

(2011) 01 GUJ CK 0030
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 7193 of 2010

Sangiah Pandiyan Rajkumar

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 10-01-2011

Acts Referred:

Arms Act, 1959 — Section 25(1), 27
Bombay Police Act, 1951 — Section 13(1)
Constitution of India, 1950 — Article 21, 32
Criminal Procedure Code, 1973 (CrPC) — Section 173(8), 439, 439(1)
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123

Citation : (2011) 01 GUJ CK 0030

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : S.B. Vakil and Archana R. Acharya, for the Appellant; K.T.S. Tulsi Sr. Advocate, Y.N. Ravani, for Respondent 1 and M.R. Mengdey, Assistant Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.

1.00. Present Criminal Miscellaneous Application u/s 439 of the Code of Criminal Procedure has been preferred by the applicant - Dr. Sangiah Pandian Rajkumar, the then Superintendent of Police, Anti Terrorist Squad, Ahmedabad - original accused No. 2 for releasing him on bail in connection with the complaint being C.R. No. I-5 of 2005 registered with ATS Police Station, Ahmedabad (Sessions Case No. 256 of 2007- FIR No. RCBS1/2010/S0004-MUM filed before the Special Court (CBI), Ahmedabad (Gujarat).

2.00 Background of the facts and chronological events which are important and necessary for deciding the present bail application are as under:

2.01. One Abdul Rahman, now accused No. 7- Police Inspector of Pratapnagar Police Station, District - Udaipur, Rajasthan alleged to be member of Special

Investigating Party formed at Udaipur, Rajasthan to investigate against various offences registered against Sohrabuddin lodged complaint being C.R. No. 5-/2005 with ATS Police Station, Ahmedabad on 26.11.2005. As per above FIR, said Sohrabuddin son of Ahwaruddin Shaikh, resident of Zaraniya, Nagda, Madhya Pradesh, who was accused of offences punishable under Sections 120(B), 121, 121-A, 122, 123, 307, 186, 224 of the IPC; u/s 25(1)(b) and Section 27 of the Arms Act and u/s 13(1) of the Bombay Police Act. It was further stated in the FIR that above accused Sohrabuddin was acting at the behest of ISI to spread terror and disturb the unity and integrity of the country and also entered into conspiracy by possessing arms and ammunition so as to kill big leaders of the State of Gujarat. Investigating team got secret information that said Sohrabuddin was to visit Ahmedabad and was to pass near Vishala Circle, Ahmedabad and therefore, all of them were on duty near Vishala Circle and at that time, said Sohrabuddin came on motorcycle and when asked to surrender by the police party, fired from revolver and attempted to kill them and in return one Abdul Rehman, PI, fired two rounds from service pistol; Shyam Singh, Sub-Inspector (also one of the accused now) fired one round; one Himanshu Singh, Sub-Inspector fired two rounds; Mr. Dabhi, PI fired one round from his service revolver on the body of the said Sohrabuddin and thereafter, he was taken to Civil Hospital, Ahmedabad where he was declared as dead. It is required to be noted that even as per the said FIR, near Vishala Circle at the time of incident following Police Officers of ATS and other Officers were present (1) D.G. Vanjara (2) Rajkumar Pandian (3) Dinesh M.N. (4) M.L. Parmar (5) N.H. Dabhi (6) B.R. Chaube (7) Abdul Raheman (8) Himanshu Singh (9) Shyamsingh (10) Ajay Parmar (11) Santram Sharma.

2.02. One Rubabuddin Shaikh, brother of Sohrabuddin, addressed letter in December, 2005 to Hon''ble the Chief Justice of India, Supreme Court of India complaining about killing of his brother in fake encounter and disappearance of sister-in-law - Kausarbi at the hands of Anti-Terrorist Squad (ATS) and Special Task Force (STF). It was alleged that while his brother and Sister-in-law were travelling in a bus from Hyderabad to Sangli, squad comprising ATS and STF team stopped the bus and picked them in the night of 21-22/11/2005 and four days later i.e. 26/11/2005 Sohrabuddin was killed in fake encounter and there was no trace of his sister-in-law. Said Rubabuddin prayed for registration of offence and investigation in the matter. It appears that taking note of the said letter, Hon''ble Supreme Court forwarded the letter to the DGP, Gujarat for further enquiry and action. Thereafter, enquiry was conducted by CID(Crimes) and statements of various witnesses came to be recorded. During said enquiry, one Tulsiram a close associate of his brother was killed in an encounter at Banaskantha on 28/12/2006. Later on, Rubabuddin Shaikh, brother of Sohrabuddin filed petition before the Hon''ble Supreme Court which was registered as Writ Petition (Criminal) No. 6 of 2007 for an appropriate order of registration of offence and investigation by the CBI team into abduction and fake encounter of his brother Sohrabuddin and disappearance of his wife Kausarbi. It

was also prayed for an appropriate order to register the offence and investigation by the CBI into the subsequent fake encounter of Tulsiram a close associate of Sohrabuddin. It was the case of Rubabuddin in the said petition that Tulsiram was used by ATS to trace whereabouts of Sohrabuddin and Mr. D.G. Vanzara, who was heading the ATS, Gujarat at the time of killing of Sohrabuddin and disappearance of Ms. Kausarbi was transferred as DIG Border Range, Kutch and Banaskantha District and he also played active role in killing of Tulsiram. One Vipul Agarwal, SP who was working under Mr. Vanzara was used to kill Tulsiram. As per Rubabuddin, one Rajkumar Pandian, SP, ATS also played active role in killing of Sohrabuddin, who was present at the relevant day. Therefore, said Rubabuddin prayed for CBI investigation. Pursuant to the directions issued by the Hon"ble Supreme Court from time to time, Investigating Agency of the State of Gujarat carried investigation. During the course of investigation, Inquiry being Inquiry No. 66 of 2006 was instituted by the CID (Crimes), Gujarat State and role of various high ranking superior officers in Police Department i.e. ATS and STF were surfaced in the statements of the witnesses. Considering material which had come on record, DGP ordered further enquiry u/s 173(8) of the Code on 6/3/2007. Accordingly, learned Metropolitan Magistrate was informed. Statement of various witnesses came to be recorded during investigation, preliminary inquiry and further investigation. After conclusion of inquiry, it was found by the Investigating agency that death of Sohrabuddin and subsequent death of Kausarbi was a result of fake encounter carried out by the applicants herein & other accused the then Officers of ATS and STF of Gujarat State, superior IPS Officers of State of Gujarat and State of Rajasthan. During the course of proceedings before the Hon"ble Supreme Court and further investigation carried out by the Special Investigation Team constituted pursuant to the order passed by the Hon"ble Supreme Court subsequently it was found that Kausarbi wife of Sohrabuddin was killed and done to death and her dead body was disposed of at village - Illol, District Sabarkantha as she was eye-witness to the entire incident right from killing / taking said Sohrabuddin from Hyderabad to Ahmedabad and killing him. The applicant herein who was, at the relevant time, Superintendent of Police also came to be arrested. That a chargesheet came to be filed against all the accused inclusive of the applicant - original accused No. 2 and at the relevant time the allegation levelled against the applicant was that "the accused No. 2 is involved in the entire conspiracy bringing Sohrabuddin from Hyderabad to Ahmedabad, killing Sohrabuddin in a fake encounter and thereafter killing Kausarbi - wife of Sohrabuddin and thereafter destroyed the Kausarbi's dead body after setting it on fire. After the arrest, the applicant filed an application u/s 439 of the Code of Criminal Procedure before the learned trial Court for releasing him on bail which came to be rejected and therefore, applicant preferred Criminal Miscellaneous Application No. 13772 of 2007 for regular bail u/s 439 of Code of Criminal Procedure for releasing him on bail. The said application was heard by this Court along with the applications filed by other co-accused and by detailed judgment and order dated 25.09.2008, this Court dismissed the said application considering the nature of

accusation, seriousness of gravity of offences alleged against the applicant and considering prima facie nature of supporting evidence; reasonable apprehension of tampering with the witness and prima facie satisfaction of the Court in support of the chargesheet.

2.03. It appears that thereafter pursuant to the order passed by the Hon"ble Supreme Court dated 12/1/2010 in Writ Petition (Criminal) No. 6/2007 directing the Central Bureau of Investigation to investigate into the matter of fake encounter of Sohrabuddin and missing of his wife Smt. Kausarbi, CBI, SCB, Mumbai registered FIR No. BS 1/2/2010/0004 (RC 4(5) 2010 - MUM) on 1/2/2010 and after the investigation, Chief Investigating Officer, Superintendent of Police, CBI:SIT: Gandhinagar has filed supplementary chargesheet against in all 15 accused and so far as the applicant is concerned, for the offences u/s 120B read with 364, 365, 368, 341, 342, 302, 384 and 201 of the Indian Penal Code. It is to be noted that earlier being aggrieved by and dissatisfied with the order passed by this Court dtd.25/9/2008 in Criminal Misc. Application No. 13772 of 2007, the applicant approached the Hon"ble Supreme Court by way of filing a SLP which came to be rejected by this Hon"ble Court confirming the order passed by this Court rejecting the bail application submitted by the applicant.

2.04. That thereafter, after supplementary chargesheet was filed, the applicant straightway approached the Hon"ble Supreme Court under Article 32 of the Constitution of India for releasing him on bail being Writ Petition (Criminal) No. 50 of 2010 and the Hon"ble Supreme Court dismissed the said writ petition seeking bail, however, it was observed that the Petitioners would be at liberty to move CBI / High Court and the Court shall be at liberty to pass appropriate order in accordance with law and on merits and hence, the applicant has preferred the present Criminal Misc. Application u/s 439 of the Code of Criminal Procedure for releasing him on bail.

3.00. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that the applicant is in jail since 3 1/2 years and the investigation is already concluded and therefore, the applicant is now required to be released on bail.

3.01. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that trial has been stayed by the Hon"ble Supreme Court and therefore, there is no possibility of concluding the trial within a short time and therefore also the applicant is required to be released on bail.

3.02. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that as such the present application has been preferred by the applicant pursuant to the liberty reserved by the Hon"ble Supreme Court in its order dtd.3/5/2010 in Writ Petition No. 50 of 2010 and choice was given to the applicant either to move CBI Court or High Court and has submitted that the Hon"ble Supreme Court has also observed that the Court shall be at liberty to pass appropriate order in accordance with law and on merits

and uninfluenced by the rejection of the earlier bail applications.

3.03. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that there are changed circumstances after rejection of the bail application submitted by the Petitioner earlier and the same are required to be considered while considering the present bail application. It is submitted that the following are the main changed circumstances after rejection of the earlier bail application:

investigation is already concluded and even supplementary chargesheet is also filed by the CBI;

the applicant is in jail since last more than 3.1/2 years and there is likelihood of delay in trial;

stay is granted by the Hon''ble Supreme Court against the trial; and this Court has granted bail to accused No. 16.

3.04. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that as the investigation is already concluded and even supplementary chargesheet has been filed by the CBI, no purpose would be served in keeping the applicant in jail. It is submitted that keeping a person / accused in jail at pretrial stage should not be to punish him at pretrial stage.

3.05. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that the applicant is not likely to repeat the crime again as trial is pending against the applicant.

3.06. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that investigation is also over twice and therefore, to apprehend that there is likelihood of tampering the witnesses and/or evidence is all imaginary. It is submitted that as such nothing is on record with regard to such apprehension.

3.07. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that more than 5 1/2 years have elapsed after the alleged incident and the applicant is in jail since last more than 3 1/2 years.

3.08. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that in view of the changed circumstances, denial of bail to the applicant would be violative of applicant's fundamental right under Article 21 of the Constitution of India which prescribes deprivation of a person's life and personal liberty except according to procedure established by law. It is submitted that right to life include right to live consistently with human dignity and decency and all that give meaning to life. He has further submitted that the procedure established by law has to be reasonable procedure and not arbitrary and oppressive or fanciful procedure. It is submitted that at this stage, the applicant is charged with but not convicted of an offence. It is submitted that

an accused is presumed to be innocent until he is convicted. It is further submitted that accused's pretrial in police/jail custody or in jail pretrial-conviction-sentence as punishment for the commission of the offence charged, is not procedure prescribed by law for crime detection or punishment and such procedure, if any, would be violative of Article 21 of the Constitution of India.

3.09. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has relied upon the following decisions:

(1999) Supp. 1 SCC 251; AIR 1978 SC 597 ; AIR 1979 SC 745 ; M/s. Madan and Co. Vs. Wazir Jaivir Chand, ; (1999) Supp. 1 SCC 251; Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, ; Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, 3.10. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that the provision for the arrest of accused in the course of investigation process is to prevent him from tampering with witness or evidence when investigation or collection of evidence is on. It is submitted after the investigation is over accused's continue detention may be reasonable, only if necessary for fair trial and on untampered evidence and witnesses and for securing presence of the accused to serve sentence, if any, at the end of trial.

3.11. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that burden of proving the valid grounds for detention of the accused without violating his fundamental rights, life and personal liberties are on the prosecution. It is further submitted that detention of an accused and denial of bail bereft of such valid ground is tantamount to subjecting the accused to undergo a pretrial and preconviction sentence for an offence, which he may or may not have committed and which sentence would be in addition to his post-trial sentence has no basis in law and is violative of Article 21 of the Constitution of India.

3.12. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that the alleged offences have been investigated first by the State Crime Branch and thereafter by CBI and chargesheets have been filed, therefore, it is submitted that denial of bail for the purpose of investigation is out of question. It is further submitted that denial of bail for fair trial on the allegation that the Petitioner may tamper with the witnesses to be examined or the evidence to be tendered at trial has to be alleged and proved by the prosecution to the satisfaction of the court.

3.13. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that denial of bail on the ground that the accused may abscond and be not available to undergo the sentence is neither alleged nor proved.

3.14. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that even when a valid ground exists the

accused" pretrial detention has to be limited to the requirement of ground and no more. According to Mr. Vakil, learned senior advocate appearing on behalf of the applicant accused, once the investigation is concluded, normal rule is that the accused should be released on bail, despite the fact that there is a prima facie case found against the applicant accused.

3.15. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that prima facie case against the accused merely indicates probabilities of his conviction at the trial, which may render the accused liable to be sentenced at the end of trial. It is submitted that therefore, even if there is a prima facie case against the accused, in absence of any valid justifying ground for detention of the accused, accused is to be released on bail.

3.16. Relying upon the decision of the Hon''ble Supreme Court reported in Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has submitted that, as observed by the Hon''ble Supreme Court prima facie case is not conclusive in the matter of grant of bail.

3.17. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that approach of this Court in rejecting earlier bail application No. 13772 of 2007 filed by the applicant herein by observing that aspects of contradictions in the statements of eye witnesses, their subsequent retractions and/or statements of the witnesses would be required to be considered at the state of trial, i.e. not at the hearing of the bail application, is in conflict with the approach of this Court while granting bail to Accused No. 16 Mr. Amit Shah.

3.18. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that the charge against the Petitioner is of conspiracy and it is well settled that when direct evidence is not available to connect an accused with the offences alleged, the investigation and the prosecution resort to a charge of conspiracy.

3.19. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that

3.20. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that the applicant is in jail since last more than 3 years and there is likelihood of delay in trial and disposal of the case and therefore, it is requested to release the Petitioner on bail.

3.21. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has further submitted that delay in trial and disposal of the case by itself is a valid ground for grant of bail.

3.22. Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused has relied upon the following decisions in support of his above

submissions:

Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., ; Supreme Court Legal Aid Committee Representing Undertrial Prisoners Vs. Union of India (UOI) and Others, ; Shailendra Kumar Vs. State of Delhi, ; Ram Narayan Singh and Another Vs. State of Bihar, ; Babanrao Tukaram Ranjane Vs. State of Maharashtra,

By making above submissions and relying upon the above decisions, it is requested by Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant - original accused to release the applicant on bail.

4.00. Present petition is vehemently opposed by Mr. KTS Tulsi, learned Senior Advocate appearing with Mr. Y.N. Ravani, learned advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation and Mr. M.R. Mengdey, learned Additional Public Prosecutor for the Respondent No. 2 - State.

4.01. Mr. Tulsi, learned Senior Advocate appearing on behalf of Respondent No. 1 - CBI has vehemently submitted that there is a strong prima facie case against the applicant. He has submitted that active participation of the applicant accused in the commission of the alleged offence right from bringing Sohrabuddin from Hyderabad to Ahmedabad; killing Sohrabuddin; killing Kausarbi wife of Sohrabuddin and even destroying her dead-body is prima facie established. It is submitted that it is not only a case of conspiracy without any further evidence, but there are sufficient evidence and material collected by the investigating agency against the applicant - original accused No. 2, which has been considered by this Court while rejecting the earlier bail application submitted by the applicant being Criminal Misc. Application No. 13772 of 2007. It is submitted that as such the order passed by this Court in the aforesaid bail application has been confirmed by the Hon''ble Supreme Court and therefore, as such the reasons assigned by this Court while rejecting the earlier bail application of the applicant has been confirmed by the Hon''ble Supreme Court.

4.02. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that as such after rejection of the earlier bail application of the applicant, there are no changed circumstances at all so far as the applicant herein is concerned. It is submitted that fresh investigation conducted by the CBI and filing of the supplementary chargesheet by the CBI cannot be said to be a change circumstances so far as the present applicant herein is concerned.

4.03. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that after further investigation by the CBI and filing of the supplementary chargesheet, some more evidences have been collected and some more accused are charge sheeted which cannot be changed circumstances so far as the applicant herein is concerned. It is further submitted that release of the accused No. 16 on bail also cannot be said to be changed circumstances so far as the applicant herein is concerned.

4.04. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that as such the order passed by the learned Single Judge of this Court releasing the accused No. 16 Mr. Amit Shah on bail is the subject matter before the Hon''ble Supreme Court and therefore, it cannot be said that the order passed by the learned Single Judge releasing accused No. 16 is confirmed by the Hon''ble Supreme Court. It is submitted that far as the order passed by this Court in Criminal Misc. Application No. 13772 of 2007 rejecting the earlier bail application of the Petitioner, was challenged before the Hon''ble Supreme Court and the said SLP came to be dismissed by the Hon''ble Supreme Court and whereby the Hon''ble Supreme Court has confirmed the order passed by this Court in Criminal Misc. Application No. 13772 of 2007. It is further submitted that even otherwise, number of evidences have been collected by the investigating agency against the accused during the course of investigation and there is a strong prima facie case against the applicant - accused.

4.05. Now, so far as the contention and submission on behalf of the applicant that to deny bail to the applicant would be violative of Article 21 of the Constitution of India and that as the applicant is in jail since last more 31/2 years and therefore, he is required to be released on bail is concerned, Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that the aforesaid aspects have been considered by the Hon''ble Supreme Court in the case of Rajesh Ranjan Yadav @ Pappu Yadav Vs. CBI through its Director, as well as recent decision of the Hon''ble Supreme Court in the case of Masroor Vs. State of U.P. and Another, It is submitted that as observed by the Hon''ble Supreme Court in the aforesaid decisions, while considering the grant of bail u/s 439 of the Code of Criminal Procedure, liberty of a person accused of an offence is required to be considered vis-a-vis interest of the society. It is submitted that as observed by the Hon''ble Supreme Court in the said decision, liberty of an individual is precious and is to be zealously protected by the Courts none the less such a protection cannot be absolute in every situation and valuable right of a liberty of an individual and the interest of the society in general has to be balanced.

4.06. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that as such, law on the bail is already discussed by this Court in earlier order passed by this Court in Criminal Misc. Application No. 13772 of 2007, and considering all the decisions, this Court has rejected the earlier bail application of the applicant and the said order and the reasons assigned in the said order while rejecting the earlier bail application of the applicant have been confirmed by the Hon''ble Supreme Court.

4.07. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that even the alleged contradictions and variance in the statements of some of the witnesses

are already considered by the Hon''ble Supreme Court in the case of Dinesh M.N. (S.P.) Vs. State of Gujarat, as well as in the case of Narendra K. Amin (Dr) v. State of Gujarat and Anr. (2008) 13 SCC 584, with respect to other co-accused persons. It is submitted that the so-called contradictions and variance in the statements of the witnesses have been considered by this Court while rejecting the earlier bail application of the applicant herein being Criminal Misc. Application No. 13772 of 2007. It is submitted that even the same is also considered by this Court in the recent decision dtd.25/10/2010 rendered in Criminal Misc. Application No. 6608 of 2010, and considering the same, this Court has rejected the said bail application preferred by the original accused No. 13 - Naresh Vishnu Chauhan.

4.08. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has relied upon the recent decision of this Court dtd.25/10/2010 rendered in Criminal Misc. Application No. 6608 of 2010, which was preferred by the original accused No. 13 - Naresh Vishnu Chauhan, whereby this Court has rejected the bail application preferred by the original accused No. 13.

4.09. Now, so far as the submission on behalf of the applicant to release him on bail on the ground that there is likelihood of delay in trial and that the applicant is in jail since more than 3 1/2 years is concerned, Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has submitted that on the aforesaid ground the applicant cannot be released on bail looking to the strong prima facie case found against the accused and the manner in which the offence has been committed, more particularly keeping in mind the fact that at the relevant time the applicant was working as Superintendent of Police in ATS, Ahmedabad. It is submitted that as such there is no rule of law that because there is likelihood of delay, accused should be released on bail despite the prima facie involvement of the accused in serious offence of killing innocent persons. It is further submitted that even the aforesaid aspect is also considered and dealt with by the Hon''ble Supreme Court in the case of Rajesh Ranjan Yadav (Supra). It is further submitted that the trial has been stayed by the Hon''ble Supreme Court considering the fact that while ordering further investigation by the CBI as earlier it was found that investigation was not carried out in fair and impartial manner and attempts were made to divert the attention from the main accused person and it was found that earlier First Information Report was filed by CID Crime to divert the real issue and even at the relevant time even Kausarbi - wife of Sohrabuddin was found to be missing and subsequently after the Hon''ble Supreme Court intervened, it was declared before the Hon''ble Supreme Court that she was also killed and her dead-body was also destroyed. It is submitted that active participation of the applicant is established from the investigation papers and there is strong prima facie case against the applicant. Therefore, it is requested to dismiss the present application.

4.10. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that prosecution is seriously apprehending that if the applicant is released on bail, there are all chances of tampering with the evidences and in fact though the applicant and other accused are in jail, they have tampered the witnesses even from the Jail. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has submitted the list of the witnesses, who are likely to be tampered with and/or pressurized, in a sealed cover. It is submitted that if name of those persons are disclosed, in that case, there is danger to their lives, liberty and safety. It is submitted that looking to the position held by the applicant in the police department he is likely to influence the witnesses.

4.11. Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - Central Bureau of Investigation has further submitted that further investigation is also continued/ going on.

By making above submissions and relying upon above decisions, it is requested not to exercise the discretion u/s 439 of the Code of Criminal Procedure and not to release the applicant on bail.

5.00. Present petition is also vehemently opposed by Mr. M.R. Mengdey, learned Additional Public Prosecutor appearing on behalf of the Respondent No. 2 - State. He has adopted the submissions made and decisions relied upon by Mr. Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - CBI and has requested not to exercise the discretion and not to release the applicant on bail.

6.00. Heard Mr. S.B. Vakil, learned Senior Advocate appearing on behalf of the applicant and Mr. KTS Tulsi, learned Senior Advocate appearing on behalf of the Respondent No. 1 - CBI and Mr. M.R. Mengdey, learned Additional Public Prosecutor appearing on behalf of the Respondent No. 2 - State, at length.

6.01. At the outset, it is required to be noted that the applicant - original accused No. 2 is charge-sheeted for the offences punishable under Sections 120(B), 121, 121-A, 122, 123, 307, 186, 224 of the IPC; u/s 25(1)(b) and Section 27 of the Arms Act and u/s 13(1) of the Bombay Police Act. Initially investigation was carried out by State CID Crime, however, subsequently pursuant to the order passed by the Hon"ble Supreme Court , further investigation has been carried out by the CBI.

6.02. As emerging from the chargesheet and evidence collected during the course of investigation, entire case can be said to have happened in three parts. First part is prior to 26/11/2005, second part is dated 26/11/2005 and third part is post dated 26/11/2005. First facet was about conspiracy part bringing Sohrabuddin from Hyderabad to Ahmedabad, second part is on the date on which the alleged encounter of Sohrabuddin took place i.e. 26/11/2005 and third part is post 26/11/2005 about death of Kausarbi and destroying evidence relating to her dead body. At this stage, it is required to be noted that prior to Hon"ble

Supreme Court's intervention in the matter and directing further investigation by the Special Investigating Team, whereabouts of Kausarbi wife of Sohrabuddin was not known and even after the matter was adjourned before the Hon''ble Supreme Court from time to time and when the interim reports were submitted before the Hon''ble Supreme Court, it appears that after going through the interim report placed before the Hon''ble Supreme Court in Writ Petition (Criminal) No. 6/2007, the Hon''ble Supreme Court was of the view that prima facie case has been made out for Rule Nisi calling upon the Union of India to show cause why the order should not be granted and also habeas corpus should not be issued for producing Kausarbi in the Court. Learned Senior Advocate appearing on behalf of the State of Gujarat submitted before the Hon''ble Supreme Court that body of Kausarbi was disposed of by burning in village Illol, Sabarkantha District and said fact was brought on record in the Action Taken Report which was submitted on 3/4/2007 before the Hon''ble Supreme Court and investigation with respect to third part of the case i.e. about death of Kausarbi and destroying evidence relating to her death was initiated.

6.03. That thereafter as stated herein above, consequent to the orders of Hon''ble Supreme Court dated 12/1/2010, CBI was directed to investigate into the matter of fake encounter of Sohrabuddin and missing of his wife, Kausarbi and the case was registered by the CBI, Mumbai, which is being investigated by the CBI, SIT, Gandhinagar under the direction of the Hon''ble Supreme Court and that the investigation is still going on and is incomplete and Hon''ble Supreme Court has granted/extended the time in favour of CBI to further investigate. It is to be noted at this stage that even in the supplementary chargesheet filed by the CBI - SIT, Gandhinagar dated 23/7/2010, in para 48, the CBI - investigating agency has specifically requested the Court to grant permission to conduct further investigation in the case under the provisions of Section 173(8) of Criminal Procedure Code, in view of the Hon''ble Supreme Court's directions to unearth the larger conspiracy wherein the involvement of other important functionaries is being investigated upon. It is further submitted that as the investigation is in progress, a supplementary chargesheet would be filed before the Hon''ble Court on completion of further investigation. Therefore, as the further investigation is being carried out by the CBI, applicant cannot be released on bail at this stage, as anything can come out at any time during further investigation. It is to be noted that when initially the investigation was carried out, nobody was aware and/or it was not disclosed with respect to killing of Kausarbi and only after further investigation, pursuant to the direction issued by the Hon''ble Supreme Court, it was declared before the Hon''ble Supreme Court with respect to killing of Kausarbi, wife of Sohrabuddin and disposing of her dead body at Illol, Sabarkantha District. Therefore, till the investigation is concluded and the final chargesheet is filed, no inference and/or final conclusion can be drawn as sought to be contended on behalf of the applicant, that at the most, it can be said that the applicant has committed the offence u/s 201 of IPC i.e. disposing of the dead body of Kausarbi only. Even otherwise when the

investigation is at crucial stage, the applicant who was holding the position in the police department i.e. he was Sub-Inspector in Anti Terrorist Squad, Ahmedabad, cannot be released on bail and there might be possibilities of tampering with the evidence and/or witnesses.

6.04. Subsequently charge-sheet has been filed by CBI- SIT, Gandhinagar on 23/7/2010 and it is alleged against the applicant - original accused No. 2 as under:

13. Investigation also revealed that Dr. Rajkumar Pandiyan (A-2) IPS (Guj-1996), the then Supdt. of Police, ATS, Gujarat Police, Ahmedabad reached Hyderabad from Ahmedabad on 21.11.2005 morning at about 10:00 hrs. A room was already reserved for him at the Senior Police Officers' Mess, Masab Tank Road, Hyderabad for his stay. Shri Nawal Kishore HC, APSP 8th Battalion, Hyderabad was present on duty at the police Mess when Dr. Rajkumar Pandiyan (A-2) had arrived there. The visitor had made an entry in the Accommodation Register kept at the Reception desk of the Mess before taking the key of Room No:16 from the duty constable. It was further disclosed that Shri Balasubramaniam, IPS (AP-1994), the then SP, Prakasam Dist., A.P. Police, Hyderabad, had arranged accommodation for Dr. Rajkumar Pandiyan (A-2) in the Senior Police Officers' Mess at Hyderabad on 21.11.2005 through a telephone call made to the Mess. The said call was initially received by Shri Gouvi Shamaraao, then HC, APSP, who made an entry to that effect in the Telephone Message Register (Page 76, Item 6) maintained at the Mess. The said entry was put up to Shri T D Viswanathan, the Mess Manager, who made the necessary verification to ensure the caller's identity as required by the procedures, before allotting a room to Dr. Rajkumar for a period of 3 days w.e.f. 21.11.2005.

14. Investigation also disclosed that on 21.11.2005, Dr. Rajkumar Pandiyan (A-2) met Police Officials of Police Commissionerate of Hyderabad and also visited blast site to give his visit to Hyderabad an official colour.

15. Investigation further disclosed that at around 7.00 pm on 21.11.2005, Dr. Rajkumar Pandiyan (A-2) had called up Shri E. Radhakrishnaiah IPS (Guj-1986), then posted as DIG, CRPF Group Centre, Chandayanigutta, Hyderabad and had requested for a room in the Group Centre for himself. Without the knowledge of the DIG, Dr. Rajkumar Pandiyan (A-2), arranged the Annexe for his four Subordinate Officials who had reached from Ahmedabad for their stay. The Subordinate Officials had dinner and consumed liquor incurring a total expenditure of Rs. 1129/-, which was later paid by the DIG. The foursome vacated the rooms on 22.11.2005 morning without clearing the bills and reported to Dr. Rajkumar Pandiyan (A-2) at the Police mess at Masab tank road, Hyderabad.

16. Investigations also disclosed that after Dr. Rajkumar Pandiyan (A-2), had left the Police Mess on 22.11.2005 evening, Shri Ajay Parmar (A-10) Constable stayed back and vacated the room no 16 at the IPS Mess on 23.11.2005 morning

after clearing the bill of about Rs. 414/-. Dr. Rajkumar Pandiyan (A-2) had earlier booked his return ticket for Ahmedabad on 24.11.2005. However on 21.11.2005, he had asked his Constable to get the ticket preponed to 23.11.2005 evening by IC 563 instead of 24.11.2005.

17. Investigation disclosed that on 22.11.2005 morning, Shri Hari, a close confidant of Saleema Begum @ Aapa, a sister of Kalimuddin went to the booking office of M.J. Travels, Hyderabad and purchased two tickets for Sohrabuddin and Kauserbi, in the name of Salim, for Sangli in Maharashtra. Sohrabuddin and Kauserbi boarded the luxury bus KA 05 F 5051 of Sangeeta Travels proceeding for Belgaum and occupied seats No. 29 and 30 respectively. On 22.11.2005 the route of this bus was from Hyderabad to Solapur, Miraj, Sangli, Kolhapur to Belgaum.

18. Investigation further revealed that the Police Party which included police personnel from Andhra Pradesh led by Dr. Rajkumar Pandiyan (A-2) left in one Qualis and two TATA Sumo vehicles and followed the said luxury bus for about two and half hours on Bombay Road. At about 11:30 p.m. the luxury bus stopped for food at M.S. Dhaba situated on the left side of the road near Zahirabad. Just ahead of this hotel on the right side one small Dhaba is there. The two Tata Sumo and Qualis stopped at a pan shop near the Dhaba. Near midnight all the passengers boarded the bus No. KA 05 F 5051 and the bus started again.

19. Investigation further revealed that the Police Party also followed the luxury bus. About 15 to 20 km from the hotel, on the instructions of Shri Rajkumar Pandiyan (A-2) their vehicles overtook the luxury bus and stopped the bus. Two police persons entered into bus and asked driver to switch on the light. While the third police person was having torch in his hand remained near the door of the bus. The police persons told there is police checking. All the three police personnel were in civil dress. They picked up Tulsiram Prajapati who was sitting in the bus. After sometime, they again came into bus and picked up Sohrabuddin. When Sohrabuddin was made to get down from the bus, Kauserbi also got down. After sometime, one police person in civil dress told Kauserbi to go inside bus, but she refused and replied that "Mere Shohar ke bina nahi jaungi". Out of the two policemen who had come into the bus, one person had a revolver in his hands. For a long time there was discussion and arguments between the policemen about what to do with Kauserbi. They then decided to take Kauserbi with them. After sometime one policemen asked the driver of the bus to proceed.

20. Investigation further disclosed that Shri Sohrabuddin and Shri Tulsi Prajapati abducted by Police Party were made to sit in the Qualis while Smt. Kauserbi was made to sit in one of the Tata Sumo vehicles along with Shri Santram Sharma (A-11). In this Tata Sumo one officer sat near the driver on front row and on the middle row, gunman Santram Sharma and the lady were sitting and on the rear row one officer and Shri Gurdhayal Singh Chaudhary were sitting. The Qualis

vehicle moved ahead of these two Tata Sumo Vehicles. All of them reached Valsad where at one big hotel, both the Tata Sumo Vehicles were stopped and they took lunch. Shri Tulsiram Prajapati was shifted to another vehicle which was brought by Rajasthan Police personnel. They took Tulsiram Prajapati straight to Udaipur where he was kept in illegal custody for five days. Thereafter he was shown arrested by a team led by Shri Bhanwar Singh Hada, Inspector/SHO, P.S. Hathipole, Udaipur, Rajasthan from Bhilwara.

21. Investigation further revealed that after having lunch, police party along with Sohrabuddin proceeded towards Bharuch in two TATA Sumo vehicles and after two kilometers both the TATA Sumo Vehicles stopped and the Qualis vehicle also joined there. Gunman, Santram Sharma (A-11) and the lady, Kauserbi, were transferred into the Qualis vehicle. The Qualis vehicle proceeded ahead of TATA Sumo vehicles and reached Koba Circle, Gandhinagar at about 7:00 PM on 23-11-2005. At Koba circle in Gandhinagar, Shri M.L. Parmar (A-4), Dy.SP, ATS along with Shri Satish Sharma (expired) and Shri B.R. Choubey (A-6), PSI, ATS were waiting in a Maruti Fronti car. On the arrival of the Qualis vehicle Shri Rajkumar Pandiyan (A-2) and Shri M.L. Parmar (A-4) had an animated discussion. Thereafter, Shri M.L. Parmar (A-4), in his official Maruti Fronti car, moved ahead followed by the Qualis Vehicle. They went to Disha Farm near Adalaj on Sarkhej Highway. Sohrabuddin and Kauserbi, who were brought in the Qualis vehicle, were alighted at this Disha farm house. They were kept under confinement at this Farm House.

25. Investigation further revealed that the Police Officials of ATS, Gujarat and STF, Rajasthan had stage managed the encounter of Shri Sohrabuddin in Ahmedabad. It was shown that Sohrabuddin had come to Ahmedabad for killing a prominent political leader. It was shown that he had come on a train from Surat to Ahmedabad and was to go to Johapura to meet one Mukhtiyar. In pursuance of the said plot, DIG, ATS, Shri D.G. Vanzara (A-1), SP (Operation) Shri Pandiyan (A-2) and Udaipur SP, Shri Dinesh M N (A-3), Shri Abdul Rehman Shaikh (A-7) and SI, Shri Himanshu Singh (A-8) and SI, Shri Shyam Singh (A-9) and ATS, Police Inspector Shri Dabhi (A-5) and SI, Shri B R Choubey (A-6), PC, Ajay Parmar (A-10), P.A. cum Police Commando for Dr. Rajkumar Pandiyan (A-2), Shri Santram Chandravan Sharma (A-11), Gunman to Dr. Rajkumar Pandiyan (A-2) all formed a combined team and reached at Narol, Ahmedabad Circle in between Vishal Toll Naka, near GEB main fiddler. Two teams were formed under the leadership of Abdul Rehman (A-7) and PI Shri Dabhi (A-5). At 3.00 hrs. they reportedly took positions at two places to keep watch on road. On 26.11.2005 at about 5.20 Hrs. it was shown that Sohrabuddin was coming on a motorcycle and was stopped by Police. It was further shown that after being stopped by Police, Sohrabuddin fired upon the police and tried to run away and in self defence Shri N.H. Dabhi (A-5) fired three rounds, two rounds each fired by Shri Abdul Rehman (A-7) and Shri Himanshu Singh (A-8) and one round by Shri Shyamsingh Charan (A-9) on Sohrabuddin. Whereas investigation revealed that Sohrabuddin was picked from Arham farm brought to the encounter site and killed in a cold

blooded manner. The Ballistic Expert vide letter No. DFS/TAPAN/2007/BL/107 dtd.12.07.2007 opined that the bullet recovered from the body of deceased Sohrabuddin was fired from the service revolver of Shri N.H. Dabhi (A-5), PI.

28. Investigation further revealed that on the way to Illol, Shri V.A. Rathod, PI, Shri N.V. Chauhan (A-13) and Shri Nathuba Jadeja saw one grey colour Maruti Zen Car, with Shri D.G. Vanzara (A-1) and Shri Rajkumar Pandiyan (A-2) standing. Shri N.V. Chauhan (A-13) met Shri D.G. Vanzara (A-1), who instructed them to follow the car. Behind that car, navy blue colour Jeep No. GJ-1G-4359 of ATS was also there in which Shri R. Choubey (A-6), Dr. N.K. Amin (A-12), Dy.SP, City Crime Branch, Ahmedabad were seated. Shri N.V. Chauhan (A-13) and Shri V.A. Rathod (A-14) followed the car and the Jeep. All the vehicles started moving together from that place. Shri Vanzara (A-1), Shri V.A. Rathod (A-14), Shri Nathubha Jadeja, Shri Rajkumar Pandiyan (A-2) fetched bundles of hay from the nearby field at the outskirts of Illol village and stacked the same in tempo. All the three vehicles again proceeded and crossed the village Illol and reached near Davdi river bed, where the rear wheel of the tempo got stuck in the sand of river. They all got down and pushed the tempo to remove from the sand, but the tempo remained standstill. Shri D.G. Vanzara (A-1) instructed them to unload the firewood from the tempo. Accordingly, Shri V.A. Rathod (A-14), Nathubha Jadeja, N.V. Chauhan (A-13), Shri Choubey (A-6) unloaded the firewood. Thereafter as per the instructions of Shri Vanzara (A-1), the unloaded firewood was placed on one side and funeral pyre was prepared by all the persons present there. Shri D.G. Vanzara (A-1) instructed to take out the body of Smt. Kauserbi which was kept in the jeep, duly wrapped in a black colour blanket. Accordingly, Shri V.A. Rathod along with Shri Nathubha Jadeja, Shri N.V. Chauhan (A-13) and Shri B.R. Choubey (A-6) took out the body from the jeep. While they were lifting the said body, the blanket got unwrapped and at that time, Shri V.A. Rathod (A-14) could see that it was a body of a lady, wearing Punjabi Dress i.e. Salwar and Kurta. Shri V.A. Rathod (A-14), Shri Choubey (A-6), Shri Chauhan (A-13) and Nathubha Jadeja kept that body on the funeral pyre. Shri V.A. Rathod (A-14) asked Shri Nathubha Jadeja about the identification of that lady, to which Shri Nathubha Jadeja told him that she was Kauserbi, wife of Sohrabuddin, who was killed on 26.11.2005.

35. Investigation also revealed that after the fake encounter of Sohrabuddin, the accused who formed the ATS Team threatened the Proprietors of M/s. Popular Builders Viz. Shri Ramanbhai Patel and Shri Dashrathbhai Patel, to give false statements against some persons including Shri Sohrabuddin and Tulsi Prajapati as per their dictate. If not, they would be implicated in false cases just to justify the fake encounter of Sohrabuddin. Accused Amit Shah forcibly directed them to do what ever accused D.G. Vanzara (A-1) says. All at the instance of accused Amit Shah (A-16). When they did not accede to their pressure tactics both the brothers were arrested in the firing case at the O/o. Popular Builders. Simultaneously, the accused demanded Rs. 1 Crore for their release, failing which they would be killed like Sohrabuddin. Both accused, Shri D.G. Vanzara

(A-1) and Dr. Rajkumar Pandiyan (A-2) made the Patel brothers viz. Ramanbhai Patel and Shri Dashrathbhai Patel cough up a sum of Rs. 60 lacs which was received by both these accused on 17.12.2005. Despite this the Patel brothers were forwarded and remanded in P.S. Navrangpura Crime No. 1124/2004.

41. In view of the above stated facts the accused A-1 to A-18 except A-10, A-11 and A-14 have committed offences u/s 120-B r/w 364, 365, 368, 341, 302, 384 and 201 IPC. Further A-2 and A-5 committed an offence u/s 364 and 365.

42. A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-12, A-13, A-15, A-16, A-17 & A-18 who were main conspirators committed offences u/s 120-B r/w 364, 365, 368, 341, 342, 302, 384 and 201 IPC. A-4 got detained secretly both abducted person Sohrabuddin and Kausarbi and took Sohrabuddin to the place of occurrence where he was killed.

44. A-1, A-2, A-3, A-5, A-7, A-8, A-9 took part in encounter of Sohrabuddin and thereby committed offence u/s 302 and A-5, A-7, A-8 and A-9 fired from their service revolver, thereby committed the above offence.

6.05. Even from the aforesaid, it appears that prima facie involvement and active participation and strong prima facie case has been established against the applicant - accused for the offences punishable under Sections 120(B), 121, 121-A, 122, 123, 307, 186, 224 of the IPC; u/s 25(1)(b) and Section 27 of the Arms Act and u/s 13(1) of the Bombay Police Act and so far as applicant - original accused No. 2 is concerned, he is involved in the commission of the offence right from bringing Sohrabuddin from Hyderabad to Ahmedabad; killing Sohrabuddin in fake encounter killing Kausarbi - wife of Sohrabuddin and destroying her dead-body at Illol. It is to be noted that at the relevant time the applicant was serving as Superintendent of Police, ATS, Ahmedabad in Police department. In the backdrop of above facts and circumstances of the case, present application of the applicant is required to be considered. It is to be noted that earlier the very applicant submitted Criminal Misc. Application No. 13772/2007 for releasing him on bail and the same came to be dismissed on merits by this Court looking to the nature of accusations, seriousness of gravity of offences alleged against the applicant, prima facie nature of supporting evidence; reasonable apprehension of tampering with the witness and prima facie satisfaction of the Court in support of the chargesheet. It is to be noted that as such there are no changed circumstances after rejection of the earlier bail application of the applicant by this Court, except filing of supplementary chargesheet by the CBI. It is to be noted that on the contrary, some further additional materials/evidences are found against the applicant and some other accused are charge-sheeted. While considering the earlier bail application and considering the case of the applicant on merits, this Court has made the following important observations: -

34. So far as the submission made on behalf of the some of the accused that they are not high ranking police officials and that they have obeyed directions of their superiors and they have no alternative but to obey directions, therefore,

they be released on bail cannot be accepted. They are not supposed to obey illegal and/or unlawful orders of superiors. On the ground that they have obeyed directions of the superiors and therefore, they be released on bail cannot be accepted. Entire conduct of the respective applicants is required to be considered and till Hon''ble Supreme Court intervened and further investigation was carried out by CID (Crimes) and Special Investigation Team, nobody disclosed correct facts. prima-facie they are part and parcel of the conspiracy and their presence at different stages is proved by the aforesaid witnesses. Therefore, merely because they are officials lower in rank, gravity of offences alleged against them will not be decreased and therefore, on that ground they cannot be released on bail.

37. It is required to be noted that while deciding aforesaid two cases, the Hon''ble Supreme Court has considered three facets (1) prior to 26.11.2005; (2) dated 26.11.2005 and (3) post 26.11.2005 i.e. bringing Sohrabuddin from Hyderabad to Ahmedabad; killing Sohrabuddin on 26.11.2005 in fake encounter and death of Kausarbi and destroying evidence relating to her death. It also appears that the Hon''ble Supreme Court has considered statements of witnesses more particularly Nathubhai Jadeja and his so called retractions. Thus considering decision of the learned Single Judge cancelling bail of the aforesaid two accused and decisions of the Hon''ble Supreme Court in the case of Dr. Narendra Amin(supra) and Dinesh M.N.(supra), none of the applicants are required to be released on bail. Seriousness of gravity of charge is very important factor while considering grant of bail and that too in a serious case. In the present case charges are of murder, killing, destruction of evidence including dead body of Kausarbi. Assuming that against some of the accused allegations are with respect to conspiracy to destroy evidence of dead body of Kausarbi only, in that case also even such is very serious and grave charge. However, as stated above, it is not possible at present to bifurcate minutely case against respective accused individually. Aforesaid charges are extremely grave, all these and same are more aggravated in as much as all the accused are police officers including high ranking officers and gravity of charges will be extremely serious when allegations against high ranking officials are kidnapping, killings in fake encounter and thereafter killing eye-witness and destroying dead body of the said eye-witness.

38. Even there are allegations of tampering evidence if applicants are released on bail, considering their high position in the police department. There seems to be substance in such apprehension. Such an apprehension is well founded. Initially complaint being C.R. No. I-5/2005 was lodged by making out false case against Sohrabuddin to divert fake encounter. Thereafter, investigation was carried out on the basis of such allegations in the said complaint. Kausarbi was not found. Subsequently brother of Sohrabuddin approached Hon''ble Supreme Court making allegations with respect to fake encounter and disappearance of his sister-in-law Kausarbi. Investigation was handed over to Special Investigation Team (CID) Crimes. Even initially whereabouts of Kausarbi was not known.

However, subsequently it was brought to the notice of the Hon'ble Supreme Court by way of third Action Taken Report after investigation by Special team that Kausarbi has been killed and her dead body has been destroyed and disposed of at Village - Illol. This is how investigation was carried out initially and subsequently after Hon'ble Supreme Court intervened. Under the circumstances, the applicants do not deserve to be released on bail. At this stage it is also required to be noted that even Rubabuddin brother of Sohrabuddin is also not satisfied with the investigation with respect to killing of Kausarbi and his application for further investigation u/s 173(8) of the Code of Criminal Procedure is pending before the learned trial Court. (after all these applications were heard and kept for orders and before even order is pronounced, it is reported that the learned trial Court has accepted the application submitted by said Rubabudin for further investigation u/s 173(8) of the Code of Criminal Procedure and has directed investigating agency to hold further inquiry / investigation). Therefore, also the applicants are not required to be released on bail as there are all possibilities of tampering with further investigation.

39. Learned Advocate appearing on behalf of the respective applicants have made lengthy submissions on merits also, however, while considering applications for bail such detailed investigation on the merits of the case and/or appreciation of evidences in detail and making observation on merits at this stage is not justified and/or will not be proper. As such same is impermissible. What is required to be considered at this stage is nature of accusations, seriousness of gravity of offences alleged, prima-facie nature of supporting evidence; reasonable apprehension of tampering with the witness and prima facie satisfaction of the Court in support of the charge.

40. As stated above and looking to the statements of the respective witnesses named herein above, presence of each of the accused at appropriate stages have been established and proved. This Court is prima-facie satisfied with respect to the accusations against respective applicants and therefore, looking to the seriousness and gravity of charges and entire case right from abducting Sohrabuddin; bringing him from Hyderabad to Ahmedabad; keeping him in one farm, thereafter killing him in fake encounter on 26.11.2005 and thereafter, killing innocent lady Kausarbi wife of Sohrabuddin who was eye witness to everything and destroying her dead body, all these applications deserve to be dismissed and accordingly they are dismissed. Rule discharged.

6.06. Therefore, while rejecting the earlier application, this Court thought it fit not to release the applicant on bail, looking to the prima facie case made out against the applicant, seriousness of gravity of offence, nature of accusations, position held by the applicant being Sub-Inspector in Anti Terrorist Squad, likelihood of tampering with the evidence etc. While rejecting the said application, this Court also considered the decisions of the Hon'ble Supreme Court in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, (para 11) as well as in the case of Gurcharan Singh and Others Vs.

State (Delhi Administration), (Para 24). This Court also considered the decision of the Hon''ble Supreme Court in the case of Anwari Begum Vs. Sher Mohammad and Another, and the observation of the Hon''ble Supreme Court in the said decision that "though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course."

6.07. From the aforesaid, this Court is of the opinion that involvement of the applicant in commission of the serious offence of killing Sohrabuddin in fake encounter and killing his innocent wife - Kausarbi has been established and hence, there is a strong prima facie case against the applicant - original accused.

6.08. Now so far as contention on behalf of the applicant that the applicant is in jail since last 3 1/2 years and in view of the stay granted by the Hon''ble Supreme Court, there is no possibility of completion of trial at the earliest and investigation is already concluded and therefore the applicant is required to be released on bail is concerned, as observed by the Hon''ble Supreme Court in the case of Rajesh Ranjan Yadav (Supra) that it all depends on the facts and circumstances of each case and it cannot be said that there is any absolute rule that as under-trial /accused has undergone long period incarceration by itself would entitle accused to be enlarged on bail. The Hon''ble Supreme Court in the case of Rajesh Ranjan Yadav (supra) in Para 11 & 12 has observed and held as under:

11. As observed by this Court in State Vs. Amarmani Tripathi, vide paras 18-19: (SCC pp.31-32)

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 (see Prahlad Singh Bhati Vs. N.C.T. Delhi and Another, and Gurcharan Singh and Others Vs. State (Delhi Administration),

While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles

relating to grant or refusal of bail stated in Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another,

11. The law in regard to grant or refusal of bail is very settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit 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. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(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. (See Ram Govind Upadhyay Vs. Sudarshan Singh and Others, and Puran Vs. Rambilas and Another etc. etc.,

19. This Court also in specific terms held that (SCC pp.536-37, para 14):

(T)he condition laid down u/s 437(1)(i) is sine qua non for granting bail even u/s 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitled the accused to be enlarged on bail, nor the fact that the trial is not likely to be concluded, in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the Appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.

(Emphasis supplied)

12. The above decisions have referred to the decision of this Court in the Appellant's own case Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, in which it was clearly held that the mere fact that the accused has undergone a long period of incarceration by itself would not entitle him to be enlarged on bail.

6.09. In light of the above observations of the Hon''ble Supreme Court in the

aforesaid decision and considering the facts of the case on hand, involvement of the applicant in the serious offence alleged to have been committed by him and considering the strong prima facie case against the applicant, as stated here in above, merely because the applicant is in jail since last more than 3 1/2 years, he cannot be released on bail. As such there is no absolute rule and proposition of law laid down by the Hon''ble Supreme Court, that as an accused is in jail for long time, despite he being involved in serious offence and a prima facie case is made out against him, he is to be released on bail. In the facts and circumstances of the case, nature of allegations and prima facie case found against the applicant, decisions relied upon by learned advocate appearing on behalf of the applicant referred to hereinabove in support of his submission to release the applicant on bail on the ground that the applicant is in jail since last more than 3 1/2 years, will not be of any assistance to the applicant.

6.10. Now so far as the contention on behalf of the applicant that as the investigation is already concluded and the applicant is in jail since last more than 3 1/2 years and if the applicant is not released on bail, it would be pretrial conviction and the same would be violative of Article 21 of Constitution of India and taking away his right to live and liberty, is concerned, the aforesaid aspect has also been considered by the Hon''ble Supreme Court in the case of Rajesh Ranjan Yadav (supra) wherein in Para 15 & 16 the Hon''ble Supreme Court has observed and held as under:

15. Learned Counsel for the Appellant has repeatedly referred to Article 21 of the Constitution and on that basis has submitted that the Appellant should be released on bail particularly since he has already been imprisoned for more than six years.

16. We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, such as the interest of the society.

6.11. Even in the case of Masroor (supra), the Hon''ble Supreme Court had an occasion to consider the aforesaid aspect and in the said decision the Hon''ble Supreme Court in Para 15 has observed and held as under:

15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may

outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan*, are quite apposite:

Liberty is to be secured through process of law, which is administered keeping in mind the interest of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.

6.12. Considering the aforesaid two decisions of the Hon''ble Supreme Court, the contentions on behalf of the applicant that since the applicant is in jail since long and if he is not released on bail, there would be violation of Article 21 of the Constitution of India and taking away his personal life and liberty, also cannot be accepted.

6.13. Now so far as contention on behalf of the applicant that as the investigation is already completed and therefore the applicant is required to be released on bail despite prima facie case found against him, as no purpose would be served to keep the applicant in jail, is concerned, the law with respect to grant or refusal of the bail is already settled by the Hon''ble Supreme Court in catena of decisions.

6.14. The question with respect to grant or refusal of bail in serious offence came to be considered by the Hon''ble Supreme Court in catena of decisions and one of such decision required to be referred to is in the case of *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*, and in para 11, it is noted as follows:

11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit 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. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the Court granting bail to consider among other circumstances, the following factors also before granting bail; they are,

(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 of the witness or apprehension of threat to the complainant;

(c) prima facie satisfaction of the Court in support of the charge

6.15. In the case of *Gurcharan Singh and Others Vs. State (Delhi*

Administration), in para 24, while considering the scope of granting bail u/s 439(1) of the Criminal Procedure Code, the Hon"ble Supreme Court has observed as under:

24. Section 439(1), Criminal Procedure Code of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike u/s 437(1) there is no ban imposed u/s 439(1), Criminal Procedure Code against granting of bail by the High Court or the Court of session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so the High Court or the Court of session will have to exercise its judicial discretion in considering the question of granting of bail u/s 439(1), Criminal Procedure Code of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of S. 437 (1) and S. 439 (1) Criminal Procedure Code of the new code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence, of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out.

It is also further observed in the said decision that Where the truth lies will be determined at the trial. It is also further observed that whether evidence will ultimately be held to be trustworthy will be an issue at the stage of trial. In considering the question of bail of an accused in a non-bailable offence punishable with death or imprisonment for life, it is necessary for the court to consider whether the evidence discloses a prima facie case to warrant his detention in jail besides the other relevant factors referred to above. In para 29, the Hon"ble Supreme Court has observed as under:

29. We may repeat the two paramount considerations, viz likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a court of justice. It is essential that due and proper weight should be bestowed on these two factors apart from others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.

6.16. In the case of Anwari Begum Vs. Sher Mohammad and Another, the Hon"ble Supreme Court has observed that "though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with

the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course." It is also observed by the Hon"ble Supreme Court in the said decision that "it is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are: 1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; 2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant; 3. prima facie satisfaction of the Court in support of the charge." Aforesaid principle is again reiterated in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, It is held by the Hon"ble Supreme Court in the said decision that merely because the accused has undergone certain period of custody by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the Appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail. It is also further held by the Hon"ble Supreme Court in the said decision that the admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of the evidence that may be adduced by the herein after are to be considered at the stage of trial and same is not permissible at the stage of considering grant of bail.

6.17. In the case of State Vs. Amarmani Tripathi, considering factors to be considered while granting or refusal of the bail, the Hon"ble Supreme Court has held that following is to be considered in application for bail: (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 fleeing, if released on bail (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. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. It is also further observed by the Hon"ble Supreme Court in the said decision that detailed examination of the evidence is to be avoided but to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima-facie case is necessary.

6.18. Now so far as the so-called contradiction and variance in the statements of witnesses are concerned, as such the same have already been considered by the

Hon"ble Supreme Court while considering the case of cancellation of bail with respect to other co-accused namely Narendra K. Amin (Dr.) (supra) and Dinesh M.N. (supra). In the case of Dinesh M.N. (supra) the Hon"ble Supreme Court in Para 14 has observed as under:

14. So far as the alleged discrepancies in the evidence of different witnesses are concerned, it was submitted that the stage for assessing the contradictions, if any, has not come. It is pointed out that as per the statement of Nathubha on 26.4.2007 presence of the Respondent was shown at the place of encounter which was sufficient to deny the protection u/s 439 of the Code. A very significant factor was pointed out to falsify claim of encounter as narrated in C.R. I-5/2005 and creation of one FIR to falsify that fake encounter aspect itself amounted to misuse of power by the accused so as to misguide the investigating agency, though such incident as narrated in the FIR never took place. It was also pointed out that the retraction of the statement made by Nathubha on 25.5.2007 has to be viewed in the background of the affidavit by Smt. Gita Johri on 25.4.2007.

6.19. Even the aforesaid aspect also came to be considered by this Court while rejecting bail application being Criminal Misc. Application No. 6608 of 2010 preferred by one of the co-accused Naresh Vishnu Chauhan. It is to be noted that when earlier the statements were recorded, investigation was carried out by CID Crime and it was established that there were serious attempts to sidetrack the investigation and threaten the witnesses and thereafter further investigation was carried out by CBI pursuant to the directions issued by the Hon"ble Supreme Court and during the course of investigation, the CBI has recorded further statements of the witnesses and, therefore, the alleged discrepancies and/or variance of the statements of the witnesses are required to be considered in the peculiar facts and circumstances of the case.

6.20. The aforesaid aspect also came to be considered by this Court while rejecting the earlier bail application preferred by the applicant herein being Criminal Misc. Application No. 13772 of 2007 and in the said decision in para 33, this Court has observed and held as under:

33. It might be that when earlier statements of witnesses were recorded they might not have supported the prosecution, however it is found that earlier investigation was faulty and same was influenced by high ranking police officials of State of Gujarat. It is also required to be noted at this stage that initially even whereabouts of Kausarbi was not known and/or disclosed and all throughout nobody disclosed that infact Kausarbi was killed who was eye-witness of bringing Sohrabuddin from Hyderabad to Ahmedabad. However, after Supreme Court intervened and when Hon"ble Supreme Court directed Union of India and State of Gujarat to produce Kausarbi, Action Taken Report was submitted before the Hon"ble Supreme Court disclosing for first time that said Kausarbi has been killed at village - Illol, Sabarkantha District and her dead body has been destroyed. All these things are required to be considered along with so called contradictions

and/or variances in the statements of the witnesses either they were recorded prior to Hon"ble Supreme Court intervention and/or subsequently and/or under what circumstances and/or to what extent there are contradictions and variances, therefore, at this stage on that ground accused are not required to be released on bail.

6.21. Now so far as the reliance placed upon the order passed by the learned Single Judge of this Court in the case of accused No. 16 - Mr. Amit Shah and releasing him on bail and contention on behalf of the applicant that the approach of this Court in rejecting the earlier bail application that the aspect of contradictions in the statements of eye-witnesses, their subsequent retractions and veracity of statements of the witnesses are required to be considered at the stage of trial i.e. not at the time of hearing of the bail application, is in conflict with the approach of this Court while granting bail to the accused No. 16 - Mr. Amit Shah, is concerned, it is to be noted that as such the earlier order passed by this Court rejecting the earlier bail application submitted by the Petitioner, has been confirmed by the Hon"ble Supreme Court and so far as the order passed by learned Single Judge releasing accused No. 16 -Amit Shah on bail is concerned, the said order is challenged before the Hon"ble Supreme Court and the said appeal is pending before the Hon"ble Supreme Court. Even otherwise so far as subsequent retraction and/or veracity of the statements of the witnesses are concerned, the same have been considered by the Hon"ble Supreme Court in the earlier decisions which is reproduced hereinabove, therefore, on the aforesaid ground the applicant is not entitled to bail.

6.22. As stated hereinabove, there are sufficient materials / evidence collected by the investigating agency during the course of investigation; there is a strong prima facie case against the applicant and active involvement of the applicant in the commission of the serious offence has been prima facie established for the commission of the alleged offence for the offences punishable under Sections 120(B), 121, 121-A, 122, 123, 307, 186, 224 of the IPC; u/s 25(1)(b) and Section 27 of the Arms Act and u/s 13(1) of the Bombay Police Act in the offence of killing Sohrabuddin in a fake encounter and also killing wife of Sohrabuddin - Kausarbi and in destroying her dead-body and having satisfied that even involvement and presence of the applicant is established right from beginning from the initial stage of bringing Sohrabuddin from Hyderabad to Ahmedabad till commission of the offence and even at the time of destroying the dead-body of wife of Sohrabuddin - Kausarbi, and considering entire chargesheet papers and in the facts and circumstances of the case, the applicant is not entitled to be released on bail. Even considering the fact that at the relevant time the applicant was holding the post of Superintendent of Police in ATS, Ahmedabad (Gujarat), it is apprehended that if the applicant is released on bail, he may try to tamper the witnesses. Even the names of witnesses are submitted by Mr. Tulsi, learned Senior Advocate appearing on behalf of the CBI in a sealed cover and has submitted that threats are given to those witnesses and the names of those witnesses are not disclosed so as to secure their life and liberty, and considering

overall facts and circumstances of the case, material produced on record, investigation papers and decisions cited at the bar, the applicant is not required to be enlarged on bail.

6.23. For the reasons as aforesaid, present bail application fails and it deserves to be dismissed and is accordingly dismissed. Rule is discharged.