

(2017) 02 BOM CK 0033

In the Bombay High Court

Case No : Criminal Revision Application Nos. 383, 377 of 2016

Sumeet Ganpatrao Bachewar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227
Penal Code, 1860 (IPC) — Section 120B, Section 302

Citation : (2017) 1 AIRBomRCri 593 : (2017) ALLMRCri 1610 : (2017) 1 BomCR(Cri) 610 : (2017) 2 MhLJCrI 209

Hon'ble Judges : A.M. Badar, J.

Bench : Single Bench

Advocate : Mrs. A.S. Pai, Addl. P.P, for the Respondent-State; Mr. Dixit i/b. Mrs. Sudha Dwivedi, Advocate, for the Applicant in Criminal Application No. 377 of 2016; Mr. Sanjiv Sawant, Advocate, for the Intervenor; Mr. S.V. Kotwal i/b. Mr. A.Y. Patil, Advocates, for the Applicant in Criminal Application No. 383 of 2016

Final Decision : Dismissed

Judgement

A.M. Badar, J. - "Before we proceed to consider the case, we must remind ourselves the maxim "judex damnatur cum nocens absolvitur" which means that a Judge is condemned when a guilty person escapes punishment. But, at the same time, we cannot forget that credibility of the justice delivery system comes under severe strain when a person is put on trial only for acquittal....."

These are observations of the Hon''ble Apex Court in the matter of Babubhai Bokhiria and Another v. State of Gujarat and Others, reported in (2014) 5 Supreme Court Cases 568. Similarly, in Madan Mohan Singh v. State of Gujarat and Another reported 2010 (8) SCC 628, the Hon''ble Apex Court has observed thus :

"The criminal trial is not exactly a pleasant experience."

2. Keeping in mind these observations of the Hon''ble Supreme Court, let us

examine whether revision petitioner/accused no.4 Sumeet Bachewar in Criminal Revision Application No. 383 of 2016 and revision petitioner/accused no.5 Mohit @ Altaf Aftab Khan in Criminal Revision Application No. 377 of 2016 can successfully assail the impugned common order dated 15th June 2016 passed by the learned Additional Sessions Judge 2, Thane, thereby rejecting their applications for discharge at Exhibit 161 and Exhibit 174 in Sessions Case No. 281 of 2013.

3. Revision petitioners are arraigned as accused in Crime No. 67 of 2013 registered at Vashi Police Station, District Thane, at the instance of First Informant Surjeet Surjansingh Kalra, Manager, S.K.Builders and Developers, Vashi, on 16th February 2013. Subsequently, the investigation in this crime came to be transferred to the Crime Branch, Mumbai. Ultimately, on completion of investigation, in all 14 accused persons are made to stand for the trial of offences punishable under Sections 302, 120B, 201 read with Section 34 of the IPC as well as under Section 3/25, 3/27 and 4/27 of the Indian Arms Act vide Sessions Case No. 281 of 2013, registered in pursuant to the charge-sheet filed on completion of investigation by the police.

To understand the prosecution case in better manner, it will be advantageous to name accused persons who are sought to stand the trial by the prosecution in the Sessions Case No. 281 of 2013. They are

Accused No. 1

Venkatesh @ Kumar Ramu Chettiyar

Accused No. 2

Emanuel Samuel Amolik

Accused No. 3

Wajeed @ Zaheer Nambi Ahmed Qureshi

Accused No. 4

Sumeet Ganpatrao Bachewar

Accused No. 5

Mohit @ Altaf Aftab Khan

Accused No. 6

Mohd. Anis Nasir Ansari @ Bhaijan

Accused No. 7

Francis Devraj Chauri @ Rajiv

Accused No. 8

Kailash Balaji Gumane

Accused No. 9

Bhupesh Gupta

Accused No. 10

Suresh @ Jawahar Chelaram Bijlani

Accused No. 11

Arif Gulam Dastgir Shaikh

Accused No. 12

Anurag Shivmohan Garg

Accused No. 13

Mahesh Chelaram Bijlani

Accused No. 14

Anil D'souza

According to the prosecution case, an accused named Ashok is still absconding.

4. Heard. Rule. Heard finally with consent of parties in the wake of interim stay to the trial granted in Revision Application No. 383 of 2016 on 2nd September 2016 which is being continued from time to time.

5. Facts projected from the police report leading to prosecution of in all 14 accused persons except one absconding accused named Ashok can be summarised thus:

(a) Sunil Kumar Lahoria (since deceased) was the proprietor of M/s. S.K. Builders and Developers having its office at Plot No. 16, Sector No. 28, Vashi, Navi Mumbai. First Informant Surjeet Singh Kalra was in employment of deceased Sunil Kumar Lahoria as Manager. Prosecution witness Ganpat Chawda and Satyendra Pandey were in employment of the firm of deceased Sunil Kumar Lahoria as office boys. Prosecution witness Kokila Yadav was in the employment of the firm of the deceased as maid servant.

(b) On 16th February 2013, in morning hours i.e. at about 8.00 a.m., employees of S.K. Builders and Developers opened the office and started their work. Office boy Ganpat Chawda was cleaning the cabin of Sunil Kumar Lahoria. In the C.C.T.V. at the cabin, Ganpat Chawda saw a person wearing the dress of a watchman/security staff firing bullets at Sunil Kumar Lahoria just outside the office. He then rushed out of the cabin making shouts. Surjeetsingh Kalra (the First Informant), Satyendra Pandey (Office boy) as well as Kokila Yadav (maid servant) followed Ganpat Chawda. This happened at about 8.20 a.m. of 16th February 2013. All of them saw bullets were being fired at their employer Sunil

Kumar Lahoria, in front of their office by assailants wearing the dress of a Security Staff. Another assailant in plain clothes was assaulting Sunil Kumar Lahoria by a sharp edged weapon. As per prosecution case, both assailants also assaulted Sunil Kumar Lahoria by means of a sharp edged weapon.

(c) It is case of the prosecution that both assailants then ran towards Kopar Khairane. Ganpat Chawda, the office boy, chased them and pelted a stone towards them. That stone hit the assailant wearing the dress of a security staff. Then, first informant Surjeet Singh Kalra was successful in apprehending that assailant on the spot itself.

(d) According to the prosecution case, after the assault, while fleeing from the spot, the assailant who was wearing dress of a security staff uttered "fcYMjks ls iaxk ysdvPNk ugha fd;k lqjs" k fctykuh] vuqjkx xxZ] Hkqis" k xqIrk] lqfer cPpsokj] ,l0ih0 vxzoky] jktw xqIrk] xtjk] bu ykxsksa ls iaxk ysdvPNk ugha fd;kA cksyk Fkk] uoh eaaqcbZ NksM+ ds tkus ds fy;s] ;s rks gksuk gh Fkk] bUgksaus gh rqEgjk dke djok;k gS" meaning thereby, "not done good by picking quarrel with Builders; not done good by picking quarrel with Suresh Bijlani, Anurag Garg, Bhupesh Gupta, Sumeet Bachewar, S.P.Agarwal, Raju Gupta, Gajra; told you to leave Navi Mumbai and go; this was to happen, these people have done your work." That assailant, according to the prosecution case, is then identified as accused no.1 Venkatesh @ Kumar Ramu Chettiyar. After nabbing him on the spot, he was handed over to the police personnel who rushed to the spot immediately.

(e) According to the prosecution case, Sunil Kumar Lahoria was lying on the footpath in front of his office with severe bleeding wounds on his person. Office boy Satyendra Pandey with the help of Kokila Yadav managed to put him in an auto rickshaw driven by Tejas Janjurne. Satyendra Pandey accompanied injured Sunil Kumar Lahoria and on instructions of the injured, he had taken injured Sunil Kumar Lahoria to Hiranandani Fortis Hospital at Vashi. On the way to the hospital, in the auto rickshaw of Tejas Janjurne, according to the prosecution case, deceased Sunil Kumar Lahoria made an oral dying declaration to Satyendra Pandey, the office boy to the effect that "QkVhZl pyks0 lqjs" k fctykuh] vuqjkx xxZ] bUgksaus eq>s ejok;kA vc eSa ugha cpqaxkA eq>s yxkrkj /kedh nsrs jgs vkSj bUgksaus gh eq>s ejok;k" meaning thereby that Sunil Bijlani and Anurag Garg caused assault on him and he will not survive, they were giving threats to him constantly and they have caused assault on him.

(f) Deceased Sunil Kumar Lahoria was admitted to Hiranandani Fortis hospital, Vashi, at about 8.44 a.m. of 16th February 2013. While being taken to the ICU ward located at 5th floor of the said hospital, according to the prosecution case, Sunil Kumar Lahoria has made another oral dying declaration to his son - Sandeep Kumar Lahoria, who by that time had reached to the hospital upon being informed about the incident telephonically by office boy Satyendra Pandey. This oral dying declaration of Sunil Kumar Lahoria made to his son Sandeep Kumar Lahoria is to the effect that "lqjs" k fctykuh] vuqjkx xxZ] lqfer

cPpsokj] ,l0ih0 vxzoky] Hkqis"k xqIrk] bu lc yksxksa us eq>s ejok;k gS vc eSa ugha cpqaxkA" meaning thereby that Suresh Bijlani, Anurag Garg, Sumeet Bachewar (present revision petitioner), S.P. Agrawal and Bhupesh Gupta caused assault on him and he will not survive.

(g) Ultimately, while taking treatment at Hiranandani Fortis hospital, Sunil Kumar Lahoria was declared dead at 10.20 a.m. on 16th February 2013 itself, as seen from the Death Summary issued by Hiranandani Fortis Hospital. In postmortem examination of the dead body, the Autopsy Surgeon opined that Sunil Kumar Lahoria died because of haemorrhage with shock due to multiple fire arm injuries. His postmortem examination was conducted at Municipal hospital of Vashi. It reflects presence of atleast five bullet wounds apart from several other wounds on the dead body.

(h) After death of Sunil Kumar Lahoria, his Manager Surjeetsingh Kalra lodged the FIR which came to be recorded at 10.50 a.m. of 16th February 2013 itself at Police Station Vashi, Navi Mumbai. Routine investigation then followed. Apart from drawing spot panchnama and other panchanamas, statement of several witnesses came to be recorded. Seized articles were sent for forensic examination and ultimately, 14 accused came to be charge-sheeted as indicated in foregoing paragraphs.

(i) According to the prosecution case, as reflected from Column No. 16 of the charge-sheet, Sunil Kumar Lahoria was done to death by accused persons by indulging in criminal conspiracy as deceased Sunil Kumar Lahoria was in habit of lodging several reports against Builders with police apart from initiating proceedings against them in various courts of law as well as lodging complaints against Builders with the office of the Navi Mumbai Municipal Corporation and the CIDCO. Several secret meetings were conducted by accused persons in the office of accused no.10 Suresh Bijlani located at Palm Beach Road of Navi Mumbai. The prosecution is alleging that revision petitioner/accused no.4 Sumeet Bachewar is one of the Builders who was attending such secret meetings by visiting office of accused no.10 Suresh Bijlani. After conspiring against Sunil Kumar Lahoria, accused persons hired contract killers and pursuant to conspiracy, Sunil Kumar Lahoria came to be murdered by them.

(j) It is the case of prosecution that services of accused no.2 Emanuel Amolik were availed by accused no.10 Suresh Bijlani, accused no.4 Sumeet Bachewar, accused no.12 Anurag Garg, accused no.13 Mahesh Bijlani and accused no.9 Bhupesh Gupta and he was paid handsome amount for executing killing of Sunil Kumar Lahoria. The planning and preparation of murder of Sunil Kumar Lahoria had been done by accused no.2 Emanuel Amolik by taking help of accused no.5 Altaf Khan, accused no.6 Mohd. Anis, accused no.7 Francis Chauri, accused no.8 Kailash Gumane, accused no.11 Arif Gulam and other accused persons by using their services for keeping a watch and exchanging messages. It is averred that accused no.5 Altaf Khan's (the revision petitioner) Innova vehicle was used for the purpose of keeping the watch on the spot at the time of executing the killing

and subsequently in order to destroy the evidence of commission of offence, said accused no.5 Altaf Khan (the revision petitioner) had changed the outer look of that vehicle. According to the prosecution case, an amount of Rs.10 Lakh was paid to accused no.2 Emanuel Amolik after executing killing of Sunil Kumar Lahoria.

6. During pendency of the Sessions Case bearing no.281 of 2013, revision petitioner/accused no.4 Sumeet Bachewar and accused no.5 Mohit @ Altaf Khan moved separate applications for their discharge from the said sessions case. After obtaining the say from the prosecution, by the impugned common order passed on 15th June 2016, the learned Additional Sessions Judge, Thane, was pleased to reject both these applications at Exhibits 161 and 174. The learned court below while rejecting those applications for discharge moved by revision petitioners/accused was pleased to hold that accused Venkatesh Chettiyar while fleeing from the spot made utterances implicating revision petitioner/accused no.4 Sumeet Bachewar. The learned trial court also held that co-accused Suresh Bijlani and co-accused Anurag Garg engaged co-accused Emanuel Amolik to kill Sunil Kumar Lahoria. It is observed by the learned trial court that there were disputes between revision petitioner/accused no.4 Sumeet Bachewar and deceased Sunil Kumar Lahoria and litigations amongst them were going on. The learned trial court further observed that deceased Sunil Kumar Lahoria had given oral dying declaration to his son Sandeep Kumar Lahoria implicating revision petitioner Sumeet Bachewar. In paragraph 17 of the impugned order, the learned trial court has held thus while rejecting the application for discharge :

"Sunilkumar has stated about the incident to his son. Deceased Sunilkumar has given his dying declaration statement to his son. Accordingly, his son has stated in his statement. There were disputes between accused no.1 Sumeet Bachchewar and deceased. Their litigations were going on. When complainant and son of deceased specifically uttered against accused Sumeet Bachchewar at this stage, it cannot be said that he was not a member of criminal conspiracy amongst the accused persons. He may not be present on the spot at the time of actual incident. It does not mean or it does not infer that he was not a member of criminal conspiracy. When son of the complainant had stated in his statement before police that his father has given dying declaration statement, at this stage, it cannot be said that deceased Sunilkumar cannot be said that he was not in a position to give his statement. Kokila Yadao might had not stated the name of accused Sumeet Bachchewar. However, complainant had specifically stated the name of applicant Sumeet Bachchewar."

It is further held that though oral dying declaration is a weak piece of evidence but no benefit thereof can be given at the stage of discharge to the accused. So far as revision petitioner/accused no.5 Altaf Khan is concerned, in paragraph 25 of the impugned order the learned trial court has observed that Sandeep Kumar Lahoria has specifically stated name of both applicants, car of Altaf was seized and weapon from the said car was also seized. With this, by holding that there is

strong prima facie evidence against both revision petitioners/accused, their applications for discharge came to be rejected by the court below by common order dated 15th June 2016.

7. I have heard Shri Kotwal, the learned advocate appearing for revision petitioner/accused no.4 Sumeet Bachewar. He urged that names of seven persons were mentioned in the FIR in view of utterances of accused no.1 Venkatesh who was apprehended from the spot, but three of them namely S.P. Agrawal, Raj Gupta and Gajra are not made to stand for the trial. He further argued that Sandeep Kumar Lahoria - son of Sunil Kumar Lahoria raised a suspicion in respect of many people but they are also not made as accused. According to him, revision petitioner Sumeet Bachewar, without there being any evidence of criminal conspiracy against him cannot be made as an accused requiring him to face the criminal trial. The learned advocate further argued that dying declarations of deceased Sunil Kumar Lahoria coming on record are divergent in material particulars and all of them are inconsistent. By pointing out the report of postmortem examination of the deceased, the learned advocate argued that the deceased cannot be said to be even in a position to talk looking to the injuries on his body. It is argued that first dying declaration and for that matter even second and third dying declaration of deceased Sunil Kumar Lahoria is not implicating revision petitioner/accused no.4 Sumeet Bachewar in the crime in question. The last dying declaration allegedly made to Sandeep Kumar Lahoria is coming on record through the belated statement of Sandeep Kumar Lahoria. The same is outcome of opinion or suspicion of the declarant and as such cannot be relied. My attention is also drawn to the statement of Jerald Bowen to show that accused no.2 Emanuel Amolik made extra judicial confession implicating only accused no.10 Suresh Bijlani and accused no.12 Anurag Garg in the conspiracy to eliminate Sunil Kumar Lahoria. In order to demonstrate that accused no.1 Venkatesh had not uttered anything while fleeing from the spot, statement of police personnel named Rajubhau Akhade is pressed in service. It is further argued that other witnesses are disclosing only occasional casual meetings of revision petitioner Sumeet Bachewar with accused no.10 Suresh Bijlani, which does not amount to grave suspicion.

8. The learned advocate appearing for revision petitioner/accused no.5 Altaf Khan argued that there is no evidence of criminal conspiracy against this accused. He further argued that statements of Faheem Ulbar and that of Mohd. Irfan Londhe shows that accused no.5 Altaf had not even alighted from his Innova car as he was under the impression that they are going to Pune for purchasing some piece of land. By drawing my attention to the statement of Abdul Latif, the learned advocate argued that it was on 28th February 2013, it is alleged that this revision petitioner/accused no.5 has repaired his Innova car by changing the strip and colouring it. This does not even remotely suggest commission of the offence punishable under Section 201 of the IPC.

9. As against this, Ms. Pai, the learned Addl. Public Prosecutor, appearing for the

State vehemently opposed both revision petitions by submitting that utterances made by accused no.1 Venkatesh and heard by first informant Surjeet Kalra forms sufficient ground to proceed against accused persons including revision petitioner Sumeet Bachewar. According to the learned Addl. Public Prosecutor, oral dying declarations of deceased Sunil Kumar Lahoria forms sufficient ground to frame the charge against revision petitioner/accused no.4 Sumeet Bachewar. She argued that statement of Sandeep Lahoria shows that the background in which the crime in question was committed by accused persons. They were harbouring the grudge against the deceased as the deceased had lodged several complaints against them. The learned Addl. Public Prosecutor pointed out statements of Haroon Shaikh, Shamsuddin Pirjade, Kiran Bhosale and that of Dattashraya Ubale and submitted that statements of these witnesses goes to show that revision petitioner/accused no.4 Sumeet Bachewar was regularly meeting co-accused and they all had indulged in criminal conspiracy to commit murder of Sunil Kumar Lahoria. She submitted that several cases are filed by the deceased against revision petitioner Sumeet Bachewar which is clear even from the supplementary statement of Sandeep Lahoria recorded on 24th February 2013.

10. The learned Addl. Public Prosecutor argued that so far as revision petitioner/accused no.5 Altaf Khan is concerned, he was on the spot with his Innova Car. The C.C.T.V. footage shows presence of his Innova car in the vicinity of the spot of occurrence, at and about the time of the incident of killing Sunil Kumar Lahoria. The learned Addl. Public Prosecutor argued that at the time of commission of the offence, this accused was with accused no.2 Emanuel Amolik as well as accused no.11 Arif. They were near the spot of the incident. The learned Addl. Public Prosecutor relied on statement of Mohd. Irfan Londhe to show complicity of revision petitioner/accused no.5 Altaf in the crime in question and pointed out his conduct in changing the outer look of his Innova car to demonstrate that this revision petitioner is also involved in the crime in question. The learned Addl. Public Prosecutor by placing reliance on Palwinder Singh v. Balwinder Singh and Others reported in 2008(14) SCC 504 argued that entering into the realm of appreciation of evidence at the stage of framing of charge is not permissible and charges can be framed on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the court at the stage of framing the charge. The learned Addl. Public Prosecutor also relied on judgment of the Hon'ble Apex Court in the State of Tamil Nadu by Inspector of Police v. N. Suresh Rajan & Others reported in AIR 1982 SC (Supp) 1982.

11. I have also heard the learned advocate appearing for intervenor Sandeep Lahoria - son of the deceased Sunil Kumar Lahoria at sufficient length. He argued that the deceased had initiated various legal actions against revision petitioner/accused no.4 Sumeet Bachewar, who is having criminal antecedents of six criminal cases pending against him. The learned advocate further argued that the deceased had filed three writ petitions against revision petitioner/accused no.4 Sumeet Bachewar apart from lodging the FIR against him. From the FIR of

the year 2010, it is seen that this revision petitioner had threatened to kill the deceased. The learned advocate further argued that deceased Sunil Kumar Lahoria was exposing various Builders involved in the FSI scam in Navi Mumbai and therefore he was done to death by accused persons including revision petitioners. Hence, he prayed for dismissal of both the revision petitions by placing reliance on the judgment of the Hon''ble Apex Court in the matter of Soma Chakravorty v. State through CBI, 2007 (5) SCC 403, in Appeal (Cri.) 710 of 2007 decided on 10th May 2007. With the aid of this judgment, the learned advocate submitted that at the stage of framing of charge, probative value of the material on record cannot be gone into and the material brought on record by the prosecution needs to be accepted as true at that stage.

12. I have carefully considered the rival submissions and also perused the entire charge-sheet running into several volumes produced on record by both parties. As the claim of accused/revision petitioners is for their discharge from the sessions case, it is apposite to quote provisions of section 227 and 228 of Code of Criminal Procedure, 1973 (Cr.P.C. for the sake of brevity). Section 227 and relevant portion of section 228 of the Cr.P.C. reads thus:

"Section 227 :

Discharge If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Section 228 :

Framing of charge (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which ?

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

13. Bare perusal of provisions of these sections of the Cr.P.C. goes to show that when the judge considers that there is no ground for proceeding against the accused, he is required to discharge the accused by recording his reasons. However, if the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, then he is required to frame charge. By

now it is well settled that at this stage detailed scrutiny of material gathered by the prosecution in order to examine whether the same is sufficient for recording the conviction or not is absolutely not essential. What is required is examination of the material from the angle whether the same constitute sufficient ground for proceeding against the accused. Some prima facie material with strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him. The learned Addl. Public Prosecutor has rightly placed reliance on paragraph No. 20 of the judgment of the Honourable Supreme Court in the matter of State of Tamil Nadu (supra) which reads thus :

"We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171), in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):

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

against the accused in respect of the commission of that offence." "

14. It will also be necessary to quote a decision of the Hon"ble Apex Court in the matter of *State of Maharashtra v. Priya Sharan Maharaj and Ors.* reported in AIR 1997 SC 2041. After referring to Section 227 of the Cr.P.C. and power of the Sessions Court to discharge the accused, this is what is observed by the Hon"ble Supreme Court:8:

8: The law on the subject is now well-settled, as pointed out in *Niranjan Singh Punjabi v. Jitendra Bijjaya*, (1990) 4 SCC 76 : (AIR 1990 SC 1962), that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, 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. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

15. In a later decisions reported in the matter of *Dilawar Babu Kurane v. State of Maharashtra* reported in AIR 2002 SC 564, the Hon"ble Supreme Court observes thus:

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

16. According to the prosecution, first and foremost ground sufficient for proceeding against revision petitioner/accused no.4 Sumeet Bachewar in order to

presume that he has committed offence alleged against him is oral dying declarations of deceased Sunil Kumar Lahoria found from statements of prosecution witnesses recorded by the Investigator during the course of investigation. After murderous assault on him at about 8.20 a.m. of 16th February 2013 in front of his office situated in Sector No. 28 of Vashi, Navi Mumbai, deceased Sunil Kumar Lahoria was taken to Hiranandani Fortis Hospital by prosecution witness Satyendra Pandey, the office boy, in an auto rickshaw driven by prosecution witness Tejas Janjurne. According to the prosecution case, during the course of his journey to the Hiranandani Fortis hospital, deceased Sunil Kumar Lahoria made statements of relevant facts as to the cause of his death. Those statements were naturally heard by the auto rickshaw driver namely Tejas Janjurne as well as office boy Satyendra Pandey. Let us see what are those statements.

17. Statement of Tejas Janjurne recorded on 16th February 2013 i.e. immediately on the day of the incident discloses that while being taken to the hospital, deceased Sunil Kumar Lahoria told Satyendra Pandey "eq>s ikWap xksyh yxh gS! esjh lkl :d jgh gSA" meaning thereby that he has been hit by five bullets and his breathing is being stopped. This statement is not naming assailants and is not implicating revision petitioners/accused nos.4 and 5.

18. On 24th February 2013 supplementary statement of Tejas Janjurne is recorded wherein he has stated that Sunil Kumar Lahoria told Satyendra Pandey during the course of the journey "fctykuh us fd;k gS" meaning thereby that Bijlani has done. This statement of deceased Sunil Kumar Lahoria is also not implicating any of the revision petitioners/accused nos.4 and 5.

19. As against these oral dying declarations of Sunil Kumar Lahoria disclosed by Tejas Janjurne, Satyendra Pandey in his statement dated 20th February 2013 recorded by Investigator disclosed that while on the way leading to the Hiranandani Fortis Hospital, deceased Sunil Kumar Lahoria told him that "lqjs" k fctykuh o vuqjkx xxZ bUgksaus eq>s ejok;k] vc eSa ugha cpqaxk] eq>s yxkrkj / kedh nsrs jgs] vkSj bUgksaus gh eq>s ejok;k gS" meaning thereby that Suresh Bijlani and Anurag Garg caused assault on him, he will not survive, they were giving threats to him constantly and they have caused assault on him. This statement of deceased Sunil Kumar Lahoria is also not implicating any of the revision petitioners/accused nos.4 and 5 in the crime in question in any manner.

20. According to prosecution case, after receipt of telephonic call from Satyendra Pandey regarding assault on his father Sunil Kumar Lahoria, prosecution witness Sandeep Lahoria immediately reached Hiranandani Fortis Hospital and had a talk with his father Sunil Kumar Lahoria. Statement of Sandeep Lahoria dated 20th February 2013 is reflecting oral dying declaration allegedly made by his father Sunil Kumar Lahoria to the following effect "lqjs" k fctykuh] vuqjkx xxZ] lqfer cPpsokj] ,l0ih0 vxzoky] Hkqis" k xqIrk] bu lc yksxksa us eq>s ejok;k gS vc eSa ugha cpqaxkA" meaning thereby that Suresh Bijlani, Anurag Garg, Sumeet Bachewar, S.P. Agrawal and Bhupesh Gupta caused assault on him and he may

not survive. As at this stage entering into the realm of appreciation of evidence and marshalling of evidence is not permitted, it is not possible to exclude any of the dying declarations from consideration by holding that those are untrustworthy or unreliable. One will have to accept them as they are by assuming that the deceased was in a fit condition to make those statements. All oral dying declarations will have to be accepted as true at this stage, in view of the law laid down in cases of Palwinder Singh (supra) and Soma Chakravarti (supra).

21. These are four oral dying declarations of deceased Sunil Kumar Lahoria coming on record of investigation as seen from the charge-sheet. Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts, when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Section 32 of the Indian Evidence Act is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicidal or suicidal, provided the statement relates to the cause of death or exhibits circumstances leading to the death. Let us, therefore, examine whether these statements allegedly made by deceased Sunil Kumar Lahoria can be said to be admissible pieces of evidence and whether those are statements as to the cause of his death or as to any of the circumstances of the transaction which has resulted in his death, so as to form sufficient ground to proceed against revision petitioner/accused no.4 Sumeet Bachewar.

22. In this context, judgment of the Apex Court in the matter of Pakala Narayan Swami v. Emperor reported in AIR 1939 PC 47 and Babubhai Bokhiria and Others (cited supra) are relevant. In the matter of Pakala Narayan Swami (supra), there was statement of the widow of the deceased that the deceased had told her that he was going to Behrampur because of the call in writing from wife of the accused. The deceased had disclosed his widow that wife of the accused had told him to come and receive payment of his dues. The Privy Council upon examination of such statement of the deceased as well as provision of section 32(1) of the Evidence Act, observed that, "The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether a particular individual or otherwise and not directly related to the occasion of the death will not be admissible" u/s 32(1) of the Evidence Act.

23. In the matter of Babubhai Bokhiria (cited supra) about one year prior to his death, deceased Mulubhai had written a chit disclosing that if he dies due to murder, then action be taken against Babubhai Bokhiria and his murder will be done by Babubhai only. In the case of murder of Mulubhai, the Honourable Supreme Court examined whether this chit written by the deceased constitutes circumstances of transaction, which resulted in his death. Relevant observations of the Honourable Supreme Court in paragraph No. 14 and 15 of this judgment

reads thus;

"14. We have given our thoughtful consideration to the rival submissions and the first question which falls for our determination is whether the note in question is admissible in evidence or in other words, can be treated as a dying declaration under Section 32 of the Act. Section 32 of the Act reads as follows:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) when it relates to cause of death When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question.

15. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.

24. It is thus clear that general expressions suspecting a particular individual by the deceased are not admissible when the cause of death of the deceased comes into question. In this view of the matter, statements made by deceased Sunil Kumar Lahoria, being his general expression of suspicion, fear and apprehension are not admissible in evidence. It is well settled that at the stage of framing of charges, the court is required to confine its attention to only those material collected during the investigation which can be legally translated into evidence. The requirement of law is to have legally admissible evidence. The material which cannot ultimately be translated into legally admissible evidence cannot be looked into while framing the charge. The Apex Court in the matter of Suresh Budhamal Kalani @ Pappu Kalani v. State of Maharashtra reported in 1998 SCC

(Cri) 1625 and in particular paragraph nos.6 and 7 has observed that at the stage of framing of the charge, the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence that the prosecution may adduce in the trial which would commence only after the charges are framed and accused denies the charges. This judgment of the Hon'ble Supreme Court is followed by this court in cases of Arun Gawli v. State of Maharashtra reported in 2007 ALL MR (Cri.) 2562 and Laxmi Koli Babita v. State of Maharashtra reported in 2005 ALL MR (Cri.) 571. In the case in hand, even if the last oral dying declaration of deceased Sunil Kumar Lahoria allegedly made to his son Sandeep Kumar Lahoria in the morning hours of 16th February 2013 at the Hiranandani Fortis Hospital found in his statement dated 20th February 2013 recorded by the Investigator is accepted as it is, then also the same is not capable of being translated into legal evidence as it is nothing but a general expression indicating apprehension, suspicion and fear of the deceased. It is not constituting circumstances of transaction which resulted in death of Sunil Kumar Lahoria and as such cannot be translated into legal evidence. Therefore, the same cannot constitute a ground for framing the charge against revision petitioner/accused no.4 Sumeet Bachewar.

25. According to the prosecution, the material in the form of confession of co-accused i.e. accused no.1 Venkatesh Chettiyar made while fleeing from the spot after assaulting deceased Sunil Kumar Lahoria forms a sufficient ground for presuming that revision petitioner/accused no.4 Sumeet Bachewar has committed the offence alleged by the prosecuting agency. Utterances allegedly made by accused no.1 Venkatesh Chettiyar while attempting to flee from the spot after committing murderous assault were heard by the first informant Surjeet Kalra and those are reflected in the FIR lodged by him on 16th February 2013. Utterances allegedly made by accused no.1 Venkatesh Chettiyar are thus :

"fcYMj ls iaxk ysds vPNk ugha fd;k lqjs" k fctykuh] vuqjkx xxZ] Hkqis" k xqIrk] lqfer cPpsokj] ,l0ih0 vxzoky] jktw xqIrk] xtjk] bu ykxsksa ls iaxk ysds vPNk ugha fd;kA cksyk Fkk] uoh eaaqcbZ NksM+ ds tkus ds fy;s] ;s rks gksuk gh Fkk] bUgksaus gh rqEgkjk dke djok;k gSA"

If freely translated in English, these utterances are to the effect that - "Not done good by taking quarrel with Builders. Not done good by picking up quarrel with Suresh Bijlani, Anurag Garg, Bhupesh Gupta, Sumeet Bachewar, S.P. Agarwal, Raju Gupta, Gajra. Told to leave Navi Mumbai and go. This had to happen. Those persons have done your work."

26. One may consider these utterances as confession of co-accused Venkatesh Chettiyar against revision petitioner/accused no.4 Sumeet Bachewar. Then, the question will be whether such confession of the co-accused can be called in aid to frame charges against revision petitioner/accused no.4 Sumeet Bachewar, if ultimately it is found that apart from this alleged confession of the co-accused, there is no other evidence against him.

27. On this aspect, it is essential to quote judgment of the Hon''ble Apex Court in the matter of Kashmira Singh v. State of Madhya Pradesh reported in AIR 1952 SC 159. In the said case, the Hon''ble Supreme Court has observed that confession of the co-accused cannot be called in aid to frame the charge against the accused, in absence of any other evidence to do so. This verdict of the Hon''ble Supreme Court is followed by this court in case of Laxmi Koli Babita (supra) which is followed in Virbhadram Vyankanna Guggalot v. State of Maharashtra reported in 2008 ALL MR (Cri) 203. In order to give finding on this aspect, one will have to consider the remaining part of the evidence pressed in service against revision petitioner/accused no.4 Sumeet Bachewar, which according to the learned Addl. Public Prosecutor is regarding indulging in the criminal conspiracy with co-accused for liquidating Sunil Kumar Lahoria.

28. Before adverting to the remaining part of evidence pressed in service against revision petitioner/accused no.4 Sumeet Bachewar, let us accept as it is the alleged confessional statement of co-accused Venkatesh Chettiyar made by him while fleeing from the spot of the incident and heard by the First Informant Surjeet Singh Kalra. If taken at its face value, said utterances of accused no.1 Venkatesh Chettiyar, by no stretch of imagination points out that murderous assault on deceased Sunil Kumar Lahoria was at the instance of revision petitioner/accused no.4 Sumeet Bachewar. General utterance is to the effect that the deceased had not done good by picking up quarrel with Builders. Then, names of some persons such as Suresh Bijlani, Anurag Garg etc. including that of revision petitioner/accused no.4 Sumeet Bachewar are appearing in the utterance. If such utterances are considered in its totality, then also these utterances allegedly made by co-accused Venkatesh Chettiyar does not reflect that it was revision petitioner/accused no.4 Sumeet Bachewar, on whose instructions, the killing was undertaken and effected. Utterances allegedly made by co-accused Venkatesh Chettiyar are in the nature of the cause for the murderous assault on Sunil Kumar Lahoria. Utterances of the co-accused found in the FIR at the most reflect opinion of the assailant and cannot be construed as statement of the fact made by him out of his own knowledge. Perusal of the entire charge-sheet does not show that revision petitioner/accused no.4 Sumeet Bachewar had ever met assailant/accused no.1 Venkatesh Chettiyar who had allegedly taken his name after the incident. Similarly, there is no iota of evidence in the entire charge-sheet to show that this revision petitioner/accused no.4 Sumeet Bachewar had ever contacted the another assailants i.e. accused no.3 Wajeed @ Zaheer Ahmed at any point of time. In this view of the matter, it cannot be said that such alleged utterances of accused no.1 Venkatesh Chettiyar amounts to evidence which can ultimately be a legally translatable evidence against the revision petitioner/accused no.4 Sumeet Bachewar during the course of the trial. Even if those utterances of accused no.1 Vyankatesh Chettiyar are held to be forming the material against the revision petitioner/accused no.4 Sumeet Bachewar, then also unless and until existence of some other evidence against him is shown, such confessional statement of the co-accused cannot be

looked into for framing charges against revision petitioner/accused no.4 Sumeet Bachewar in the light of the law laid down by the Hon''ble Apex Court in the matter of Kashmira Singh (supra). Let us, therefore, search whether some other evidence is appearing against him in the charge-sheet.

29. Rajabhau Akhade and Namdeo Gadekar were the Police Constables on the patrolling duty in the area where the incident took place. They immediately rushed on the spot while accused no.1 Venkatesh Chettiyar was still on the spot in injured condition. These police personnel took his custody on the spot itself. They are not disclosing anything about alleged utterances of accused no.1 Venkatesh Chettiyar, as disclosed by the First Informant Surjeet Singh Kalra. Similarly, Ganpat Chawda, Satyendra Pandey and Kokila Yadav who rushed on the spot immediately at the time of the incident are also not disclosing anything about alleged utterances of accused no.1 Venkatesh Chettiyar as stated by First Informant Surjeet Singh Kalra. However, without giving any importance to this aspect of the matter at this stage, let us examine whether there is any other evidence to connect revision petitioner/accused no.4 Sumeet Bachewar to the crime in question, so as to make use of confessional statement of co-accused Venkatesh Chettiyar as per the exposition in the case of Kasmira Singh (supra).

30. According to the prosecution case and particularly as reflected from the statement of Sandeep Lahoria - son of the deceased, deceased Sunil Kumar Lahoria was in profession of building construction and that he had made several complaints against several Builders of Navi Mumbai to various authorities apart from taking out various proceedings in several courts including this court against them. As he had unearthed FSI scam of Builders in Navi Mumbai and therefore, those were having grudge against the deceased. This, according to the prosecution case, constituted a motive for indulging in criminal conspiracy in liquidating Sunil Kumar Lahoria. According to prosecution case, accused no.10 Suresh @ Jawahar Bijlani and accused no.12 Anurag Garg were the kingpin of the criminal conspiracy. They along with co-accused - accused no.13 Mahesh Bijlani, accused no.9 Bhupesh Gupta and revision petitioner/accused no.4 Sumeet Bachewar indulged in the criminal conspiracy, hired services of accused no.2 Emanuel Amolik for hiring contract killers viz. accused no.1 Venkatesh Chettiyar and accused no.3 Wajeed @ Zaheer and executed the object of the conspiracy by getting Sunil Kumar Lahoria killed through contract killers. For pointing out sufficient ground for proceeding against revision petitioner/accused no.4 Sumeet Bachewar, the learned Addl. Public Prosecutor pressed in service statements of prosecution witnesses Haroon Shaikh, Shamsuddin Pirjade, Kisan Bhosale and Dattashraya Ubale, apart from placing reliance on statements of Sandeep Lahoria and argued that in the backdrop of enmity with the deceased due to his acts of lodging complaints against them, accused persons indulged in criminal conspiracy and revision petitioner/accused no.4 Sumeet Bachewar was one of the conspirators who planned to get Sunil Kumar Lahoria killed.

31. Section 120A of the IPC defines the offence of criminal conspiracy and it

reads thus :

120A. Definition of criminal conspiracy- When two or more persons agree to do, or cause to be done

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Bare perusal of this definition of criminal conspiracy makes it clear that if circumstances in a case when taken together on their face value are indicating meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal committed by illegal means, then, the offence of criminal conspiracy punishable under Section 120B of the IPC is made out. In the matter of John Pandian v. State reported in JT 2010(130) SC 284 the Hon'ble Apex Court has held that a few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. As it is alleged that the revision petitioner/accused no.4 Sumeet Bachewar, being one of the conspirators, is liable to be prosecuted for the offence punishable under Section 120B as well as under Section 302 read with 120B or Section 302 read with 34 of the IPC, it is necessary to quote observations of the Hon'ble Apex Court in the matter of Keharsingh v. State (Delhi Administration) reported in AIR 1978 SC 1883. Ingredients of the offence of criminal conspiracy are explained by the Apex Court in the following manner in paragraphs 271 and 272 which read thus :

"271. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120A and 120B, IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

272. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit

of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299) explains the limited nature of this proposition :

"Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done."

32. What constitutes an offence of criminal conspiracy is further explained by the Hon^{ble} Apex Court in the matter of State of Tamil Nadu v. Nalini reported in 1999 Cri. L.J. 124 and the relevant observations read thus :

"The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive action evidencing their joining of conspiracy. It has been said that a criminal conspiracy is a partnership in crime and there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose."

33. In the matter of Nalini (supra), according to prosecution case, the former Prime Minister Late Shri Rajiv Gandhi was killed in a bomb blast as a result of conspiracy to eliminate him. While allowing the appeal partly, the Hon^{ble} Supreme Court has considered important points relating to conspiracy which was allegedly hatched by accused persons. It is apposite to cull out those points in order to appreciate as to how the offence of criminal conspiracy can be made out.

(a) Association of accused with one of main accused or even his knowledge about conspiracy would not make him conspirator as agreement is sine quo non of

agreement.

(b) Accused harbouring main accused persons knowing fully well their involvement in the commission of offence is itself not sufficient to infer that he was member of conspiracy.

(c) If accused had no knowledge of conspiracy as per evidence produced then his mere association with main conspirator would not make him member of the conspiracy.

(d) If main conspirator is looking after the welfare of the accused who has lost his leg and meeting his medical expenses, then in the absence of any evidence to the contrary, that would not import accused with the knowledge of conspiracy.

(e) Wireless message showed that only main accused conspirators knew the object of conspiracy. So if accused said that he had strong suspicion that targetted person was Rajiv Gandhi, but it would certainly not make him member of conspiracy without something more.

(f) It is not necessary for the conspirator to be present at the scene of crime. If evidence showed that the accused was in thick of conspiracy then his plea that he derived the knowledge of incident after the explosion is not tenable specially when he himself had purchased the battery which he knew will be used for explosion of human bomb.

(g) Mere association with LTTE hard core militant or the fact that those militants turned out to be the persons responsible for the killing of Rajiv Gandhi, would not make them member of any conspiracy to kill the targetted person.

34. Let us now see what witnesses pointed out by the learned Addl. Public Prosecutor are stating and consider whether their recitals taken at the face value reflects prima facie case and constitutes sufficient ground for proceeding against revision petitioner/accused no.4 Sumeet Bachewar. Haroon Shaikh was one of the driver with accused no.2 Emanuel Amolik. His police statement shows that he had seen accused no.2 Emanuel Amolik, accused no.10 Suresh Bijlani, accused no.13 Mahesh Bijlani, accused no.12 Anurag Garg, revision petitioner/accused no.4 Sumeet Bachewar, accused no.9 Bhupesh Gupta and S.P. Agarwal chitchatting in the office of Suresh Bijlani. He further states that he had seen accused no.2 Emanuel Amolik and accused no.12 Anurag Garg smoking cigarettes and chitchatting outside the office of accused no.10 Suresh Bijlani. With this introductory narration, prosecution witness Haroon Shaikh is disclosing the happening of events which took place on 15th February 2013 and on 16th February 2013 i.e. on the day of the incident. As per his version, on 15th February 2013 at about 2.30 p.m., accused no.2 Emanuel Amolik met accused no.10 Suresh Bijlani and accused no.12 Anurag Garg at the office of Suresh Bijlani. He then disclosed further movements of accused no.2 Emanuel Amolik on that day. Then this witness narrated what happened on 16th February 2013 when he was accompanying his employer accused no.2 Emanuel Amolik. He

disclosed that on this fateful day at about 2.30 to 3.00 p.m. he saw accused no.2 Emanuel Amolik going to the office of accused no.10 Suresh Bijlani and then accused no.2 Emanuel Amolik met accused no.10 Suresh Bijlani, accused no.13 Mahesh Bijlani and accused no.12 Anurag Garg at that place. Then this witness is disclosing how consideration for contract killing was paid. However, this witness has not named revision petitioner/accused no.4 Sumeet Bachewar as a person who was in contact with rest of the conspirators on a day earlier to or on the day of the incident. He has not disclosed any complicity of this revision petitioner even in payment of the amount as a consideration for murder of Sunil Kumar Lahoria.

35. Shamsuddin Pirzade is dismissed employee of the Police Department who was working with accused no.2 Emanuel Amolik. In the introductory portion of his police statement he has stated that since last one year, accused no.2 Emanuel Amolik was visiting office of accused no.10 Suresh Bijlani and he has seen accused no.12 Anurag Garg, accused no.9 Bhupesh Gupta, accused no.13 Mahesh Bijlani as well as S.P. Agrawal many times in the office of Suresh Bijlani, Thereafter, this witness has disclosed what he had seen on 16th February 2013 i.e. day of the incident, when he was accompanying accused no.2 Emanuel Amolik. He disclosed visit of accused no.2 Emanuel Amolik to the office of accused no.10 Suresh Bijlani at about 2.30 p.m. of 16th February 2013 and meeting of accused no.2 Emanuel Amolik with accused Suresh Bijlani and other accused persons on that day. Statement of this witness does not show that revision petitioner/accused no.4 Sumeet Bachewar was seen by him on that day in company of the co-accused.

36. Kisan Bhosale was working with accused no.13 Mahesh Bijlani. He has stated to police that S.P.Agrawal, revision petitioner/accused no.4 Sumeet Bachewar, accused no.9 Bhupesh Gupta and Vijay Gajra used to come to meet accused no.10 Suresh Bijlani at his office at Fairmount. He has further stated that accused no.2 Emanuel Amolik also used to come to meet accused no.10 Suresh Bijlani. Apart from this, Kisan Bhosale stated that office of Suresh Bijlani used to be visited frequently by several Builders of Navi Mumbai, several Officers of Navi Mumbai Municipal Corporation and CIDCO as well as agriculturists who wanted to sell their lands. They all were meeting Suresh Bijlani. He also disclosed that Police Commissioner of Navi Mumbai Shri Sharma used to accompany accused no.12 Anurag Garg for jogging. Thereafter, this witness has disclosed what happened on 16th February 2013 when he was in the office of accused no.10 Suresh Bijlani. This witness stated how money was paid to accused no.2 Emanuel Amolik after murder of Sunil Kumar Lahoria. Nowhere this witness has disclosed complicity of revision petitioner/accused no.4 Sumeet Bachewar even remotely in the conspiracy of killing Sunil Kumar Lahoria.

37. Dattashraya Ubale is an employee of the Police Department and was working as official bodyguard to accused no.10 Suresh Bijlani. Introductory part of his police statement is to the effect that accused no.2 Emanuel Amolik, accused

no.12 Anurag Garg, S.P.Agrawal and revision petitioner/accused no.4 Sumeet Bachewar are known to him. He stated that accused no.2 Emanuel Amolik used to visit the office of accused no.10 Suresh Bijlani two or three times in a week whereas accused no.12 Anurag Garg and one S.P.Agrawal used to meet Suresh Bijlani regularly. He has stated that revision petitioner/accused no.4 Sumeet Bachewar used to meet accused no.10 Suresh Bijlani occasionally.

38. It is, thus, seen from statements of these witnesses that several Builders of Navi Mumbai apart from Officers of statutory bodies such as Municipal Corporation and CIDCO used to visit accused no.10 Suresh Bijlani at his office frequently. Revision petitioner/accused no.4 Sumeet Bachewar also used to visit accused no.10 Suresh Bijlani. All these witnesses, apart from disclosing these casual visits of several persons including revision petitioner/accused no.4 Sumeet Bachewar, have also categorically disclosed prima facie material to infer about criminal conspiracy to eliminate Sunil Kumar Lahoria by disclosing what had transpired on 15th and 16th February 2013 amongst rest of accused persons. However, none of them have even remotely disclosed any incriminating material against the revision petitioner/accused no.4 Sumeet Bachewar. General introductory statements are made by all of them to the effect that apart from other visitors, (which even included one S.P.Agrawal, who is also named in utterances of the co-accused and disclosure of the deceased to his son) revision petitioner/accused no.4 Sumeet Bachewar was also used to be one such visitor to the office of accused no.10 Suresh Bijlani. Apart from occasional casual visits of this revision petitioner to accused no.10 Suresh Bijlani, nothing more is stated by all these witnesses. By mere visits and meeting with another who may be an accused in a case, such visitor cannot be said to be one of the conspirators. Some thing more is expected to be shown in terms of provisions of Section 120A of the IPC.

39. Apart from the witnesses pointed out by the learned Addl. Public Prosecutor, I have scrutinized the entire charge-sheet and come across statements of Shamkant Patil and Sanjay Zhot who are employees of the Police Department and who were working as official bodyguard of accused no.10 Suresh Bijlani. They both are disclosing visits of other co-accused to the house of accused no.10 Suresh Bijlani but have not made any statement to the effect that revision petitioner/accused no.4 Sumeet Bachewar ever visited accused no.10 Suresh Bijlani. In supplementary statement, Sanjay Zhot, Police Nayak, has stated that on the day of the incident i.e. on 16th February 2013, at about 12 noon, Advocate S.P.Agrawal came to meet Suresh Bijlani at his house and then they went to the office of accused no.10 Suresh Bijlani. There accused no.12 Anurag Garg, accused no.2 Emanuel Amolik and Advocate Sachdev came to meet accused no.10 Suresh Bijlani. Thus, it is clear that revision petitioner/accused no.4 Sumeet Bachewar never contacted any of accused persons though meetings and movements of other accused persons indicating criminal conspiracy are seen from disclosures made by prosecution witnesses.

40. Faheem Ulbar is one of the drivers of accused no.2 Emanuel Amolik. He disclosed meeting of accused persons at about 2.30 - 3.00 p.m. of 16th February 2013 at the office of accused no.10 Suresh Bijlani but has not named revision petitioner/accused no.4 Sumeet Bachewar as one of the persons attending that meeting. His supplementary statement shows meeting of accused persons which took place on 15th February 2013 i.e. a day earlier to the incident. Name of revision petitioner/accused no.4 Sumeet Bachewar is not figuring in the statement of Faheem Ulbar as a participant in such meeting.

41. Jerald Bowen is father of Jackson who is partner of accused no.10 Suresh Bijlani. His statement as well as statement of Jackson shows how money was paid as a consideration for executing the contract of killing to accused no.2 Emanuel Amolik. Extra judicial confession of accused no.2 Emanuel Amolik is reflected from their statements. In that extra judicial confession, allegedly made by accused no.2 Emanuel Amolik, no role is attributed to revision petitioner/accused no.4 Sumeet Bachewar. Statement of these witnesses shows that nothing was contributed by revision petitioner/accused no.4 Sumeet Bachewar in the contract killing of Sunil Kumar Lahoria.

42. Apart from statements of these witnesses, no other material in respect of criminal conspiracy could be found except statement of Sandeep Lahoria - son of the deceased. At the cost of repetition, it needs to be pointed out that the learned Addl. Public Prosecutor has relied on police statements of Sandeep Lahoria, Haroon Shaikh, Shamsuddin Pirzade, Kisan Bhosale and Dattashraya Ubale in order to point out that revision petitioner/accused no.4 Sumeet Bachewar was one of the conspirators in the criminal conspiracy to eliminate Sunil Kumar Lahoria.

43. Let us now put on record what Sandeep Kumar Lahoria states in his statement. On 20th February 2013 Sandeep has stated to police that his father deceased Sunil Kumar Lahoria had lodged reports against the accused no.12 Anurag Garg and others at Nerul Police Station and Khargar Police Station. Some proceedings were also taken out in that regard before this court. It is further averred by him that accused no.10 Suresh Bijlani had called his father twice and asked him to withdraw cases against accused no.12 Anurag Garg and revision petitioner/accused no.4 Sumeet Bachewar. His father was called at the office of the Fine Art in October 2012 where Vijay Gajra, S.P. Agrawal, revision petitioner/accused no.4 Sumeet Bachewar, accused no.9 Bhupesh Gupta, accused no.12 Anurag Garg were present apart from accused no.2 Emanuel Amolik and at that time accused no.10 Suresh Bijlani asked his father to withdraw the cases. It is further averred that S.P.Agrawal had installed secret cameras in front of the office of his father and he transmitted details of movements of his father to assailants. Then, detail statement of Sandeep Lahoria is seen to have been recorded on 24th February 2013 by Unit No. I of the Crime Branch wherein apart from reciting the oral dying declaration of his father, he gave details of correspondence made by his father to police as well as initiation of various

proceedings by his father before police authorities and courts. Allegations are made against several Builders and persons such as S.P.Agrawal, Vijay Gajra and Pramod Mittal apart from accused persons.

44. If statement of all witnesses recorded by the prosecution in respect of its case regarding criminal conspiracy are considered, then it is seen that averments regarding revision petitioner/accused no.4 Sumeet Bachewar are only in respect of his casual occasional visits to main accused Suresh Bijlani. There is no material even to suggest remotely that prior to the incident or after the incident, he contacted accused no.10 Suresh Bijlani or other accused. Though witnesses are alleging some material in respect of criminal conspiracy against other accused persons, they are not attributing any role to revision petitioner/accused no.4 Sumeet Bachewar. Perusal of the entire charge-sheet does not show anything to suggest even remotely that there was a tacit understanding between the revision petitioner/accused no.4 Sumeet Bachewar and other co-accused such as Suresh Bijlani, Anurag Garg, Bhupesh Gupta and Mahesh Bijlani in respect of killing of Sunil Kumar Lahoria. There is no iota of evidence regarding transmission of thoughts and sharing the unlawful design between revision petitioner/accused no.4 Sumeet Bachewar and other co-accused. For suggesting even prima facie material to infer criminal conspiracy, it is necessary for the prosecution to point out as to how it was hatched. That can be inferred from the circumstances specially declaration, acts and conduct of conspirators. Need of meeting of minds of conspirators for doing illegal act is sinequonon. What is prima facie required to show is revision petitioner/accused no.4 Sumeet Bachewar was having object to accomplish and hence a plan or scheme was framed by accused persons including revision petitioner/accused no.4 Sumeet Bachewar for accomplishing that object and that there was agreement or understanding between them for accomplishment of the object by executing the same in the manner decided by them. In the case in hand, accepting statements of Sandeep Lahoria as they are, what can at the most be inferred is only a faint motive with revision petitioner/accused no.4 Sumeet Bachewar. However, that by itself, without there being any other evidence, cannot form a ground for presuming that he was member of a criminal conspiracy hatched by accused persons to eliminate Sunil Kumar Lahoria. At this juncture, observations of the Hon"ble Apex Court in the matter of State of Uttar Pradesh v. Sanjay Singh reported in 1994 SSC (Supp) (2) 707 can be quoted with advantage. Paragraphs 18 and 20 of that judgment read thus :

"18. At the highest, the prosecution can only suggest from the circumstances what is or may be the motive for any particular act. However, motive is not a sine qua non for bringing the offence of murder or of any crime home to the accused. At the same time the absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person but to eke out a case by proof of a motive alone that too Suspicion of motive apparently tending towards any possible crime, is not only a very unsatisfactory but also a dangerous process, because circumstances do not always lead to

particular and definite inferences and the inferences themselves may sometimes be erroneous.

20. This Court in *Century Spinning & Manufacturing Co. Ltd. v. State of Maharashtra* while examining the scope of Section 251(A) subsections (2) and (3) of the old Code corresponding to Sections 239 and 240 of the new Code has made the following observation: (SCC p. 291, para 17: AIR p. 552, para 16) "... If on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the State of U.P. v. Dr. Sanjay Singh on 27 January, 1994 plain language of the section or on its judicial interpretation or on any other recognised principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecution authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the Court and it has to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution."

45. It is, thus, clear that even if it is accepted that there is material to infer a faint motive with revision petitioner/accused no.4 Sumeet Bachewar, it is not possible in absence of other evidence to conclude that there is ground for presuming the commission of offence by criminal conspiracy by him. Mere assumption of motive with revision petitioner/accused no.4 Sumeet Bachewar is not adequate to infer conspiracy and his being a member of the criminal conspiracy. There is no material on record to indicate tacit understanding or agreement amongst him and other co-accused as to what had to be done. Thus, from whatever angle, the entire material placed on record by the prosecution is considered, no prima facie case can be said to have been made out to demonstrate that revision petitioner/accused no.4 Sumeet Bachewar was one of the conspirators in a plan hatched for eliminating Sunil Kumar Lahoria.

46. At this stage it needs to put on record that whatever material is appearing against revision petitioner/accused no.4 Sumeet Bachewar is by and large also appearing against S.P. Agarwal, Raju Gupta and Gajra who are not arraigned as an accused in the sessions case.

47. It is, thus, clear that there is no prima facie material demonstrating sufficient ground for proceeding against revision petitioner/accused no.4 Sumeet Bachewar in respect of offences alleged against him. There is nothing even to create grave suspicion against revision petitioner/accused no.4 Sumeet Bachewar in respect of his complicity in the offence alleged against him. The entire material found against the revision petitioner/accused no.1 Sumeet Bachewar if taken at its face

value does not disclose existence of all ingredients constituting the alleged offence. As there is no ground for presuming that he has committed the alleged offence, the so called confession of accused no.1 Venkatesh Chettiyar cannot be called in aid to frame charges against him, leave apart the fact that the said confession nowhere discloses that the killing was under the directions of the revision petitioner/accused no.4 Sumeet Bachewar. As no prima facie case is made out against the revision petitioner/accused no.4 Sumeet Bachewar even to create some suspicion against him, a charge cannot be framed against him for offences alleged against him.

48. For the above reasons, I am of the opinion that the learned Additional Sessions Judge while rejecting the application for discharge of revision petitioner/accused no.4 Sumeet Bachewar has committed manifest error of law resulting in miscarriage of justice. Therefore, case of revision petitioner/accused no.4 Sumeet Bachewar is a fit case for exercise of revisional jurisdiction of this court in as much as the court below has overlooked the fact that the ingredients of offence as alleged against the revision petitioner/accused no.4 Sumeet Bachewar are not even prima facie satisfied from the entire material gathered by the prosecution. The learned Additional Sessions Judge ought to have exercised the jurisdiction vested in him under Section 277 of the Code of Criminal Procedure and ought to have discharged the revision petitioner/accused no.4 Sumeet Bachewar from the sessions case as there are no sufficient grounds for proceeding against him. In this view of the matter, the impugned order so far as rejecting the application for discharge moved by the revision petitioner/accused no.4 Sumeet Bachewar needs to be termed as perverse as the same suffers from total non-application of mind. The same, therefore, cannot be sustained.

49. Now let us examine whether there are sufficient grounds for proceeding against accused no.5 Altaf Khan, in the wake of submissions of the learned advocate that statement of Mohd. Irfan Londhe does not show even prima facie complicity of this revision petitioner/accused no.5 in the crime in question.

50. The foregoing discussion makes it clear that there is prima facie evidence to suggest that some of the co-accused have indulged in conspiracy and hired services of accused no.2 Emanuel Amolik to get Sunil Kumar Lahoria murdered. Statement of Faheem Ulbar - driver of accused no.2 Emanuel Amolik shows that accused no.2 Emanuel Amolik met with other co-accused on 15th February 2013 at Sahil Hotel of Mumbra. Supplementary statement of this witness shows that on the day of the incident i.e. on 16th February 2013, from morning hours revision petitioner/accused no.5 Altaf was in company of accused no.2 Emanuel Amolik. For most of the time on that day, accused no.2 Emanuel Amolik moved in black coloured Innova car of this revision petitioner/accused no.5 Altaf Khan while in company of the revision petitioner/accused no.5 Altaf Khan and accused no.11 Arif Shaikh. During his movement with revision petitioner/accused no.5 Altaf Khan, accused no.2 Emanuel Amolik met rest of the accused persons including assailants viz. accused no.1 Venkatesh Chettiyar and accused no.3

Wajeed. Statement of Mohd. Irfan Londhe, who is partner of revision petitioner/accused no.5 Altaf Khan reflects that on 16th February 2013, in morning hours, revision petitioner/accused no.5 Altaf Khan told him that accused no.2 Emanuel Amolik called them at Vashi and therefore by Innova Car he along with revision petitioner/accused no.5 Altaf Khan and Arif Shaikh went there and met accused no.2 Emanuel Amolik. Mohd. Irfan Londhe further stated that assailants - accused no.1 Venkatesh Chettiyar and accused no.3 Wajeed also came there. He speaks of meeting of accused no.2 Emanuel Amolik with those assailants/accused and about suspicious circumstances in which accused no.2 Emanuel Amolik was moving on that day. Statement of Londhe further reflects that accused no.2 Emanuel Amolik alighted from the vehicle and sat for a while in a Scorpio vehicle at Vashi Railway Station. Neelkanth Thorat is the son of the owner of that Scorpio vehicle and he was driving that vehicle. Statement of Neelkanth Thorat shows that some of the accused travelled in his Scorpio vehicle on the day of the incident and prior to the incident, accused no.2 Emanuel Amolik met them in that vehicle to ascertain whether the fire arm is made available for accomplishing the mission. Accused no.2 Emanuel Amolik verified availability of a fire arm. It is, thus, clear that, on the day of the incident, revision petitioner/accused no.5 Altaf Khan was throughout in the company of accused no.2 Emanuel Amolik till commission of murder of Sunil Kumar Lahoria by two co-accused. Even if this revision petitioner/accused no.5 Altaf Khan might not have alighted from the Innova Car by which they were travelling, that by itself, does not indicate that there were no meeting of minds and sharing of thoughts for ultimate object of eliminating Sunil Kumar Lahoria between revision petitioner/accused no.5 Altaf Khan and accused no.2 Emanuel Amolik. The C.C.T.V. footage gathered by the prosecution is reported to be showing presence of the Innova car of this revision petitioner/accused no.5 Altaf Khan in the vicinity of the spot of the incident and evidence on record shows that he was in the company of the contract killer accused no.2 Emanuel Amolik at that time. This material is prima facie sufficient to conclude that there is strong and grave suspicion against this revision petitioner/accused no.5 Altaf Khan, and as such, it is not justifiable to discharge him by holding that the learned lower court erred in rejecting his revision petition. Statement of the garage owner Abdul Latif recorded by the prosecution shows that on 28th February 2013 i.e. after the incident of murder of Sunil Kumar Lahoria, this revision petitioner/accused no.5 Altaf Khan got outer look of his Innova Car changed by colouring it and changing the strip. The material found against this revision petitioner/accused no.5 Altaf Khan constitutes sufficient ground for proceeding against him and it cannot be said that there is absolutely no material to connect him with the alleged offence.

51. In the result, no fault can be found out with the impugned common order passed by the learned Additional Sessions Judge thereby rejecting the application for discharge filed by revision petitioner/accused no.5 Altaf Khan.

52. In the light of foregoing discussion, I proceed to pass the following order :

ORDER

i) The Revision Petition bearing No. 383 of 2016 filed by revision petitioner/accused no.4 Sumeet Ganpatrao Bachewar is allowed. The impugned common order, so far as it relates to rejecting his application for discharge, is quashed and set aside.

ii) The Revision Petitioner/accused no.4 Sumeet Ganpatrao Bachewar is discharged from the Sessions Case No. 281 of 2013 pending on the file of the Sessions Court at Thane, arising out of Crime No. 167 of 2013 registered with Vashi Police Station on 16th February 2013 for the offences punishable under Sections 302, 120B, 201, 34 read with Sections 3/25, 3/27 and 4/27 of the Indian Arms Act.

iii) The Revision Petition No. 377 of 2016 filed by revision petitioner/accused no.5 Mohit @ Altaf Khan is dismissed.

The learned APP seeks stay of the order discharging revision petitioner in Criminal Revision Application No. 383 of 2016 for a period of four weeks by contending that the Sessions case is fixed for framing of Charge on the next date.

Request so made seems to be reasonable.

Hence the order discharging revision petitioner in Criminal Revision Application No. 383 of 2016 is stayed for a period of four weeks from today.