

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.557 OF 2016

RUBABUDDIN SHAIKH

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ORS.

)...RESPONDENTS

Mr.Gautam Tiwari i/b. Mr.Chandrakirti Zende, Advocate for the Applicant.

Mr.Mahesh Jethmalani, Senior Counsel a/w. Ms.Siya Chaudhry i/b. Ms.Gunjan Mangla, Advocate for Respondent No.2.

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 : 10th 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 25th August 2016 passed by the learned Special Judge for the CBI, Greater Mumbai, below Exhibit 562, thereby discharging respondent/accused no.2 Rajkumar Pandiyan, the then Superintendent 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 dropping of the proceedings 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. According to the intelligence input, he was going to help Pakistani Intelligence Agency ISI and Terrorist Organization Lashkar-e-Toiba in assassinating some big leader of Gujarat. 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.2, by being in constant touch with each other. For that purpose, discharged accused D.G. Vanzara, respondent/discharged accused no.2 Rajkumar

Pandiyan and discharged accused 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) What happened thereafter is reflected from police 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.

- (d) As reflected from police statement of PW105 Nathuba Jadeja recorded by the CBI, at about 6.00 p.m. of 20th November 2005, respondent/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, respondent/discharged accused no.2 Rajkumar Pandiyan had already reached Hyderabad by taking a morning flight. Police Inspector N.H.Dhabi and Santaram Sharma went to meet respondent/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.

- (e) 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 respondent/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 respondent/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.

- (f) CBI statement of PW105 Nathuba Jadeja shows that at about 7.00 p.m of 22nd November 2005, respondent/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, respondent/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, respondent/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. Respondent/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 the return journey towards Ahmedabad, 2 kms. 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 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, and thereafter, he came to be apprehended on 26th November 2005 from the house of Chandan Kumar Jha at Bhilwara by

Sudhir Joshi, Deputy Superintendent of Police, Udaipur, Rajasthan.

- (g) 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. Respondent/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.

- (h) 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. Respondent/discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmednagar, and 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.

- (i) 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 bed of the river at Village Ellol. PW105 Nathuba Jadeja was asked by 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. on 28th November 2005, that tempo also got stuck in the sand at the bed of the river at Village Ellol. Then, discharged accused no.1 D.G.Vanzara, respondent/discharged accused no.2 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. It was kept on the funeral pyre by PW105 Nathuba Jadeja, Chauhan, Chaubey and Rathod. 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.

- (j) 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 respondent/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 respondent/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 20th 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 respondent/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.

(k) According to the prosecution case, though respondent /discharged accused no.2 Rajkumar Pandiyan was executing the operation of abducting Sohrabuddin Shaikh in the night intervening 22nd November 2005 and 23rd November 2005, a show of his return journey from Hyderabad to Ahmedabad by the flight of 23rd November 2005 came to be made. Infact, somebody else travelled by that flight.

(l) 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 the Abate Summary. According to the prosecution case, respondent/discharged accused no.2 Rajkumar Pandiyan, on 27th December 2006, intercepted the cell phone of Tulsiram Prajapati by alleging that said Tushiram Prajapati has escaped from custody of police. This fact is reflected from statement of Arun Kumar Sharma, Deputy Inspector General, Gandhi Nagar.

- (m) According to the prosecution case, Tulsiram Prajapati, who came to be arrested in November 2005 was kept in the

Central Jail at Udaipur in company of other prisoners and on 25th December 2006, he was sent alone to Ahmedabad for attending the court by giving his custody to the Special team of four Police Guards. This was done for killing him in the fake encounter as per the plan hatched by accused persons. In return journey to Udaipur from Ahmedabad, he was not with the escort team in Udaipur Mail. Farce of his escaping from the custody of Police Guards at 3.00 a.m. of 27th December 2006 was made and ultimately he was murdered by firing bullets by co-accused Ashish Kumar Pandya, Police Sub-Inspector, at 5.00 a.m. of 28th December 2006 in a fake encounter.

3 In the wake of this case of the prosecution, Shri Tiwari, the learned counsel appearing for revision petitioner Rubabuddin drew my attention to paragraph 35 of the impugned order dated 25th August 2016 whereby respondent/discharged accused no.2 Rajkumar Pandiyan came to be discharged. Shri Tiwari, the learned counsel argued that the learned Additional

Sessions Judge erred in holding that statements of PW105 Nathuba Jadeja and PW106 Gurudayal Singh cannot be accepted without corroboration. Similarly, the learned Additional Sessions Judge erred in holding that somebody else cannot undertake air travel in the name of respondent/discharged accused no.2 Rajkumar Pandiyan and there can be possibility of filling his declaration form by Police Official named Ajay Parmar. In submission of the learned counsel for the revision petitioner, the learned Additional Sessions Judge erred in holding that for want of sanction under Section 197 of the Code of Criminal Procedure, cognizance of the offence cannot be taken against respondent/discharged accused no.2 Rajkumar Pandiyan.

4 Shri Tiwari, the learned counsel appearing for the revision petitioner, argued that, evidence of PW105 Nathuba Jadeja, so far as it relates to journey from Ahmedabad to Hyderabad by Qualis vehicle is gaining corroboration from statement of PW144 Premjibhai Cham, proprietor of M/s.Cham Tron Net Organization, who is owner of the Qualis vehicle. The

same is gaining corroboration from statements of PW146 Malde Odederra - Transport Manager, Chamdu Singh Jadhav - Watchman, and PW145 Madhubhai Bandyawala, who is relative of PW144 Premjibhai Cham. Their evidence shows that Qualis vehicle bearing Registration No.GJ-25-A-7007 owned by Premjibhai came to be requisitioned by respondent/discharged accused no.2 Rajkumar Pandiyan from 18th November 2005 to 23rd November 2005. This shows respondent/discharged accused no.2 Rajkumar Pandiyan arranged the vehicle for the team of Police Officials for the purpose of abducting Sohrabuddin Shaikh and others. He also reached Hyderabad by flight and headed the team while executing the operation of abducting the three victims.

5 Shri Tiwari, the learned counsel appearing for the revision petitioner, further argued that presence of respondent/discharged accused no.2 Rajkumar Pandiyan at Hyderabad is vouched by PW88 Islavat Arvindu, Mess Commander at Hyderabad. This witness has also spoken about the arrival and stay of other Police Officers at Officers Mess at Hyderabad on 21st

November 2005. Statement of PW90 Naval Kishor, Mess Assistant, which is based on documentary evidence, also shows that respondent/discharged accused no.2 Rajkumar Pandiyan arrived at Hyderabad on 21st November 2005 and vacated his room on 23rd November 2005. This check out from the room, according to Shri Tiwari, the learned counsel, was done by Ajay Parmar, as respondent/discharged accused no.2 Rajkumar Pandiyan was accompanying other accused persons for executing the operation of abducting Sohrabuddin Shaikh. It is further argued that CBI statement of PW91 T.D.Vishwanathan, Manager of the Mess, also shows presence of respondent/discharged accused no.2 Rajkumar Pandiyan at Hyderabad from 21st November 2005. CBI statement of PW92 Laxmikant Shinde, Police Sub-Inspector of Andhra Pradesh Police, shows that respondent/discharged accused no.2 Rajkumar Pandiyan was with him at the time of inspection of Begum Pet blast site, but he had not shown any inclination to gather details of the bomb blast. Statement of PW97 E.R.Radha Krishnaiah, Inspector General

Police, also shows presence of respondent/discharged accused no.2 Rajkumar Pandiyan at Hyderabad on 21st November 2005.

6 Shri Tiwari, the learned counsel appearing for the revision petitioner, further argued that abduction of Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati from the luxury bus which was on its way to Sangli from Hyderabad is also established from statements of PW100 Sharad Apte as well as those of Amit Apte, Manjusha Apte and Anjali Apte. Statements of Gaziuddin – cleaner and Misbaa Hyder - driver of the bus, so also that of Biswass Joshi – Partner of Sangita Travels, show that Sohrabuddin, Kausarbi and Tulsiram Prajapati were occupying seat nos.29, 30 and 31 of that luxury bus. Evidence of these witnesses shows that Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati were made to alight from the luxury bus after it was intercepted.

7 Reliance is also placed on statements of Sylvester Daniel and Mohd.Azam Khan, who were members of gang of

Sohrabuddin Shaikh and Tulsiram Prajapati, to demonstrate that Tulsiram Prajapati had narrated to them the incident of their abduction by police officials of Gujarat police comprising of respondent/discharged accused no.2 Rajkumar Pandiyan.

8 Shri Tiwari, the learned counsel appearing for the revision petitioner, further argued that statements of PW149 Girishbhai Patel – owner of Disha Farm House, PW150 Dinesh Patel – Manager of Disha Farm House, and that of PW151 Nareshbhai Patel shows that the farm house was given to Police Officers and in the evening hours of 24th November 2005, Sohrabuddin Shaikh and Kausarbi were kept in that farm house by Police Officers. On 25th November 2005, Sohrabuddin Shaikh was taken out from that farm house, whereas, on 26th November 2005, Kausarbi was taken out from the said farm house.

9 Shri Tiwari, the learned counsel, further argued that PW107 Bhailal Rathod – driver of Police Official Ajay Parmar, has witnessed the encounter of Sohrabuddin Shaikh, but has not

spoken about the fact that Sohrabuddin Shaikh came to the spot by riding a motorcycle.

10 It is further argued that role of respondent/discharged accused no.2 Rajkumar Pandiyan in killing Sohrabuddin Shaikh and disposal of dead body of Kausarbi is established from the statement of PW105 Nathuba Jadeja. His evidence is gaining corroboration from statements of PW157 Irfanbhai Dhanchi - tempo owner, PW188 Jahir Abbas – driver, PW153 Gurubant Singh Sardar – crane owner, PW154 Kantiji – crane operator and PW155 Allah Rakkha, who was accompanying Kantiji. Evidence of these witnesses reveals that initially tempo of PW188 Jahir Abbas was taken for transporting firewood for burning dead body of Kausarbi, but because of malfunctioning of the gear of that tempo, another tempo was summoned and that tempo got stuck in the river bed requiring services of the crane.

11 It is further argued that PW106 Gurudayal Singh – co-driver working with PW105 Nathuba Jadeja has also corroborated

version of PW105 Nathuba Jadeja and has narrated the episode of abduction.

12 Shri Tiwari, the learned counsel appearing for the revision petitioner, further argued that statement of PW254 Arun Kumar Sharma, Deputy Inspector General, Gandhi Nagar, shows that on 27th December 2006, respondent/discharged accused no.2 Rajkumar Pandiyan requested to intercept the mobile phone of Tulsiram Prajapati.

13 Shri Tiwari, the learned counsel appearing for the revision petitioner, summed up his arguments by submitting that even uncorroborated evidence of an accomplice can form sole basis for conviction and there is no rule of law that evidence of the accomplice should always be corroborated in material particulars. In the case at hand, evidence of PW105 Nathuba Jadeja is gaining corroboration from voluminous evidence collected by the investigating agency, and as such the learned Additional Sessions Judge erred in discharging respondent/accused no.2 Rajkumar

Pandiyan by evaluating the evidence collected by the prosecuting agency. To buttress this contention, reliance is placed on judgments in Sitaram Sao @ Mungeri vs. State of Jharkhand¹, Mathuradas vs. State², Haroon Haji Abdulla vs. State of Maharashtra³ and State vs. S. Selvi and Others⁴ so also judgment of the learned Single Judge of Delhi High Court in Aruna Chadha vs. State of Delhi⁵.

14 Shri Tiwari, the learned counsel appearing for the revision petitioner, further argued that the respondent/discharged accused no.2 Rajkumar Pandiyan was not acting or purporting to act in discharge of his official duty. He indulged in conspiracy to eliminate Sohrabuddin Shaikh. He had sent teams of Police Officers by arranging the Qualis vehicle. Number plates of that Qualis vehicle were changed. Luxury bus was chased. Sohrabuddin Shaikh and others were abducted and subsequently killed. Dead body of Kausarbi came to be disposed off in presence

1 AIR 2008 SC 391

2 104 (2003) DLT 147

3 AIR 1968 SC 832

4 AIR 2018 SC 81

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

of respondent/discharged accused no.2 Rajkumar Pandiyan. Calls were intercepted by him and these acts are, in no way, concerned with discharge of duties by respondent/discharged accused no.2 Rajkumar Pandiyan. Therefore, no sanction is required to prosecute him. To substantiate this contention, reliance is placed on the judgments in Devinder Singh and Others vs. State of Punjab⁶ and Omprakash and Others vs. State of Jharkhand⁷.

15 As against this, Shri Jethmalani, the learned senior counsel appearing for respondent/discharged accused no.2 Rajkumar Pandiyan vehemently argued that the evidence of accomplice can be acted upon, provided he is found to be a reliable witness, and if his evidence gains corroboration in material particulars. This aspect can be looked into even at the stage of framing of Charge. In support of this contention, he relied on judgment of the Honourable Apex Court in the matter of Sarwan Singh Rattan Singh vs. State of Punjab⁸ and Suresh Budharmal Kalani vs. State of Maharashtra⁹.

6 2016(12) SCC 87

7 2012 (12) SCC 72

8 AIR 1957 SC 637

9 1998 (7) SCC 337

16 Shri Jethmalani, the learned senior counsel appearing for respondent/discharged accused no.2 Rajkumar Pandiyan, drew my attention to several statements of PW105 Nathuba Jadeja recorded from time to time by Officers of Gujarat Police as well as the statement dated 11th May 2010 recorded by the Central Bureau of Investigation. My attention is also drawn to applications on affidavit tendered by PW105 Nathuba Jadeja before the Chief Metropolitan Magistrate, Ahmedabad, as well as before the Additional Sessions Judge, Ahmedabad. It is argued that in his statement dated 6th December 2005, 14th February 2007 and 15th February 2007, this witness has not uttered anything about the alleged incident, but has stated that he was at Ahmedabad from 20th November 2005 to 24th November 2005. So far as his statement dated 26th April 2007 recorded by T.K.Patel from CID Crimes, Gujarat, PW105 Nathuba Jadeja immediately filed an application on affidavit on 22nd May 2007 before the learned Chief Metropolitan Magistrate, Ahmedabad, by stating that the said statement was recorded under duress and temptation, on instructions of Police Officer Rajnish Rai. In

another application on affidavit submitted on 25th May 2007, this witness disowned his statement dated 26th April 2007 by stating that it was pre-written statement, on which he was made to sign under duress. Shri Jethmalani, the learned senior counsel, drew my attention to application on affidavit filed under Section 438 of the Code of Criminal Procedure by PW105 Nathuba Jadeja claiming anticipatory bail wherein he has reiterated his contention that statement dated 26th April 2007 was a pre-written statement, and he was compelled to sign it. The learned senior counsel drew my attention to statement dated 11th May 2010 of PW105 Nathuba Jadeja, allegedly recorded by the CBI, and submitted that this statement is *ad verbatim* same including punctuations, when compared with the statement dated 26th April 2007 recorded by T.K.Patel of CID Crimes, Gujarat. It is further argued that PW105 Nathuba Jadeja had filed affidavit on 1st July 2015 before the learned Additional Sessions Judge, Mumbai, and reiterated that his statement dated 26th April 2007 is an outcome of pressure exerted on him as well as temptation given to him. With this, it is argued that, finding of the learned Additional Sessions Judge, to

the effect that, statement of PW105 Nathuba Jadeja cannot form the basis of framing the Charge, is not perverse. It is further argued that, in the ongoing trial, PW105 Nathuba Jadeja has not supported the prosecution, in any manner. If during the course of the trial, any evidence surfaces against this respondent/discharged accused no.2 Rajkumar Pandiyan, then the court can even add him as an accused. To buttress this submission, reliance is placed on judgment of **Hardeep Singh vs. State of Punjab**¹⁰.

17 Shri Jethmalani, the learned senior counsel, further argued that even PW106 Gurudayal Singh has filed an affidavit before the learned Additional Sessions Judge on 1st July 2015 and stated that he had not witnessed anything nor had visited Hyderabad, as alleged by the prosecution. With this, it is further argued that 32 passengers from the luxury bus as well as its driver and cleaner have not identified respondent/discharged accused no.2 Rajkumar Pandiyan. There is no evidence to show that PW105 Nathuba Jadeja and PW106 Gurudayal Singh were at Hyderabad, at the relevant time. Official record shows that both

¹⁰ AIR 2014 SC 1400

these witnesses were at Ahmedabad itself during the relevant period and had claimed TA/DA as well as leave salary for Saturday. Their Attendance Register shows that they were present at Ahmedabad.

18 It is further argued that statement of PW3 Tejas Patel of Vodafone shows that there was no call from respondent/discharged accused no.2 Rajkumar Pandiyan to Premjibhai Cham for the period from 15th November 2015 to 20th November 2015. Even statement of Premjibhai Cham shows that registration number of his Qualis vehicle is GJ-25-A-7007 whereas, PW105 Nathuba Jadeja has referred to its registration number as “GJ-1” and PW106 Gurudayal Singh referred to its registration number as “MH”.

19 Shri Jethmalani, the learned senior counsel appearing for respondent/discharged accused no.2 Rajkumar Pandiyan, further argued that the charge-sheet itself shows that visit of respondent/discharged accused no.2 Rajkumar Pandiyan to

Hyderabad on 21st November 2005 was for specific intelligence job and it was not for abducting Sohrabuddin Shaikh, his wife Kausarbi as well his accomplice. Undisputedly, the suicidal bomber had caused bomb blast at the office of Hyderabad City Police Task Force, Begum Pet, Hyderabad, on 12th October 2005, and this bomb blast was having Gujarat connection as seen from email of Rajiv Trivedi as well as further correspondence and order of the POTA court for interrogating Mulla Nasiruddin. Therefore, on 21st November 2005 itself, discharged accused no.1 D.G.Vanzara, the then Deputy Inspector General, had informed the Additional Director General of Police as well as the Director General Of Police of Gujarat State that the respondent/discharged accused no.2 Rajkumar Pandiyan is urgently sent to Hyderabad by morning flight for confidential inquiry into suicidal bombing. In submission of the learned senior counsel, for the reasons best known to it, the prosecuting agency i.e. the CBI has not recorded the statement of the Additional Director General of Police as well as the Director General of Police, Gujarat State, despite this communication, and respondent/discharged accused no.2

Rajkumar Pandiyan was made a scapegoat. It is further argued that statements of L.K.Shinde, Assistant Commissioner of Police, Anil Kumar, IPS Officer and Raju Trivedi, Assistant Commissioner of Police, Hyderabad, would show that visit of respondent/discharged accused no.2 Rajkumar Pandiyan to Hyderabad was for the purpose of specific intelligence job with regard to the suicidal bomb blast at the office of the City Police Task Force, Hyderabad. For this purpose, he paid visits to various officers and had visited the spot.

20 Shri Jethmalani, the learned senior counsel appearing for respondent/discharged accused no.2 Rajkumar Pandiyan, further argued that the documents filed with the charge-sheet itself would falsify case of the prosecuting agency making no material available for framing of Charge. For this purpose, reliance is placed on communication of S.A.Jabbar, Director General of Police, Hyderabad, to Geeta Johari, Director General of Police, Gujarat. Reliance is also placed on the documents filed with the charge-sheet in the form of In and Out Register of the

Officers Mess of Central Reserve Police Force with a rider that such extract cannot form evidence that is legally admissible. Still, according to the learned senior counsel, this extract of In and Out Register is totally inconsistent to the prosecution case. Statement of PW88 Islavat Arvindu, Mess Commander at Hyderabad, PW97 E.R.Radha Krishnaiah, Inspector General Police, PW90 Naval Kishor, Mess Assistant, and PW91 T.D.Vishwanathan, Manager of the Mess, are relied upon to demonstrate that they are not corroborating the version of PW105 Nathuba Jadeja and PW106 Gurudayal Singh. Shri Jethmalani, the learned senior counsel, pointed out that statement of PW91 T.D.Vishwanathan, Manager of the Andhra Pradesh Police Officers Mess, is based on the documentary evidence and the same reflects that respondent/discharged accused no.2 Rajkumar Pandiyan had arrived at the Officers Mess on 21st November 2005 and left at 15.00 hours of 23rd November 2005. However, after 3 years in his supplementary statement recorded by the CBI, an effort was made to suggest that someone had vacated the room in which respondent/discharged accused no.2 Rajkumar Pandiyan stayed.

21 It is further argued that PW105 Nathuba Jadeja and PW106 Gurudayal Singh are falsified in their version about the air ticket by statement of PW98 Simanta Bordolo, Deputy Manager of Indian Air Lines, who stated that the air tickets for return journey from Hyderabad for 24th November 2005 was booked from City Reservation Office of the Indian Air Lines. It is further argued that statement of Ajay Parmar, though he is an accused, can be seen as the same is not a confessional statement and it reflects that the Custom Declaration Form was filled by him for the respondent/discharged accused no.2 Rajkumar Pandiyan. With this, it is submitted that there is no legally admissible evidence against the respondent/discharged accused no.2 Rajkumar Pandiyan and as such, the revision petition needs to be dismissed.

22 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.

23 In reply, Shri Tiwari, the learned counsel appearing for the revision petitioner, argued that even this court in Criminal Revision Application No.363 of 2016 decided on 28th March 2016 has considered PW105 Nathuba Jadeja and PW106 Gurudayal Singh as accomplices and they are undisputedly accomplices. Their evidence is required to be assessed at the time of the trial. He further argued that the documents regarding TA and DA of these witnesses are fabricated documents. Email of Rajiv Trivedi is a text email. Fax message dated 21st November 2005 is not reflecting any urgency. The learned counsel further argued that question of sanction can be decided even during the trial. According to him, as passengers of the luxury bus were under fear, there is no question of identifying the police officers who intercepted the bus.

24 As the claim of the respondent/discharged accused No.2 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.

25 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 with strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him.

26 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 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

¹¹ AIR 1997 SC 2041

proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.”

27 In a later decisions 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 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

¹² AIR 2002 SC 564

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.”

28 Case of the prosecution 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)

29 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

13 2007 ALL MR(Cri) 2562

14 2005 ALL MR(Cri) 571

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.”

30 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.

31 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 (supra)**, 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 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.”

32 By this revision petition, the revision petitioner, who happens to be brother of deceased Sohrabuddin Shaikh is challenging the Order dated 25th August 2016 passed by the learned Special Judge for CBI on discharge application (Exhibit 562) in Session Case Nos.177, 178, and 577 of 2013 and Session Case No.312 of 2014, whereby the respondent/original accused No.2 Rajkumar Pandiyan the then Superintendent of Police, Anti

Terrorist Squad, Ahmedabad came to be discharged on merits as well as for want of sanction to prosecute him. 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.

33 According to the prosecution case, prosecuting agency has found involvement of the respondent/original accused No.2 Rajkumar Pandiyan in the case of abduction and murder by fake encounters in the following manner :

(a) Respondent/discharged accused No.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, Ahmedabad arranged a Qualis vehicle bearing registration No.GJ-25-A-7007 from PW144 Premjibhai Cham and PW145 Madhubhai Bandyawala for taking policemen to Hyderabad for abducting deceased Sohrabuddin Shaikh and his aide Tulsiram Prajapati.

- (b) Respondent/discharged accused No.2 Rajkumar Pandiyan actively took part in abduction of deceased Sohrabuddin Shaikh, his wife Kauserbee and his aide Tulsiram Prajapati by intercepting the luxury bus near Zahirabad and by abducting them, he personally brought them to Ahmedabad.

- (c) Respondent/discharged accused No.2 Rajkumar Pandiyan was found present when Sohrabuddin Shaikh came to be murdered under the guise of encounter in the night intervening 25th November 2005 and 26th November 2005 between the Narol circle and Vishala circle.

- (d) Respondent/discharged accused No.2 Rajkumar Pandiyan had given information to discharged accused No.3 M.N.Dinesh that Tulsiram Prajapati – an escaped offender came to be spotted at Banaskanta District in Gujarat and that information was passed to Sudhir Joshi, Deputy Commissioner of Police, Udaipur for onward transmission.

(e) Respondent/discharged accused No.2 Rajkumar Pandiyan caused interception of mobile phone of Tulsiram Prajapati on the pretext that he had escaped from the custody.

34 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**¹⁵)

35 This revision petition has come up for hearing after about 1 year from discharge of respondent/accused. It is reported

15 AIR 2013 SC 73

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 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**¹⁶ need reproduction and they read thus :

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

¹⁶ AIR 2014 SC 1400

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 on trial, after careful examination of evidence, the court is of the opinion that there exists evidence to proceed against the person discharged, it can take steps as provided by law and such discharged accused can also be made to face the trial.

36 Let us, therefore, consider whether the impugned Order of discharging the respondent/discharged accused No.2 Rajkumar Pandiyan suffers from perversity or error of law resulting in flagrant miscarriage of justice. It will be required to be seen *dehorse* confessional statements of accomplice viz. PW105 Nathuba Jadeja and PW106 Gurudayal Singh whether there is any material which is sufficient to make out a *prima facie* case for framing the charge against respondent/discharged accused No.2 Rajkumar Pandiyan. One will also have to consider whether

confessional statements of PW105 Nathuba Jadeja and PW106 Gurudayal Singh can be called in aid to frame the charge against the respondent/discharged accused No.2 and whether along with other material collected by the prosecution, those statements recorded by the CBI so also their 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 the accused has committed the offence alleged against him by the prosecuting agency.

37 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 Himanshusing 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.

38 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 H.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.

39 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 respondent/discharged accused no.2 Rajkumar Pandiyan along with other discharged accused persons including D.G.Vanzara, Deputy Inspector General, and 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 respondent /discharged accused no.2 Rajkumar Pandiyan, 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.

40 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.

41 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.

42 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 about his earlier version dated 15th February 2007 was correct version but his statement dated 26th April 2007 came to be forcibly extracted and that CBI was not ready to accept this version, came to be replied as “No comments” in the reply tendered by the CBI.

43 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.

44 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 Sohrabuddin 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.

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.

45 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.

46 Thereafter, detail statement of this witness PW106 Gurudayal Singh 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.

47 Statement of this witness PW106 Gurudayal Singh 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.

48 However, ultimately, this witness PW106 Gurudayal Singh 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.

49 It is worthwhile to note that the learned Additional Sessions Judge, Mumbai, on presentation of affidavit by PW105

Nathuba Jadeja and PW106 Gurudayal Singh, had verified the contents thereof from both these witnesses and has made a note to that effect on those affidavits.

50 Undisputedly, both these witnesses PW105 Nathuba Jadeja and PW106 Gurudayal Singh, during the course of the trial, turned hostile and reported to have not supported the prosecution in any manner. This position is undisputed. This is the nature and quality of statements of both these witnesses, allegedly recorded during the course of investigation by various Investigating Officers. Their statements which are recorded by the CBI undisputedly show that they 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.

51 First and foremost circumstance alleged against respondent/discharged accused no.2 Rajkumar Pandiyan for making out prima facie case for framing the Charge is his act in

arranging the Qualis vehicle for travel of the police team from Ahmedabad to Hyderabad for abducting deceased Sohrabuddin Shaikh, his wife and his aide. Let us, therefore, scrutinize the charge-sheet for ascertaining whether there is any material in that regard for framing the Charge against the respondent/discharged accused no.2 Rajkumar Pandiyan. In his first statement dated 19th January 2007, PW106 Gurudayal Singh has referred the registration number of this Qualis vehicle as starting with letters “MH” and has stated that he did not remember full registration number. PW105 Nathuba Jadeja, in his statement, has referred to the registration number of this Qualis vehicle as starting with the letters “GJ-1”. He also failed to state full registration number of the Qualis vehicle, which allegedly was taken to Hyderabad for transporting members of the police team, allegedly entrusted with the job of abducting Sohrabuddin Shaikh.

52 According to the prosecution case, the Qualis vehicle which was used in commission of the alleged crime, was owned by PW144 Premjibhai Cham. Statement of PW144 Premjibhai Cham

shows that Registration number of his Qualis vehicle is “GJ-25-A-7007.”

53 On 13th May 2007, PW144 Premjibhai Cham has stated before the CID Crimes that while he was at Mumbai, shopping for the purpose of marriage of his daughter, he received a telephone call from respondent/discharged accused no.2 Rajkumar Pandiyan and that a request for arranging a big vehicle was made to him. Then PW144 Premjibhai Cham telephonically called his cousin PW145 Madhubhai Bandyawala and informed him that respondent/discharged accused no.2 Rajkumar Pandiyan will ask for the Qualis car and that the Qualis car would have to be provided to him. On 13th May 2007 itself, statement of PW145 Madhubhai Bandyawala was recorded by CID Crimes wherein he has stated that two or three days prior to 18th November 2005, PW144 Premjibhai Cham called him telephonically and informed him that respondent/discharged accused no.2 Rajkumar Pandiyan wants the Qualis car in two or three days and that the Qualis car

should be given to respondent/discharged accused no.2 Rajkumar Pandiyan.

54 On 14th July 2010, statement of PW144 Premjibhai Cham was recorded by the CBI wherein he has stated that he had received a telephonic call from PW145 Madhubhai Bandyawala informing him that respondent/discharged accused no.2 Rajkumar Pandiyan wants a high passenger capacity vehicle, preferably a Qualis. PW144 Premjibhai Cham further stated that he then told PW145 Madhubhai Bandyawala to provide the requisite vehicle to respondent/discharged accused no.2 Rajkumar Pandiyan. On 14th July 2010 itself, statement of PW145 Madhubhai Bandyawala was recorded by the CBI, wherein he has stated that two to three days before 18th November 2005, he received telephonic call from respondent/discharged accused no.2 Rajkumar Pandiyan requesting need for a high passenger capacity, preferably a Qualis vehicle. He, then, telephonically informed PW144 Premjibhai Cham about this fact.

55 This is the quality of evidence collected by the prosecuting agency. If we compare statement dated 13th May 2007 of PW144 Premjibhai Cham with statement of PW3 Tejas Patel of Vodafone Service Provider recorded on 8th March 2012, then it becomes clear that right from 15th November 2005 to 20th November 2005, there was not a single call from respondent/discharged accused no.2 Rajkumar Pandiyan to PW144 Premjibhai Cham. There is documentary evidence to this effect. Thus, there is no prima facie evidence for even inferring that the respondent/discharged accused no.2 Rajkumar Pandiyan had requested PW144 Premjibhai Cham to provide the Qualis vehicle for being used for taking police personnel to Hyderabad.

56 As stated in foregoing paragraphs, police team went from Ahmedabad to Hyderabad by Qualis vehicle owned by PW144 Premjibhai Cham. According to the prosecution case, Ajay Parmar and N.H.Dhabi police officials from Anti Terrorist Squad, apart from others, travelled in that Qualis vehicle and reached Hyderabad in the evening hours of 21st November 2005. In and

Out Register of Central Reserve Police Force Guest House of Hyderabad came to be supplied to Inspector General of Police, Gujarat State, by S.A.Jabbar, Additional Deputy Inspector General of Central Reserve Police Force, vide letter dated 10th May 2007. Along with the charge-sheet, relevant page of that In and Out Register of Station Officers Mess is filed. Perusal of that relevant page shows that Police Official Ajay Parmar reached Central Reserve Police Force Mess at 19.00 hours on 21st November 2005 and left at 20.20 hours. He arrived there in Sunny vehicle bearing Registration No.AP-11-G-5416. Police Officer N.H.Dhabi, as per entry in that page, arrived there from Gujarat by Qualis vehicle at 20.45 hours of 21st November 2005, and that Qualis vehicle was having Registration No.AP-12-J-6364. Thus, even the contemporaneous documentary evidence does not show that the Qualis vehicle bearing registration number GJ-25-A-7007 owned by PW144 Premjibhai Cham, was taken to Hyderabad on 21st November 2005. Thus, contemporaneous documentary evidence in the form of In and Out Register of Central Reserve Police Force maintained by the public servant in discharge of official duty in

respect of the relevant fact falsifies the version of accomplice PW105 Nathuba Jadeja that the Qualis vehicle of PW144 Premjibhai Cham arranged for respondent/discharged accused no.2 Rajkumar Pandiyan was used for going to Hyderabad. Documentary evidence collected from Central Reserve Police Force shows that no Qualis vehicle bearing registration number starting from words "GJ" from Gujarat entered into that campus.

57 Apart from this, there is no evidence in respect of the registration number of the Qualis vehicle allegedly used for transporting police team from Ahmedabad to Hyderabad. This evidence in no way, makes out even a prima facie case nor does it create a strong suspicion that Qualis vehicle bearing Registration No.GJ-25-A-7007 owned by PW144 Premjibhai Cham, summoned at the instance of respondent/discharged accused no.2 Rajkumar Pandiyan, was used for transporting staff of Anti Terrorist Squad from Ahmedabad to Hyderabad for abducting Sohrabuddin Shaikh and two others. Careful perusal of statements of PW144 Premjibhai Cham, PW146 Malde Odederra - Transport Manager,

Chamdu Singh Jadhav - Watchman, also do not show that respondent/discharged accused no.2 Rajkumar Pandiyan took Qualis vehicle bearing Registration No.GJ-25-A-7007 from its owner for using it in commission of the crime in question. The documentary evidence in the form of In and Out Register mentioning vehicle number belies the case of the prosecution against respondent/discharged accused no.2 Rajkumar Pandiyan.

58 According to the CBI statement dated 11th May 2010 of PW105 Nathuba Jadeja, the Qualis vehicle by which they travelled from Ahmedabad to Hyderabad was of silver colour but in his statement dated 19th January 2007 to the CID, PW106 Gurudayal Singh – the another accomplice – is referring the colour of the Qualis vehicle as light blue. Neither PW144 Premjibhai Cham – owner, nor other witnesses associates with him described the colour of the Qualis vehicle bearing Registration No.GJ-25-A-7007. With this material it cannot even be suspected that the Qualis vehicle of PW144 Premjibhai Cham came to be arranged by respondent/discharged accused no.2 Rajkumar Pandiyan for

taking the Anti Terrorist Squad staff from Ahmedabad to Hyderabad.

59 Now let us examine contents of the charge-sheet in order to ascertain whether prima facie it demonstrates that respondent/discharged accused no.2 Rajkumar Pandiyan visited Hyderabad for the purpose of abducting Sohrabuddin Shaikh and others. It is a cardinal principle of law that a witness may lie, but documents do not. The charge-sheet contains fax message dated 21st November 2005 sent by discharged accused no.1 D.G.Vanzara, Deputy Inspector General, to the Additional Director General of Police and Director General of Police, Gujarat, informing them that as communicated on telephone and later on discussed with those authorities in person, respondent/discharged accused no.2 Rajkumar Pandiyan has been urgently sent to Hyderabad by morning flight on 21st November 2005 in connection with a confidential inquiry regarding recent suicidal bombing in the office of the Deputy Commissioner of Police, Crimes, Hyderabad City. It is seen from the charge-sheet that

there was a blast by suicidal bomber on 12th October 2005 at the Hyderabad City Police Task Force Office. PW195 Rajiv Trivedi, Additional Commissioner of Police, Hyderabad, had sent a letter to Manoj Shashidhar, Deputy Commissioner of Police, Ahmedabad, informing him about this blast. It was reported in this letter that an unidentified Muslim youth, who carried out the bomb blast, is an associate of Maulana Mulla Nasiruddin, who was arrested by Gujarat Police in Hyderabad. Manoj Shashidhar, Deputy Commissioner of Police, Ahmedabad, vide letter dated 25th October 2005 had informed discharged accused N.K.Amin, Assistant Commissioner of Police, Ahmedabad, that during arrest of the accused Maulana Mulla Nasiruddin in Hyderabad by his team, one Mujahid Salim was killed in police firing. It was also informed to discharged accused N.K.Amin, Assistant Commissioner of Police, Ahmedabad, by this letter that in suicidal bomb blast at Hyderabad, involvement of ISI is suspected, and therefore, discharged accused N.K.Amin, Assistant Commissioner of Police, Ahmedabad, should take appropriate steps and avoid negligence. Application was also

moved on behalf of the CID Crimes, Gujarat, before the concerned court for permission to interrogate Maulana Mulla Nasiruddin and such permission was granted vide order dated 11th October 2005. In the light of all these earlier events, fax message dated 21st November 2005 sent by the Deputy Inspector General to the Additional Director General of Police and the Director General of Police reflects that visit of respondent/discharged accused no.2 Rajkumar Pandiyan to Hyderabad was a bonafide official visit for a specific intelligence job. It is seen from statement of PW92 Laxmikant Shinde, Assistant Commissioner of Police, Andhra Pradesh, recorded on 4th June 2007 by the CID Crimes that on instructions of Shashidharan Reddy, Deputy Commissioner of Police, Hyderabad, he had shown the spot where suicidal bomb blast was carried out in the office of the Hyderabad City Police to respondent/discharged accused no.2 Rajkumar Pandiyan. In his subsequent statement dated 21st April 2010 recorded by the CBI, some facts are reiterated by adding that respondent/discharged accused no.2 Rajkumar Pandiyan had not shown any inclination to gather details of the blast that occurred at Begum Pet. This

addition in no way, raises strong suspicion, because senior officer during intelligence job is not supposed to disclose details of his work to some other junior police officers of a different State. Moreover, statements of the Additional Director General of Police and the Director General of Police, Gujarat State, with whom this visit was discussed by the Deputy Inspector General of Anti Terrorist Squad are not recorded by the Investigator, for the reasons best known to him. Their statements would have certainly thrown light if the real purpose of visit of respondent/discharged accused no.2 Rajkumar Pandiyan was something else. That would have helped in furthering the case of the prosecution.

60 PW93 Anil Kumar, Deputy Inspector General of Andhra Pradesh Police, has disclosed to the CBI that on 12th May 2010 respondent/discharged accused no.2 Rajkumar Pandiyan had been to his place and at the instance of respondent/discharged accused no.2 Rajkumar Pandiyan, he had arranged a meeting of respondent/discharged accused no.2

Rajkumar Pandiyan with the Inspector General of Police, Andhra Pradesh. PW95 Rajiv Trivedi, Additional Commissioner of Police, Hyderabad, has stated before the CBI that respondent/discharged accused no.2 Rajkumar Pandiyan came to his office and requested him to show spot of the suicidal bomb blast. Therefore, he contacted Deputy Commissioner of Police Shashidhar Reddy and arranged a visit of respondent/discharged accused no.2 Rajkumar Pandiyan to the City Police Task Force Office, where the bomb blast occurred. PW95 Rajiv Trivedi, Inspector General of Police, Andhra Pradesh, has stated before the CBI that on instructions of PW93 Anil Kumar, Deputy Inspector General of Andhra Pradesh Police, he met respondent/discharged accused no.2 Rajkumar Pandiyan and there was a discussion regarding case of suicidal bomb blast in the office of the Hyderabad City Police Task Force at Begum Pet. PW95 Rajiv Trivedi, Inspector General of Police, Andhra Pradesh, further stated that he described the offence to respondent /discharged accused no.2 Rajkumar Pandiyan and showed pictures of suicidal bomber to him. As per version of PW95 Rajiv Trivedi, Inspector General of Police, Andhra Pradesh,

on request of respondent/ discharged accused no.2 Rajkumar Pandiyan, he made arrangements for visiting of respondent/discharged accused no.2 Rajkumar Pandiyan to the scene of the offence. This documentary evidence reflected from the charge-sheet indicates that presence of respondent /discharged accused no.2 Rajkumar Pandiyan at Hyderabad on 21st November 2005 was with regard to confidential inquiry regarding recent suicidal bomb blast at the office of the Hyderabad City Police Task Force, as reflected in the letter dated 21st November 2005. This oral as well as documentary evidence collected by the Investigating Agency, is no way, in tune with the version of accomplice PW105 Nathuba Jadeja and PW106 Gurudayal Singh. Evidence as reflected from the charge-sheet positively indicates that visit of respondent/discharged accused no.2 Rajkumar Pandiyan to Hyderabad was for the specific intelligence job relating to suicidal bombing assigned to him under information to the Director General Police and Additional Director General Police of Gujarat State.

61 Now let us consider evidence collected by the Investigator found in the charge-sheet regarding stay of respondent/discharged accused no.2 Rajkumar Pandiyan at Hyderabad, so also stay of other officers from the Anti Terrorist Squad, who allegedly visited Hyderabad. The charge-sheet shows that respondent/discharged accused no.2 Rajkumar Pandiyan actually stayed at Andhra Pradesh Police Officers Mess. Register of accommodation of Andhra Pradesh Police Officers Mess with the charge-sheet shows that respondent/discharged accused no.2 Rajkumar Pandiyan checked in the said Mess at 10.20 a.m. of 21st November 2005 and stayed in Room No.16. Accommodation chart of that Andhra Pradesh Police Officers Mess dated 23rd November 2005 collected by the Investigator shows that respondent /discharged accused no.2 Rajkumar Pandiyan stayed there up to 3.00 p.m. of 23rd November 2005. The purpose of his visit is shown as “Official visit” and Accommodation Register bears his signature. Statement of PW90 Naval Kishor, Mess Assistant, also reflects this fact. PW91 T.D.Vishwanathan is Manager of that Mess. His statement recorded by the CID on 11th May 2007 shows

that from 21st November 2005 upto 3.00 p.m. of 23rd November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan stayed in Room No.16 of that Mess. This witness has spoken on the basis of the documentary evidence. However, in his subsequent statement dated 8th March 2010 recorded by the CBI, he has spoken that someone had vacated Room No.16 on 23rd November 2005. His statement does not reveal the fact that the person who had vacated that room was not respondent/discharged accused no.2 Rajkumar Pandiyan. Who was that someone is also not stated by this witness. Therefore, this version of the Manager is not even sufficient to raise suspicion against respondent/discharged accused no.2 Rajkumar Pandiyan, in order to form a basis for charging him. On the contrary, this documentary evidence reflecting stay of respondent/discharged accused no.2 Rajkumar Pandiyan at the Officers Mess at Hyderabad upto 15 hours of 23rd November 2005 is totally contradictory to the case of the prosecution solely based on versions of accomplice that respondent/discharged accused no.2 Rajkumar Pandiyan indulged in abduction of Sohrabuddin Shaikh

and two others in the night intervening 22nd November 2005 and 23rd November 2005 and then took abducted persons immediately towards Ahmedabad in that night of 23rd November 2005 itself by four wheeler vehicles and he reached Ahmedabad by road journey. This evidence, as such, is in no way corroborating what has been stated by PW105 Nathuba Jadeja and PW106 Gurudayal Singh. Here also, there is nothing in the charge-sheet to corroborate the version of these two accomplices.

62 On this backdrop, it is relevant to point out that various statements of PW106 Gurudayal Singh show that in the night of 21st November 2005, he, PW105 Nathuba Jadeja, Police Officials N.H.Dhabi and Ajay Parmar stayed at the guest house of the Central Industrial Security Force. Respondent/discharged accused no.2 Rajkumar Pandiyan was also staying there. This fact is even restated by him in his statement under Section 164 of the Code of Criminal Procedure. PW106 Gurudayal Singh was candid in stating that in the guest house, where they took night halt, there was no arrangement for tea or breakfast. Similar is the

version of PW105 Nathuba Jadeja. There is no iota of evidence in the entire charge-sheet reflecting the stay of PW105 Nathuba Jadeja, PW106 Gurudayal Singh and Police Officials N.H.Dhabi and Ajay Parmar as well as respondent/discharged accused no.2 Rajkumar Pandiyan at the Central Reserve Police Force Guest House at Hyderabad in the intervening night of 21st November 2005 and 22nd November 2005. If really they had stayed at such guest house, the prosecution could have easily collected documentary evidence to that effect. Thus, on this material aspect of the matter, there is no evidence other than confessional statements of accomplice PW105 Nathuba Jadeja and PW106 Gurudayal Singh. In absence of semblance of other evidence, confessional statements of both these accomplice, cannot therefore, be used for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan.

63 Contrary to the version in these statements of accomplice PW105 Nathuba Jadeja and PW106 Gurudayal Singh is the statement of PW88 Islavat Arvindu, Mess Commander of

Central Reserve Police Force and PW97 E.R.Radha Krishnaiah, Inspector General Police of the Central Reserve Police Force. On 10th May 2007, PW88 Islavat Arvindu, Mess Commander of Central Reserve Police Force, has stated to the CID on verifying the Room Rent Register that on 21st November 2005 respondent/discharged accused no.2 Rajkumar Pandiyan, guest of Deputy Inspector General E.R.Radha Krishnaiah, was allotted one room i.e. Annexe-1 and three dinners were served there apart from tea and breakfast in that room. Subsequently, on 7th February 2010, this witness has stated to the CBI that on 21st November 2005 at 8.00 p.m., Deputy Inspector General PW97 E.R.Radha Krishnaiah of Central Reserve Police Force informed him that his three guests from Gujarat were expected to visit, and therefore, Room Nos.1 and 2 in the Annexe building be kept for them. Accordingly, on 21st November 2005, at 9.00 p.m., three officers came in the Tata Sumo Vehicle and they were accommodated in the Annexe Building and were served the dinner. As against this, PW97 E.R.Radha Krishnaiah, Deputy Inspector General, has maintained his stand before the CID as well

as the CBI by stating that on 21st November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan had come to his house at 7.00 p.m. and requested for one room at Central Reserve Police Force Mess, and therefore, he told the Mess Commander to give one room in the Annexe Building to respondent/discharged accused no.2 Rajkumar Pandiyan. This witness has stated that respondent/discharged accused no.2 Rajkumar Pandiyan had come to his house all alone. He categorically denied of having met anyone from Gujarat Police than respondent/discharged accused no.2 Rajkumar Pandiyan. This evidence of the prosecution is not in tune with statements of accomplice PW105 Nathuba Jadeja and PW106 Gurudayal Singh to the effect that in the night intervening 21st November 2005 and 22nd November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan was staying in the bungalow in the campus of Central Industrial Security Force and they along with Police Officials N.H.Dhabi and Ajay Parmar were staying in two rooms in the guest house of the same campus. Version of the accomplice is not gaining any corroboration by this evidence collected by the

investigation agency, and this material collected by the prosecuting agency, as such, is not helpful for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan, on the premise that he arranged for the stay of Anti Terrorist Squad staff at Hyderabad in pursuant to the criminal conspiracy. Version of PW88 Islavat Arvindu, at the most, shows that only three persons stayed for a night in one room of Central Reserve Police Force Guest House where three dinners and three breakfast and tea were served. This version is not in tune with the prosecution case reflected from statement of accomplice PW105 Nathuba Jadeja.

64 PW105 Nathuba Jadeja and PW106 Gurudayal Singh have stated that in the afternoon of 22nd November 2005, they both as well as Police Officials Ajay Parmar and Santaram Sharma went to the Airport for purchasing air ticket for respondent/discharged accused no.2 Rajkumar Pandiyan. As per their version, the air ticket to be purchased was for journey by air of respondent/discharged accused no.2 Rajkumar Pandiyan on

23rd November 2005 from Hyderabad to Ahmedabad. The Investigator has recorded statement of the Deputy Manager of Indian Air Lines PW98 Simanta Bordolo. Statement of this PW98 Simanta which is based on data available in the computer system shows that at 14.45 hours of 22nd November 2005, air ticket of respondent/discharged accused no.2 Rajkumar Pandiyan was booked for Hyderabad to Ahmedabad for journey dated 24th November 2005 by IC 981 which was to depart at 17.50 hours. This ticket was booked at Reservation Office at Hill Fort Road, Saifa Baug. It is also seen from his statement that respondent/discharged accused no.2 Rajkumar Pandiyan had approached Hyderabad Airport on 23rd November 2005, at about 17.28 hours, to advance his journey from 24th November 2005 to 23rd November 2005 by IC 563. As seats were available, respondent/discharged accused no.2 Rajkumar Pandiyan was accommodated in IC 563 on 23rd November 2005 for journey from Hyderabad to Ahmedabad and Seat No.20D was allotted to him. This evidence of PW98 Simanta Bordolo, Deputy Manager of Indian Air Lines, is not corroborating versions of PW105 Nathuba

Jadeja and PW106 Gurudayal Singh that tickets were purchased from the Airport of Hyderabad and Police official Ajay Parmar went inside the Airport for this job. PW106 Gurudayal Singh has categorically stated to the Investigator that on 22nd November 2005 air ticket for journey dated 23rd November 2005 was booked, but as seen from version of PW98 Simanta, Deputy Manager of Indian Air Lines, the ticket booked on 22nd November 2005 was for journey dated 24th November 2005. This aspect assumes importance as first version of the accomplice PW105 Nathuba Jadeja shows that he had not visited Hyderabad on 21st November 2005.

65 Statement of PW99 M.Sivraman, Air Customs Superintendent, shows that any Domestic Passenger travelling in International flight, even to the domestic sector, is required to fill in a declaration in respect of goods of foreign origin being carried by him. According to the prosecution case, Customs Declaration form in respect of air journey of 23rd November 2005 from Hyderabad to Gujarat in the name of respondent/discharged

accused no.2 Rajkumar Pandiyan bears hand writing of Police Official Ajay Parmar. What is relevant and what is required to be seen is that who had travelled from Hyderabad to Gujarat by Flight No.IC 563 on 23rd November 2005. Statement of PW98 Simanta, Deputy Manager of Indian Air Lines, clearly shows that it was respondent/discharged accused no.2 Rajkumar Pandiyan. There is no evidence to indicate that, that air travel was undertaken by Police Official Ajay Parmar in the name of respondent/discharged accused no.2 Rajkumar Pandiyan. Even contemporaneous documentary evidence in the form of the document D146 of the charge-sheet in respect of “check-in” of passengers of Air India shows that respondent/discharged accused no.2 Rajkumar Pandiyan checked in at Hyderabad Airport at 17.35 hours of 23rd November 2005 for boarding flight to Ahmedabad. Thus, this is a factor, which assumes importance, when material collected by the Investigator is examined by the court for determining whether a prima facie case is made out for framing Charge against the accused in such a serious case. The

material presented before the court is required to be scrutinized for searching whether the ground for presuming that the accused has committed the offence is made out. The court is not expected to presume that what the prosecution states is a gospel truth, even if it is opposed to common sense or the broader probabilities of the case. There is no material to indicate that in the assumed name of respondent/discharged accused no.2 Rajkumar Pandiyan, somebody else had undertaken that air journey by stealing identity of respondent/discharged accused no.2 Rajkumar Pandiyan. Atleast no such material can be found in the charge-sheet. Thus, this evidence/material found in the charge-sheet itself positively shows that respondent/discharged accused no.2 Rajkumar Pandiyan had undertaken return journey from Hyderabad to Ahmedabad by Flight No.IC0563 by cancelling his air ticket of journey dated 24th November 2005. As this fact is reflected primarily from the contemporaneous documentary evidence and when there is no other evidence to show that the said passenger was not respondent/discharged accused no.2 Rajkumar Pandiyan, then infact it needs to be held that there are

no grounds for presuming that respondent/discharged accused no.2 Rajkumar Pandiyan had infact executed the plan hatched by indulging in criminal conspiracy and abducted Sohrabuddin Shaikh and two others in the night intervening 22nd November 2005 and 23rd November 2005 and had immediately taken them by a road journey to Ahmedabad, to reach there by 23rd November 2005. Thus, on this aspect also, the other evidence collected by the investigating agency is not supporting the prosecution, so as to call in aid confessional statements of PW105 Nathuba Jadeja and PW106 Gurudayal Singh for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan.

66 Now let us ascertain what is the evidence/material produced by the prosecution with regard to the case against respondent/discharged accused no.2 Rajkumar Pandiyan so far as alleged abduction of Sohrabuddin Shaikh and others is concerned. Accomplice PW105 Nathuba Jadeja in his incriminating statement dated 11th May 2010 given to the CBI has stated that at about 7 O'Clock of 22nd November 2005, respondent/discharged accused

no.2 Rajkumar Pandiyan sat in the Tata Sumo vehicle occupied by seven to eight persons. Then, Police Inspector N.H.Dhabi told him to follow two Tata Sumo vehicles out of which one was occupied by respondent/discharged accused no.2 Rajkumar Pandiyan. He, therefore, drove Qualis vehicle and followed the Tata Sumo vehicle in which respondent/discharged accused no.2 Rajkumar Pandiyan was travelling. They stopped at a circle and then respondent/discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and Santaram Sharma with two other persons sat in the Qualis vehicle driven by him. Other two Tata Sumo vehicles were behind his vehicle. They chased the luxury bus. On instructions of respondent/discharged accused no.2 Rajkumar Pandiyan, he stopped the luxury bus by intercepting it. Then respondent/discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and rest of the persons alighted from his Qualis vehicle and approached the luxury bus. Two persons were made to alight from the luxury bus. One lady was also made to alight from the luxury bus. Those two persons were made to sit in the Qualis vehicle driven by him, whereas the burkha clad lady

was made to sit in the Tata Sumo vehicle with Santaram Sharma. Respondent/ discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and two other persons alighted from the luxury bus and sat in the Qualis vehicle driven by him. Then all three vehicles viz., two Tata Sumo vehicles and one Qualis vehicle departed for Ahmedabad via Pune. He drove the vehicle for the whole night, as also in the day time of 23rd November 2005. At about 7.00 p.m. of 23rd November 2005, they reached Cobra circle in between Gandhi Nagar and Ahmedabad. Thereafter, Deputy Superintendent of Police Parmar and Police Sub-Inspector Chauhan came there in Maruti car, had a talk with respondent/discharged accused no.2 Rajkumar Pandiyan and then respondent/discharged accused no.2 Rajkumar Pandiyan instructed him to follow that Maruti car. They went to one farm house and one of the abducted persons (Sohrabuddin Shaikh) as well as the burkha clad lady were taken to that farm house. Then he dropped respondent/discharged accused no.2 Rajkumar Pandiyan to his house. This witness has not spoken about where the second abducted person (i.e. Tulsiram Prajapati) was left by

the Anti Terrorist Squad officials. These are the narrations of PW105 Nathuba Jadeja to the CBI.

67 Another accomplice PW106 Gurudayal Singh in his statement dated 4th March 2010 has disclosed to the CBI that at about 6.30 p.m. of 22nd November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and Santaram Sharma sat in the Qualis vehicle driven by PW105 Nathuba Jadeja and he sat in the Tata Sumo vehicle occupied by one driver and three other persons. Another Tata Sumo vehicle was occupied by about four persons. All those three vehicles departed from Hyderabad and stopped at one circle. Officers then alighted from the vehicles. Thereafter, respondent/discharged accused no.2 Rajkumar Pandiyan informed that one luxury bus would pass and they should follow that luxury bus. Then, on passing the luxury bus, Qualis vehicle in which respondent/discharged accused no.2 Rajkumar Pandiyan was travelling, started chasing that luxury bus and Tata Sumo vehicles also followed it. After brief halt at a hotel, that luxury bus

proceeded further and it was chased by those three vehicles. After about 15 to 20 kilometers from the hotel, the Qualis vehicle overtook and stopped the luxury bus. PW106 Gurudayal Singh further stated that the Tata Sumo vehicle in which he was travelling also stopped ahead of the luxury bus at some distance. Officers travelling in the vehicles stopped the traffic. After some time, the Qualis vehicle in which respondent/ discharged accused no.2 Rajkumar Pandiyan and Police Inspector N.H.Dhabi were travelling approached the Tata Sumo vehicle in which he was travelling. One burkha clad lady alighted from the Qualis vehicle and she as well as Santaram Sharma sat in the Tata Sumo vehicle in which he was travelling. Then the Qualis vehicle in which respondent/discharged accused no.2 Rajkumar Pandiyan was travelling departed. PW106 Gurudayal Singh further stated that the Tata Sumo vehicle in which he was travelling also proceeded further. After Bharuch, Santaram Sharma and the burkha clad lady were transferred to the Qualis vehicle and he came to Ahmedabad in Tata Sumo vehicle and reached there at about 3.30 hours of 24th November 2005.

68 Careful scrutiny of version of both these accomplices shows that their version is not consistent and congruous, so far as alleged abduction of Sohrabuddin Shaikh and two others is concerned. Let us ascertain whether these inconsistent versions are gaining corroboration from some other evidence collected by the prosecution, in order to make out grounds for proceeding against respondent/discharged accused no.2 Rajkumar Pandiyan. If some independent material is available then statements of both these accomplices can be made use of for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan.

69 PW100 Sharad Apte along with his family members was travelling in the luxury bus from which Sohrabuddin Shaikh and two others were allegedly abducted by respondent/discharged accused no.2 Rajkumar Pandiyan and others. His statement to the CBI shows that after stopping the luxury bus, three persons in civil dress entered inside the luxury bus. Driver switched on the lights in the luxury bus. Initially, they took one person out of the bus and thereafter another person was taken out of the bus. Then, the

burkha clad woman accompanying that person also alighted. She was not ready to board the bus. For long time there was discussion and arguments amongst them. Then, on instructions of one of the persons, driver started the bus. Those two male passengers and one burkha clad woman passenger did not board the luxury bus again. Similar are statements of his other family members viz. PW101 Amit Apte, PW102 Manjusha Apte and PW103 Anjali Apte. PW83 Gaziuddin was the cleaner of the luxury bus. PW84 Misbaa Hyder was the driver of the luxury bus whereas PW81 Bishwas Joshi is the partner of Sangita Travels – owner of the luxury bus. Sohrabuddin Shaikh and Kausarbi came to be identified as passengers of that luxury bus by the witnesses. However, there is no material on record to show that these witnesses have identified respondent/discharged accused no.2 Rajkumar Pandiyan as the person who along with others took part in abduction of Sohrabuddin Shaikh and two others. None of these witnesses are claiming to have seen respondent/discharged accused no.2 Rajkumar Pandiyan at that spot. The charge-sheet does not explain as to why even Test Identification Parade was not

conducted by the prosecution. Even photograph of respondent/discharged accused no.2 Rajkumar Pandiyan was not shown to these witnesses by the Investigator. Thus, except confessional statements of both accomplices, there is no iota of evidence to infer presence of respondent/discharged accused no.2 Rajkumar Pandiyan on the spot at the time of alleged abduction of Sohrabuddin Shaikh and two others.

70 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.

71 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 that, 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.2 Rajkumar Pandiyan in the Qualis vehicle or at the “Disha Farm House” for detaining

Sohrabuddin Shaikh and Kausarbi at that place. Thus, no other evidence on this aspect is available for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan so as to enable the court to take aid of the confessional statements of these two prosecution witnesses viz., PW105 Nathuba Jadeja and PW106 Gurudayal Singh.

72 Now let us ascertain from the material gathered by the prosecution as to whether it is seen that respondent/discharged accused no.2 Rajkumar Pandiyan had taken any part in encounter of Sohrabuddin Shaikh and two others. 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, discharged accused no.1 D.G.Vanzara, Deputy Inspector General, respondent/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.

73 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.2 Rajkumar Pandiyan 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.2 Rajkumar Pandiyan on the spot of the incident, at the time of the alleged fake encounter of Sohrabuddin Shaikh. PW159 ChaturSingh Panchbhai is driver of respondent/ discharged accused no.2 Rajkumar Pandiyan. His statement dated 28th April 2007 reveals that on the day of encounter of Sohrabuddin Shaikh,

he had driven respondent/discharged accused no.2 Rajkumar Pandiyan from the house to the office. This witness has spoken about presence of respondent/discharged accused no.2 Rajkumar Pandiyan in the office of the Anti Terrorist Squad till late night. This witness was very specific about stating that respondent/discharged accused no.2 Rajkumar Pandiyan was present in the office even at 2.00 a.m. of that day.

74 This is the evidence gathered by the prosecuting agency to show active involvement of respondent/discharged accused no.2 Rajkumar Pandiyan in encounter of Sohrabuddin Shaikh. However, evidence of accomplice PW105 Nathuba Jadeja is not gaining any corroboration from version of both these witnesses in order to make use of confessional statements of this accomplice for forming the ground for proceeding against respondent/discharged accused no.2 Rajkumar Pandiyan. There is no other independent evidence on this aspect also, so as to seek aid of confessional statement of accomplice PW105 Nathuba Jadeja.

75 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.2 Rajkumar Pandiyan is to the effect that he was found present at the spot where Kausarbi's dead body was disposed off by burning. 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 discharged accused no.1 D.G.Vanzara, respondent/discharged accused no.2 Rajkumar Pandiyan and discharged accused no.12 Narendra 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, discharged accused no.1 D.G.Vanzara, respondent/ 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 discharged accused no.1 D.G.Vanzara. Respondent/ 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.

76 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.2 Rajkumar Pandiyan 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.2 Rajkumar Pandiyan. 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.2 Rajkumar Pandiyan 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.2 Rajkumar Pandiyan 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.2 Rajkumar Pandiyan 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, so as to frame the Charge, no independent evidence is available on this aspect.

77 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 namely Chaubey and Chauhan, Police Sub-Inspectors 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, it had travelled to Ahmedabad, Rajkot, Viramgan Village. Thus, this official document does not show that it 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 respondent/discharged accused no.2 Rajkumar Pandiyan.

78 Now the only circumstance relied by the prosecution for framing the Charge against respondent/discharged accused no.2 Rajkumar Pandiyan is to the effect that he had given information to discharged accused no.3 M.N.Dinesh about spotting of escaped undertrial prisoner Tulsiram Prajapati in Banaskantha District of Gujarat and passing over of that information by discharged accused no.3 M.N.Dinesh to Sudhir Joshi, Deputy Superintendent of Police, Udaipur, as well as requesting to intercept the mobile phone allegedly belonging to deceased Tulsiram Prajapati. On these aspects also, there is no evidence constituting the ground for framing the Charge. PW254 Arunkumar Sharma, Inspector General of Police, Gujarat, has spoken about request of respondent/discharged accused no.2 Rajkumar Pandiyan for interception of one mobile number connected with Tulsiram Prajapati. Undisputedly, Tulsiram Prajapati was a wanted criminal, and hence, these acts on the part

of respondent/discharged accused no.2 Rajkumar Pandiyan cannot form the ground for proceeding against him in respect of alleged charge.

79 Now let us examine allegation against respondent/discharged accused no.2 Rajkumar Pandiyan 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.

80 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.

81 Now let us examine whether any grounds for proceeding against respondent/discharged accused no.2 Rajkumar Pandiyan 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.

82 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.”

83 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.

84 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.

85 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.

86 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.

87 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.

88 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.

89 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.

90 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.2 Rajkumar Pandiyan in the matter of alleged elimination of Tulsiram Prajapati by conspiring with others.

91 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 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 doesn't 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.

92 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.

93 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.

94 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.2 Rajkumar Pandiyan 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

or the broader probabilities of the case as seen from other material, and as such cannot be accepted as a gospel truth.

95 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.

96 According to the prosecution case, Tulsiram Prajapati alongwith Sohrabuddin Shaikh and Kausarbi was 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.

101 It is argued on behalf of respondent/discharged accused no.2 Rajkumar Pandiyan 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**¹⁷ 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 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

¹⁷ 2004 CRI.L.J.2050

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, specially 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.”

102 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 Odadera, PW14 Malde Odadera, 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.

103 The cumulative effect of the foregoing discussion requires me to hold that the learned trial court is perfectly

justified in discharging respondent no.2 Rajkumar Pandiyan for want of evidence and absence of material under Section 227 of the Code of Criminal Procedure. The impugned order below Exhibit 562 is neither perverse nor illegal, so far as it relates to discharge of respondent no.2 Rajkumar Pandiyan, the then Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat.

104 Now let us examine whether the learned trial court is justified in dropping proceedings against respondent/discharged accused no.2 Rajkumar Pandiyan for want of sanction as envisaged by Section 197 of the Code of Criminal Procedure. The role attributed to this discharged accused Rajkumar Pandiyan is to the effect that he arranged Qualis vehicle bearing Registration No.GJ-25-A-7007 from PW144 Premjibhai Chan and PW145 Madhubhai Bandyawala for taking the policemen to Hyderabad for abducting Sohrabuddin Shaikh and Tulsiram Prajapati. It is alleged that he took active part in abducting Sohrabuddin Shaikh and Tulsiram Prajapati as well as Kausarbi wife of Sohrabuddin

Shaikh in the night intervening 22nd November 2005 and 23rd November 2005 from the luxury bus proceeding from Hyderabad towards Sangli. The prosecution is further alleging that respondent/discharged accused no.2 Rajkumar Pandiyan was present on the spot of fake encounter of Sohrabuddin Shaikh in the night intervening 25th November 2005 and 26th November 2005. He gave information to discharged accused no.3 Dinesh M.N. about spotting Tulsiram Prajapati at Banaskantha District in Gujarat and had caused interception of mobile phone of Tulsiram Prajapati on the pretext that he escaped from custody of police guards. The prosecuting agency has collected material to show that on 21st November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, had visited Hyderabad by undertaking journey by air. This, according to the prosecution case, was for the purpose of abducting Sohrabuddin Shaikh and Tulsiram Prajapati. The charge-sheet itself contains the documentary evidence which reflects that this visit of respondent/discharged accused no.2 Rajkumar Pandiyan to

Hyderabad was during the course of discharge of official duty by him. The fax message dated 21st November 2005 sent by the Deputy Inspector General of Police, Anti Terrorist Squad, to the Director General of Police and Additional Director General of Police, Gujarat State, shows that there was telephonic conversation in respect of visit of respondent/discharged accused no.2 Rajkumar Pandiyan to Hyderabad amongst higher-ups in the Police Department and accordingly, respondent/discharged accused no.2 Rajkumar Pandiyan was urgently sent to Hyderabad by flight in connection with the confidential inquiry regarding suicidal bombing in the office of the Deputy Commissioner of Police, Crimes, Hyderabad. The material collected during the course of investigation, as discussed in foregoing paragraphs, shows that respondent/discharged accused no.2 Rajkumar Pandiyan met PW93 Anil Kumar, Deputy Inspector General of Police of Andhra Pradesh and PW95 Rajiv Trivedi, Assistant Commissioner of Police, Hyderabad, in connection with the confidential inquiry into the suicidal bombing in the office of the Deputy Commissioner of Police, Crimes, Hyderabad. The material

collected during investigation shows that respondent/discharged accused no.2 Rajkumar Pandiyan visited the spot of suicidal bomb blast and made inquiries in respect of that incident at Hyderabad. His stay at Hyderabad is documented in the official record as “Official visit.” The visit to Hyderabad was not surreptitious visit and stay of respondent/discharged accused no.2 Rajkumar Pandiyan during that visit was not at some private hotel for concealing his visit to Hyderabad. Thus, this act attributed to respondent/discharged accused no.2 Rajkumar Pandiyan is certainly his official act done in discharge of his official duty in pursuant to the directions of his official superiors.

105 Though it is alleged that in the night intervening 22nd November 2005 and 23rd November 2005, respondent/discharged accused no.2 Rajkumar Pandiyan with the aid of the co-accused had abducted Sohrabuddin Shaikh, Kausarbi and Tulsiram Prajapati from the luxury bus proceeding towards Sangli, there is no material to infer complicity of respondent/discharged accused no.2 Rajkumar Pandiyan in this alleged incident. Similarly, there

is no legally admissible evidence to show presence of respondent/discharged accused no.2 Rajkumar Pandiyan on the spot at the time of the alleged encounter of Sohrabuddin Shaikh in the night intervening 25th November 2005 and 26th November 2005. Similarly, there is no evidence to show that this respondent was present on the spot at the time of disposal of dead body of Kausarbi by cremating it. Undisputedly, Tulsiram Prajapati was initially an absconding accused against whom Crime No.214 of 2004 was registered at Hathipole Police Station of Udaipur. He was also an accused in Crime No.1124 of 2004 registered with Navrangpura Police Station, Ahmedabad, in respect of fire at the office of Popular Builder. Tulsiram Prajapati had, allegedly, escaped from the custody of police guards during his journey from Ahmedabad to Udaipur in the night intervening 26th November 2006 and 27th November 2006. Thus, even if it is assumed that respondent/discharged accused no.2 Rajkumar Pandiyan, being Superintendent of Police, Anti Terrorist Squad, Ahmedabad, Gujarat, had caused interception of cell phone of Tulsiram Prajapati, this act is attributable to the official duty of

respondent/discharged accused no.2 Rajkumar Pandiyan. Similarly, giving information about the absconding accused and location of the absconding accused to the counter part in the Police department is also, certainly, an official act, performed in discharge of official duties by the public servant.

106 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.”

107 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**¹⁸, the Honourable Supreme Court

¹⁸ (2015) 12 SCC 231

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, 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 and 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.”

108 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.....”

109 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.

110 The provisions of Section 197(1) being mandatory requires no further elaboration. In the matter of **State of H.P. vs. M.P.Gupta**¹⁹ the Honourable Supreme Court has observed thus :

“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

¹⁹ (2004) 2 SCC 349

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.”

111 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.

112 In the matter of R.S.Nayak vs. A.R.Antulay²⁰ 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 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

²⁰ 1984 (2) SCC (Cri) 172

against public servants that has got close connection with the official discharge of his duty without the sanction from the Competent Authority concerned.

113 The alleged charges on the face of record demonstrate 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**²¹, 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

²¹ 1993 (2) SCC 567

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**²², 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**²³, 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 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. Nagarajaswamy**²⁴, grant of proper sanction by a Competent Authority is a sine-qua-non for taking

22 2001 (6) SCC 704

23 2004 (8) SCC 31

24 2005 (8) SCC 370

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”.

114 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 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.

115 In the case of **R.R.Chari vs. State of Uttarpradesh**²⁵, 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 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.

25 AIR 1962 SC 1573

116 In the case of Arulswamy vs. State of Madras²⁶, 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 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

²⁶ AIR 1967 SC 776

Procedure is necessary for taking cognizance of the alleged offence.

117 In the case of Matajog Dubey vs. H.C.Bhari²⁷, 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.

118 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 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

²⁷ AIR 1956 SC 44

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.

119 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**²⁸]. 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 have made him answerable for the charge of dereliction of his official duty.

120 Testing the case alleged against the discharged accused, it is not in dispute that apart from the discharged

²⁸ (2016) 6 SCC 734

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.

121 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 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.

122 The net result of foregoing discussion requires me to hold that the learned trial court is perfectly justified in allowing the application Exhibit 562 by the impugned order dated 25th August 2016 and thereby discharging respondent/discharged accused no.2 Rajkumar Pandiyan, the then Superintendent 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 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.)