

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on 23.05.2018

Date of decision 28.05.2018

CRL.M.C. No.2618/2018

DEEPIKA SHARMA

..... Petitioner

Through Mr. Anurag Jain,
Mr.M.M.Khan, Ms.Ayushi
Sharma and Ms.Rajni,
Advocate, Adv.

versus

THE STATE GOVT. OF NCT OF DELHI & ORS..... Respondents

Through: Mr.Kamal Kumar Ghei, APP
for State with Inspector
Surender Kumar Crime Branch.

Mr.Vikas Pahwa, Sr. Advocate
with Mr.Pradeep Teotia,
Mr.Shadman Ahmed Siddiqui,
Advocates for R-2.

Mr.Rajiv Dawar, Mr.Deepak
Kohli, Advocates for R-3.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The present petition has been filed by the petitioner under Section 439 (2) r/w Section 482 Code of Criminal Procedure, 1973 whereby she seeks cancellation of bail granted to the respondents No.2

and 3, namely, Sumit Chauhan and Kush Chauhan, granted vide order dated 14.5.2018, of the learned Additional Sessions Judge -03 (East), KKD Courts, Delhi in relation to FIR No.382/2016, PS Geeta Colony which was registered under Sections 302 r/w 34 of the Indian Penal Code, 1860 and Section 25 of the Arms Act, 1959, submitting to the effect that the grant of the said bail if permitted to stand would result in serious miscarriage of justice. The petitioner further submits that the gravity of the offence involved and the nature of serious allegations with enough material on the record to show that the respondents 2 and 3 were actively involved in the commission of the crime of a cold blooded murder of her husband Vinod Kumar Sharma on 23.10.2016 at about 6:45 p.m. whereby the respondents No.2 and 3 were found to have actively criminally conspired to eliminate the deceased whilst her spouse was sitting in the office,— were wholly overlooked at the time of grant of bail to the respondents No.2 and 3, vide the impugned order.

2. Notice of the petition and Crl.M.A. No.9289/2018 was issued to the respondents No.2 and 3 and to the State, the respondent No.1 vide order dated 15.5.2018. Vide order dated 15.5.2018, the operation of the impugned order permitting the release of the respondents No.2 and 3 on bail was directed to remain stayed till the next date of hearing, i.e., till 18.5.2018, which interim order has been extended vide orders dated 18.5.2018 and 21.5.2018 and is in existence till date.

3. Additional documents were submitted on behalf of the respondents No.2 and 3 and in terms of order 21.5.18 of this Court the order dated 11.5.2018 of the Trial Court vide which charges were framed, was directed to be submitted and has since been submitted on the record.

4. Arguments were addressed on behalf of the petitioner by Mr.Anurag Jain, Advocate and on behalf of the State by the learned Additional Public Prosecutor for the State, Mr.Kamal Kumar Ghei, and on behalf of the respondents by Mr.Vikas Pahwa, Sr. Advocate on behalf of the respondent No.2 and Mr.Rajiv Dawar, Advocate on behalf of the respondent No.3.

5. As per the FIR, the police was set into action on receipt of DD No.24A on 23.10.2016 by the Police Station Geeta Colony on receipt of a PCR call at 6:45 p.m. that at house No.10/90, Geeta Colony, near Mother Diary, four to five boys had fired at another boy and the Investigating Officer on reaching the spot found the fixed glass door of Shri Shri Trading Company on the ground floor open and blood was scattered on the floor and two pistols and empty cartridges were found lying at the spot and on enquiries it was learnt that three to four boys had come on a motorcycle and had fired bullet shots at about 6:45 p.m. and it was learnt that the injured who had been taken to the Max Hospital was declared '**brought dead**' by the doctors.

6. After investigation, the police filed the first charge sheet in January, 2017 against four accused persons, *namely*, Akash Chauhan @ Bittoo, Mohd. Kamil @ Nahid, Mohd.Kamar and Mohd Nazim.

The second charge sheet was filed in April, 2017 and four more accused persons named Dilshad, Farukh Mazahar, Bilal Tansir @ Manhar and Babu Waseem were chargesheeted and all these eight persons are stated to be presently in judicial custody. The third charge sheet was also filed on 27.3.2018 in which the respondents No.2 and 3 to the present petition were charge sheeted. The respondents No.2 and 3 to the present petition were also charged under Section 120 B r/w Section 107 of the Indian Penal Code, 1860, read with Section 302 of the Indian Penal Code, 1860.

7. As per the averments made in the petition, the petitioner alleged that despite the crime having been implemented in an organized manner of the cold blooded murder of her husband, the local police did not make any sincere efforts to identify and assist the other associates of the main suspect Akash Chauhan despite the fact that this was a case of a contract killing where professional killers were hired to execute the murder and the CCTV footage was also available in which the assailants were captured whilst coming on a motorcycle and in the CCTV footage the respondent No.3 herein, Kush Chauhan, was also indicated to have been captured in the CCTV footage showing the office to the hired shooters which CCTV footage was stated to be with the investigating agency.

8. The petitioner has submitted that she thus filed a Writ Petition (Criminal) No.3325/2016 before this Court for transfer of the investigation to the Crime Branch and vide order dated 14.12.2016, the investigation was transferred to the Crime Branch. The order dated

14.12.2016 of this Court specifically makes mention of the names of the respondents No.2 and 3 herein i.e., Sumit Chauhan and Kush Chauhan in as much as it was submitted by the petitioner that despite her having specifically named them as suspects in the crime on the ground that they had financial dealing with her deceased husband and despite the fact that one suspect, *namely*, Kush Chauhan, i.e., respondent No.3 to the present petition was seen in the CCTV footage allegedly pointing out towards the house of the petitioner, no investigation had been conducted in relation to the financial dealings between the deceased, Kush Chauhan and Sumit Chauhan and the case was thus transferred to the Crime Branch of the Delhi Police.

9. The observation and directions in order dated 14.12.2016, in W.P.(Crl.) No.3325/2016 are as under:

“Status report has been filed and perused.

The submission of learned counsel for the petitioner is that the petitioner has specifically named Sumit and Kush as suspects in the crime on the ground that they had financial dealings with the deceased, i.e. her husband. In fact, one of the suspects, namely Kush is seen in the CCTV footage allegedly pointing out towards the house of the petitioner.

Mr. Lao submits that consent of these two persons has been obtained for conduct of their polygraphic test. If something comes out from the said test, they shall also be named as accused in the case.

The aspect as to whether the husband of the deceased had any financial dealings, according to instructions of Mr.

Lao, has been confirmed by Akash Chauhan, one of the persons who have been arrested. However, there is no investigation conducted in relation to the financial dealings between the deceased and Kush and Sumit. The case is a serious one involving murder.

In my view, the facts of the present case deserve transfer of the investigation from the present I.O. to the Crime Branch of Delhi Police. Accordingly, let the investigation be henceforth conducted by the Crime Branch of Delhi Police. Further status report be filed by the Crime Branch before the next date.

List on 07.03.2017.”

10. Vide order dated 7.3.2017 in the said W.P(Crl) No.3325/2016, it was observed to the effect:

“Status report dated 01.03.2017 has been filed by the IO, Eastern Range, Crime Branch, Shakarpur, Delhi.

Mr. Lao submits that the polygraph test report is shortly awaited. Learned counsel for the petitioner submits that on the last date, this Court directed that investigation should also be done with regard to the financial dealings between the deceased, Kush and Sumit. Though the status report generally states that the said financial dealings have been investigated thoroughly, nothing further is disclosed.

Let a further status report be filed premised on the polygraph test results as well as the investigation done in relation to the financial dealings between

the deceased, Kush and Sumit, before the next date.”

11. Vide order dated 12.5.2017 of this Court, the said petition was disposed of with the task of monitoring the further investigation and giving appropriate guidance thereto having been entrusted to the Court of the Metropolitan Magistrate in terms of *Sakiri Vasu vs. State of U.P and ors.*, (2008) 2 SCC 409, with the petitioner having been granted liberty to assist the Investigating Agency either directly or through the Court of the Metropolitan Magistrate in the matter. The order dated 12.5.2017 of this Court observes in *toto* to the effect:

“1. The present petition was filed primarily to seek transfer of the investigation of case FIR no. 382/2016 registered on 23.10.2016 in police station Geeta Colony under Sections 302, 34 IPC and Sections 25 and 27 of the Arms Act concerning the homicidal death of Vinod Kumar Sharma, the petitioner being his wife.

2. The FIR and the initial reports of investigation indicated that there was no eye witness to the occurrence. The petitioner gave some inputs on the basis of CCTV footage indicating presence of the persons she suspects to be involved.

3. By earlier order dated 14.12.2016, the investigation of the FIR was transferred from the local police of Crime Branch of Delhi Police. The Investigating officer deputed by the crime branch has since submitted two reports. The reports have been perused.

4. It appears that during the investigation by the local police four persons were arrested, they being Akash

Chauhan, Mohd. Kamil, Mohd. Kamar and Mohd. Nazim. During the investigation by Crime Branch, four more persons have been arrested, they being Dilshad, Farookh Mazhar, Bilal Tansir and Babu Waseem, the last arrest having been effected on 18.04.2017. Pursuant to the earlier directions, two of the suspects named by the petitioners, they being Kush and Sumit were subjected to polygraph test. The report of such polygraph test, however, so far has not resulted in any input as could lead to some cogent material or evidence being discovered showing their complicity.

5. The petitioner's insistence in that the above-said persons ought to have been arrested and subjected to custodial interrogation in as much as there is clear evidence of financial dealings between them and the deceased person in addition to other evidence. The Investigating officer, however, submits through the additional standing counsel that the antecedents of the deceased as also some members of his family are also to be kept in view and, in that light, mere financial dealings cannot be sufficient to take the case further against the persons the petitioner holds suspect.

6. The Investigating agency has already filed two reports under Section 173 Cr. PC in the court of the Magistrate against the eight persons who have been arrested. Thus, the proceedings against them on the basis of charge-sheets submitted are already underway. The Police is undertaking further investigation primarily in light of the allegations made by the petitioner.

7. In this fact situation, it would be proper that the task of monitoring the further investigation and giving appropriate guidance thereto is entrusted to the court of

the Metropolitan Magistrate in terms of Sakiri Vasu Vs. State of U.P. and Ors., (2008) 2 SCC 409. Ordered accordingly. The petitioner is at liberty to assist the investigating agency, either directly or through the court of the Metropolitan Magistrate, in the matter.

8. With these observations, the petition and the pending application are disposed of.”

12. Vide the impugned order dated 14.5.2018 it was held as under:

“2. Ld. Counsel for these accused persons contended that both these accused persons have been implicated falsely in this case and there is very weak type of evidence and trial of the case will take considerable time. It is further submitted that polygraphic test of the applicants were also conducted but nothing incriminating revealed in the said test and as such, applicants were not chargesheeted at that time and the supplementary statement of the some of the witnesses were recording some money transaction and thereafter applicants were named in the second supplementary charge sheet but there is nothing alleged in their statements regarding the present crime nor anything was recovered at the instance of the accused persons and that both applicants have clean antecedents and the alleged charges are false and fabricated. Besides the above, it is argued that earlier in the disclosure statement of the some of the accused persons, names these applicants/accused persons were not mentioned for commission of offence with ulterior motive. It is also submitted that both accused person have roots in the society and prayed for regular bail while submitting that these accused are ready to abide by all terms and conditions as imposed while granting bail to them.

3. On the other hand, ld. Addl. PP duly assisted by ld. Counsel for the complainant opposed the applications submitting that allegations against these accused persons are serious in nature. It is also submitted that in the present matter, there is likelihood of absconding away from facing trial or tempering with the prosecution evidence.

4. Rival submissions considered and record perused.

5. Applicants have been in custody since the day of their arrest. These applicants have been charged for the offence punishable under Section 120B & 107 read with Sec.302 Indian Penal Code, 1860, only. Trial of the case will take considerable time. The FSL reports regarding the exhibits, CDRs etc. is yet to take further time though the FIR was registered in Oct. 2016. The applicants were arrested on 04.01.2018 on the basis of disclosure statements of co-accused persons though nothing allegedly incriminating recovered. There is no denial to the law laid down on the point of bail that bail should be rule not exceptional. By taking reference of the judgments reports as **Kalyan Chandra Sarkar Vs Rakesh Ranjan (2005) 2 SCC 42; State of UP Vs. Amarmani Tripathi (2005) 8 SCC 21; State of Kerala Vs. Raneef (2011) 1 SCC 784 and Sanjay Chandra Vs. CBI (2012) 1 SCC 40** as well the contentions raised by on the point of bail by ld. Defense Counsel, applicant/accused persons Sumit Chauhan and Kush Chauhan are admitted to bail on furnishing person bond in the sum of Rs.2,00,000/- each with two sureties of the like amount to the satisfaction of this court subject to the following conditions.

(a) They will surrender their passport, if any within a week time of their release;

(b) Will not try to hamper/tamper with the prosecution evidence in any manner and also will not flee away from the justice; ”

13. Vide order dated 11.5.2018 which is the order vide which the charges were directed to be framed are the accused persons arrested in the case were discharged for the commission of the offence punishable under Sections 27 and 25 of the Arms Act, 1959 it having been observed vide paragraph 27 thereof to the effect that there was nothing on the record to show that any of the accused were found in possession of the arms and ammunition nor had they been recovered at any point of time during investigation.

14. No charges qua the alleged commission of the offence punishable under Section 212 of the Indian Penal Code, 1860 or Section 27/25 Arms Act, 1959, were also held to have been made out against any of the accused. Vide the said order dated 11.5.2018 charges were directed to be framed against all the accused persons, *namely*, Akash Chauhan @ Bitto; Dilshad; Babu Waseem; Mohd. Kamil @ Nahid; Mohd. Kamar; Mohd. Nazim; Farookh Mazhar; Bilal Tansir @ Manhar; Sumit Chauhan and Kush Chauhan to the present petition under Section 120B r/w Section 107 of the Indian Penal Code, 1860, read with Section 302 of the Indian Penal Code, 1860.

15. As per the order dated 11.5.2018, it was observed to the effect that during the investigation a Narco test was conducted on Sumit Chauhan and Kush Chauhan and it was learnt that the vehicle with

registration No. DL 9CAU 8500 which was utilized in the commission of the crime belonged to Sumit Chauhan and the house No.9/71, Geeta Colony where the criminals took the meals also belonged to Sumit Chauhan, i.e., respondent No.2 who further disclosed that Kush Chauhan, i.e., respondent No.3 was also involved in the planning with direction to give information about the presence of the deceased and as per the same, the respondent No.3 assisted the shooters to park their motorcycles in the Gali and after pointing out towards Vinod Sharma @Vinu Pandit left the place on a scooty and the CCTV footage was seized to that effect.

16. Submissions had been made at the time of arguments on framing of charges against the accused person Sumit Chauhan and Kush Chauhan, i.e., respondents No.2 and 3 herein, that there were no material on record to connect either of them with the offence alleged and that even in the Narco Analysis Test there was no material on record that could connect the said respondents No.2 and 3 to the crime.

17. The status report submitted by the State through the Assistant Commissioner of Police-II, Crime Branch dated 19.5.2018 during the course of hearing in the present petition states that no eyewitnesses were found at the spot and that on local enquiry it had been learnt that 4/5 persons had come on a motorcycle and fired several times and that the investigation had revealed that Akash Chauhan was the main conspirator, along with Sumit Chauhan and Kush Chauhan and that Dilshad was found known to them and Dilshad had arranged and hired

sharp shooters named Mohd. Kamil @ Nahid, Mohd. Kamar, Mohd. Nazim; Farookh Mazhar and Bilal Tansir @ Manhar to kill the deceased through Babu Waseem and that all the sharp shooters came to Anand Vihar Delhi on 22.10.2016 and all the shooters were taken to S.S.Residency Hotel at Anand Vihar in a Duster Car which was registered in the name of Sumit Chauhan and on 23.10.2016 all the sharp shooters were shifted to a house bearing No.9/71, Geeta Colony which was also owned by Sumit Chauhan i.e., respondent No.2 and that during the course of investigation the CCTV footage installed near the place of incident was seized in which it was seen that Kush Chauhan, i.e., respondent No.3 was found helping the shooters in parking their motorcycles near his house and after getting the motorcycles parked by the accused persons, Kush Chauhan, i.e., respondent No.3 had left the spot and had run away on his two wheeler and on 23.10.2016 Akash Chauhan, Sumit Chauhan and Kush Chauhan along with hired sharp shooters executed their plan murdering Vinod Pandit @ Vinu Pandit. Thus the two accused persons Sumit Chauhan and Kush Chauhan were arrested on 4.1.2018 and the supplementary charge sheet was filed on 3.4.2018.

18. The respondents No.2 and 3 herein were reported to be still in jail in view of the order in the present petition directing the stay of the release of the respondent No.2 and 3 and it was submitted by the State through the status report that the accused persons Sumit Chauhan and Kush Chauhan were involved in the commission of a heinous crime and they could extend threat to the complainant and possibility of

their jumping of the bail could not be ruled out. The State thus supported the petitioner in its prayer seeking cancellation of bail granted to the respondents No.2 and 3 herein.

19. The third supplementary charge sheet, specifically stated the alleged roles of the two respondents herein i.e., Sumit Chauhan and Kush Chauhan stating that the accused Sumit Chauhan was found to be a property dealer dealing in finance. Through the third supplementary charge sheet it was stated to the effect that on 1.12.2016, the statements of Deepika Sharma, i.e., the present petitioner and her mother-in-law Nirupma Sharma were recorded and both of them stated that on 23.10.2016 at 5:05 p.m. Vishnu Pandit had called his wife and had stated that Sumit Chauhan (reference to the respondent No.2 herein) had left the office of the deceased just then after quarreling and had stated that they would see him and in the meantime they called someone on the phone and the call details of Vinod Pandit, the deceased prior to the incident also indicated that there were conversations between the deceased with his wife and his mother.

20. As per this third supplementary charge sheet, the statement of Rakesh @ Chillan S/o Sh. Charan Singh was also recorded to the effect that on 23.10.2016 three to four boys had stayed at the flat of Sumit Chauhan at Geeta Colony and the shooters also allegedly disclosed that they had come from the Anand Vihar Bus Terminal to the house of Sumit in a Duster Car and on verification it was learnt

that said Duster Car bearing registration No.DL9CAU 8500 belonged to Sumit Chauhan, i.e., respondent No.2.

21. As per the said charge sheet, the shooters had stayed at Anand Vihar at S.S.Residency Hotel and had come to the house No.9/71, Geeta Colony on the date of the incident and had planned the commission of the murder at the said house, i.e., H. No.9/71, Geeta Colony which house was also found to be registered in the name of the respondent No.2 Sumit Kumar. The witness Amit Kumar S/o Naresh Kumar also stated to the effect that the shooters had stayed at the house of Sumit Kumar, i.e., H. No.9/71, Geeta Colony on 23.10.2016 and on interrogation the accused Sumit Chauhan, i.e., respondent No.2 could not give any satisfactory explanation and rather disclosed that he was related to Akash Chauhan as his brother and both of them used to deal with the deceased in a finance business and had their office at 10/19, Ground Floor, Geeta Colony and both of them i.e., Akash Chauhan and he, i.e., Sumit Chauhan used to give the money to Vinu Pandit on interest @ 3% and Vinu Pandit used to give the money further to other person on interest at the rate 5 to 6 % and gradually Vinu Pandit had taken two to three crores of rupees from Akash Chauhan as a consequence of which every month his brother Akash Chauhan was suffering a loss of 8 to 10 lakhs of rupees per month and that Vinu Pandit also had criminal tendencies and used to threaten Akash Chauhan and Sumit Chauhan and kept utilizing their money forcibly as a consequence of which both of them were under stress and in September, 2016 Akash Chauhan in order to get rid of Vinu Pandit

had spoken to Waseem and Dilshad to get Vinu Pandit killed and that Dilshad was the bouncer of Sanjay Kaul who used to deal in finance at Gandhi Nagar and Sanjay Kaul also used to visit their office and Sanjay Kaul had got Akash Chauhan introduced to Dilshad and the contract killing was arranged for a sum of Rs.7,00,000/- to be paid to Waseem and Dilshad for killing Vinu Pandit and on 22.10.2016, four to five persons came from Meerut in a bus at Anand Vihar Bus Terminal and Akash Chauhan informed Sumit Chauhan that the men had come to kill Vinu Pandit at the bus terminal and that he Sumit Chauhan had to go to bring them from there and thus Sumit Chauhan had given his Duster car bearing No.DL-9CAU 8500, to Akash Chauhan who had left these persons at a hotel and on the next date i.e. 23.10.2016 Akash Chauhan had brought those persons in Sumit Chauhan's car and planned the murder. It has been stated further that Sumit Chauhan also disclosed that Akash Chauhan had also involved the persons who worked in their office and who used to collect interest i.e. Kush Chauhan, i.e., respondent No.3 herein and that Kush Chauhan had been told that he was to give the information of Vinu Pandit sitting in the office and thus in accordance therewith when the shooters reached outside the office of Vinu Pandit then Kush Chauhan, i.e., respondent No.3 assisted the shooters in parking their motorcycles and pointed out to Vinu Pandit and then sped away on his scooty.

22. As per this disclosure statement of Sumit Chauhan, he was introduced by Akash Chauhan his brother in his talks and stated that

he could point out 9/71, Geeta Colony, where the shooters had stayed and could also get recovered the documents in relation to the vehicle and the premises which were utilized. As per the third charge sheet on the basis of available evidence Sumit Chauhan was arrested on 4.1.2018 and that his disclosure statement was also recorded.

23. As per this supplementary charge sheet which is the third charge sheet filed by the Investigating Agency it was also stated to the effect that the CCTV footage in front of the spot of the occurrence was seized in which it was found that Kush Chauhan s/o Sushil Kumar Chauhan R/o 10/91, Geeta Colony i.e., respondent No.3 to the present petition was getting the vehicle of the shooters parked at the time of the incident and thereafter had immediately fled away from the spot and that Kush Chauhan was not able to give any satisfactory explanation and informed during interrogation that he was a relative of Akash Chauhan and he worked as a collector in the office of Akash Chauhan and Sumit Chauhan and that Vinu Pandit, the deceased, used to work with these two persons in giving the money on interest and that Vinu Pandit, i.e., the deceased had taken 2 to 3 crores of rupees on interest from his brother Akash Chauhan and had given the same on credit on interest to persons as a consequence of which his brother was loosing Rs.8 to 10 lakhs per month and that Vinu Pandit also used to threaten Akash Chauhan and Sumit Chauhan.

24. This accused also allegedly disclosed that Akash Chauhan and Sumit Chauhan wanted to get rid of Vinu Pandit and thus got arranged the person from Meerut and on 23.10.2016 had come to the premises

No.9/71, Geeta Colony and that as he Kush Chauhan was assigned by Akash Chauhan the task of informing when Vinu Pandit would sit in his office, he,i.e., Kush Chauhan, respondent No.3 on seeing the motorcycles being near the office, then waited in the lane and kept his motorcycle on one side and pointed out to Vinu Pandit to the shooters and then sped away on his scooty and disclosed that he had so acted on the instructions of his brothers Akash Chauhan and Sumit Chauhan. This accused was also arrested on 4.1.2018.

25. Through the third supplementary charge sheet dated 27.3.2018, Sumit Chauhan had pointed out to the house No.9/71, Geeta Colony as being the address where he and others had planned to keep the shooters. As per the charge sheet, the motorcycles utilized were not traced out and that the CD shows the presence of Kush Chauhan.

26. It was thus submitted on behalf of the petitioner that the perusal of the charge sheet would show that the respondents No.2 and 3 played an active role in the killing of the deceased and were part and parcel of the criminal conspiracy and despite the orders framing charge against the respondents No.2 and 3 vide orders dated 11.5.2018, vide order dated 14.5.2018 the respondents No.2 and 3 were allowed to be released on bail ignoring the gravity of the offence despite the respondents No.2 and 3 being in fact actively involved in the commission of offence. It was thus submitted on behalf of the petitioner that the involvement of respondents No. 2 and 3 being apparent and categorical and the factum that there was a financial dispute between the parties which can be a motive for commission of

the crime, thus the role of the accused Sumit Chauhan had been established and the role of Kush Chauhan had also been corroborated in the CCTV footage in helping the shooters in parking their motorcycles and immediately running away from the spot and that he is also closely related to Sumit Chauhan and Akash Chauhan and used to do money collection and his interrogation also revealed that monetary disputes appear to be the reason behind eliminating the deceased Vinod Sharma.

27. It was also submitted on behalf of the petitioner that the learned Additional Sessions Judge had failed to consider that the material witnesses are yet to be examined and the petitioner and her family members have been continuously threatened by the accused persons and their associates and also not to depose against any of them.

28. The State through the learned Additional Public Prosecutor of the State and through the status report dated 19.5.2018 supported the contentions of the petitioner.

29. On behalf of the respondents No.2 and 3, the petition was vehemently opposed submitting to the effect that apart from the disclosure statements of the co-accused, i.e., respondents No.2 and 3 there was no sufficient evidence against the said two respondents. It was thus submitted on behalf of the respondents No.2 and 3 that merely because the house of the respondent No.2 had been utilized by the alleged shooters for staying at his house, they cannot be held to be culpable. It was also submitted on behalf of the petitioner that the polygraphic test had no relevance in the matter in as much as vide the

verdict of the Apex Court in ***Smt. Selvi & Others v. State of Karnatka*** decided on 5.5.2010 in CrI.Appeal No.1267/2004 it has categorically been observed to the effect whilst placing reliance on Principles 6 and 21 of the Body of Principles for the Protection of all persons under any form of Detention or Imprisonment (1988) to the effect:

“The term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”

And that further more Principle 21(2) lays down that:

"No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment."

30. It was also observed by the Apex Court vide paragraph No.205 in the said verdict to the effect:

“205. It is undeniable that during a narcoanalysis interview, the test subject does lose ‘awareness of place and passing of time’. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's ‘capacity of decision or judgment’. Going by

the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes 'cruel, inhuman or degrading treatment' in the context of [Article 21](#). It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as 'torture' and 'cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.

31. Vide paragraph No. 206 of the said verdict, it was observed to the effect that the infliction of pain by Narco Analysis Test falls within the category of disproportionate exercise of police powers. The observations in para 206 of the Apex Court in the said verdict are to the effect:-

“206. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of ‘physical or mental pain and suffering’ on account of medical interventions such as surgeries and drug-treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some ‘pain and suffering’ is

permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers. Incompatibility with the 'Right to fair trial'."

32. It has been observed vide para 208 of this verdict to the effect:

"208. The decision of this Court in [D.K. Basu v. State of West Bengal](#), AIR 1997 SC 610, had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated."

33. Vide paragraphs 221, 222 and 223 of this verdict of the Hon'ble Apex Court, it has been observed to the effect:

“221. In our considered opinion, the compulsory administration of the impugned techniques violates the ‘right against self- incrimination’. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of [Article 20\(3\)](#) extends to the investigative stage in criminal cases and when read with [Section 161\(2\)](#) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. [Article 20\(3\)](#) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. [Article 20\(3\)](#) aims to prevent the forcible ‘conveyance of personal knowledge that is relevant to the facts in issue’. The results obtained from each of the impugned tests bear a ‘testimonial’ character and they cannot be categorised as material evidence.

222. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of ‘substantive due process’ which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are

forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to [Sections 53, 53-A](#) and [54](#) of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of 'ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

*223. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. **However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal***

justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with [Section 27](#) of the Evidence Act, 1872. The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.”

(Emphasis Supplied)

which indicates categorically that forcing an individual to undergo any of the tests i.e. Narco analysis or Brain Mapping would violate the right against self incrimination process and that such a violation would also create suspicion whether these techniques were forcibly administered during the course of investigation or any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature.

34. Vide paragraph 223 of the said verdict it was further observed to the effect that no individual should be forcibly subject to any of the

techniques in question whether in the context of investigation in criminal cases or otherwise as doing so would amount to an unwarranted intrusion into personal liberty. However, vide the said verdict itself it was laid down by the Apex Court that it leaves room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards were in place and that when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test but any material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872 and that the Guidelines for Administration of Polygraphy Test (Lie Detector Test) on an accused in 2000” and safeguards thereunder be adhered to which *inter alia* include to the effect that if an accused voluntarily consented to a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer and that the actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

35. As regards the reliance placed by the respondents No.2 and 3 on the polygraph test conducted on the respondents No.2 and 3, to contend that the polygraph test indicated that they were not involved in the commission of any crime qua the deceased Vinu Pandit, it is

essential to observe that the other specific evidence that has been collected by the Investigating agency cannot be overlooked presently.

36. Reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble Apex Court in **Virupakshappa Gouda and Another v. the State of Karnanataka** 2017 AIR (SC) 1685 to contend that the requisite factors of the nature of accusation, and the severity of punishment in case of conviction and the nature of supporting evidence, a reasonable apprehension of tampering with the evidence, or apprehension of the threat to the complainant—*prima facie* satisfy and support the charge and are all factors which ought to have sufficed to negate the grant of bail which ought not to have been granted in the facts and circumstances of the instant case, in the facts and circumstances of the instant case, and that these considerations have not been kept in mind by the learned Trial Court and that the bail granted ought to be essentially cancelled.

37. Reliance was also placed on behalf of the petitioner on the verdict of the Apex Court in **Lachhman Dass v. Resham Chand Kaler & Anr.**; 2018(1) JT 451 to contend that in similar circumstances where there were allegations against the petitioner in the case before the Apex Court that he was the main conspirator of the occurrence and the petitioner had been arrested and the police report under Section 173 Code of Criminal Procedure, 1973 had been filed with even no injury attributed to the petitioner, taking the seriousness of the case into account where the petitioner of that case had been in criminal conspiracy in accompanying a habitual criminal in getting a person

killed, the seriousness and the gravity of the offence was taken into account and as the case of the prosecution in that case mainly revolved around the petitioner as he was alleged to be the kingpin of the criminal conspiracy which demanded his custodial interrogation, the bail granted in the said case was cancelled with it having been observed to the effect vide para 12 of the said verdict that that was not a case of seeking cancellation of bail in any sense, rather it was a case which called for the legal sustainability of the impugned order granting bail to the accused. It was thus submitted on behalf of the petitioner that the facts of the instant case were in *pari materia* with the facts of the case in ***Lachhman Dass v. Resham Chand Kaler & Anr.*** in as much as in the instant case, the respondents No.2 and 3 were wholly involved in the commission of the crime of the murder of Vinu Pandit pursuant to a criminal conspiracy hatched between the respondents No.2 and 3 and their associates.

38. On behalf of the respondents No.2 and 3 it was contended that the parameters for grant of bail and cancellation of bail are wholly different and reliance was placed on the verdict of this Court in ***Directorate of Revenue Intelligence v. Harsh Vasant & Anr.***; 2010 (114) DRJ 33 wherein it has been observed to the effect:

“7. The proposition of law which emerges from the above referred judgments is that if an order granting bail is challenged on merits and it is claimed that in the facts and circumstances of the case, the bail ought not to have been granted, it is permissible for the superior Court to consider not

only the post bail conduct and supervening circumstances, but also the facts and circumstances which prevailed at the time of granting bail and which ought to have been taken into consideration by the Court, which granted bail. Irrespective of whether the prosecution seeks cancellation of bail or challenges the order whereby bail is granted, the net effect, in the event of such a petition being allowed, would be the same. Hence, post-bail conduct is not irrelevant even while considering a petition seeking setting aside of bail order, though such a conduct alone would not be the determinative factor. A bail would normally be cancelled if the accused tries to interfere with the course of justice by influencing the witnesses or he evades the process of the Court by remaining absent during investigation or otherwise tries to abuse the concession of bail granted to him. But, even if no such post-bail conduct on the part of accused is alleged, it is still permissible for a superior Court, while considering a petition challenging grant of bail, to examine whether the Court, which granted bail, took into consideration the material, which was not relevant or germane or it granted bail without due application of mind to the facts and circumstances of the case, whether the bail was granted in disregard of a statutory provision or by totally misapplying the settled principles governing grant of bail or whether there was any other gross procedural illegality or impropriety committed in granting bail.

(Emphasis Supplied)

8. But, an order granting bail cannot be disturbed except for compelling reasons and the superior Court ought to interfere only in a case where gross injustice has been done on account of grant of bail. The superior Court will not be justified in setting aside an order of bail merely because had it been the Court concerned, it would not have granted bail in the case before it. The petitioner seeking cancellation of bail or setting aside of an order granting bail must make out a strong case and must show that the order granting bail was manifestly illegal, unjust or improper.

9. The order granting bail cannot be set aside merely because some judgments referred by the learned counsel for the petitioner were not discussed in the course of the order, whereby the bail was granted though there can be no denial that the Court before which the judgments are referred ought to duly consider them before it passes the order. This is not an act attributable to the accused and it is always open to the aggrieved party to bring such judgments to the knowledge of the superior Court in appropriate proceedings.”

39. It was thus submitted on behalf of the respondents No.2 and 3 that they did not even get any such occasion to violate the terms of the bail order in as much as they were not even allowed to put forth their bail bonds in as much as the impugned order dated 14.5.2018 whereby the bail was granted to the respondents No.2 and 3 herein was stayed vide order dated 15.5.2018 of this Court in the present petition whereby the respondents No.2 and 3 were directed to be not released

on bail, if not already released, which order has been extended vide order dated 21.5.2018 and is in existence till date. It has thus been submitted on behalf of the respondents No.2 and 3 that there is no question of their having at any stage violated the terms of the grant of bail and having not yet even availed of the grant of bail, the petition was liable to be dismissed.

40. Reliance was also placed on behalf of the respondents No.2 and 3 on the verdict of the Hon'ble Supreme Court in ***Hazari Lal Das v. State of West Bengal***: (2009) 10 SCC 562 to contend that there being nothing on the record to indicate any interference or attempt to interfere with the due course of administration of justice by the respondents and there being nothing to indicate that the concession granted to them had been abused in any manner, that there being no supervening circumstances having surfaced in order to show any justification for cancellation of bail, the petition ought to be rejected.

41. The verdict of the Apex Court in ***Dolat Ram & Ors. v. State of Haryana***; (1995) 1 SCC 349 was also relied upon on behalf of the respondents No.2 and 3 submitting to the effect that there existed no cogent and overwhelming circumstances to cancel the bail already granted to the respondents No.2 and 3 herein and it was submitted that the bail granted to the respondents No.2 and 3 ought not to be cancelled in a mechanical manner. The reliance was placed on behalf of the respondents No.2 and 3 on the observations in para 4 of this verdict to the effect:

“4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of Justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a nonbailable case in the first instance and the cancellation of bail already granted.”

42. Reliance was also placed on behalf of the respondents No.2 and 3 on the verdict of the Apex Court in **Ankit Sharma v. State of NCT Delhi**; (2014) SCC Online 3260 submitting to the effect that the

prosecution cannot have the bail cancelled on some circumstances which may have existed before the grant of bail and placed reliance on observations of the Apex Court in this case to the effect:

“23. It is a settled law that bail granted can be cancelled on the ground which has arisen after the bail was granted. It is generally presumed that at the time of hearing of the bail application, the prosecution has raised all possible grounds which could go against the accused in the matter of bail and, therefore, when once bail has been granted to the accused, the prosecution cannot have the bail cancelled on some circumstances which may have existed before the grant of bail.

24. The ground of cancellation of bail and grounds of rejection of bail are two different circumstances and hence the approach of the Court should also be different. At the time of hearing the bail application, the Court looks at the possibilities of the violation of bail conditions and the Court has to be more open and flexible, whereas while hearing the cancellation application, the Court has to be more rigid and it has to examine not only the possibility of violations but whether the actual violation has taken place or not. The Court should be more rigid here and actual proof of violation is required.

25 xxxxxxxxx

26 xxxxxxxxx

27 xxxxxxxxx

28. No doubt, the offence with which respondent/accused is charged is serious in nature, but every accused is presumed innocent until proven guilty beyond reasonable doubt and every accused person has the right to enjoy the bail granted to him unless there is evidence to show the abuse of this right given to him. It is re-emphasized by this Court that at the time of dealing with the question of cancellation of bail of an accused, the only issue which is germane is whether the accused has misused the conditions of bail or tampered with the investigation or the evidence or not.

29. In the instant case, no incriminating evidence has been brought by the petitioner which could create an adverse opinion regarding the conduct of respondent after the grant of bail.

30. The power of cancellation of bail must be exercised with care and circumspection of cogent and overwhelming circumstances which are necessary for an order seeking cancellation of bail. Where there is no violation of the terms of order granting bail, cancellation is not justified. The bail already granted should not be cancelled in a routine manner as it jeopardize personal liberty of the person. The petitioner, Anikit Sharma, has not been able to show any supervening circumstance which would reflect that the liberty granted to the respondent was misused.”

43. It was thus strenuously contended on behalf of the respondents No.2 and 3 that the bail granted vide order dated 14.5.2018 cannot be cancelled pursuant to the present writ petition having been filed by the

petitioners. Reliance was also placed on behalf of the respondents No.2 and 3 on the verdict of the Supreme Court in ***Lalit Laxman Das Soni v. State of Union Territory***; 2013 SCC Online BOM792 to contend that bail having been granted vide order dated 14.5.2018 it cannot now be cancelled without the respondents No.2 and 3 herein, being allowed to be released on bail and thereafter can be cancelled only after supervening circumstances are found against the respondents No.2 and 3. Reliance was placed on behalf of the respondents No. 2 and 3 on the observations of the Supreme Court in this case in paragraphs:

“9 The principles governing grant of bail are well settled. Grant of bail is discretionary. The law does not favour pre-trial detention for an unduly long period. It is also well settled that the power to refuse bail is not to be exercised, as if punishment before the trial, is being imposed. It is only in cases of offences which are punishable with death or imprisonment for life, that the courts are ordinarily reluctant to release an accused on bail, but even that is not because the desire to inflict punishment upon the supposed offender before trial; but only because of the inherent possibility of the accused persons absconding in view of the severity of the punishment, that would be imposed upon an accused on conviction.

10 Moreover, it is also well settled that considerations for grant of bail and considerations for cancellation of bail are quite distinct and different. Rejection of bail in a non-bailable case

at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. [See Dolatram v. State of Haryana, (1995) 1 SCC 349].

11 Though it cannot be said that bail once granted can be cancelled only on account of some supervening circumstances, for cancelling the bail once granted on other grounds, the order granting av 5/8 905-APL-514-2013-APL-515-2013 bail must appear to have been passed on totally irrelevant considerations or exhibit non-application of mind, or would be categorized as 'perverse.' The criticism of the order passed by the Magistrate as 'perverse', as done by the Sessions Judge, does not seem to be justified, as the grounds on which the Magistrate granted bail cannot be termed as irrelevant."

44. Likewise reliance was placed on behalf of the respondents No.2 and 3 on the verdict of the Supreme Court in ***Abdul Basit @ Raju v. Mohd. Abdul Kadir Chaudhary***; (2014) 10 SCC 754, to contend that the grounds of cancellation of bail are

- (i) The accused misuses his liberty by indulging in similar criminal activity,
- (ii) Interferes with the course of investigation,
- (iii) Attempts to tamper with evidence or witnesses,

- (iv) Threatens witnesses or indulges in similar activities which would hamper smooth investigation,
- (v) There is likelihood of his fleeing to another country,
- (vi) Attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,
- (vii) Attempts to place himself beyond the reach of his surety etc.

and that these grounds are illustrative and not exhaustive, but where the bail has been granted for instance in a case under the proviso to Section 167(2) of the Code of Criminal Procedure, 1973 for the default of the prosecution in not completing the investigation within sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody but for the same very strong grounds would be needed.

45. As regards the contention raised on behalf of the respondents No 2 and 3 to the effect that the respondent No.2 and 3 have not yet been released pursuant to the order dated 14.5.2018 granting bail to them, they cannot be allowed to be incarcerated any further without there being any supervening circumstances necessitating the cancellation of grant of bail, it is essential to observe that in terms of Section 437(5) of the Code of Criminal Procedure, 1973 as amended, it is provided as follows:

“437: when bail may be taken in case of non-bailable offence.—(1)

(2) _____

(3) _____

(4) _____

(5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.”

46. The said provision is virtually analogous to Section 497(5) of the Code of Criminal Procedure, 1989 which provided to the effect:

*“497: -- (5) The High Court Division or Court of Session and, in the case of a person released by itself, any other Court may cause any person **who has been released under this section to be arrested and may commit him to custody** .”*

47. This Section 497(5) of the Code of Criminal Procedure, 1989 was interpreted by the Court in *B.K.Sardari lal v. Superintendent of Central Jail and Ors.*; 1968 Crl.L.J. 675 to the effect:

“.....Sub-section (5) of section 497 is really designed to protect the interests of administration of justice and to prevent its being hampered in any manner. In case an order has been made for releasing a person on bail and it is later found that such order is either based on some misapprehension or being otherwise infirm is likely to prejudice the interest of administration of justice, then this provision of law seems to us to amply empower the Courts mentioned therein to make a suitable order cancelling the order of release on bail so as to protect and safeguard the

cause of justice. This provision, in our opinion, necessarily implies jurisdiction in the Court concerned to cancel an order even before the person in question has been actually released, and it is not intended to prohibit the Courts from cancelling the order of release on bail before it is executed. This seems to us to be just common-sense. This provision must be construed in a practical manner for the purpose of achieving the general purpose and object which the Legislature can reasonably be presumed to have in view. The argument that being a penal statute, this subsection should be construed strictly, seems to us to be wholly misconceived. Similarly, any reference to the dictionary for the purpose of controlling the meaning of the word 'release' used in section 497(5) would be misleading. We have to construe this section in the background of its purpose and object and so construed, it does not seem-in to us to have been intended to restrict the exercise of the power of the Court only after an accused person is actually released. It, is, in our view, within the competence of the Court to cancel an order j of release on bail even before its execution, if protection of the interests of administration of justice so demand. Granting of bail in a non-bail- j able offence is, from one point of view, a concession allowed to an I accused person and if, for certain reasons, the Court comes to the conclusion that for substantial reasons it was not a fit case for making an order of release on bail, we are aware of no principle which would divest the Court of the jurisdiction to

cancel that order. In any event, sub-section (5) of section 497 does not imply the negative, as seems to be suggested by the petitioner's counsel”

48. Thus it is held that this petition is maintainable and cannot be rejected on the ground that the respondents No.2 and 3 herein have not yet been released on bail in terms of the order dated 11.5.2018.

49. The petition that has been filed by the petitioner is one under Section 439(2) read with Section 482 Code of Criminal Procedure, 1973 as well and in terms of Section 437(5) of the Code of Criminal Procedure, 1973 in terms of which the present petition is held to be maintainable, the same is taken up for consideration despite the factum that the respondents No.2 and 3 have not yet availed of the impugned order dated 14.5.2018 of grant of bail to them subject to terms and conditions thereby.

50. A consideration of the available record indicates that vide order dated 11.5.2018 the learned Trial Court held that a *prima facie* case was made out against the respondents No.2 and 3 herein for the alleged commission of the offences punishable under Section 302 read with Section 120B of the Indian Penal Code, 1860, and in the alternative read with Section 107 of the Indian Penal Code, 1860, read with Section 302 against the respondents No.2 and 3 herein along with other co-accused named Akash Chauhan @ Bitto; Dilshad; Babu Waseem; Mohd. Kamil @ Nahid; Mohd. Kamar; Mohd. Nazim; Farookh Mazhar; Bilal Tansir @ Manhar.

51. The status report that the State has submitted states that Akash Chauhan was the main conspirator along with the respondents No.2 and 3 herein who are related to him as brothers and that Dilshad was known to them and Dilshad had arranged and hired sharp shooters Mohd. Kamil @ Nahid; Mohd. Kamar; Mohd. Nazim; Farookh Mazhar; Bilal Tansir @ Manhar through Babu Waseem. The third supplementary charge sheet filed in the instant case through evidence collected allegedly by the Investigating Agency is to the effect that the shooters had stayed at the residence of the respondent No.2 on 23.10.2018 and they had been brought to the house of Sumit Chauhan from S.S. Residency Hotel, Anand Vihar, in the Duster Car registered in the name of Sumit Chauhan and that they stayed at his house No.9/71, Geeta Colony on 23.10.2016, the date of alleged commission of the offence. The plans for arrangement and execution of the murder are also stated to have been discussed at the residence of the respondent No.2. The third supplementary charge sheet that the State has filed also states to the effect that the deceased at 5:05 p.m. on 23.10.2016 had told his wife telephonically that Sumit Chauhan, i.e. respondent No.2 had just left his office after quarreling with him and had told him that he would see him, and as per the charge sheet the existence of the call details record between Vinu Pandit, the deceased and his wife prior to the incident had been collected.

52. It is essential to observe that as laid down by the Apex Court in *Lachhman Dass v. Resham Chand Kaler & Anr* (supra) the difference between the cancellation of bail and a legal challenge to an

order granting bail for non-consideration of material available on record is a settled proposition and thus though there is no ground pleaded herein of any violation of term of bail which could have been so be impleaded also of any supervening event breaching the bail conditions, taking the gravity of the offence alleged against the respondents and the submissions of material evidence collected as stated in the charge sheet submitted by the State which has resulted into orders that a *prima facie* case was made out against the respondents, the overlooking of the material circumstances by the learned Trial Court itself thus involves the jurisdiction of this Court consider cancelling the bail.

53. The verdict of ***Dinesh M.N. (S.P.) vs State Of Gujarat***, in CrI.A. 739/2008 categorically lays down vide para 12 thereof that even at the stage of consideration of the application for cancellation of bail under Section 439(2) of the Code of Criminal Procedure, 1973, the Court dealing with the application for cancellation of bail can consider whether irrelevant materials were taken into consideration. This is so in as much as it is not known as to what was the irrelevant material that weighed with the Court for accepting the prayer for bail and further more the verdict of the Hon'ble Supreme Court in ***Kalyan Chandra Sarkar v. Rakesh Ranjan @ Pappu Yadav and Anr.***: 2004 (2) SCC 528; categorically lays down that though at the stage of grant of bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for *prima facie* concluding

why bail was being granted particularly where the accused is charged of having committed a serious offence, any order devoid of such reasons would suffer from non-application of mind. It was further laid down herein that for the Court granting bail to consider among other circumstances, the following factors also before granting bail; they are

(a) The nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (***Ram Govind Upadhyay v. Sudarshan Singh*** (2002 (3) SC 598) and ***Puran V. Rambilas*** (2001(6) SCC 338)

54. The material circumstances of the stay of the alleged shooters at the house belonging to the respondent No.2 and the user of his vehicle to bring them to his place where they stayed and from there were carried to the place of occurrence in his vehicle are material circumstances which have been brought forth,-- have been overlooked by the Trial Court.

55. Vide para 5 of the impugned order dated 14.5.2018, the learned Trial Court has observed to the effect that the trial of the accused would take considerable time; that the FSL report regarding CDR would take further time, though the FIR was registered in the year 2016 that the applicants were arrested on 4.1.2018 on the basis of the disclosure statements of the co-accused though allegedly nothing incriminating was recovered, as observed herein above, the material circumstances of the aspect of the accused shooters having been

brought to the house of Sumit Chauhan at 9/71 Geeta Colony in his vehicle and thereafter having been taken to the spot of the occurrence in the vehicle belonging to Sumit Chauhan are material circumstances in addition to the statement of the wife of the deceased that she had received a call from her husband before the incident of Sumit Chauhan having threatened her husband, the deceased, that he would see him.

56. Further more, it is essential to observe that the conditions laid down under Section 437(1)(i) are a *sine qua non* for the grant of bail even under Section 439 of the Code of Criminal Procedure, 1973, as laid down in ***Ram Govind Upadhyay v. Sudarshan Singh*** (2002 (3) SC 338) and reiterated in ***Dinesh M.N. (S.P.) vs State Of Gujarat***, in CrI.A. 739/2008.

57. Section 437 (1) (i) provides to the effect:

“437. When bail may be taken in case of non- bailable offence.”¹

(1) When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;”

58. Without any observations on the merits or demerits of the case, the alleged existence of the conversation between the deceased and his wife prior to the incident of the alleged threat meted out by the respondent No.2 also coupled with the factum that the shooters had stayed at the property of the respondent No.2 which premises are of the respondent No.2 is reported to have been got verified to be registered in the name of the respondent No.2 and that a *prima facie* case as observed herein above having been held to be made out against the respondents No.2 and 3, there is no ground for the said respondent No.2 to continue on bail in the present case, taking into account the alleged evidence collected and the factum that the respondent No.2 was one of the main conspirators in the commission of the crime.

59. The available record indicates that the evidence put forth by the prosecution through the charge sheet as regards the respondent No.3 is to the effect that the CCTV footage of the place in front of the place of occurrence at 10/91, Geeta Colony shows the presence of the respondent No.3 on 23.10.2016 getting the bikes of the shooters, (i.e., all the co-accused persons) parked near the spot, i.e., near the office of the deceased and thereafter having sped away from the spot. This circumstance *per se* cannot negate the grant of bail already directed to be granted to the respondent No.3 in as much as the said disclosure statement made by the said respondent No.3 to the effect that he was getting the bikes parked in front of the premises where the incident occurred before the incident cannot aid the prosecution and the complainant *ipso facto* in support of their contentions, in as much as

the disclosure statement of the respondent No.3 is inadmissible in evidence as the factum that the respondent No.3 was allegedly seen in the CCTV footage of the spot in getting the bikes parked and of his then having sped away,-- unless proved, cannot by itself simplicitor bring forth the alleged complicity of the respondent No.3 with the main conspirator Akash Chauhan and other conspirators. In the instant case thus there is no ground necessitating the cancellation of bail which is brought forth. Thus, the prayer of the petitioner qua the respondent No.3, Kush Chauhan, is declined in as much as without any evidence being led the entire chain of evidence leading to the alleged complicity of the respondent No.3 cannot be established.

60. Thus the petition is allowed to the extent that it seeks cancellation of bail granted to the respondent No.2, Sumit Chauhan, but is declined qua the respondent No.3, Kush Chauhan.

61. The petition is disposed of accordingly.

Copy of the order be sent to the learned Trial Court.

ANU MALHOTRA, J

May 28, 2018

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