(2012) 10 RAJ CK 0075

In the Rajasthan High Court

Case No : Criminal Revision Petition No''s. 614 and 618 of 2012

State of Rajasthan APPELLANT

Vs

Rajendra Rathore
 Smt. Sushila Devi Vs Rajendra Rathore and Another RESPONDENT

Date of Decision : 26-10-2012

Acts Referred:

Arms Act, 1959 — Section 25, 3
Criminal Procedure Code, 1973 (CrPC) — Section 102, 156(3), 161, 173(8), 209
Evidence Act, 1872 — Section 10, 57(4), 78(2)
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 120A, 120B, 173(8), 193, 201

Citation : (2013) 2 RLW 1536 : (2012) 4 WLN 241

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Advocate : Harin P. Rawal with Mr. Anando Mukherjee, Mr. S.K. Saksena, Mr. Tej Prakash Sharma, Mr. Sarfaraz Haider Khan, for State CBI, Mr. S.K. Sinha, with Mr. S.S. Punia and Ms Seema Kashyap in Criminal Revision Petition No. 618/2012, for the Appellant; Sushil Kumar and Shri Surendra Singh with Shri Aruneshwar Gupta, Shri Hemant Nahata, Shri A.K. Jain, Shri Mahendra Gaur, Shri Sanjeev Singhal and Shri Alankar Khana, for the Respondent

Judgement

Ajay Rastogi

1. Both the criminal revision petitions involving common controversy arising out of self-same order impugned have been heard together and are decided by the present order. Both the petitions U/S 397 read with S. 401, Code of Criminal Procedure ("CrPC") have been filed by State of Rajasthan through Investigating Oficer (CBI, N. Delhi) & also by Smt. Sushila Devi who has alleged that her husband Dara Singh, was killed on October 23, 2006, in a fake encounter by police officials of Special Operation Group ("SOG"), assailing the order dt. 31/05/2012 passed by learned Sessions Judge, Jaipur District, Jaipur in Sessions Case No. 29/2011 discharging respondent (Rajendra Rathore) from the commission of offence U/Ss 120B, IPC, read with Ss. 302, 364, 346, 201, 218,

IPC.

2. In order to appreciate the grievance of the petitioners, it will be relevant to take note of the background facts.

3. As alleged, Dara Singh was killed in a fake encounter at the behest of Team of SOG, Rajasthan Police, Jaipur, on 23/10/2006. However, story of the encounter as per version of the SOG official is that at 1.00 AM in the mid night of 23/10/2006, Shri Arshad Ali, Addl. Superintendent of Police (now an Accused) (A13) received source information that Dara Singh alongwith his gang members duly armed with sophisticated weapons have come to Jaipur City to commit a serious incident and would leave before the sunrise for Ajmer-in response to which, on the direction of Arshad Ali, SOG team headed by Rajesh Choudhary Sub Inspector consisting of 11 members well equipped with arms & ammunitions in a jeep left SOG police station at 2.30 AM in the night of 23/10/2006 and put Nakabandi at 4.00 AM on Ajmer Road, near Flyover of Kamala Nehru Nagar and started checking the vehicles-during which at 5.20 AM when Rajasthan Roadways Bus going towards Udaipur from Jaipur was being checked, two suspects were sitting on seat Nos. 10 & 11 and they were asked to step down from the bus but sooner they alighted from the bus, they started firing at the SOG team while running away to which, the SOG team chased them by jeep as well as on foot for about 3 kms and during cross firing, Dara Singh died in Rajendra Nagar Area, Police Station Mansarovar Jaipur, (which according to the complainant-wife of Dara Singh was a fake encounter engineered at the behest of SOG team) while the other ran away and the information of the occurrence was given to the police control room Jaipur. On this information of Rajesh Choudhary (now Accused)(A1) Inspector of Police, FIR-396/2006 came to be registered at PS Mansarovar, Jaipur for offence U/Ss 307, 332, 353, IPC & 3/25 of Arms Act; and the investigation was started; site plan was prepared, the jeep was examined and sample of blood soil was taken and shawl of deceased Dara Singh was seized alongwith his purse having Bus ticket No. 3309683 dt. 23/10/2006 bearing time 05.10 AM & seat No. 10-11 of bus No. RJ27PA 0295, in the presence of independent witnesses. Post mortem was conducted on the autopsy of deceased Dara Singh and his dead body was handed over to his brother (Shishram) who took the dead body and reach the native village Mundital but on 25/10/2006, his dead body could not be cremated because villagers'' strong protest demanding lodging of FIR U/s 302, IPC against culprits/police officials. However, matter was resolved and on 26/10/2006, complaint made by Shishram brother of Dara Singh was handed over to Sri BR Gwala, the then IGP Range-II, Jaipur wherein Sri AK Jain (Accused-15), A Ponnuchami (Accused-14), Arshad Ali (Accused-13), Rajesh (Accused-1) and Sukhiya alias Sukhbir who was allegedly a henchman of Virendra Singh Niangli involved in the killing of Dara Singh. On 27/10/2006, dead body of Dara Singh was cremated and ultimately, BR Gwala, the then IGP Range-II forwarded the complaint of Shishram to the Director General of Police who in turn forwarded it for enquiry and report to AK Jain (Accused-15).

4. However, as there were allegations imputed regarding credibility of FIR-396/2006, Smt. Sushila W/o Dara Singh filed criminal complaint-9/2006 before the Judicial Magistrate who sent the complaint U/s 156(3), CrPC to the police for submitting its report. However, the Judicial Magistrate dismissed application of Sushila Devi on being informed by SHO PS Mansarovar about the complaint of Shishram being attached to FIR-396/2006 vide order dt. 15/05/2007-against which Criminal Revision Petition-1015/2007 was preferred in which notices were ordered to be issued on 02/08/2007 but on 01/10/2007, revisional Court recalled order dt. 02/08/2007 for issuing notices. SLP (Crl)-3212/2008 was filed by Smt. Sushila Devi for transferring the matter to CBI imputing allegations against Sukhiya & SOG police officials. Pendente SLP before the Supreme Court, Investigating Officer Om Prakash Sharma filed an affidavit that State Government has already decided to refer the matter for enquiry by Central Bureau of Investigation (CBI)-taking note thereof, SLP was ordered to have become infructuous as such was dismissed.

5. However, since no action was taken and the investigation was not handed over to the CBI, hence Smt. Sushila Devi filed Misc. Petition-13244/2009 in SLP (Crl)-3212/2008 and finally, the Supreme Court passed order on 09/04/2010 directing the CBI to hold an investigation in respect of the offence alleged. In pursuance thereof, Case-RC No. 2(S)/2010-SCU-V/SC-II/CBI/NDelhi was registered to investigate FIR-396/2006 of P.S. Mansarovar, Jaipur on 23/04/2010. The CBI conducted investigation in respect of the alleged offence and recorded statements of 296 witnesses and collected 247 voluminous documents and on completion of investigation, charge sheet came to be filed against Sixteen accused persons in the Court on 03/06/2011 and the investigation against present respondent was kept pending U/s 173(8) CrPC. Out of sixteen accused persons, Rajesh Choudhary, Inspector (A1), Subhash Godara Inspector (A-6), Badri Prasad (A8) Head Constable, Zulfikar Inspector (A2) Arvind Bhardwaj (A7) Head Constable, Jagram Constable (A-10), Sardar Singh Driver constable (A-11), Arshad Ali Addl. SP, SOG (A-13), AK Jain, IPS-ADGP (Crime)-Incharge SOG (A-15) & Vijay Kumar Choudhary (A-12) all were absconding while Satya Narain Godara, SI (A-3), Nissar Khan Police Inspector (A-4), Naresh Sharma, Police Inspector (A-5), Surendra Singh, ASI (A-9), Munshi Lal, SI (retd) & A. Ponnuchamy IPS IGP who all were in judicial custody were committed to the Court of Sessions and rest of accused persons (named above) were declared proclaimed offender.

6. However, later on Subhash Godara (A6), Badri Prasad (HC)(A8), Jagram Constable (A10) & Sardar Singh Driver/Constable (A11) surrendered themselves on 25/07/2011 and thereafter they were committed to the Court of Sessions. The learned Sessions Judge, after hearing the arguments passed a detailed order on 25/08/2011 and framed the charges against each of accused persons for offences punishable U/S 120-B, IPC read with Ss. 302, 364, 346, 201, 218, IPC. At the same time, Munshilal, ASI SOG (A-16) was charged for offence punishable U/Ss 218 & 193, IPC. But accused Satya Narain Godara, Vijay Kr Choudhary,

Naresh Sharma, Surendra Singh, Subhash Godara, Badri Prasad & Jagram were alternatively charged U/s 302 read with S. 34, IPC.

7. Arshad Ali, Addl. SP (SOG) (A13) surrendered on 09/11/2011 and after he being committed to the Court of Sessions, and hearing the parties, charge against him was framed on 16/11/2011 keeping in view the earlier order dt. 25/08/2011, for offences punishable U/Ss 120B, IPC read with Ss. 302, 364, 346, 201, 218 & 193, IPC.

8. Later on, Arvind Kumar Jain, IPS, (A15) surrendered on 27/02/2012 who was committed to the Court of Sessions and after hearing both the parties, the charges were framed against him on 01/05/2012 U/Ss 120B, read with S. 302, 364, 346, 218 & 193, IPC after having relied upon earlier order dt. 25/08/2011 of framing charges against co-accused persons.

9. Upon completing further investigation, supplementary charge-sheet came to be filed against Rajendra Rathore (respondent herein) who as alleged, was a member of Rajasthan Legislative assembly and Minister Incharge of Public Works Department to the Government of Rajasthan when the alleged offence was committed on 23/10/2006; and he was committed to Court of Sessions on 24/04/2012. However, learned Sessions Judge after hearing the parties, vide order dt. 31/05/2012, discharged Rajendra Rathore (respondent herein) from the commission of offences punishable U/Ss 120B, IPC, read with Ss. 302, 364, 346, 201, 218, IPC.

It is relevant to point out at the threshold that learned Sessions Judge while passing initial order of framing charges against other co-accused persons on 25/08/2011 after examining the evidence having come on record, arrived at certain prima facie conclusions as referred to in para 135-extract whereof (Hindi language) relating for the purposes of controversy raised pertaining to the respondent is being quoted ad infra:

10. Afore quoted observations have been taken note of, while rest of co-accused persons after surrender were committed to the Court of Sessions; charges were framed vide orders dt. 16/11/2011 & 01/05/2012 and even the order framing charges against Arvind Kumar Jain IPS (A-15) regarding active association of present respondent (A-17) was noticed by learned Sessions Judge in his order dt. 01/05/2012 at para 6-extract whereof reads ad infra:-

11. However, after committing the respondent (A-17) to the Court of Sessions, in the course of arguments for framing of the charges, a plea was raised on behalf of the respondent (A-17) that there was no sufficient material available on record, which could connect him with the alleged commission of offence and he should be discharged. After hearing both the parties, the Court of Sessions vide order dt. 31/05/2012 discharged the respondent, primarily assigning the reasons inter-alia that no reliable evidence came on record indicating any patronage at the instance of respondent (A-17) to Virendra Singh Niangli; threat given by Dara Singh & Vijendra @ Tiliya to respondent (A17); & personal enmity between

respondent (A17) & Dara Singh & Vijendra Singh @ Tiliya could not be established.

12. Further reason assigned by Court of Sessions was that there was no documentary evidence having come on record that witness Vijender Singh @ Tilia wanted to surrender; and Call details record ("CDR") of the cell phone from which Arshad Ali (co-accused-13) is said to have asked Tilia to talk with the respondent (A-17) has not been produced; and further that there were parrot-like statements of PW-46 to PW-68 that Dara Singh told that he had a danger to his life from Rajendra Rathore (respondent), which cannot be believed. The learned Sessions Judge further observed that there was a belated statement of Sushila Devi & Shishram in regard to involvement of respondent, having been made belatedly after four years of the date of incident, is not reliable; and further that there was no strong motive for the respondent (A-17) being prima facie established on record as to get Dara Singh eliminated; and the allegation of criminal conspiracy being hatched between Arvind Kumar Jain (A-15) & respondent on the basis of CDR was not believable; inasmuch as at the same time, no further material came on record against the respondent (A-17) in supplementary charge sheet which cold connect him with the commission of crime alleged.

13. Here it is appropriate to record that apart from further statements of the witnesses having been recorded in course of investigation after filing of charge sheet against accused persons on 03/06/2011, which came to be examined by Court of Sessions vide three separate orders dt. 25/08/2011, 16/11/2001 & 01/05/2012, the statement recorded U/s 161, CrPC & voluminous documents are found reliable and strong suspicion was recorded by the Court of Sessions while framing of the charges against all the sixteen accused persons except Munshilal (A16) who was charged for offence U/Ss 218 & 193, IPC.

14. Before proceeding to examine the controversy, this Court would like to observe that it may not be advisable to state in any great detail the facts of the prosecution case or to refer in details regarding all the material & evidence having been produced by prosecution against the respondent before the Court of Sessions since unnecessary details in that regard are supposed to be avoided as it may cause prejudice either to the prosecution or the defence of the accused; and keeping that in view, this Court proposes to examine the issue for further consideration.

15. Under the Scheme of Code of Criminal Procedure ("CrPC/Code"), while opening the case for prosecution U/s 226, CrPC, the Prosecutor is supposed to describe the charge against the accused and in regard to the evidence which he proposes to prove the guilt of the accused and thereafter comes at the initial stage the duty of the Court to consider the record of the case and documents annexed therewith and to hear submissions of the accused and prosecution and then the Court has to pass an order either U/s 227 or 228, CrPC; in course thereof, if the learned Judge considers that there is no sufficient ground for

proceeding against the accused, he may discharge the accused and record the reasons for doing so, as enjoined by S. 227, CrPC; and on the other hand, if the learned Judge is of the opinion that there is ground for presuming that the accused has committed an offence, the reasons in details ordinarily are not required to be assigned in the order framing charges and the Court is not supposed to examine whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction; and what is required to be looked into is whether there is a strong suspicion leading the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.

16. However, what is required to be examined is for deciding prima facie as to whether the Court should proceed with the trial or not. If the evidence, which the Prosecutor proposes to adduce or prove the guilt of the accused even if fully accepted before it is challenged in cross examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. It is true that there cannot be exhaustive list of circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable.

17. Scope of S. 227, CrPC was considered by Apex Court in State of Bihar Vs. Ramesh Singh (1977 (4) SCC 4) ad infra:

4....Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

18. While examining ambit of S. 209, CrPC, the Apex Court in Union of India (UOI) Vs. Prafulla Kumar Samal and Another, propounded the law ad infra:

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the

accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge & proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

19. In later judgment in Sajjan Kumar Vs. Central Bureau of Investigation, the Apex Court while examining the issue regarding exercise of jurisdiction U/Ss 227 & 228, CrPC, observed ad infra:

21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

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

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

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

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

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

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging there from taken at their face value discloses the existence of all ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

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

Aforesaid principles have also been noticed by Apex Court in recent decision in CBI Hyderabad Vs. K. Narayana Rao (Criminal appeal-1460/2012 in Arising out of SLP (Crl.)-6975 of 2011 decided on 21/09/2012).

20. From the principles culled out by Apex Court (supra) for exercising jurisdiction U/Ss 227 & 228, CrPC, the Court cannot act merely as a post office or mouth piece of the prosecution but is supposed to consider broad probabilities of the case, total effect of the evidence & documents produced before it and while considering for framing of the charges, the Court indisputably has a power to sift & weigh the evidence but for the limited purposes of finding out whether or not a prima facie case against the accused is made out. But at the same time, the Court is not supposed to hold a roving enquiry into the pros & cons of the case and weigh the evidence as if conducting a trial. At the stage of framing the charge, probative value of the materials produced before the Court cannot be gone into and the material brought on record has to be accepted as true at that stage obviously for the reason that the truth, veracity and effect of the evidence which the prosecution proposes to adduce are not to be meticulously judged; and at this stage, the Court is not expected to go deep into the probative value of the material on record and on the basis of material on record, if the Court comes to the conclusion that the accused would have committed the offence, it is obliged to frame the charge and proceed with the trial. Thus, on the basis of a strong suspicion founded on material placed before it, the Court can form a presumptive opinion regarding existence of factual ingredients constituting the offence alleged and in that event, it is justified in framing the charges against the accused for the offence alleged to have been committed by the accused.

21. In a catena of decisions (supra), it has been settled that at the stage of order being passed U/Ss 227 & 228, CrPC for framing the charge, the Court is required

to peruse the evidence with a view to find out sufficient ground for proceeding against the accused and after such considerations, if the Court forms an opinion that there is a ground for presuming strong suspicion that the accused has committed an offence, it may frame charge against the accused. However, if the Court decides to frame a charge, there is no legal requirement to pass an order specifying the detailed reasons as to why it opts to do so; and framing of charge itself is a prima facie order that the Court has formed an opinion upon considering the police report duly accompanied by supporting other documents and after hearing both the parties that there is ground for presuming that the accused committed the offence.

22. However, it is equally true that if two views are possible and the Court is satisfied that the evidence produced before it gives rise to some suspicion but not grave suspicion against the accused, the Court will certainly be justified to discharge the accused in exercise of its jurisdiction U/s 227, CrPC.

23. What is supposed to be considered by the Court in exercise of its jurisdiction U/s 227 & 228, CrPC, is to consider sufficient ground for proceeding against the accused on general consideration of the material placed by Investigating Officer. While framing of the charge in exercise of jurisdiction U/s 228, CrPC or while considering the discharge U/s 227, CrPC, it is not for the Court to analyse all the materials including pros & cons, reliability or acceptability which is the stage of trial when the Court has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents -on the basis of which, the Court is free to take a decision one way or the other and not at initial stage of framing of the charge; obviously for the reason that there are different yardsticks for consideration at the stage of framing of the charge and final stage of the trial; and at the stage of charge, the trial Judge is not to see whether the trial against the accused will end in conviction or acquittal.

24. Let this Court may now apply the principles enunciated (supra) to the present case with a view to find out whether or not the court below was legally justified in discharging the respondent (A-17) vide order impugned.

25. Learned Special Public Prosecutor arguing for the CBI (petitioner) submits that in any case, the findings recorded by learned Sessions Judge in the order of discharge impugned are not only incorrect & perverse but also contrary to the material evidence produced before the court below. Public Prosecutor further submits that the finding impugned was that there was no reliable evidence on record indicating regarding patronage of respondent to the group of Virendra Singh Niangli, while according to the Public Prosecutor, the factum of patronage is supported from the statements of witnesses (Mahendra Singh (Pw262) Alok Kumar (PW264), Hardayal (PW265), Mohar Singh (PW266), Budhe Shah (Pw267), Lekh Ram (Pw270), Bansi Lal Sehag (Pw276), Ashok Kumar (Pw277) alongwith that of Sheeshram (Pw1), Rakshpal Singh Sehag (Pw46), Om Prakash (Pw47), Vikash Meel (Pw48), Devi Lal (Pw84), Vijendra Singh alias Tilia (Pw87), Ram Kumar (Pw101) and their statements indicate that they had seen the

respondent & Virendra Singh Niangli together many a times in public meetings & functions while the respondent extended his patronage to Virendra Singh Niangli. Similarly, the finding impugned that there was no documentary proof that Vijendra Singh @ Tilia wanted to surrender, is also perverse and not supported from the material on record.

26. As regards the finding impugned that CDR of cell phone from which co-accused Arshad Ali is alleged to have asked Tilia to talk to Rajendra Rathore (respondent/A-17) has not been produced, Public Prosecutor submits that in course of investigation, CDRs of cell phone of the respondent (A-17) for a month of October, 2006 was provided by cell service provider and since Tilia was asked to talk to Rajendra Rathore (A-17) in police custody in September, 2006, non-availability of CDR of September, 2006 may not rule out the evidence of witness during investigation. If Arshad Ali who is one of accused asked Tilia to surrender, what will be its effect; can certainly be examined only during trial.

27. As regards finding impugned that parrot like statements of PW46 to Pw68 are recorded that Dara Singh told them that he had danger to his life from respondent (Rajendra Rathore) cannot be believed and belated statements of Shushila Devi & Shishram involving respondent (A-17) after four years from the date of incident is not reliable, Counsel submits that the finding impugned is in contravention of the canons of criminal jurisprudence for the reason that mere delay in statement will not rule out veracity of statements of the witness recorded during investigation; and probative value/reliability of such statements cannot be gone into at the stage of framing of the charge; as has been propounded by Apex Court in a catena of decisions in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., P. Vijayan Vs. State of Kerala and Another, Sajjan Kumar Vs. Central Bureau of Investigation,

28. As regards finding impugned that there was no strong motive of respondent (A-17) to get Dara Singh eliminated, Public Prosecutor submits that such a finding impugned is perverse in the light of statements of Pw1, Pw2, Pw79, Pw85, Pw101, Pw131, Pw121, & Pw46 to Pw68-all of whom clearly bought out the motive behind elimination of Dara Singh.

29. From the statements of Pw46 to Pw68, it clearly emerges that all of witnesses (Pw46 to Pw68) have consistently stated that Dara Singh told them that he had endanger of his life. It is appropriate to point out that evidence of these witnesses (Pw46 to Pw68) on the one hand while framing the charges against respondent (Rajendra Rathore) has not been considered to be reliable while on the other hand, has been found to be sufficient giving rise to presume a strong suspicion against the accused No. 1 to 16 having committed the offence and charges have been framed vide three separate orders.

30. As regards strong motive for elimination of Dara Singh, it has also come in evidence collected during investigation that a group headed by Virendra Singh Niangli was involved and engaged in illegal sale of liquor mafia and having the

patronage of respondent (A-17) (Rajendra Rathore) who was an MLA & Minister in the Government of Rajasthan at the relevant point of time in the year 2006. It has also come in evidence during investigation that in the year 2002, Sumer Singh Fagedia was shot dead after being abducted from the Court campus at Rajgarh by rival gang of Virendra Niangli, regarding which FIR-324/02 at PS Rajgarh was registered against Virendra Singh Niangali & others-during trial, respondent (Rajendra Rathore) influenced Virendra Jakhar Inspector of police who was the prosecution witness (Pw131) and in that case, the accused were acquitted after giving benefit of doubt vide judgment dt. 12/04/2006.

31. From the material collected during investigation, it is also apparent that after death of Sumer Singh Fagedia, the group led by Vijendra Singh @ Tilia, his successor R/o Bali Ki Dhani of PS Malsisar (Jhunjhunu), of which Dara Singh @ Daria was an associate/Driver and from 2003 to 2005, the enmity between Vijendra Singh @ Tilia & Dara Singh with respondent (Rajendra Rathore) continued increasing even to the extent of personal level. In the year 2005, Dara Singh & Vijendra Singh @ Tilia came in close contact with Vijay Kumar Choudhary (A12) of Fatehpur, for whom Dara Singh started working and who provided him shelter alongwith one Veer Singh in a house of Asgar Peer at Fatehpur where Dara Singh resided in the name of Vinod Kumar due to the threats of endangering his life given by rival group patronage by respondent (Rajendra Rathore).

32. In course of investigation, it has come in evidence on record that names of Vijendra Singh alias Tilia & Dara Singh were mentioned in FIR-143/2005 registered at PS Malsisar which was investigated by Pratap Singh Sevda (Pw121), DySP, who during investigation found that they (Tilia & Daria) were not at all involved in the commission of alleged murder but respondent (Rajendra Rathore) pressurized him (Pw121) to implicate Tilia & Daria as well and he (Pw121) further found that after murder of Sumer Singh Fagedia, there were two rival groups one led by Vijendra Singh Tilia and another by Virendra Singh Niangli; and the group led by Virendra Singh Niangli was having patronage of the respondent (Rajendra Rathore); as a consequence whereof, Vijendra @ Tilia & Daria both were being given threats of dire consequences of endangering their lives-due to which they were absconding hiding themselves but the respondent (Rajendra Rathore) by one way or the other, wanted to get both of them implicated in criminal case and there was persuasion to file charge sheet against them but there was no eye witness and since no person made statement during investigation regarding commission of the alleged crime of FIR-143/2005 against Tilia & Daria, Pratap Singh Sevda (Pw121) did not take action against them any further and ultimate fact remained that he (Pw121) was transferred and investigation was handed over to Shivraj Meena.

33. From a statement of Devilal @ Debu (Pw84), it depicts that in May, 2006, Dara Singh through cell phone No. 9414350830 in his presence (Devilal''s) threatened respondent (Rajendra Rathore) at his cell phone-9829248999 to his

life and warned not to patronage Virendra Singh Niangli group otherwise he would kill him. Similar is the version given out in statement of Vijendra Singh @ Tilia (Pw87) & Ram Kumar (Pw101) and since the enmity was continuing day by day, Vijendra @ Tilia & Daria left Rajasthan and took shelter at the house of Suresh Sharma (Pw129) at Guwahati for about a month and after returning therefrom, they were hiding themselves at the house of Asgar Peer at Fatehpur upon shelter by Vijay Kumar Choudhary (A-12) but Vijendra @ Tilia feeling danger of life ultimately surrendered before the police on 08/09/2006 and during the remand, he was taken to the office of SOG where during interrogation Arshad Ali, Addl SP (SOG) (A-13) gave him cell phone and asked him to talk with respondent (A-17) (Rajendra Rathore) and in course of mobile conversation he tendered pardon to which respondent (Rajendra Rathore) told him that he had escaped managing surrender but fate of Dara Singh would be of dire consequences. It revealed from statement of Tilia that the SOG officials pressurized him to lay a trap for Dara Singh.

34. As regards threat at the behest of Rajendra Rathore (A-17) to Dara Singh having danger to his life, such an apprehension was expressed by Dara Singh to many persons (Pws1, 46 to 68, 72, 78, 84, 87, 101, 107, 129 & 131)-all of whom have made consistent statement as to grave threat given by respondent (Rajendra Rathore) to Dara Singh endangering his life.

35. The evidence about the motive to get Dara Singh eliminated at this stage cannot be ruled out and the finding impugned that there was no strong motive of the respondent of getting Dara Singh eliminated is totally perverse in the light of evidence comprising of oral & documentary made available during investigation as taken note of (supra).

36. As regards criminal conspiracy as defined in S. 120A, punishable U/s 120-B, IPC, it has been examined by Apex Court in Kehar Singh and Others Vs. State (Delhi Administration), thereafter in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., ; Esher Singh Vs. State of Andhra Pradesh, & State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, and the principles emerged from the Apex Court''s decisions (supra) are that in case of criminal conspiracy, there cannot be any direct evidence but ingredients of offence that there are agreement between persons who are alleged to have been indulged in conspiracy and that agreement should be for doing illegal act or for doing by illegal means an act which itself may not be illegal; therefore, essence of criminal conspiracy is an agreement to do an illegal act, which can be proved either by direct or circumstantial evidence or by both, and it is a matter of common experience that criminal conspiracy is hatched in secrecy and it is difficult if not impossible to obtain direct evidence to prove conspiracy as it being rarely elicited. But the manner & circumstances in which offence has been committed and the level of involvement of accused persons therein are relevant factors and that can always be inferred from the material brought on record. That being so, circumstances proved before, during and after the occurrence, have to be considered while

deciding regarding complicity of the accused and its existence is a matter of inference which is normally deduced from the acts of the parties in pursuance of a purpose in common between the conspirators. It is not always possible to give affirmative evidence about date of the formation of criminal conspiracy, about the persons having taken part in the formation of the conspiracy but what could be inferred is that there must be meeting of minds resulting in ultimate decision taken by the conspirators regarding commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, there must be material being placed by the prosecution which could give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

37. In the instant case, as regards criminal conspiracy hatched between respondent (Rajendra Rathore) & Arvind Kumar Jain (A-15) put forth during investigation based on Call details record, (CDR), which was considered but not found believable by Court of Sessions while passing the order impugned, suffice it to say that the CDR is a part of the material on record to depict that there had been cell phone calls between Arvind Kumar Jain (A-15) & respondent (Rajendra Rathore) on different dates including 04th, 05th, 16th, 19th, 25th, 27th & 31st October, 2006 and on October 15, 2006, both (respondent & AK Jain) were on same cell ID-302.

38. From the material placed for perusal before the Court, it is apparent that there were tele conversations between respondent (Rajendra Rathore) & Arvind Kumar Jain (A-15) on 04/10/2006 at 22.32 hours for 64 seconds and at 22.48 hours for 295 seconds; again on 05/10/2006 at 22.16 hours for 66 seconds, on 16/10/2006 at 13.11 hours for 106 seconds & at 13.15 hours for 153 seconds; and immediately after cell phone calls, the SOG team after return back, left on 05/10/2006 and 16/10/2006 at 04.15 PM; and simultaneously proceedings were initiated for cash reward on 17/10/2006 and after misleading the facts, sanction order was got issued through Director General of Police (Pw182-AS Gill-IPS) who during investigation in his statement gave out the version that there was no case registered against Dara Singh after 29/01/2005 i.e. 20 months period before Cash reward being declared and there was no direction from his office to Arvind Kumar Jain (A-15) or to the other (Arshad Ali) (A-13) for intercepting mobile calls of Dara Singh, which was however, not the work of SOG team engaged in tracing out the criminals and when there was telephonic talk on 19/10/2006 at 19.25 hours for about 146 seconds, again the SOG team was sent on 21/10/2006 and Dara Singh was killed in the morning hours of 23/10/2006 and thereafter again there was telephonic talk on 25/10/2006 & 27/10/2006-rojnamcha entry No. 626 made on 22/10/2006 at 08.00 AM is indicative of the fact that the SOG team was sent to look out for Dara Singh and this was the team which as alleged has killed Dara Singh in a fake encounter. The time of return back of the SOG team on 16/10/206 & 21/10/2006 corroborates with the telephonic talk with the two (respondent (A-17) & Arvind Kumar Jain (A-15) and that certainly gives rise to strong suspicion of criminal conspiracy being hatched

between them and that appears to be completely over-looked by learned Sessions Judge.

39. As regards observation made by learned Sessions Judge regarding tele conversation & deliberations, if any, having taken place between respondent (A-17) & Arshad Ali, Addl. SP, SOG (A-13) have not been placed in the evidence on record during investigation and in absence whereof, conspiracy between the two regarding elimination of Dara Singh cannot be considered to presume any strong motive for alleged criminal conspiracy among the accused, such a finding cannot be made the basis for discharging the accused at this stage for the reason that learned Sessions Judge was supposed to consider call details record for arriving at the conclusion that there was commission of offence as probable consequence whether it is believable or not, it was the question to be determined at the stage of trial and not at the stage of framing of the charge.

40. Further it emerges from the material on record that letter dt. 11/10/2006 (Document-203) was addressed to the Home Secretary of the Government seeking permission to intercept calls of Dara Singh''s mobile for sixty days which was granted on 18/10/2006 (document-203) but while the permission being awaited, accused-Arvind Kumar Jain invoked provisions of R.419 of Indian Telegraph Rules which provides that in case of extra ordinary urgency a person holding the post of IG & above could straight away ask for interception of the phone from the service provider for six days and on the basis whereof, Arvind Kumar Jain vide letter dt. 11/10/2006 directed the service provider to divert the calls for interception of Dara Singh''s (3) cell phones.

41. It has also come in evidence that on 17/10/2006, Arvind Kumar Jain (A-15) called Sub Inspector Virendra Pal who was dealing with the reward file & Rajasthan Criminal Intelligence Digest and asked him only to produce letter dt. 18/05/2006 of SP Churu and directed to get the file processed and as per the Office note in the file, Dara Singh was a hardened criminal having 20 serious cases of dacoity, murder, abduction pending against him while the other criminal being wanted in 30 cases of theft & burglary, for which no steps were proposed for approval of reward. However, the basis for declaration of Reward was the letter dt. 18/05/2006 of SP Churu according to which there were 20 cases registered against Dara Singh out of which 11 cases finally culminated into his acquittal while the trial was pending in nine cases-none of which was registered for offence U/s 302, IPC.

42. However, it appears that the matter rushed so fast that the Reward was declared against Dara Singh on 18/10/2006 & photographs of Dara Singh were neither published in the News papers nor displayed on the Notice Board of Police Stations of the State nor in the village to which he belonged; and declaration of the Reward was publicly withheld by SOG police team (accused persons) without taking local police into confidence and the local police was not made known regarding the movement & likelihood of the commission of serious offence by Dara Singh within Jaipur City in spite of such information if any available with

SOG on 23/10/2006 at 1.00 AM just after 5 hours, in fake encounter, Dara Singh was killed.

43. It is also apparent from statement of KL Bairwa (Pw155) that complete file in respect of declaration of the reward on 18/10/2006 was taken away by Arvind Kumar Jain ADG (crime) which remained with him even after his transfer till 02/02/2010 which prima facie shows that it was done with an attempt to conceal truth of fake encounter and to destroy the evidence leading to the conspiracy between him and respondent (A-17).

44. It has further come in the evidence in course of investigation that Dara Singh telephonically contacted on 18/10/2006 from a PCO booth in Delhi to Cell phone No. 9829219370 of Vijay Kumar Choudhary whose calls were being intercepted by SOG party, thereby the SOG team was made known of the location of Dara Singh and fact of telephonic call made on 18/10/2006 is fortified from a PCO slip having been recovered from the body of Dara Singh upon fake encounter. The respondent (Rajendra Rathore) further made a telephonic call through his mobile on 19/10/2006 at 19.25 hours to Arvind Kumar Jain (A-15) which prima facie depicts that the SOG team in furtherance of criminal conspiracy put pressure on Vijay Kumar Choudhary to elicit the location of Dara Singh or to induce him to come & contact him and with this intent, Vijay Kumar Choudhary (A-12) was detained by SOG team in the night of 19/10/2006 at Jaipur during which cash of Rs. Six Lac was seized for him U/s 102, CrPC; this development was shared among accused persons including Arvind Kumar Jain (A-15), A Ponnuchamy (A-14) & Arshad Ali (A-13) and that being so, Vijay Kumar Choudhary alias Viju Thekedar (A-12) was shown released at 03.10 hours on 20/10/2006 by Naresh Sharma (A-5) while in fact his mobile location was in SOG office area till 17.00 hours on 20/10/2006 while Vijay Kumar Choudhary (A-12) reached Fatehpur on 20/10/2006 around midnight and the cash of Rs. Six lacs was subsequently got released vide order dt. 30/10/2006, to which SOG officials did not object after killing of Dara Singh in alleged encounter.

45. Criminal conspiracy is fortified from the material on record, which can be drawn from the circumstance that on 25th October, 2006, there was a call from the respondent (Rajendra Rathore) to Arvind Kumar Jain (A-15), ADG (Crime) and admittedly there was an agitation on the very day in the village of Dara Singh and similarly on 27/10/2006 there was a call from respondent (Rajendra Rathore) to Arvind Kumar Jain while cremation of Dara Singh being taken place in the village and last call in the series was made on 31/10/2006 from Arvind Kumar Jain to the respondent.

46. That apart, while the charge sheet initially came to be filed, the investigation remained pendente against respondent (Rajendra Rathore) requiring further investigation U/s 173(8), CrPC and in supplementary charge sheet, statements of 29 witnesses alongwith documents were brought on record indicative of association and intimacy between Arvind Kumar Jain & VS Niangli, whom patronage was being provided by respondent (Rajendra Rathore), apart from

rivalry between the groups headed by Virendra Niangli & late Sumer Singh Fagedia and further case diary of FIR-143/2005 (Document-247) is indicative of the pressure exerted in the name of respondent (Rajendra Rathore) for false implication of Dara Singh & Vijendra Tiliya as is evident from case diary No. 4 entry No. 5 dt. 24/12/2004 at 7 PM in support whereof, statement of Pratap Singh Sevda (IO) (Pw121) was taken note of during investigation.

47. At this stage, it is appropriate to observe that the Apex Court in (2009 SCC 346) held in reference to S. 173(8) CrPC that further investigation is in the continuation of earlier investigation and not a fresh investigation to be started ab initio wiping out earlier investigation altogether.

48. However, as per supplementary charge sheet, statements of PW168 onwards are the result of further investigation which showed that respondent (Rajendra Rathore) was using Cell phone No. 9829248999 while Arvind Kumar Jain was using cell phone No. 9829052167 as is evident from statements of Pw-168, Pw-173 and Pw-183; besides print out of CDRs of the cell phone (document-140 & 141), according to which respondent (Rajendra Rathore) talked to Arvind Kumar Jain (A-15) on 04/10/2006 at 22.32 hours and 22.48 hours-as a result of which, the SOG team was sent to visit Sikar, Rajgarh and Churu areas on 05/10/2006 to locate Dara Singh on the direction of Arshad Ali (Addl. SP, SOG) (A-13) and that apart, respondent (Rajendra Rathore) further made telephonic call to Arvind Kumar Jain (A-15) 05/10/2006 at 22.16 hours and in furtherance of criminal conspiracy, Arvind Kumar Jain (A-15) vide letter No. 2059/dt. 06/10/2006 sought approval of Principal Secretary (Home) for interception of cell phone numbers of Vijay Kumar Choudhary (A-12) for 60 days to prevent them in committing the crime. Whereas respondent (Rajendra Rathore) further made two telephonic calls to Arvind Kumar Jain (A-15) on 16/10/2006-as a result whereof, the SOG team despite having returned to Jaipur on 16/10/2006 without any success was again sent to the very areas within two hours for selfsame purpose. At the same time, Arvind Kumar Jain (A-15) initiated a proposal for declaration of Reward on Dara Singh on 17/10/2006.

49. It is also elicited from the material collected during investigation that Dara Singh left Delhi and reached village Kumbhawas (Nawalgarh) in the evening of 20/10/206 and after having stayed with his relatives in the night left Kumbhawas in the morning of 21/10/2006 telling his niece & her husband for meeting Vijay Kumar Choudhary at Fatehpur who received telephonic call at 10.22 hours on 21/10/2006 from a landline number (PCO) of Mandawa where Dara Singh was on the way, and immediately thereafter Vijay Kumar Choudhary telephonically informed to Arshad Ali (A-13) -in response thereof, Arshad Ali activated the SOG team members who were already camping over Phone at Churu & Nawalgarh and in pursuance whereof, all the SOG team members reached Fatehpur in the afternoon of 21/10/2006 around the house of Vijay Kumar Choudhary and remained in constant touch with him while Dara Singh reached Fatehpur at about 12.30 hours on 21/10/2006.

50. Regarding involvement of the respondent (Rajendra Rathore), in details, it was noticed by the learned Sessions Judge while passing initial order dt. 25/08/2011 framing charges against other accused persons; apart from a gist having been jotted down in para 135 of the order but thereafter statements of Jitendra Singh & Surendra Singh (Pw255 & 256) were recorded during further investigation for submission of supplementary charge sheet, from which it prima facie depicts that respondent (Rajendra Rathore) used to be in his constituency invariably till next day of Diwal to celebrate festive get-together (Rama-shyama) but this time, left Churu and came to Jaipur on 22/10/2006 at 23.05 hours- during which Dara Singh was in the custody of the SOG officials and was killed in fake encounter in early morning of 23/10/2006.

51. Taking aid of the afore-narrated circumstances appearing from the material collected during further investigation, Counsel laid much stress that there was strong suspicion that the respondent (A-17) had come back to Jaipur on 22/10/2006 in order to monitor and ensure regarding elimination of Dara Singh in the encounter and further that from call details record (document-140 & 141) it is evident that the date and period of calls made between the two establish the fact of criminal conspiracy being hatched amongst them for killing Dara Singh in fake encounter.

52. It is true that there is no conversation details of such alleged calls among the accused persons on record but such call details cannot be ruled out and cannot be eschewed as irrelevant for atleast at the stage of considering the case for framing of the charges against the respondent (A-17); and learned Sessions Judge was supposed to sift and weigh the material brought on record to prima facie examine the accusation for the purposes of framing the charge against respondent (Rajendra Rathore) and the circumstantial evidence, oral and documentary collected during investigation prima facie elicited that respondent (Rajendra Rathore) had engineered a criminal conspiracy among the accused persons with a motive to manage fake encounter of Dara Singh but ignoring circumstantial connecting evidence at the stage of framing of the charge against the respondent (A-17), the Court of Sessions has exceeded its jurisdiction while passing the order impugned for discharging the respondent.

53. Now let this Court may consider the arguments made on behalf of respondent (Rajendra Rathore). While supporting order of learned Sessions Judge discharging the respondent of the offence alleged, Counsel for respondent has tried to convince this Court that there was no sufficient material which could connect or link respondent (Rajendra Rathore) with the group headed by Virendra Singh Niangli having any motive or to enter into any criminal conspiracy for the commission of the alleged offence. Counsel further submits that there was no evidence as to the alleged patronage at the instance of respondent (Rajendra Rathore) at any point of time. Counsel further submits that if at all there was any animosity or as alleged having any inimical relations with the deceased (Dara Singh), but none named elsewhere for a span of four years from

the year 2006 to 2010 and that apart, even family members of Dara Singh had never named respondent at any point of time before their statements could be recorded during investigation; inasmuch as there was no factum of threat which can be said to have been prima facie established on record, allegedly given by respondent (Rajendra Rathore) to Dara Singh and Vijendra @ Tiliya which remained unsubstantiated by evidence on record. Counsel further submits that there was no call in Devilal''s incoming CDR on 08/05/2006 to show that respondent (Rajendra Rathore) called back and gave a threat to Dara Singh while last incoming call being at 05.27 PM and his statement (Pw84) was not worthy of credence who in any way is a member of crime syndicate of Tiliya and Devilal (Pw84) is an identified criminal and liquor mafia of Police Station Bhaleri. Counsel further submits that even in his own affidavits submitted on 29/08/2007 & 11/02/2010 before two different inquiry commissions, he never made any mention of alleged exchange of threats over phone on 08/05/2006 whereas in his statement U/s 161, CrPC, he gave out a complete different version which in no manner could have been relied upon and that apart, no CDRs either of Tiliya or the respondent was placed on record to show that such calls were ever made while cell phone number of Tiliya was in the knowledge of CBI from the day itself of diary of Dara Singh being seized. Counsel further submits that if at all there was a threat to the respondent by Dara Singh, steps could have been taken certainly for his safety & security but there is no evidence that respondent (Rajendra Rathore) has ever asked to have additional security which could have certainly asked for, had there been any threat of dire consequence endangering his life.

54. Counsel further submits that CDRs of respondent (Rajendra Rathore) or Arvind Kumar Jain or Arshad Ali in any manner could not be considered to a proof of criminal conspiracy since the CDR merely shows factum of a call made from one phone to the other which is not suggestive or evidence of criminal conspiracy and cannot be considered as an incriminating circumstances at all. Counsel has tried to give explanation that respondent (Rajendra Rathore) had an official cause to talk with accused-Arvind Kumar Jain as a part of performance of duties being a Minister of Parliamentary Affairs while Arvind Kumar Jain was a nodal officer of police and the Assembly being in session, he had reasonable official cause to call him regarding Bills, assembly questions & other issues, which according to Counsel, the Court may take judicial notice of proceedings of legislature in terms of S. 57(4) of Evidence Act being a public document as prescribed in S. 78(2) thereof.

55. As regards inference drawn of conspiracy being hatched from call details without proof of conversation in isolation, Counsel submits that such an inference cannot be considered as grave suspicion about any conspiracy and in support, Counsel placed reliance upon the decision of Apex Court in State of U.P. Thru CBI Vs . Dr. Sanjay Singh and Anr. and further submits that it was a mere surmise and presumption that on 04/10/2006, criminal conspiracy was hatched but there is no proof of conversation on record which may render the explanation as false;

and as regards calls of Arvind Kumar Jain, it could be made in relation to the official business. Counsel further submits that basic ingredients of S. 120A, IPC are completely missing to establish criminal conspiracy between Arvind Kumar Jain & the respondent to kill Dara Singh and that apart, meting of minds and agreement to do an illegal act is a condition sine qua non to establish criminal conspiracy, which cannot be inferred from CDR showing 64 seconds'' call without any proof of conversation. In support, Counsel relied upon the decision of Apex Court in Saju Vs. State of Kerala (2001 (1) SCC 378) and submits that the onus was on the prosecution to prove that accused was directly or indirectly connected with the acts or omissions attributable to the crime committed by him and to attract applicability of S. 10 of the Evidence Act, the Court must have reasonable ground to believe that two or more persons had conspired together for committed an offence and if the condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be an evidence against the other; and as regards meeting of mind, that has been examined by Apex Court in State of UP Vs. Sanjay Singh (supra) wherein it has been held that mere association among accused persons is not adequate to prove conspiracy among them and that was the reason that Dr. Sanjay Singh was discharged from the commission of the alleged crime.

56. Counsel has further tried to give explanation and place certain documents for perusal of this Court to justify that respondent (Rajendra Rathore) on different occasions visited the CBI office and submitted his written explanation along with annexed documentary evidence but that was not at all looked into while the decision being taken for filing the charge sheet against him. Counsel has tried to convince this Court while taking support from the decision of Apex Court in Harshendra Kumar D. Vs. Rebatilata Koley Etc., and submits that in appropriate case, on the face of defence documents, which are beyond suspicion or doubt, if accusations cannot stand, it would be travesty of justice if accused is relegated to trial and asked to prove his defence in course of the trial.

57. As already observed (supra) in the initial part of the judgment, that it would not be advisable to mention in great details the prosecution case alleged against the respondent or to refer all the evidence and material which might be placed at the stage of trial since whatever being observed in regard to evaluation of the material on record, may prejudice the rights of either of the parties; hence this Court constrains from recording any finding in regard to the material brought on record as a part of the charge sheet at this stage. However, it would be sufficient to observe that sufficient material has come on record which could justify that there was one group of Virendra Singh Niangli which was engaged in illegal sale of liquor mafia having patronage with respondent (Rajendra Rathore). Statements recorded in course of investigation and part of the charge sheet on record are of independent persons who have no grudge or enmity or personal interest or inclination to either side. This Court after going through material on record finds that motive and link with Virendra Singh Niangli group having patronage at the instance of respondent (Rajendra Rathore) cannot be ruled out.

As regards the fact that no one named respondent (Rajendra Rathore) for a span of four years from the year 2006 to 2010, that can be one of his defence being put forth at the stage of trial but in totality of investigation made by the prosecuting agency, whatever having come on record cannot be brushed aside at the stage of exercise of jurisdiction U/s 227/228, CrPC, only for the reason that for a span of four years, such statements have not come forward on record.

58. As regards the factum of threats at the instance of respondent (Rajendra Rathore) given to Dara Singh, certainly there are statements recorded during investigation which could link the fact that the respondent has certainly given threats to either group members particularly after the murder of Sumer Singh Fagedia in whose case, group members of Virendra Singh Niangli were acquitted by the Court.

59. As regards the CDRs which showed factum of conspiracy being hatched, suffice is to say that the cell phone conversation might have not come on record but telephonic calls between the two corroborates simultaneous action being initiated at the behest of Arvind Kumar Jain (A-15) who was head of Special Operation Group and one after the other calls made on 04th, 05th, 16th, 19th, and also on 26th, 27th & 31st October, 2006 after alleged encounter of killing Dara Singh certainly gives rise to grave suspicion against respondent (Rajendra Rathore) and this Court is of prima facie view that sufficient material has come on record to draw strong presumption that respondent (Rajendra Rathore) committed the offence as alleged by the prosecution. However, this fact has also come on record during investigation that the SOG as a whole or any individual member or members thereof was not having any animosity or prejudice of any nature with Dara Singh or any close proximity with the group headed by Virendra Singh Niangli who had direct confrontation with the group of Vijendra Singh @ Tiliya & Dara Singh and both of whom were engaged in illicit liquor business being Mafia having patronage at the behest of the respondent, in regard to which incriminating material has come during investigation which could certainly give rise to draw strong suspicion about the respondent having acted as one of conspirator to carry out fake encounter of Dara Singh on 23/10/2006.

60. As regards submission made that explanation of respondent (Rajendra Rathore) either by representation before investigating officer or other incriminating material being beyond suspicion or doubt could certainly be considered by this Court, suffice it to say that it may not have nexus to stand at this stage in the instant case for the reason that before the Apex Court in State of Orissa Vs. Debendra Nath Padhi (2005 (1) Cr. CC (SC) 312), while examining scope of S. 227 or 228, CrPC, question came for consideration as to whether at the time of framing the charges can the trial Court consider the material made available by the accused as his explanation and taking note of the 3 Judges'' Bench decision of the Apex Court finally observed ad infra:

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce

any material. Satish Mehra Vs. Delhi Administration and Another, holding that the trial Court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.

What has been observed has been consistently followed at the stage of framing of the charges or order of discharge passed in exercise of jurisdiction U/s 227 or 228, CrPC and at the stage of framing of the charge, the Court is not supposed to examine & consider the documents and other evidence produced by the accused U/s 228, CrPC.

61. As regards judgment in Harshendra Kumar D. Vs. Rebatilata Koley Etc., relied by Counsel for respondent (Rajendra Rathore), it was a complaint case U/s 138 of the Negotiable Instruments Act and the plea raised by the accused was regarding his arraigning as accused. It was a matter arisen out of the proceedings initiated by the appellant U/s 482, CrPC where the High Court has inherent jurisdiction to take judicial notice of the fact if there is abuse of process of law. In that case, it was alleged that Managing Director and the other Directors were responsible for the day to day affairs of the Company; however, the fact was that appellant was neither Director on the date when the cheques were issued nor on the date when cheques were got dishonoured and the factum of his resignation which was recorded in Form 32 filed by the Company with the Registrar of Companies on 04/03/2004, was of evidentiary value-in view thereof, he had no concern or connection with the Company and in this connection, it was observed that in appropriate case on the basis of document, such a fact could certainly be looked into to avoid travesty of justice if one is relegated to face the trial; but it has no application in the facts of the instant case.

62. As regards decision in State of U.P. Thru CBI Vs . Dr. Sanjay Singh and Anr. there was only circumstantial evidence having come on record during investigation-on which presumption could be drawn that there was a conspiracy to eliminate the victim (Syed Modi) for the reason that both were intimated to each other and developed sexual relationship and one of them being wife, it was considered to be strong circumstantial evidence to connect with commission of the offence. However, it came on record during investigation that their sexual relations were known to the deceased even at the time of their marriage and there was no protest either from the accused or the deceased at any point of time and no evidence came forward that there was any independent witness came with the version that there was any enmity or such circumstances are created where the decision could have been taken to eliminate the deceased and the suspicion was not considered to be sufficient to draw either strong motive or grave suspicion of entering into conspiracy for commission of the offence. However, each case has to be looked into on its own facts and circumstances.

63. It is true that whatever observed (supra) could be appreciated in course of the trial but what is to be examined in the instant case at this stage regarding strong suspicion of conspiracy hatched. This Court has already taken note of the gist of the facts in earlier part of this judgment regarding material having

brought on record during investigation, which certainly prima facie establishes that there was a criminal conspiracy hatched between Arvind Kumar Jain (A-15) and respondent (Rajendra Rathore)-in course of which the SOG team was being sent to various places to nab the deceased (Dara Singh) and that apart circumstantial evidence has come on record regarding patronage to one Niangli group and threats by other Tilia group in as much as prosecution witnesses were pressurized in the criminal case registered for murder of Sumer Singh Fagedia who was shot after abducting from court campus by group member of Virendra Singh Niangli and the investigating officer in that criminal case stated about threats being given to him when he was going for recording his statement as prosecution witness. A cumulative effect of the material having come on record during investigation certainly constitute a strong suspicion of conspiracy among the accused (A-15) and the respondent (A-17) and at the same time, there was no direct enmity between either of members of the SOG team or SOG Head with Dara Singh; while at the same time, the respondent held it otherwise. Circumstantial evidence taken note of (supra) prima facie strongly support regarding conspiracy being hatched in fake encounter of Dara Singh.

64. As regards next submission made by respondent''s Counsel that this Court has very limited jurisdiction U/s 397 CrPC which vests judicial powers of superintendence and unless the finding/observations are found to be perverse and two views are possible, the view expressed by Court below may not be interfered with.

65. It is true that under the scope of revisional jurisdiction U/s 397, CrPC, detailed appreciation of material is not ordinarily open but this Court holds jurisdiction to consider correctness, legality or propriety of finding/observations recorded by the court below and if that is not in conformity with the material brought on record, that can certainly be interfered with in exercise of revisional jurisdiction U/s 397 read with S. 401 of the Code.

66. As regards last feeble attempt of the Counsel for respondent (Rajendra Rathore) raising objection that present revision petition filed by the CBI without approval from the administrative Ministry DOPT required under Cl. 23.14 of the CBI procedural manual, is not maintainable; and per contra, Counsel for CBI submits that order of discharge was passed on 31/05/2012 and its certified copy was obtained on 01/06/2012-xerox copy whereof was given to the Public Prosecutor for taking his comments on 05/06/2012, the matter was further processed through Special Legal Advisor (Crime Zone) and Additional Legal Advisor (Special Crime Zone) and finally by Director of the CBI (S) expressed his comments at para 68/N and granted approval on 26/06/2012 for filing the revision petition which was filed on 27/06/2012 and thus it is in conformity with Cl. 23.14 of the CBI manual.

67. However, this Court would like to observe that the procedural manual has been framed by the CBI for its internal rules of business and that according to Counsel for prosecution has been taken care of but still this Court is not

concerned in any manner with such hyper technicalities and once the revision petition has been filed by the prosecution exhausting remedy provided under the law, atleast this Court is supposed to examine the grievance on merits and not on mere technicalities as raised by respondent.

68. At the same time, Criminal revision petition-618/2012 has been filed by widow of deceased (Dara Singh) on being aggrieved by order of discharge impugned dt. 31/05/2012. However revisional jurisdiction at the instance of complainant or victim cannot be absolutely ruled out and can be exercised by the High Court in exceptional circumstances keeping in view the facts & circumstances where there is a defect of procedure or manifest error of law resulting in flagrant miscarriage of justice but in the instant case, since revision petition has been filed by the prosecution, as well and that has been examined on merits, and since both the petitions were clubbed and heard together, this Court is of the opinion that there is no need to deal with merit of 2nd petition filed separately at the behest of victim, Smt. Sushila wife of Dara Singh who died in a fake counter, as alleged and deserves to be disposed of in the light of present order passed in criminal revision petition-614/2012.

69. Before conclusion, this Court would like to observe that any expression of opinion if any in the judgment at hand, is barely tentative and remains for the purposes of disposal of controversy in the instant revision petition. The same shall not in any manner prejudice rights of either side at the stage of trial before the court below.

70. In the result, Criminal Revision Petition No. 614/2012 succeeds and is hereby allowed. Impugned order of discharge dt. 31/05/2012 passed by learned Sessions Judge, Jaipur District Jaipur is accordingly quashed & set aside. Respondent (Rajendra Rathore) shall surrender, himself, forthwith before the learned trial Court, failing which concerned police authorities & the trial Court are directed to take necessary steps to arrest the respondent and the charges for offences punishable U/S 120-B, IPC read with Ss. 302, 364, 346, 201 & 218, IPC be framed and read over to him; and the trial may be expedited in accordance with law. Criminal Revision Petition No. 618/2012 (Smt. Sushila Devi Vs. Rajendra Rathore & Another) in the light of the present order stands disposed of. However, it is made clear that right of respondent to apply and seek bail is not taken away which prayer, if made, shall be dealt with and disposed of on its own merits in accordance with law.