

(2011) 05 BOM CK 0001

In the Bombay High Court

Case No : Criminal Revision Application No's. 408 of 2005, 94 of 2006 and 404 of 2010

Ashfaque Ahmed

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Arms Act, 1959 — Section 25, 27

Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 156, 157, 162

Penal Code, 1860 (IPC) — Section 120(b), 143, 144, 145, 147

Citation : (2013) ALLMR(Cri) 563

Hon'ble Judges : R.P. Sondurbaldota, J

Bench : Single Bench

Advocate : Vijay Pradhan, assisted with Y.H. Muchhala and Mr. Javed Patel, Mr. Vaibhav Nagvekar instructed by . Mr. Sagheer Khan, in Revn. appln. Nos. 408/2005 and 94/2006, for the Appellant; M.K. Kocharekar - Intervenor in Cri. Appln. No. 404/2010 and Mr. Pradip D. Gharat with Mr. S.A. Shaikh and Mr. V.B. Kondedeshmukh, APP, for the Respondent

Judgement

R.P. Sondurbaldota, J.—This is a common order on the above two revision applications filed by original accused nos. 32 and 76 in Sessions Case No. 930 of 2002 (C.R. No. 46 of 1993). The first revision application is directed against the order of framing of charge and the second revision application is directed against the order of the Sessions Court rejecting their applications for discharge from the sessions case. The interveners application is allowed. Heard all the Counsel.

2. The proceedings herein relate to the aftermath of the demolition of Babri Masjid in December, 1992. During the period December, 1992 and January, 1993 the city of Mumbai had witnessed incidents of riot on a large scale with complete breakdown of law and order. One of the several incidents that had taken place during the period is the incident of, now commonly known as Suleman Bakery incident. The incident is dated 9th January, 1993. Suleman Usman Bakery is situate within the jurisdiction of Dongri Police Station adjoining to a Masjid by

name Chunnabatti Masjid. On 9th January, 1993 firing was resorted to by the Special Operation Squad (hereinafter referred to as the "SOS") led by Shri. R.D. Tyagi, the then Additional Commissioner of Police. In the firing, 9 persons had died. In connection with the incident, Dongri Police Station registered C.R. No. 46 of 1993 against the persons present inside the premises of Suleman Bakery and Chunnabatti Masjid alleging that at the relevant time they had become violent and aggressive and that their act of aggression had led to the police firing.

3. The communal riots and the large scale violence that had taken place in the city of Mumbai had resulted into death of more than thousand persons. This created huge public furor. There were allegations made that during the riots, the Mumbai police had acted in a biased and partisan manner. By way of appeasement to public and by responding to the public demand, the State of Maharashtra had set up a Commission under the provisions of Commission of Enquiry Act, 1952 to enquire into the circumstances, and the immediate causes of riots which had led to the breakdown of the law and order situation in Mumbai. Justice B.N. Srikrishna, the then sitting Judge of this Court was appointed as the sole Commissioner to head the inquiry. One of the terms of reference of the Commission was to inquire whether the steps taken by the police in controlling the riots were adequate and proper and whether the police firing resulting in the deaths was justified or not. A large number of persons appearing before the Commission, filed their affidavits and gave evidence. A fair opportunity was afforded to each party who had submitted its statement before the Commission, to cross examine the witnesses and also to lead evidence. After examining the witnesses, evaluating the evidence, submissions and arguments, the Commission submitted its report dated 16th February, 1998. The report is known as "The Srikrishna Commission Report".

4. The incident of Suleman Bakery is discussed at paragraphs-11.59 to 11.70 of the Srikrishna Commission Report. On appreciation of the material before it, the Commission in its report has expressed dissatisfaction over the version of the police of the incident. At paragraphs 11.68, 11.69 and 11.70 of the report, it concludes as follows:

11.68 The public witnesses examined, have given graphic accounts as to how the inmates, who were unarmed, were shot down in virtually cold blood. That some of them jumped over the Chunabhatti Masjid premises and made their escape does not support the theory that they were terrorists or that they were carrying "deadly firearms". The police recovered no firearms whatsoever. All that they claim to have recovered was one spent shell of AK-47 rifle. This perhaps came from the AK-47 rifle carried by one of the SOS personnel. In fact, the utter disappointment of Tyagi is seen when he admits that, to the extent of the operation failed to apprehend the miscreants firing at the police, he was not satisfied with the implementation of his instructions. Tyagi was also surprised as to how 78 persons could have been flushed out and arrested from the bakery which was so narrow and congested. Though there is a statement that one P.C.

23157 Chander Tukaram Sanmukh has recovered 8 swords from under the water tank on the roof, this recovery is also doubtful as no panchanama has been made at all about this recovery.

11.69. The evidence of the students and teachers of the Madrassa-E-Ulum-Imadadiiya appears consistent and leads the Commission to the conclusion that the policemen who barged in the Suleman Bakery and thereafter stormed in the Chunabhatti Masjid and Madrassa, went on a rampage assaulting the inmates there. It also appears that there was indiscriminate and callous police firing resulting in nine casualties.

11.70 The Commission is not at all satisfied with the version of the police. Even assuming some element of truth in the version of the police that there was private firing in the incident, it was not as serious as it is sought to be made out. The Commission feels that the police were very much influenced by the floating exaggerated rumors of attacked from sophisticated firearms, and the consequent fear psychosis, which caused them to shoot to kill. The result-deaths of nine innocent persons in the Suleman Bakery and the adjoining premises. The evidence on record in no way bears out the police story that there were terrorists much less with deadly arms; nor does the evidence suggest that it was necessary for the police to carry out such extensive firing as they did. This is one incident where the police appeared to be utterly trigger happy and used force utterly disproportionate to meet the apprehensions of private firing, assuming there was one. The responsibility for this incident must squarely fall on Joint Commissioner of Police, R.D. Tyagi, who was overall incharge of the operations at the Suleman Bakery, and Assistant Police Inspector Deshmukh and Police Inspector Lahane, who were leading the SOS men.

5. The findings and recommendations of the Srikrishna Commission were however, not accepted by the then Government. This led to filing of a number of writ petitions in this Court, as well as, in the Hon''ble Supreme Court, more particularly Writ Petition No. 527 of 1998, Writ Petition No. 5642 of 1998 and Writ Petition (Civil) No. 40 of 1999. Several parties including two representative bodies of Muslim community who had actively participated in the relief work during the riots and actively participated before the proceedings of the Srikrishna Commission viz. Mumbai Aman Committee and All India Milli Council filed intervention applications in the Writ Petition No. 527 of 1998 and 5642 of 1998. During the hearing of the petitions, the State made a statement before the Hon''ble Supreme Court that although it was not bound to, it had accepted various recommendations made by Srikrishna Commission in the report and constituted a committee comprising of the Senior Police Officer, Officers from Home department and from Law and judiciary department to examine into the delinquency or lapse on the part of the police officer and to recommend suitable action against them. Later after lapse of some more time, another statement came to be made that the State shall refer the report and conclusions of the Srikrishna Commission to the crime Branch, C.I.D. Mumbai for further

investigation and action in accordance with the law. However, the Apex Court as also several interveners were not satisfied with the statement of State of Maharashtra. Then as a result of constant monitoring by the Apex Court, the State of Maharashtra filed further affidavit dated 23rd March, 2001 placing on record that it had passed resolution No. DIS-06-2000-258(13)/SPL-1(B) dated 31st August, 2000 to initiate further investigation to implement recommendations of Srikrishna Commission. The affidavit also disclosed the notification of constitution of the Special Task Force (STF) along with the officers and staff appointed on the STF for carrying out further investigation. The incident of Suleman Usman Bakery, was one of several other incidents taken up for further investigation by the STF.

6. During the course of further investigation, STF found that the material shown collected in C.R. No. 46 of 1993 of Suleman Bakery case was got up material, the firing by the police on 9th January, 1993 was totally unjustified and that the police personnel who had indulged into unjustified firing had infact committed murder of 9 persons. It came to the conclusion that C.R. No. 46 of 1993 registered by the police against inmates of Suleman Bakery and the adjoining mosque was not a genuine complaint but was infact a coverup for their action of unjustified firing. Curiously, after completion of further investigation the STF registered fresh FIR against the delinquent police personnel vide C.R. No. 198 of 2001 instead of filing further report in C.R. No. 46 of 1993. It then made an application for sanction u/s 197 Cr.P.C. to prosecute 18 delinquent police personnel, including Shri. R.D. Tyagi, involved in the Suleman Bakery incident. The State of Maharashtra after examining material collected in both the complaints i.e. C.R. No. 46 of 1993 and C.R. No. 198 of 2001, granted necessary sanction to prosecute the delinquent police personnel u/s 302, 304, 307 and 34 of I.P.C. Thereafter, the STF in the year 2001 filed chargesheet which on committal to the Sessions Court came to be registered as Sessions Case No. 1171 of 2001.

7. On 22nd December, 2004 Sessions Case No. 930 of 2002 came up for framing of charges against the applicant and other accused before the 3rd Additional Sessions Judge, at Sewri. At that time, the applicants and other accused persons, all of whom belong to lower economic class of the society, were unaware of the facts relating to the above referred proceedings in the Apex Court and further investigations in the matter. The Public Prosecutor appearing for the State also failed and neglected to inform the Sessions Court about further investigations into the Suleman Bakery incident by STF pursuant to the directions of the Apex Court and filing of chargesheet in C.R. No. 198 of 2001. Resultantly, the charges came to be framed against the applicants and others. In the meantime, the proceedings in Sessions Case No. 1171 of 2001 came to be transferred to the same Court. In that case, on 2nd May, 2005 the prosecution filed in Court, list of articles, list of witnesses and the summonses to be served upon the witnesses. The evidence in the proceedings commenced on 9th June, 2005 when the first witness therein was administered oath. However, strangely,

the prosecutor did not proceed with the evidence.

8. In the meanwhile, the Advocate appearing for the applicants, learnt about the further developments as regards the Suleman Bakery case. He also learnt about the transfer of S.C. No. 1171 of 2001 to the Court in which S.C. Case No. 930 of 2002 is pending. Then, the applicants and others moved applications for discharge being M.A. No. 138 of 2005 and 145 of 2005 in Sessions Court submitting that further investigation carried out by the STF showed that the accused in S.C. No. 930 of 2002 had been unjustly charge sheeted. The police officers, accused in S.C. No. 1171 of 2001 also filed an application praying that recording of evidence in S.C. No. 1171 of 2001 be commenced after completion of evidence in S.C. No. 930 of 2002.

9. Both the applications were heard by the Court on 2nd September, 2005. The learned APP appearing for the State opposed the application of the applicants herein and tacitly supported the application of the police officers by not opposing it. The learned Sessions Judge by his order passed on the same day rejected the application filed by the applicants for discharge and allowed the application of accused police officers in S.C. No. 1171 of 2001 directing prosecution to record and complete the evidence in S.C. No. 930 of 2002 prior to the evidence in S.C. No. 1171 of 2001.

10. Mr. Pradhan, the learned senior counsel appearing for the applicants submits that not just the order of framing of charge against the applicants herein and the other accused in Sessions Case No. 930 of 2002 but the entire proceedings of S.C. No. 930 of 2002 are bad and in the facts of the case are required to be quashed. His first submission is that the prosecution has suppressed material facts from the trial court which facts go to the roots of the matter. He points out that the prosecution never pointed out to the court at the time of framing of charge the further developments in Suleman Bakery incident, of further investigation into the incident pursuant to the statement made before the Hon'ble Apex Court. The prosecution also suppressed the fact of pendency of Sessions Case No. 1171 of 2001 from the learned Judge. His second submission is that the facts revealed in the further investigation are such that no charge could have been framed against the appellants herein and their co-accused. His third submission is that after conducting further investigation the procedure followed by the appellants of recording fresh FIR and filing an independent chargesheet is improper and not in accordance with the procedure laid down in Criminal Procedure Code. According to him, the police ought to have filed supplementary chargesheet in the same proceedings as there could be no second time cognizance of the same event. Mr. Pradhan submits that the further investigation into the same incident could be u/s 173(8) Cr.P.C. and on conclusion of the investigation, the only course to be followed by the police was to file a supplementary chargesheet u/s 173(2) Cr.P.C. Along with that, he submits that, in view of the material collected during the further investigation, the prosecution ought to have filed an application to the court for dropping the

proceedings against the applicants and their co-accused. According to him non-following of the correct procedure has resulted into absolute injustice to the applicants.

11. Mr. Gharat, Special P.P. appearing for the respondent seeks to support the impugned order by submitting that Srikrishna Commission report was only a fact finding report and the recommendations contained therein cannot be binding upon the State. Nonetheless, according to him, in view of the statement made by the State Government before the Apex Court, the investigation into the report was conducted resulting into a fresh complaint. According to him, two cases i.e. Sessions Case No. 930 of 2002 and Sessions Case No. 1171 of 2001 are distinct proceedings in respect of two separate incidents and cannot be allowed to be mixed up. Alternatively, they should be treated as cross cases in respect of the same incident and tried separately though by the same Judge as provided in the Cr.P.C. He further submits that this court cannot take over the responsibility of the trial court of evaluating the material before the court, deciding its veracity or its effect. It is for the trial court to decide whether the first C.R. and the subsequent C.R. are separate cases or one and the only case. Mr. Gharat also submits that since the charges against the applicants having been framed, the trial court could not have discharged the applicants. Besides the applicants would have an opportunity to prove their innocence by cross-examining the witnesses to be examined by the prosecution. Scuttling the entire prosecution at this preliminary stage of the proceedings, would not be correct. Mr. Gharat submits that the second chargesheet filed by the competent investigating agency has not been set aside or quashed by any court. Therefore, the Sessions Court has rightly framed charges against the applicants on the material available in C.R. No. 46 of 1993. No intervention by this court by invoking inherent extra ordinary powers u/s 482 Cr.P.C. is justified. Mr. Kocharekar, for the intervener supports all the arguments of Mr. Gharat.

12. The undisputed position is that in the incident dated 9th January, 1993 of Suleman Bakery case happened there was firing by police and on account of their firing 9 persons died. The complaint in connection with the incident, however, came to be filed against 78 persons named in the FIR and 10 to 15 unknown persons u/s 143, 144, 145, 147, 148, 149, 307, 34 of Indian Penal Code read with 120(b) Indian Penal Code and u/s (3), 25 and 27 of the Arms Act alleging that they had formed unlawful assembly with deadly weapons like firearms, choppers, knives, iron bars, stones etc. and caused rioting and attempted to commit murder.

13. The first informant in C.R. No. 46 of 1993 is Anant Keshav Ingale, the intervener herein and accused no. 17 in C.R. No. 198 of 2001. The allegations made by him in his statement which is treated as FIR for C.R. No. 46 of 1993 are as follows: On 9th January, 1993 from 07.00 hrs. he was petrolling in connection with the ongoing communal riots in the limits of Pydhonie Police Station. He was patrolling in Police jeep along with staff. While patrolling along Mohammed Ali

Road, at about 09.30 hrs. he visited the police picket in front of Taj Office shop. The police had reported to him that somebody was firing shots at them from the roof top of Suleman Bakery. On hearing this he got down from the jeep along with the staff and started watching the movements on the rooftop of Suleman Usman Bakery and its adjoining buildings. Suddenly a bullet was fired at them from the rooftop of Suleman Usman Bakery, but, he could not see the person firing the shot. Therefore, he shouted a warning to stop the firing but 3/4 more bullets came to be fired at him from the same place. Therefore, he along with his staff went to the terrace of Taj Office shop in order to locate the place from where the firing was taking place. He saw about 8/10 persons hiding behind the water tanks on the rooftop of Suleman Usman Bakery and adjoining Chunabhathi masjid and shouted a warning asking the persons to stop firing and surrender to the police. However, they continued the firing. Sensing a danger to their lives, P.I. Ingale alongwith his staff retaliated the firing. The said persons continued firing at them by taking cover of water tanks. P.I. Ingale saw that one of the persons had an automatic weapon like stengun and other 2/3 persons were having revolvers. He then got down from the terrace and gave a call to police control room, informing about the incident and requesting for additional help. At about 12.30 hrs. Shri Tyagi, Joint Commissioner of Police reached the spot along with special operation squad and other enforcement. When the staff reached the spot, the persons on the rooftop again opened fire on them. Police found that the doors of Suleman Bakery was locked from inside. When the inmates were ordered to open the door, they did not respond instead they started throwing stones, soda water bottles, and acid bulbs on the police party. Then, the police tried bursting tear gas shells but it had no effect on the rioters. Thereafter, the police broke open the door of Suleman Bakery and Mr. Tyagi alongwith other officers went inside the Suleman Bakery. Inspector Ingale also joined them. As they entered the building, about 10 to 15 persons armed with choppers, knives and iron bars came down from the first floor and advanced at the police. There was a warning given by the police to surrender but these persons did not respond and instead attacked the police party. Then, some of the officers and men of SOS opened fire and managed to go to the first floor. On the first floor, there were about 40/50 persons. Those persons obstructed the police party but they were pushed aside by using minimum force. Police then entered the rooftop of Suleman Bakery where they found 15 to 20 persons on the rooftop hiding behind water tank and wall of Chunabhathi Masjid. The Officers took position and warned the persons on the rooftop to come down and surrender. However, the persons on the terrace who had automatic gun and revolvers started firing indiscriminately at the police. The firing was retaliated by the members of the S.O.S. Then 8 to 10 persons jumped inside Chunabhathi Masjid. The police saw that these persons were carrying firearms. The police therefore entered Chunabhathi Masjid. They found two persons with bullet injuries and arrested them. They also arrested 4/5 other persons present in the Masjid. In the firing by the police, in retaliation, in all 9 persons were found injured. They were immediately taken to J.J. Hospital in police vehicles. On that day 78 persons

were arrested and sent to Dongri Police Station. Police searched the premises of Suleman Bakery and its rooftop but could not recover any weapon. As per the complaint, persons carrying the firearms had probably managed to escape along with the weapons. More than a month thereafter, i.e. on 22nd February, 1993 further statement of P.I. Ingale was recorded stating that subsequently he came to know that "ten miscreants had sustained bullet injuries and nine of them succumbed to the injuries. In the action, A.P.I. Deshmukh of Crime Branch and P.S.I. Sawant and ten policemen of Special Operations Squad were also injured". The statement does not elaborate upon the nature of the injuries sustained by the police persons. It also does not name the ten injured policemen from S.O.S.

14. During the course of investigation, the police had recorded statements of 24 police persons including that of Shri R.D. Tyagi, Joint Commissioner of Police (Crime and Administration), API Deshmukh and PSI Sawant. The only two persons unconnected to police force whose statements had been recorded were one Maulana Abdul Aziz Ali Hussain Shaikh and Anwar Ali Islam Mallhu. Perusal of the statements of these persons shows that they had not witnessed any part of the incident. At the relevant time, they were infact inside the masjid and had only heard the firing. Therefore, their statements throw no light on the incident. As per the statement of API Deshmukh, he sustained injury to his left hand when a glass bottle allegedly hurled by the inmates of the bakery hit him. No description of the injury, whether blunt or cut and lacerated, is given in the statement. The statement of PSI Sawant is still more vague. It baldly mentions that he, API Deshmukh and 10 policemen sustained injury and that they were treated at GT. Hospital and allowed to go. The police had recorded panchanama of the scene of the offence and inquest panchanama in respect of 9 persons who had succumbed to police bullets. The contents and purports of the panchanama will be discussed in the later part of the order.

15. Later, pursuant to the statement made before the Apex Court further investigation was conducted by the STF. During the course of further investigation, the statement of P.I. Mirza Baig, a member of STF was recorded. This statement forms basis of the second FIR i.e. C.R. No. 198 of 2001. The statement of Mirza Baig touches upon every aspect of investigation done earlier by the police. As per the complaint of P.I. Ingale the alleged incident had commenced at 9.30 a.m. and continued for three hours. Strangely, no intimation of the incident had been sent to Dongri Police Station within the jurisdiction of which Suleman Bakery is located. At about 12.30 hrs i.e. 3 hours after the alleged incident commenced, a message was received by Pydhonie Wireless Mobile that the public was firing at police from above the bakery and that the staff of P.I. Ingale had gone to the building opposite the bakery and from the terrace top of the building they had fired in the direction of the bakery. The message sent to the Police Control Room was also belated by three hours. Equally strange are the messages sent by Mr. Tyagi to the Control Room. He arrived at the scene at about 12.30 hrs. At 13.03 hrs, he sent message to the Control Room that he was already at Suleman Bakery and there was no firing

and the situation was quiet. One more message sent by him around the same time to the Control Room read that one man was found sitting near Suleman Bakery with a stengun and the police party had rounded him. But the factual position is that neither any man with stengun was caught nor any stengun recovered. The next message sent by Mr. Tyagi to the control room was at 13.30 hrs. The message stated that police firing was going on, the persons who were firing with stengun had been cordoned off and 4 persons were injured, two of them had been sent to the hospital and remaining two were to be sent. Then at 13.37 hrs, Mr. Tyagi sent one more message to the Control Room that he had already taken round of Umarkhadi and Imambada and that he was at Dongri, that Senior P.I. knew about the firing and that there was nothing to worry. After 13.30 hrs Mr. Tyagi and other members of S.O.S. had left the place for further rounds. Significantly, none of the messages sent to the Control Room had made even so much as a reference to the ten injured persons at the Bakery out of which eight had been declared dead before admission to the Hospital and one had died in the hospital later during the day.

16. According to the first F.I.R. the statement of P.I. Ingale, he visited the police picket in front of Taj office shop at about 9.30 hrs when he was informed that the police picket was being fired at from the rooftop of Suleman Bakery. A shot was fired even during his presence. Therefore, he accompanied by the policemen went to the terrace of Taj Office shop. Then there was exchange of fire from terrace of Taj Office shop and rooftop of Suleman Bakery. This was second incident of firing. The next is the attack on police with sodawater bottles, stones and acid bulbs when they were at the door of the bakery. Once the police entered the bakery on breaking open the door, they were attacked with choppers, knives and iron bars. Therefore, police opened firing. Thus, the third incident of firing was on the ground floor part of the bakery. The fourth round of alleged firing was again an exchange of firing, this time at the rooftop of Suleman Bakery. If that was the extent of firing, some member of the police party would have suffered bullet injury. There would have been bullet marks on (i) the buildings near the picket party, (ii) terrace of Taj Office shop (iii) ground floor premises of Suleman Bakery and (iv) rooftop of Suleman Bakery or the least, spent bullets or cartridges traced around these area. However, no cartridges or spent bullets had been traced near about the picket or anywhere else on the road or any of the above places. Similarly, no stones, no sodawater bottles were found. No aftereffects of acid bulbs noticed.

17. In the further investigation it was noticed that the panchanama of scene of offence drawn by PI Patil of Dongri Police Station on 9th January, 1993 between 16.30 hrs to 17.30 hrs makes no mention of the location where the injured persons were lying after receiving gunshot wounds from the police. The location could be ground floor of Suleman Bakery or it's rooftop. The places where the dead bodies were lying were not shown to the Panchas. There is also no mention of the places from where the injured were removed to hospital and the nature of injuries sustained by them. There is no mention about the presence of blood

stains. Though the blood-stained clothes of the deceased were taken charge of, there is nothing to show whether they were sent for chemical analysis. The panchanama shows recovery of only 7 empties and five cartridges from the place of offence. It is silent about the ammunition fired by the police (SOS) and their empties. No weapon was recovered during the panchanama. The panchanama is also silent about the search of the masjid and the madarassa.

18. The inquest panchanama of the 9 bodies was drawn at J.J. Hospital during 16.00 hrs to 19.00 hrs. It shows that all the 8 persons who were declared dead before admission had sustained bullet injuries. The injuries were on vital organs like chest, head etc. Two of the bodies showed 4 gunshot wounds, 3 bodies showed 2 gunshot wounds and others one each. Such injuries can hardly be said to be injuries caused in the controlled fire. The further investigation showed that though the bodies showed blackish appearance on skin, there was no request made by police for examining the tissue behind the black marks. This test was important as it would have indicated the distance from which the bullets were fired at the deceased.

19. Another major and significant aspect is that, there was no panchanama drawn of the area outside the bakery, the vicinity of Taj Book Depot and the location of police picket. There is no material to substantiate repeated firing from the rooftop of the Bakery. There is also no record by way of station diary, control room register or wireless van register to show that the alleged incident of firing at the police had commenced at 9.30 a.m. and continued for 3 hours.

20. There is one more very important factual aspect considered by the STF regarding the alleged incident and that is the topography of the Suleman Bakery and the Masjid. During further investigation, the STF inspected the two premises, noted the situation of the rooms and measurements of various parts of the premises. It noted that the staircase in the Bakery and the passage from the Bakery to the Masjid, is so narrow that it is barely sufficient for one person to climb at a time. To climb into the landing at the first floor after reaching the top of the stairs, one has to pull oneself up with the help of a hanging rope. Therefore, the allegation that as the police party entered Suleman Bakery, 10 to 15 persons armed with choppers, knives and iron bars came down from the first floor and advanced at the police cannot be believed. The bakery premises cannot accommodate 78 persons at a time. There was also no escape route through either Suleman Bakery or Mosque. Therefore, the claim made in the first complaint that some persons must have run away with AK-47 rifles or stenguns without being noticed or without being stopped by police picket is baseless. Further, with declaration of curfew order, there was hardly any person on the road or any shop or other place open for anyone to rush and conceal inside without being noticed.

21. The next crucial aspect would be the presence of P.I. Ingale at the scene at the relevant time. As per his statement, he had reached the picket point at the place at 9.30 a.m. and then acted as claimed. However, the entry in the station

diary made on the day at Pydhonie Police Station shows that he and A.P.I. Jadhav had left the police station at 10.20 a.m. for Mandvi Telephone Exchange since a large crowd had assembled there. Both were handling the situation there till 12.45 p.m. This would mean that P.I. Ingale was not at Suleman Bakery between 9.30 a.m. to 12.45 p.m. In that case, his statement which is treated as the first information becomes suspicious and the entire claim made therein not worthy of credit.

22. The STF considered statements of Anwar Ali Mohd. Islam, Mohd. Qutubuddin, Nurool Huda and Abdul Wafa Habibulla Khan who were witnesses before the Srikrishna Commission. Anwar Ali Mohd. Islam had received gunshot wounds during the firing, the lone survivor among the 10 persons fired at. He stated that he was lying on the water tank on the rooftop of the bakery when a bullet hit him. He therefore got up and hid behind the water tank. Within about 10 minutes, 4 commandos came and demanded to know where the weapons were hidden. Then more bullets were fired at him. But he escaped by jumping from the rooftop of the bakery to the rooftop of the toilet of Masjid. The statements of witnesses Mohd. Qutubuddin showed inter-alia that the police had entered into the residential part of the Masjid premises and that they had not found any weapons anywhere. The evidence of Abdul Wafa narrates how SOS had shot dead Maulana Abdul Kasim.

23. With the above facts coming to light during the further investigation alongwith several others, the STF concluded that the entire FIR in C.R. No. 46 of 1993 of Dongri Police Station is a got up document. It is nothing but an attempt to justify the death of nine persons caused by the police. While conducting the so called investigation into the FIR, the police had taken care to ensure that no material that would go against them was brought on record.

24. The conclusion arrived at by the STF after completion of further investigation as recorded in the statement of P.I. Mirza Baig is best reproduced verbatim. It reads as follows:

7. On examination of the entire record before the commission the FIR and Panchanama in Dongari P. Stn. Cr. No. 46/93 the material collected by the police for prosecution in the above C.R. No. 46/93 clearly establishes that the death of following nine persons was caused by accused who acted in concert with each other, the death is a direct consequence by the injuries sustained by the deceased which was intentionally caused to them by the accused and which was in any event sufficient in ordinary course of nature to cause death. Besides Anwarali who survived was inflicted with grievous gunshot wound and the attempt to cause his death also failed.

The above fact and circumstances show that the death of nine persons namely

1. Shri. Anwar Ali Kalu M/20 yrs.
2. Shri. Abdul Kasim Sirajul Haq M/40 yrs.

3. Shri. Liyyakat Ali Nibar Khan M/30 yrs.
4. Shri. Mohd Kadarbahi Dudhawala M/30 yrs.
5. Shri. Shabbir Mohd. Ali @ Mohram Ali Abdul Rashid Khan M/20 yrs.
6. Shri. Mohd. Samsad Khan Abdul Khan M/34 yrs.
7. Shri. Jamil Fatebhadur M/20 yrs.
8. Shri. Shabbir Mohd. Ali @ Firoz Khan Gaffar Khan Nanku M/30 yrs. &
9. Shri. Mohd. Sayyad Abubakhar Sarotiya M/22 yrs.

Was caused by firing the firearms carried by the accused who acted ruthlessly and with impunity and without any regard for law or their duties.

The accused took undue advantage of the authority given to them and abuse the power to caused the death of nine innocent persons with nothing to create even a suspicion that any one of them was in the bakery for the purpose of committing any violence act.

There is nothing found in the antecedent of the deceased that they were at any time involved in any illegal activities. They were persons of modest means, earning their livelihood either by working in the bakery or doing some other honest work. Even the previous record with regard to Suleman Bakery itself and its owner does not show that the place was ever used for any suspicious activities or that any of his employees was ever involved in commission of any illegal act.

It is therefore obvious that in the name of discharging their duties the accused committed acts which were no part of their duties to perform, and there was no authority given to them to exercise.

Further the acts committed by the accused do not have any reasonable appearance to suggest that they were acting under colour of authority or duty.

I now lodge my FIR against the above mentioned 17 accused persons on behalf of the Govt. of Maharashtra for committing the murder of nine above mention deceased persons with common intention and attempting to cause the death of the 10th injured Shri. Anwar Ali Mohd. Islam Salahu.

25. If one reads the two statements forming the two F.I.R. together, it becomes more than obvious that C.R. No. 46 of 1993 was clearly a got up document and there is no material whatsoever collected in evidence to support the case. As against this, the presence of the entire police party of SOS at site is admitted. The police had admittedly fired at the inmates of Suleman bakery and persons on the rooftop of Suleman bakery. There is no dispute even in the first FIR that the death of 9 persons had been caused on account of the firing by the police. The only question to be considered therefore, is whether the firing, extent of it and the manner of it was justifiable. The statement of Mr. Baig shows that there was

hardly any justification for the firing.

26. Mr. Pradhan, the learned Senior Counsel submits that, perusal of the affidavits filed on behalf of the State in the Apex Court in the writ petitions relating to implementation of Srikrishna Commission Report shows that the State had promised to conduct further investigations into the various incidents. Even the Resolution No. DIS-06-2000-258(13)/SPL-1(B) dated 31st August, 2000 passed by the State was to initiate further investigation to implement recommendations of Srikrishna Commission. Therefore, after completion of further investigation the police could not have filed a fresh FIR and independent chargesheet. It ought to have filed a supplementary report. He submits that the only provision in the Cr.P.C. for carrying out investigation further after filing of the chargesheet is the provision u/s 173(8) Cr.P.C. This provision enables the police to carry out further investigation but thereafter report to be submitted is supplementary report and not an independent chargesheet. In support of his submission, Mr. Pradhan relies upon decision of the Apex Court in T.T. Antony Vs. State of Kerala and Others, . The facts of the decision cited by Mr. Pradhan are somewhat similar to the facts of the present case. On 25th November, 1994, the Minister from UBF Government, State of Kerala had proposed to visit Kannur district for an inauguration programme. The visit planned was much against the advice of the district administration as, on the earlier visit of the Minister, few country made bombs had been hurled at him. Finally, the apprehensions of the district administration turned out to be true. The visit of the Minister turned out to be a nightmare to the general public, as well as, the authorities. The police had to open fire at two places. In connection with the two incidents, complaints came to be registered with the Resident police station against eight named persons and some more unidentified persons belonging to the same party for forming unlawful assembly. That incident gave rise to public uproar and a demand for judicial enquiry was made. The Kerala Government then appointed a District & Sessions Judge as Commission of Enquiry u/s 3(1) of the Commission of Enquiry Act, 1952. The Commission submitted its report recording its findings that the uncompromising attitude of the Minister and his disregard to the possible consequences of his visit to Kannur district, was the root cause for firing and the failure on the part of the District Collector and Executive Magistrate to evaluate and take stock of the situation ended in the police firing resulting into death of 5 persons and injuries to others. It also found that the police firing was not justified. The report of the Commission was accepted by the Government. Thereafter, on the instruction of the Additional General Secretary to the Government of Kerala, Director General of Police issued orders to Inspector General of Police to register the case immediately and have the same investigated by a senior officer. The Inspector General of Police noted that firing without justification in which people were killed amounted to murder and issued directions to the Station House Officer to register a case. Accordingly Crime No. 268 of 1997 came to be registered. On that information, complaint came to be registered against government officers including Deputy Collector and Executive

Magistrate. With registration of the subsequent FIR, the two cases earlier registered against members of the political party came to be closed as being false and undetected, some time in April, 1999 and June, 1999 respectively. Some of the accused in the second complaint, filed proceedings inter-alia for quashing of the second FIR. One of the points for determination framed by the Apex Court in the case was whether the registration of the fresh case on the basis of the report of D.G.P. which is in the nature of second FIR u/s 154 Cr.P.C. is valid and can form the basis of the fresh investigation. The Apex Court after considering the scheme of Cr.P.C. and various provisions therein, disapproved the registration of the second FIR observing as follows:-

18. An information given under subsection (1) of Section 154 of Cr.P.C. is commonly known as First Information Report (F.I.R.) though this term is not used in the Code. It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion u/s 169 or 170 of Cr.P.C, as the case may be, and forwarding of a police report u/s 173 of Cr.P.C. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion u/s 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate u/s 173(2) of Cr.P.C. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the

same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 of Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling u/s 162 of Cr.P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr.P.C.

19. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion u/s 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate u/s 173(2) of Cr.P.C. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of subsection (8) of Section 173 Cr.P.C.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C.

27. After stating the above position in law, the Apex Court considered the facts of the case before it and held that the second report filed by the police was unwarranted and illegal. It held that the investigating agency should have taken advantage of the report of the Commission for proper further investigation into

the case. On the facts which might come to light during investigation, if necessary, the investigating agency should have altered the offences under appropriate section of the relevant Acts and concluded the investigations. The Apex Court found, on comparison and critical examination of the FIRs in the two cases disclosed that the date and place of occurrence was same, the narration of events was almost same and there was alluding reference to the deaths caused by police firing in the first FIR. Thus, in truth and substance, the essence of the offence in the first FIR was same as in the second FIR. Therefore, the second FIR on the facts of the case was irregular and fresh investigation by the investigating agency was unwarranted and illegal. The Apex Court concluded on the facts before it as follows:-

The correct course of action should have been to take note of the findings and the contents of the report, streamline the investigation to ascertain the true and correct facts, collect the evidence in support thereof, form an opinion under Sections 169 and 170 Cr.P.C. as the case may be, and forward the report/reports u/s 173(2) or Section 178(3) Cr.P.C. to the concerned Magistrate. The course adopted in this case, namely, the registration of the information as the second FIR in regard to the same incident and making a fresh investigation is not permissible under the scheme of the provisions of the Cr.P.C. as pointed out above, therefore, the investigation undertaken and the report thereof cannot but be invalid. We have, therefore, no option except to quash the same leaving it open to the investigating agency to seek permission in Crime No. 353/94 or 354/94 of the Magistrate to make further investigation, forward further report or reports and thus proceed in accordance with law.

28. In the instant case, the essential facts are no different. The date and place of occurrence in the two FIRs is same, there is alluding reference to the deaths caused due to police firing in the first FIR and narration of events in the two FIRs is almost same. The only difference is that the first FIR seeks to justify police firing, whereas, the second FIR does not. The STF had materially and actually carried out further investigation in the first FIR as per the statement made before the Apex Court. Therefore, the only course open to STF, having taken note of the findings and contents of Srikrishna Commission Report, having streamlined the investigation to ascertain the true and correct facts, having collected evidence in support thereof, having formed an opinion under Sections 169 and 170 Cr.P.C., was to forward further report u/s 173(2) Cr.P.C. to the concerned Court, with alteration in the offences and indicting the accused in the second FIR. The statement of P.I. Baig in no uncertain terms records that the first complaint was not genuine and that the police had taken undue advantage of the authority given to them and abused the power to cause death of nine innocent persons. Had the correct course been followed by the investigating agency, the result would have been of withdrawal of prosecution against the applicants and their co-accused.

29. Mr. Gharat, the learned Special Public Prosecutor submits that the documents

relating to the further investigation neither form part of the police report in the first FIR nor have been relied upon by the investigating officer and therefore the same cannot be taken into consideration by this Court. He further submits that appreciation of the said documents and the police report as filed will amount to appreciation of evidence which is essentially the function of the trial Court which should not be undertaken by this Court. To support his submissions, he relies upon the decision of the Apex Court in *State of Bihar and Another Vs. P.P. Sharma, IAS and Another*, . The said proceedings arose out of a writ petition filed in High Court for quashing of FIR and police report on the allegations of malafides against the informant and the investigating officer. In order to establish the malafides, the petitioner had annexed several documents to the writ petition which were not part of the police report. The High Court considered the documents and allowed the writ petition. But the Apex Court set aside that order on merit as well as by observing as follows:

16. It is thus obvious that "the annexures" were neither part of the police reports nor were relied upon by the investigating officer. These documents were produced by the respondents before the High Court alongwith the writ petitions. By treating "the annexures" and affidavits as evidence and by converting itself into a trial Court the High Court pronounced the respondents to be innocent and quashed the proceedings. The least we can say is that this was not at all a case where High Court should have interfered in the exercise of its inherent jurisdiction. This Court has repeatedly held that the appreciation of evidence is the function of the criminal courts. The High Court, under the circumstances, could not have assumed jurisdiction and put an end to the process of investigation and trial provided under the law. Since the High Court strongly relied upon "the annexures" in support of its findings, we may briefly examine these documents.

The facts of the instant case are entirely different. This Court is not considering any new material, but the material collected during further investigation into the complaint and the opinion formed by the investigating agency on the basis of that material. These documents would undoubtedly be relevant. Actually in the facts of the case, consideration of this material is essential for rendering of justice.

30. The second argument of Mr. Gharat, in support of which also, he relies upon the same judgment of the Apex Court, is that this Court should not assume the jurisdiction of the trial Court by appreciating the evidence. In my considered opinion, no exercise of evaluation or appreciation of evidence is involved in the present applications. The Court is only required to look at the entire material unearthed during the investigation into the incident of death of 9 persons in police firing which includes further investigation and the opinion formed by the investigating agency itself. It is the investigating agency which has re-looked into the material collected earlier and into the material collected during further investigation. It has then arrived at the conclusion of innocence of the applicants

and their co-accused. While doing so, the investigating agency has actually discharged its duty in true sense. In the very decision cited, in his concurring judgment stating additional and separate reasons, K. Ramswamy, J. comments upon the duty of the investigating officer in following terms by placing reliance upon an earlier decision of the Apex Court.

The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction, but to bring out the real unvarnished truth.

31. As has been rightly submitted by Mr. Pradhan, it was the bounden duty of the concerned prosecutor to bring the facts of further investigation into the complaint to the notice of the Sessions Court at the time of framing of charge. This would have enabled the Court to consider all the relevant facts at the appropriate time.

32. When the facts were ultimately brought to the notice of the Sessions Court by the applicants, the Court refused to look into the same on the ground that the stage to consider the same had been crossed. In its order, after referring to the procedure laid down under Chapter XVIII under the heading "Trial before the Court of Sessions" the Sessions Court held that it had framed the charge against the applicants after hearing the prosecution and verifying the investigation papers produced alongwith the chargesheet. The Court therefore had already passed the stage of Section 227 Criminal Procedure Code of considering discharge of accused and reached the stage of framing of charge. Not just that, but the prosecution had already commenced the evidence in trial. The Sessions Court also noted that the next stage of acquittal u/s 232 of Criminal Procedure Code was yet to be reached. Therefore according to the Sessions Court it was not proper for it to consider the allegations made in the second FIR leading to Sessions Case No. 1171 of 2001. The Sessions Court, therefore unfortunately, did not even look into the documents of further investigation.

33. The applicants had cited the decision of the Apex Court in T.T. Anthony's case (supra) before the Sessions Court. Apparently, it did not fully comprehend the judgment cited and held that the judgment was of no help to the applicants. It went on to observe that the judgment in fact helps the accused in the second FIR and that those accused should have filed proceedings in the higher Courts for appropriate reliefs in view of the ratio in that decision. What was lost sight of by the Sessions Court, was the effect of the ratio that after conclusion of the further investigation, there could not have been second FIR but ought to have been supplementary report in the first FIR. The material in the further investigation therefore became completely relevant to the proceedings against the applicants and deserved attention of the Sessions Court in the extraordinary circumstances of the case.

34. It would be worthwhile to revert to the observations of K. Ramaswamy, J. in P.S. Sharma's case (supra) on the aim of Criminal Procedure Code and the duty of the police. It is observed therein:

The aim of Code is to secure a conviction if he can do by use of utmost fairness on the part of the Officer investigating into the crime before lodging a chargesheet. The reason is that no one should be put to unnecessary harassment on a trial unless there are good and substantial reasons for holding it.

AND

The primary duty of police, thus is to collect and sift the evidence of the commission of the offence to find whether the accused committed the offence or has reason to believe to have committed the offence and the evidence available is sufficient to prove the offence and to submit his report to the competent magistrate to take cognizance of the offence.

In the instant case, the investigating agency had apparently lost sight of its primary duty and in an attempt to save it's officers, registered the first complaint against innocent citizens for whose protection it exists. Nothing can be more frightening than the situation where the protector becomes the predator.

35. Mr. Pradhan submits that in the above facts of the case, it is patent that the entire act of police of registration of a fresh case after conducting further investigation permissible u/s 173(8) Cr.P.C. is void ab initio. The registration of fresh case is therefore, required to be abhorred and directions are in order to the trial court to treat chargesheet in C.R. No. 198 of 2001 as supplementary chargesheet in C.R. No. 46 of 1993. He submits that inherent powers of this court u/s 482 Cr.P.C. are wide enough to include such directions which would secure the ends of justice. He seeks precedent in a decision of Calcutta High Court in Rajab Ali Vs. State of West Bengal and Another, . In the facts of the decision cited a complaint u/s 498A/302/34 IPC had been registered against 10 persons. On completion of investigation the investigating agency submitted chargesheet against nine accused persons with a prayer for discharge of the 10th accused. The complainant raised an objection to the prayer for discharge followed by a prayer of further investigation. The learned Magistrate upheld the objection and directed "re-investigation" u/s 173(8) Cr.P.C. On completion of "re-investigation" the I.O. submitted fresh chargesheet against all the ten accused. Then cognizance was taken of the fresh chargesheet and warrant of arrest was issued against the 10th accused who was by then absconding. Being aggrieved by the order of taking cognizance, an application u/s 401 read with section 482 Cr.P.C. came to be filed by the 10th accused contending that subsequent submission of final report in the form of chargesheet disregarding the earlier final report in respect of the tenth accused was not permissible in law. The Calcutta High Court after considering the provisions of section 173(8), section 190(7)(b) held that the learned Magistrate was wrong in accepting fresh chargesheet instead of supplementary chargesheet on the basis of further investigation which was required to be submitted by the investigating officer and issued directions, to secure ends of justice, to the Magistrate to assess the entire evidence afresh including the material collected by both the investigation officers in the original

investigation and the further investigation to proceed against the 10th accused. Undoubtedly, the inherent powers of this court saved u/s 482 Cr.P.C., are wide, to be exercised to give effect to any order under the code or to prevent abuse of process of any court or otherwise to secure the ends of justice. But the question is whether the directions as sought can be given by this court in the facts and circumstances of the present case on the application by the present applicants. The facts in the case cited of Calcutta High Court are distinctly different from the present case. What was challenged before Calcutta High Court was the action on the second chargesheet on the ground that it was legally impermissible and it was challenged by the person implicated in the second chargesheet. Whereas what is challenged in the present proceedings is the order passed on the first charge-sheet by the persons implicated in the first charge-sheet. It would be one thing to state that the court should take into consideration the material available by virtue of further investigation for discharging the accused in the first chargesheet. But it would be entirely another thing to say that any specific action be taken in respect of the second chargesheet resulting into another case, particularly when the persons arrayed as accused in the second chargesheet are not before this court in the proceedings on hand. No order, howsoever correct, can be passed without notice and hearing to the affected persons. Therefore, in my considered opinion, the directions as desired by the applicants cannot be given in the present proceedings. It is for the Investigating agency now to adopt the correct course of action as regards the second FIR filed. But at the same time, continuation of the present proceedings against the applicants and their co-accused would amount to absolute injustice to them when the investigating agency itself has reached the conclusion that the FIR filed against the applicants and their co-accused was a bogus FIR. The proceedings arising therefrom, even if have reached the stage of recording evidence, cannot be continued. In view of the same the following order:

ORDER

Both the proceedings are disposed off with a direction that the accused persons in Sessions Case No. 930 of 2002 in connection with C.R. No. 46 of 1993 are discharged.