IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 3191 of 2016

With
CRIMINAL MISC.APPLICATION (DIRECTION) NO. 1 of 2022
In
R/SPECIAL CRIMINAL APPLICATION NO. 3191 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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STATE OF GUJARAT
Versus
HAFIZHUSAIN @ ADNAN @ JAID TAJJUDIN GOSMOHIDDIN MULLA
TAJUDDIN MULLA & 23 other(s)

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Appearance:
MR MITESH AMIN, PUBLIC PROSECUTOR with MS MAITHILI MEHTA, APP for the Applicant(s) No. 1
D.D. PATHAN(5923) for the Respondent(s) No. 1,13,14,18,19,23,6
MR KHALID G SHAIKH(3233) for the Respondent(s) No. 15,7
MR S M VATSA(6000) for the Respondent(s) No. 1,13,14,18,19,23,6
RULE SERVED for the Respondent(s) No. 10,11,12,16,17,2,20,21,22,24,3,4,5,8,9

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CORAM:**HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**

Date : 23/11/2022

ORAL JUDGMENT

1. By way of present writ-application the prosecution – State of Gujarat has invoked Article 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 challenging the order dated 16.4.2016 passed by the learned Additional Sessions Judge, Court No.15, City Sessions Court, Ahmedabad, below Ex.81 and 82 in Sessions Case No.389 of 2013 whereby, the learned Judge has discharged the respondents - accused from the charges levelled against them under Section 130 of the Indian Penal Code, 1860.

2. The brief facts as stated by the writ-applicant herein for consideration of the present dispute are stated thus :-

2.1 There were serial bomb blasts in the City of Ahmedabad in the year 2008, wherein an FIR came to be lodged qua the present accused with Shahibaug Police Station being C.R. No. I-236/2008 for the offences punishable under Sections 120(B), 121 A, 124 A, 153(1) (b) (a), 302, 307, 326, 427, 435, 468,

471 of Indian Penal Code read with Sections 3, 5, 6 , 7 of Explosive Substance Act, also read with Sections 10, 13, 16, 18, 19, 20, 23, 38, 39 and 40 of Unlawful Activities (Prevention) Act, read with Sections 3, 4 of Damage to Public Properties Act, read with Section 25 (1) (b)(a), 27 of Arms Act, read with Sections 65, 66 of Information Technologies Act. In that incident 56 persons lost their lives and 240 persons were injured.

2.2 Few accused were arrested and charge-sheeted in connection with the aforesaid offence of serial bomb blast and the same culminated in Sessions Case No. 38 of 2009 and others. Charges came to be framed in the said connection and the accused were lodged at Sabarmati Central Jail, Ahmedabad.

2.3 The accused being in jail and offenders of the offence against the State under Section 121A and 124A, are considered to be the enemies of the State and further they being in the prison the Prisoners Act is also applicable to them, therefore

any act committed by the accused which is against the Prisoners Act, are governed by the said Act and also by other criminal law.

2.4 It is the case of the first informant i.e. Govindbhai – Subedar who was on duty on 10.02.2013 that while he was on duty alongwith other officers of Sabarmati Central Jail, Ahmedabad the first informant discovered a tunnel in Yard No. 4, barrack No.4/2 of Sabarmati Central Jail, Ahmedabad dug-up by the accused persons in connivance with each other with an intention to escape from the lawful custody. The Investigation of the FIR was entrusted to Crime Branch, Ahmedabad City by way of order dated 11.02.2013 passed by the Commissioner of Police, Ahmedabad.

2.5 The accused were not allowed to attend the court proceedings as they are considered to be the offenders of such a grave crime and therefore, the government had passed an order under Section 268 of Code of Criminal Procedure

excluding these accused from attending the court's proceedings and that the trial was conducted through video conference.

2.6 These accused had no other way to come out of the prison and escape and therefore, a conspiracy was hatched to escape from the prison by digging up a tunnel from the premises of the jail to outside the jail campus, which is well known as "Surangkand".

2.7 The accused were kept in different Yard No.4 and 5, from where they had planned to escape by digging-up a tunnel from the jail to the outside campus of the jail and had conspired to run away in the nearby jungle.

2.8 The accused are all well educated and some of them are having degree in Engineering and MBA and therefore they were well conversant with many languages and techniques of engineering. The accused no. 1 was a civil engineer, who took the measurement of the distance from jail to outside the jail and planned as to how long and deep the tunnel would be.

Further all the other accused got the equipments to dig-up the tunnel, cover it up if any jail officer visited, to distract them etc., to understand the technique of digging up the tunnel the accused had also got four books from the library and started the work of digging up the tunnel which was done from around 11.10.2012 to 11.2.2013, when during the visit of the jail premises the officers found out that a big tunnel was being made near the water tank behind a big tree, which was approximately 16 ft deep and around 196 ft long, which is outside the jail campus. An FIR being CR No.I-24/2013 was registered with Ranip Police Station on 11.2.2013 against 14 accused persons for the offences punishable under sections 224, 120(B), 511 of IPC and under Section 45 of the Prisoners Act. After the investigation was carried out other names of the accused were also disclosed. The authority also prepared two reports for adding Section 130 of IPC dated 27.2.2013 and to add Section 42 of the Prisoners Act dated 29.4.2013. That, the sanction was given by the concerned authority on 17.5.2013.

2.9 After completion of the investigation in connection with the aforesaid FIR, charge-sheet was filed against 24 accused and the C.C No.102 of 2013 was filed at Additional Chief Judicial Magistrate, Court No. 11, Ghee-Kanta, Ahmedabad on 18.5.2013.

2.10 The accused had approached the Sessions Court by filing the application seeking discharge under Section 227 of Code of Criminal Procedure praying that the accused be discharged from the offences punishable under Section 130 of Indian Penal Code on the ground that the accused are not State Prisoners. The learned Sessions Court went into the technicality of the definition of "State Prisoners" which is beyond the jurisdiction of the concerned Court and discharged the respondents accused from the offence punishable under Section 130 of the Indian Penal Code by order dated 16.4.2016 passed by the learned Additional Sessions Judge, Court no. 15, City Sessions Court, Ahmedabad below Exh.81 and 82 in Sessions Case no. 389 of 2013 which has resulted into filing of the present petition at

the instance of the prosecution. Paragraphs 8, 9 and 10 of the said order dated 16.4.2016 read thus :-

> *"(8) Before the Court examines the merit - demerit of the applications with the submissions of both the parties, first of all the Court opines that there is no specific legal definition of State Prisoners in the law. Therefore as per the citations placed by the accused along with Annexure (E) i.e. 2002(3) SCC Pg. 676 in the matter between Shrimant Shamrao Suryavanshi and Another Vs. Legal Heirs of Pralhad Bhairoba Suryavanshi and Others,Note D Para 10 and 2015(9) SCC Page 502 in the matter between Vikramsinh @ Viki and Others Vs. Union of India and Others, Note C Page 15 to 22. The Hon'ble Apex Court has held that the report preceding the legislation can legitimately be taken into consideration while construing the provisions of an Act. Hence, the Court has taken into consideration of Annexure (E) historical background for the word State Prisoner in which the provision came on the Statue Book as State Prisoner.*
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> *(9) The question which requires a thought is whether the accused are State Prisoner as per Section 130 of IPC in the case on hand.*
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> *(9.1) The Court has gone through Section 130 of IPC. It especially is essential ingredients 5/9 which are (A)*

Knowledge, thata person being harbour is an offender, (B) Assistance or attempt or harbouring to the offender to escape from the lawful custody or an offer of or actual harbouring of such offender by the harbourer. So, from the ingredient word knowledge is essential in the case. If someone harbours a person without any knowledge of whom have a State Prisoner, he shall not be liable under Section 130 of IPC.

(9.2) Further here the word State Prisoner is also very essential to decide the applications as prayed for. So, if we go through Section 128 of IPC, the State Prisoner is defined as a prisoner confined under the provisions of regulation for confinement of State Prisoner. Such a person is arrested for reasons of State embarrassing the due maintenance and the alliances formed by the Indian Government with the foreign power. Therefore if we go through Annexure (E) at Sr.No.1 Bengal Regulation III of 1818, the Court is of the opinion that here in a case on hand the accused are not identified as State Prisoners as per Section 128 of IPC read with Bengal Regulation III of 1818 at Annexure (E) Page 1 to 4. Moreover the charge of Session Case No. 38/2009 in the matter of Serial Bomb Blast cases also not applicable to the present case. It cannot be read as vice-a-versa for the applicability of Section 130 of IPC.

(9.3) The Court also feels that on perusal of record and proceedings of Session Case No. 389/2013 the Investigating

Officer has not placed any documents or statement of witnesses to comply the definition of State Prisoners as said above. Even at the time of hearing the Investigating Officer fails to do so. Therefore the Annexure (E) Sr. No. 2 Bombay Regulation 25 of 1827 of Pg.5 to 7 helps to accused. Therefore the Court opines that there is no sufficient evidence or material on record to charge Section 130 of IPC against the accused. Hence, the report of Investigating Officer for the addition of Section 130 of IPC at a later stage of the investigation is also deemed to be false and with misreading of Section 130 of IPC.

(9.4) Ulterior motive behind report of Section 130 of IPC also draw the attention against the Investigating Officer that Police Agency by one or other pretext wants to keep the accused behind the bar. It can be read out from the second FIR at Annexure (D) .Why the second FIR is needed that best reasons known to Investigating Officer but in the second FIR the Investigating Officer has tried to fulfill the lacunaoffirstFIR by adding a few names of Police personnels to satisfy Section 130 of the Act. It is because if this was a legal and just act than why the Investigating Officer has not added the names of the Police personnels at Annexure (A). So the procedures followed by the prosecution cast doubt on the prosecution case and surprisingly till today despite of second FIR at Annexure (D) Police personnels arenot arrested or the Government has not yet proceeded with the prosecution

sanction, accordingly. As considerable time has been passed, the charge sheet is already filed. So by one or other way the Investigating Officer has cleverly tried to place the present accused under Section 130 of IPC but as above discussed reasons Section 130 of IPC does not come into the play for the presentcase and therefore the judgment of 1994 (3)SCC Pg . 569 in the matter between KartarSingh Vs. State of Punjab & Haryana does not come into play to help the prosecution in the case, looking to the facts of the incident and accusations. Hence, committal order is also considered as falsity and with misreading of Section 130 of IPC, which deserves to be set aside.

(9.5) If, at this juncture by said reasons both the applications at Exh. :81 & 82 are allowed as per the final order than there shall be no legal injury to the prosecution side as legal alternative remedy at Section 323 of Cr.P.C ., remains open for the prosecution. Hence, the submission of learned Special P.P ., Mr. Mitesh Amin cannot be accepted.

(10) Parting with the matter both the applications at Exh. :81 & 82 deserve to be allowed as per the final following order. Hence, the order:

ORDER

Both the applications at Exh. :81 & 82 are allowed.

The Investigating Officer, Crime Branch, Ahmedabad is hereby directed and ordered to delete Section 130 of IPC from the charge sheet of Session Case No. 389/2013, accordingly.

The committal order of Addl. Metropolitan Magistrate, Ahmedabad, Court No. 11 is hereby set aside.

The Registry is directed to send original charge sheet of Session Case No. 389/2013 to Chief Metropolitan Magistrate Court, Ahmedabad with muddamal, accordingly.

The Registry is further directed to transfer the jail warrants of concerned accused to the Court of Chief Metropolitan Magistrate Court, Ahmedabad, accordingly.

The order be intimated to Police Inspector, Crime Branch, and Superintendent, Central Jail, Sabarmati, Ahmedabad.

Order portion copy be intimated to Chief Metropolitan Magistrate Court, Ahmedabad.

The next date of the case is 30th April, 2016.

No order as to costs.

Pronounced in the open court today on this 16th day of April, 2016."

3. Heard Mr. Mitesh Amin, the learned Public Prosecutor appearing for the writ-applicant – State with Ms. Maithili Mehta, the learned APP and Mr. Vatsa, the learned advocate appearing with Mr. Arjun Joshi, the learned advocate appearing for the respondents – original accused.

Submissions on behalf of the writ-applicant – State :-

4. Mr. Mitesh Amin, the learned Public Prosecutor appearing for the writ-applicant – State submitted that the respondents were arrested and are in jail for an FIR which was lodged with the Shahibaug Police Station being C.R. No.I-236 of 2008 for the offences punishable under Sections 120B, 121A, 124A, 153(1)(b)(a), 302, 307, 326, 427, 435, 468 and 471 of the Indian Penal Code read with Sections 3, 5, 6 and 7 of the Explosive Substance Act also read with Sections 10, 13, 16, 18, 19, 20, 23, 38, 39 and 40 of the Unlawful Activities (Prevention) Act read with Sections 3 and 4 of the Damage to

Public Properties Act read with Sections 25(1)(b)(a) and 27 of the Arms Act read with Sections 65 and 66 of the Information Technologies Act. In view of aforesaid, charge-sheet came to be filed which culminated into Criminal Case No.38 of 2009 and others. The charges were framed in connection with aforesaid sessions case and accused were lodged at Sabarmati Central Jail at Ahmedabad.

4.1 Mr. Amin, the learned Public Prosecutor submitted that the present writ-application has been preferred seeking writ of certiorari and/or any other writ order or direction in the nature of certiorari for quashing and setting aside the order dated 16.04.2016 passed by learned Additional Sessions Judge, Court No. 15, Ahmedabad passed under Exh.81 and 82 in Sessions Case No. 389 of 2013.

4.2 Mr. Amin, the learned Public Prosecutor submitted that the present writ-application has also been preferred invoking inherent powers for passing such orders for prevention of abuse of process of court and to secure by meeting the end of

justice by quashing the order dated 16.04.2016 passed by learned Additional Sessions Judge, Court No. 15, Ahmedabad passed under Exh.81 and 82 in Sessions Case No. 389 of 2013.

4.3 Mr. Amin, the learned Public Prosecutor submitted that the respondents herein are 'state prisoners' considering the fact that FIR bearing No I – 236/2008 was registered at Shahibaug Police Station, Ahmedabad under the provision of Sections 120B, 121A, 124, 153(1)(b)(a), 302, 307, 326, 427, 435, 468, 471 of Indian Penal Code read with Sections 3, 5, 6 and 7 of the Explosive Substances Act, 1883 read with Sections 10, 13, 16, 18, 19, 20, 23, 38, 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 read with Sections 3 and 4 of the Damage to Public Property Act read with Sections 25(1)(b)(a) and 27 of the Arms Act read with Sections 65 and 66 of Information Technology Act. The said offence basically pertained to serial bomb blast in the city of Ahmedabad which took place in the year 2008 for which the abovementioned FIR stood registered.

4.4 Mr. Amin, the learned Public Prosecutor submitted that considering the offence of the year 2008 bearing C. R. No. I - 236/2008, the respondents – accused were in Sabarmati Central Jail and while the accused were in jail it was discovered that tunnel in Yard No. 4 Barrack No. 4/2 of Sabarmati Central Jail, Ahmedabad was digged by the accused persons in connivance with others with an intention to escape from any lawful custody. Hence, the said Investigation was carried out by Crime Branch and FIR bearing No I-24/2013 was registered under the provisions of section 224, 120B, 511 of IPC and under Section 45 of the Prisons Act.

4.5 Mr. Amin, the learned Public Prosecutor submitted that considering the fact that the accused were charged for the offence under Section 121A and 124A of the Indian Penal Code which pertains to an offence against the State under Chapter VI read with Section 16 of the Unlawful Activities (Prevention) Act 1967. Thus on a conjoint reading of section 121A and 124A of the Indian Penal Code, Chapter VI read with section

15 of The Unlawful Activities (Prevention) Act 1967, the respondents-accused would fall within the purview of 'State Prisoner' or rather be considered as State Prisoners.

4.6 Mr. Amin, the learned Public Prosecutor appearing for the applicant placed reliance on the definition of term "State Prisoner" provided in The Chambers Dictionary (Deluxe Edition) the same is reproduced herein which defines *"State Prisoner confined for offence against the state"* which on duly being considered with Chapter VI of Indian Penal Code read with Section 15 of Unlawful Activities (Prevention) Act, 1967 would substantiate the contention of the applicant that the respondents herein are state prisoners and hence they have been accordingly charge sheeted.

4.7 Mr. Amin, the learned Public Prosecutor relied upon the aforesaid submissions, submitted that the Court may quash and set aside the order dated 16.04.2016 passed by learned Additional Sessions Judge, Court No. 15, Ahmedabad passed under Exh.81 and 82 in Sessions Case No. 389 of 2013.

4.8 Mr. Amin, the learned Public Prosecutor in view of the aforesaid submissions submitted that the present writ-application has been preferred for prevention of abuse of process of law and to secure the end of justice by quashing the impugned order dated 16.4.2016.

Submissions on behalf of the respondents – accused Nos.1 to 24:-

5. Mr. S. M. Vatsa, the learned advocate appearing for the respondents submitted that the present special criminal application is not maintainable under Articles 226 and 227 of the Constitution of India inasmuch as that no fundamental rights of the writ-applicant State has been violated on account of the impugned order passed by the learned City Civil & Sessions Court, Ahmedabad discharging the accused from the charge of offence punishable under Section 130 of the Indian Penal Code.

5.1 Mr. Vatsa, the learned advocate submitted that the respondents accused are not State prisoners to arraign the

respondents in the ambit of Section 130 of the Indian Penal Code. Mr. Vatsa, the learned advocate submitted that the term "State prisoner" is not defined in the Indian Penal Code nor in any other Statute having the force of law in India. No other legislation since independence defines or categorises a person accused of any offence punishable under special laws such as UAPA, POTA, TADA, Official Secret Act, National Security Act and other preventive detention laws, Prisons Act, Prisoners Act any State Jail Manual and Rules and Regulations framed under any Jail Manual etc. Mr. Vatsa, the learned advocate further submitted that to claim that State prisoners are those who are accused committing offence under Chapter- VI of the Indian Penal Code, such a course is unwarranted by recognized principles of statutory interpretation.

5.2 Mr. Vatsa, the learned advocate submitted that as regards the claim made in para-2.3 of the memorandum of the application, it is stated that meaning cannot be supplied to words by using colourful use of language, hence terms and

phraseology such as "Enemies of State" are non-starters for the purpose of present application. Mr. Vatsa, the learned advocate submitted that the other word 'Prisoner of War" is a term which has been clearly defined in 3rd Geneva Convention and has got nothing to do with offence "Waging of War" as enshrined under Section 121, 121A, 122, 123 and 125 of the Indian Penal Code. Mr. Vatsa, the learned advocate submitted that the word used in 3rd Geneva Convention of 1949 for 'Prisoner of War' is defined under Article 47 as mercenaries.

5.3 Mr. Vatsa, the learned advocate relied on the historical legislation and documents as aids in statutory interpretation. Mr. Vatsa, the learned advocate submitted that the term "State Prisoner" was first used in the context of preventive detention laws which were in force pre-independence i.e. before 1947. Mr. Vatsa, the learned advocate relied on chronological description of definition of "State Prisoner" as contained in various ;

(a) pre independent Statute / provisions of law

(b) citation and Court judgment and

(c) documents extracted for the convenience of perusal

Mr. Vatsa, the learned advocate placing reliance on the aforesaid submitted that even "State Prisoner" would fall within the category of Article 13(3)(b) of the Constitution of India which is in respect of laws which has been explicitly repealed and not impliedly repealed.

The term "State Prisoner" is now a wholly absolute term which has been specifically recognized in 42nd Law Commission Report of India.

Any judicial proceeding which would include trial of the respondents/accused persons as "State Prisoner" will be in contravention of Article 21 of the Constitution of India as "State Prisoner" as category or group of prisoners as occurring in all the Statutes came to be specifically repealed while repealing and amending Act, 1952.

5.4 Mr. Vatsa, the learned advocate submitted that State

Prisoner as a category was allowed to exist in the Indian Penal Code is more a reflection of political realities of immediate aftermath of partition where Indian political landscape was littered with several princely States. It is well known historical fact that some of these princely States were not keen on exceeding or merging with India. It was submitted that the phraseology of Section 5 of the Indian Penal Code is also suggestive of the fact that the legislator did not wish to add any other or different meaning to "State Prisoner" then what already existed in special laws dealing with "State Prisoner".

5.5 Mr. Vatsa, the learned advocate submitted that if the legislature has not thought it appropriate to ascribe any meaning to the category of detainee recognized as "State Prisoner" in the pre independent context, the same cannot be claim by mere claim in memorandum of the captioned application. Mr. Vatsa, the learned advocate submitted that even the Acts which have been alleged to have been attributed to the respondents accused, do not attract the offence as

prescribed under Section 130 of the Indian Penal Code. Undisputedly Section 130 of the Indian Penal Code came to be added by way of a separate report and ordered by the Magistrate to be placed with the FIR which was initially lodged in respect of only Section 224 read with Sections 120B and 511 of the Indian Penal Code and Section 45 of the Prisons Act.

5.6 Mr. Vatsa, the learned advocate submitted that even the said report falsely lays basis in the explanation to Section 130 of the Indian Penal Code which is wholly inapplicable, both in law and in fact. Conspicuously, the memorandum of the captioned application does not even elude to this report adding the offence under Section 130 of the Indian Penal Code.

5.7 Mr. Vatsa, the learned advocate submitted that the writ-applicant – State has deliberately suppressed the material information about lodging of FIR dated 10.5.2013 which came to be registered as C.R. No.I-17 of 2013 with DCB Police Station, Ahmedabad by one Mr. H. A. Rathod, Police Inspector

Crime Branch, Ahmedabad city against the total nine persons which included the present respondents accused at Serial No.1, 2 and 10 as well as six other public servants, who were on duty at Sabarmati Central Jail. This is subsequent FIR which came to be lodged for the offences under Sections 217, 218, 201 read with Section 120B of the Indian Penal Code which is in respect of the same transaction in respect of which FIR dated 11.2.2013 was lodged with Ranip Police Station. Conspicuously, no charge-sheet has been filed. However, instead of coming clean on the very crucial aspect the captioned application termed the observation in para 9.4 of the impugned order as "improper observations against the investigation agency" and quashing of this observation is sought for without praying for the same.

5.8 Mr. Vatsa, the learned advocate submitted that the alleged offence committed by the respondents accused as having gone beyond the limit within which they were permitted to be at large cannot be said to be even committed

by the respondents accused. It was submitted that the respondents accused persons have been lodged inside the Sabarmati Central Jail, Ahmedabad and are in judicial custody of the learned City Civil & Sessions Court, Ahmedabad. It is submitted that the respondents/accused have never gone beyond the limits within which they were allowed to be at large and thus cannot be said to have escaped from the lawful custody at any time. Mr. Vatsa, the learned advocate submitted that it is also not the case of the writ-applicant – State that the present respondents accused persons have been charged as "State Prisoner" in the Sessions Case No.38 of 2009 and other cognate offences in which they are currently facing trial before the learned City Civil & Sessions Court, Ahmedabad.

Position of Law :-

6. While considering the question of framing of charge under Section 227 of the Code, this Court deems it fit to refer to the position of law as culled out by the Hon'ble Supreme Court which read thus :-

6.1 In the case of **Union of India vs. Prafulla Kumar Zsamal and Anr., reported in (1979) 3 SCC 4,** paragraph-10 reads thus:-

> *"(10.) Thus, on a consideration of the authorities mentioned above, the following principles emerge:*
>
> *(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;*
>
> *(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
>
> *(3) The test of determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.*
>
> *(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a*

senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

6.2 In the case of Sajjan Kumar Versus Central Bureau Of Investigation, reported in (2010) 9 SCC 368, paragraph-17 reads thus :-

"(17.) Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose

grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging

therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

6.3 In the case of State Of Tamil Nadu By Ins.Of Police Vigilance And Anti Corruption Versus N.Suresh Rajan, reported in (2014) 11 SCC 709, paragraphs 28 to 30 read thus :-

"(28.) Yet another decision on which reliance has been placed is the decision of this Court in the case of Dilawar Balu Kurane V/s. State of Maharashtra, (2002) 2 SCC 135, reference has been made to the following paragraph of the said judgment :-

"12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Sec. 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the

said Section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Sec. 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."]

(29.) We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the Court cannot act as a mouthpiece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an

application for discharge, the Court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the Court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the Court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

(30) Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat & Ors. V/s. State of Uttar Pradesh & Anr., AIR 2013 SC 52, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra V/s. State (NCT of Delhi), (2008) 2 SCC 561 :-

["11. It is trite that at the stage of framing of charge the

Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the Court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."]"

6.4 In the case of State of Rajasthan vs. Ashok Kumar Kashyap, reported in (2021) 11 SCC 191, paragraphs 10 to 17 read thus :-

"(10) By the impugned judgment and order, the High Court in exercise of its revisional jurisdiction has set aside the order passed by the learned Special Judge framing the charge against the accused under Section 7 of the PC Act and consequently has discharged the accused for the said offence. What has been weighed with the High Court while discharging the accused is stated in paragraphs 10 & 11 of the impugned judgment and

order, which are reproduced hereinabove.

(11) While considering the legality of the impugned judgment and order passed by the High Court, the law on the subject and few decisions of this Court are required to be referred to.

(11.1) In the case of P.Vijayan (supra), this Court had an occasion to consider Section 227 of the Cr.P.C. What is required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C., if not, he will discharge the accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the

matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

(11.2) In the recent decision of this Court in the case of M.R. Hiremath (supra), one of us (Justice D.Y. Chandrachud) speaking for the Bench has observed and held in paragraph 25 as under:

> *"25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of T.N. v. N. Suresh Rajan [State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709, adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)*
>
> *"29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not*

warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

(12) We shall now apply the principles enunciated above to the present case in order to find out whether in the facts and circumstances of the case, the High Court was justified in discharging the accused for the offence under Section 7 of the PC Act.

(13) Having considered the reasoning given by the High Court and the grounds which are weighed with the High Court while discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in exercise of the revisional jurisdiction and has acted beyond the scope of Section 227/239 Cr.P.C. While discharging the accused, the High Court has gone into the merits of the case and has considered whether on the basis of the material on record, the accused is likely to be convicted or not. For the aforesaid, the High Court has considered in detail the transcript of the

conversation between the complainant and the accused which exercise at this stage to consider the discharge application and/ or framing of the charge is not permissible at all.

(14) As rightly observed and held by the learned Special Judge at the stage of framing of the charge, it has to be seen whether or not a prima facie case is made out and the defence of the accused is not to be considered. After considering the material on record including the transcript of the conversation between the complainant and the accused, the learned Special Judge having found that there is a prima facie case of the alleged offence under Section 7 of the PC Act, framed the charge against the accused for the said offence. The High Court materially erred in negating the exercise of considering the transcript in detail and in considering whether on the basis of the material on record the accused is likely to be convicted for the offence under Section 7 of the PC Act or not.

(15) As observed hereinabove, the High Court was required to consider whether a prima facie case has been made out or not and whether the accused is required to be further tried or not. At the stage of framing of the charge and/or considering the discharge application, the mini trial is not permissible. At this stage, it is to be noted that even as per Section 7 of the PC Act, even an attempt constitutes an offence. Therefore, the High Court has erred and/or exceeded in virtually holding a mini trial at the stage of discharge application.

(16) We are not further entering into the merits of the case and/or merits of the transcript as the same is required to be considered at the time of trial. Defence on merits is not to be considered at the stage of framing of the charge and/or at the stage of discharge application.

(17) In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court discharging the accused under Section 7 of the PC Act is unsustainable in law and the same deserves to be quashed and set aside and is accordingly hereby quashed and set aside and the order passed by the learned Special Judge framing charge against the accused under Section 7 of the PC Act is hereby restored. Now the case is to be tried against the accused by the competent court for the offence under Section 7 of the PC Act, in accordance with law and its own merits."

Analysis :-

7. On 10.2.2013, while the first informant i.e. Govindbhai - Subedar was on duty alongwith other officers of the Sabarmati Central Jail, Ahmedabad, the first informant discovered a tunnel in yard No.4, Barrack No.4/2 of Sabarmati Central Jail Ahmedabad dug-up by the accused in connivance with each

other. The investigation with regard to the aforesaid came to be entrusted to the Crime Branch, Ahmedabad city by order dated 11.2.2013 passed by the Commissioner of Police Ahmedabad. The said complaint dated 11.2.2013 under Sections 224, 120B, 511 paragraph 12 (page-21 – Annexure-B) (true translation) read thus :

> *"Detail of First Information :*
> *The fact of this case is such that, at the afore stated time and date, the accused persons as mentioned in column no. 7 have gathered at any time during the shown hours at Central backside of Yard no. 4 and have framed a criminal conspiracy with an intention to execute the same, in collusion with one another at the backside of Water Tank, have illegally made a bunker of about 10 to 12 feets in the ground within the prohibited area of judicial custody and have tried to escape from the Jail Barrack. Hence, have committed an offence."*

8. On investigation being carried out, the names of the other accused were also disclosed. The concerned authority prepared two reports (1) adding Section 130 of the Indian Penal Code by report dated 27.12.2013 and (2) adding Section 42 of the Prisoners Act by report dated 24.9.2013. The said

report seeking addition of Section 130 in the FIR No.24 of 2013 dated 27.2.2013 (page-25 Annexure-C) (true translation) read thus :-

"To,

The Additional Chief Metropolitan Magistrate,
Additional Chief Metropolitan Court No.11,
The Kanta Ahmedabad City.

Subject: Regarding to add Section-130 of I.P.C. in the Case of CR. No. I – 24 / 2013 lodged with Ranip Police Station under Section-24 of I.P.C.

I, Police Inspector R.D.Jadeja, Crime Branch, Ahmedabad City report with due respect that,

The accused persons in connection with I-CRNo.24/2013 registered wih Ranip Police Station.. namely..

(1) Saduli Abdulkarim,
(2) Shibli Abdulkarim,
(3) HafidhusainTajuddin Mulla,
(4) Mfti @ Abubashar Abubakar Shaikh,
(5) Mo. Ismail @ Furkan Mo.Irshad,
(6) Jahid @ Javed Kutubddin @ Maji Shaikh,
(7) Nadim Abdulnaim Saiyed,
(8) Nasirahemad Liyakatali Patel,

(9) Ikbal @ Iksar Kasambhai Shaikh,

(10) Saifur Rehman @ Saifu @ Saifu Abdulrehman,

(11) Imran Ibrahim,

(12) Mo. Ansar @ Nadvi Abdulrazak Muslim,

(13) Shakib Nisharahemad Azami,

(14) M. Usman Mo. Anish Mansuri Agarbattiwala

All residing at - Yard No.-Ahmedabad Central Jail, Sabarmati.

These are the accused in the grave offence under section-120,B, 121A, 124A, 153(1)(B)(C), 302, 307, 326, 326, 427, 435, 465, 468, 471 of I.P.C. and Section-3,5,6,7 of the Explosive Substance Act and Section-10, 13, 16, 18, 19, 20, 23, 38, 39, 40 of the Unlawful Activity Act and Section-3,4 of the Damage to Public Property Act and Section-65,66 of the Information Technology Act. The accused have committed other offences alike. As per section-121(A), 124(A) of I.P.C., it is grave offence of sedition against the Government. That permission has been also received to file charge sheet against the accused from Government of Gujarat State as per section-196 of Cr.P.C. for the said offence. After the the charge sheet framed in accordance with the said permission, charge was also framed against the 14 accused persons of this case in the Court of the Spl. Designated Judge, Bomb blast cases, Sessions Court at Ahmedabad city

According to the explanatory reading of section-130 of

I.P.C., a State prisoner or prisoner of war who has been permitted to remain on parole within a certain limit in India is said to have absconded from legal custody if he goes beyond the limit within which the prisoner has been allowed to remain at liberty.

Considering the explanation, As per Section 121(a), 124(a) of I.P.C., there are serious offenses of sedition against the state. In this case, the accused were kept in Chota Chakar in Yard No.-4/2 located in Yard No.4 of the Central Jail Sabarmati. A tunnel was made by the accused in that Yard, the said tunnel is found to be sixteen and a half feet deep and twenty six feet long as per Panchnama. Thus, the accused of this case were kept in yard no.4/2. But it becomes clear that the accused illegally excavated the yard, made a tunnel and went beyond the prescribed limits of the jail.

Thus, the accused of this case are at present in Ahmedabad Central Jail under the serious charges of sedition against the State, they hatched a criminal conspiracy, made tunnel in the jail in collusion with one another with the intention of escaping from the jail, have gone out of the fixed boundary, it is found that an offence under section-130 of the I.P.C. occurred therefore, it is requested to add Section-130 of I.P.C. in this case which may be noted.

Date-27/2/2013

Sd/-illegible
(R.D.Jadeja)
Police Inspector
Crime, Branch,
Ahmedabad
Ahmedabad City."

9. Sanction came to be accorded by the appellant on 17.5.2013 (page-28 Annexure-D) under Section 196 of the Criminal Procedure Code, 1973 taking into consideration the following :-

> *"2 . WHEREAS, it transpires from the papers of investigation that, an offence came to the notice on 12" February, 2013, at Central Jail, Ahemedabad where on duty jail staff caught some under trial prisoners attempting escape through a tunnel type bunker which was dug by them, behind water tank situated behind the yard no.4. An F.I.R. has been lodged against accused prisoners at Ranip Police Station with I C.R.No. 24/2013. During the investigation of the said offence, 24 under trial prisoners have been arrested by the Crime Branch, Ahmedabad City.*
>
> *3. AND WHEREAS, there is a prima facie evidence against the above accused persons about their involvement in commission of the offences under Section 130 of Indian Penal Code, and Section 42, 45 of the Prison Act.*

4. ANDWHEREAS, sanction of the State Government under section 196 of the Criminal Procedure Code 1972 is necessary before the Hon'ble Court takes cognizance of the said offences under 130 of Indian Penal Code 1972, and Section 42, 45 of the Prison Act.

5. Now therefore, in exercise of the powers conferred by Section 196 of Criminal Procedure Code 1973, sanction is hereby accorded to prosecute the aforesaid accused in connection with Ahmedabad City Ranip Police Station I.C.R.No. 24/2013 for the offence referred to above.

By order and in the name of Governor of Gujarat."

10. During the course of investigation of the said offence, twenty-four undertrial prisoners have been arrested by the Crime Branch, Ahmedabad city and there is prima facie evidence against the above referred accused with regard to their alleged involvement in commission of offence under Section 130 of the Indian Penal Code and Section 42 of the Prisoners Act. After completion of investigation in connection with the FIR, charge-sheet was came to be filed against 24

accused which culminated into Criminal Case No.102 of 2013 before the Additional Chief Judicial Magistrate Court No.1, Gheekanta, Ahmedabad on 18.5.2013. The charge-sheet is attached with the list of 169 witnesses and 14 muddamal articles which have been seized by the concerned authority. Overlooking the aforesaid aspect, the concerned Court discharged the respondents-accused on a technical ground of the definition of "State Prisoner" that the case of the respondents/accused cannot be considered under the definition of "State Prisoner" and that the respondents not being "State Prisoners", Section 130 of the Indian Penal Code cannot be invoked against the present respondents/accused and proceeded to discharge the respondents/accused from the aforesaid charge under Section 130 of the Code. Being aggrieved by the same, the prosecution has approached this Court by filing the present writ-application.

10.1 It is pertinent to note that the respondents accused are charged with offence under Section 121A and 124A of the

Indian Penal Code as also Section 10, 13, 16, 18, 19, 20, 23, 38, 39 and 40 of the Unlawful Activities (Prevention) Act being FIR being C.R. No.I-236/2008 registered at Shahibaug Police Station, Ahmedabad for the offences punishable under Chaprter-VI of the Indian Penal Code offences against the State. The respondents accused are charged with offence under Section 130 of the Indian Penal Code. Section 130 of the IPC reads thus :-

> *"SECTION 130 : Aiding escape of, rescuing or harbouring such prisoner*
>
> *Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with* [103] *[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation. A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in [India], is said to escape from lawful custody if he goes*

beyond the limits within which he is allowed to be at large."

10.2 In the facts of the present case, it appears that the accused allegedly conspired/harboured to escape from the prison by digging up a tunnel from the premises of the jail to the outside campus which is now known as 'Surangkand'.

10.3 The accused were kept in different yards i.e. No.4 and 5 and the accused allegedly planned to escape by digging up a tunnel from the jail to the outside campus of the jail and it is further alleged that the accused conspired to escape in nearby jungle. As stated by the prosecution, the accused are well educated and some of them are having degree of Engineering and MBA and, therefore, they are conversant with many languages and techniques of engineering. It is further alleged that the accused No.1 was the Civil Engineer, who took the measurement from the distance from jail to outside jail and planned as to how long and deep the tunnel would be. It is further alleged that all the other accused got the equipments to dig-up the tunnel, cover it up if any jail officer visited, to

distract them etc., and to understand the technique of digging up the tunnel where the accused had got four books from library, and they started the work of digging up of tunnel which was done around 11.10.2012 to 12.2.2013, when during the visit of jail premises the officers found-out that a big tunnel was dug near the water-tank behind the big tree which was approximately six feet deep and around 196 feet long, which is outside the jail campus. The aforesaid resulted in addition of charge under Section 130 of the Indian Penal Code against the accused by report dated 27.2.2013 as also Section 42 of the Prisoners Act by report dated 29.4.2013.

11. In view of the ratio/principles as laid down by the Hon'ble Apex Court as referred above for exercising jurisdiction in respect of Section 227/239 of the Criminal Procedure Code and the facts of the present case the impugned order dated 16.4.2016 passed by the learned Additional Sessions Judge, Court No.15, City Sessions Court, Ahmedabad is required to be interfered with in view of the fact that the

concerned Court has digressed by going into the definition of "State Prisoner" and relied upon the Bengal Regulation-3 of 1818 though repealed and proceeded on the footing that the case of the present respondents-accused do not fall under Bengal Regulation-III since "State Prisoner" is not defined in Indian Penal Code.

11.1 At this stage, this Court is not required to consider whether the case of the respondents-accused fall within the definition or explanation of "State Prisoner" as the same would be subject matter of evidence. At this stage, it is only required to consider from the evidence on record whether a prima facie case is made out against the respondents-accused. In view of this Court, the concerned Court has only dealt with the definition of "State Prisoner" on demurer without assessing the evidence on record for coming to a prima facie conclusion and without giving an opportunity to the prosecution to establish whether the respondents-accused are "State Prisoners" and the concerned Court has proceeded to discharge

the respondents-accused.

11.2 The respondents-accused could not have been discharged from the charges and the allegations leveled against the respondents-accused herein, at this stage, without examining the evidence as regards the "State Prisoner". The Sessions Court could not have held at this stage i.e. at the prima facie stage, when the charge is to be framed under Section 227 of the Criminal Procedure Code that the accused are not "State Prisoners" relying on the definition in Bengal Regulation-3. When the Statute does not defer the "State Prisoner" the same would be subject matter of evidence at the trial. The contention of the respondents-accused that continuation of charge under Section 130 of the Code would result in sessions trial. The said contention raised by the respondents-accused does not weight with this Court.

12. In view of above, this Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution

of India read with Section 482 of the Code the impugned order dated 16.4.2016 passed by the learned Additional Sessions Judge, Court No.15, City Sessions Court, Ahmedabad, below Ex.81 and 82 in Sessions Case No.389 of 2013 whereby the learned Judge has discharged the respondents – accused from the charges levelled against the respondents-accused is quashed and set aside. It is however, clarified that it will be open for the respondents-accused to take all the contentions as available under the law at the time when the evidence is led at the time of trial. The concerned Court may decide the same independently in accordance with law.

13. The present writ-application stands allowed accordingly. Rule is made absolute to the aforesaid extent. Consequently the Criminal Misc. Application No.1 of 2022 stands disposed of.

(VAIBHAVI D. NANAVATI,J)

K.K. SAIYED