party. Its glass was found broken. One cartridge was found lying near the edge of the road. One gun was also found lying on the spot of the incident. It was having wooden grip and the same was of 0.314 bore having body

made up of steel. One cartridge was also found loaded in the barrel of that gun. This was the situation prevalent on the spot of the incident which was on the main road leading from Ambaji to Sarhad Chapri, where according to the prosecution case, Tulsiram Prajapati was eliminated in the fake encounter. During inquest proceedings, the Executive Magistrate recovered a mobile phone, three bullets and sundry items from dead body of Tulsiram Prajapati.

- (u) It is alleged that fake encounter of Tulsiram Prajapati was done as Tulsiram Prajapati was disclosing to all and sundry as to how he was used by Gujarat Police for nabbing Sohrabuddin Shaikh and as he was an eye witness to abduction of Sohrabuddin Shaikh and his wife Kausarbi. While in Central Jail, Udaipur, Tulsiram Prajapati used to disclose role of respondent/discharged accused no.1 D.G.Vanzara in abducting and killing of Tulsiram Prajapati and Kausarbi apart from apprehending danger to his life from respondent/discharged accused no.1 D.G.Vanzara and others. Hence, he came to be murdered.

3 I have heard Shri Tiwari, the learned counsel appearing for the revision petitioner Rubabuddin – First Informant and brother of deceased Sohrabuddin Shaikh. He argued that it was respondent/discharged accused no.1 D.G.Vanzara, who conspired with this accused person and devised modus operandi for abduction as well as killing of Sohrabuddin Shaikh and Tulsiram Prajapati. Motorcycle of one Shoksingh Yadav, who is cousin of Police Constable Ajaysingh Yadav, was used for making a show of encounter of Sohrabuddin Shaikh. This Ajaysingh Yadav, Police Constable, was close to respondent/discharged accused no.1 D.G.Vanzara. His presence on the scene of encounter of Sohrabuddin Shaikh is disclosed by PW105 Nathuba Jadeja. The learned counsel further argued that Village Ellol is native place of respondent/discharged accused no.1 D.G.Vanzara. After killing, dead body of Kausarbi was taken towards Village Ellol at the instance of respondent/discharged accused no.1 D.G.Vanzara. By imparting necessary instructions to PW105 Nathuba Jadeja as well as other police personnels,

respondent/discharged accused no.1 D.G.Vanzara arranged for the tempo for transporting firewood to the river bed of the river at Village Ellol in order to dispose of dead body of Kausarbi after murdering her. The learned counsel relied on statement of PW Mohd.Azam Khan, PW37 Sharafat Ali, PW41 Sylvester Danial, PW42 Rafique @ Bunty, PW43 Firoz Khan and PW Raju Das to demonstrate activities of Sohrabuddin Shaikh and Tulsiram Prajapati, narrations of Tulsiram Prajapati regarding abduction of Sohrabuddin Shaikh and Kausarbi from the luxury bus while on the way towards Sangli, threat to his life from police personnel and his apprehension that he would be killed in an encounter. These narrations, in submission of the learned counsel for the revision petitioner, amount to dying declarations of Tulsiram Prajapati and as such, becomes relevant evidence for framing Charge. He placed reliance on statement of PW35 Advocate Salim Khan to demonstrate that Tulsiram Prajapati had even disclosed his apprehension regarding his life to his advocate. It is argued that statements of inmates of jail as well as that of PW35 Advocate Salim Khan show that Tulsiram Prajapati was used by Gujarat

Police for tracing out Sohrabuddin Shaikh, and thereafter, instead of keeping Sohrabuddin Shaikh in custody, he was killed.

4 Shri Tiwari, the learned counsel appearing for the revision petitioner, argued that respondent/discharged accused no.1 D.G.Vanzara took active part in destruction of dead body of Kausarbi. The funeral pyre was lit by respondent/discharged accused no.1 D.G.Vanzara and in respect of this incident, statement of PW105 Nathuba Jadeja is corroborated by statements of owners of tempo, crane operator as well as person accompanying the crane operator. Reliance is also placed on statement of Head Constable Lakhoba Churasama, who was working with Anti Terrorist Squad as driver to demonstrate that gypsy of the Anti Terrorist Squad was used by co-accused Chauhan and Chaubey from Anti Terrorist Squad for travelling to Village Ellol and to the bed of Narmada river. Statement of Yusuf Ali is relied by the learned counsel to demonstrate that he heard that something was burning near the check dam apart from hearing about movement of vehicles.

5 Shri Tiwari, the learned counsel appearing for the revision petitioner, submitted that statements of witnesses show that respondent/discharged accused no.1 D.G.Vanzara used deceased Tulsiram Prajapati for apprehending Sohrabuddin Shaikh by assuring that no harm would be caused to Sohrabuddin Shaikh and this fact shows involvement of respondent/discharged accused no.1 D.G.Vanzara in the conspiracy to abduct and kill Sohrabuddin Shaikh and Tulsiram Prajapati.

6 According to the learned counsel for the revision petitioner, statement of PW45 Rajeev Dasot, Additional Director General of Police, shows that respondent/discharged accused no.1 D.G.Vanzara along with discharged accused Dinesh M.N. met this witness and during meeting, respondent/discharged accused no.1 D.G.Vanzara praised discharged accused Dinesh M.N. by stating that work of discharged accused Dinesh M.N. is outstanding. Statement of PW Rajendra Acharya, Typist with the Anti Terrorist Squad, is relied upon to demonstrate that respondent/discharged accused no.1 D.G.Vanzara was meeting discharged accused

Dinesh M.N. as well as Rajkumar Pandiyan. The entire action was planned by respondent/discharged accused no.1 D.G.Vanzara.

7 In submission of the learned counsel for the revision petitioner, respondent/discharged accused no.1 D.G.Vanzara summoned co-accused Ashish A. Pandya, Police Sub-Inspector, from his house through Police Sub-Inspector PW132 Khanji Jadeja on 25th December 2006. Ultimately, this co-accused Ashish A. Pandya killed Tulsiram Prajapati in a fake encounter at about 5.00 a.m. of 28th December 2006. Reliance is placed on statements of PW132 Khanji Jadeja, Police Sub-Inspector, PW133 Meghajibhai Maheshwari, Head Constable, PW248 H.B.Jhala, Police Inspector, and PW230 Arvindbhai Patel, Police Inspector, from Ambaji Police Station. It is argued that investigation of Crime No.115 of 2006 registered at the instance of co-accused Ashish A. Pandya regarding encounter of Tulsiram Prajapati was deliberately entrusted to Police Inspector Patel by co-accused Vipul Agrawal, Superintendent of Police. Respondent/discharged accused no.1 D.G.Vanzara was in constant communication with co-accused

Vipul Agrawal and Police Sub-Inspector Ashish A. Pandya. He was also communicating with other accused persons. This material, according to the learned counsel, is sufficient to frame the Charge. The learned counsel further argued that conspiring with other police personnel, killing three persons while executing plan hatched in pursuant to the conspiracy, does not amount to an act done or purported to be done in official capacity and in discharge of official duty. Therefore, there was no need to seek sanction. To buttress this submission, he placed reliance on judgments in Devinder Singh and Others vs. State of Punjab Through CBI¹ and Omprakash and Others vs. State of Jharkhand². To demonstrate that material forming strong suspicion against the accused in respect of commission of crime is sufficient to frame the Charge, the learned counsel for the revision petitioner relied on judgments in Sitaram Sao @ Mungeri vs. State of Jharkhand³, Mathuradas vs. State⁴, Haroon Haji Abdulla vs. State of Maharashtra⁵ and State vs. S. Selvi and Others⁶.

1 2016(12) SCC 87

2 2012 (12) SCC 72

3 AIR 2008 SC 391

4 104 (2003) DLT 147

5 AIR 1968 SC 832

6 AIR 2018 SC 81

Reliance is also placed on judgment of the learned Single Judge of Delhi High Court in **Aruna Chadha vs. State of Delhi**⁷. Similarly, reliance is also placed on judgment in **Albir vs. Government of NCT of Delhi**⁸ for demonstrating that recitals of Tulsiram Prajapati to inmates of jail and others constitute his dying declarations and forms material to frame the Charge.

8 Shri Jethmalani, the learned senior counsel, supported the impugned order of discharge by arguing that there is no corroboration to the version of PW105 Nathuba Jadeja, who is an accomplice in the crime in question. There is no evidence, whatsoever, against respondent/discharged accused no.1 D.G.Vanzara, so far as alleged abduction and killing of Sohrabuddin Shaikh as well as Kausarbi is concerned. The learned senior counsel further argued that alleged fake encounter of Tulsiram Prajapati was not part of alleged original conspiracy. Why Tulsiram Prajapati was kept in custody for one year, just for killing him subsequently, does not appeal to the common sense. It

7 Criminal Revision No.305 of 2013 decided on 25th July 2013

8 (2010) 9 SCC 1

does not stand to reason that accused persons will allow him to speak to all and sundry and then after one year would kill him. The learned senior counsel argued that all inmates of the jail are speaking of something heard by them in the year 2006 by reciting it to the Investigator in 2011. There is nothing on record to show that so called statements of Tulsiram Prajapati to inmates of the jail were correct. Such recitals by Tulsiram Prajapati does not constitute his dying declarations. On this count, reliance is placed on Babubhai Bokhiria and Another vs. State of Gujarat and Others⁹.

9 The learned senior counsel further argued that the Honourable Supreme Court directed transfer of investigation to the CBI while deciding Writ Petition (Cri.) No.6 of 2007 on 12th January 2010, principally on the ground that seven police officials from Andhra Pradesh Police are not charge-sheeted, though they had taken part in abduction of Sohrabuddin Shaikh and others. However, even the CBI has also failed to trace them out. Action Taken Reports submitted by the said police were found to have

9 (2014) 5 Supreme Court Cases 568

contained large discrepancies. Therefore, it was incumbent on the part of the CBI to collect material to demonstrate that Tulsiram Prajapati was, infact, accompanying Sohrabuddin Shaikh and Kausarbi from Indore to Hyderabad and from Hyderabad towards Sangli. However, there is no iota of evidence to show that Tulsiram Prajapati was with Sohrabuddin Shaikh at any point of time in November 2005. The learned senior counsel placed reliance on statements of revision petitioner Rubabuddin as well as statements of his brother Nayabuddin and that of Saleema Begum, apart from relying on pleadings in the writ petition as well as in the letter of revision petitioner Rubabuddin. With this, it is argued that the charge-sheet itself does not show that the third person, who was allegedly abducted, was Tulsiram Prajapati. At the time of alleged abduction, presence of Tulsiram Prajapati at Bhilwara is established from the statement of Chandan Kumar Jha. In his written complaints, Tulsiram Prajapati has never stated that he is an eye witness to the abduction of Sohrabuddin Shaikh. No one has seen Tulsiram Prajapati at Hyderabad during the relevant period, and therefore, according to the learned senior

counsel, statements of inmates of Central Jail at Udaipur containing alleged disclosure by Tulsiram Prajapati to them, cannot form ground for framing the Charge.

10 The learned senior counsel further argued that, with passage of time, almost all material witnesses are examined by the prosecution in the trial and they have not supported the prosecution case. Relying on judgment in the matter of **Zahira Habibullah H. Sheikh and Another vs. State of Gujarat and Others**¹⁰ the learned senior counsel submitted that this additional evidence needs to be considered by this court for confirming order of discharge for vindicating innocence of respondent/discharged accused no.1 D.G.Vanzara.

11 Shri Anil Singh, the learned Additional Solicitor General appearing for the CBI has stated that the prosecuting agency is not disputing the impugned order of discharge and has not filed any revision against the same.

¹⁰ 2004 CRI.L.J.2050

12 As the claim of the respondent/discharged accused No.1 for his discharge from the sessions case is accepted by the learned Additional Sessions Judge and the said Order is the subject matter of challenge before this Court, it is apposite to quote provisions of Sections 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.

13 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 constitutes sufficient ground for proceeding against the accused. Some prima facie material raising strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him.

14 It is necessary to quote a decision of the Hon'ble Apex Court in the matter of **State of Maharashtra v. Priya Sharan Maharaj and Ors.**¹¹. 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 Bijaya**, (1990) 4 SCC 76 : (AIR 1990 SC 1962), that 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

¹¹ AIR 1997 SC 2041

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.”

15 In a later decision reported in the matter of Dilawar Babu Kurane v. State of Maharashtra¹², 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 exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the

¹² AIR 2002 SC 564

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.”

Similar is the ratio of judgment in the matter of **S.Selvi & Others (supra)** and **Arun Chadha (supra)**.

16 Case of the prosecution against respondent/discharged accused no.1 D.G.Vanzara, so far as it relates to alleged killing of Sohrabuddin Shaikh, to a large extent, is based on statements of PW105 Nathuba Jadeja and PW106 Gurudayal Singh. They both, at the relevant time, were drivers working with Anti Terrorist Squad Ahmedabad and had taken active part in the abduction of Sohrabuddin Shaikh, his wife Kausarbi and his aide Tulsiram Prajapati, who were subsequently killed allegedly in the fake encounter. According to the prosecution case, both these drivers drove the Qualis vehicle which was a private vehicle from Ahmedabad to Hyderabad for the purpose of taking police personnels for effecting abduction. They did not disclose this visit to Hyderabad on record. PW105 Nathuba Jadeja, in fact, intercepted the luxury bus in which the trio were travelling. Both these witnesses had, according to the prosecution case, carried abducted persons to Ahmedabad and then Tulsiram Prajapati was taken to Rajasthan. PW105 Nathuba Jadeja had participated in the alleged event of disposal of dead body of Kausarbi apart from his act of aiding accused persons in killing Sohrabuddin Shaikh.

As per his CBI statement dated 11th May 2010, PW105 Nathuba Jadeja with the help of others had kept the body of Kausarbi on the funeral pyre for destroying it by burning. He had fetched firewood for burning the dead body. Thus, both these witnesses are guilty associates of accused persons in the crime in question. In that sense, being accomplice, they are infamous witnesses. It is well settled that at the stage of framing of the charge, attention of the Court is required to be confined to only that material collected during investigation, which can be legally translated into evidence. Similarly, at the stage of framing of the charge, even if two views are possible then the view favourable to the prosecution has to be accepted for the purpose of framing charge. On this aspect, the learned Counsel for the revision petitioner has rightly relied on Judgment of the Delhi High Court in the case of **Mathura Das & Ors. (supra)**. At the stage of framing of the charge against accused persons, when case of the prosecution is also based on confessional statement of the accomplice, then the proper way is to consider the other evidence of the accused and if the Judge is not prepared to act solely on such evidence, then he

can take aid of the confession and use it to seek assurance to other evidence adduced by the prosecution. In other words, even at the stage of framing charge, statement of accomplice in the form of confession requires corroboration. Valuable assistance can be had to this proposition from the Judgment of the Honourable Apex Court in the matter of **Suresh Budharmal Kalani @ Pappu Kalani (supra)** relied by Shri Jethmalani, the learned Senior Counsel. Paragraph 7 of that Judgment reads thus :

“ So far as the confession of Jayawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then the question is what would be its evidentiary value against the latter. The question was succinctly answered by this Court in **Kashmira Singh V. State of Madhya Pradesh (1952 SCR 526)** with the following words :

"The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession,

then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though if believed, it would be sufficient to sustain a conviction. In such an event Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The view so expressed has been consistently followed by this Court. Judged in the light of the above principle the confession of Suryarao cannot called in aid to frame charges against Kalani in absence of any other evidence to do so."

Thus at the stage of framing Charge, the court is required to confine its attention to only those material collected during investigation which can be legally translated into evidence. (Refer **Arun Gawli vs. State of Maharashtra**¹³ and **Laxmi Koli vs. State of Maharashtra**¹⁴)

13 2007 ALL MR(Cri) 2562

14 2005 ALL MR(Cri) 571

17 Similarly, it is apposite to keep in mind the law regarding appreciation of evidence of accomplice. By not arraigning them as accused in the subject crime, the prosecution is relying on evidence of PW105 Nathuba Jadeja and PW106 Gurudayal Singh by treating them as prosecution witnesses. In the matter of Haroom Haji Abdulla (supra), the Honourable Apex Court has considered this aspect and held thus in paragraph Nos.8 and 12 of its judgment, relevant portion of which is reproduced thus :

“8.....The law as to accomplice evidence is well settled. The Evidence Act in Section 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in illustration (b) to Section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This

cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law.

“12 In **Rameshwar v. State of Rajasthan (1952 SCR 377=(AIR 1952 SC 54)** this Court laid down certain general rules about the nature of corroboration needed before accomplice evidence

may be accepted. It is there pointed out that every detail of the story of the accomplice need not be confirmed by independent evidence although some additional independent evidence must be looked for to see whether the approver is speaking the truth and there must be some evidence, direct or circumstantial which connects the co-accused with the crime independently of the accomplice. One such circumstance may be the making of a number of confessions without a chance for prior consultation between the confessing co-accused. But before even a number of such confessions can be used each such confession must inspire confidence both in its content and in the manner and circumstances of its making. If there be any suspicion of false implication the confession must be discarded as of no probative value. This may result from a variety of circumstances of which a few alone may be mentioned, such as why the, accused confessed whether he expected again for himself by implicating his co-accused, the part he assigns to himself and that to his co-accused, the opportunity for being coached up to narrate a false story or a story false in certain details. Where there is a single retracted confession corroborating other

accomplice evidence, the caution must necessarily be still greater and the probative value smaller. Even if there are more than one such confession and they are proved to be given independently and without an opportunity for a prior concert, the probative value may increase but the need for caution remains because a number of suspects may be prompted by the same or different motives to embroil a particular individual. It is only when false implication is excluded after close scrutiny that confession of a co-accused can be used to lend assurance to other evidence. This was so stated by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerburty [(1911) ILR 38 Cal. 559 p.588] and accepted by this Court, and a retracted confession cannot obviously go further or have higher value.”

18 Similar is the ratio of Judgment of the Honourable Supreme Court in the matter of Sitaram Sao @ Mungeri (supra) relied by the learned Counsel for the revision petitioner.

19 As the accomplice is also one of the perpetrator of the crime, his evidence needs to pass two tests before acting upon by

the Court. The first is that of reliability and second is that of corroboration in material part. This aspect has been considered by the Honourable Apex Court in the matter of **Sarwan Singh Rattan Singh vs.State of Punjab**¹⁵, paragraph 7 of which reads thus :

“7.7. On behalf of Harbans Singh, it has been urged before us by Mr. Kohli that the judgment of the High Court of Punjab suffers from a serious infirmity in that, in dealing with the evidence of the approver, the learned Judges do not appear to have addressed themselves to the preliminary question as to whether the approver is reliable witness or not. The problem posed by the evidence given by an approver has been considered by the Privy Council and Courts in India on several occasions.

It is hardly necessary to deal at length with the true legal position in this matter. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally

¹⁵ AIR 1957 SC 637

reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter and no question as to whether his evidence is corroborated or not falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence

must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.”

20 By this revision petition, the revision petitioner, who happens to be brother of deceased Sohrabuddin Shaikh is challenging the Order dated 1st August 2017 passed by the learned Special Judge for CBI on discharge application (Exhibit 912) in Session Case Nos.177, 178, and 577 of 2013 and Session Case No.312 of 2014, whereby respondent/discharged accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, came to be discharged. Revisional jurisdiction of this Court is invoked for impugning the said order of discharge. The learned trial court has discharged the respondent/accused for want of evidence and absence of material to show prima facie case against him apart from want of sanction to prosecute him. The State has not challenged the impugned

order of discharge. For limited purpose of appreciating the wordings of Section 227 of Code of Criminal Procedure.....“there is not sufficient ground for proceeding” this discharge order is comparable to order of acquittal. It is well settled that normally the revisional jurisdiction of this Court is to be exercised sparingly when it is shown that there is glaring defect of procedure or manifest error on the point of law, which has resulted in miscarriage of justice. Finding of fact cannot be upset in the revisional jurisdiction, unless and until it is shown to be perverse. Sufficiency of evidence for recording a finding of fact cannot be reassessed in the revisional jurisdiction. However, if it is pointed out that a particular finding is arrived at by the learned Court below without there being any evidence to support such finding, the revisional Court is required to interfere in upsetting such perverse finding. Keeping in mind these parameters of the revisional jurisdiction of this Court, let us consider the case in hand and examine whether the impugned Order of discharge suffers from perversity or error of law requiring interference at the hands of this Court.

21 The prosecuting agency considered Call Data Records (CDRs) of respondent/discharged accused no.1 D.G.Vanzara to show that he was in communication with other accused persons prior to alleged abduction of Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati. He had given permission to discharged accused Rajkumar Pandiyan to visit Hyderabad and had sent fax to the higher-ups for sanctioning air fare for this visit to Hyderabad on the ground of making secret inquiry in the matter of suicidal bomb blast. This respondent/discharged accused no.1 D.G.Vanzara was present at the spot of the encounter at the time of killing of Sohrabuddin Shaikh and the material collected by the prosecution shows that he took active part in destroying the dead body of Kausarbi by burning it. Thereafter, he had visited Udaipur and met discharged accused Dinesh M.N. as well as Additional Director General of Police Rajeev Dasot. Thereafter, this respondent/discharged accused no.1 D.G.Vanzara, at the time of killing of Tulsiram Prajapati, has summoned Police Sub-Inspector Ashish Kumar Pandya on 25th December 2006, and thereafter,

Tulsiram Prajapati was shown to be killed in an encounter on 28th December 2006. This, according to the prosecution case, reflects that respondent/discharged accused no.1 D.G.Vanzara had taken lead role in conspiring with other accused persons for killing Sohrabuddin Shaikh and Tulsiram Prajapati.

22 It is apposite to note that the crime in question was initially investigated by Gujarat Police. Later on, under orders of the Honourable Supreme Court, further investigation came to be entrusted to the CBI. There is no order of reinvestigation. Therefore, statement of witnesses initially recorded by Gujarat Police, so also the charge-sheet filed by it are not redundant and cannot be kept out of consideration. They continue to be relevant and cannot be termed as tainted or unreliable. This point is clear from the judgment of the Honourable Apex Court in the very same matter. (Refer **Vipul Shital Prasad Agarwal vs. State of Gujarat and Others**¹⁶)

16 AIR 2013 SC 73

23 This revision petition has come up for hearing after about 1 year from discharge of respondent/accused. It is reported by the parties that in between the Charge against rest of the accused persons has been framed and explained to them. They pleaded not guilty and claimed trial. It is also reported that the trial thereafter began and by now more than 150 witnesses are already examined by the prosecuting agency in support of the Charge. Therefore, it is necessary to put on record, at this stage itself, that only because of discharge order in his favour, the respondent/discharged accused cannot claim immunity from the trial at subsequent stage. Person discharged can also be arraigned again as an accused by following due process of law and this option is always available with the trial court during the course of the trial. Paragraphs 104 to 108 from the judgment of the Honourable Apex Court in the matter of **Hardeep Singh vs. State of Punjab**¹⁷ need reproduction and they read thus :

“104 However, there is a great difference with regard to a person who has been

¹⁷ AIR 2014 SC 1400

discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to

proceed against the person so discharged, it may take steps but only in accordance with [Section 398 Cr.P.C.](#) without resorting to the provision of [Section 319 Cr.P.C.](#) directly.”

“**105** In [Sohan Lal & Ors. v. State of Rajasthan](#), (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under [Section 398 Cr.P.C.](#) cannot be circumvented by prescribing to procedure under [Section 319 Cr.P.C.](#)”

“**106** In [Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.](#), AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under [Section 319 Cr.P.C.](#) and try them along with the other accused.”

“107 Power under [Section 398](#) Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to [Section 300 \(5\) Cr.P.C.](#), a person discharged under [Section 258](#) Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, [Section 398](#) Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged.”

“108 Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, [Section 319](#) Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by [Section 300\(5\)](#) Cr.P.C. and [Section 398](#) Cr.P.C.

cannot be an inquiry under [Section 319](#) Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by [Sections 300\(5\)](#) and [398](#) Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under [Section 319](#) Cr.P.C. can be exercised. We may clarify that the word ‘trial’ under [Section 319](#) Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.”

Thus, if at trial, after careful examination of evidence, the court is of the opinion that there exists evidence to proceed against the discharged accused, it can take steps as provided by law and such discharged accused can also be made to face the trial. Keeping in mind this aspect, let us test the impugned order within the limited scope and parameter of the revisional jurisdiction of this court.

24 Now let us, therefore, consider whether the impugned order of discharging respondent/discharged accused no.1

D.G.Vanzara suffers from perversity or error of law resulting in flagrant miscarriage of justice. It will be required to be seen *dehorse* the confessional statement of accomplice viz. PW105 Nathuba Jadeja as to whether there is any material which is sufficient to make out a *prima facie* case for framing the charge against respondent/discharged accused no.1 D.G.Vanzara by considering his alleged presence on the spot where Sohrabuddin Shaikh was killed. Effect of statement of PW105 Nathuba Jadeja regarding presence and active part of respondent/discharged accused no.1 D.G.Vanzara in burning dead body of Kausarbi at the river bed of Village Ellol will also have to be considered. One will also have to consider whether confessional statements of PW105 Nathuba Jadeja can be called in aid to frame the charge against respondent/discharged accused no.1 D.G.Vanzara and whether along with other material collected by the prosecution, his statements recorded by the CBI so also his other confessional statements recorded by the CID Crimes, Gujarat, constitute *prima facie* material or ground for presuming that this discharged accused had committed the alleged offence. Considering the

importance of the matter, I propose to examine the entire charge-sheet minutely in order to cull out all incriminating material found therein against the concerned accused in order to ascertain and judge as to whether the same forms the ground for presuming that this accused has committed the offence alleged against him by the prosecuting agency.

25 Let us now examine what is the nature and quality of evidence given by PW105 Nathuba Jadeja – a partner in the subject crime. On 6th December 2005, his statement came to be recorded during the investigation of Crime No.5 of 2005 registered on the basis of FIR lodged by Abdul Rehman. His version, in his statement dated 6th December 2005 is to the effect that, in the night intervening 25th November 2005 and 26th November 2005, he accompanied by Police Inspector Abdul Rehman, Police Sub-Inspector Himanshu Singh and Police Inspector Shyam Singh went to the place between Narol circle and Vishala circle. Officers of the Anti Terrorist Squad were also with them. At about 5.00 a.m. of 26th November 2005, one

motorcyclist came from Narol circle. Police Inspector N.H.Dhabi signaled him to stop and alerted others by shouting that the motorcyclist is Sohrabuddin Shaikh. The motorcyclist did not stop and opened fire on the policemen. Hence, police returned fire and Sohrabuddin Shaikh was injured, and ultimately died. There is no mention of visit to Hyderabad for abduction in this statement.

26 Statements of PW105 Nathuba Jadeja were again recorded on 14th February 2007 and 15th February 2007, during inquiry of P.E.No.66 of 2006 by the CID. On 14th February 2007, he stated that he is not mentally fit to give statement. On 15th February 2007 he stated that in the night intervening 25th November 2005 and 26th November 2005, he along with Police Inspector Abdul Rehman and Police Officers Himanshu Singh and Sham Singh, went to Narol circle in the Maruti car driven by him. Police Inspector N.H.Dhabi along with the other staff was in other Maruti car. Thereafter, at 5.00 a.m., Sohrabuddin Shaikh came from Narol circle on the motorcycle and he was asked to stop by Police Inspector N.H.Dhabi. He, thereafter, repeated what he had

stated in his earlier statement dated 6th December 2005, reflecting genuine return of fire by police causing death of Sohrabuddin Shaikh. In these statements also, PW105 Nathuba Jadeja has not whispered about visiting Hyderabad and abducting Sohrabuddin Shaikh and two others.

27 Thereafter, on 26th April 2007, statement of PW105 Nathuba Jadeja came to be recorded by one T.K.Patel, CID Crimes, Gujarat, at Thaltej, wherein this witness has spoken about his journey in detail with PW106 Gurudayal Singh and other accused persons to Hyderabad, abduction of Sohrabuddin Shaikh and two others from the luxury bus and their subsequent return to Ahmedabad. He also stated about encounter of Sohrabuddin Shaikh in the night intervening 25th November 2005 and 26th November 2005 and the presence of discharged accused Rajkumar Pandiyan along with other discharged accused persons including respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, and discharged accused no.3 Dinesh M.N., Superintendent of Police, Udaipur, on the spot of encounter i.e.

between Narol circle and Vishala circle. This witness has further stated about disposal of dead body of Kausarbi in the night of 28th November 2005 in presence of discharged accused viz., Rajkumar Pandiyan, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, and N.K.Amin. At the end of this statement dated 26th April 2007, PW105 Nathuba Jadeja has allegedly stated that he did not inform anybody about this incident till date because he is a small employee and has to work under the higher officers so also because there is danger to his life from higher officers as a result of which he is living under constant coercion and fear etc.

28 Next statement of this witness is in the form of his sworn affidavit dated 22nd May 2007 in the nature of an application under Section 437 of the Code of Criminal Procedure filed before the learned Chief Metropolitan Magistrate, Ahmedabad. In that application, this witness has stated that his earlier statement dated 26th April 2007 is recorded under duress and temptation against his wish, and as per wish of Officer named

Rajnish Rai. His so called statement dated 26th April 2007 does not contain the facts narrated by him. He expressed his apprehension that his statement under Section 164 of the Code of Criminal Procedure would be recorded by extending threats, and therefore, prayed that his surrender may be accepted. On 24th May 2007, the learned Chief Metropolitan Magistrate passed the order to file the said application in view of the fact that the Investigating Officer informed to the court that PW105 Nathuba Jadeja shall be considered as witness.

29 Further statement of PW105 Nathuba Jadeja is found in his affidavit dated 25th May 2007 presented before the learned Chief Metropolitan Magistrate, Ahmedabad. In his duly sworn affidavit, he has stated that he was not aware about the contents of his statement dated 14th February 2006 and 15th February 2006 and without actually reading those statements, his signature was obtained thereon. This witness further stated that on 26th April 2007, he was sent in the government vehicle along with Anti Terrorist Squad personnel to CID Office at Gandhi Nagar, where

senior officers started giving threat to him that he should sign the pre-prepared written note, and that, only after doing so he could be tendered pardon. Thereafter, he was taken to Thaltej and making a farce of videography by turning video cameras on and off, his statement is shown to have been recorded. The said statement (dated 26th April 2007) is under duress and temptation. He had not seen any incident.

30 Further statement of PW105 Nathuba Jadeja is reflected in his duly sworn application for anticipatory bail under Section 438 of the Code of Criminal Procedure filed before the CBI court at Ahmedabad on 25th February 2010. Prior to this, on 12th January 2010, under orders of the Honourable Supreme Court, the case was transferred to the CBI and on 1st February 2010, the FIR came to be registered by the CBI. In the wake of this development, PW105 Nathuba Jadeja preferred an application for anticipatory bail. He has, on affidavit, stated therein that on 26th April 2007, Police Inspector Rajnish Rai threatened him to give the purported statement as per his wish, with a threat that else, he

(PW105 Nathuba Jadeja) would be arrested. His false and concocted statement was created on 26th April 2007. That statement is forcibly extracted under threat of putting him in jail for the rest of his life. He apprehended that the CBI may try to extract forcible confessional statement from him again. Averments in this application under Section 438 of the Code of Criminal Procedure to the effect that he disclosed to the CBI that his earlier version dated 15th February 2007 was correct version but his statement dated 26th April 2007 was forcibly extracted and that CBI was not ready to accept his correct version, came to be replied as “No comments” in the reply tendered by the CBI.

31 Thereafter, statement dated 11th May 2010 of PW105 Nathuba Jadeja is shown to have been recorded by the CBI. This statement dated 11th May 2010 of PW105 Nathuba Jadeja is *ad verbatim* same as per his statement dated 26th April 2007, allegedly recorded at Thaltej by T.K.Patel from CID Crimes, Gujarat. Perusal of the concluding paragraph of this statement dated 11th May 2010 recorded by the CBI makes this aspect clear.

It is again written in the statement dated 11th May 2010 of PW105 Nathuba Jadeja that he had not informed about this incident to anybody till date because he is a small employee and has to work under the higher officers and there is danger to his life from higher officers, and he lives in fear and danger. These averments are, infact, there in the alleged statement dated 26th April 2007, in which the incident was informed to T.K.Patel of the CID Crimes.

32 Lastly, on 1st July 2015, PW105 Nathuba Jadeja has made his last statement in the matter, which is in the form of an affidavit placed before the learned Additional Sessions Judge, Mumbai. In this last statement, PW105 Nathuba Jadeja has reiterated that he witnessed arrival of Soharabuddin Shaikh at about 5.00 a.m. of 26th November 2005 on motorcycle from Narol circle and that when the team of police officers tried to nab him. Soharabuddin Shaikh opened fire from the firearm, and in retaliation the police team opened fire, in which he was injured and subsequently died. PW105 Nathuba Jadeja stated that he had disclosed these facts in his subsequent statement recorded on 14th

February 2007. He was, then, initially taken to Gandhi Nagar on 26th April 2007 and then to Thaltej, where he was confined. His false statement was drawn by T.K.Patel from CID Crimes, Gujarat, by repeatedly threatening and intimidating him. He has further stated on affidavit before the court that even in the year 2010, he was threatened repeatedly with the prospect of his arrest and loss of his job, if he fails to stick to his version of 26th April 2007 drawn by T.K.Patel of the CID Crimes, Gujarat. In his affidavit PW105 Nathuba Jadeja has further stated that his statement dated 11th May 2010, allegedly recorded by the CBI, is paragraph wise translation of his previously recorded statement dated 26th April 2007 fabricated by T.K.Patel of the CID Crimes, Gujarat. PW105 Nathuba Jadeja further stated on affidavit that he is neither a witness nor an accomplice to the alleged prosecution story of visiting Hyderabad and abducting Sohrabuddin Shaikh with two others in the night intervening 22nd November 2005 and 23rd November 2005. He never visited Hyderabad nor was he part of the team which allegedly killed Kausarbi and disposed off her dead body at Village Ellol. He was driver of the Anti Terrorist

Squad Maruti car, in which members of Rajasthan Police travelled up to Narol circle in morning hours of 26th November 2005, where encounter of Sohrabuddin Shaikh took place.

33 Thus, these several statements reflect initial as well as last stand of PW105 Nathuba Jadeja, to the effect that, he never visited Hyderabad nor was he a part of the team, which allegedly abducted Sohrabuddin Shaikh and two others. He drove the official car in the night intervening 25th November 2005 and 26th November 2005, when in the return fire by police, Sohrabuddin Shaikh was injured and ultimately died. In between first and last stand of this witness it is shown that, he has made statements that he was one of the members of the police team which went to Hyderabad, abducted Sohrabuddin Shaikh and two others, brought them towards Ahmedabad and subsequently in fake encounter, Sohrabuddin Shaikh was killed and later on his wife was also killed.

34 So far as another accomplice PW106 Gurudayal Singh – driver with the Anti Terrorist Squad is concerned, his statement was firstly recorded on 19th January 2007 by one Solanki from CID Crimes. Like statement of PW105 Nathuba Jadeja before the CID Crimes, this witness has also stated about his visit to Hyderabad. He stated about chasing the luxury bus and stopping other vehicles.

35 Thereafter, detail statement of this witness came to be recorded by T.K.Patel of CID Crimes, Gujarat, on 4th April 2007 where he has spoken about visiting Hyderabad, chasing the luxury bus and abducting persons from the board of that bus. He stated that a burkha clad lady from that bus along with Santaram Sharma sat in the Tata Sumo vehicle in which he was sitting. He stated that after Bharuch, that lady and Santaram Sharma were made to sit in another Tata Sumo vehicle. He further stated that then, by the Tata Sumo vehicle, he reached the Anti Terrorist Squad campus and went to his room.

36 Statement of this witness under Section 164 of the Code of Criminal Procedure came to be recorded by the learned Judicial Magistrate First Class, Manavadar, on 10th May 2007. It is somewhat like the one which was recorded on 4th April 2007. Further statement of this witness came to be recorded on 4th March 2010 by the CBI, wherein, he has spoken about his visit to Hyderabad by Qualis vehicle, chase of the luxury bus, abduction of Sohrabuddin Shaikh and two others, his travel towards Ahmedabad along with burkha clad lady and Santaram Sharma in Tata Sumo vehicle.

37 However, ultimately, this witness has tendered affidavit before the learned Additional Sessions Judge, Mumbai, on 1st July 2015, and has disowned the earlier statement made by him. Like PW105 Nathuba Jadeja, he has also stated that he was threatened. He deposed that he was not a part of the team which allegedly visited Hyderabad. His statement dated 19th January 2007 is a created and is a false statement containing untrue particulars, showing his visit to Hyderabad in Qualis car. He

further stated that, his statement under Section 164 of the Code of Criminal Procedure is not a statement made by him, but that he was made to sign a type written statement, after he was kept in the private house of a Muslim family. Even T.K.Patel of CID Crimes, Gujarat, has insisted him to stick to the story reflected in his statement dated 19th January 2007, failing which he was threatened that he would be arrested. In other words, as per last version of this witness reflected in his affidavit filed in the court, all his inculpatory statements are false and are concocted statements created by the Investigating Officers.

38 It is worthwhile to note that the learned Additional Sessions Judge, Mumbai, on presentation of affidavit by PW105 Nathuba Jadeja had verified the contents thereof from this witness and has made a note to that effect on that affidavit.

39 Undisputedly, this witness PW105 Nathuba Jadeja and PW106 Gurudayal Singh have turned hostile to the prosecution during the course of the trial and reported to have not supported

the prosecution in any manner. This position is undisputed. This is the nature and quality of statements of PW105 Nathuba Jadeja and PW106 Gurudayal Singh, allegedly recorded during the course of investigation by various Investigating Officers. Their statements recorded by the CBI undisputedly show that PW105 Nathuba Jadeja and PW106 Gurudayal Singh were guilty associates in the crime in question, and therefore, even at the time of framing of Charge, the court is bound to search for necessary corroboration by looking into other evidence sans statement of such accomplice.

40 According to the prosecution case, Sohrabuddin Shaikh and Kausarbi were detained in “Disha Farm House” owned by PW140 Girishbhai Patel. Statement of this witness shows that on 23rd November 2005, he was requested by the Deputy Superintendent of Police Parmar to allow him to use the farm house. PW150 Dinesh Patel was working as Manager/caretaker of that farm house. Statement of this witness shows that in the evening hours of 24th November 2005, one male and one burkha

clad female were brought to the farm house by the Qualis vehicle and they were detained in the office room of the farm house. Two men were keeping watch on them. In night hours of 25th November 2005, the male person who was detained in the farm house was taken out, whereas on 26th November 2005, the burkha clad lady was taken out of the farm house in the Maruti car. PW149 Girishbhai Patel corroborated version of PW150 Dinesh Patel by stating that PW150 Dinesh Patel told him that one male and one female were brought in the farm house in the night hours of 24th November 2005. This witness has identified the photographs of Sohrabuddin Shaikh and Kausarbi as persons who were brought to “Disha Farm House.” PW151 Nareshbhai has deposed about taking of Kausarbi – the burkha clad lady from the Disha Farm House. This material collected during investigation is totally contrary to the version of PW105 Nathuba Jadeja who had disclosed to the investigating agency that after 7.00 p.m. of 23rd November 2005, by following the Maruti car of Deputy Superintendent of Police Parmar, they had gone to the farm house where Sohrabuddin Shaikh and Kausarbi were detained. This

accomplice has not deposed about dumping the abducted persons in the “Disha Farm House” in evening hours of 24th November 2005. The charge-sheet is not disclosing where abducted persons were kept from night hours of 23rd November 2005 to night hours of 24th November 2005.

41 PW107 Bhailal Rathod is the driver of Deputy Superintendent of Police Parmar who had led the Qualis vehicle to the farm house for detaining Sohrabuddin Shaikh and Kausarbi. PW107 Bhailal Rathod has stated that after office hours of 24th November 2005, he went to Coba circle along with Deputy Superintendent of Police Parmar. From there Qualis vehicle followed their Maruti car. Deputy Superintendent of Police Parmar alighted from the Maruti car and went inside the farm house and then the Qualis vehicle also went inside the farm house. Thus, PW107 Bhailal Rathod is also not corroborating version of accomplice PW105 Nathuba Jadeja that Sohrabuddin Shaikh and Kausarbi were detained in the “Disha Farm House” at about 7.00 p.m. of 23rd November 2005. Moreover, PW107

Bhailal Rathod has not spoken about presence of respondent/discharged accused no.1 D.G.Vanzara in the Qualis vehicle or at the “Disha Farm House” for detaining Sohrabuddin Shaikh and Kausarbi at that place. There is no evidence even according to the prosecution case to the effect that though respondent/discharged accused no.1 D.G.Vanzara was present at Ahmedabad, he ever visited the place where Sohrabuddin Shaikh and his wife were detained by Gujarat Police. If really under conspiracy, respondent/discharged accused no.1 D.G.Vanzara had caused this abduction, he would have certainly visited the place where Sohrabuddin Shaikh was allegedly detained by police on 24th November 2005. This did not happen.

42 Now let us ascertain from the material gathered by the prosecution as to whether it is seen that respondent/discharged accused no.1 D.G.Vanzara had taken any part in encounter of Sohrabuddin Shaikh and Tulsiram Prajapati. On this aspect, PW105 Nathuba Jadeja has stated that in the night intervening 25th November 2005 and 26th November 2005, and particularly

around 1.30 to 2.00 a.m., he drove Police Inspector N.H.Dhabi along with three officers of the Rajasthan Police in the Maruti car. On instructions of Police Inspector N.H.Dhabi, he stopped the Maruti car near a big electric pole in between Narol circle and Vishala circle. Then, Police Inspector N.H.Dhabi and three officers of Rajasthan Police alighted from that vehicle. He took the Maruti car ahead of that spot and parked it. PW105 Nathuba Jadeja further stated that at about 2 O'Clock in the night, second Maruti car driven by PW107 Bhailal Rathod came from Narol and stopped near the electric pole. Some person alighted from that vehicle driven by PW107 Bhailal Rathod. PW105 Nathuba Jadeja stated that driver of that another Maruti car was PW107 Bhailal Rathod. PW107 Bhailal Rathod then parked that Maruti car behind Maruti car driven by PW105 Nathuba Jadeja. As per version of PW105 Nathuba Jadeja, after sometime he heard sound of firing. Thereafter, they were instructed to reverse the vehicles. Hence, he himself and PW107 Bhailal Rathod reversed their vehicles and reached near the electric pole. One person (Sohrabuddin Shaikh) was lying there in injured condition. He was put in the Maruti car

driven by PW107 Bhailal Rathod. PW105 Nathuba Jadeja further stated that, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, discharged accused no.2 Rajkumar Pandiyan and the Superintendent of Police, Udaipur, were present there apart from Police Sub-Inspector Chaubey, Santaram Sharma and three officers from Udaipur.

43 As against this statement of accomplice PW105 Nathuba Jadeja, PW107 Bhailal Rathod, who happened to be driver of Deputy Superintendent of Police Parmar, has stated to the CBI that at about 2.30 a.m. in the night intervening 25th November 2005 and 26th November 2005, he had taken Deputy Superintendent of Police Parmar and others by Maruti car to Cobra circle. There Police Sub-Inspector Chaubey with two other persons came and sat in his car. Face of one of those two persons was covered. PW107 Bhailal Rathod stated that he then drove the Maruti car to Narol circle and then towards Vishala circle. Then he stopped the car near the electric pole. Police Sub-Inspector Chaubey and those two persons alighted from the car. Another

Maruti car came and stopped there. He then heard sound of firing bullets. Thereafter, Police Inspector N.H.Dhabi called him. Another Maruti car left the spot. He took his car towards Police Inspector N.H.Dhabi. He saw one motorcycle lying there and also one person (Sohrabuddin Shaikh) lying there in injured condition. PW107 Bhailal Rathod further stated that then Police Inspector N.H.Dhabi and Police Sub-Inspector Chaubey kept that injured person (Sohrabuddin Shaikh) in his car and they went to civil hospital where that person was declared dead. If statements of PW105 Nathuba Jadeja and PW107 Bhailal Rathod are read in tandem, then version of PW105 Nathuba Jadeja reflects that even PW107 Bhailal Rathod has witnessed the post event happenings after hearing sound of firing. Infact, as per versions of both these witnesses, the injured was put in the car driven by PW107 Bhailal Rathod for taking him to the hospital. Thus, if really respondent/discharged accused no.1 D.G.Vanzara was present on that spot at the time of the incident, then PW107 Bhailal Rathod would have certainly spoken about his presence. However, statement of PW107 Bhailal Rathod is conspicuously silent about

presence of respondent/discharged accused no.1 D.G.Vanzara on the spot of the incident, at the time of the alleged fake encounter of Sohrabuddin Shaikh.

44 This is the evidence gathered by the prosecuting agency to show alleged active involvement of respondent/discharged accused no.1 D.G.Vanzara in encounter of Sohrabuddin Shaikh. However, evidence of accomplice PW105 Nathuba Jadeja is not gaining any corroboration from version of other witnesses in order to make use of confessional statements of this accomplice for forming the ground for proceeding against respondent/discharged accused no.1 D.G.Vanzara. There is no iota of evidence to show presence of respondent/discharged accused no.1 D.G.Vanzara at the spot of the incident of encounter of Sohrabuddin Shaikh in the night intervening 25th November 2005 and 26th November 2005. There is no other independent evidence on this aspect, so as to seek aid of confessional statement of accomplice PW105 Nathuba Jadeja.

45 According to the learned counsel for the revision petitioner, the motorcycle found lying on the spot where encounter of Sohrabuddin Shaikh took place, was belonging to one Shok Singh Yadav who happens to be cousin of Ajay Singh Yadav, Constable, and this Ajay Singh Yadav is close to respondent/discharged accused no.1 D.G.Vanzara. According to the learned counsel for the revision petitioner, this circumstance shows involvement of respondent/discharged accused no.1 D.G.Vanzara in conspiracy to kill Sohrabuddin Shaikh. There is no evidence in this regard to infer complicity of respondent/discharged accused no.1 D.G.Vanzara. Few bits here and few bits there cannot make out even a prima facie case for inferring conspiracy and this aspect is inconsequential.

46 The next circumstance relied by the prosecution and urged by the revision petitioner to make out a prima facie case for framing Charge against respondent/discharged accused no.1 D.G.Vanzara is to the effect that he was found present at the spot where Kausarbi's dead body was disposed off by burning. The

learned counsel for the revision petitioner argued that spot was at Village Ellol which is native place of respondent/discharged accused no.1 D.G.Vanzara. Heavy reliance is placed on confessional statement of accomplice PW105 Nathuba Jadeja in order to demonstrate that his version forms sufficient ground for proceeding against respondent/discharged accused no.1 D.G.Vanzara, discharged accused no.2 Rajkumar Pandiyan and discharged/accused no.12 Narendar K. Amin. This witness in his statement given to the CBI on 11th May 2010 has stated that on 28th November 2005 he was called by discharged accused no.1 D.G.Vanzara and he was directed to go with the tempo with one Chauhan. Therefore, he along with Police Sub-Inspector Chauhan, proceeded on the tempo. That tempo was then loaded with 700 to 800 kilograms of firewood. PW105 Nathuba Jadeja further stated that on the way, the tempo faced problem of malfunctioning of gear and stopped moving. Hence, another tempo was summoned and Police Inspector Rathod brought that another tempo. The firewood was then transferred to the another tempo and then they proceeded further by another tempo and

reached Village Ellol at about 10.00 to 11.00 p.m. of 28th November 2005. PW105 Nathuba Jadeja further stated that at the bed of the river, that tempo got stuck in the sand. Therefore, firewood came to be unloaded at that place only. Then, respondent/discharged accused no.1 D.G.Vanzara, discharged accused no.2 Rajkumar Pandiyan and discharged accused Deputy Superintendent of Police N.K.Amin arrived. In the jeep brought by Police Official Chaubey, there was one dead body. PW105 Nathuba Jadeja further stated that he himself alongwith Police Officials Chaubey, Chauhan and Rathod kept the dead body on the stacked firewood. Then that dead body was burnt by respondent/discharged accused no.1 D.G.Vanzara. Discharged accused no.2 Rajkumar Pandiyan and another discharged accused N.K.Amin apart from others were present there up to 4.00/5.00 a.m in the morning.

47 This confessional statement can be acted upon provided some independent evidence is available in that regard. Except confessional statement of PW105 Nathuba Jadeja, there is

no other evidence to point out that respondent/discharged accused no.1 D.G.Vanzara was present at the bank of the river at Village Ellol when allegedly the dead body of Kausarbi was burnt. PW188 Jahir Abbas was the driver of the first tempo and his version shows that it was on 29th November 2005, at about 5.15 p.m., his tempo was stopped by two plain clothed policemen. He was then taken to the Anti Terrorist Squad Office. His tempo was then taken by Rathod on the pretext of RTO checking and he was made to sit at the Anti Terrorist Squad Office. Subsequently, Rathod came and told him that his tempo went out of order. This witness accompanied Rathod and found that firewood from his tempo was being shifted to the another tempo. What is stated by this witness is in respect of events which took place on 29th November 2005 and not on 28th November 2005, as stated by PW105 Nathuba Jadeja. This witness has not named respondent/discharged accused no.1 D.G.Vanzara. The another tempo owner PW156 Kalpesh Waghela has also stated to the CBI that it was on 29th November 2005 after 7.00 p.m., his tempo was taken by the Anti Terrorist Squad Officers and then he stayed in the Anti

Terrorist Squad Office on that night. His tempo was given to him on 30th November 2005. PW156 Kalpesh Waghela has also not named respondent/discharged accused no.1 D.G.Vanzara and he has spoken about taking of his tempo not on 28th November 2005 but on 29th November 2005. PW154 Kantiji is the crane operator and PW155 Allah Rakkha is the person who accompanied PW154 Kantiji. They had gone to the river bed at Village Ellol and by means of the crane removed the tempo stuck in the river bed. Both these witnesses have not spoken about witnessing the funeral pyre, burning of the dead body of a female or about presence of respondent/discharged accused no.1 D.G.Vanzara on the spot, i.e. the river bed at Village Ellol. It is, thus, seen that even statements of other witnesses are not corroborating and supporting version of accomplice PW105 Nathuba Jadeja in respect of presence of respondent/discharged accused no.1 D.G.Vanzara at the spot where the dead body of Kausarbi was allegedly disposed off. Thus, in order to act upon the incriminating statement of accomplice PW105 Nathuba Jadeja, there is no independent evidence on this aspect.

48 PW26 Lakhoba Churasama was the driver with the Anti Terrorist Squad Ahmedabad. He stated that he came to know that Gypsy vehicle allotted to him was used by accused police officers Chaubey and Chauhan Police Sub-Inspector and it was taken by them to Ellol and to Narmada river. This hearsay evidence is not even disclosing the source of information. Moreover this witness has stated that as per Log Book of that vehicle, during relevant period, that Gypsy vehicle had travelled to Ahmedabad, Rajkot, Viramgan Village. Thus, this official document does not show that the Gypsy was taken to Ellol or Narmada River. PW37 Sharafat Ali is supplier of raw material – silica. His Labour Contractor told him that something was burning near the check dam and there was movement of vehicle. This material, being hearsay cannot be legally translated into evidence. As such, it does not depict ground for framing the Charge against discharged accused.

49 Similarly, statement of Rajendra Acharya, English Typist with the Anti Terrorist Squad as well as that of Dinesh

Parmar, Deputy Superintendent of Police, shows that respondent/discharged accused no.1 D.G.Vanzara used to meet discharged accused no.3 Dinesh M.N. when discharged accused Dinesh M.N. used to visit the office of Anti Terrorist Squad and discharged accused no.3 Dinesh M.N. had visited that office even two months prior to the encounter of Sohrabuddin Shaikh. Such visits and meeting of respondent/discharged accused no.1 D.G.Vanzara and discharged accused no.3 Dinesh M.N. cannot be considered as part of conspiracy, particularly when such visits of discharged accused no.3 Dinesh M.N. were not clandestine visits and those are reflected in the official documents and are made after seeking prior permission of the higher-ups in the department. Letter at Exhibit D-112 dated 19th May 2007 sent by Inspector General of Police to the CID shows that discharged accused no.3 Dinesh M.N. had taken permission of the Inspector General for his visit to Ahmedabad. Statement of A.S.Gill, the then Director General of Police, Rajasthan, also shows that discharged accused no.3 Dinesh M.N. had taken permission of even the Director General of Police for visiting Ahmedabad. Log book of official

vehicle of discharged accused no.3 Dinesh M.N. filed with the charge-sheet also reflects mention of his visits to Ahmedabad. Thus, visits of discharged accused no.3 Dinesh M.N. to Anti Terrorist Squad, Ahmedabad and his meetings with respondent/discharged accused no.1 D.G.Vanzara cannot be made capital of and cannot be construed as visits for conspiring to kill either Sohrabuddin Shaikh or Tulsiram Prajapati. On the contrary, both these persons were wanted accused in Crime No.214 of 2004 in respect of murder of Hamid Lala with Hathipole Police Station of Rajasthan as well as in the Crime No.1124 of 2004 registered with Navrangpura Police Station at Ahmedabad regarding case of firing at the Popular Builder. Statements of inmates of prison show that Tulsiram Prajapati along with Sohrabuddin Shaikh was indulging in extorting crores of rupees from Marble Traders and Textile Industry of Rajasthan. Therefore, it is, but natural for Police Officers to search for such absconding accused and to meet various Police Officers for tracing them out. When such visits are with due permission and well documented in all official record, those cannot be branded as

clandestine visits for conspiring to kill Sohrabuddin Shaikh and Tulsiram Prajapati in fake encounter. Log books of official vehicle of discharged accused no.3 Dinesh M.N. corroborates version of his driver Puranmal Meena that discharged accused no.3 Dinesh M.N. was at the Circuit House of Ahmedabad in the night intervening 25th November 2005 and 26th November 2005 and at day time of 25th November 2005 he did not go anywhere. Even charge-sheet contains the documents in respect of claim of discharged accused no.3 Dinesh M.N. for TA and DA Allowance for his visit to Ahmedabad from 24th November 2005 to 26th November 2005. Thus, such visits of discharged accused no.3 Dinesh M.N. to Anti Terrorist Squad, Ahmedabad and his meetings with respondent/discharged accused no.1 D.G.Vanzara do not constitute ground for framing the Charge as there is nothing objectionable in such visits.

50 So far as Call Data Records (CDRs) of respondent/discharged accused no.1 D.G.Vanzara reflecting calls between him and discharged accused no.3 Dinesh M.N. are

concerned, telephonic communication between two senior police officers of two different States by themselves does not reflect any conspiracy. Contents of those telephonic calls are not with the prosecuting agency. Without any material as regards the subject matter of conversation between respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, and discharged accused no.3 Dinesh M.N., merely on the basis of CDR of respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, it cannot be inferred that sufficient ground is made out for framing the Charge. Proper course of action would have been to obtain CDR of discharged accused no.3 Dinesh M.N. also for giving clear picture. Such CDRs would have shown whether they both were in contact with each other, so also with other accused persons.

51 It was urged that once respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, visited Udaipur and discharged accused no.3 Dinesh M.N. made arrangements for his stay and this fact reflects

conspiracy to kill Sohrabuddin Shaikh and Tulsiram Prajapati. For this purpose, reliance is placed on statement of PW11 Suresh Mehta and PW12 Phulchand which shows that during 27th December 2005 to 30th December 2005, respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, visited Circuit House, Udaipur, and that room was booked at the instance of discharged accused no.3 Dinesh M.N. Infact, this visit was after one month of encounter of Sohrabuddin Shaikh. Respondent/discharged accused no.1 D.G.Vanzara was the Deputy Inspector General of Police of Anti Terrorist Squad, Ahmedabad. Extending protocol courtesy by reserving room in the name of D.G.Vanzara cannot be termed as an objectionable act raising suspicion. Ultimately, the said visit was official visit and the stay was documented in the Circuit House by official booking. It was not clandestine visit and the stay was not at some secret place or private hotel.

52 Now let us examine allegation against respondent/discharged accused no.1 D.G.Vanzara in respect of

murder of Tulsiram Prajapati. According to the prosecution case, Tulsiram Prajapati was abducted along with Sohrabuddin Shaikh and his wife Kausarbi during their journey from Hyderabad to Sangli. The abduction was by intercepting the luxury bus by the Qualis vehicle occupied by discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, Ahmedabad. Though prosecution case is clear about taking Sohrabuddin Shaikh and Kausarbi to “Disha Farm House” after abduction, the same is shrouded in mystery so far as disposal after abduction of Tulsiram Prajapati is concerned. What happened to him after abduction is not made clear by the prosecuting agency CBI, particularly in the light of the fact that he was wanted accused in Popular Builder firing case at Navrangpura Police Station, Ahmedabad, so also in murder case of Hamid Lala registered with Hathipole Police Station of Udaipur. Thus, he was required by Gujarat Police as well as Rajasthan Police. Still, it is not clear from the prosecution case, as to what happened with him after his abduction from the luxury bus in the night intervening 22nd November 2005 and 23rd November 2005. If he

was allowed to go by himself, why and how this was done, is a question not answered from the papers of investigation. Similarly, if Tulsiram Prajapati was one of prime eye witnesses to abduction of Sohrabuddin Shaikh and Kausarbi, and Sohrabuddin Shaikh was to be killed by the accused persons shortly thereafter, then also why Tulsiram Prajapati was allowed to go freely is not clear from the charge-sheet. Similarly, if it is assumed that he was kept in illegal detention after abducting him on 23rd November 2005, then there is no iota of evidence in this regard and particularly regarding the whereabouts from 23rd November 2005 to 26th November 2005.

53 Now let us examine the charge-sheet in order to ascertain evidence collected by the prosecution to demonstrate that the third person who came to be abducted from the luxury bus proceeding from Hyderabad to Sangli was none else but Tulsiram Prajapati. It is worthwhile to mention here that the charge-sheet contains no evidence of any person from Hyderabad to show that Sohrabuddin Shaikh and Kausarbi were accompanied

by Tulsiram Prajapati during their stay at Hyderabad or in their journey from Hyderabad to Sangli. According to the prosecution case, Sohrabuddin Shaikh and his wife Kausarbi came to Hyderabad from Indore in the Maruti van owned by his friend Kalimuddin. Then they stayed with Kalimuddin for celebrating Eid at Hyderabad. Statement of this Kalimuddin would have thrown some light on this aspect. However, during investigation, it appears Kalimuddin is not examined by the investigating agency. We are having statement of Saleema Begum from Hyderabad recorded by the CBI with the charge-sheet. This statement dated 2nd March 2010 reveals that Saleema Begum is sister of Nayeemuddin @ Nayeem and according to the charge-sheet, this Nayeemuddin is infact Kalimuddin. This Kalimuddin @ Nayeem, as per statement of Saleema Begum is absconding accused in D.I.G. Vyas assassination case. Saleema Begum has stated to the CBI that Sohrabuddin Shaikh and Kausarbi had been to Hyderabad in November 2005. She refused to divulge further details to the CBI by stating that for that purpose she will have to talk with her brother Nayeemuddin. She accepted the fact that

visit of Sohrabuddin Shaikh to Hyderabad was arranged by her brother Nayeemuddin. She further stated that she is acquainted with Sohrabuddin Shaikh and Kausarbi but put a rider by stating that she will disclose further things after consulting her brother Nayeemuddin. As per version of Saleema Begum relatives of Sohrabuddin Shaikh are in their contact, but then this witness has stated that she would narrate further facts after consulting Nayeemuddin @ Kalimuddin. The investigating agency has not traced out this Nayeemuddin @ Kalimuddin with whom Sohrabuddin Shaikh and his wife Kausarbi stayed at Hyderabad. Saleema Begum has not stated that Tulsiram Prajapati was with Sohrabuddin Shaikh and Kausarbi in their stay at Hyderabad in November 2005, but she made it clear that relatives of Sohrabuddin Shaikh were in contact with her. Not a single witness from Hyderabad is there to vouch for presence of Tulsiram Prajapati at Hyderabad during the relevant period.

54 Now let us examine whether any grounds for proceeding against respondent/discharged accused no.1

D.G.Vanzara can be found from statements of brothers of deceased Sohrabuddin Shaikh viz. revision petitioner Rubabuddin Shaikh and Nayabuddin Shaikh, and to infer availability of prima facie evidence for framing the Charge. The entire episode began with undated letter of revision petitioner Rubabuddin received by the Honourable Supreme Court on 14th January 2006. By this letter, revision petitioner Rubabuddin has informed that his brother Sohrabuddin Shaikh and his sister-in-law Kausarbi were travelling in the bus of N.J.Travels from Hyderabad to Sangli and Seat nos.29 and 30 were allotted to them. He further stated that Sohrabuddin Shaikh and Kausarbi were arrested by police. His brother Sohrabuddin Shaikh came to be killed in the encounter on 26th November 2005 and Kausarbi is missing. He apprehended that Kausarbi might have been killed and prayed for action against all guilty persons. This letter was then forwarded to the Director General of Police, Gujarat, vide letter dated 21st January 2006 of the Assistant Registrar of the Honourable Supreme Court. It was directed that on conducting inquiry, report be forwarded to the Honourable Supreme Court. Perusal of the first letter of

Rubabuddin thus shows that he has not mentioned that during their journey from Hyderabad to Sangli, Sohrabuddin Shaikh and Kausarbi were accompanied by Tulsiram Prajapati and was travelling on seat no.31 of the luxury bus.

55 Statement of revision petitioner Rubabuddin came to be recorded by the CID Crimes on 25th July 2006. It is a detailed statement running into five pages. Relevant portion from third paragraph of this statement reads thus :

“.....On the last 23/11/2005 my brother Sohrabuddin and his wife Kaushar bi had seated in the bus for Hyderabad to Sangli of A.J.Travels, thus I was informed by my younger brother Nayabuddin. This my brother had informed Nayabuddin from his mobile phone. Moreover my younger brother Nayabuddin was informed on his mobile phone by Sohrabuddin from S.T.D. phone, when he started from Hyderabad to Sangli and even Nayabuddin had informed me on my mobile phone.

Relevant portion from page 5 of the statement reads thus :

“.....Moreover, I had learnt from the narration of my brother Nayabuddin that on the last 23/11/05, my elder brother Sohrabuddin and his wife Kaushar bi had started to come to Sangli from Hyderabad by Hytrack Travels Bus No.5051 of M.J.Tour and Travels on the Seat Nos.29 and 30.”

56 Perusal of this statement of revision petitioner Rubabuddin goes to show that deceased Sohrabuddin Shaikh was in contact with his brothers regularly either from the cell phone or S.T.D. phone. He was communicating the facts regarding his onward journey to both of them. It is seen that even during his journey from Hyderabad to Sangli, deceased Sohrabuddin Shaikh was in contact with his brothers and had disclosed to them regarding their journey to Sangli. However, this statement of Rubabuddin does not show that Tulsiram Prajapati was accompanying Sohrabuddin Shaikh and Kausarbi as a third person

by occupying seat no.31 in that luxury bus. Such fact was not told to him by Sohrabuddin Shaikh. Had Tulsiram Prajapati really accompanied Sohrabuddin Shaikh and Kausarbi during this journey, Sohrabuddin Shaikh would have certainly disclosed it to his brothers.

57 It is seen that on 11th January 2007 revision petitioner Rubabuddin has filed a writ petition being Writ Petition (Cri.) No.6 of 2007 before the Honourable Supreme Court. Relevant pleadings in paragraph 2 of that writ petition read thus :

“The facts leading to the filing of the present petition are as follows :-

a) Between the night of 22nd and 23rd of November, the Petitioner's brother Shri.Sohrabuddin with his wife Smt.Kausarbi were travelling from Hyderabad to Sangli in a bus of M J Tours and Travel No.5150 on Seats Nos.29 and 30. At that time, the Gujarat Anti Terrorist Squad (ATS) Police and Rajasthan Special Task Force (STF) intercepted the bus and picked up Sri Sohrabuddin and his wife Kausarbi.

b) On 26.11.2005 Shri Sohrabuddin was killed by a team consisting of Shri. Rajkumar Pandyan, S.P. ATS and Shri Dineshkumar S.P., Udaipur and some other police personnel under the direct supervision of Shri. D.G. Vanzara, DIG, ATS. Also the above named officers played an active role in causing disappearance of Smt.Kasurbi.

58 Perusal of the entire pleading in this writ petition shows that Rubabuddin has not mentioned that Tulsiram Prajapati was accompanying his brother Sohrabuddin Shaikh and Kausarbi during their journey by luxury bus from Hyderabad to Sangli in the night intervening 22nd and 23rd November 2005, though he has specifically pleaded seat numbers allotted to Sohrabuddin Shaikh and Kausarbi. He has not even pleaded that along with his brother Sohrabuddin Shaikh and Kausarbi, Tulsiram Prajapati was picked up by Gujarat and Rajasthan Police, on that night.

59 After filing of Writ Petition bearing no.6 of 2007, statement of Rubabuddin came to be recorded again on 3rd

February 2007. In this statement, Rubabuddin has disclosed that Sohrabuddin Shaikh and Kausarbi left their village Jharania for Indore on 16th /17th November 2005. Rubabuddin has further stated that at that time, Sohrabuddin Shaikh disclosed them that from Indore he along with Kausarbi would go to the place of Kalimuddin at Hyderabad for celebrating Eid. Rubabuddin further disclosed in this statement dated 3rd February 2007 that after Sohrabuddin Shaikh and Kausarbi reached Indore, they went to Hyderabad by taking Maruti van belonging to Kalimuddin, kept at the residence of Dr.Prakash Odekar of Indore. Rubabuddin in his statement dated 3rd February 2007 further stated that Sohrabuddin Shaikh had telephonically informed him that Kausarbi's health had deteriorated and as per advise of Dr.Prakash Odekar of Indore, he is taking Kausarbi to Sangli for medical treatment. Thereafter, on 21st November 2005, at about 6 to 8.30 p.m., he had talks with Sohrabuddin Shaikh on a phone call. In this statement dated 3rd February 2007 also, Rubabuddin had not whispered about presence of Tulsiram Prajapati with Sohrabuddin Shaikh, though allegedly, he was in constant touch with

Sohrabuddin Shaikh and though Sohrabuddin Shaikh was disclosing the facts regarding his stay and journey to him. If really Tulsiram Prajapati was accompanying the couple in their journey from Indore to Hyderabad, in normal course Sohrabuddin Shaikh would have disclosed this fact to his brothers during their telephonic talks.

60 On 1st April 2007 another statement of Rubabuddin came to be recorded by the CID. That statement is a detailed statement running into ten pages. In this statement, Rubabuddin has disclosed about journey of Sohrabuddin Shaikh and Kausarbi to Indore and disclosure of Sohrabuddin Shaikh to him at that time that thereafter he would go to the place of his friend Kalimuddin at Hyderabad. Rubabuddin further disclosed that their journey from Indore to Hyderabad was in the Maruti van of Kalimuddin and Sohrabuddin Shaikh might have stayed at the place of Kalimuddin at Hyderabad. Rubabuddin also stated that Sohrabuddin Shaikh while at Hyderabad used to talk with him regularly on his mobile phone as well as mobile phone of his

brother Nayabuddin. Rubabuddin further stated that on 23rd November 2005 Sohrabuddin Shaikh telephonically contacted Nayabuddin and informed that he and Kausarbi were leaving from Hyderabad for going to Sangli for medical treatment by luxury bus. According to Rubabuddin, Nayabuddin had informed this fact to him.

Thus, this statement of Rubabuddin given on 1st April 2007, reflects the fact that Rubabuddin and his brother Nayabuddin were in constant touch with Sohrabuddin Shaikh and were communicating with each other about movements of Sohrabuddin Shaikh after he left for Indore and Hyderabad. However, Rubabuddin had not even remotely averred that he came to know from Sohrabuddin Shaikh or sister of Nayeemuddin @ Kalimuddin that Tulsiram Prajapati was accompanying Sohrabuddin Shaikh and Kausarbi, either during their journey from Indore to Hyderabad or by joining them at Hyderabad. He has not stated that Tulsiram Prajapati was with Sohrabuddin Shaikh and Kausarbi from Hyderabad for going to Sangli though there was telephonic contact of Sohrabuddin Shaikh and

Nayabuddin on 23rd November 2005, within knowledge of this witness. Non-disclosure of this fact by deceased Sohrabuddin Shaikh to his brothers indicates that Tulsiram Prajapati must not be with him during this period.

61 Now comes the statement dated 18th February 2010 of Rubabuddin recorded by the CBI. Rubabuddin in this statement has reiterated that when Sohrabuddin Shaikh was at Hyderabad, Sohrabuddin Shaikh was frequently talking with him as well as with Nayabuddin over mobile phones. Sohrabuddin Shaikh was even communicating from the S.T.D. phones. Rubabuddin further stated that Sohrabuddin Shaikh had lastly phoned him as well as his brother Nayabuddin in the evening hours of 22nd November 2005 and informed that he is taking Kausarbi to Sangli for medical treatment. As per version of Rubabuddin, in this statement, his brother Nayabuddin told him that he learnt from Kalimuddin's sister that Kalimuddin had gone to see off Sohrabuddin Shaikh and Kausarbi at the luxury bus at Hyderabad. They had occupied seat nos.29 and 30 of that bus. Mentioning of

only two seat numbers shows that nobody else was accompanying the couple. It needs to be noted that after about 4 years, Rubabuddin has introduced new fact in this statement dated 18th February 2010 to the effect that his brother Nayabuddin told him that from Indore one friend namely Tulsiram Prajapati has also joined Sohrabuddin Shaikh for going to Hyderabad.

62 Rubabuddin in this statement dated 18th February 2010 also disclosed about his meeting with Tulsiram Prajapati in September/October 2006 at Ujjain. As per his version, when he asked Tulsiram Prajapati about death of Sohrabuddin Shaikh, Tulsiram Prajapati told him that he as well as Sohrabuddin Shaikh and Kausarbi had gone to Hyderabad, stayed there with Kalimuddin and in the night between 22nd and 23rd November 2005, they were going to Sangli for medical treatment of Kausarbi by the luxury bus. Thereafter, according to Rubabuddin, Tulsiram Prajapati became emotional and started crying. Thereafter, as stated by Rubabuddin, Tulsiram Prajapati had handed over two blank papers containing his signatures for writing letters to the

Honourable Supreme Court and Rajasthan High Court on his behalf.

63 It is, thus, clear that for the first time in the year 2010, Rubabuddin is introducing presence of Tulsiram Prajapati with Sohrabuddin Shaikh and that too on the basis of information given by his another brother named Nayabuddin. Up to the year 2010, Rubabuddin has not disclosed this fact to anyone. He has not disclosed this fact by pleading it in the Criminal Writ Petition bearing no.6 of 2007 filed on 11th January 2007. Those two blank papers containing signatures of Tulsiram Prajapati were not annexed to that writ petition to point out gravity of the alleged incident. Thus, versions of Rubabuddin if considered chronologically reflects that averments made therein are opposed to the basic common sense as well as broader probabilities of the case, and as such, does not even create suspicion against respondent/discharged accused no.1 D.G.Vanzara in the matter of alleged elimination of Tulsiram Prajapati by conspiring with others.

64 Now, let us examine what Nayabuddin has stated to the investigating agencies in this regard. On 8th July 2006 statement of Nayabuddin came to be recorded by the CID. As per his version, in May 2005, his brother Sohrabuddin Shaikh and sister-in-law Kausarbi had gone to Indore and he then stayed with them at Indore. Nayabuddin further stated that on 16th/17th November 2005 Sohrabuddin Shaikh and Kausarbi went to Hyderabad and thereafter they used to frequently call him from Hyderabad on his mobile number. On 22nd November 2005 also he received call from Sohrabuddin Shaikh, who at that time, was at Hyderabad. Then, on telephonic call on 23rd November 2005 Sohrabuddin Shaikh told him that he is going from Hyderabad to Sangli. This witness further disclosed that after death of Sohrabuddin Shaikh he contacted sister of Kalimuddin and she disclosed to him that on 23rd November 2005, Kalimuddin had dropped Sohrabuddin Shaikh and Kausarbi in the luxury bus going from Hyderabad to Sangli. This witness further stated that after some days he received a call from Kalimuddin who told him that on on 22nd November 2005 or 23rd November 2005 he

(Kalimuddin) got ticket booked for Sohrabuddin Shaikh and Kausarbi from Hyderabad to Sangli and during that journey, Sohrabuddin Shaikh and Kausarbi were taken by persons who came in 6 to 7 cars. This statement of Nayabuddin recorded soon after the incident of death of Sohrabuddin Shaikh does not show that Tulsiram Prajapati was with Sohrabuddin Shaikh and Kausarbi at Indore or at Hyderabad. This statement makes it clear that this witness Nayabuddin has not seen Tulsiram Prajapati in the company of his brother Sohrabuddin Shaikh and Kausarbi when they left Indore for Hyderabad. Moreover, soon after death of Sohrabuddin Shaikh, as per version of Nayabuddin, Kalimuddin had disclosed to him about last journey of Sohrabuddin Shaikh with Kausarbi. Statement of this witness Nayabuddin does not show that Tulsiram Prajapati was with Sohrabuddin Shaikh and Kausarbi during their stay at Hyderabad or in their journey towards Sangli. This is, despite the fact that, Nayabuddin claimed to be in frequent touch with Sohrabuddin Shaikh during this period.

65 On 31st March 2007 another statement of this witness came to be recorded. In this statement also, Nayabuddin has not claimed that from Indore, Tulsiram Prajapati joined his brother Sohrabuddin Shaikh for onward journey to Hyderabad. On the contrary, he has stated that at Indore, Sohrabuddin Shaikh and Kausarbi went to Dr.Prakash Odekar and from there they went to Hyderabad by Maruti van. He is not speaking about presence of Tulsiram Prajapati with Sohrabuddin Shaikh at Indore or while leaving Indore for Hyderabad.

66 Lastly, on 19th February 2010, statement of Nayabuddin came to be recorded by the CBI in which he has stated that on or about 14th 15th or 16th November 2005, he had gone to see off Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati at Indore bus stand when they were leaving for Hyderabad in white Maruti van belonging to Kalimuddin. There is no explanation as to why such an important fact is not disclosed by this brother of deceased Sohrabuddin Shaikh for a long period of more than 4 years to any authority or even to the court, when

his another brother had already approached Honourable Supreme Court in the matter.

67 It is seen from all former statements of Rubabuddin as well as Nayabuddin that they maintained their version right from the year 2006 to 2010 that there was no third person with Sohrabuddin Shaikh and Kausarbi during their journey from Jharania to Indore and then to Hyderabad and from Hyderabad towards Sangli. Even this fact is not pleaded in the writ petition filed before the Honourable Supreme court by Rubabuddin. However, after about 5 years from the incident, all of a sudden Nayabuddin is stating in the year 2010 that he had gone to see off Sohrabuddin Shaikh and Kausarbi and Tulsiram Prajapati in November 2005 at the bus stand of Indore for their journey to Hyderabad. For the reasons best known to it, the prosecution has not collected CDRs of telephonic communication between Sohrabuddin Shaikh and his brothers Rubabuddin and Nayabuddin. Sister of Kalimuddin namely Saleema Begum has not spoken about presence of any third person with Sohrabuddin

Shaikh and Kausarbi at Hyderabad. Statement of Kalimuddin is not recorded during the course of investigation. Not a single witness from Hyderabad is examined to show presence of Tulsiram Prajapati with Sohrabuddin Shaikh at Hyderabad. This is the only evidence regarding presence of third person named Tulsiram Prajapati during journey of Sohrabuddin Shaikh and Kausarbi from Hyderabad to Sangli, which is introduced in the year 2010 by Nayabuddin. This material is not at all making prima facie case against the respondent/ discharged accused no.1 D.G.Vanzara nor raising any suspicion of having committed alleged offence by him. This version of Nayabuddin made in the year 2010 by which he introduced presence of Tulsiram Prajapati with Sohrabuddin Shaikh and Kausarbi at Bus Stand of Indore for onwards journey in November 2005 is opposed to common sense as well as contrary to the broader probabilities of the case as seen from other material, and as such cannot be accepted as a gospel truth.

68 To crown this all, there is statement of Chandan Kumar Jha recorded under Section 164 of the Code of Criminal Procedure. Undisputedly, this witness has maintained this version during the trial, as stated by learned counsel appearing for the parties. According to the charge-sheet, Tulsiram Prajapati is shown to have been nabbed from house of this witness situated at Bhilwara in Rajasthan on 26th November 2005. This witness Chandan Kumar Jha has stated to the Judicial Magistrate that he had leased out one room from his three roomed house having common toilet and bathroom to Tulsiram Prajapati. As per version of Chandan Kumar Jha he used to see Tulsiram Prajapati daily and he had seen him residing in that house at Bhilwara regularly for the period of fifteen days prior to 26th November 2005. Thus, as per version of landlord Chandan Kumar Jha, his tenant Tulsiram Prajapati was at Bhilwara atleast from 11th November 2005. The question which arose from perusal of the charge-sheet is whether Tulsiram Prajapati was, therefore, really accompanying Sohrabuddin Shaikh and Kausarbi during their

journey from Hyderabad to Sangli on 22nd November 2005, when his landlord is stating before the Judicial Magistrate that he was at Bhilwara at that time. Atleast, there is no prima facie evidence to show that Tulsiram Prajapati was with Sohrabuddin Shaikh and Kausarbi in the journey from Hyderabad towards Sangli in the charge-sheet and as such, no infirmity could be found in the impugned order of discharge.

69 Though according to the prosecution case, Tulsiram Prajapati was abducted during bus journey from Hyderabad towards Sangli in the night intervening 22nd November 2005 and 23rd November 2005, according to the prosecution case, he was nabbed by PW38 Sudhir Joshi, Deputy Superintendent of Police, Udaipur, and his team including PW22 Bhawarsingh Hada, Station House Officer, Hathipole, on 26th November 2005 from the house of Chandan Kumar Jha. How he was released from the custody of the abductors is not clear from the charge-sheet. Similarly, if it is assumed that he was illegally detained after 23rd November 2005, then charge-sheet contains no evidence in this

regard. Evidence and material collected to show that the third person was Tulsiram Prajapati is totally unsatisfactory.

70 According to the prosecution case, Tulsiram Prajapati alongwith Sohrabuddin Shaikh and Kausarbi were proceeding from Hyderabad to Sangli by luxury bus bearing Registration No.KA-05-F-5051 of M/s.Sangita Travels. During the course of investigation, while recording their statements, photographs of Sohrabuddin Shaikh and Kausarbi were shown to the following witnesses by the Investigating Officer of the CBI and these witnesses identified those photographs as photographs of the couple abducted from that bus in the night intervening 22nd November 2005 and 23rd November 2005 on its way from Hyderabad to Sangli.

- a) PW83 Gaziuddin S/o.Jamaluddin Chabukswar – Cleaner of the luxury bus
- b) PW84 Misban Hyder S/o. Ghosuddin Sheikh – Driver of the luxury bus

- c) PW85 Mohammed Naimuddin S/o. Mohd.Salimuddin –
Booking clerk cum pick up man
- d) PW100 Sharad Apte – Co-passenger of the luxury bus
- e) PW101 Amit Apte - Co-passenger of the luxury bus

However, photographs of Tulsiram Prajapati were not shown to all these witnesses by the Investigating Officer for fixing the identity of the third person travelling with Sohrabuddin Shaikh and Kausarbi. As such, it cannot be inferred that the third person travelling with Sohrabuddin Shaikh and Kausarbi in that luxury bus was Tulsiram Prajapati.

71 As discussed in foregoing paragraphs, there is no evidence to infer even prima facie that Tulsiram Prajapati was accompanying Sohrabuddin Shaikh and Kausarbi at Hyderabad and that he left Hyderabad in company of Sohrabuddin Shaikh and Kausarbi in the luxury bus by occupying seat no.31. Similarly, there is no material to infer that Tulsiram Prajapati was abducted from the luxury bus alongwith Sohrabuddin Shaikh and

Kausarbi. Consequently, no sanctity can be attached to versions of inmates of Central Jail, Udaipur, such as PW30 Mohd.Azam Khan, PW37 Sharafat Ali, PW41 Sylvester Danial, PW187 Rafique @ Bunty, Mohd.Hafiz, PW43 Firoz Khan, PW3 Kundan Prajapati, PW4 Vimal Shrivastava etc. regarding their narrations in respect of the incident of abduction which they allegedly heard from Tulsiram Prajapati while in jail at Udaipur. These inmates of jail are speaking about what they heard from Tulsiram Prajapati in the year 2006, in the year 2010-11. Truth of statement of Tulsiram Prajapati to these witnesses is not established prima facie also because of absence of evidence to show that Tulsiram Prajapati had accompanied Sohrabuddin Shaikh and Kausarbi to Hyderabad and was proceeding with them from Hyderabad towards Sangli.

72 Now let us consider whether recitals of what was allegedly stated to them by Tulsiram Prajapati documented in the statements made by prisoners to the Investigating Officer at Central Jail, Udaipur, constitute dying declarations of Tulsiram Prajapati, and therefore, forms sufficient ground for framing

Charge against respondent/discharged accused no.1 D.G.Vanzara. For this purpose, reliance is placed on statement of co-prisoners PW Dinesh Gujar, PW42 Rafique @ Bunty, PW Mohd.Azam and PW37 Sharafat Ali apart from that of PW3 Kundan Prajapati – nephew of Tulsiram Prajapati as well as PW4 Vimal Shrivastava – friend of PW3 Kundan Prajapati. Statement of PW35 Advocate Salim Khan representing Tulsiram Prajapati in Hamid Lala murder case is also relied by the learned counsel for the revision petitioner. PW Dinesh Gujar in his statement dated 27th June 2011 has stated to CBI about recitals of Tulsiram Prajapati to him during their stay at Udaipur Jail. He stated that Tulsiram Prajapati used to abuse Gujarat police and discharged accused no.3 Dinesh M.N. and used to declare that he will kill discharged accused no.3 Dinesh M.N. because his brother and sister-in-law are killed by him. PW Dinesh Gujar further stated that on request of Tulsiram Prajapati, he wrote applications in English on his behalf to the courts and senior civil officers. As per statement of this witness, application of Tulsiram Prajapati addressed to the National Human Rights Commission was drafted by him. He

stated that in the last week of November 2006, Tulsiram Prajapati had informed him that this time police had sent extra force with them and the in-charge of the escorting party gave indication to Tulsiram Prajapati by saying that “अब तेरा नंबर है”. Therefore, Tulsiram Prajapati called his nephew PW3 Kundan Prajapati and another boy PW4 Vimal Shrivastava from Ujjain. On 25th December 2006, Tulsiram Prajapati was reluctant to go to Ahmedabad but police took him forcibly. Before leaving Tulsiram Prajapati told him that this could be his last meeting. This witness further stated that Tulsiram Prajapati and Mohd.Azam had informed him on earlier occasions that they had requested the court to send them back by chaining their legs so that police may not claim that they had escaped. This witness has not named respondent/discharged accused no.1 D.G.Vanzara. PW42 Rafique @ Bunty in his statement to the CBI has stated that Tulsiram Prajapati disclosed to him that police arrested his nephew PW3 Kundan Prajapati and PW4 Vimal Shrivastava. He further stated that when Police Inspector Abdul Rehman met Tulsiram Prajapati in the jail, Tulsiram Prajapati uttered that if something happens to his nephew, he will

not spare discharged accused no.3 Dinesh M.N.,
respondent/discharged accused no.1 D.G.Vanzara, Churasama, so
also Police Inspector Abdul Rehman.

73 PW Mohd.Azam Khan in his statement dated 14th
November 2011, in detail, confessed about his criminal activities
in association with Tulsiram Prajapati and Sohrabuddin Shaikh,
incident of firing at the Popular Builder at Ahmedabad, activities
of extortion carried out by the gang of Sohrabuddin Shaikh and
Tulsiram Prajapati. Mohd.Azam Khan has stated that Tulsiram
Prajapati was brought before respondent/discharged accused no.1
D.G.Vanzara at Ahmedabad and then respondent/discharged
accused no.1 D.G.Vanzara told him that they want to arrest
Sohrabuddin Shaikh due to political pressure and no harm will be
caused to Sohrabuddin Shaikh. Mohd.Azam Khan then spoke
about incident of abduction of Sohrabuddin Shaikh, Kausarbi and
Tulsiram Prajapati and stated that respondent/discharged accused
no.1 D.G.Vanzara called Rajasthan Police and asked Tulsiram
Prajapati to go to Bhilwara where he was subsequently arrested.

Thereafter, Tulsiram Prajapati was brought to Udaipur Jail. This version of Mohd.Azam Khan is totally hearsay and cannot be legally translated into evidence. As per version of PW Mohd. Azam, on 28th November 2006, about 30 to 40 police personnels were accompanying him and Tulsiram Prajapati to Ahmedabad, and at Ahmedabad they shouted in the court that police might kill them. He stated that he himself and Tulsiram Prajapati had applied for security. He stated that on 26th December 2006, Tulsiram Prajapati hugged him and told him that it might be their last meeting and the police might encounter him. PW37 Sharafat Ali in his statement had disclosed that Tulsiram Prajapati was openly saying that he himself will kill respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, and discharged accused no.3 Dinesh M.N. so also was apprehending danger to his life at the hands of police. In first week of December 2006, Police Inspector Abdul Rehman told him that he will receive news of encounter of Tulsiram Prajapati shortly.

74 PW35 Advocate Salim Khan has stated to the Investigating Officer that whenever he used to meet Tulsiram Prajapati, Tulsiram Prajapati used to express fear of his liquidation by police. He used to say that Gujarat Police and Rajasthan Police have already killed Sohrabuddin Shaikh and now they might kill him. This witness has also spoken about applications submitted by Tulsiram Prajapati to various courts.

75 PW3 Kundan Prajapati and PW4 Vimal Shrivastava unanimously stated that in December 2005, Tulsiram Prajapati met them in the court and told that he is used by Gujarat Police to abduct Sohrabuddin Shaikh and Kausarbi and then he was allowed to go to Bhilwara. His days are numbered and they will kill him. They further disclosed that on request of Rubabuddin, in the end of November 2006, they came to Udaipur as there was apprehension that Tulsiram Prajapati may be killed. They met Tulsiram Prajapati in the district court and he told them that he and Mohd. Azam are being taken by train to Ahmedabad. Fifty to sixty policemen were accompanying Tulsiram Prajapati and Mohd.

Azam at that time. This witness stated that prior to their meeting with Tulsiram Prajapati, they both were arrested by police. Discharged accused no.3 Dinesh M.N. met them and told that he has decided to kill Tulsiram Prajapati and then they both will also be killed. They were beaten by police and kept in illegal detention. According to this witness, on 22nd December 2006, they were kept in Central Jail, Udaipur. They met Tulsiram Prajapati and he expressed strong fear of being killed by Gujarat and Rajasthan Police when he would be taken to Ahmedabad on 25th December 2006. Before leaving, Tulsiram Prajapati told that he would be killed in the fake encounter and discharged accused no.3 Dinesh M.N. played game by preventing Mohd. Azam from accompanying him. These witnesses have not named respondent/discharged accused no.1 D.G.Vanzara and have not stated that Tulsiram Prajapati apprehended fear from him.

76 These recitals to co-prisoners, allegedly made by Tulsiram Prajapati, do not constitute legally admissible evidence in the form of dying declarations, and as such, cannot be

considered for framing Charge. Only that material which can be legally translated into evidence can be considered for framing of the Charge. Valuable assistance to this proposition can be had from judgment of Honourable Apex Court in the matter of **Babubhai Bokhiria and Another vs. State of Gujarat and Others**¹⁸. Relevant portions from paragraphs 14 to 17 of this judgment read 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

18 (2014) 5 Supreme Court Cases 568

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.”

“15 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.”

“16 The Privy Council had the occasion to consider the meaning of the expression “circumstances of transaction” used in [Section 32](#) of the Act in the case of [Pakala Narayanswami v. Emperor](#), [AIR 1939 PC 47](#) and on page 50 held as follows:

“.....The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.....”

“17 Aforesaid view had been approved by this Court in Shiv Kumar v. State of Uttar Pradesh, (Criminal Appeal No. 55 of 1966, decision dated 29th July, 1966) (SC), wherein it was held as under:

“It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed, but general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence. For instance, a statement made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be a circumstance of the transaction, and would be so whether the person

was unknown, or was not the person accused. The phrase “circumstances of the transaction” is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in “circumstantial evidence” which includes evidence of all relevant facts. It is on the other hand narrower than ‘res gestae’ [See **Pakala Narayana Swami v. The King Emperor, AIR 1939 PC 47**]. As we have already stated, the circumstance must have some proximate relation to the actual occurrence if the statement of the deceased is to be admissible under s.32(1) of the [Evidence Act.....”](#)

Whatever has come on record from mouth of co-prisoners is general expression indicating fear or suspicion of Tulsiram Prajapati. That cannot be construed as statement relating to circumstance of transaction resulting in death. As such, these recitals are not admissible and relevant when the cause of death of Tulsiram Prajapati comes into question. As this material cannot legally be translated into evidence, it needs to be kept out of consideration and cannot form sufficient ground for proceeding against respondent/discharged accused no.1 D.G.Vanzara. These

recitals are not indicating any evidence of indulging in conspiracy by accused. In this view of the matter, ruling in the matter of **Albir (supra)** is of no use for furthering the case sought to be made out by the revision petitioner.

77 Deceased Tulsiram Prajapati had sent written complaint to National Human Rights Commission, New Delhi, and has stated therein that Maharashtra, Gujarat, Madhya Pradesh and Rajasthan Police have implicated him in several cases and there is conspiracy amongst the Police Officers of these States to bump him off in any fake encounter by showing that he ran away from the custody and subsequently killed in exchange of fire. It is averred that this complaint was not properly attended by discharged accused no.3 Dinesh M.N. which indicates that he is one of the conspirators in the conspiracy hatched by respondent/discharged accused no.1 D.G.Vanzara. Allegations in this complaint are general in nature and not against Gujarat and Rajasthan Police in particular. It is seen from the charge-sheet that the National Human Rights Commission has not sought for

any compliance report from Rajasthan Police. Forwarding letter dated 13th June 2006 of Assistant Registrar (Law) of the said Commission is clear. Statement of PW79 Abhay Singh Rathod, Inspector at the office of the Superintendent of Police, Udaipur, is also clear on this aspect. It is seen from his statement that the said complaint was never put up before discharged accused no.3 Dinesh M.N. It went to the Additional Superintendent of Police named Katara and it was assigned to Assistant Superintendent of Police (East) Udaipur for necessary action. The complaint was then sent to the concerned Police Station from the office of the Superintendent of Police. As such, this aspect is not indicating any conspiracy allegedly hatched by discharged accused persons.

78 Charge-sheet contains applications D-108 and D-109 made by Tulsiram Prajapati to the court at Udaipur. In these applications, vague allegations are made by stating that police from Maharashtra, Madhya Pradesh, Gujarat and Rajasthan are conspiring to kill him, he may be given injection for slow poisoning or for contracting AIDS or he may be killed in an

encounter etc. He prayed that he may be medically examined and necessary protection be given to him. In these written applications, Tulsiram Prajapati has not stated that he was present with Sohrabuddin Shaikh and Kausarbi at the time of their abduction or that he is apprehending danger to his life from respondent/discharged accused no.1 D.G.Vanzara, discharged accused no.2 Rajkumar Pandiyan or discharged accused no.3 Dinesh M.N. These written applications, therefore, do not constitute sufficient ground to proceed against respondent/discharged accused no.1 D.G.Vanzara for framing the Charge nor those are making out any prima facie case against him.

79 PW3 Kundan Prajapati and PW4 Vimal Shrivastava are arrested for the commission of offences punishable under the Narcotic Drugs and Psychotropic Substances Act and in view of stringent provisions of Section 58 of the said Act, it is difficult to comprehend that police would venture their false implication in such case. There is nothing to indicate that discharged accused no.3 Dinesh M.N. or respondent/discharged accused no.1

D.G.Vanzara had played any role in arresting them in the said case.

80 On this backdrop, statement of PW143 Mayur Chawda, the then Deputy Superintendent of Police, Banaskantha, at Palanpur, is relevant. This witness, being the Deputy Superintendent of Police, was doing visitation (supervision) of Crime No.115 of 2006 registered with Ambaji Police Station after death of Tulsiram Prajapati. This witness PW143 Mayur Chawda, Deputy Superintendent of Police, has categorically stated in his statement dated 27th July 2010 that after death of Tulsiram Prajapati, his brother Pawan and others came to Ambaji Hospital for taking custody of dead body of Tulsiram Prajapati. Those relatives of deceased Tulsiram Prajapati including his brother Pawan, as disclosed by PW143 Mayur Chawda, the then Deputy Superintendent of Police, did not raise any doubt about death of Tulsiram Prajapati. They had, infact, disclosed PW143 Mayur Chawda that Tulsiram Prajapati was a criminal, but did not suspect any foul play in his death.

81 Sending police personnel to the house of co-accused Ashish Kumar Pandya by respondent/discharged accused no.1 D.G.Vanzara is stated to be a circumstance reflecting sufficient ground for proceeding against respondent/discharged accused no.1 D.G.Vanzara. Let us examine material collected by the investigating agency in this regard. PW132 Khanji Jadeja, Police Sub-Inspector, has stated to the CBI that on 25th December 2006, respondent/discharged accused no.1 D.G.Vanzara, the then Range Deputy Inspector of General, Border Range, Bhuj, called him at his chamber and asked him to go to the residence of Ashish Kumar Pandya, Police Sub-Inspector, and told him to contact respondent/discharged accused no.1 D.G.Vanzara. This witness as well as PW133 Meghajibhai Maheshwari, Head Constable, have stated to the Investigator that then they went to the house of Ashish Kumar Pandya, Police Sub-Inspector, situated at Meghpur Village which is twenty kilometers away from their office by car of PW248 H.B.Jhala, Police Inspector. They further stated that they informed family members of Police Sub-Inspector Ashish Kumar Pandya to contact respondent/discharged accused no.1

D.G.Vanzara. PW248 H.B.Jhala, Police Inspector, had stated to the Investigating Officer that once Police Sub-Inspector PW132 Khanji Jadega told him that he had taken his car to Meghpur. There is no evidence to suggest that there was meeting between the respondent/discharged accused no.1 D.G.Vanzara and co-accused Ashish Kumar Pandya, Police Sub-Inspector, in pursuant to this call. Even if this material is accepted as it is, then also it cannot be said that prima facie case is made out against respondent/discharged accused no.1 D.G.Vanzara. None of these witnesses have deposed about purpose of calling Ashish Kumar Pandya, Police Sub-Inspector, by respondent/ discharged accused no.1 D.G.Vanzara. One telephone call by Ashish Pandya, Police Sub-Inspector, to respondent/discharged accused no.1 D.G. Vanzara cannot depict criminal conspiracy unless some kind of physical manifestation or agreement is established. Ultimately, Ashish Pandya, Police Sub-Inspector, was serving under respondent/discharged accused no.1 D.G.Vanzara and as such, telephone communication between them without contents of conversation does not create strong suspicion against respondent/discharged accused no.1 D.G.Vanzara.

82 Reliance is placed on statement of PW230 Arvindbhai Patel, Police Inspector of Ambaji Police Station, Gujarat. In territorial jurisdiction of this police station, encounter, in which Tulsiram Prajapati died, took place. This witness has stated that he investigated the subject Crime No.115 of 2006 registered on the basis of FIR lodged by Ashish Kumar Pandya, Police Sub-Inspector. Version of this witness reveals that on getting information of the incident, he immediately rushed to the Cottage hospital, Ambaji, and found co-accused Ashishkumar Pandya, Police Sub-Inspector, having suffered bullet injuries and undergoing treatment at that hospital. PW230 Arvindbhai Patel has deposed about the inquest of the dead body of Tulsiram Prajapati and recovery of three bullets, mobile phone, cigarette pack etc. from the dead body. As per his version, information about absconding of Tulsiram Prajapati was not passed by the Police Control Room. He stated that the then Superintendent of Police Vipul Agrawal (co-accused) and accused Ashishkumar Pandya, Police Sub-Inspector, were in constant touch with respondent/discharged accused no.1 D.G.Vanzara over telephone

and it took about two hours for lodging the FIR because of their conversation. Here, it needs to be kept in mind that the incident was of encountering the wanted criminal. Co-accused Ashishkumar Pandya, Police Sub-Inspector, who had shot down Tulsiram Prajapati had himself suffered bullet injuries in that incident. Said injuries were not found to be self inflicted injuries and this fact is seen from the medical certificate collected during the course of investigation. Bullet injuries generally are not self inflicted injuries as in such process, one may get more than what he had bargained for. Police jeep was found to be damaged by firing of the bullet. Loaded gun was found lying on the spot of the incident apart from the cartridge. In such situation, telephonic conversation by injured co-accused Ashishkumar Pandya with the Superintendent of Police Vipul Agrawal and respondent/discharged accused no.1 D.G.Vanzara, who then was the Deputy Inspector General of Border Range, Bhuj, by no stretch of imagination can be construed as an act of the conspiracy and circumstance raising strong suspicion against respondent/discharged accused no.1 D.G.Vanzara for having committed the

crime in question.

83 Except this material, nothing could be found in the charge-sheet which can be used as ground in order to frame Charge against respondent/discharged accused no.1 D.G.Vanzara. No prima facie material raising strong suspicion regarding commission of alleged offence by respondent/discharged accused no.1 D.G.Vanzara can be found in the entire charge-sheet. Allegations against respondent/discharged accused no.1 D.G.Vanzara are principally of entering into conspiracy with others for eliminating Sohrabuddin Shaikh and Tulsiram Prajapati. There is no iota of evidence to infer meeting of minds of respondent/discharged accused no.1 D.G.Vanzara and other accused persons for doing illegal act of abducting Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati, and subsequently killing them. It is not prima facie seen that respondent/discharged accused no.1 D.G.Vanzara was having an object to accomplish, and hence, a plan or scheme was framed by him along with others for committing the alleged crime. If really Tulsiram Prajapati was

abducted with Sohrabuddin Shaikh and Kausarbi under conspiracy to eliminate them, in ordinary course, he would have been killed then and there by the accused persons, rather than causing his death after the period of more than one year, and that too, by producing him before various courts and detaining him in jail during that period.

84 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**¹⁹ 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. It is necessary to quote observations of the Hon'ble Apex Court in the matter of **Keharsingh vs. State (Delhi Administration)**²⁰. 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

¹⁹ JT 2010 (130) SC 284

²⁰ AIR 1978 SC 1883

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 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.””

85 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. Nalini**²¹ 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

²¹ 1999 Cri.L.J.124

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.”

86 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 qua 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 targetted 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 targetted person.

87 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-qua-non. What is prima facie required to show is the respondent/discharged accused was having object to accomplish and hence a plan or scheme was framed by accused persons including the respondent/discharged accused 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. The learned counsel for the revision petitioner argued that in the instant case, the respondent/discharged accused had motive to kill Tulsiram Prajapati as he was disclosing to others as to how he was used by police to nab Sohrabuddin Shaikh and he was an eye witness of abduction of Sohrabuddin Shaikh and Kausarbi. 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 Tulsiram Prajapati. Material collected during investigation does not show that Tulsiram Prajapati was accompanying Sohrabuddin Shaikh and Kausarbi at the time of their abduction. At this juncture,

observations of the Hon'ble Apex Court in the matter of **State of Uttar Pradesh vs. Sanjay Singh**²² 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** 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

²² 1994 SCC (Supp) (2) 707

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."

Evidence and material collected by the prosecution and discussed in foregoing paragraphs do not remotely indicate that respondent/discharged accused no.1 D.G.Vanzara conspired with other accused persons by sharing thoughts for achieving common goal jointly. To conclude, there is no sufficient ground for framing the Charge against respondent/discharged accused no.1 D.G.Vanzara. No fault, therefore, can be found in the impugned order of discharge.

88 Though according to the prosecution case, Tulsiram Prajapati was kept at Ahmedabad itself and was not with police personnel deputed for escorting him during return journey to Ahmedabad on 26th December 2006, there is no evidence in this regard. This version of the prosecution case is solely rested on statements of PW139 Bhupatsingh and PW140 Shabbir Khan – Constables from Ahmedabad Railway Police Station, who were on patrolling duty in Udaipur Mail in which the incident of Tulsiram Prajapati escaping from the custody of police guards took place at

about 3.00 a.m. of 27th December 2006. Both these police personnel have categorically stated to the CBI that they do not remember whether accused was in custody of police personnel from Rajasthan Police travelling in the last compartment of Udaipur mail. Statement of Hiralal, Guard of Udaipur Mail in which this incident had happened, reflects that he had seen the tin box containing red chilli powder lying in the general train coach in which Assistant Sub-Inspector Narayan Singh and other members of the escorting party were travelling. He has also stated that he heard policemen shouting “पकड़ो पकड़ो दौड़ो दौड़ो कैदी भाग गया.” Statement of Hasmukhlal Modi, Scientific Officer with Forensic Science Laboratory shows that he inspected the coach and found chilli powder on wooden space located near wash basin and door. He also saw fire arm discharge hit marks in the coach with residue fire ammunition. Statement of Assistant Driver Ghanshyam of Udaipur mail shows that Hiralal – Guard of the train, informed him about the incident. Voice of three policemen was being heard but he was unable to see them due to darkness. He was told that those three policemen have gone to nab the

criminals. These statements recorded during investigation as such, do not make out any ground for proceeding against respondent/discharged accused no.1 D.G.Vanzara. They do not indicate that the prisoner Tulsiram Prajapati was not with the escort party but are suggesting that the prisoner escaped from the custody of the guards.

89 It is argued on behalf of respondent/discharged accused no.1 D.G.Vanzara that with the passage of time, during pendency of the trial all material witnesses of the prosecution have turned hostile to the prosecution. Relying on judgment of the Honourable Apex Court in the matter of **Zahira Habibullah H. Sheikh and Another vs. State of Gujarat and Others**²³ it is argued that Section 401 of the Code of Criminal Procedure provides that the court while exercising revisional jurisdiction can exercise powers of the appellate court including those vested in it under Section 391 of the Code of Criminal Procedure for vindicating innocence of the accused. Reliance is placed on paragraphs 50 to 52 of the said ruling in support of this

²³ 2004 CRI.L.J.2050

contention. Those read thus :

“50 [Section 391](#) of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though [Section 386](#) envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. [Section 391](#) is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in [Section 386](#) and [Section 391](#) have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. [Section 391](#) is in the nature of an exception to the general rule and the powers under it must also be exercised with great care,

especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of [Section 391](#) is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under [Section 391](#) is desirable.”

“51 The legislative intent in enacting [Section 391](#) appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under [Section 391](#).”

“52 There is no restriction in the wording of [Section 391](#) either as to the nature of the evidence or that it is to be taken for the

prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.”

90 Section 401 of the Code of Criminal Procedure deals with revisional powers of this court. It provides that the High court may, in its discretion, exercise any of the powers conferred on court of appeal by Sections 386, 389, 390 and 391 of the Code of Criminal Procedure or on a court of Sessions by Section 307 of the Code of Criminal Procedure. Those powers can be exercised

in the interest of justice, if the court thinks it necessary to prevent escape of a guilty man, so also for vindication of an innocent person wrongfully accused. There is no restriction in the wording of Section 391 and such powers can be exercised to subserve the ends of justice. Viewed from this angle, if subsequent developments which took place during the course of trial are considered, then undisputedly, witnesses such as PW105 Nathuba Jadeja, PW22 Bhawarsingh Hada, Police Inspector, PW52 Himmat Singh, Police Inspector, PW Hazarilal Meena, PW37 Sharafat Ali, PW Hiralal, PW2 Sharad Apte, PW Amit Apte, PW7 Gaziuddin Chabuksawar, PW9 Dineshbhai Koli, PW12 Madhubhai Bandiyawala, PW13 Sajjan Odedera, PW14 Malde Odedera, PW17 Premji Cham, PW27 Mohd.Jaffar, PW30 Gurudayal Singh, PW73 Manjusha Apte, PW20 Saleema Begum, PW21 Gurubantsingh Bachhansingh Sardar, PW22 Allarakha Shaikh, PW23 Kantiji Chauhan, PW24 Kalpesh Vaghela, PW25 Irfanbhai Ghanchi, PW89 Govind Singh, PW108 Ghanshyam Wadera, PW121 Nasir Hussain and PW31 Bhailal Rathod have turned hostile to the prosecution and not supported the CBI. PW61

Ranvijay Singh, Police Inspector, has also not supported the prosecuting agency but is not declared hostile. Chandan Jha whose version before the Investigating Officer so also before the Magistrate is supporting the defence, has stuck to his statement recorded under Section 164 of the Code of Criminal Procedure.

91 The cumulative effect of foregoing discussion requires me to hold that the learned trial court is perfectly justified in discharging respondent/discharged accused no.1 D.G.Vanzara for want of evidence and absence of material under Section 227 of the Code of Criminal Procedure. The impugned order below Exhibit 912 is neither perverse nor illegal, so far as it relates to discharge of respondent/discharged accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, Gujarat State.

92 Now let us examine whether the learned trial court is justified in dropping the proceedings against respondent/discharged accused no.1 D.G.Vanzara for want of sanction as envisaged by Section 197 of Code of Criminal Procedure. The role

attributed to respondent/discharged accused no.1 D.G.Vanzara is to the effect that he had deputed discharged accused Rajkumar Pandiyan, Superintendent of Police, to Hyderabad for conducting secret inquiry in respect of suicidal bomb blast. It is further averred by the prosecuting agency that this respondent no.1 was present on the scene of the crime when Sohrabuddin Shaikh was killed by the team of Police Officers from Gujarat and Rajasthan State. He was also present on the spot at the time of cremation of dead body of Kausarbi. It is further averred that, respondent/discharged accused no.1 D.G.Vanzara was meeting discharged accused Dinesh M.N., Superintendent of Police, Udaipur, Rajasthan, at the office of the Anti Terrorist Squad, Ahmedabad, and had also visited Udaipur in State of Rajasthan. The prosecution further alleged that respondent/ discharged accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, used to have telephonic conversation with discharged accused Dinesh M.N., Superintendent of Police, Udaipur, Rajasthan. Apart from this, it is alleged by the prosecution that respondent/discharged accused no.1 D.G. Vanzara, Deputy

Inspector General of Police, while posted at the Border Range, Bhuj, had deputed PW132 Khanji Jadeja, Police Inspector, to the residence of Ashish Kumar Pandya, Police Sub-Inspector, for informing Ashish Kumar Pandya to contact him. Apart from this, the prosecution, is alleging that respondent /discharged accused no.1 D.G.Vanzara, while posted at Border Range, Bhuj, as Deputy Inspector General of Police, had telephonic conversation with co-accused Ashish Pandya, Police Sub-Inspector, and discharged accused Vipul Aggarwal, Superintendent of Police, Banaskantha, after fake encounter of Tulsiram Prajapati.

93 Foregoing discussion would show that there is no iota of evidence/material to show that respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, was present on the scene of crime at the time of alleged fake encounter of Sohrabuddin Shaikh. Similarly, there is no material to show that respondent/discharged accused no.1 D.G.Vanzara while holding the post of Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, was present at the river bed

of the river at Village Ellol, where dead body of Kausarbi was allegedly cremated. This respondent, being the Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, had sent his subordinate officer – discharged accused Rajkumar Pandiyan, the then Superintendent of Police, Anti Terrorist Squad, to Hyderabad for secret inquiry into the incident of suicidal bomb blast at the office of the Police Department at Hyderabad. The charge-sheet reveals that respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, had sent discharged accused Rajkumar Pandiyan to Hyderabad after seeking due permission of the Director General of Police as well as Additional Director General of Police. Deputing the subordinate officers to conduct inquiry is, undoubtedly, a part of official duty of the public servant holding supervisory post in the Police Department. Visit of discharged accused Dinesh M.N., Superintendent of Police, Udaipur, to the office of Anti Terrorist Squad, Ahmedabad, and his meetings with respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, were not clandestine visits. Those visits are documented in the official documents.

Discharged accused Dinesh M.N., Superintendent of Police, Udaipur, had visited Ahmedabad with prior permission of the Inspector General Police. Deceased Sohrabuddin Shaikh as well as deceased Tulsiram Prajapati were absconding accused and crimes against them were registered at Ahmedabad in the State of Gujarat as well as at Udaipur in State of Rajasthan. As such, meeting of these two high ranking Police Officers was certainly in discharge of their official duties. Similar is the case of telephonic conversation between respondent/discharged accused no.1 D.G.Vanzara and discharged accused Dinesh M.N. Even visit of respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, to Udaipur was an official visit during which he stayed at the Government Circuit House. So whatever attributed to respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police, are the acts done by him in discharge of his official duty. This respondent had sent PW132 Khanji Jadeja, Police Sub-Inspector, to the residence of co-accused Ashish Kumar Pandya, Police Sub-Inspector. This was for passing the message to co-accused Ashish Kumar Pandya, Police Sub-

Inspector, to contact respondent/discharged accused no.1 D.G.Vanzara, Deputy Inspector General of Police. Thus, this is also a fall out of official duty and function exercised by the respondent. Undoubtedly, at the time of alleged fake encounter of Tulsiram Prajapati, respondent/discharged accused no.1 D.G.Vanzara was the Deputy Inspector General of Police of Border Range, Bhuj, where this incident took place. Therefore, his conversation with his subordinate officer, namely, co-accused Ashish Kumar Pandya, Police Sub-Inspector, who was injured in the incident as well as with Vipul Aggarwal, who was the Superintendent of Police of the area where the incident took place, needs to be held as the act done in discharge of the official duty by respondent/discharged accused no.1 D.G.Vanzara.

94 It is not in dispute that the discharged accused is a public servant not removable from his office save by or with the sanction of the Government. Procedure for prosecuting a public servant for offences under Indian Penal Code, is specifically provided for under Section 197 of Code of Criminal Procedure.

Section 197(1) specifically provides that “When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction -

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

95 In as much as the word 'shall' has been used in Section 197 of the Code of Criminal Procedure, it goes without saying that sanction from the Competent Authority of the public servant is a sine-qua-non and a condition precedent for prosecuting a public servant and accordingly sanction in this regard is absolutely

mandatory in nature. It hardly needs to be mentioned that an official act or official duty means an act or duty done by an officer in his official capacity. The official act can be performed in the discharge of official duty as well as in dereliction of it. Therefore, the court is supposed to focus on the 'act' of the public servant. If the 'act' is related to the performance of the official duties of the accused public servant, then sanction for his prosecution is necessary. For getting protection of Section 197 of the Code of Criminal Procedure, the offence alleged to have been committed by the accused public servant must have something to do with the discharge of official duty. In other words, if allegations against the accused public servant sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty, then bar of Section 197 of the Code of Criminal Procedure applies at the threshold itself. If offence is committed within the scope of official duty, then sanction is must. Similarly, if the offence is within the scope of the official duty but in excess of it, then also the protection of sanction under Section 197 of the Code of Criminal Procedure can be claimed by a public servant. It

is well settled that if the act is done under the colour of office, in purported exercise of official duty, then also for prosecuting the public servant, sanction is must. If the act has been found to have been committed by the public servant in discharge of his duty, then such act is to be given liberal and wide construction, so far as its official nature is concerned. In the matter of **D.T. Virupakshappa vs. C.Subhash**²⁴, the Honourable Supreme Court has held thus in paragraph 32 of its judgment :

“32 The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty,

²⁴ (2015) 12 SCC 231

but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood. (Emphasis supplied)

In our view, the above guidelines squarely apply in the case of the appellant herein. Going by the factual matrix, it is evident that the whole allegation is on police excess in connection with the investigation of a criminal case. The said offensive conduct is reasonably connected with the performance of the official duty of the appellant. Therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government. The High Court missed this crucial

point in the impugned order.”

It is equally well settled that, at the stage of examination whether sanction is necessary, the accused can produce documents which can be admitted into evidence without formal proof for the limited consideration of necessity of sanction. In the matter of **Devinder Singh & Others vs. State of Punjab Through CBI (supra)** after considering its earlier verdicts, the Honourable Supreme Court has held thus in paragraph 39 :

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

II. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far as its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 Cr.P.C. has to be construed narrowly and in a restricted manner.

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

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

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

authority.

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

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

VIII. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each

case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

IX. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.”

96 Shri Tiwari, the learned counsel for the First Informant placed reliance on judgment in the matter of **Om Prakash and Others (supra)** for contending that facts of the instant case do not warrant obtaining sanction for prosecuting the accused. Facts of the case of **Om Prakash and Others (supra)** need to be noted. In that matter, Kailashpati Singh – father of deceased Amit Pratap Singh @ Munna Singh filed a complaint in the court of the Chief Judicial Magistrate, Jamshedpur, against Police Officers namely,

Rajiv Rajan Singh - Deputy Superintendent of Police, Pradeep Kumar and Om Prakash – both Sub-Inspectors, Shyam Bihari Singh and Bharat Shukla – both Constables, by alleging that Amit Pratap Singh @ Munna Singh was killed by them in a fake encounter. The accused therein invoked powers of the High Court under Section 482 of the Code of Criminal Procedure for quashing the proceedings. However, the High Court refused to grant relief and that is how the accused therein approached the Honourable Supreme Court. By exercising powers under Section 482 of the Code of Criminal Procedure, the Honourable Supreme Court in the matter of **Om Prakash and Others (supra)** was pleased to quash the Complaint Case bearing no.731 of 2004 filed by complainant Kailashpati Singh. The Honourable Apex Court noted the version of accused police personnel which was to the effect that one Jeevan Prasad Naredi – a dealer in scrap lodged the FIR to the effect that some miscreants came to his house riding on a motorcycle and armed with firearms. They fired at his office situated in his house and ran away. This was done to threaten him and to force him to yield to their ransom demand. The

Honourable Supreme Court further noted that it is the case of the police personnel, as disclosed in the FIR lodged by Deputy Superintendent of Police Rajiv Ranjan Singh (accused), that having received information about this incident the police set out to arrest the accused. They traced them and asked them to surrender. However, instead of surrendering, they fired at the police. The police had to retaliate to save themselves and in that four criminals were killed. The rest escaped. The son of the complainant was one of those, who were killed. The Honourable Apex Court, considering the version of the accused police personnel, came to the conclusion that accused police officers were acting in performance of their duties and are entitled to protection given under Section 197 of the Code of Criminal Procedure. It is observed that it is not even necessary for the accused to wait till the charges are framed to raise the plea of sanction. Following are the material observations of the Honourable Supreme Court in the matter of **Om Prakash and Others (supra)** :

“42 It is not the duty of the police officers

to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This court has repeatedly admonished trigger happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to

prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. Plea regarding sanction can be raised at the inception.”

“43 In our considered opinion, in view of the facts which we have discussed hereinabove, no inference can be drawn in this case that the police action is indefensible or vindictive or that the police were not acting in discharge of their official duty.....”

97 In the case in hand also, the discharged accused was acting in discharge of his official duty and the alleged offence was committed while acting or purporting to act in discharge of his official duty by the discharged accused. The cognizance of the offence alleged against him cannot be taken except with the previous sanction of the Appropriate Authority.

98 The provisions of Section 197(1) being mandatory requires no further elaboration. In the matter of **State of H.P. vs. M.P.Gupta**²⁵ the Honourable Supreme Court has observed thus :

25 (2004) 2 SCC 349

“The mandatory character of protection afforded to a public servant is brought out by the expression, “no court shall take cognizance of such offence except with the previous sanction”. Use of the words “no” and “shall” make it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence, without being supported by prior sanction from the Competent Authority concerned is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. The word “cognizance” means “jurisdiction” or “the exercise of jurisdiction” or “power to try and determine causes”. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty, in the absence of the prior sanction from the Competent Authority concerned.”

99 It is well settled that sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an

acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty.

100 In the matter of R.S.Nayak vs. A.R.Antulay²⁶ it was observed by the Honourable Supreme Court that the authority alone would be competent to judge whether on facts alleged, there has been a misuse of office held by the public servant. The Competent Authority alone would know the nature and functions discharged by the public servant holding office and whether the same have been abused or misused. The prosecution would not be the authority to come to a conclusion whether the public servant has abused his office. The legislative mandate engrafted in Section 197(1) of the Code of Criminal Procedure debars courts from taking cognizance of an offence except with a previous sanction from the Competent Authority concerned. In case where the acts complained are alleged to have been committed by a

²⁶ 1984 (2) SCC (Cri) 172

public servant in discharge of his official duty or purporting to be in the discharge of his official duty, such public servant cannot be prosecuted for the acts done in exercise of his powers as public servant without the sanction from his Competent Authority. Hence, Section 197(1) of Code of Criminal Procedure imposes prohibition on courts in taking cognizance of the offence alleged against public servants that has got close connection with the official discharge of his duty without the sanction from the Competent Authority concerned.

101 The alleged charges on the face of record demonstrates that they have strong nexus with the official discharge of duties by the discharged accused or that there is a reasonable nexus between the offence alleged to have been committed by him and the routine discharge of his official duties. Even according to the case of prosecution, the official character of the discharged accused gave him an opportunity for commission of alleged crime, when he was actually engaged in the performance of official duties. Therefore, the sanction of the

Competent Authority before taking cognizance of alleged offences is a must. In the case of **State of Maharashtra vs. Dr. Budhikota Subbarao**²⁷, the Honourable Supreme Court has held that when an act alleged to be constituting an offence is directly and reasonably connected with the official discharge of the duties by a public servant, in such case the prosecution cannot be proceeded with, without the sanction from the Competent Authority under Section 197 of the Code of Criminal Procedure. In the case of **P.K. Pradhan vs. State of Sikkim**²⁸, the Honourable Supreme Court has held that when the act complained as an offence is done in discharge of official duties and when there is a reasonable connection between such act and the official duties, then in such event, the criminal prosecution cannot be set in motion without the sanction from the Competent Authority of such public servant. In the case of **S.K. Zusthi and another vs. Bimal Debnath and another**²⁹, the Honourable Supreme Court has held that once it is established that the act alleged was done by the public servant while discharging his duties, in such event, “the scope of such act

27 1993 (2) SCC 567

28 2001 (6) SCC 704

29 2004 (8) SCC 31

being official” should be construed in wider perspective to advance the object and purport of “prior sanction” as contemplated under Section 197(1). As per the ratio of the judgment delivered by the Honourable Supreme Court in the case of State of Karnataka vs. Nagarajaswamy³⁰, grant of proper sanction by a Competent Authority is a sine-qua-non for taking cognizance of an offence against a public servant. The Honourable Supreme Court has also gone to the extent of reinforcing the fact that “the statutory requirement of prior sanction by a Competent Authority can arise at any stage of the prosecution and as such there is no prescribed time limit for putting forth the said plea of defence by any public servant”.

102 Public servants who discharge their duties in the routine course of their office need to be protected so that the administrative/executive wheel can run smoothly. It was with the view to extend protection to public servants against unwarranted prosecution, Section 197 was incorporated under the Code of Criminal Procedure. In other words, Section 197 of the Code of

30 2005 (8) SCC 370

Criminal Procedure has made it amply clear that whenever a public servant is to be prosecuted, prior sanction must be obtained by the prosecuting agency from the sanctioning/Competent Authority.

103 In the case of **R.R.Chari vs. State of Uttarpradesh**³¹, the Honourable Supreme Court has observed that it is clear that the first part of Section 197(1) provides a special protection, inter alia to public servants who are not removable from their offices save by or with the sanction of the State Government or the Central Government where they are charged with having committed offences while acting or purporting to act in the discharge of their official duties and the form which this protection has taken is that before a criminal court can take cognizance of any offence alleged to have been committed by such public servants, a sanction should have been accorded to the said prosecution by the appropriate authorities. In other words, the appropriate authorities must be satisfied that there is a prima facie case for starting the prosecution and this prima facie satisfaction

31 AIR 1962 SC 1573

has been interposed as a safeguard before the actual prosecution commences. The object of Section 197(1) clearly is to save public servants from frivolous prosecution.

104 In the case of Arulswamy vs. State of Madras³², the Honourable Supreme Court has specifically held that when the offence alleged is directly connected with the official duty and falls within the scope of official duties assigned, in such a case the prosecution can be launched only after obtaining permission from the Competent Authority concerned. For getting protection of Section 197 of the Code of Criminal Procedure, the offence alleged to have been committed must have something to do or must be related in some manner with the discharge of official duty. No question of sanction can arise under Section 197 of the Code of Criminal Procedure unless the act complained of is an offence. The only point which needs determination is whether it was committed in the discharge of official duty. The exercise which needs to be undertaken is to find out whether the act and the official duty are so interrelated that one can assume

³² AIR 1967 SC 776

reasonably that it was done by the accused in the performance of the official duty. If finding on this aspect is in affirmative, then even if the act exceeds the need and requirement of the situation, sanction as envisaged under Section 197 of the Code of Criminal Procedure is necessary for taking cognizance of the alleged offence.

105 In the case of Matajog Dubey vs. H.C.Bhari³³, the Honourable Supreme Court has held that when the offence alleged is related to the discharge of the official duty of the public servant concerned and when there is reasonable connection as between the offence alleged and the discharge of official duty, in such event sanction for prosecution should be obtained from the Competent Authority of the accused before even institution of prosecution.

106 It is, thus, clear that, the legislative purport contained in Section 197 of the Code of Criminal Procedure prohibits a court from taking cognizance of an offence against a public servant

³³ AIR 1956 SC 44

without previous sanction from the appropriate authority. In other words, only the Competent Authority who is entitled to appoint and remove a public servant can evaluate as to whether a public servant has committed the alleged offence while discharging his official duties or not. To put it differently, when a person is not conversant with the duties that are cast upon the public servant, such person cannot evaluate as to whether the 'act' done by public servant is an offence or not. In this view of the matter, considering the facts of the instant case and role allegedly played by the discharged accused and the material sought to be relied by the prosecuting agency as discussed in the foregoing paragraphs, it was incumbent on the prosecution to obtain sanction prior to prosecuting the discharged accused. The discharged accused, as seen from the material in the charge-sheet, which is discussed in earlier paragraphs, was certainly acting in discharge of his official duties. There is reasonable connection or nexus between the 'act' and discharge of official duty which needs to be performed by the discharged accused. The discharged accused officer was doubtlessly a 'public servant' when the alleged

offence is alleged to have been committed. Even going by the charge-sheet, one fact remains not in doubt that the 'act' alleged against him was committed while he was discharging his official duty.

107 It is settled principle in law, while analysing the requirement of Section 197 Code of Criminal Procedure, that it is not the 'duty' which is to be examined so much as the 'act' since the alleged official act can be performed both in discharge of his official duty as well as in dereliction of it. The real test, as held by the Honourable Supreme Court clearly appears to be that the act must fall within the scope and range of the official duties of public servant concerned. [Refer **D.T.Virupakshappa (supra)** and **Amal Kumar Jha vs. State of Chhattisgarh and Another**³⁴]. Though there cannot be any universal rule to determine whether there is a reasonable connection between the alleged act done and the official duty, the safest test as laid down by the Honourable Supreme Court would be to consider if omission or negligence on part of the public servant to commit the act complained of would

³⁴ (2016) 6 SCC 734

have made him answerable for the charge of dereliction of his official duty.

108 Testing the case alleged against the discharged accused, it is not in dispute that apart from the discharged accused undisputably being a public servant, the act alleged was a part of his official duty. Applying the test laid down by the Honourable Supreme Court in the judgment in the case of Amal Kumar Jha (supra) as well as in the case of D.T.Virupakshappa (supra), if the discharged accused would not have acted against the individuals about whom there were inputs of they being involved in serious criminal activities, the discharged accused would have been charged for dereliction of duty.

109 Keeping in mind this settled law on the aspect of sanction to prosecute the public servant, I have considered all allegations against the discharged accused found in the charge-sheet and those are elaborated in detail in the opening paragraph

of this judgment. I have examined all allegations contained in the Final Report for deciding whether previous sanction is required to be obtained by the prosecuting agency before taking cognizance of the alleged offence by the trial court. In the instant case, as allegations made against the discharged accused in charge-sheets filed by the prosecuting agencies show that the alleged offence was committed by the respondent/discharged accused no.1 in discharge of his official duty and under the colour of office, even if it is assumed that the discharged accused acted in excess of his official duty, then also he is entitled to claim protection of section 197 of the Code of Criminal Procedure.

110 The net result of foregoing discussion requires me to hold that the learned trial court is perfectly justified in allowing the application Exhibit 912 by the impugned order dated 1st August 2017 and thereby discharging respondent/discharged accused no.1 D.G.Vanzara, the then Deputy Inspector General of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, and Deputy Inspector General of Police, Border Range, Bhuj, Gujarat, for want

of evidence and absence of material under Section 227 of the Code of Criminal Procedure as well as dropping of the proceedings for want of sanction as envisaged by Section 197 of the Code of Criminal Procedure. Resultantly, I proceed to pass the following order :

ORDER

The Revision Petition is dismissed.

(A. M. BADAR, J.)