

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Order: August 14, 2019

+ **CRL.M.C. 829/2011 & CRL.M.A. 3145/2011**

C.B.I. Petitioner

Through: Mr. Ripu Daman Bhardwaj,
Special Public Prosecutor with
DSP Manoj Pathak.

Versus

STATE & ANR.Respondents

Through: Mr. M.P. Singh, Additional Public
Prosecutor for State with SI Tej
Ram.

+ **CRL.M.C. 2925/2014 & CRL.M.As. 10082/2014 & 13606/2015**

SANDEEP MALIK & ANR.Petitioners

Through: Ms. Kaadambari & Mr. Navin Kr.
Thakur, Advocates.

Versus

STATE & ANR.Respondents

Through: Mr. M.P. Singh, Additional Public
Prosecutor for State with SI Tej
Ram.
Mr. Ripu Daman Bhardwaj,
Special Public Prosecutor for CBI
with DSP Manoj Pathak.

+ **CRL.REV.P. 173/2011 & CRL.M.As. 16728/2017 & 20647/2017**

BALKRISHAN Petitioner

Through: Mr. Vikas Arora & Ms. Radhika
Arora, Advocates.

Versus

THE STATE (NCT OF DELHI) THR. CBIRespondent

Through: Mr. M.P. Singh, Additional Public
Prosecutor for State with SI Tej
Ram.

Mr. Ripu Daman Bhardwaj,
Special Public Prosecutor for CBI
with DSP Manoj Pathak.

+ **CRL.M.C. 5104/2017 & CRL.M.A. 20094/2017**

KRISHAN GULIA & ANR.Petitioners

Through: Ms. Kaadambari & Mr. Navin Kr.
Thakur, Advocates.

Versus

THE STATE GOVT OF NCT OF DELHI & ANR.Respondents

Through: Mr. M.P. Singh, Additional Public
Prosecutor for State with SI Tej
Ram.

Mr. Ripu Daman Bhardwaj,
Special Public Prosecutor for CBI
with DSP Manoj Pathak.

+ **CRL.REV.P. 198/2018 & CRL.M.A. 4305/2018**

CENTRAL BUREAU OF INVESTIGATION Petitioner

Through: Mr. Ripu Daman Bhardwaj,
Special Public Prosecutor with
DSP Manoj Pathak.

Versus

THE STATE GOVT OF NCT OF DELHI & ANR.Respondents

Through: Mr. M.P. Singh, Additional Public
Prosecutor for State with SI Tej
Ram.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

In the above captioned first petition, the challenge is to order of 1st November, 2010 vide which trial court has refused to club FIR No. 592/02 of Police Station Najafgarh, Delhi and RC No. 4(S)/2003.

Vide impugned order of 14th December, 2010 trial court has refused to discharge *Krishan Gulia & Sandeep Malik* as charge against them already stood framed in Sessions Case No. 06/09 under Sections 307/353/186 of IPC & under Section 25 of Arms Act.

In the above captioned second petition, quashing of FIR 592/2002, under Sections 186/353/307/34 of IPC r/w Sections 25/27/54 of Arms Act, registered at Police Station Najafgarh, Delhi is sought and in the alternate discharge of petitioners-*Sandeep Malik & Krishan Gulia* is sought on the basis of final report filed by CBI in R.C. No. 4(S)/2003-SIU-1, New Delhi.

In the above captioned third petition, prayer is made to re-consider the sanction aspect before proceeding further in RC No. 4(S)/2003, under Section 302/364/120-B/218 of IPC, titled as '*CBI Vs. Balkrishan*'. In the above captioned fourth and fifth petition quashing of order of 6th September, 2017 is sought.

With the consent of learned counsel for both the sides, the above captioned petitions have been heard together and are being disposed of by this common order while treating *CRL.REV.P. 173/2011* as lead case.

The factual background of this case as noticed in the trial court's order of 6th September, 2017 are as under:-

“The case of the prosecution in brief is that, on 17.10.2002, an FIR bearing No. 592/2002 was registered at PS Najafgarh for the offence under Section 186/353/307 IPC read with Section 25/27 of Arms Act, on the complaint filed by Sub-Inspector Bal Krishan (accused herein), who was posted at Anti Auto Theft Squad, South West District, New Delhi.

The allegations contained in the FIR were that SI Bal Krishan received a secret information regarding the movement of a notorious criminal Vivek @ Vicky who remained involved in as many as seventeen cases of heinous nature. On the basis of this information a trap was laid with the permission of superior officers and that on 16.10.2002 when the Maruti car bearing No. DL 8 CD 5284, in which the accused Vivek @ Vicky and his gang members were travelling, was intercepted in the area of Jharoda Kalan, Najafgarh, Delhi and the inmates of the car opened the fire towards the police party. The police team in which all the accused persons (herein) were the members also fired in self defence. Due to this cross firing, two inmates of the car namely, Mandeep S/o Shri Dayanand, Vivek @ Vicky S/o Shri Prem Raj sustained injury, who were declared dead in R.T.R.M. Hospital, Jaffarpurkalan, Delhi. Two other inmates of the car, namely, Krishan Gulia and Sandeep Malik were apprehended from the spot. As these two persons were alongwith their two other associates who died in the Hospital obstructed and assaulted the public servant to deter the in discharge of their official duty as well as they also attempted to commit murder of these police officials by firing towards them, the said FIR under the relevant provisions of law was registered”.

It is matter of record that aforesaid Balkrishan had assailed the charge-sheet filed by CBI for the afore-referred offences in CRL.REV.P. 173/2011 titled as ‘Balkrishan Vs. State NCT of Delhi THR. CBI’. Vide this Court's order of 18th May, 2011 trial court was called upon to deal

with the sanction aspect and its consequences on the framing of charge and till then recording of evidence was to be kept in abeyance. In compliance of the aforesaid order of 18th May, 2011 trial court vide order of 6th September, 2017 has concluded as under:-

“Hence, I am of considered opinion that in the present case filed by the CBI, the cognizance should not have been taken and the charge, as framed by Id. Predecessor, should not have been framed and the accused, the police officials are entitled to be discharged”.

In CRL.REV.P. 173/2011 discharge is now sought by petitioner-*Balkrishan* on the strength of order of 6th September, 2017, whereas in CRL.M.C. 5104/2017, Petitioners-*Krishan Gulia & Sandeep Malik* seek quashing of the aforesaid order of 6th September, 2017. In CRL.REV.P. 198/2018, CBI has also sought quashing of the aforesaid order of 6th September, 2017, whereas in CRL.M.C. 829/2011, CBI seeks discharge of petitioners-*Krishan Gulia & Sandeep Malik* in CRL.M.C. 2925/2014.

The challenge to impugned order of 6th September, 2017 by CBI and petitioners-*Krishan Gulia & Sandeep Malik* is on the ground that CBI has not concluded in the charge-sheet that *Balkrishan* and his co-accused had done the act in discharge of their official duty. It was submitted that sanction for prosecution of *Balkrishan* and his co-accused is not required because they eliminated *Vivek @ Vicky* in a fake encounter. So, it is submitted that the compliance of Section 140 of Delhi Police Act and Section 197 of Cr.P.C. is not required.

It was submitted that decisions relied upon by trial court are of no assistance in the case in hand. It was further submitted that the CBI case has been stayed by virtue of order of this Court of 5th March, 2003 and so,

continuance of proceedings arising out of the FIR in question is exercise in futility and the proceedings emanating therefrom ought to be quashed. Reliance was placed by petitioner's counsel upon Supreme Court's decisions in '*Sankaran Moitra Vs. Sadhna Das and Another*' (2006) 4 SCC 584; '*Satyavir Singh Rath, Assistant Commissioner of Police and Others Vs. State Through Central Bureau of Investigation*' (2011) 6 SCC 1 and '*Paul George Vs. State of NCT of Delhi*' 2008(3) SCALE 614 in support of above submissions.

The submissions advanced have been duly considered and the impugned order has been scrutinised in the light of the decisions cited and thereupon, it transpires that issue of sanction raised goes to the root of the matter. Trial court in the impugned order has duly considered various decisions of Supreme Court and this Court and the crux of the impugned order is as under:-

“48. The expression “institution of prosecution” has to be understood in the context of scheme of the Act applicable in a particular case and so far as the criminal proceedings are concerned, “institution” does not mean filing, presenting or initiating the proceedings, rather it mean taking cognizance as per the provision contained in the Code of Criminal Procedure. The power of the State is performed by an executive authority authorised in this behalf in terms of the rule of executive business framed under Article 166 of the Constitution of India in so far as such a power has to be exercised in terms of Article 162 of Constitution of India. Reference can be given of para 24 of the judgment of the Hon'ble Apex Court in case titled General Officer Commanding Vs. CBI reported as AIR 2012 SC 1890. Thus, to say that if the application of Section 140 D.P. Act is to be construed so strictly, then it will preclude even the Hon'ble Supreme Court and Hon'ble High Court to pass order for

investigation beyond the period prescribed under Section 140 D.P. Act or it will lose its significance and will be bad in law, as is the contention raised by the CBI before this court, is groundless and hence rejected.

49. *In view of my said discussion, I am of considered opinion that sanction under Section 140 D.P. Act was required in the present CBI case which has not been obtained at all and period of limitation for obtaining the same has expired long back.*

50. *Now, the question arises of non-obtaining of sanction under Section 140 D.P. Act and its effect on the charge. The Hon'ble Supreme Court in the case titled Anjani Kumar Vs. State of Bihar reported as AIR 2008 SC 1992 has held that in such a situation, the continuance of proceedings by the prosecution would amount to abuse of the process of law and as such, the criminal proceedings in the court of ld. Chief Judicial Magistrate, Begu Sarai in PS Case No. 63 of 1993 are quashed. Similarly, Hon'ble High Court of Delhi in Crl.Misc. (M) No. 672 of 1995 and Crl.Misc No. 1003/1995 decided on 22.11.2000 titled Kiran Bedi Vs. NCT of Delhi & another has held that in the absence of any sanction under Section 140 D.P. Act, cognizance could not have been taken because of the bar created in that provision of law.*

51. *Hence, I am of considered opinion that in the present case filed by the CBI, the cognizance should not have been taken and the charge, as framed by ld. Predecessor, should not have been framed and the accused, the police officials are entitled to be discharged”.*

Reliance placed by learned counsel for *Krishan Gulia & Sandeep Malik* and Special Public Prosecutor for CBI upon Supreme Court's decisions in *Satyavir Singh Rathi, Assistant Commissioner of Police and Others (Supra) & Paul George (Supra)* is of no avail, as in the said

decisions Supreme Court's earlier three judge Bench decision in *Sankaran Moitra (Supra)* has not been considered.

Three Judge Bench decision in *Sankaran Moitra (Supra)* succinctly deals with the sanction aspect and the pertinent observations made therein are as under:-

“25. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary

and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned counsel for the complainant that this is an eminently fit case for grant of such sanction ” .

Applying the afore-noted dictum in *Sankaran Moitra (Supra)* to the facts of the instant case, I find that the impugned order does not suffer from any illegality and infirmity.

In light of the aforesaid reasoning, petitioner-*Balkrishan* and his co-accused are hereby discharged in RC No. 4(S)/2003/CBI/SCR-1/N. Delhi, under Sections 302/364/120-B of IPC. So far as discharge sought by *Krishan Gulia & Sandeep Malik* in the FIR case is concerned, I find that they have been charge-sheeted in FIR No. 592/2002 registered at Police Station Najafgarh for the offence under Sections 186/353/307 of IPC read with Sections 25 & 27 of Arms Act and the charge for the aforesaid offences has been already framed by the trial court. Upon prima-facie consideration of the merits of the case, I find that CBI has found the evidence against *Krishan Gulia & Sandeep Malik* to be insufficient.

In the light of the final report submitted by CBI, continuance of proceedings in the aforesaid FIR case, would be exercise in futility. Resultantly, the proceedings emanating from the aforesaid FIR case qua *Krishan Gulia & Sandeep Malik* are set at rest.

The above captioned petitions and applications are accordingly disposed of in the aforesaid terms.

(SUNIL GAUR)
JUDGE

AUGUST 14, 2019
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