

(2010) 10 GUJ CK 0146
In the Gujarat High Court

Case No : Criminal Misc Application No. 12240 of 2010

Amitbhai Anilchandra Shah

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 29-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161, 164, 164, 439
Penal Code, 1860 (IPC) — Section 120(B), 120B, 201, 201, 302

Citation : (2011) 52 GLR 194

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : Ram Jethmalani, N.D. Nanavati and Kunan B. Naik, for the Appellant; K.T.S. Tulsi Y.N. Ravani, for Respondent 1, P.K. Jani, Public Prosecutor for Respondent 2 and Mukul Sinha, for Original Complainant, for the Respondent

Judgement

Rajesh H. Shukla, J.—The present application has been filed by the applicant for grant of regular bail u/s 439 of the Code of Criminal Procedure after the charge sheet is filed.

2. The applicant-accused is charged with having committed offences under Sections 365, 368, 302, 201 and 120B of IPC for which FIR, being RC BS1/S/2010/0004, has been registered with C.B.I., Mumbai (Criminal Case No. 5 of 2010 before the learned Magistrate).

3. Learned Sr. Counsel Mr. Ram Jethmalani appearing with learned Sr. Counsel Mr. ND Nanavati with learned advocate Mr. Kunan Naik for the applicant submitted that the applicant had preferred Criminal Misc. Application No. 137 of 2010 before the Special Judge (CBI) at Mirzapur, Ahmedabad which came to be rejected. Learned Sr. Counsel Mr. Ram Jethmalani submitted that it only displayed the lack of judicial balance and the learned Special Judge has not considered the material placed on record and has made observations which are not supported by any material and evidence and, therefore, the present application has been filed.

4. Learned Sr. Counsel Mr. Ram Jethmalani has referred to the charge sheet and submitted that, as it transpires from the charge sheet, the case relates to conspiracy with regard to Sohrabuddin fake encounter by the Gujarat Police as well as the Andhra Pradesh Police. He submitted that as it is stated in the brief facts of the case in the charge sheet itself, the investigation revealed that during the year 2004, the criminal gang of Sohrabuddin had become very active in the areas of Rajsamand, Nathdwara, Sukher and Udaipur districts of Rajasthan. The said areas are known for marble mining and trade. Learned Sr. Counsel Mr. Ram Jethmalani further emphasised referring to the fact that, as stated in the charge sheet, Sohrabuddin gang was one group of gang and as it is further stated, one Hamid Lala was very active in this area and protection was provided to the marble traders in return for money. Therefore, Sohrabuddin gang wanted to take all the share of protection money by getting rid of Hamid Lala gang. Sohrabuddin gang realized that their image had taken a beating and they have to posture actively and in a more aggressive and violent manner to regain their lost image and create fear among the marble traders.

5. Learned Sr. Counsel Mr. Ram Jethmalani submitted that this is the background in which the alleged conspiracy is said to have taken place between the Gujarat and Rajasthan police to eliminate Sohrabuddin, which led to filing of the present case.

6. The present applicant accused is the ex-Home Minister of the State (A-16) arraigned for the alleged conspiracy which is not borne out from any material and evidence. Learned Sr. Counsel Mr. Ram Jethmalani strenuously submitted that it is no less than a figment of imagination and fiction story created and concocted by the respondent-CBI for ultimate political motive.

7. Learned Sr. Counsel Mr. Ram Jethmalani submitted that, initially, the investigation was made by the Gujarat Police under the supervision of the Hon"ble Apex Court and the Government itself has accepted that it was a fake encounter and reported before the Court. However, the investigation came to be transferred to the CBI for the reason that the Gujarat Police was not able to identify the seven personnel of the police force of Andhra Pradesh State when Sohrabuddin and his wife were accompanied by seven police personnel of Andhra Pradesh Police. He emphasised that, though, as it is stated, admittedly, Sohrabuddin and his wife were accompanied in a Tata Sumo jeep by the personnel of the Andhra Pradesh Police as well as Gujarat Police, there is no investigation made in that regard with regard to involvement of the police personnel of Andhra Pradesh because the State is ruled by the Congress-led government.

8. Learned Sr. Counsel Mr. Ram Jethmalani submitted that even after the order was passed, and till the charge sheet is filed by the CBI, there is no clue. He emphasised that what was considered as not a proper investigation by the Gujarat police, the CBI, having taken over the investigation, till the charge sheet is filed, has not even made an attempt to make any further progress which

suggests about the investigation with political motive, which will be further demonstrated while referring to the evidence on the basis of which the applicant is sought to be made an accused for the alleged conspiracy on mere ipse dixit.

9. Learned Sr. Counsel Mr. Ram Jethmalani submitted that one more aspect which is required to be stated is that one Sr. IPS officer Ms. Geeta Johri who was investigating the case had gone to Hyderabad and, as stated in detail, as there was no response and co-operation from the local police or local persons, she could not make any headway. However, there is no further attempt made by CBI, though it is a central agency, and the same Ms. Johri has been now sought to be arraigned, for which she has filed a curative petition before the Hon"ble Apex Court specifically alleging about the dishonest investigation by the CBI and pressurizing her to nail the present applicant which she has specifically stated before the Hon"ble Apex Court about such pressures.

10. Learned Sr. Counsel Mr. Ram Jethmalani submitted that it is in this background he would refer to the evidence in detail, and referring to the averments in the petition as well as the rejoinder, he submitted that as contended, the main offence alleged against the applicant is kidnapping and killing of Sohrabuddin and his wife. The CBI has not alleged any overt act or presence of the applicant even remotely, and to implicate the accused he has been alleged to have been involved in conspiracy with the other co-accused based upon inadmissible hearsay, unreliable and concocted evidence of the witnesses, which have been stated in detail in the rejoinder, namely, two Patel brothers of M/s. Popular Builders, Ramanbhai Patel and Dashrathbhai Patel, who are themselves the accused in Criminal Case No. 1124 of 2004, who are cited as witnesses in the charge sheet.

11. Learned Sr. Counsel Mr. Ram Jethmalani referred to the statements and submitted that even considering the statements of both these persons u/s 161 and 164, it will reveal that the statements of these two persons do not implicate the applicant accused as, what has been referred to in audio recording of the conversation between the two other accused is with regard to settlement of their own dispute in connection with huge loan amount of the bank which has been defaulted by them.

Learned Sr. Counsel Mr. Ram Jethmalani submitted that though the payment is said to have been made, for which a kachha account for such payment is maintained, as admittedly stated, but on one of the dates on which the payment is said to have been made to Ajay Patel and Yashpal Chudasma has not tallied which has also been observed by this Court while deciding the anticipatory bail applications of Mr. Ajay Patel and Mr. Yashpal Chudasma. Mr. Ajay Patel was abroad at that time and therefore this itself suggests about the maneuvering and falsehood by the investigating agency. He has also made a reference to the summary of submissions before the Special Court produced on record and the submissions at pages 322 to 326.

12. Further, the statement of the brothers of Sohrabuddin are referred, but the statement before the Gujarat Police and the one recorded by the CBI are verbatim the same adding a few paragraphs. Learned Sr. Counsel Mr. Ram Jethmalani submitted that even these statements do not implicate the applicant with the main offence of kidnapping and murder.

13. Learned Sr. Counsel Mr. Ram Jethmalani submitted that the charge sheet further refers to the statements and material which is also produced in para 3 of the rejoinder referring to the statements of different witnesses. He referred to the statements of

(a) Rubabuddin Sheikh (PW 1)

(b) Nayamuddin Sheikh, brother of Sohrabuddin (PW2)

(c) Ramanbhai Patel (PW 60)

(d) Dashrathbhai Patel (PW 67)

(e) V.L. Solanki (PW 163)

(f) Zahid Kadri (PW 193)

(g) Murtuza Khan (PW 194)

(i) sting operation purported to be carried out by Ramanbhai Patel and Dashrathbhai Patel

(j) audio recording of conversation alleged to have taken place between two co-accused, namely, Dr N.K. Amin and N.V. Chauhan.

14. Learned Sr. Counsel Mr. Ram Jethmalani submitted, as stated in the written submissions produced on record, that the charge which links the present applicant accused with the offence of conspiracy is that the Gujarat police had stage-managed the Popular Builders shoot out case in order to create a false case against Sohrabuddin to get him and kill him. However, Learned Sr. Counsel Mr. Ram Jethmalani submitted that in that case, being Criminal Misc. Application No. 1124 of 2004, the name of Sohrabuddin never cropped up as an accused in the investigation till after his death and even as per the case of the prosecuting agency CBI, the applicant was not in the picture, and in December, 2005, after the death of Sohrabuddin, it is alleged that the present applicant and the Gujarat police pressurized Patel brothers to testify in that case, though, in fact, the transcript and other evidence including their own statements suggest that their meeting with the co-accused one Ajay Patel and Yashpal Chudasma was for settlement of their own cases regarding huge default and defalcation and PASA and there is no reference to the Sohrabuddin case.

15. Therefore, the submission that both the witnesses, Ramanbhai Patel and Dashrathbhai Patel, were approached is not even suggested by the CBI that the present applicant had made any effort or any direct contact, but it was through other two co-accused who have, on the contrary, suggested that it was for a

different settlement altogether. In any case, it would be a hearsay evidence so far as the applicant is concerned as to what transpired between the two co-accused and the witnesses.

16. Learned Sr. Counsel Mr. Ram Jethmalani also submitted that the meetings, with the details as stated in the charge sheet as well as the transcript with regard to Ajay Patel (A-17) and Yashpal Chudasma (A-18), therefore, has no relevance for the purpose of the present applicant. In fact, the transcript and the statements of both the witnesses do not even suggest any pressure, but in fact it refers to the conversation when the other two co-accused are said to have advised. He further submitted that Ramanbhai Patel and Dashrathbhai Patel, as it is revealed in this conversation, were on the contrary desperate to see that the case regarding their own huge default and defalcation of the bank loans are put an end to and also in the Popular Builders shoot out case where they were ultimately found to be the accused. Therefore, they have fallen prey to CBI who wanted to falsely implicate the present applicant and others. Learned Sr. Counsel Mr. Ram Jethmalani, therefore, submitted that if the statements of both the witnesses are examined, even if it is accepted, it would not suggest about any involvement of the present applicant.

17. Learned Sr. Counsel Mr. Ram Jethmalani further submitted that the main witness for the respondent-CBI is Azam Khan who is also an accused in the Popular Builders case and the statements recorded by CBI u/s 161 and 164 do not involve the present applicant and in one statement he is said to have stated with regard to Abhay Chudasma, but there is no mention of the present applicant in his statement both u/s 161 and 164 of CrPC, wherein it is alleged that Rs. 50 lakhs was offered to Naimuddin for not pursuing the matter before the Hon'ble Apex Court. Learned Sr. Counsel Mr. Ram Jethmalani submitted that this very witness has subsequently filed an affidavit before the Metropolitan Magistrate specifically alleging that CBI had got a false statement recorded by him which Learned Sr. Counsel Mr. Ram Jethmalani has pointedly referred to and submitted that this refers to the pressure and the method of investigation with ulterior motive to falsely implicate the applicant and others.

18. Similarly, Learned Sr. Counsel Mr. Ram Jethmalani submitted that as stated by Azam Khan, the call by Chudasma (A15) to Nayamuddin was made in his presence, but said Azam Khan has not made any mention referring to the present applicant.

19. Learned Sr. Counsel Mr. Ram Jethmalani also referred to the statement of other two witnesses Rubabuddin Sheikh and Nayamuddin Sheikh referring to the written submissions and submitted that the statement of both the witnesses recorded by the Gujarat Police and CBI is verbatim the same, but subsequently, the paragraph is added as stated in the retracted statement of Azam Khan.

20. Learned Sr. Counsel Mr. Ram Jethmalani therefore submitted that for the alleged involvement of the applicant in the larger conspiracy and/or extortion,

the respondent-CBI has relied upon the statements of Patel Brothers which are not reliable and is only hearsay. Further, even if it is read, it refers to a different transaction than killing Sohrabuddin and his wife and there is no link to the present applicant suggested by such statements. Learned Sr. Counsel Mr. Ram Jethmalani submitted that for the purpose of the case regarding Sohrabuddin and his wife, the CBI has in fact accepted the statements recorded by the Gujarat Police of the brothers of Sohrabuddin and thereafter they have added statements of Patel Brothers to improvise to support their theory of false implication. He emphasised and submitted that it is evident that they were desperate to get out of their own dispute and they could have fallen prey. Learned Sr. Counsel Mr. Ram Jethmalani submitted that even then, taking the evidence of these witnesses as it is, the involvement of the applicant accused is not suggested and what has been referred to by referring to the conversation between the co-accused and others is a hearsay evidence and recording of the audio tape also has no evidentiary value.

21. Similarly, he submitted, referring to other evidence with regard to the conversation between the two accused, namely, Dr. NK Amin and Mr. NV Chauhan, which is said to have been a recorded conversation in the jail, is highly unbelievable. Learned Sr. Counsel Mr. Ram Jethmalani submitted that how it could have been recorded, that itself is making it unreliable. He submitted that even if it is believed that such conversation was recorded, still, the transcript would show that there is no reference to the present applicant and it is stated that NV Chauhan informs Dr. NK Amin that he understood that other co-accused Mr. Vanzara has received instruction from the higher-up, viz. the present applicant, which is again a hearsay and unbelievable and in any case it is a conversation or a statement between the co-accused not admissible in evidence.

22. Learned Sr. Counsel Mr. Ram Jethmalani referred to the statement of Ramanbhai Patel and Dashrathbhai Patel and submitted that it is required to be considered that both these persons had filed a petition before the High Court of Gujarat being Special Criminal Application No. 1749 of 2005 and an application for amendment being Criminal Misc. Application No. 14815 of 2005 was also filed on 16.12.2005 and till then there is not a whisper or allegation about the present applicant. Further, in this very petition in the amendment it has been stated that they were made to sit in the police station for 3-4 hrs. on 14.12.2005 as well as on 15.12.2005, whereas in the statement given before the CBI which is at page 162, it is stated that they were in the ATS office where the statement was recorded and the phone call came on the cell phone of Mr. Vanzara and he had told the witnesses that the accused was on line and the applicant accused is said to have directed the witness that he should give the statement to Mr. Vanzara, otherwise he would be in trouble. Learned Sr. Counsel Mr. Ram Jethmalani submitted that in the original FIR filed they have alleged with regard to the firing at their office by unknown person. The petition was withdrawn and the withdrawal of the petition on 16.12.2005 was even objected by the Government Pleader and the petitioner has not stated anything with regard to this aspect

which is taken place one day prior to withdrawal of the petition which again clearly suggests that such statements are concocted and the statements are not at all reliable.

23. Learned Sr. Counsel Mr. Ram Jethmalani submitted that, similarly, the statement of Sohrabuddin which is also relied upon, also refers to the conversation with Ms Johri. However, as per the version of CBI as well as the statement of Ms. Johri herself, she has been threatened by CBI to fix her unless she deposes against the present applicant and therefore she has filed a curative petition before the Hon'ble Apex Court. This itself would suggest that such hearsay evidence of Sohrabuddin which Ms. Johri totally denied and has, on the contrary, talked about the pressure put upon by CBI threatening to fix her unless she depose against the applicant would further make the political motive clear with which the entire investigation has been carried out.

24. Learned Sr. Counsel Mr. Ram Jethmalani submitted that the so-called evidence in the form of statement of the witnesses or audio video recordings cannot be the basis of implicating the applicant as the analysis of evidence would clearly suggest that in fact it is a case of no evidence, but it is only a political victimization.

25. Learned Sr. Counsel Mr. Ram Jethmalani submitted that one other officer Shri O.P. Mathur has also written a letter pointing as to how the CBI has threatened to falsely implicate the applicant failing which he will be arrested which is also a part of the record.

26. Learned Sr. Counsel Mr. Ram Jethmalani submitted that Mr. Solanki had a long pending dispute with regard to his promotion and therefore he has made this statement which has no corroboration and in fact it has been falsified by Ms. Geeta Johri.

27. Learned Sr. Counsel Mr. Ram Jethmalani submitted that one further example of the dishonest and unfair investigation with ulterior motive is further demonstrated for which he referred to the report of the CBI which reads as under:

Shri NV Chauhan: I am confident that this person can be made approver who will be made instrumental in making the case against Amit Shah water tight for the murder of Kausar Bi. However this would only be possible to be done after the arrest of Amit Shah.

The only caveat here is that this person [NV Chauhan] is an accused, but my appreciation is that he will be readily usable as an approver once Shri Shah is arrested.

I concede that the extremely damaging and credible evidence of Police Inspector Shri VL Solanki can have a support from Shri Raigar and Ms Johri immediately after Shri Shah is arrested and his overbearing personal influence on these officers is thereby removed. I feel that Shri Raigar and Ms Johri will have all

incentive to co-operate and speak the truth at that stage, when confronted with the material evidence against them having the potential to land them in serious trouble in the case. Conversely, unless Shri Amit Shah is arrested, it is futile to endeavour to achieve the same outcome. I have tested it before.

Conclusion:

I request permission to arrest Shri Amit Shah and Shri PC Pande. I also request permission to arrest S/Shri GC Raigar, Jitendra Yadav, and Ms. Geeta Johri if they do not co-operate and refuse to divulge the truth.

28. Learned Sr. Counsel Mr. Ram Jethmalani, therefore, submitted that this internal report of the CBI itself, which was in fact traced while observing one TV Channel, and on that basis it has been found about the dishonest method of investigation. Learned Sr. Counsel Mr. Ram Jethmalani submitted that this report speaks for itself that such powers of investigation by the investigating agency given by the direction of the Hon''ble Apex court has been abused and misused resulting in a mockery of justice. He has referred to and relied upon the judgment of the Hon''ble Apex Court reported in Rajiv Ranjan Singh "Lalan" and Another Vs. Union of India (UOI) and Others,

29. Learned Sr. Counsel Mr. Ram Jethmalani, therefore, referring to the aforesaid discussion on the evidence, submitted that the court is required to consider the nature and character of evidence and it is capable of being misunderstood. He submitted that the court has to consider whether, on the basis of such evidence, the present applicant could be denied bail and in fact it would be a case for acquittal. He submitted that the jurisdiction of this Court for deciding a bail application is not required to be much elaborated though he emphasised that in a quashing petition it would be a different case altogether where not a word would be added or subtracted from the complaint, which is not the case while deciding the bail application.

30. Learned Sr. Counsel Mr. Ram Jethmalani emphasised and submitted that the case of the prosecution has to be examined on the probabilities and the burden of the accused is very less for the purpose of bail. In support of his submission, he has referred to and relied upon the judgment of the Hon''ble Apex Court reported in the case of Bhagirathsinh Judeja Vs. State of Gujarat,

31. Learned Sr. Counsel Mr. Ram Jethmalani submitted that therefore the court has to examine with reference to the state of evidence when considering the alleged involvement of the applicant accused in the conspiracy. He submitted that there is no direct evidence and the conspiracy with regard to killing of Sohrabuddin and his wife has therefore to be considered on the basis of circumstantial evidence as there is no other evidence. He emphasised and submitted that there has to be an evidence of such nature which can be said to be cogent and convincing for suggesting an inference about the involvement of the accused in the conspiracy. He further emphasised that before a person can be accused of involvement in a conspiracy, the well accepted criteria that it has

to be established about the crime or the meeting of mind for the purpose of doing the act and there is no evidence to link the applicant accused or even remotely suggesting about his involvement in killing of Sohrabuddin and his wife.

32. Learned Sr. Counsel Mr. Ram Jethmalani emphasised that in fact the State Government has accepted before the Hon'ble Apex Court about the fake encounter and therefore the Court may consider when the evidence against the accused is so concocted, unreliable and even the genuineness of such audio-video recording can be doubted whether it can be said to be a sufficient evidence suggesting the involvement of the accused in the conspiracy. He emphasised and submitted that as suggested by the theory of the prosecution CBI with regard to extortion or conspiracy for extortion leading to the killing of Sohrabuddin, there is no case, there is no evidence and in fact there has to be some semblance of evidence or instance where the applicant can be said to have been indulging in such activity. CBI has not been able to throw any light or collect any evidence even when the charge sheet is filed. Learned Sr. Counsel Mr. Ram Jethmalani therefore submitted that it is nothing but a political victimisation merely because he was the Home Minister of an opposition party ruling the State which has led to such fabricated stories.

33. Learned Sr. Counsel Mr. Ram Jethmalani submitted that therefore the present application for bail is required to be considered on the basis of well accepted principles regarding grant of bail for which he referred to and relied upon the judgment in the case of Bhagirathsinh s/o Mahipatsinh Jadeja (supra). He further submitted that now to oppose the bail, with a view to see that the applicant accused is not released, what has been harped and alleged is tampering with the evidence. However, he, referring to the judgment of the Hon'ble Apex Court in the case of State (Delhi Administration) Vs. Sanjay Gandhi, emphasised that it has been observed that the fact that the witnesses had turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent, meaning thereby, it must be established or shown that there is some connection in the witnesses turning hostile and the applicant having any kind of involvement. He further submitted that mere preponderance of probabilities that the accused has tampered with the witnesses will not be sufficient as it has to be considered by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice and therefore it is necessary for the prosecution in order to succeed in an application for cancellation of bail.

34. Learned Sr. Counsel Mr. Ram Jethmalani submitted that it may be considered that when the statements of such witnesses are recorded, the applicant was a Minister where he could have wielded some influence, and when the statements are still recorded, there is no question of interfering or influencing the witnesses. He submitted that the retraction which has been relied upon suggesting the influence by the applicant may not be believed as at that time the applicant was in jail and admittedly there is no reason to interfere particularly when he is in jail

and there is no connection for the said purpose. He further submitted that in fact a person may make an attempt for retraction of the statement of witnesses if there is anything against him, but as stated above, the statement as it is, most of them do not even refer to the name of the applicant and therefore there is no reason for him to even make any such effort.

35. Learned Sr. Counsel Mr. Ram Jethmalani also referred to the judgment of the Hon''ble Apex Court reported in Bhagirathsinh s/o Mahipatsinh Jadeja (supra) and emphasised the observations made in Para 5 which reads as under:

...If there is no prima facie case there is no question of considering other circumstances. But even where a prima facie case is established, the approach of the court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence....

36. Learned Sr. Counsel Mr. Ram Jethmalani submitted that the detailed reference to the submissions and the affidavit-in-rejoinder has been made which may be considered.

37. Learned Sr. Counsel Mr. KTS Tulsi for the respondent-CBI pointedly referred to the observations made by the Hon''ble Apex Court in its judgment and order by which the investigation was handed over to the CBI and submitted that it was not merely a failure to identify the personnel of the Andhra Pradesh Police which has led to transfer of the investigation, but the Hon''ble Apex Court has given six reasons and one of the same was that the motive for the offence has not been investigated and there was an attempt to destroy human witnesses which led to the order of investigation by the Hon''ble Apex Court. He therefore submitted that for the purpose of a fair and impartial investigation, it has been handed over to the CBI and it is in this background, the investigation has been made and the charge sheet has been filed with substantial evidence including the statements u/s 164 of CrPC of the witnesses, which would prima facie establish the case against the applicant. Learned Sr. Counsel Mr. Tulsi also submitted to emphasise that earlier the bail granted to Dr. NK Amin had been cancelled by the Hon''ble Apex Court and the factors which are relevant for the purpose of granting bail would always be a reasonable apprehension of tampering/influencing the witnesses has to be considered. Learned Sr. Counsel Mr. Tulsi submitted that the past experience has clearly established that the witnesses have retracted at the instance of the applicant and, therefore, only on this count, the application may not be entertained.

38. Learned Sr. Counsel Mr. Tulsi submitted that the case of the prosecution is that the applicant is part and parcel of the larger conspiracy in the killing of Sohrabuddin, his wife and Tulsiram Prajapati and also the conspiracy with regard to extortion of money. He submitted that the Gujarat Police and Rajasthan Police were in touch with regard to Sohrabuddin and Hamid Lala gangs. He submitted

that even before the threat to the marble traders was given, the conspiracy was already there. He emphasised and submitted that the present applicant (A-16) had presided over the extortion syndicate and Sohrabuddin was his aid including other police persons.

39. Learned Sr. Counsel Mr. Tulsi, therefore, submitted that the gravity of the offence is required to be considered in background of these facts. He submitted that after the murder of Hamid Lala, Sohrabuddin refused to part with the extortion money with others and he has been eliminated, leading to the alleged case for the fake encounter and the involvement of the present applicant and others. Learned Sr. Counsel Mr. Tulsi submitted that as referred hereinabove, the investigation was handed over to CBI and in fact, as per the communication from the Government of Rajasthan, the phones of Sohrabuddin were intercepted by one of the co-accused, Mr. M.N. Dinesh unauthorisedly.

40. Learned Sr. Counsel Mr. Tulsi tried to emphasise on the aspect of conspiracy and involvement of the applicant referring to the statement of Rubabuddin and submitted that one of the co-accused Mr. Chudasma had pressurised for withdrawal of the petition and offered Rs. 50 lakhs and stated that the name of the present applicant is also referred that he was angry and he can get both the witnesses eliminated. He also referred to the statement of Nayamuddin on the same line.

41. Learned Sr. Counsel Mr. Tulsi also referred to the statement of one Azam Khan recorded u/s 161 of CrPC dated 22.2.2010 to emphasise that Sohrabuddin was indulging in extortion from the businessmen, builders etc. which is recorded in detail. He also referred to the confessional statement recorded u/s 164 before the Metropolitan Magistrate, Mumbai.

42. Learned Sr. Counsel Mr. Tulsi also referred to the statement of Zahid Kadri dated 21.7.2010 and submitted that this witness has also stated about other co-accused Mr. Rajkumar Pandian asking him to give the statement implicating Sohrabuddin and others in the incident of firing at the office of Ramanbhai Patel and Dashrathbhai Patel. The co-accused Mr. Pandian is also said to have referred the name of the present applicant-accused that he has the permission to encounter by the present applicant. He has also stated that he was pressurised to withdraw the petition but he did not withdraw.

43. Similarly, Learned Sr. Counsel Mr. Tulsi referred to the statement of one Murtuzakhan on the same line as well as that of Noor Mohd. Ghogari.

44. Further, he has also referred to the statement of Mahendrasinh Jhala also recorded u/s 161 of dated 11.3.2010 and also the statement recorded u/s 164 of CrPC. Learned Sr. Counsel Mr. Tulsi emphasised that it also refers to the name of the applicant that the other co-accused Abhay Chudasma had stated to him that he has received a message from the applicant for giving an affidavit against the CBI.

45. Learned Sr. Counsel Mr. Tulsi also referred to the statement of Azam Khan recorded u/s 164 of CrPC before the Judicial Magistrate (First Class), Vashi, Dist. Thane, dated 16.10.2010 and submitted that he has narrated as to what had transpired. He emphasised that the dates are relevant that after his statement was recorded and pending hearing of the bail application before the Special Judge, CBI, the witness Azam Khan was picked up by the officers of Gujarat police and was kept in a hotel and the statement was recorded u/s 164 by the CBI as to how he was taken and the affidavit was taken from him. Therefore, he submitted that it shows tampering with the evidence or witnesses and therefore the present application may not be entertained.

47. Learned Sr. Counsel Mr. Tulsi further referred to the statement of P.A. to Ms. Johri and how she had also tried to change the note at the instance of the applicant. Learned Sr. Counsel Mr. Tulsi has passed on the said note to the Court and also has referred to the document to emphasise that she was trying to tamper with it by correcting the words "certain agencies" instead of "State Government".

48. He also submitted referring to the background regarding interrogation of Sylvester and Tulsiram Prajapati that on one hand it has been stated that she desires to interrogate and on the other it is also stated that Tulsi was encountered.

49. Learned Sr. Counsel Mr. Tulsi submitted that the circumstances are also required to be noticed that the co-accused Mr. Vanzara was transferred to the Border Range about that time and he could not have been there unless orders of transfer were passed by the applicant as the Minister in-charge.

50. He has also referred to the statement of Mr. Raigar dated 26.7.2010 who was a senior officer of the Gujarat Police and who had stated about the pressure put upon by the applicant and as he was not happy he was transferred.

51. Learned Sr. Counsel Mr. Tulsi submitted that this evidence is sufficient to suggest the involvement of the applicant-accused in the conspiracy and it also suggests the pressure exerted by the applicant, and if he is released on bail, it would allow him putting the thumb at the system. He also referred to the aspect that one of the co-accused Dr. N.K. Amin has been transferred to another jail and some recording has also been made. Learned Sr. Counsel Mr. Tulsi submitted that these are the circumstances suggesting involvement of the applicant and it could not be a matter of chance.

52. Learned Sr. Counsel Mr. Tulsi, therefore, submitted that in light of this evidence suggesting prima facie case against the accused and also his attempts of tampering with the witnesses, the present application may not be entertained. He has submitted that the principles regarding grant of bail are well settled and one of the relevant considerations or parameters is the prima facie case and the apprehension of the applicant tampering with the witnesses.

53. In support of his submission, he has referred to and relied upon the judgment of the Hon''ble Apex in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, and has emphasised the observations made in Para 8, 9 and 10. He submitted that the period of incarceration already undergone is not the consideration. He submitted that for grant of bail, the circumstances/factors which are required to be considered are stated in Para 11 viz.

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

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

(c) Prima facie satisfaction of the court in support of the charge.

He also referred to the observations made in Para 18 to emphasise that inducement to the witnesses is also a relevant factor.

54. Learned Sr. Counsel Mr. Tulsi has also referred to the judgment of the Hon''ble Apex Court in the case of State Vs. Amarmani Tripathi, again referring to the criteria/parameters for grant of bail. He emphasised, referring to the observations in Para 18 with regard to the relevant criteria or parameters for grant of bail and also the observations made in Para 26, 27 and 28 as well as 31 to emphasise that the prima facie case as well as the apprehension of the accused tampering with the witnesses has to be considered.

55. Learned Sr. Counsel Mr. Tulsi submitted that the applicant was cocking a snook at the law as the entire State machinery was at his beck and call.

56. Learned Sr. Counsel Mr. Tulsi has also referred to and relied upon the judgment of the Hon''ble Apex Court reported in the case of Anil Kumar Tulsyani v. State of UP and Anr. (2006) 9 SCC 425 He has also referred to the judgment in the case of Dr. Narendra K. Amin v. State of Gujarat and Anr. reported in AIR 2008 SCW 3268, and also in the case of Dinesh M.N. v. State of Gujarat reported in AIR 2008 SCW 3677, with much emphasis as both the above judgments also refer to the same case.

57. Learned Counsel Mr. Mukul Sinha has requested that he may be heard, which was objected by learned Sr. Counsel Mr. Nanavati for the applicant stating that Criminal Revision Application No. 444 of 2010 was filed for the same purpose for joining party, which has not been granted, and he has been permitted to file the written submissions at the time of hearing of the bail application. Therefore, he has made the written submissions and also, in spite of reservations by learned Sr. Counsel Mr. Nanavati for the applicant, learned Counsel Mr. Sinha was permitted to address the Court to supplement the submissions made on behalf of the prosecuting agency, CBI.

58. Learned Counsel Mr. Sinha referred to the statement of one Vijay Kumar

Rathod, another co-accused, at page 60 and referred to the statement at p. 61. He has submitted that he has stated as to how the dead body of Kausar Bi was disposed of. He has also referred to the details of the telephone call record between 23rd & 29th which is produced on record and submitted that the details of the telephone calls is a direct evidence, though corroborative evidence. He referred to the judgment of the Hon''ble Apex Court in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, and pointedly referred to Para 15 on this aspect that it can be considered.

59. He has also referred to the judgment of the Hon''ble Apex Court reported in the case of Narendra K. Amin (Dr. v. State of Gujarat and Anr. (2008) 13 SCC 584 , and observations made with regard to the telephone call details between 25.11.2005 to 29.11.2005 and referring to the details of these mobile phone calls, he submitted that one of the numbers is of the applicant referring to 15 calls. He has therefore submitted that this is one of the circumstances that a Minister is talking to a Dy.S.P. of the Crime Branch, though the protocol would demand that such frequent calls would not be made. He emphasised that the applicant was the Home Minister and the said co-accused was working in the Department under him and therefore these circumstances would point a finger regarding the involvement of the applicant accused. He emphasised that it establishes the nexus in the conspiracy.

60. He referred to the letter of Rubabuddin dated 19.10.2010 at Annexure-C in his compilation and submitted that it refers to the name of the applicant referring to the same alleged interference to withdraw the case before the Hon''ble Supreme Court for Rs. 50 lakhs which is also referred to in the statement. Learned Counsel Mr. Sinha, therefore, submitted that it is a reasonable apprehension that the applicant would influence the witnesses if released and therefore the present application may not be entertained considering the nature of offences also.

61. Learned Counsel Mr. Ravani appearing for the CBI submitted that pending hearing of this application a supplementary charge sheet is filed and therefore the applicant should approach the Special Court for which he has referred to the previous application of the co-accused. He has also referred to the judgments of this Court rejecting the bail applications of other co-accused Mr. N.V. Chauhan, Rajkumar Pandian, Rajendra Jain, Dinesh M.N., N.V. Chauhan and Ors., and submitted that these very submissions have been considered and at this stage the court is not required to appreciate or consider the evidence in detail. He also submitted that Azam Khan has also retracted the statement. He has also referred to the letter by the wife of co-accused Dr. N.K. Amin stating that as there was a threat, admittedly, he has been shifted to another jail.

62. Learned Counsel Mr. Ravani that submitted that the letter of Mr. O.P. Mathur is not forming part of the charge sheet and he could have issued such letter to favour the applicant. Similarly, he submitted that the curative petition filed by Ms. Johri is before the Apex Court and to save herself and to expunge the

remarks she might have made the application which cannot be considered.

63. Learned Sr. Counsel Mr. N.D. Nanavati appearing for the applicant, in rejoinder, submitted that the case is built up on the material without any evidence. He emphasised that there is no evidence against the applicant and he has been falsely implicated after the order of the Hon''ble Apex Court transferring the investigation to the CBI dated 12.1.2010. He submitted that it refers to a pre-arranged script that as per the FIR produced at Annexure-A, an offence of conspiracy for kidnapping and abducting has been registered, and as submitted earlier, he was called just one day earlier where he could not remain present and thereafter, after he was interrogated, straightway he was arrested and the charge sheet running into pages was filed. This itself suggests the manner in which he was called for interrogation and immediately thereafter he was arrested and the charge sheet was kept ready, which itself suggests pre-determination.

64. He has also referred to the directions of the Hon''ble Apex Court and also the observations in Para 66 for that purpose and tried to submit that after that the first statement was recorded, which is highlighted, is that of Rubabuddin and he is said to have been informed by his brother Nayamuddin about the pressure applied, which is a hearsay. He submitted that the statement of Rubabuddin is recorded on 18.2.2010 after the investigation was handed over to CBI.

65. Learned Sr. Counsel Mr. N.D. Nanavati submitted that though he may not again refer to these statements, it would be evident that the complainant was before the Apex Court, there was a lawyer, he does not disclose anything with regard to any kind of such pressure or offer for withdrawal of the petition and thereafter has made a statement. He submitted that, similarly, the statement of Azam Khan has been recorded and in his first statement there is not a word about the applicant, but subsequently in a latter statement recorded u/s 164, the applicant has been implicated. Learned Sr. Counsel Mr. Nanavati submitted that the statement recorded by the CBI of both these witnesses is verbatim the same as recorded by the Gujarat Police. However, one paragraph is added subsequently. Similarly, he referred to the statement of Azam Khan and submitted that in his earlier statement he had not referred to the name of the applicant. Thereafter, when CBI recorded his statement, the name of the applicant is included on hearsay and again he has retracted.

66. Further, Learned Sr. Counsel Mr. Nanavati submitted that thereafter, and pending hearing of this application before this Court, a supplementary charge sheet is filed and again the statement of Azam Khan is produced that he was taken by the Gujarat Police, kept in a hotel, and at their instance he had addressed a letter/statement to the court under pressure. However, Learned Sr. Counsel Mr. Nanavati submitted that this latest statement of Azam Khan does not refer to the name of the applicant.

67. Learned Sr. Counsel Mr. Nanavati submitted that, therefore, the court may consider this material on the basis of which the applicant is sought to be

implicated, which has no credence. Further, he emphasised that the so-called clinching evidence, in fact, is required to be appreciated in light of the entire material and the manner in which the investigation has been made. He emphasised that one statement of Ramanbhai Patel, where he is said to have stated and which has been much emphasised by the learned Counsel for the CBI, where the name of the applicant has been referred that he is said to have stated that deceased Sohrabuddin had closed all the options, is only hearsay and it is required to be considered in light of his own statements and conversation with the other co-accused which has been placed on record. Learned Sr. Counsel Mr. Nanavati submitted that it refers to his understanding/perception as could be seen from the reading of the statement.

68. Learned Sr. Counsel Mr. Nanavati has also referred to the statement of Mr. V.L. Solanki dated 27.5.2010 which is produced along with the compilation given by the learned Counsel for the CBI, and submitted that he is said to have stated that the meeting of the three officers, Ms. Johri, Mr. Pandey and Mr. Raigar was called by the applicant for change in the report, though, in fact, this statement is only a hearsay as he has in his statement referred to Ms. Johri having talked to him, whereas in fact Ms. Johri has specifically stated about CBI having pressurised her for which she has even moved the Hon'ble Apex Court by way of a curative petition and therefore this statement has no relevance and there was no such meeting.

69. Further, even the statement of Mr. Raigar, which has been recorded by the CBI and relied upon by the learned Counsel for the CBI, has also not referred to this aspect about having convened any meeting. In fact, he has also stated that no request was made by Mr. Solanki for going to Udaipur. Learned Sr. Counsel Mr. Nanavati has also submitted that this witness in fact is arraigned as an accused as per the order passed by this Court and, still, he has been removed from the list of accused and is made a witness without any order by any court including the High Court or the Apex Court. Therefore, Learned Sr. Counsel Mr. Nanavati submitted that this suggests the manner of the investigation and the ultimate object or motive.

70. Learned Sr. Counsel Mr. Nanavati submitted that, similarly, another senior officer Mr. O.P. Mathur has written a letter after his statement was recorded as to how he was humiliated and pressurised to give the name of the present applicant by the CBI. Learned Sr. Counsel Mr. Nanavati has submitted that it is required to be noted that the applicant had removed him as he was not prepared to accept illegal directions or the instructions. The fact remains that subsequently Mr. Mathur was in-charge of CID and during his tenure between April 2007 to June 2007 the arrest of the police officers has been made, which itself would falsify the allegations with regard to interfering with the investigation and which also belies the allegations about interference and tampering with the investigation by the applicant.

71. Learned Sr. Counsel Mr. Nanavati also submitted that the details of telephone

calls, which has been emphasised by learned Counsel Mr. Sinha, cannot be even a basis for drawing any adverse inference, much less it can be said to be any evidence. He submitted that as explained in his written submissions in detail, there was abduction of a young boy which was investigated by Mr. Amin and, therefore, as a public representative and Home Minister, he was constantly kept in touch to get the information about the progress of the matter and as a public representative in such situation he is not to see the protocol and, on the contrary, the protocol is not required to be followed in such situation as media was also focusing on that case.

72. Learned Sr. Counsel Mr. Nanavati, therefore, submitted that this case is only politically motivated for victimizing the applicant. He referred to and relied upon the judgment of the Hon''ble Apex Court in the case of Jayendra Saraswathi Swamigal Vs. State of Tamil Nadu, and submitted that the Hon''ble Apex Court has considered the bail application and the same contentions which have been raised by learned Sr. Counsel Mr. Tulsi for CBI, have not been accepted. He pointedly referred to the observations in Para 16 to emphasise that, relying upon the judgment of the Apex Court in the case of Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7n SCC 528 the same contentions were made with regard to tampering with the witnesses and the public interest, the Apex Court has in this judgment clearly observed that the case of Kalyan Chandra Sarkar was decided on its own peculiar facts where seven applications for bail were made before the High Court and were rejected and it has no general application in every case. He submitted that it has been specifically observed that in case of Jayendra Saraswathi Swamigal (supra) it was the bail application for the first time.

73. Learned Sr. Counsel Mr. Nanavati has also submitted that the aspect of conspiracy has also been referred in this judgment and in Para 12 it has been observed-

The opening words in Section 10 are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence." If prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all.... No worthwhile prima facie evidence apart from the alleged confessions have been brought to our notice to show that the petitioner along with A-2 and A-4 was party to a conspiracy.

74. Learned Sr. Counsel Mr. Nanavati submitted that in the facts of the present case, there is not even a confessional statement of any of the co-accused and merely on the basis of the statement of the witnesses which are either hearsay, concocted and based on their believe, the applicant is implicated. He emphasised that even in some statements, as submitted earlier, initially the name of the applicant is not found, but subsequently, improvising the same, later on again the statements of the witnesses have been recorded adding a paragraph. Therefore, learned Sr. Counsel Mr. Nanavati submitted that the present

application may be allowed.

75. Learned Sr. Counsel Mr. Nanavati submitted that though the letter written by the wife of Mr. Amin is referred to, all papers are not conveniently placed on record for the so-called threat for which an application was given by one jail inmate which has been withdrawn before the court.

76. In view of rival submissions, it is required to be considered whether the present application can be entertained or not.

77. It is well-accepted that this Court is not required to appreciate and scrutinize the evidence in detail at this stage. The Hon'ble Apex Court in a judgment in the case of State Vs. Amarmani Tripathi, , has, in fact, laid down the guidelines and has observed in Para 18:

It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail....

Further, in this very judgment it has been observed\\1, "Though at the stage of granting bail a detailed examination of facts and elaborate documentation of merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence."

78. Therefore, though a detailed scrutiny of the evidence may not be necessary, however, for considering even the prima facie case for the purpose of granting bail as per the guidelines referred to hereinabove, some evidence has to be referred for the purpose of indicating the reasons for arriving at the conclusion. It is also well accepted that "reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at."

79. Therefore, for considering the present application, some relevant factors/guidelines with reference to the evidence is required to be considered to decide the prima facie case or the involvement of the applicant.

Prima Facie Case

80. The first aspect with regard to involvement of the applicant in the larger conspiracy, as it is canvassed by learned Sr. Counsel Mr. Tulsi for the CBI with regard to the alleged extortion racket and the killing of Sohrabuddin and his wife, is required to be appreciated. As per the charge sheet itself, one Hamid Lala gang was active who was giving protection to the marble traders against

Sohrabuddin leading to the ultimate murder of Hamid Lala and it also refers to the fact that one Manilal Goshal had lent money to Ramanbhai Patel and Dashrathbhai Patel of Popular Builders and as these two brothers were not able to make repayment of the amount and the interest, there was some dispute. Therefore, the case of the prosecution with regard to the alleged conspiracy and involvement of the applicant has to be supported by material and evidence which can be the basis or foundation for drawing the inference. There may not be a direct evidence for the conspiracy, but the inference can be drawn on the basis of some material laying the foundation or the basis for drawing the inference with regard to such conspiracy.

81. It is also well accepted with regard to the law of conspiracy that there has to be a meeting of mind or agreement to do an act. As observed by the Hon''ble Apex in a judgment in the case of Esher Singh v. State of Andhra Pradesh reported in AIR 2004 SC 3030, it is well accepted that before the charges for conspiracy could be attracted, necessary ingredients have to be established, namely, agreement or meeting of mind. Criminal conspiracy has its foundation on an agreement to commit the offence. In this judgment, the Hon''ble Apex Court has also referred to Halsbury''s Laws of England, 4th Edn., Vol. 11, p. 44 & 58. Therefore, the moot question is required to be considered whether the material and evidence on record suggest the involvement of the applicant in the alleged conspiracy.

82. Therefore, without any further elaboration, the submissions made with regard to the alleged conspiracy for racket of extortion and killing of Sohrabuddin suggesting involvement of the applicant will have to be appreciated in background of the material and evidence. Again, for that purpose, some reference to the statements of witnesses which have been referred in detail by both the sides are required to be made without much elaboration only taking a bird''s eye view.

Character of Evidence

83. A reference to the character of evidence as one of the guidelines laid by the Hon''ble apex Court will have to be made. The statement of Rubabuddin states that Azam Khan had gone to his brother''s house and conveyed that Abhay Chudasma had suggested for withdrawal of the petition and payment of Rs. 50 lakhs. As Nayamuddin (brother) did not agree, Abhay Chudasma is said to have stated to the brother Nayamuddin that the present applicant was angry and he would meet the same fate as Sohrabuddin and the applicant would get him eliminated. The statements of both these brothers which have been recorded by the State Police and also by CBI, as emphasized, are the same except the last paragraph and even accepting the same as it is, it would prima facie suggest about the conversation between the witness and the other co-accused.

84. Similarly, the statement of Azam Khan, as it is evident, has been recorded. Thereafter, he has retracted and again there is a further statement of Azam Khan

recorded u/s 164 which was recorded and again there is a statement pending hearing of this application which has been relied upon by learned Sr. Counsel Mr. Tulsi with much emphasis that he has been made to retract. The latest statement of the said witness Azam Khan recorded u/s 164 of CrPC, it is evident that he has not referred to the name of the applicant. Therefore, it suggests about the conversation of the witness with some co-accused where the name of the applicant is referred. Similarly, the statements are also retracted. Therefore, even the confessional statement recorded u/s 164 does not stand as it is and the confessional statement and retracted statement will have to be considered which is in the realm of appreciation of evidence at the trial. However, the fact remains that the statements are retracted. Further, it is also well accepted that such confessional statement can be a corroborative piece of evidence, but cannot be a substantial evidence. The confessional statements are not of the co-accused and such statements u/s 164 are of the witnesses.

85. Similarly, the statement of Ramanbhai Patel and Dashrathbhai Patel, both u/s 161 and 164 of CrPC, have been recorded which have been also referred to emphasise that when the statement was recorded on 15.12.2005 by ATS, Ahmedabad, the co-accused Mr. Vanzara had insisted to give the statement and at that time Vanzara received a phone call stating that it was the applicant's phone and the witness had talked, recognized the voice of the applicant and the witness was asked by the applicant to give the statement as suggested by Mr. Vanzara. Again, this statement as it is had to be appreciated in light of the submissions made by learned Sr. Counsel Mr. Jethmalani as even the earlier statement dated 27.3.2010 of the same witness, Ramanbhai Patel, there is a reference to settlement of dispute with regard to huge amount defaulted by the witness and the meeting with the other co-accused Ajay Patel and Yashpal Chudasma which was also subsequently stated to have been recorded and also PASA cases.

86. Similarly, Mr. V.L. Solanki who was the accused in the charge sheet filed by the State Police in this very case has been made a witness and as it is evident from the papers of the charge sheet itself, he is A-14 and it has been stated in the charge sheet, column XVII which states that he had only acted on instruction of A1 and A2. He does not have any active role in the case and also there was no meeting of mind with the main conspirators. Therefore, his name is being removed from the list of accused in the case. It is required to be mentioned that his name was added as an accused pursuant to the order passed by this Court and without any procedure, permission of any court, including the High Court or the Hon'ble Apex Court, it is stated clearly in this manner.

87. The authenticity and genuineness of the evidence in the form of transcript of recording of the conversation and the statements will have to be considered based on the submissions made.

88. These statements of the witnesses are required to be read along with the transcript of conversation with the co-accused which has been recorded, though

a detailed appreciation is not desirable and, therefore, it is not referred to. It will clearly suggest a reference to the settlement of their pending dispute. Further, these witnesses have stated in the statement recorded on 15.12.2005 before the ATS one version, whereas the statement in a petition filed before the High Court it is different and it is withdrawn on the next day which has been referred to by learned Sr. Counsel Mr. Jethmalani for the applicant.

89. Again, reference is made to the statement of other witnesses including Zahid Kadri, where he has stated that the other co-accused Mr. Pandian is said to have stated to give the statement as desired with regard to the firing at the Patel Brother's office, otherwise Mr. Pandian will do encounter as directed by the applicant. He has also moved the Hon'ble Apex Court and though he has stated about the pressure, he has also stated in this very statement that he had not withdrawn the petition.

90. The internal note of the CBI with regard to the arrest of the present applicant clearly refers to the consideration for arrest which has been much emphasised by learned Sr Counsel Mr. Jethmalani. This clearly states that it is emphasised that an accused can be usable as an approver after Shri Shah (accused) is arrested which is also quoted in detail in the paper-book. This itself will reflect about the manner of investigation. However, as the Hon'ble Apex Court is supervising the investigation, it is not proper to make any comment on it. (emphasis supplied)

91. This is further required to be considered in view of the fact that Ms. Geeta Johri who was investigating the case has specifically alleged about the manner and method of investigation by CBI that she has been compelled to give a statement implicating the accused and a curative petition is filed before the Hon'ble Apex Court.

92. Further, Mr. O.P. Mathur, another higher officer, has also stated on the same lines.

93. Learned Sr. Counsel Mr. Tulsi for the CBI, on one hand, therefore, referred to this evidence much emphasizing as clinching evidence and also emphasizing about the nature of offence and emphasizing about the apprehension about tampering with the witnesses to oppose the bail. On the other hand, learned Sr. Counsel Mr. Jethmalani and learned Sr. Counsel Mr. Nanavati have emphasized about the fact that it is a case of no evidence or, at the most, it is a sketchy evidence and coupled with the submissions which have been recorded hereinabove with regard to the manner of investigation and the political motive.

94. Therefore, without any further discussion or elaboration of the evidence, on the basis of the material and evidence relied upon, prima facie case suggesting the involvement of the accused is not made out for the purpose of deciding the complicity of the accused in light of the character of evidence.

95. The Court is conscious about the fact that the Hon'ble Apex Court has directed the investigation to be made by CBI and as the Hon'ble Apex Court is

supervising, it would not be desirable to further reflect on the evidence at this stage. However, from the discussion made hereinabove, it suggests about the twist in the tale by the investigating agency, which has a reference to the character of evidence.

REASONABLE APPREHENSION

96. The Hon''ble Apex Court in a judgment in the case of Amarmani Tripathi (supra) has also referred to this aspect in the guidelines which has been quoted hereinabove referring to the observations in Para 18 where the gravity of the offence and the punishment has also been considered with the character of evidence, behavior, position and standing of the accused and reasonable apprehension of the witnesses being tampered with and danger of justice being thwarted by grant of bail. In the facts of the preset case, the applicant was a Minister when such statement or incriminating material was collected by the investigating agency, CBI. When the retractions have been made, he was in jail and there is no evidence prima facie suggesting connection or link with such retraction. Further, the investigation is made by CBI where the applicant cannot have any say. Therefore, balance has to be struck between the rival claims of the accused for liberty as well as the apprehension of the investigating agency. Further, it can also be taken care of that the presence of the accused is secured by providing normal condition of reporting.

97. Moreover, the judgment/order of this Court rejecting the bail applications of the other co-accused referred to by learned Counsel Mr. Ravani will not have application to the facts of the case as those applications have been considered on the basis of the role attributed to the accused concerned. The accused therein were the police officers who were present and/or attributed with an overt act in the alleged encounter of Sohrabuddin and his wife, which is not the case here.

98. Moreover, as observed in the judgment of the Hon''ble Apex Court in the case of Jayendra Saraswathi Swamigal Vs. State of Tamil Nadu, the same contentions with regard to the apprehension of tampering with witnesses have been considered and therefore, in light of the guidelines with regard to grant of bail, the present application deserves to be allowed.

99. Before parting, it is required to be mentioned that the observations made by the learned Special Judge, CBI, while deciding the bail application are unwarranted and unjustified.

100. The application is accordingly allowed. The applicant is ordered to be released on bail in connection with FIR, being RC BS1/S/2010/0004, registered with C.B.I., Mumbai (Criminal Case No. 5 of 2010 before the learned Magistrate) on his executing a personal bond of Rs. 1,00,000/- (Rupees One lac only) with one solvent surety for the like amount to the satisfaction of the lower court (Addl. Chief Judicial Magistrate, CBI, Mirzapur, Ahmedabad) and subject to the further conditions that he shall:

- (a) not take undue advantage of his liberty or abuse his liberty.
- (b) not to try to tamper or pressurize the prosecution witnesses or complainant in any manner;
- (c) not act in any manner injurious to the interests of the prosecution.
- (d) maintain law and order and should co-operate with the investigating officers;
- (e) mark his presence before the I.O., CBI, in RC BS1/S/2010/0004, registered with C.B.I., Mumbai once in the first week of every calendar month between 11.00 am and 2.00 pm for one year.
- (f) furnish the address of his residence to the investigating officer and also to the court at the time of execution of the bond and shall not change his residence without prior permission of the court.
- (g) surrender his passport, if any, to the lower court, within a week.
- (h) not leave India without the prior permission of the court.

101. If breach of any of the above conditions is committed, the concerned Sessions Judge will be free to issue warrant or take appropriate action in the matter.

102. Bail before the lower court having jurisdiction to try the case. It would be open to the trial court concerned to give time to furnish the solvency certificate, if prayed for.

Rule is made absolute. D.S. permitted.

FURTHER ORDER

After the order was pronounced, learned Counsel Mr. Ravani for the CBI as well as learned Counsel Dr. Mukul Sinha have requested that the order may be stayed for a period of three weeks to enable them to carry the matter before the Hon"ble Apex Court. Learned Counsel Mr. Ravani has also referred to and relied upon the judgment of this High Court in the case of State of Gujarat v. Lalji Popat and Ors. reported in 1988 (2) GLH 114 , stating that considering the nature of offence, the release of the applicant on bail may prejudice the prosecution.

Learned Sr. Counsel Mr. Nanavati appearing for the applicant has objected to the request and submitted that the facts of the case cited will not have any application and the applicant is not likely to abscond and he will co-operate. He also submitted that any other additional condition may be imposed.

In view of the submissions and in the facts and circumstances, the request made by learned Counsel Mr. Ravani for the CBI and learned Counsel Dr. Mukul Sinha cannot be accepted and, accordingly, the request stands rejected.