

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 2941 of 2019

Kingsuk Biswas & Anr.

-vs.-

State of West Bengal

Mr. Shekhar Kumar Basu, Sr. Adv.

Mr. Anirban Dutta,

Mr. Sayantan Sinha

...for the petitioner

Mr. Bikash Ranjan Bhattacharya, Sr. Adv.

Mr. Rabi Sankar Chottopadhyay,

Mr. Uday Sankar Chottopadhyay,

Mr. Suman Sankar Chottopadhyay,

Mr. Santanu Maji,

Mr. Arabinda Maji

...for the Opposite Party

Ms. Rajashee Venket Kundalia

...for the CBI.

Heard on : 31.01.2022, 15.02.2022, 22.02.2022,
28.02.2022, 30.03.2022, 06.04.2022,
19.04.2022, 04.05.2022, 06.05.2022,
10.06.2022 & 15.06.2022.

Judgment on : 02.09.2022

Tirthankar Ghosh, J:-

The present petitioners namely, Kingsuk Biswas and Prabhat Chatterjee
@ Pravat Kumar Chattopadhyay are Assistant Sub-Inspector of Police who were

implicated as accused persons in connection with custodial death of Kazi Nasiruddin in the charge-sheet submitted by the CBI in its charge-sheet no. 2 of 2014 arising out of CBI case no. RC2(S)/SCU.V/SC-II/CBI/New Delhi dated 22.05.2013.

The challenge of the petitioners in this revisional application are four-fold:

- (a) Quashing of the proceeding including the charge-sheet no. 2 of 2014 filed by the CBI under Section 34 read with Section 304A/324/342/218 of the Indian Penal Code.
- (b) Quashing or setting aside the order dated 22.12.2015 passed by the learned Magistrate wherein the prayer of the petitioners were rejected for dismissing the charge-sheet for non-compliance of Section 197 of the Code of Criminal Procedure.
- (c) Quashing and or setting aside the order dated 02.08.2017 passed by the learned CJM, Hooghly, thereby framing charges under Sections 342/324/304A read with Section 34 of the Indian Penal Code.
- (d) Quashing of the charge-sheet, FIR which was registered pursuant to direction passed by the Hon'ble High Court in W.P. No. 3800(W) 2013.

The petitioners in course of hearing of the present revisional application, canvassed on several points including the merits of the charge-sheet filed by

the Investigating Agency but mainly emphasized on the continuance of the proceedings in the absence of an order of sanction under Section 197 of Code of Criminal Procedure. Such contentions would be evident in paragraph 5(xix) which is set out as follows:

*“ **5(xix).** The petitioners states that subsequently the petitioners and other had also moved an application stating that in the event of absence of sanction under Section 197 of the Code of Criminal Procedure the petitioners being public servant and sub-Inspector /Asst. Sub-Inspector of Police attached to Dhoniakhali Police Station and the alleged occurrence having taken place during the duty hours of the petitioners and other co-accused, Learned Court ought to have taken sanction from the appropriate authority before taking cognizance of the impugned charge sheet filed against the petitioners.”*

The same contention is reiterated in ground XIX of the submission of the petitioners which is also set out as follows:

*“**XIX.** FOR THAT it is trite law that any offence, it at all is alleged to have been committed in the custody of a police authority the same is always within the purview of discharge of duty of a police official and as such sanction is warranted in terms of Section 197 of the Code of Criminal Procedure.”*

Records of the revisional application reflected that such point was initially canvassed before the learned Magistrate on 22.12.2015 which was a date fixed by the learned Magistrate after cognizance of the offence was taken

and the learned Magistrate after considering the series of judgments relied upon by the petitioners was pleased to hold as follows:

“.....On that matrix, if we consider prior sanction as to determination of official discharge as a right for the public servant, therefore such right has also a duty to obey. Duty always flow from the higher laws, in our case it is the Constitution of India, where right to life has got a higher value; which has been allegedly violated in the instant case. Therefore, the provisions under sec.197 of the Code cannot supersede the principles of the Constitution. As a student of law this court has not hesitation to hold that rights are of two types, basic and non-basic rights. Right to life under Constitution of India is a basic right whereas provision under sec.197 of the Code is a non-basic right; so when there is a debate between these two rights as to which one shall earn supremacy, it is needless to answer that the basic right shall stand. The definition or scope of official duty of public servants cannot in any situation warrant the cause of death of any citizen by them, therefore the charge prima facie does not at all attract the provisions of sec. 197 of the Code. We are in the era of welfare state and India as a champion in human rights has international obligations to respect the guidelines and treaties of United Nations dealing with custodial violence, where it has been unambiguously mentioned that, such violence cannot come within the scope of state action or discharge of official duty.

Therefore when the alleged offence does not fit within the scope of the “discharge of official duties”, the court has got no obligation to seek prior sanction under sec. 197 of the Code for taking cognizance on prima facie examination of the record. As the determination of “official duty” is always a mixed question of law and facts, which

can only be decided upon evidence. So as the compliance regarding sanction can be raised at any time during trial, as observed by the Hon'ble Supreme Court of India in Chandan Kumar Basu vs. State of Bihar, SLP (Crl.) 3020/2013. Moreover this court is of this opinion that in criminal trials first phase before commencement of trial is very crucial as to preservation of evidence, therefore, any unnecessary delay at that point could be fatal. When there is no harm or miscarriage of justice meant as the scope for sanction under sec. 197 of the Code is always wide open during trial, such a ground as contended in the instant petition should not be entertained."

The order dated 02.08.2017 by which the learned Magistrate was pleased to frame charge against the persons, however, do not reflect that such point was reiterated and the learned Magistrate was pleased to frame charges against two of the accused persons namely, ASI Sanat Karmakar and SI Barun Ghosh under Section 304A/324/342/218 of the Indian Penal Code and against Constable Somnath Chatterjee and Amit Dey along with ASI Kingsuk Biswas and Prabhat Chatterjee under Sections 304A/324/342/34 of the Indian Penal Code and against Sub-Inspector Ashim Mondal under Section 218 of the Indian Penal Code.

Mr. Sekhar Kumar Basu, learned Senior Advocate appearing for the petitioners submitted that the petitioners had no role to play in the alleged act and neither any intention is established from their part on the documents relied upon by the prosecution. He further argued that the medical reports reflect that the deceased had hypertensive cardiac pathology which resulted in

sudden death which cannot contribute to any commission of an offence. Attention of the Court was drawn to the observation of the Investigating Officer from the CCTV footage, which according to the petitioners were efforts of assistance rather than any act of negligence. Lastly, it was contended that there is no remote possibility of any nexus of the petitioners with the death of Kazi Nasiruddin and the charges under Section 304A of the Indian Penal Code are not maintainable. The emphasis so far as the applicability of Section 197 of the Code of Criminal Procedure is concerned for want of sanction prior to taking cognizance of the offence in respect of the petitioners who were working in discharge of their official duties, Learned advocate relied upon the following judgments:

- State of Orissa (through Kumar Raghavendra Singh and ors.) –Vs. – Ganesh Chandra Jew reported in (2004) 8 SCC 40;
- D.T. Virupakshappa –Vs. – C. Subash reported in (2015) 12 SCC 231;
- Debasish Chakraborty –Vs. – State of West Bengal and Anr. reported in 2017 SCC OnLine Cal 15477;
- D. Devaraja –Vs. – Owais Sabeer Hussain reported in (2020) 7 SCC 695.

In order to substantiate his contentions petitioners relied upon paragraph 7, 9, 11, 12 and 22 of Ganesh Chandra Jew (supra) which are set out as follows:

“7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there

is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

9. *Prior to examining if the courts below committed any error of law in discharging the accused, it may not be out of place to examine the nature of power exercised by the court under Section 197 of the Code and the extent of protection it affords to public servants, who apart from various hazards in discharge of their duties, in absence of a provision like the one may be exposed to vexatious prosecutions. Sections 197(1) and (2) of the Code read as under:*

“197. (1) 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:

(2) No court shall take cognizance of any offence alleged to have been committed by any member of the armed forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.”

The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance, no prosecution can be initiated in a Court of Session under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the 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” makes it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of.

According to Black's Law Dictionary 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 been committed during discharge of his official duty.

11. *It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is, under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in the course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far as its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that the act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force, which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in*

the course of service but not in discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in Matajog Dobey v. H.C. Bhari [AIR 1956 SC 44 : 1956 Cri LJ 140] thus: (AIR p. 49, paras 17 & 19)

“The offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner, with the discharge of official duty. ...

There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim), but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.”

12. *If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.*

22. *The High Court's judgment and the proceedings in ICC Case No. 45 of 1991 are quashed. We make it clear that we have not expressed any opinion about the merits of the cases instituted against the respondent-complainant which shall be dealt with in accordance with law.”*

Attention of the Court was drawn to paragraph 4, 6, 7, 8 and 9 of D.T.

Virupakshappa (supra) which is as follows:

“4. *The main contention of the appellant is that the learned Magistrate could not have taken cognizance of the alleged offence and issued process to the appellant without sanction from the State*

Government under Section 197 CrPC, and that on that sole ground, the High Court should have quashed the proceedings.

6. In the case before us, the allegation is that the appellant exceeded in exercising his power during investigation of a criminal case and assaulted the respondent in order to extract some information with regard to the death of one Sannamma, and in that connection, the respondent was detained in the police station for some time. Therefore, the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 CrPC, in case, the government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary.

7. The issue of “police excess” during investigation and requirement of sanction for prosecution in that regard, was also the subject-matter of State of Orissa v. Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104] , wherein, at para 7, it has been held as follows: (SCC pp. 46-47)

“7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable

act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty.”

(emphasis supplied)

8. *In Om Prakash [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] , this Court, after referring to various decisions, particularly pertaining to the police excess, summed up the guidelines at para 32, which reads as follows: (SCC p. 89)*

“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 [K. Satwant Singh v. State of Punjab, AIR 1960 SC

266 : 1960 Cri LJ 410]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104]). 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)

9. 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.”

Reference was made to paragraphs 6, 10 and 11 of Debasish Chakraborty (supra) which is quoted below:

“6. Ultimately the Hon'ble Court has been pleased to observe that the sanction is necessary in case of any allegation of police excess in connection with the investigation of a criminal case and thereafter the Hon'ble Apex Court has been pleased to quash the proceedings initiated against the petitioner.

10. It is therefore apparent from the materials on record as well as from the submissions of learned Advocates that the opposite party no. 2 has filed a petition of complaint against the petitioner on the ground that he was subjected to torture during his custody in connection with a criminal case. The factual aspect, as transpires in the decision of *D. Birpakkho (Supra)*, reveals that the appellant was allegedly assaulted and detained in police station for some time to get a confession from him to the effect that he was involved in a murder case and accordingly learned Magistrate took cognizance, registered the case and issued summons to the appellant under Section 323 and other Sections of Penal Code, 1860. High Court declined to interfere with such order of learned Magistrate under Section 482 of the Code of Criminal Procedure. Hon'ble Apex Court held that the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 of the Code of Criminal Procedure, in case, the Government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary. The magistrate could not have taken cognizance of the case without the previous sanction of the State Government.

11. It is therefore apparent that learned Magistrate was not at all justified in taking cognizance of the petition of complaint filed by opposite party no. 2 and learned Magistrate was also not justified in issuing summons against the present petitioner without having any sanction of the State Government. The principle enunciated by the Hon'ble Apex Court squarely applies in the context of the given facts and circumstances of this case. Learned Advocate for opposite party no. 2 however contended that the complainant may be permitted to file such complaint after obtaining necessary sanction from the State Government. In the premises set forth above the order of learned Magistrate in respect of taking cognizance and issuance of summons against the petitioner in complaint case no. 1881 of 2014 dated June, 19, 2014 is accordingly quashed. The opposite party no. 2 will not be precluded from taking any action with regard to his grievances against the petitioner after obtaining sanction under Section 197 of the Code of Criminal Procedure from appropriate authority.”

Reliance has been placed in respect of paragraph 66, 67, 68 and 69 of D.

Devaraja (supra) which is quoted below:

“66. *Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the Government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate Government.*

67. *Every offence committed by a police officer does not attract Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act. The protection given under Section 197 of the Criminal Procedure Code read with Section 170 of the Karnataka Police Act has its limitations. The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and official duty is not merely a cloak for the objectionable act. An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a policeman assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However, if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be.*

68. *If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of*

the protection of the government sanction for initiation of criminal action against him.

69. *The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.”*

Learned senior counsel emphasized that the facts of the present case clearly narrates that the present petitioners were engaged in their official duties and as such they are entitled to the protection under Section 197 of the Code of Criminal Procedure. He further submits that the very purpose of sanction would be diluted in case the petitioners while discharging their official functions are not granted sanction by the appropriate authority before initiation of proceeding in a criminal Court. The learned Magistrate in both the orders ignored the same and as such erroneously framed charges against the present petitioners.

Ms. Rajashee Venket Kundalia, learned advocate appearing for the CBI relied upon Indra Devi –Vs. – State of Rajasthan and Anr. reported in (2021) SCC 768 and submitted that the Hon’ble Supreme Court was pleased to hold:

“that Section 197 of the Code of Criminal Procedure seeks to protect officer from unnecessary harassment, who is accused of offence committed while acting or purporting to act in discharge of his official duties and thus, prohibits court from taking cognizance of such offence

except with previous sanction of competent authority. At the same time such shield cannot protect corrupt officers and provisions must be construed in such manner as to advance cause of honesty, justice and good governance. Alleged indulgence of officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Yardstick to be adopted is to form prima facie view whether act or omission for which accused was charged had a reasonable connection with the discharge of his duties.”

Learned counsel further submitted that in the present case the question is whether the act done by the accused/police personnel were directly connected with or concerned with the official duty. It has been categorically submitted on behalf of the CBI that the act complained of was beyond the scope of the official duty of the petitioners and were not directly connected with the discharge of their official duties, as such there is no reasonable nexus which is the main requirement for the progress under Section 197 of the Code of Criminal Procedure. Reference was made to Devendra Prasad Singh –Vs. – State of Bihar and Anr. reported in (2019) 4 SCC 351 wherein it was held that:

“...to attract the rigor of section 197 of Code of criminal procedure, it is necessary that the offence alleged against a government officer must have some nexus or/and relation with the discharge of his official duties as a government officer.”

The Central Bureau of Investigation by its contention before this Court has categorically stated that the nature of the offence committed by the

accused being a heinous offence of custodial death, no sanction is required in respect of the offences committed by the present petitioners who are accused in the case.

Mr. Bikash Ranjan Bhattacharya, learned Senior Advocate appearing on behalf of the opposite parties refuted the contention of the petitioners by reiterating the facts of the case relating to custodial torture and death. He submitted that it is the quality of the act which is important for the protection of a public servant and the act complained of cannot by any stretch of imagination fall within the scope of the official duty of the present petitioners who can take recourse to the provisions of Section 197 of the Code of Criminal Procedure. Learned senior advocate relied upon the principles which have been set out in *Prakash Singh Badal & Anr. -Vs. - State of Pinjab & Ors.* reported in (2007) 1 SCC 1 and also drew the attention of the Court to the different judgments relied upon in the aforesaid judgment to arrive at its conclusion. Reference was also made to *Matajog Dobey -Vs. H.C. Bhari* reported in 1956 CrLJ 140 for emphasising regarding the reasonable nexus between the offence committed and due discharge of official duty by a public servant and it was contended that the present case do not call for the applicability of the provisions of sanction. Learned advocate also distinguished the judgments by the petitioners and submitted that the decision of the Hon'ble High Court in *Haraprasad Ghosh -Vs. - State of West Bengal* reported in 2018 CrLJ 3815 which related to an offence of custodial death after abduction by an Officer-in-charge of a police station is squarely applicable to the present case. It was

submitted that in the said judgment the issue of sanction was raised by the accused/police officers and the same was rejected by the learned trial Court and affirmed by the Hon'ble Calcutta High Court.

I have considered the contentions advanced by the petitioners, prosecution (CBI) as well as the private opposite party/de facto complainant and the decisions relied upon by them which are distinctive in its nature in the facts of each of the case. In *Devinder Singh –Vs. – State of Punjab* reported in (2016) 12 SCC 87 the Hon'ble Supreme Court in a case of custodial death was pleased to hold that the issue of requirement of sanction may not be possible to decide at the initial stage and may arise at any stage of the proceedings and even at or after the stage of defence evidence. Paragraph 19, 39.8, 39.9 and 40 which are relevant for the purpose of the present case are set out as follows:

“19. *In Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan [Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan, (1998) 1 SCC 205 : 1998 SCC (Cri) 1] this Court has laid down that the accused is not debarred from producing the relevant documentary materials which can be legally looked into without any formal proof to support the stand that the acts complained of were committed in exercise of his jurisdiction or purported jurisdiction as a public servant in discharge of his official duty thereby requiring sanction of the appropriate authority. This Court held that at a preliminary stage such questions are not required to be considered because the accused has not yet led evidence in support of their case on merits. This Court has held thus: (SCC pp. 217-19, paras 23-25)*

“23. Mr Sibal's contention is based upon the observations made by this Court in Mathew case [K.M. Mathew v. State of Kerala, (1992)

1 SCC 217 : 1992 SCC (Cri) 88] wherein this Court had observed that even after issuance of process under Section 204 of the Code if the accused appears before the Magistrate and establishes that the allegations in the complaint petition do not make out any offence for which process has been issued then the Magistrate will be fully within his powers to drop the proceeding or rescind the process and it is in that connection the Court had observed 'if the complaint on the very face of it does not disclose any offence against the accused'. The aforesaid observation made in the context of a case made out by the accused either for recall of process already issued or for quashing of the proceedings may not apply fully to a case where the sanction under Section 197(1) CrPC is pleaded as a bar for taking cognizance. The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with a previous sanction of the Government concerned in a case where the acts complained of 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 and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the court to rectify its error where jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings.

24. In *Matajog case* [*Matajog Dobey v. H.C. Bhari*, AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] the Constitution Bench held that the complaint may not disclose all the facts to decide the question of applicability of Section 197, but facts subsequently coming either on police or judicial inquiry or even in the course of prosecution evidence may establish the necessity for sanction. In *B. Saha case* [*B. Saha v. M.S. Kochar*, (1979) 4 SCC 177 : 1979 SCC (Cri) 939] the Court observed that instead of confining itself to the allegations in the complaint the Magistrate can take into account all the materials on the record at the time when the question is raised and falls for consideration. In *Pukhraj case* [*Pukhraj v. State of Rajasthan*, (1973) 2 SCC 701 : 1973 SCC (Cri) 944] this Court observed that whether sanction is necessary or not may depend from stage to stage. In *Matajog case* [*Matajog Dobey v. H.C. Bhari*, AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] the Constitution Bench had further observed that the necessity for sanction may reveal itself in the course of the progress of the case and it would be open to the accused to place the material on record during the course of trial for showing what his duty was and also the acts complained of were so interrelated with his official duty so as to attract the protection afforded by Section 197 of the Code of Criminal Procedure. This being the position it would be unreasonable to hold that the accused even though might have really acted in discharge of his official duty for which the complaints have been lodged yet he will have to wait till the stage under sub-section (4) of Section 246 of the Code is reached or at least till he will be able to bring in relevant materials while cross-examining the prosecution witnesses. On the other hand it would be logical to hold that the matter being one dealing with the jurisdiction of the court to take cognizance, the accused would be entitled to produce the relevant and material documents which can be admitted into evidence without formal proof, for the limited consideration of the

court whether the necessary ingredients to attract Section 197 of the Code have been established or not. The question of applicability of Section 197 of the Code and the consequential ouster of jurisdiction of the court to take cognizance without a valid sanction is genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of cognizance and/or the criminal proceedings be quashed. In the aforesaid premises we are of the considered opinion that an accused is not debarred from producing the relevant documentary materials which can be legally looked into without any formal proof, in support of the stand that the acts complained of were committed in exercise of his jurisdiction or purported jurisdiction as a public servant in discharge of his official duty thereby requiring sanction of the appropriate authority.

25. Considering the facts and circumstances of the case, it prima facie appears to us that the alleged acts on the part of the respondents were purported to be in the exercise of official duties. Therefore, a case of sanction under Section 197 of the Criminal Procedure Code has been prima facie made out. Whether it was unjustified on the part of the respondents to take recourse to the actions alleged in the complaint or the respondents were guilty of excesses committed by them will be gone into in the trial after the required sanction is obtained on the basis of evidences adduced by the parties. At this stage, such questions are not required to be considered because the accused have not yet led evidence in support of their case on merits.”

39.8. *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 the accused to place material during the course of trial for showing what his duty was. The accused has the right to lead evidence in support of his case on merits.

39.9. *In some cases 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.*

40. *In the instant cases, the allegation as per the prosecution case is that it was a case of fake encounter or death caused by torture whereas the defence of the accused person is that it was a case in discharge of official duty and as the deceased was involved in the terrorist activities and while maintaining law and order the incident has taken place. The incident was in the course of discharge of official duty. Considering the aforesaid principles in case the version of the prosecution is found to be correct, there is no requirement of any sanction. However, it would be open to the accused persons to adduce the evidence in defence and to submit such other materials on record indicating that the incident has taken place in discharge of their official duties and the orders passed earlier would not come in the way of the trial court to decide the question afresh in the light of the aforesaid principles from stage to stage or even at the time of conclusion of the trial at the time of judgment. As at this stage it cannot be said which version is correct. The trial court has prima facie to proceed on the basis of the prosecution version and can re-decide the question afresh in case from the evidence adduced by the prosecution or by the accused or in any other manner it comes to the notice of the court that there was a reasonable nexus of the incident with discharge of official duty, the court shall re-examine the question*

of sanction and take decision in accordance with law. The trial to proceed on the aforesaid basis.”

Having regard to the observations made by the learned Magistrate in its order dated 22.12.2015 and the present stage of the case wherein charge is required to be framed by the learned Sessions Court, in view of the order passed in CRR 1811 of 2019, based on the materials available in the record I am of the opinion that presently for framing the charges there is no requirement for sanction for proceeding with the trial. If the factual circumstances so demand, the petitioners shall be at liberty to canvass the issue relating to sanction at a stage which would be commensurate with the principles laid down in Devinder Singh's case (supra).

Accordingly, CRR 2941 of 2019 is dismissed.

As the merits of the case has been discussed in CRR 1811 of 2019 regarding the applicability of the provisions of Indian Penal Code for framing of charges on the materials available on record, further reiteration is not required in the present revisional application.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby vacated.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)