

THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.206 OF 2018

CENTRAL BUREAU OF INVESTIGATION)...APPLICANT

V/s.

DALPAT SINGH RATHOD AND ANR.)...RESPONDENTS

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 Petitioner/CBI.

Mr.Niranjan Mundargi a/w. Ms.Karishma R.K., Advocate for
Respondent No.1.

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

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

CORAM : A. M. BADAR, J.

DATE : RESERVED ON : 16th July 2018
PRONOUNCED ON : 10th September 2018

JUDGMENT :

1 By this revision petition, petitioner/Central Bureau of
Investigation (CBI) is challenging the order dated 24th July 2017

passed by the learned Special Judge for the CBI, Greater Mumbai, below Exhibit 1061, thereby discharging respondent/accused no.28 Dalpat Singh Rathod, the then Police Constable of Rajasthan Police, for want of evidence and absence of material under Section 227 of the Code of Criminal Procedure as well as for want of sanction as envisaged by Section 197 of the Code of Criminal Procedure. The claim for discharge was for offences punishable under Sections 120B, 364, 365, 368, 341, 342, 384, 302 read with 201 of the Indian Penal Code as well as under Section 25 of the Indian Arms Act.

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

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

Rajasthan. He was an absconding accused in Crime No.214 of 2004 regarding murder of Hamid Lala committed in jurisdiction of Hathipole Police Station of Udaipur in Rajasthan and in Crime No.1124 of 2004 registered at Navrangpura Police Station, Ahmedabad, Gujarat, in respect of firing at the office of the Popular Builder. He was having link with the terrorists. 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, by being in constant touch with each other. For that purpose, discharged accused D.G.Vanzara, Rajkumar Pandiyan and Dinesh M.N. as well as others were in constant touch and were visiting various places in other States, there was meeting of minds between them. Everyone had interest in nabbing Sohrabuddin Shaikh. For

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

- (c) According to prosecution case, in pursuant to conspiracy hatched discharged accused no.3 Dinesh M.N. visited Anti Terrorist Squad, Ahmedabad, about two months prior to fake encounter of Sohrabuddin Shaikh. He also visited Ujjain in Madhya Pradesh. Discharged accused no.3 Dinesh

M.N. was at Ahmedabad from 24th November 2005 to 26th November 2005 when Sohrabuddin Shaikh died in fake encounter by teams of Gujarat and Rajasthan Police. Infact, he was present on the spot of encounter of Sohrabuddin Shaikh.

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

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

Parmar stayed in one room, whereas PW105 Nathuba Jadeja and PW106 Gurudayal Singh stayed in the another room of the guest house in the campus of the Central Industrial Security Force at Hyderabad, for the night halt.

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

number plates of Qualis came to be changed by substituting it with the number plate having registration number of Andhra Pradesh by PW105 Nathuba Jadeja and PW106 Gurudayal Singh, on instructions of Police Officer Parmar.

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

Nathuba Jadeja. After midnight, discharged accused no.2 Rajkumar Pandiyan directed PW105 Nathuba Jadeja to intercept the luxury bus by overtaking it by the Qualis vehicle. Accordingly, on intercepting it near Zahirabad, the luxury bus stopped. Discharged accused no.2 Rajkumar Pandiyan, Police Inspector N.H.Dhabi and others approached the bus. Then Sohrabuddin Shaikh, his wife Kausarbi as well as Tulsiram Prajapati were made to alight from the said bus. Sohrabuddin Shaikh and Tulsiram Prajapati were then made to sit in the Qualis vehicle driven by PW105 Nathuba Jadeja, whereas Kausarbi was made to sit in the Tata Sumo vehicle driven by PW106 Gurudayal Singh. During return journey towards Ahmedabad, 2 kilometers after Bharuch, Kausarbi was also shifted to the Qualis vehicle driven by PW105 Nathuba Jadeja. Tulsiram Prajapati was shifted to another vehicle by Rajasthan Police. He was taken to Udaipur where he was kept in illegal custody for five days. Thereafter, he was shown to be arrested by a team led by PW22 Bhawarsingh Hada, Station

House Officer, Hathipole Police Station, Udaipur. Tulsiram Prajapati was then allowed to go by setting him free. He came to be apprehended on 26th November 2005 from the house of Chandan Kumar Jha at Bhilwara by PW38 Sudhir Joshi, Deputy Superintendent of Police, Udaipur, Rajasthan.

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

luxury bus near Zahirabad, while they were undertaking journey from Hyderabad to Sangli and subsequently Sohrabuddin Shaikh and Kausarbi were dumped in the “Disha Farm House” near Ahmedabad.

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

being fired. On instructions, he and co-driver Bhailal (PW107) reversed the Maruti car. PW105 Nathuba Jadeja then saw Sohrabuddin Shaikh lying there in injured condition. Discharged accused no.2 Rajkumar Pandiyan, Superintendent of Police, Anti Terrorist Squad, discharged accused no.1 D.G.Vanzara, Deputy Inspector General, Anti Terrorist Squad, Ahmedabad, and discharged accused no.3 Dinesh M.N. (who is referred as the Superintendent of Police Udaipur by PW105 Nathuba Jadeja) along with other Police personnels namely Chaubey, Santaram Sharma etc. were found to be present there. One motorcycle was also found lying there. Police Officials N.H.Dhabi and Ajay Parmar took Soharabuddin Shaikh to the hospital in Maruti car driven by Bhailal (PW107). In this way, fake encounter of Sohrabuddin Shaikh came to be effected in between Narol circle and Vishala circle, in the night intervening 25th November 2005 and 26th November 2005, by the accused persons.

- (j) According to the prosecution case reflected from the CBI statement of PW105 Nathuba Jadeja, thereafter, Kausarbi also came to be murdered by the accused persons and her dead body came to be disposed off by burning it at the 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. of 28th November 2005, that tempo also got stuck in the sand in the bed of the river at Village Ellol. Then, discharged accused no.1 D.G.Vanzara, discharged accused no.2 Rajkumar Pandiyan and discharged accused no.12 N.K.Amin came there. Firewood from the tempo came to be stacked near the river bed. Dead body of

Kausarbi was brought there by a jeep. As stated by PW105 Nathuba Jadeja, it was kept on the funeral pyre by him as well as by Chauhan, Chaubey and Rathod. Accused no.1 D.G.Vanzara, Deputy Inspector General, burnt it by setting the pyre on fire. Thereafter, ashes and bones came to be collected in a bag and by the jeep, that bag was carried away by Police Officials named Chaubey and Chauhan.

- (k) Prosecution case, as reflected from the statement dated 4th March 2010 of PW106 Gurudayal Singh recorded by the CBI is to the effect that on instructions of N.H.Dhabi, Police Inspector, Anti Terrorist Squad, at 7.30 p.m. of 20th November 2005, he, alongwith N.H.Dhabi, Santaram Sharma and Ajay Parmar started their journey in the Qualis vehicle driven by PW105 Nathuba Jadeja and then after 2.00 a.m., he drove that vehicle. They reached Hyderabad and stayed in the rooms at the campus of Central Industrial Security Force for the night halt on 21st November 2005. On 22nd November 2005, they went to the IPS Mess where

discharged accused no.2 Rajkumar Pandiyan was camping. In the afternoon, he along with Parmar, Nathuba Jadeja (PW105) and Santaram Sharma went to the Airport for purchasing Air tickets for discharged accused no.2 Rajkumar Pandiyan. Parmar went inside the Airport for purchasing the Air ticket. Thereafter, on instructions from N.H.Dhabi, he and PW105 Nathuba Jadeja changed the number plates of the Qualis vehicle by affixing number plates starting with "AP-11". In the evening of 22nd November 2005, he sat in the Tata Sumo vehicle along with three officers and followed the luxury bus. He has then spoken about intercepting the luxury bus by the Qualis and abduction of three persons including a lady from that bus by discharged accused no.2 Rajkumar Pandiyan and others. As per his version, abducted lady and Santaram Sharma sat in the Tata Sumo in which he was travelling. Thereafter, two kilometer after Bharuch, that burkha clad lady and Santaram Sharma sat in the Qualis vehicle. This witness further stated that on reaching Ahmedabad, he went

to his room in the Anti Terrorist Squad campus, and thereafter, proceeded on leave due to sickness of his nephew. Thus, statement of this witness PW106 Gurudayal Singh shows that while leaving Ahmedabad by the Qualis vehicle, he was not driving it but it was being driven by PW105 Nathuba Jadeja, whereas PW105 Nathuba Jadeja is stating that PW106 Gurudayal Singh was driving it. He has stated that he was one of the member of the police team which travelled from Hyderabad in three vehicles and abducted Sohrabuddin Shaikh and two others, but he was not driving the vehicle during that period.

- (1) After murdering Sohrabuddin Shaikh in the fake encounter, accused no.7 Police Inspector Abdul Rehman from Rajasthan Police filed First Information Report (FIR) with Crime Investigation Department, Crimes, (CID Crimes), Gujarat, alleging that absconding accused Sohrabuddin Shaikh was coming by highway from Surat and upon being asked to surrender he opened fire, and therefore, in retaliation the

police also opened fire, due to which Sohrabuddin Shaikh came to be killed. Accordingly Crime No.05 of 2005 came to be registered. Accused no.4 Parmar, Police Officer, investigated the FIR and reported the encounter to be genuine and submitted Abate Summary. According to the prosecution case, 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 though Sohrabuddin Shaikh and others were already nabbed by Gujarat Police in the night intervening 22nd November 2005 and 23rd November 2005, discharged accused no.3 Dinesh M.N. travelled to Ahmedabad on 24th November 2005 on the false pretext that he has secret information and he wants to arrest Sohrabuddin Shaikh. Investigating Officer of Hamid Lala

murder case was not taken by him to Ahmedabad. Even case diary of that case was also not taken to Ahmedabad.

- (n) According to the prosecution case apart from active role in eliminating Sohrabuddin Shaikh, discharged accused no.3 Dinesh M.N. has played vital role in encountering Tulsiram Prajapati. He had directed PW38 Sudhir Joshi, Deputy Superintendent of Police, Udaipur, for nabbing Tulsiram Prajapati on 26th November 2005 by contacting him through accused Abdul Rehman, Police Inspector. After Tulsiram Prajapati was nabbed by the team of Police Officers including PW61 Ranvijay Singh, Police Inspector and PW22 Bhawarsingh Hada, Police Inspector, from house of PW Chandankumar Jha, Bhilwara, discharged accused no.3 Dinesh M.N. told them not to show his arrest for 2 to 3 days. Thereafter on 29th November 2005, Tulsiram Prajapati was shown to have been arrested in Crime No.214 of 2004 registered with Hathipole Police Station, Udaipur, due to murder of Hamid Lala. After completion of his police

custody, he was kept at the central jail at Udaipur, where he was threatened by Abdul Rehman, Police Inspector. In conspiracy to eliminate Tulsiram Prajapati, discharged accused no.3 Dinesh M.N. has caused arrest of PW3 Kundan Prajapati – nephew of Tulsiram Prajapati as well as PW4 Vimal Shrivastava – friend of PW3 Kundan Prajapati when they wanted to meet Tulsiram Prajapati. They were implicated in false cases in order to prevent their meeting with Tulsiram Prajapati. When Tulsiram Prajapati was to be produced in the concerned court at Ahmedabad, co-accused Mohd.Azam came to be tactfully separated by implicating him in old closed case of scooter theft. In this way, according to the prosecution case, Tulsiram Prajapati was sent all alone to Ahmedabad from Udaipur with selected police guards.

- (o) According to the prosecution case, Tulsiram Prajapati used to disclose his apprehension of killing in fake encounter by police to inmates of jail at Udaipur, including his nephew PW3 Kundan Prajapati and PW4 Vimal Shrivastava, PW42

Rafique @ Bunty, PW Mohd.Azam and PW37 Sharafat Ali. He had expressed same apprehension of killing in fake encounter to his Advocate PW35 Salim Khan. Tulsiram Prajapati had submitted several applications before the concerned court as well as National Human Rights Commission, New Delhi, expressing apprehension of killing by police in fake encounter. Thus, according to the prosecution case, under the conspiracy hatched by accused persons, Tulsiram Prajapati was systematically eliminated by sending him to Ahmedabad from Udaipur in custody of four selected guards of choice of discharged accused no.3 Dinesh M.N.

- (p) According to the prosecution case on 25th December 2006 Tulsiram Prajapati was given in custody of specially formed escort team of Udaipur Police headed by Assistant Sub-Inspector Narayan Singh and comprising of Police Constables Dalpat Singh (respondent/discharged accused no.28), Kartar Singh and Yaduveer Singh on instructions of

discharged accused no.3 Dinesh M.N. Tulsiram Prajapati was produced before the court at Ahmedabad in Popular Builder Firing case on 26th December 2006. The prosecution case indicates that during return journey undertaken on 26th December 2006 from Ahmedabad to Udaipur by Udaipur Express, Tulsiram Prajapati was infact not with the escort team headed by Assistant Sub-Inspector Narayan Singh of which respondent/discharged accused no.28 Dalpat Singh Rathod was a member. At about 3.00 a.m. of 27th December 2006, show of escape of Tulsiram Prajapati from the custody of the police guards was made. When the train became slow because of turning near Shamalji Railway Station, Tulsiram Prajapati was shown to have escaped from custody of the police guards. It is alleged that two criminals threw chilli powder in eyes of police guards Yaduveer Singh and Kartar Singh when they accompanied Tulsiram Prajapati towards urinal and then along with those two criminals, Tulsiram Prajapati was shown to have escaped from the custody of the Police

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

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

by checking various places including guest houses. Then, after 4.30 a.m. of 28th December 2006, they started patrolling on the road leading towards Sarhad Chapri. At about 5.00 a.m., they saw three persons on the road who were trying to stop the Matador pick up vehicle. That Matador vehicle did not stop. When the police jeep following the Matador vehicle reached at that spot, those three persons tried to stop that jeep. At that time, Assistant Sub-Inspector Narayan Singh of Udaipur Police identified one from those three persons as Tulsiram Prajapati. Then, according to the FIR lodged by Police Sub-Inspector Ashish Kumar Pandya, Tulsiram Prajapati took out a firearm and fired a bullet which hit on left side of mudguard of the police jeep. Thereafter, Tulsiram Prajapati along with those two persons started running away. Police Sub-Inspector Ashish Kumar Pandya further reported that he got down from the jeep and asked those three persons to surrender. At that time, Tulsiram Prajapati turned back and fired one round from the firearm. That bullet hit left upper arm of

Police Sub-Inspector Ashish Kumar Pandya (co-accused), and therefore, he fired two rounds from his service revolver. Apart from him, Assistant Sub-Inspector Narayan Singh and Police Constable Yaduveer Singh also fired from their service weapons causing fall of Tulsiram Prajapati. He was, then, taken to Simji Hospital. Tulsiram Prajapati was declared dead at that hospital. Accordingly, Crime No.115 of 2006 came to be registered at Police Station Ambaji on the basis of this report lodged by Police Sub-Inspector Ashish Kumar Pandya.

- (r) The charge-sheet in the instant case reveals that Police Sub-Inspector Ashish Kumar Pandya (co-accused) was admitted to the Government hospital Palanpur on 28th December 2006 with the history of fire arm injury caused at about 5.00 a.m. of that day. Initially, he had taken treatment at Shri Arasuri Ambaji Mata Devasthan Trust Hospital, Ambaji, on 28th December 2006 itself. Certificate of that hospital shows that Police Sub-Inspector Ashish Kumar Pandya had

sustained a circle wound (2.5 x 2.5 cm) on upper part of left arm with active bleeding and blackness of skin. Small carbon particles were found near that wound. He had also sustained an irregular wound (3 x 1 cm) vertical 1 cm, posterior to wound no.1. Bleeding was found present apart from sand particles in that wound. Similar are the findings of the Government hospital Palanpur. Medical Officer had opined that the injury was a fire arm injury. Medical Officer of Palanpur had informed police that entry wound was having inverted margin and blackening of skin in wound and tissues were present. Thus, Ashish Kumar Pandya (co-accused), Police Sub-Inspector of Gujarat Police, had also suffered gunshot injuries in alleged fake encounter of Tulsiram Prajapati.

- (s) Spot of the incident of alleged encounter of Tulsiram Prajapati was inspected. It was found that the shot from the firearm had damaged left side signal light of the jeep of the police party. Its glass was found broken. One cartridge was

found lying near the edge of the road. One gun was also found lying on the spot of the incident. It was having wooden grip and the same was of 0.314 bore having body made up of steel. One cartridge was also found loaded in the barrel of that gun. This was the situation prevalent on the spot of the incident which was on the main road leading from Ambaji to Sarhad Chapri, where according to the prosecution case, Tulsiram Prajapati was eliminated in the fake encounter. During inquest proceedings, the Executive Magistrate recovered a mobile phone, three bullets and sundry items from dead body of Tulsiram Prajapati.

- (t) It is alleged that fake encounter of Tulsiram Prajapati was done as Tulsiram Prajapati was disclosing to all and sundry as to how he was used by Gujarat Police for nabbing Sohrabuddin Shaikh and as he was an eye witness to abduction of Sohrabuddin Shaikh and his wife Kausarbi.

3 Shri Anil Singh, the learned ASGI, argued that deceased Tulsiram Prajapati was entrusted in custody of escort

team headed by Assistant Sub-Inspector Narayan Singh, of which respondent/discharged accused no.28 Dalpat Singh Rathod was a member. After producing him before the court at Ahmedabad, a show of return journey of Tulsiram Prajapati in company of the escort team was made in the night hours of 26th December 2006. It was shown that in company of the escort team, Tulsiram Prajapati boarded Udaipur Mail for journey from Ahmedabad to Udaipur at about 11.15 p.m. of 26th December 2006. According to the learned ASGI, Tulsiram Prajapati did not infact board the train and he was not in company of the escort team comprising of respondent/discharged accused no.28 Dalpat Singh Rathod. Thereafter, in the morning hours at about 3.00 a.m. of 27th December 2006, a show of Tulsiram Prajapati escaping the custody of the Police Guards was made. This was done by alleging that chilli powder was thrown in the eyes of Police Guards by two unknown criminals and thereafter, Tulsiram Prajapati was taken by those two criminals. Shri Singh, the learned ASGI, relied on statements of PW138 Hiralal – Guard and PW137 Ghanshyamlal – Assistant Driver of Udaipur Mail, so also

that of Dr.Manish Suvera, who medically examined the Police Constables. He also placed reliance on statements of Head Constable Bhupat Singh and Police Constable Shabbir Khan of Railway Police to demonstrate that Tulsiram Prajapati was not in custody of the escort team during return journey. Reliance is also placed on statement of PW152 Govindji Vaghela. With this, it is argued that impugned order of discharge of respondent/discharged accused no.28 Dalpat Singh Rathod suffers from perversity. The learned ASGI further argued that respondent/discharged accused no.28 Dalpat Singh Rathod was co-conspirator with other accused persons and the role attributed to him does not show that he was acting in discharge of his official duty or purported discharge of his official duty. Hence, no sanction to prosecute him was necessary.

4 I have also heard Shri Tiwari, the learned counsel appearing for the First Informant Rubabuddin. He placed reliance on statements of Govind Singh – Constable, Hazarilal Meena – Police Sub-Inspector and Bhopalsingh Rathod – Battalion Havildar

Major of Reserve Police Line Udaipur, apart from statements of PW137 Ghanshyamlal and PW138 Hiralal. The learned counsel argued that respondent/discharged accused no.28 Dalpat Singh Rathod was a member of Special Task Force and as such, he ought not to have been sent to the Reserve Police Line for escorting Tulsiram Prajapati. However, discharged accused no.3 Dinesh M.N. deputed him to escort Tulsiram Prajapati and this fact reflects why respondent/discharged accused no.28 Dalpat Singh Rathod was one of the conspirator. The fact that the escort team, on return, went on leave, indicates their role in conspiracy. It is further argued that PW138 Hiralal – Guard of the train had not seen chilli powder and Dr.Manish Suvera had not noticed chilli powder on person of police personnel. It is further argued by Shri Tiwari that statement of Bhopalsingh Rathod – Battalion Havildar Major with Reserve Police Line shows that respondent/discharged accused no.28 Dalpat Singh Rathod was armed with a revolver, but the panchnama of the boggie shows that he had fired from 303 rifle and empty cartridge came to be seized from respondent/discharged accused no.28 Dalpat Singh Rathod. This

indicates that false evidence has been created by respondent/
discharged accused no.28 Dalpat Singh Rathod in furtherance of
the conspiracy hatched by accused persons. He argued that there
is enough material to frame the Charge against respondent/
discharged accused no.28 Dalpat Singh Rathod.

5 To buttress these contentions on behalf of the First
Informant, 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.

6 Shri Tiwari, the learned counsel appearing for the First
Informant, further argued that respondent/ discharged accused
no.28 Dalpat Singh Rathod was not acting or purporting to act in
discharge of his official duty. He indulged in conspiracy to

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

eliminate Sohrabuddin Shaikh and Tulsiram Prajapati. Accordingly, Sohrabuddin Shaikh and others were abducted and subsequently killed. Respondent/discharged accused no.28 Dalpat Singh Rathod was personally present for escorting Tulsiram Prajapati in Udaipur Mail to Ahmedabad. Tulsiram Prajapati was sent alone to Ahmedabad for remand with a selected team of only four policemen including respondent/discharged accused no.28 Dalpat Singh Rathod. Subsequently, he was killed by making show of his escape from custody. 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 Punjab Through CBI⁶ and Om Prakash and Others vs. State of Jharkhand⁷.

7 Shri Mundargi, the learned counsel appearing for respondent/discharged accused no.28 Dalpat Singh Rathod argued that, there is no iota of evidence forming material to frame Charge against respondent/discharged accused no.28 Dalpat

6 2016(12) SCC 87
7 2012 (12) SCC 72

Singh Rathod, who was merely serving as Police Constable with Udaipur Police. Neither Bhupatsingh S/o. Parbatsingh nor Shabbir Khan have stated that the escort party was not having the prisoner with them. Statement of Fatehsingh, Police Sub-Inspector, Reserve Police Line, shows that even on earlier occasion, respondent/discharged accused no.28 Dalpat Singh Rathod was entrusted with duty to escort Tulsiram Prajapati and Mohd.Azam Khan. It is further argued that even according to the prosecution case, Yaduveer Singh – accused no.27 and Kartar Singh – accused no.29 accompanied Tulsiram Prajapati for taking him to the urinal and at that spot, chilli powder was thrown by miscreants for taking away Tulsiram Prajapati. Prosecution case shows that respondent/discharged accused no.28 Dalpat Singh Rathod and Assistant Sub-Inspector Narayan Singh were sitting in the compartment and after hearing screams they rushed on the spot. Hence, non-finding of the chilli powder, if any, on person of respondent/discharged accused no.28 Dalpat Singh Rathod is of no consequence. PW137 Ghanshyamlal and PW138 Hiralal – Assistant Driver and Guard of the Udaipur Mail have not stated

anything which would amount to material for framing the Charge against respondent/discharged accused no.28 Dalpat Singh Rathod. It is further argued that scientific expert Hasmukhlal Modi had inspected the coach and found presence of red chilli powder near the wash basin apart from hit mark of the bullet on the roof of the coach. This material collected during investigation points out innocence of respondent/discharged accused no.28 Dalpat Singh Rathod. Hence, according to Shri Mundargi, the learned counsel, the revision petition needs to be dismissed.

8 As the claim of the respondent/discharged accused No.28 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.

9 Bare perusal of provisions of these sections of the Cr.P.C. goes to show that when the judge considers that there is no ground for proceeding against the accused, he is required to discharge the accused by recording his reasons. However, if the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, then he is required to frame charge. By now it is well settled that at this stage detailed scrutiny of material gathered by the prosecution in order to examine whether the same is sufficient for recording the conviction or not is absolutely not essential. What is required is examination of the material from the angle whether the same constitutes sufficient ground for proceeding against the accused. Some prima facie material raising strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him.

10 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.**⁸. After referring to Section 227 of the Cr.P.C.

⁸ AIR 1997 SC 2041

and power of the Sessions Court to discharge the accused, this is what is observed by the Hon'ble Supreme Court:-

“8. The law on the subject is now well-settled, as pointed out in **Niranjan Singh Punjabi v. Jitendra Bijjaya**, (1990) 4 SCC 76 : (AIR 1990 SC 1962), that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.”

11 In a later decision reported in the matter of Dilawar Babu Kurane v. State of Maharashtra⁹, 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 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

9 AIR 2002 SC 564

as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

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

12 This revision petition is filed by the prosecuting agency CBI for assailing order passed by the learned Special Judge for the CBI, Mumbai, allowing application for discharge filed by the respondent/discharged accused no.28 Dalpat Singh Rathod. 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.

13 This revision petition has come up for hearing after about 1 year from discharge of respondent/accused. It is reported by the parties that in between the Charge against rest of the accused persons has been framed and explained to them. They pleaded not guilty and claimed trial. It is also reported that the trial thereafter began and by now more than 150 witnesses are already examined by the prosecuting agency in support of the Charge. Therefore, it is necessary to put on record, at this stage itself, that only because of discharge order in his favour, the respondent/discharged accused cannot claim immunity from the trial at subsequent stage. Person discharged can also be arraigned again as an accused by following due process of law and this option is always available with the trial court during the course of the trial. Paragraphs 104 to 108 from the judgment of the Honourable Apex Court in the matter of **Hardeep Singh vs. State of Punjab**¹⁰ 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

¹⁰ AIR 2014 SC 1400

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

take steps but only in accordance with [Section 398](#) Cr.P.C. without resorting to the provision of [Section 319](#) Cr.P.C. directly.”

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

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

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

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

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

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

14 Though not urged by the revision petitioner, in submission of the learned counsel for the First Informant,

deploying respondent/discharged accused no.28 Dalpat Singh Rathod for escorting Tulsiram Prajapati to Ahmedabad on 25th December 2006, is an act of larger conspiracy hatched by accused persons and as respondent/discharged accused no.28 Dalpat Singh Rathod escorted Tulsiram Prajapati from Udaipur to Ahmedabad by Udaipur Mail, he is also one of the conspirator and liable for penal consequences, as envisaged by Section 120B of the Indian Penal Code. Therefore, in submission of the learned counsel for the First Informant, material from the charge-sheet in the nature of statement of PW112 Govindsingh – Constable, Hazarilal Meena – Police Sub-Inspector with Reserve Police Line as well as statement of Bhopalsingh Rathod working as Battalion Havildar Major with the Reserve Police Line, Udaipur, prima facie case for proceeding against respondent/discharged accused no.28 Dalpat Singh Rathod is made out. PW112 Govindsingh, Constable, has given his statement as per record. He has stated about Entry No.1690 in the roznamcha of Police Station Surajpole taken on 25th December 2006 in respect of sending Assistant Sub-Inspector Narayan Singh along with respondent/discharged

accused no.28 Dalpat Singh Rathod with two other constables to the Reserve Police Line as per telephonic orders of the Superintendent of Police. These four police personnel were members of the Special Task Force. Hazarilal Meena, Police Sub-Inspector, working with Reserve Police Line has stated in his statement to the CBI that the Superintendent of Police had told telephonically not to depute the escorting party for Tulsiram Prajapati and Mohd. Azam Khan on 25th December 2006 as there is information that Tulsiram Prajapati will try to escape. Therefore, special team for escorting them will be sent. PW115 Bhopalsingh Rathod, Battalion Havildar Major of the Reserve Police Line has deposed about Entry No.34 dated 25th December 2006 in the Roznamcha showing arrival of Assistant Sub-Inspector Narayan Singh with three constables including respondent/discharged accused and their departure with arms. PW115 Bhopalsingh Rathod, Battalion Havildar Major of the Reserve Police Line, has further stated to the CBI that Assistant Sub-Inspector Narayan Singh, Police Constables Yaduveer Singh and respondent/ discharged accused no.28 Dalpat Singh Rathod

were armed with revolver whereas, Police Constable Kartarsingh was without arms, when they left Reserve Police Line.

15 With this material on record, let us examine whether sufficient ground for framing Charge against respondent/discharged accused no.28 Dalpat Singh Rathod, Police Constable, is made out. For that purpose, other material on record collected during investigation needs to be looked into. As per version of PW52 Himmat Singh, Police Inspector, in November 2006 discharged accused no.3 Dinesh M.N. formed special team of policemen under joint leadership of Abdul Rehman, Police Inspector, as well as that of PW52 Himmat Singh, Police Inspector. Assistant Sub-Inspector Narayan Singh and Police Constables Dalpat Singh (respondent/discharged accused no.28), Yaduveer Singh and Kartar Singh were also members of that special task force. This, according to the revision petitioner, shows that members of the escort team viz., Assistant Sub-Inspector Narayan Singh, Police Constables Dalpat Singh (respondent/discharged accused no.28), Yaduveer Singh and

Kartar Singh were men of confidence of discharged accused no.3 Dinesh M.N. PW52 Himmat Singh, Police Inspector, in his statement further disclosed that on 25th December 2006, Assistant Sub-Inspector Narayan Singh told him that discharged accused no.3 Dinesh M.N. has ordered him to go for escorting Tulsiram Prajapati and to take Dalpat Singh (respondent/discharged accused no.28), Yaduveer Singh and Kartar Singh with him. PW52 Himmat Singh, Police Inspector, then confirmed this fact from discharged accused no.3 Dinesh M.N. and discharged accused no.3 Dinesh M.N. told him not to take entry of this fact in Roznamcha of the police station. Similarly, it was urged that, on earlier occasion 15 to 20 guards were entrusted for this work of escorting Tulsiram Prajapati.

16 Let us now examine whether all this amounts to some physical manifestation of tacit agreement between the accused persons for committing the crime in question and whether such act on the part of discharged accused no.28 Dalpat Singh Rathod

amounts to evidence as to transmission of thoughts sharing the unlawful design. In this regard, statement of PW109 Fateh Singh Kishor Singh recorded by the CBI on 4th July 2012 is relevant. On the basis of record, Fateh Singh Kishor Singh, Sub-Inspector with Reserve Police Line, Udaipur, has spoken about deployment of guards for taking Tulsiram Prajapati and co-accused from Udaipur to Ahmedabad. His statement based on documentary evidence reveals that on 3rd July 2006 Tulsiram Prajapati, Mohd.Azam and PW41 Sylvester Danial were taken for production before the court at Ahmedabad by one police guard named Laxmanlal. On 17th July 2006, Tulsiram Prajapati, PW41 Sylvester Danial and Mohd.Azam were taken from Udaipur to Ahmedabad by seven police guards. On 31st July 2006 Tulsiram Prajapati along with Mohd. Azam and PW41 Sylvester Danial were taken from Udaipur to Ahmedabad by six police guards. On 24th August 2006, total five accused persons including Tulsiram Prajapati were taken to Ahmedabad from Udaipur by eight police guards. On 10th September 2006, Tulsiram Prajapati, Mohd. Azam and PW41 Sylvester Danial were taken to Ahmedabad from Udaipur for

producing them before the court by six police guards. On 24th September 2006, Tulsiram Prajapati with two others were taken to Ahmedabad by just five police guards. On 8th October 2006 Tulsiram Prajapati and two others were taken to Ahmedabad by six police guards, whereas on 17th October 2006 they were taken by just five police guards. On 31st October 2006 and 13th November 2006, Tulsiram Prajapati and Mohd. Azam were taken to Ahmedabad by four police guards. However, on 27th November 2006 Tulsiram Prajapati and Mohd. Azam were taken from Udaipur to Ahmedabad by twenty police guards, including respondent/discharged accused no.28 Dalpat Singh Rathod. On 14th December 2006 they were taken by thirteen police guards whereas on 25th December 2006 Tulsiram Prajapati was taken to Ahmedabad by four police guards namely, Assistant Sub-Inspector Narayan Singh, Police Constables Dalpat Singh, Yaduveer Singh and Kartar Singh. Respondent/discharged accused no.28 Dalpat Singh Rathod was the member of escort party even on 17th July 2006. Thus, this evidence indicates that as per need of the situation and availability of the staff, police guards were used to

be deployed for escorting the prisoners. This data culled out from the record does not reflect any tangible evidence to infer that on 25th December 2006, Tulsiram Prajapati was deliberately entrusted to team of only four police guards, including respondent/discharged accused no.28 Dalpat Singh Rathod.

17 Reason for deploying only four police guards for taking Tulsiram Prajapati to Ahmedabad on 25th December 2006 can be found from the material collected and incorporated in the charge-sheet itself. Deploying police guards for escorting the prisoners from Udaipur Central Jail to various courts in various States is a job entrusted to the Reserve Police Line. This Reserve Police Line of Udaipur has its own staff for various works entrusted to it and escorting the prisoners to the court is one of such works. Deployment of police guards for the purpose of escorting the prisoners to the court is done by the field in-charge of the rank of Head Constable. If on a particular day there is paucity of the staff at the Reserve Police Line, then additional staff was used to be summoned from police stations in the vicinity.

Surajpole Police Station is one of such police station and Central Jail of Udaipur falls within territorial jurisdiction of that police station. Roznamcha of Reserve Police Line, Udaipur, is part of the charge-sheet against the accused persons. It shows that on 25th December 2006 for the purpose of escorting the prisoners, only three staff members, and that too, of the rank of Sub-Inspector were available. Availability of the staff as well as the actual work of deploying police guards for escorting prisoners on 25th December 2006 can be gathered from the statement of three witnesses examined during the course of investigation. Those are (a) Bhawarsingh Rajput, Head Constable (b) PW115 Bhopal Singh Rathod, Head Constable and (c) Bhawarsingh Rathod, Reserve Police Inspector. Statement of Bhawarsingh Rathod, Reserve Police Inspector dated 10th June 2011 shows that staff members designated as Battalion Havildar Majors, were working with him at the Reserve Police Line who were actually allotting duties to the staff and deploying the staff members for escorting the prisoners to the court as well as for other works. He further stated that in case of shortage of staff at the Reserve Police Line,

request is made to the Superintendent of Police for extra staff and then the Superintendent of Police permits use of the staff from other police stations. Central Jail, Udaipur, falls in the territorial jurisdiction of the Police Station Surajpole and as such, whenever extra police force is required for escorting duty, those are sent by Police Station Surajpole. This is the version of Police Inspector of Reserve Police Line in the matter of escorting duty to the staff.

18 PW115 Bhopal Singh, Head Constable, has clarified this situation further. He has stated that as Battalion Havildar Major working in Reserve Police Line, he used to allot duties to the staff members and he used to deploy the staff for various duties.

19 PW Bhawarsingh Kalyansingh Rajput, another Police Constable working with Reserve Police Line, stated that being posted as a Major at Reserve Police Line, he along with his colleagues used to deploy guards for escorting the prisoners to the court. After the order to that effect is received in the name of the

Reserve Sub-Inspector and after signature thereon, he and his colleagues used to deploy guards for escorting duty. His statement shows that number of prisoners to be taken to the court were more on 25th December 2016 and therefore, additional staff came to be summoned from other Police Stations by sending requisition. Thereafter, staff for escorting the prisoners came from various Police stations to Reserve Police Line on 25th December 2006. As per version of Bhawarsingh Kalyansingh Rajput given to the Investigating Officer on 17th September 2010, it was he who had issued guard duty to Assistant Sub-Inspector Narayan Singh and Police Constables Dalpat Singh, Yaduveer Singh and Kartar Singh for escorting prisoner Tulsiram Prajapati from Udaipur Central Jail to Ahmedabad. In the light of this positive version regarding the fact situation of paucity of staff occasioned on 25th December 2006, summoning additional staff comprising of Assistant Sub-Inspector Narayan Singh and others from Surajpole Police Station as usual, cannot be given any over bearing importance for treating it as a tacit understanding between the accused persons, and that too, only for eliminating Tulsiram

Prajapati by showing his escape from custody of the police guards. Even if it is assumed that discharged accused no.3 Dinesh M.N. had directed specific staff including respondent/discharged accused no.28 Dalpat Singh Rathod to escort Tulsiram Prajapati to Ahmedabad, this fact only reflects careful attitude of the Superintendent of Police, Udaipur, in the light of criminal background of the prisoner and obedience of respondent/discharged accused no.28 Dalpat Singh Rathod to the directions of his superior officer. The same is purely an official act performed in due discharge of his official duty by respondent/discharged accused no.28 Dalpat Singh Rathod and does not manifest any agreement to commit crime in order to form sufficient ground for framing the Charge.

20 Now let us examine merits of submissions of Shri Singh, the learned ASGI, to the effect that Tulsiram Prajapati was not accompanying the escorting party during return journey which started at about 11.15 p.m. of 26th December 2006 from Ahmedabad to Udaipur by Udaipur Mail and this was a part of

conspiracy. It was sought to be demonstrated that Tulsiram Prajapati was given in custody of somebody else for committing his encounter. The prosecuting agency has relied on statements of only two witnesses to demonstrate that Tulsiram Prajapati was not with the escorting party during return journey which was undertaken on 26th December 2006 by Udaipur Mail. Those are Police Head Constable PW139 Bhupatsingh S/o.Parbatsingh, who at the relevant time was doing patrolling duty in Udaipur Mail – Train No.9944 from Ahmedabad to Himmat Nagar in company of Railway Police Constable PW140 Shabbir Khan s/o. Akbar Khan. Both these witnesses have unanimously stated to the Investigator that they boarded Udaipur Mail at about 11.00 p.m. of 26th December 2006 and saw four to five Police Officers of Rajasthan Police Force travelling in the last compartment of that train. Both of them are unanimous in stating that they did not remember if at all there were some accused persons in custody of team of that Police Officers from Rajasthan Police. This material collected during investigation cannot be stretched to the extent of holding that Tulsiram Prajapati was not in company of the escorting team

traveling from Ahmedabad towards Udaipur in Udaipur Mail on 26th December 2006. Hence, this material does not make out any ground for proceeding against respondent/discharged accused no.28 Dalpat Singh Rathod in order to frame the Charge.

21 Next contention urged on behalf of the revision petitioner is to the effect that farce of escape of Tulsiram Prajapati from the custody of the escorting team was made by alleging that chilli powder was flung by two criminals in eyes of members of the escorting team and then those two criminals took away Tulsiram Prajapati from custody of the escorting police team. For making out this ground for framing the Charge against respondent/discharged accused no.28 Dalpat Singh Rathod, reliance is placed on statements of PW138 Hiralal – Guard and PW137 Ghanshyamlal – Assistant Driver as well as on statement of Dr.Manish Suvera. In this regard, material collected during investigation, as found in the Occurrence Report No.14 of 2006 registered with Himmat Nagar Railway Police Outpost as well as from the FIR of Crime No.294 of 2006 registered with Ahmedabad

Railway Police Station shows that during return journey to Udaipur by Udaipur Mail, Tulsiram Prajapati sought permission to go to the urinal and therefore, rifle guard Yaduveer Singh and handcuffed chain holder Kartar Singh took him to the toilet of railway coach for urinating. At that time, Assistant Sub-Inspector Narayan Singh and respondent/discharged accused no.28 Dalpat Singh Rathod were sitting in the compartment. Near the toilet of the coach, two persons flung red chilli powder in the eyes of Police Constables Yaduveer Singh and Kartar Singh and that is how Tulsiram Prajapati came to be escaped from the custody of the Police Guards along with those two persons.

22 PW138 Hiralal – Guard of Udaipur Mail has stated to the Investigator that at about 3.00 a.m. of 27th December 2006, Udaipur Mail was moving slowly because of slight turn on the railway track. At that time, he heard sound like that of a cracker and the train came to a halt. On walkie-talkie, driver of the train informed him that the train was stopped by pulling chain from rear side coach. PW138 Hiralal further stated that he saw

policeman shouting “पकड़ो पकड़ो दौड़ो दौड़ो कैदी भाग गया.” He got down from the train and asked that policeman as to why he was shouting. That policeman told him that two persons by throwing red chilli powder in the eyes of policemen, helped prisoner Tulsiram Prajapati to escape from the custody. PW138 Hiralal has stated that he did not see any symptoms of red chilli powder in the eyes of that policeman but saw a tin of red chilli powder lying in the general train coach in which policemen were travelling. Statement of PW138 Hiralal is specific to the effect that there was no visibility on that spot, and therefore, other policemen whose voice was being heard by him were not visible to him. He further stated that after thirty to forty minutes other three police personnel came back. He noted down names of those policemen in the guard rough general. It is worthwhile to note that PW138 Hiralal has not stated about finding of red chilli powder or absence thereof on the uniform or on the face of those three policemen.

23 Another witness relied on by the prosecuting agency is PW137 Ghanshyamlal – Assistant Driver. As per his version before

the Investigating Officer, on instructions of the driver of the train, he reached at the last coach of the train and asked PW138 Hiralal – Guard about the incident. Then he disclosed what he heard from Guard PW138 Hiralal to the Investigator. Thus, PW137 Ghanshyamlal - Assistant Driver of the train has not stated about anything which he had seen at the time of the incident. He disclosed whatever he heard from PW138 Hiralal.

24 PW153 Hasmukhlal Modi, at the relevant time, was working as Scientific Officer with the Forensic Science Laboratory. His statement reveals that he inspected the coach of Udaipur Mail and found red chilli powder lying near the wash basin adjacent to the western facing door. This witness also noted existence of the red chilli powder on the wooden space located near wash basin and door of the coach. He also noted hit mark residue of fired ammunition on the frame of the box towards western side. There was one hole on the roof near to that light box. It was having residues of fired ammunition. One copper jacketed bullet, whose diameter was 9 millimeter and found to be .38 inch revolver

cartridge bullet, came to be recovered from the roof of the coach by this Scientific Expert. PW152 is Govindji Vaghela. He is Ballistic Expert. He examined copper jacketed fired bullet and cartridge and submitted his report.

25 Statement of Dr.Manish Suvera shows that he examined Police Constable Yaduveer Singh – accused no.27 and Police Constable Kartar Singh - accused No.29 after 4.15 p.m. of 27th December 2006 and found nothing in the eyes of both these Police Constables. He then referred both of them to an Eye Surgeon and the Eye Surgeon could not detect anything abnormal.

26 This is all the material which the prosecution has gathered and on the basis of which it is sought to be demonstrated that as a part of larger conspiracy, respondent/discharged accused no.28 Dalpat Singh Rathod with other accused persons, made a farce of escape of Tulsiram Prajapati from custody of the Police Guards and created false evidence. Statement of PW138 Hiralal – Guard, who has actually seen the accused policemen at the time of

the incident of alleged escape of Tulsiram Prajapati has stated that because of darkness there was no visibility and he could not even see the police personnel searching the absconded accused though their voice was audible to him. This witness has not stated that on return of those three police personnel, he did not notice chilli powder on their faces and uniform. However, he has positively spoken about finding of the tin box containing red chilli powder lying in the general coach of the train in which accused policemen were travelling. Even PW153 Hasmukhlal Modi, Scientific Expert, who inspected the coach after the incident has spoken about finding of the red chilli powder in the coach as well as near the toilet and wash basin of that coach. Medical examination of accused Yaduveer Singh and accused Kartar Singh came to be conducted after about 13 hours from the alleged incident. It does not stand to reason as well as common sense that persons in whose eyes red chilli powder was flung, would allow that red chilli powder to remain in eyes and on the clothes in order to prove their innocence for a long period of 13 hours. In this view of the matter, it cannot be said that the impugned order of

discharge passed by the court below suffers from perversity or error of law.

27 It was pointed out that panchnama reveals that bullet shell of 303 rifle came to be seized from respondent/discharged accused no.28 Dalpat Singh Rathod under panchnama but statement of PW115 Bhopalsingh Rathod – Battalion Havildar Major working with Reserve Police Line, shows that respondent/discharged accused no.28 Dalpat Singh Rathod was carrying revolver with him. This, according to the learned counsel for the First Informant, demonstrated material for framing the Charge. However, it needs to be noted that the escorting team was deputed from Surajpole Police Station of Udaipur. It went to Reserve Police Line of Udaipur for escort duty. Then, it left the Reserve Police Line with three revolvers and ammunitions. This cannot be construed to mean that while leaving Surajpole Police Station, members of the escort team were not carrying any other arms with them. At any rate, this trivial aspect is incapable of even raising suspicion about commission of such offence by

respondent/discharged accused no.28 Dalpat Singh Rathod, who happens to be from the lowest rank of Police Department.

28 Papers of investigation also contain FIR lodged by Ashish Kumar Pandya, Police Sub-Inspector, after alleged fake encounter of Tulsiram Prajapati. This FIR, which is part of the charge-sheet, shows that at the time of alleged fake encounter of Tulsiram Prajapati, respondent/discharged accused no.28 Dalpat Singh Rathod was not present on the spot. In this view of the matter, no error can be found in the impugned order discharging respondent/discharged accused no.28 Dalpat Singh Rathod.

29 Except this material, nothing could be found in the charge-sheet, which can be used as a ground for framing Charge against respondent/discharged accused no.28 Dalpat Singh Rathod. No prima facie material raising strong suspicion regarding commission of alleged offence by this respondent/discharged accused no.28 Dalpat Singh Rathod can be found in the entire charge-sheet. Allegations against this respondent/

discharged accused no.28 Dalpat Singh Rathod are principally in respect of entering into conspiracy with other accused persons for making a show of taking Tulsiram Prajapati back from Ahmedabad to Udaipur and then to show that he had absconded from custody of the Police Guards. There is no iota of evidence to infer meeting of minds of this respondent/discharged accused no.28 Dalpat Singh Rathod and other accused persons for doing illegal act of handing over Tulsiram Prajapati to somebody else and making a farce of taking him back towards Udaipur and then to falsely show that he had escaped from the custody of Police Guards. This respondent/discharged accused no.28 Dalpat Singh Rathod was serving as a Police Constable with Udaipur Police and was not having any object to accomplish for which he participated in the plan or scheme framed by other accused persons for commission of the alleged crime.

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

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

(1) an illegal act, or

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

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

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

Bare perusal of this definition of criminal conspiracy makes it clear that if circumstances in a case when taken together on their face value are indicating meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal committed by illegal means, then, the offence of criminal conspiracy punishable under Section 120B of

the IPC is made out. In the matter of **John Pandian vs. State**¹¹ the Hon'ble Apex Court has held that a few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It is necessary to quote observations of the Hon'ble Apex Court in the matter of **Keharsingh vs. State (Delhi Administration)**¹². Ingredients of the offence of criminal conspiracy are explained by the Apex Court in the following manner in paragraphs 271 and 272 which read thus :

“271 It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Ss. 120-A and 120-B, IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.”

“272 Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in

11 JT 2010 (130) SC 284

12 AIR 1978 SC 1883

reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299) explains the limited nature of this proposition :

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

31 What constitutes an offence of criminal conspiracy is further explained by the Hon'ble Apex Court in the matter of State of Tamil Nadu Vs. Nalini¹³ and the relevant observations read thus :-

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

¹³ 1999 Cri.L.J.124

responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose.”

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

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

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

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

(d) If main conspirator is looking after the welfare of the accused who has lost his leg and meeting his medical expenses, then in the absence of any evidence to the contrary, that would not import accused with the knowledge of conspiracy.

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

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

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

33 For suggesting even prima facie material to infer criminal conspiracy, it is necessary for the prosecution to point out as to how it was hatched. That can be inferred from the circumstances specially declaration, acts and conduct of conspirators. Need of meeting of minds of conspirators for doing illegal act is sine-qua-non. What is prima facie required to show is the respondent/discharged accused was having object to accomplish and hence a plan or scheme was framed by accused persons including the respondent/discharged accused for accomplishing that object and that there was agreement or understanding between them for accomplishment of the object by executing the same in the manner decided by them. There is no iota of evidence or material in that regard against respondent/discharged accused no.28 Dalpat Singh Rathod. At

this juncture, observations of the Hon'ble Apex Court in the matter of **State of Uttar Pradesh vs. Sanjay Singh**¹⁴ can be quoted with advantage. Paragraphs 18 and 20 of that judgment read thus :

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

“20 This Court in **Century Spinning & Manufacturing Co. Ltd. v. State of Maharashtra** while examining the scope of Section 251(A) sub-sections (2) and (3) of the old Code corresponding to Sections 239 and 240 of the new Code has made the following observation: (SCC p. 291, para

14 1994 SCC (Supp) (2) 707

17: AIR p. 552, para 16) "... If on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the State Of U. P vs Dr. Sanjay Singh on 27 January, 1994 plain language of the section or on its judicial interpretation or on any other recognised principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecution authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the Court and it has to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution."

Evidence and material collected by the prosecution and discussed in foregoing paragraphs do not remotely indicate that respondent/discharged accused no.28 Dalpat Singh Rathod conspired with other accused persons by sharing thoughts for achieving common goal jointly. To conclude, there is no sufficient ground for framing the Charge against respondent/discharged accused no.28 Dalpat Singh Rathod. No fault, therefore, can be found in the impugned order of discharge.

34 Now let us examine whether the learned trial court is justified in dropping the proceedings against respondent no.1 Dalpat Singh Rathod for want of sanction as envisaged by Section 197 of the Code of Criminal Procedure. Discharged accused Dalpat Singh Rathod was, at the relevant time, serving as Police Constable with Rajasthan Police. He was one of the member of the escort team of Udaipur Police which was headed by co-accused Assistant Sub-Inspector Narayan Singh. Respondent no.1/discharged accused Dalpat Singh Rathod accompanied the escort team which took Tulsiram Prajapati by train from Udaipur

to Ahmedabad on 25th December 2006 for producing him before the court at Ahmedabad in Popular Builder firing case on 26th December 2006. Then, according to the prosecution case, discharged accused Dalpat Singh Rathod was traveling with the escort team as its member from Ahmedabad to Udaipur by Udaipur Express on 26th December 2006. There is no iota of evidence to infer that Tulsiram Prajapati was, infact, not with this escort team of which respondent no.1 Dalpat Singh Rathod was one of the member. It is alleged by the prosecution that when the train became slow because of turning near Shamalji Railway Station, the escort team made a farce of escape of Tulsiram Prajapati from its custody. Undisputedly, under the official order of his superior officer, respondent no.1 Dalpat Singh Rathod, Police Constable, joined the escort team as one of its member.

35 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.”

36 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**¹⁵, the Honourable Supreme Court has held thus in paragraph 32 of its judgment :

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

¹⁵ (2015) 12 SCC 231

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 & 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.”

37 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.....”

38 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.

39 The provisions of Section 197(1) being mandatory requires no further elaboration. In the matter of **State of H.P. vs. M.P.Gupta**¹⁶ 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 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

16 (2004) 2 SCC 349

the prior sanction from the Competent Authority concerned.”

40 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.

41 In the matter of R.S.Nayak vs. A.R.Antulay¹⁷ 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

¹⁷ 1984 (2) SCC (Cri) 172

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

42 The alleged charges on the face of record demonstrates that they have strong nexus with the official discharge of duties by the discharged accused or that there is a reasonable nexus between the offence alleged to have been

committed by him and the routine discharge of his official duties. Even according to the case of prosecution, the official character of the discharged accused gave him an opportunity for commission of alleged crime, when he was actually engaged in the performance of official duties. Therefore, the sanction of the Competent Authority before taking cognizance of alleged offences is a must. In the case of **State of Maharashtra vs. Dr. Budhikota Subbarao**¹⁸, the Honourable Supreme Court has held that when an act alleged to be constituting an offence is directly and reasonably connected with the official discharge of the duties by a public servant, in such case the prosecution cannot be proceeded with, without the sanction from the Competent Authority under Section 197 of the Code of Criminal Procedure. In the case of **P.K. Pradhan vs. State of Sikkim**¹⁹, 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

18 1993 (2) SCC 567

19 2001 (6) SCC 704

the sanction from the Competent Authority of such public servant. In the case of **S.K.Zusthi and another vs. Bimal Debnath and another**²⁰, 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**²¹, grant of proper sanction by a Competent Authority is a sine-qua-non for taking cognizance of an offence against a public servant. The Honourable Supreme Court has also gone to the extent of reinforcing the fact that “the statutory requirement of prior sanction by a Competent Authority can arise at any stage of the prosecution and as such there is no prescribed time limit for putting forth the said plea of defence by any public servant”.

20 2004 (8) SCC 31

21 2005 (8) SCC 370

43 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.

44 In the case of **R.R.Chari vs. State of Uttarpradesh**²², 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

²² AIR 1962 SC 1573

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.

45 In the case of Arulswamy vs. State of Madras²³, 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

²³ AIR 1967 SC 776

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 Procedure is necessary for taking cognizance of the alleged offence.

46 In the case of Matajog Dubey vs. H.C.Bhari²⁴, 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

²⁴ AIR 1956 SC 44

Competent Authority of the accused before even institution of prosecution.

47 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 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.

48 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 Another²⁵]. 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.

49 Testing the case alleged against the discharged accused, it is not in dispute that apart from the discharged accused undisputably being a public servant, the act alleged was a part of his official duty. Applying the test laid down by the Honourable Supreme Court in the judgment in the case of **Amal Kumar Jha (supra)** as well as in the case of **D.T.Virupakshappa (supra)**, if the discharged accused would not have joined the escort team for taking Tulsiram Prajapati to Ahmedabad from Udaipur for producing him before the court, he would have been charged for dereliction of duty.

²⁵ (2016) 6 SCC 734

50 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.

51 The net result of foregoing discussion requires me to hold that the learned trial court is perfectly justified in allowing the application Exhibit 1061 by impugned order dated 24th July

2017 and thereby discharging respondent/accused no.28 Dalpat Singh Rathod, Police Constable of Rajasthan Police, for want of evidence and absence of material under Section 227 of the Code of Criminal Procedure as well as dropping of the proceedings against him 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.

**Arti
Vilas
Khatate**

Digitally signed
by Arti Vilas
Khatate
Date:
2018.09.10
13:16:06 +0530

(A. M. BADAR, J.)