

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 25.05.2010**
Judgment delivered on: 19.07.2010

+ **Crl. Rev. P. No.261/2010 & CRL MA No.7006/2010**

SAJJAN KUMAR Petitioner

Through: Mr. Amarendra Sharan, Senior
Advocate with Mr. Amit Anand
Tiwari, Mr. I.U. Khan, Mr. A.K.
Sharma, Mr. S.A. Hashmi & Mr.
Vivek Singh, Advocates

versus

C.B.I. Respondent

Through: Mr. Vikas Pahwa, Standing
Counsel with Mr. D.P. Singh &
Mr. Saurabh Soni, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

J U D G M E N T

VIPIN SANGHI, J.

1. The present petition has been filed by the petitioner under Sections 397 & 401 Cr.P.C. to challenge the order dated 15.05.2010 passed by the Court of Ms. Sunita Gupta, District Judge-VII/NE-cum-ASJ, Karkardooma Courts, Delhi in S.C. No.26/10, RC SII 2005 S0024

under Sections 109/147/148/149/153A/295/302/ 396/427/ 486/505/201 IPC.

2. By the impugned order the learned ASJ has ordered the framing of charge against the petitioner for offences under Section 120B read with Sections 153A, 295, 302, 395, 427, 436, 339, 505 IPC and also for the offence under Section 109 read with Sections 147, 148, 149, 153A, 295, 302, 395, 427, 435, 339, 505 IPC, besides framing of a separate charge for offence punishable under Section 153A IPC. At the same time the application of the petitioner seeking discharge has been rejected by the learned ASJ.

3. The charge sheet in question filed by the CBI, which forms the basis of the impugned order pertains, inter alia, to murder of five persons, namely, Kehar Singh and Gurpreet Singh, the husband and son of Smt. Jagdish Kaur, Sh. Raghvinder Singh, Sh. Narender Pal Singh and Sh. Kuldeep Singh. Apart from the petitioner, who has been arrayed as accused No.1, 11 other persons have been named as accused, out of which 4, namely, Ishwar Chand Gaur @ Chand Sharabi, Dharam Veer Singh Solanki, Balidan Singh and Raj Kumar @ Raja Ram, have already expired. Accordingly, they have not been chargesheeted. The other 7 accused are Balwan Khokhar (accused No.2), Mahender Yadav (accused No.3), Maha Singh (accused No.4), Capt. Bhagmal (Retd.) (accused No.5), Santosh Rani @ Janta Hawaldarni (accused No.6), Girdhari Lal (accused No.7) and Krishan Khokhar (accused No.8).

4. Case FIR No.416/1984 was registered at police station Delhi Cantt. on 04.11.1984 under Sections 147, 148, 149, 329, 436, 480, 302, 201 IPC against unknown persons on the complaint of Ms. Baljeet Kaur D/o late Avtar Singh r/o WZ-108, Raj Nagar Part-II, Palam Colony, Delhi. In her complaint, she made allegations of unlawful assembly, rioting with dangerous weapons and attack on her house by a mob of around 400-500 people on 01.11.1984, resulting in injuries to her parents and another attack on her house on 02.11.1984, in which her father was set on fire by the mob upon the instigation of her neighbour Mahender Sharabi. Later, her father had succumbed to his injuries. During the investigation of the aforesaid case at police station Delhi Cantt. some complaints were received in respect of similar incidents in the same locality. The investigation of these complaints was also taken up after clubbing them with FIR No.416/1984. After completion of the investigation by Delhi Police, five charge sheets were filed against 10 accused persons.

5. However, the name of the petitioner Sajjan Kumar did not figure as one of the accused in the said cases bearing Special Case Nos.10/1986, 11/1986, 31/1986, 32/1986 and 33/1986. The 10 accused persons were acquitted by the Court on various dates in the year 1986. These cases pertained to the murder of Avtar Singh, Harbhajan Singh, Joga Singh, Nirmal Singh and Avtar Singh, respectively. The details pertaining to these five cases have been

tabulated in the final report filed by the CBI, a copy whereof has been placed on record.

6. In the year 1992-93, on the recommendation of Justice Jain-Agarwal Committee, further investigation into the incident of attack on the house of Jasbir Singh and the incident involving deaths of husband, son and cousins of Smt. Jagdish Kaur wife of Sh. Kehar Singh, was taken up by the Riot Cell of Delhi Police. A supplementary charge sheet was filed on 26.02.1993 against 4 accused persons, namely, Sunil Tiwari @ Raju, Hukum Chand, Mangat Ram and Balwan Khokhar in the matter of attack on the house of Jasbir Singh. This case was tried as special case No.28/93 and resulted into acquittal vide final order/judgment dated 30.04.1994.

7. After 1984 anti-Sikh riots in Delhi and other places, the Government of India constituted various committees/commissions for enquiring into the said incidents including the Justice Nanavati Commission in May, 2000, which submitted its report to the Government of India on 09.02.2005. Justice Nanavati Commission took note of the depositions/affidavits filed before it and concluded that there was credible material against, inter alia, the petitioner for recording that the petitioner was involved, as alleged by the witnesses, in the commission of various offences. The commission recommended that the Government should examine only those cases and take further action in them as per law, in which the

witnesses had accused the petitioner herein specifically of committing offences and yet no charge sheets were filed against him and the cases were terminated as untraced.

8. After considering the findings of Justice Nanavati Commission, the Government of India, Ministry of Home Affairs vide order dated 24.10.2005 directed the CBI to investigate/re-investigate the cases, inter alia, against the petitioner-accused Sajjan Kumar including FIR No.416/1984 dated 04.11.1984 of police station Delhi Cantt., Delhi. Accordingly, the case FIR No.416/1984 of police station Delhi Cantt. was re-registered by CBI as case RC-24(S)/2005-SCU.I/SCR.I on 22.11.2005 and investigation was taken up.

9. As per the charge sheet, investigation conducted by the CBI revealed that after assassination of Smt. Indira Gandhi, the then Prime Minister of India on 31.10.1984 by her Sikh body guards, large scale riots broke out in Delhi including Raj Nagar, Palam area which continued unabated till 04.11.1984. The charge sheet further states that investigation revealed that on 01.11.1984, an unlawful assembly led by Balwan Khokhar (A-2), Maha Singh (A-4), Santosh Rani @ Janta Hawaldarni (A-6), Iswar Chand @ Chand Sharabi (since expired), Dharamveer Singh (since expired) and 100-200 other persons, in furtherance of their common object, attacked the house of Smt. Jagdish Kaur wife of late Kehar Singh at RZ-1-129, Shiv Mandir Marg, Raj Nagar, Palam Colony, Delhi. Smt. Jagdish Kaur

stated that the said mob assaulted her husband Kehar Singh and son Gurpreet Singh with iron rods and sticks causing death of Kehar Singh on the spot. When her elder son Gurpreet Singh tried to escape, he was caught by another mob and burnt alive by pouring kerosene over him. Investigation further revealed that in pursuance of the common object, on the intervening night of 01/02.11.1984 Sajjan Kumar (A-1), the then Member of Parliament arrived at Raj Nagar, Palam area in an Ambassador car at about 10:00 – 11:00 p.m. Sh. Jagsher Singh stated that thereafter Sajjan Kumar (A-1) took a round of the area and berated his followers/mob for carrying out nominal destruction of the properties of the Sikhs. He (A-1), while promoting the enmity between Hindus & Sikhs, instigated the unlawful assembly/mob by provoking it not to leave any Sikh alive besides, not even sparing any Hindu, who had provided shelter to Sikhs. After instigating the unlawful assembly, Sajjan Kumar (A-1) left Raj Nagar, and in pursuance of the common object, the mob so instigated looted the household items from the house of Jagsher Singh and thereafter set it on fire. The mob also looted the houses of other Sikhs residing in that area and also attacked the house of Smt. Rajni where Raghuvinder Singh, Narender Pal Singh and Kuldeep Singh had taken shelter.

10. As per the charge sheet the investigation has revealed that pursuant to the instigation of Sajjan Kumar on the night intervening 01/02.11.1984 to achieve the common object, a mob comprising of

Girdhari (A-7), Dharmveer (since expired), Balidan Singh (Ex-Subedar) (since expired), Captain Bhagmal (A-5) and others burnt alive Raghuvinder Singh, Narender Pal Singh and Kuldeep Singh in Raj Nagar area, on the morning of 02.11.1984. The gruesome murders of Raghuvinder Singh, Narender Pal Singh and Kuldeep Singh were witnessed by Smt. Jagdish Kaur. Smt. Jagdish Kaur also states that on 02.11.1984 at about 10:00 a.m. Sajjan Kumar (A-1), while addressing a meeting of his followers near Mangla Puri Mandir, Police Post, exhorted and incited them not to leave any Sikh alive and even kill those who had given shelter to Sikhs. This fact has also been corroborated by Smt. Nirpreet Kaur.

11. The investigation further revealed that provocative speeches, with common object as aforesaid, made by Sajjan Kumar (A-1) to the mob gathered in Raj Nagar area, promoted immediate and violent enmity amongst the public against Sikhs and disturbed the harmony between the two religious groups/communities in the locality resulting into killing of Sikhs and burning/looting of their houses/properties. Thus, Sajjan Kumar (A-1) instigated the mob and other accused persons including Balwan Khokhar (A-2), Mahender Yadav (A-3), Maha Singh (A-4), Bagmal (A-5), Santosh Rani @ Janta Hawaldarni (A-6), Girdhari Lal (A-7), Krishan Khokhar (A-8), Ishwar Chand Gaur @ Chand Sharabi (since expired), Balidan Singh (since expired), Dharamveer Singh (since expired), Raja Ram (since expired) and other unknown persons formed an unlawful assembly

armed with deadly weapons like iron rods, lathis, kerosene oil etc. for the purpose of committing various criminal acts of murder, dacoity and destruction of the property of Sikh community. The said unlawful assembly also defiled the Gurudwara in Raj Nagar area with intention to insult the religion of Sikh community.

12. With the aforesaid acquisitions, the prosecution pressed for charges under Section 120B read with Sections 153A, 295, 302, 395, 427, 436, 339 & 505 of the IPC. It was further submitted that Sajjan Kumar had, besides being guilty of the conspiracy committed substantive offences under Section 153A of the IPC. The prosecution argued that in view of his specific acts of abetment with regard to the offences committed by the unlawful assembly, he is also required to be charged under Section 109 read with Sections 153A, 295, 302, 395, 427, 436, 449, 505 of the IPC. Charges against the other accused persons were also pressed on similar lines.

13. By the detailed impugned order before me, the learned ASJ has framed the charge, as already set out hereinabove, inter alia, against the petitioner.

14. The first submission of learned counsel for the petitioner is that there is a fundamental error in the approach of the learned ASJ while considering the aspect of framing of charge/discharge of the petitioner. He submits that the learned ASJ has failed to adopt the approach as enunciated by the Supreme Court in various decisions

including in ***Union of India v. Prafull Kumar Samal & Anr.*** (1979) 3 SCC 4 in paragraph 10 of the said judgment. He submits that the learned ASJ has not sifted and weighed the evidence to find out whether or not a prima facie case against the petitioner accused has been made out. His further submission is that the materials placed before the learned ASJ, far from raising a “grave suspicion” against the petitioner accused, does not raise any suspicion against him. He further submits that in any case, even if the evidence produced gave rise to some suspicion but not “grave suspicion”, the learned ASJ should have discharged the petitioner accused, as two views were equally possible including the view in favour of the petitioner that he was not involved in the commission of the charged offences. He submits that the learned ASJ has acted as the mouthpiece of the prosecution and has not considered the broad probabilities of the case and the total effect of the evidence and documents produced before the Court. The learned ASJ has failed to appreciate the basic infirmities appearing in the case of prosecution, namely, the shifting stand of the prosecution witness No.1, Smt. Jagdish Kaur, in her various statements recorded from time to time; the fact that the statements of PW-2 Sh. Jagsher Singh and PW-10 Smt. Nirpreet Kaur were recorded more than 20 years after the incidents in question had taken place and were, therefore, liable to be rejected on that ground alone. In furtherance of his aforesaid submission, Mr. Sharan referred to a statement attributed

to Smt. Jagdish Kaur allegedly recorded on 20.01.1985 under Section 161 Cr.P.C. wherein she is alleged to have stated that after the murder of Smt. Indira Gandhi on 31.10.1984 riots had taken place, inter alia, in Raj Nagar, Palam Colony, New Delhi. Her husband Kehar Singh and son Gurpreet Singh were caught held by a mob of 250/300 people and they were killed by beatings of rods, fists, cuffs and pouring kerosene oil in her presence. She had stated that she could not recognize anyone from the mob and that she could recognize some of them if they come in front of her. Mr. Sharan submits that from that statement it is evident that the said witness Smt. Jagdish Kaur (PW-1) did not raise a accusing finger against the petitioner.

15. The scope of the enquiry that the Court is required to undertake at the stage of consideration of the aspect of framing of charge and the approach that the Court should adopt is well settled by a catena of decisions of the Supreme Court. At the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence for arriving at a conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further, then the charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused,

even if fully accepted before it is challenged by the cross examination or rebutted by defence evidence, if any, cannot show that the accused committed a particular offence. In such a case, there would be no sufficient ground for proceeding with the trial. At the stage of framing of charge, the enquiry must necessarily be limited to decide if the facts emerging from the materials on record constitute the offence with which the accused could be charged. The Court may peruse the record for that limited purpose, but it is not required to martial it with a view to decide the reliability thereof. The Court is required to evaluate the material and documents on record with a view to find out the if the facts emerging therefrom taken at their face value disclosed the existence of all the ingredients constituting the alleged offence. For this limited purpose, the Court may sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as the gospel truth, even if it is opposed to common sense or the broad probabilities of the case.

16. Consequently, if on the basis of the material on record, the Court could form an opinion that the accused might have committed the 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.

17. At the time of framing of the charge, the probative value of the material on record cannot be gone into and the material

brought on record by the prosecution has to be accepted as true at that stage. Before framing the charge, the Court must apply its judicial mind to the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided at the trial. (See ***State of Madhya Pradesh v. S.B. Johari, (2000) 2 SCC 57; State of Maharashtra v. Priya Sharma Maharaj & Ors., (1997) 4 SCC 393; and Soma Chakravarty v. State, (2007) 5 SCC 403***).

18. In the light of the aforesaid principles, I now proceed to deal with the aforesaid submissions of Mr. Sharan on the basis of the charge sheet filed by the CBI.

19. On being asked, Mr. Sharan submits that the statement attributed to Smt. Jagdish Kaur, allegedly recorded on 20.01.1985 under section 161 Cr PC, does not form part of the charge sheet.

20. The trial Court has considered the issue with regard to the framing of charge or, in the alternative, the discharge of the petitioner accused on the basis of the materials placed before it by the prosecution along with charge sheet. If there are any other materials that the petitioner accused wishes to rely upon in his defence, it would be open to the petitioner accused to produce and rely upon the same at the stage of trial. A document, which is not even sought to be relied upon by the prosecution and does not form

part of the charge sheet, cannot be produced by the petitioner in these proceedings to justify his claim for being discharged. For the same reason the statement attributed to PW-1 Smt. Jagdish Kaur dated 31.12.1992, allegedly made under Section 161 Cr.P.C. cannot be relied upon by the petitioner at this stage.

21. Mr. Sharan then referred to another affidavit of PW-1 Smt. Jagdish Kaur dated 07.09.1985. Mr. Sharan submits that in this affidavit PW-1, Jagdish Kaur did not specifically implicate the petitioner accused.

22. A perusal of this affidavit shows that the first part of it pertains to the incident wherein the husband and son of PW-1 Jagdish Kaur, as aforesaid, were killed. Though in paragraph (iii) she does not name the petitioner accused specifically while naming three other leaders, who led the mob, she states in paragraph (viii) that the major hand in organizing the attacks on the 01st & 02nd November, 1984 was of Government of India and that many Congress-I leaders were leading the mob. She further states that no government agency, police or army helped the Sikhs. The Sikhs were killed in front of them and they did nothing.

23. Prima facie, in this affidavit there is nothing stated by PW-1 which could be said to be contradictory with her later statement. The petitioner accused was at the relevant time a Congress-I leader. This is also evident from his own claim in this petition that after the

incident of assassination of late Smt. Indira Gandhi all through he remained with the former Prime Minister late Mr. Rajiv Gandhi consoling him for the untimely and unfortunate demise of his mother and making arrangements for her cremation. In any event, it would be for petitioner accused to confront PW-1 Smt. Jagdish Kaur during her cross-examination with the statements allegedly made by her from time to time. Her statement contained in her affidavit dated nil tendered before Justice Nanavati Commission makes the following accusations against the petitioner accused: -

“3. That on 1.11.1984 my husband was serving in E.M. 505, Workshop was present with his family in his house. During noon at 2 P.M. near about 100 persons laced with weapons & stones came to his house and out of these persons 25-30 persons entered in our house & started beating my son Gurpreet Singh. He ran and was burned with powder to death & also they injured my husband which caused death of my son & husband on the spot.

4. That M.P. Sajjan Kumar was leading the mob.

5. That on 02.11.1984 an other mob entered the residence of my brother and in front of me my three brothers were burned after putting kerosene oil over them causing death of them. Then after this I was taken to military compound.

6.

7. That I can identify the leader of mob Mr. Sajjan Kumar M.P. because few days back he visited our mohalla regarding sewerage water problem. Local congress worker Shri Mann Singh Chand and Capt. Bhagmal were also accompanying this mob.

8. That during this danga my husband Kehar Singh, my son Gurpreet Singh and my three brothers Narender Pal Singh, Raghuwinder Singh, Kuldeep Singh were murdered and our houses were looted and dead bodies of my husband and sons were not allowed to be lifted on that day but after three days I cremated their dead bodies with the household belongings.

9. That on 2.11.1984, in the morning when I approached the police station in way near Mandir Mangla Puri abovesaid M.P. Sajjan Kumar was organizing a meeting and addressing that "SARDAR SALA KOI NAHI BACHNA CHAHIDA and any hindu if found giving shelter to them should also be burned."

24. Her statement on oath was also recorded before Justice Nanavati Commissioner of Enquiry and she was cross-examined by counsels appearing for Delhi Police and Central Government. In her said statement recorded as witness No.136 she, inter alia, stated that on 02.11.1984 when she went to her house she found that the same was burning and so she could not go inside her house. She had to go to the house of Sh. Om Prakash who was working with her husband. He was reluctant to keep her in his house as in the meeting held in the morning Sh. Sajjan Kumar declared that whoever keeps Sikhs in his house, his house will also be burnt. In her statement dated 23.05.2006 recorded before Sh. Manoj P. Pangarkar, DSP, CBI, SCR-1, New Delhi PW-1 Smt. Jagdish Kaur, inter alia, stated that on 02.11.1984 in the morning at about 08:39 a.m. she saw her cousin brothers being burnt alive. Then, about

10:00 a.m. she went to the police post. Before going to the police post she learnt that Sh. Sajjan Kumar, the petitioner-accused, a Member of Parliament, was conducting a meeting in that area. She felt that the MP Sajjan Kumar would help her in saving the lives of her children and for cremating the dead bodies of her husband and son. At that time, the petitioner-accused Sajjan Kumar was conducting a meeting near Manglapuri Mandir/police post. She was shocked to hear what the petitioner-accused Sajjan Kumar was telling his followers. He was openly asking the Jaats not to leave any Sikh alive. He was asking them to kill even those people who had given shelter to the Sikhs. She further stated that in 1984-85 the atmosphere was totally anti-Sikh and, therefore, under that pressure she did not write the name of Sajjan Kumar. She further stated that Sh. Rajiv Gandhi had justified the anti-Sikh riots in view of the assassination of Smt. Indira Gandhi by her Sikh bodyguards and that as everybody was against the Sikhs, she could not mention the name of Sajjan Kumar for the sake of safety of her children. She further stated that she did not cooperate with the Special Riot Cell of Delhi Police as she did not have faith in the investigation by Delhi Police and felt that the investigation was carried out by Delhi Police as a mere formality.

25. The statement of PW-2, Sh. Jagsher Singh, was recorded by Sh. Manoj P. Pangarkar, DSP, CBI, SCR-1, New Delhi, on 07.11.2007. He stated that in November, 1984 he was about 17-18 years old.

He stated that Raghvinder Pal Singh and Narender Pal Singh were his real brothers, whereas Kuldeep Singh was his first cousin. He claims to be an eye witness to the mob attack which killed Kehar Singh and Gurpreet Singh. He states that Sajjan Kumar, the petitioner, knew his elder brother Narender Pal. During those days the area was very undeveloped and people used to face a lot of problems. Prior to the riots once Sajjan Kumar had come to the area to listen to the problems of the residents. That time the elder brother of Jagsher Singh, namely, Narender Pal had spoken to Sajjan Kumar on behalf of the people of Raj Nagar Part-1. He states that on 01.11.1984 in the evening at about 10-11 p.m. one ambassador car came to the area and Sajjan Kumar, Member of Parliament, got down. He took a round of the area and enquired from the mobsters about the job done by them. While taking a round Sajjan Kumar, the petitioner accused, had gone to the house of Sh. Jagsher Singh and found only one door broken. The petitioner Sajjan Kumar then scolded the mobsters for not doing the job properly. He further stated that after scolding the mob, Sajjan Kumar left and the mob once again attacked the house of Jagsher Singh and looted every possible thing and the rest was set on fire. He further stated that before leaving, Sajjan Kumar had told his men not to spare Hindus who had given shelter to Sikhs and hence the mob then attached the residents of Smt. Rajni once they learnt that his brothers were hiding at the residence of Smt. Rajni.

26. Smt. Nirpreet Kaur, PW-10, in her statement made before Sh. Manoj Pangarkar, DSP, CBI, SCR-1, New Delhi on 05.12.2008 stated that she was 16 years of age in the year 1984. She, inter alia, stated that on the morning of 02.11.1984 she saw Sajjan Kumar, the petitioner accused, then Member of Parliament standing and supervising the work of his followers and at that time the mob was at full swing involved in the killing of Sikhs, burning and looting their properties in the Raj Nagar area.

27. I have already noticed hereinabove the statement of PW-1 Smt. Jagdish Kaur where she has sought to explain the reason why the petitioner was not specifically named by her in her earlier statements. So far as PW-2 Jagsher Singh and PW-10 Smt. Nirpreet Kaur are concerned, they have both sought to explain the aspect of delay in their own way. PW-2 Jagsher Singh stated that his late father Gurcharan Singh had filed a complaint with the police. However, the police did not record his statement. He also stated that he had not deposed before any commission, committee or Court in this regard and that he had not filed any affidavit before any commission or committee. PW-10 Smt. Nirpreet Kaur stated that Rawail Singh wrote a complaint relating the killing of her father, but neither she nor her mother were examined by the police and no statement was recorded. Thereafter neither she nor her mother was called to depose before any Court. She was not even aware that the appellants had filed a chargesheet in respect of killing of

her father and that the accused had been acquitted. The circumstances disclosed by the witnesses to explain the so called delay in the recording of their statements has to be considered by the trial court.

28. From the statements of the aforesaid prosecution witnesses, it appears that the case of the prosecution against the petitioner accused is that he was seen in the riot struck area making inflammatory speeches and instigating the mobs to attack and kill the Sikhs: (i) firstly on 01.11.1984 (as claimed by PW-1 Smt. Jagdish Kaur in her affidavit filed before Justice Nanavati Commsision and by PW-2 Sh. Jagsher Singh in his statement dated 07.11.2007 recorded by the CBI); (ii) secondly on 02.11.1984 at about 10:00 a.m. (as stated by PW-1 Smt. Jagdish Kaur in her statement recorded on 23.05.2006 and by PW-10 Smt. Nirpreet Kaur in her statement dated 05.12.2008 recorded by the CBI).

29. The killing of Kehar Singh and Gurpreet Singh, husband and son of PW-1 Smt. Jagsher Kaur is stated to have taken place on 01.11.1984. However, the killing of the other three victims, namely, Sh. Raghvinder Singh, Sh. Narender Pal Singh and Sh. Kuldeep Singh had taken place at 02.11.1984 i.e. after the alleged speech and inflammatory statements and instigation of the petitioner accused Sajjan Kumar.

30. Mr. Sharan has also sought to place reliance upon the statements of the other witnesses recorded by the CBI, namely, Smt. Harbhajan Kaur (PW-6) dated 01.05.2007 recorded before Sh. Govind Avasthi, S.I., C.B.I., SCR-1, New Delhi and the statement of Sh. Om Prakash (PW-8) dated 22.10.2007 recorded before Sh. Manoj P. Pangarkar, DSP, C.B.I. On the basis of these statements he submits that these witnesses do not support the case of the prosecution that the petitioner accused was seen in the area committing the offences of which he is charged.

31. The statement of PW-6 Smt. Harbhajan Kaur, inter alia, is to the effect that she along with another lady Smt. Daljeet Kaur with children took shelter in the house of a neighbour whose name she did not remember. She did not know where her husband and his brothers were and where they had taken shelter. She remained along with Smt. Daljeet Kaur and children in shelter till 02.11.1984 till she learnt about the killing of her husband and the husband of Daljeet Kaur. She did not visit the place where her husband was killed or where his body was lying. She was not aware whether the dead body of her husband and his brothers were cremated or not. She also did not know the persons who were involved in the killing of her husband and his brothers. Hence, she could not name the person(s) who killed her husband and his brothers during 1984 anti-Sikh riots. She stated that she had not seen the petitioner Sajjan Kumar in the area during that period.

32. From the said statement of Smt. Harbhajan Kaur (PW-6), it is seen that Smt. Harbhajan Kaur remained in shelter inside the house of her neighbour at the time of occurrence of the incidents of 01st and 02nd November, 1984. It is for this reason she did not witness either the killings or the movement of those involved in the killing or instigation of the mobs. Her statement appears to be of no avail to the petitioner.

33. PW-8 Sh. Om Prakash in his statement recorded on 22.10.2007 by the CBI, no doubt, states that he did not see the petitioner accused in the area during that period. However, that by itself cannot be a reason to discharge the petitioner accused at this stage. The statement of Sh. Om Prakash that he did not see the petitioner accused in the area during the riots in question does not lead to the definite conclusion that the petitioner was indeed not present in the area at the relevant time and that he did not make the inflammatory speeches or instigate the mobs as claimed by the prosecution. The statements made by the other witnesses as discussed hereinabove do not get discredited only account of the aforesaid statement made by PW-8 Sh. Om Prakash. His statement pertains only to his own personal knowledge and does not contradict the statements made by the other witnesses.

34. The assassination of Smt. Indira Gandhi, the then Prime Minister of the country, came as a grave shock to the nation. The assassination took place at the hands of her Sikh bodyguards.

According to the case of the prosecution, after the said assassination a large number of anti-social elements indulged in rioting, arson killing of innocent persons belonging to the Sikh community throughout the country. In so far as the petitioner is concerned, I have already noticed in paragraph 9 above the accusations made against the petitioner - that on the intervening night on 01/02.11.2004, he arrived at Raj Nagar, Palam Area in an Ambassador Car at about 10:00-11:00 p.m. and took a round of the area and berated his followers/mob for carrying out nominal destruction of the properties of the Sikhs. He is also alleged to have promoted the enmity between Hindus & Sikhs and have instigated the unlawful assembly/mob by provoking it not to leave any Sikh alive, besides not even sparing any Hindu, who had provided shelter to Sikhs. It is also alleged that after instigating the unlawful assembly, the petitioner had left Raj Nagar, and in pursuance of the common object, the mob so instigated looted the household items from the house of Jagsher Singh and thereafter set it on fire. The mob also looted the houses of other Sikhs residing in that area and also attacked the house of Smt. Rajni where Raghuwinder Singh, Narender Pal Singh and Kuldeep Singh had taken shelter. Smt. Jagdish Kaur has also stated that on 02.11.1984 at about 10:00 a.m., the petitioner while addressing a meeting of his followers near Mangla Puri Mandir, Police Post, exhorted and incited them not to leave any Sikh alive and even kill those who had given shelter to

Sikhs. This fact has also been corroborated by Smt. Nirpreet Kaur. In her affidavit dated 07.09.1985, PW-1 Jagdish Kaur had stated that the major hand in organizing the attacks on 1/2.11.1984 was of Govt. of India and that many Congress-I leaders were leading the mob. She further stated that no government agency, police or army helped the Sikhs. Though PW-1, Jagdish Kaur did not name the petitioner, as a matter of fact, the petitioner was a Member of Parliament from Congress-I Party of which late Smt. Indira Gandhi was a leader at the relevant time. At this stage, there is no reason disclosed on record as to why the said prosecution witnesses most, if not, all of whom are victims of the anti sikh communal riots of 1984, should falsely implicate the petitioner. It would be for the trial court to examine these aspects, if raised, on the basis of the evidence that may be brought on record.

35. Considering the aforesaid materials, in my view, it cannot be said on sifting and weighing the materials produced with the charge sheet (for the limited purpose of finding out whether or not a prima facie case is made out against the petitioner accused), that no prima facie case is made out against the petitioner. The materials produced by the prosecution along with the charge sheet, namely, the statements of the various prosecution witnesses gives rise to grave suspicion against the petitioner accused about the commission of the alleged offences. It cannot be said at this stage

that the petitioner is not involved in the commission of offences, of which he is charged.

36. The next submission of Mr. Sharan, learned senior counsel, is that there has been immense delay in the conduct of the investigation and that the statements of PW-2 Jagsher Singh and PW-10 Nirpreet Kaur should have been rejected at the outset on account of the fact that the same had been recorded nearly 21 years and 24 years, respectively, after the incident in question. He submits that the said statements could not have been relied upon by the learned trial Court, even at the stage of consideration of the aspect of framing of charge, on account of the fact that there was immense delay in the making of the said statements.

37. Mr. Sharan has submitted that the delay in the conduct of the investigation by the CBI was fatal to the case of the prosecution as the right to a speedy trial is a facet of Article 21 of the Constitution, which has been breached in this case. He submits that the delay has caused prejudice to the petitioner-accused, inasmuch as late Shri Rajeev Gandhi, with whom he had spent his time after the assassination of late Smt. Indira Gandhi, had also passed away.

38. Mr. Sharan has submitted that the incidents in question are of 1st and 2nd November, 1984, whereas the FIR No.416/84 was registered by Delhi Police on 04.11.1984. The said FIR was re-registered by the CBI as case RC-24(S)/2005-SCU.I/SCR.I, in

pursuance of the order dated 24.10.2005 and charge sheet No. 01/2010 in question had been filed on 13.01.2005. He further submits that petitioner has had no role to play in the delay in investigation of the alleged offences.

39. In support of his submission regarding delay in investigation of the FIR; in recording of statements of prosecution witnesses by the CBI and in filing the charge-sheet, Mr. Sharan has placed reliance upon the Supreme Court decision in **Abdul Rehman Antulay and Others Vs. R.S. Nayak and Another**, (1992) 1 SCC 225, wherein the Supreme Court has held that fair, just and reasonable procedure, which is implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. The right to speedy trial flows from Article 21 and encompasses all the stages, namely, the stage of investigation, inquiries, trial, appeal, revision and re-trial.

40. Mr. Sharan also placed reliance upon the decision of the Supreme Court in **Dilawar Balu Kurane v. State of Maharashtra** (2002) 2 SCC 135. In this case the statements of the witnesses had been recorded by the police after 10 months of the occurrence. The Supreme Court had come to the opinion that far from raising grave suspicion against the accused, the prosecution had not been able to throw any suspicion and, therefore, no prima facie case had been made against the accused. Mr. Sharan has also placed reliance on **Vakil Prasad Singh Vs. State of Bihar** (2009) 3 SCC 355.

41. In answer to the ground of delay in investigation and in filing the charge sheet, and its impact on the petitioners fundamental rights under Article 21 of the Constitution, Mr. Vikas Pahwa, the learned Standing Counsel, placed reliance upon the decision of the Supreme Court in ***P. Vijayan v. State of Kerala*** (2010) 2 SCC 398 to submit that mere delay in the re-investigation of the case and in recording the statement of the prosecution witnesses is not a ground for discharge of the accused in every case. The said decision has been taken note of by the trial Court in para 32 of the impugned order.

42. In ***Abdul Rehman Antuley (Supra)*** the Supreme Court while recognizing the right to speed trial as a fundamental right implicit in Article 21 of the Constitution of India forewarned that the proposition laid down by it were not exhaustive, as it was difficult to foresee all situations, and it was not possible to lay down any hard and fast rule. The Supreme Court also cautioned that one cannot ignore the fact that it is usually the accused, who is interested in delaying the proceedings. The Court noticed that “*delay is a known defence tactics*” since the burden of proving the guilt of the accused lies on the prosecution. Delay ordinarily prejudices the prosecution. Non availability of the witnesses, disappearance of evidence by lapse of time, really works against the interest of the prosecution. In a case where the right to speedy trial is alleged to have been infringed the first question to be put and answered is – who is

responsible for the delay? It was also observed that while determining whether undue delay has been caused (resulting in violation of the right to speedy trial), one must have regard all the attendant circumstances, including nature of offence, number of accused and witnesses, the work load of the court concerned, prevailing local conditions and so on – called the systemic delays. The Supreme Court observed that though it is true that obligation of the State is to ensure a speedy trial, and state includes judiciary as well, but a realistic and a practical approach should be adopted in such matters instead of a pedantic one. Each and every delay does not necessarily prejudice the accused, some delay may indeed work to his advantage. The Supreme Court quoted Powell, J. in **Willie Mae Barker v. John Wingo** 33L Ed. 2d 101, wherein it is said “*it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate.*” The Supreme Court also quoted White, J in **U.S. Vs. Ewell 15 L Ed - 2 d 627**, wherein he observed:

‘....the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.’

43. The Supreme Court observed that Court has to balance and weigh the several relevant factor and determine in each case

whether the right to speedy trial had been denied in the given case. If the Court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, shall be quashed. But that is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceeding may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded, or reducing the sentence, where the trial is concluded – as may be deemed just and equitable in the circumstances of the case.

44. In the facts of the case before it, by applying the aforesaid principles, the Supreme Court held that quashing of charge in the criminal proceedings at that stage was not just and proper. It, however, directed that the case be disposed of expeditiously.

45. The decision in **A.R. Antulay** (supra), in the facts of this case, does not support the contention of the petitioner that the petitioner should be discharged because of delay in investigation and prosecution of the case. Later in this judgment, I have discussed the circumstances of this case in the light of the dictum of the Court in **A.R. Antulay** (supra), which, in fact, leads me to conclude that this is a fit case where the trial should proceed and should be expeditiously concluded.

46. Reliance placed by Mr. Sharan on the decision of ***Dilawar Balu Kurane*** (supra) appears to be misplaced. Paragraph 14 of the said decision itself records the various other infirmities noticed by the High Court in the said case. These are:

- (i) No police agency was involved in the alleged trap;
- (ii) The FIR was lodged after 7 days;
- (iii) No incriminating articles were found in the possession of the accused; and
- (iv) Statements of witnesses were recorded by the police after 10 months of the occurrence.

47. It was in the aforesaid circumstances that the Court had come to the conclusion that far from raising grave suspicion the prosecution had not been able to throw any suspicion on the conduct of the accused.

48. The decision of the Supreme Court in ***Vakil Prasad Singh*** (supra) too has no application in the facts of the present case. In this case a petition had been filed before the Supreme Court under Section 482 Cr. PC against the order passed by the Special Judge, Muzaffarpur, taking cognizance of the offences, on the ground that Inspector of Police who had conducted the investigations on the basis of which the charge sheet had been filed, had no jurisdiction to do so. The Patna High Court had accepted this plea, and by the order dated 07.12.1990 the order of Magistrate taking cognizance was quashed with a direction to the prosecution to complete the

investigation within a period of 3 months from the receipt of the order by an officer of the rank of Deputy Superintendent of Police or any other officer duly authorized in his behalf. No further progress was made in the case and the matter rested till the year 1998. In 1998, the appellant filed yet another petition under Section 482 Cr. PC seeking quashing of the entire criminal proceedings pending against him mainly on the ground that re-investigation of the matter had not been initiated even after a lapse of 7 and ½ years from the date of passing of the order by the High Court on 07.09.1990. The matter remained pending for nearly 9 years. On 11.05.2007, the Court was informed that the Superintendent of Police, Muzaffarpur, vide a letter dated 22.02.2007 had directed the Deputy Superintendent of Police to complete the investigation. In pursuance of the said direction, the Deputy Superintendent of Police started investigation on 28.02.2007 and ultimately filed a fresh charge sheet on 01.05.2007. Consequently the High Court dismissed the petition preferred by the appellant which led to the filing of the Special Leave Petition before the Supreme Court. The Supreme Court noticed in its earlier decision in **Abdul Rehman Antulay (Supra)** and proceeded to observe as follows:

“24. It is, therefore, well settled that the right to speedy trial in all criminal persecutions (*sic* prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to

speedy trial equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where **the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case.**

25. **Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time-frame for conclusion of trial.** (Emphasis added)

49. The Court then proceeded to examine the case before it on the touchstone of the broad principles enumerated by it, and concluded that the appellant's constitutional right recognized under Article 21 of the Constitution stood violated. The Court referred to the earlier order passed by the High Court on 07.09.1990, and the fact that the said order had not been complied with till, after filing of the second petition under Section 482 Cr.P.C. by the appellant, complaining about the delay in investigation. The Court also noticed that it was not clear whether the sanction for prosecution of the

appellant had been granted by the State or not. The Supreme Court in paragraphs 29 and 30 of the judgment held as follows:

“29. We have no hesitation in holding that at least for the period from 7-12-1990 till 28-2-2007 there is no explanation whatsoever for the delay in investigation. Even the direction issued by the High Court seems to have had no effect on the prosecution and they slept over the matter for almost seventeen years. Nothing could be pointed out by the State, far from being established to show that the delay in investigation or trial was in any way attributable to the appellant. The prosecution has failed to show any exceptional circumstance which could possibly be taken into consideration for condoning a callous and inordinate delay or more than two decades in investigations and the trial. The said delay cannot, in any way, be said to be arising from any default on the part of the appellant.

30. Thus, **on the facts in hand**, in our opinion, the stated delay clearly violates the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution. We feel that under these circumstances, further continuance of criminal proceedings, pending against the appellant in the Court of Special Judge, Muzaffarpur, is unwarranted and despite the fact that allegations against him are quite serious, they deserve to be quashed.” (emphasis supplied)

50. Mr. Sharan while countering the reliance placed by the State upon the Supreme Court decision in **P. Vijayan** (supra) submitted that the Supreme Court had not held in the said decision that despite delay in recording of the statements of the prosecution

witnesses the accused could be proceeded against. He submits that **P. Vijayan** (supra) is at best an instance of a case where despite delay the plea of the accused for discharge was rejected. However, it is not an authority for the proposition that despite delay in the recording of the statements of the prosecution witnesses, the accused may be proceeded against and not discharged on that ground alone.

51. In view of the aforesaid controversy, it is necessary that I should examine the decision of the Supreme Court in **P. Vijayan** (supra). A nexalite leader Varghese of CPI (ML) in Kerala had been killed. As per then circulated reports he had been killed while trying to escape from police custody in the year 1970. From 1970 till 1998 i.e. for 28 years there was no allegation that the encounter in which Varghese was killed was fake. Only in the year 1998 reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officials were involved in the said fake encounter. Pursuant to the said reports several writ petitions were filed by individuals and organizations before the Kerala High Court with a prayer that the investigation may be transferred to CBI. One constable Ramchandran Nair filed a counter affidavit dated 11.01.1999 making a confession that he had shot nexalite Varghese on the instructions of then DSP Lakshmana. He also stated that the appellant P. Vijayan was present when the incident occurred. The

Kerala High Court vide order dated 21.07.1999 directed the CBI to register an FIR on the facts disclosed in the counter affidavit of Ramachandran Nair. Accordingly, the CBI registered the FIR on 03.03.1999. Constable Ramachandran Nair was named as accused No.1 Mr. Lakshmana was named as accused No.2 and P. Vijayan was named as accused No.3 for the offence under Section 302 IPC read with Section 34 IPC. After investigation the CBI filed the charge sheet before the Special Judge (CBI) Ernakulam on 11.12.2002.

52. The appellant P. Vijayan sought discharge by moving a petition before the trial Court. The same was dismissed by the trial Judge on 08.06.2007 and he passed an order framing the charge for the offences under Sections 302 & 34 IPC. The appellant then preferred criminal revision petition before the Kerala High Court. The same was dismissed by the learned Single Judge of the Kerala High Court on 04.07.2007. It is the said decision which was assailed in the special leave petition before the Supreme Court. The Supreme Court took note of its earlier decisions on the subject. Thereafter, the Court proceeded to apply the principles culled out from its earlier decisions, inter alia, in **Soma Chakravarty** (supra).

53. Though the word/expression “delay” has not specifically been used in its discussion by the Supreme Court while dealing with the submissions of the appellant P. Vijayan, in paragraph 17 of the judgment the Court consciously dealt with the aspect of delay from

1972 to 1998 between the time when the alleged fake encounter had taken place, and the issue was raked up for the first time on a news report. The relevant extract from the said decision contained in paragraphs 17 to 19 and 25 to 27 are reproduced hereunder:

“17. In the earlier part of our judgment, we have adverted to the assertion of the appellant that from 1970 till 1998, there was no allegation that the encounter was a fake encounter. In the year 1998, reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organizations before the High Court of Kerala with a prayer that the investigation may be transferred to Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999 in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. In the same counter affidavit, he also stated that the appellant was present when the incident occurred.

18. Based on the assertion in the counter affidavit of Ramachandran Nair dated 11.01.1999 by order dated 27.01.1999 learned single Judge of the High Court of Kerala passed an order entrusting an investigation to the CBI. As said earlier, accordingly, CBI registered an FIR on 03.03.1999 implicating Constable Ramachandran Nair, Lakshmana and the appellant-Vijayan as accused Nos. 1, 2 and 3 respectively for an offence under Section 302 read with Section 34 IPC.

19. The materials relied on by the CBI against the appellant are as follows:

- a) Confessional note dictated by Constable Ramachandran Nair to Shri M.K. Jayadevan which was handed over to one Mr. Vasu.
- b) The 161 statement of CW 6, Mr. Vasu, an erstwhile Naxalite in which he stated that in the year 1977, Constable Ramachandran Nair confessed to him that he had shot dead Naxalite Varghese.
- c) The 161 statement of CW 21 Constable Mohd. Hanifa in which he has stated that he was present along with Constable Ramachandran Nair while he shot dead Naxalite Varghese.
- d) The 161 statement of CW 31, Mr. K. Velayudhan in which he stated that Constable Ramachandran Nair contacted him and stated that he had shot dead Naxalite Varghese.
- e) The 161 statement of CW 32, Mr. M.K. Jayadevan who stated that Constable Ramachandran Nair had dictated his confessional statement to him and he delivered the same to Mr. Vasu.
- f) The counter affidavit dated 11.01.1999 filed by Constable Ramachandran Nair before the High Court of Kerala in O.P. No. 21142/1998.

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25. As discussed earlier, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding

against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time when a *prima facie* case was not disclosed and to save the accused from avoidable harassment and expenditure.

26. In the case on hand, though, the learned Trial Judge has not assigned detailed reasons for dismissing the discharge petition filed under Section 227, it is clear from his order that after consideration of the relevant materials charge had been framed for offence under Section 302 read with Section 34 IPC and because of the same, he dismissed the discharge petition. After evaluating the materials produced by the prosecution and after considering the probability of the case, the Judge being satisfied by the existence of sufficient grounds against the appellant and another accused framed a charge. Whether the materials at the hands of the prosecution are sufficient or not are matters for trial. At this stage, it cannot be claimed that there is no sufficient ground for proceeding against the appellant and discharge is the only remedy. Further, whether the trial will end in conviction or acquittal is also immaterial. All these relevant aspects have been carefully considered by the High Court and it rightly affirmed the order passed by the Trial Judge dismissing the discharge petition filed by A3-appellant herein. We fully agree with the said conclusion.

27. It is made clear that we have not expressed anything on the merits of the claim made by both the parties and the

conclusion of the High Court as well as this Court are confined only for disposal of the discharge petition filed by the appellant under Section 227 of the Code. It is for the prosecution to establish its charge and the Trial Judge is at liberty to analyze and to arrive at an appropriate conclusion, one way or the other, in accordance with law.” (emphasis supplied)

From the above it is clear to me that the Supreme Court did not consider the delay of 28 years in the registration of the FIR and its investigation, in the facts of that case, to be so fatal as to justify the discharge of the accused or quashing of the prosecution. It cannot, therefore, be argued that every case involving delay in the registration of the FIR, its investigation and filing of the charge-sheet should necessarily result in the charge-sheet being quashed.

54. The unsatisfactory manner in which the Delhi Police conducted itself in controlling the communal violence, and thereafter handled the investigation in the 1984 anti-Sikh riot cases is demonstrated by the fact that, from time to time various commissions including Justice Nanavati Commission, were constituted to examine the role of politicians and other players in the said riots.

55. Political interference in the working of the police organizations is a hard reality in our system. The same has been repeatedly noticed by various Commissions and Committees set up by the Government from time to time. The **National Police**

Commission was appointed by the Government of India in 1977 with wide terms of reference covering the police organization, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc. This was the first Commission appointed at the national level after Independence. The Commission produced eight reports between 1979 to 1981, suggesting wide ranging reforms in the existing police set-up. The second reported submitted by the National Police Commission specifically dealt with the aspect of political interference in police work. It observed that in the existing set-up, the police function under the executive control of the state government. According to the Commission, the manner in which political control has been exercised over the police in this country has led to gross abuses, resulting in erosion of rule of law and loss of police credibility as a professional organization. The threat of transfer/suspension is the most potent weapon in the hands of the politician to bend the police down to his will. The Commission made several recommendations to remedy the situation.

56. On account of the failure of the Government to implement the recommendations of the National Police Commission a writ petition under Article 32 of the Constitution of India was preferred before the Supreme Court titled “**Prakash Singh & Ors. v. Union of India & Ors.**” being Writ Petition (C) No.310/1996. The same was disposed of by the Supreme court on 22.09.2006 by its

judgment reported as **(2006) 8 SCC 1**. The Supreme Court in its judgment also referred to a research paper “**Political and Administrative Manipulation of the Police**” published in 1979 by the Bureau of Police Research and Development, which warned for excessive control of the political, executive and its principal advisers over the police as the inherent danger of making the police a tool for subverting the process of law, promoting the growth of authoritarianism, and shaking the very foundations of democracy. The Supreme Court also took note of the reports of various other high powered committees and commissions which had examined the issue of police reforms, viz. (i) National Human Rights Commission, (ii) Law Commission, (iii) Rebeiro Committee, (iv) Padmanabhaiah Committee, (v) Malimath Committee on Reforms of Criminal Justice System, and (vi) The draft outline prepared by Sorabjee Committee for a new Police Act. (Government of India vide office memorandum dated 20.09.2005 constituted a committee comprising Sh. Soli Sorabjee, former Attorney General and five others to draft a new police act in view of changing role of the police in view of the socio-economic and political changes which have taken place in the country, and the challenges posed by modern day global terrorism, extremism, rapid urbanisation as well as fast evolving aspirations of a modern democratic society).

57. The Supreme Court also took note of the communication dated 03.08.1997 sent by the then Union Home Minister to the

State Governments, wherein he echoed the overall popular perception that there has been a general fall in the performance of the police as also a deterioration in the policing system as a whole in the country, and he expressed that time had come to rise above limited perceptions to bring about some drastic changes in the shape of reforms and restructuring of the police before the country is overtaken by unhealthy developments. It was expressed that the popular perception all over the country appears to be that many of the deficiencies in the functioning of the police had arisen largely due to an overdose of unhealthy and petty political interference at various levels starting from transfer and posting of policemen of different ranks, misuse of police for partisan purposes and political patronage quite often extended to corrupt police personnel. The Union Home Minister expressed the view that rising above narrow and partisan considerations, it is of great national importance to insulate the police from the growing tendency of partisan or political interference in the discharge of its lawful functions of prevention and control of crime including investigation of cases and maintenance of public order.

58. The Supreme Court quoted the following extracts from the National Human Rights Commission Report dated 31.05.2002:

“28.(i) The Commission drew attention in its 1-4-2002 proceedings to the need to act decisively on the deeper question of police reforms, on which recommendations of the National Police Commission (NPC) and

of the National Human Rights Commission have been pending despite efforts to have them acted upon. The Commission added that recent events in Gujarat and, indeed, in other States of the country, underlined the need to proceed without delay to implement the reforms that have already been recommended in order to preserve the integrity of the investigating process and to insulate it from 'extraneous influences'."

After taking cognizance of, inter alia, the aforesaid materials, the Supreme Court issued various directions to improve the working of police forces in the country.

59. It would be useful to notice the observations made by Mr. Justice H.S. Bedi in the decision of the Supreme Court reported as ***Harendra Sarkar v. State of Assam*** (2008) 9 SCC 204. At the outset, I may state that there was a difference of opinion between the two learned Judges, namely, Mr. Justice S.B. Sinha and Mr. Justice H.S. Bedi on a legal issue. The legal issue on which they differed was whether in cases of communal riot involving serious crimes such as murders, a different yardstick for proving the guilt of the accused could be adopted than the one applicable at the trial in other cases involving the same offences. Mr. Justice S.B. Sinha was of the view that the same yardstick with regard to standard and onus of proof should be applied in cases involving communal riots, as it is applied in common place crimes. He was of the view that the Code of Criminal Procedure and the Evidence Act must be followed in such cases in the same manner as in any other ordinary

case involving a similar crime. The provisions of Cr.P.C. and the Evidence Act would not be applied any differently than they are applied to ordinary cases. Mr. Justice H.S. Bedi, however, was of the view that an offence such as a murder committed during the communal riot cannot be equated with a crime committed in the normal course – a common place crime as ordinarily understood. He held that it could not be said in all honesty that the investigation and prosecution in matters relating to communal rights accord with the rights enshrined in Articles 14 and 21 of the Constitution of India or Articles 2, 7, 8 & 12 of the universal declaration of human rights to which India is a signatory.

60. I am not confronted with the aforesaid issue on which there was a difference of opinion in the said case. However, some of the observations made by the Hon'ble Mr. Justice H.S. Bedi in his opinion are relevant and useful for the present purpose. In paragraph 61 his lordship observed:

“61. The genesis of a communal riot, its development as it goes along and the consequences have been identified/underlined by dozens of Commissions of Inquiry both judicial and administrative for more than four decades now and there appears to be near unanimity that a deliberate attempt is made by the police and the investigating agencies to forestall fair investigation in attacks on the minority communities and on the contrary to connive with the perpetrators. It is indeed tragic that though reams of paper have been used and dozens of suggestions made as to the methods to prevent or to

control communal riots, yet the cancer continues to metastasise on account of several factors, one of the predominant being the feeling amongst the assailants, emboldened yet further by the anonymity which a crowd provides, that come what may, no harm will come to them.”

61. The learned Judge extracted from the various Commissions of Inquiry set up from time to time in the aftermath of communal riots which had taken place in different parts of the country. In this process he extracted the following quotation from the ***Justice Ranganath Misra Commission*** on the 1984 Anti-Sikh Riots in Delhi:

“The riots occurred broadly on account of the total passivity, callousness and indifference of the police in the matter of controlling the situation and protecting the people of the Sikh community... Several instances have come to be narrated where police personnel were found marching behind or mingled in the crowd. Since they did not make any attempt to stop the mob from indulging in criminal acts, an inference has been drawn that they were part of the mob and had the common intention and purpose ... The Commission was shocked to find that there were incidents where the police wanted clear and definite allegations against the anti-social elements in different localities to be dropped out while recording FIRs.”

62. He also extracted from Volume VI, Chapter 47 of the First National Police Commission Report above referred to, which dealt with communal riots. The same being relevant is reproduced hereinbelow:

"The investigation of crimes recorded is a matter which calls for professional skill and expertise of a different variety. Investigations of crimes cannot be undertaken in moments of tension and confusion. The National Integration Council has observed that special investigation squads should be set up to investigate crimes committed in the course of serious riots. We endorse this observation and recommend that such squads should be set up under the State investigating agency [State CID (Crime)] to investigate all crimes committed in the course of a riot.

The Madon Commission which inquired into the communal riots in Bhiwandi, Jalgaon and Mahad in the State of Maharashtra in 1969 passed severe strictures against the special investigation squads set up to investigate crime committed in the course of those riots. The Commission observed that these special investigation squads had acted in a partial and biased manner against one community. We take note of this finding and feel that there are many instances where the special investigation squads were not set up properly with the result that some of them acted in an incompetent and biased manner. We would, therefore, recommend that the special investigation squads for investigating into crimes reported in the course of a riot, should consist of officers of high ability who could be expected to act without fear or favour, and without bias or prejudice. These squads should function under the supervision of a fairly senior officer.

We are also aware that once a riot gets under control several forces come into prominence and these forces try to interfere in the registration and investigation of crimes. There is an alarming tendency on the part of several local bigwigs to prevent the initiation of action against well-known goondas and anti-social elements. We are

aware that the police also is not entirely free from blame in this regard. It should be realised that non-initiation of action against those who commit serious crimes in the course of a riot is a matter which would destroy the morale and trust of the local population. If the big criminals are left out and only a few small ones are prosecuted the people will lose faith in the investigation processes and in the rule of law. The administration, the police and the politicians should remember that the people are generally aware of the real culprits, and if the official agencies shield these culprits the people would not only look at these agencies as connivers of crime, but as criminals themselves. We strongly recommend that the investigation of reported crimes in serious riot situations should be done thoroughly, competently, quickly and impartially by special teams of competent officers working under the supervision of senior officers. Any interference in this process by any group, however powerful it may be and whatever may be the reasons should be strongly condemned."

63. The following broad principles were culled out by the learned Judge from various reports quoted by him in his opinion:

- "(1) that police officers deliberately make no attempt to prevent the collection of crowds;
- (2) that half-hearted attempts are made to protect the life and property of the minority community;
- (3) that in rounding up those people participating in the riots, the victims rather than the assailants are largely picked up;
- (4) that there is an attempt not to register cases against the assailants and in some cases where cases are registered, loopholes are provided with the intention of providing a means of acquittal to the accused;

(5) that the investigation is unsatisfactory and tardy and no attempt is made to follow up the complaints made against the assailants; and finally

(6) that the evidence produced in court is often deliberately distorted so as to ensure an acquittal."

64. In the aforesaid background, the plea taken by the petitioner accused that there has been immense delay in the conduct of the investigation for which he could not be held responsible has to be taken with a pinch of salt. Even if it is accepted that the petitioner himself was not directly or indirectly responsible for the delay in the investigation and in filing the charge sheet before the Court, the role of the investigating agency concerned, viz. Delhi Police in causing delay cannot be ruled out at this stage. Their conduct, as noticed a little later, prima facie appears to be far from satisfactory.

65. The delay in the prosecution of the case against the petitioner-accused does not, in any event, appear to have caused any prejudice to him. He has not faced the trial for over two and a half decades and has enjoyed his freedoms. He has claimed that in the meantime, Sh. Rajiv Gandhi has passed away, with whom he was throughout present after the assassination of late Smt. Indira Gandhi. This fact by itself does not appear to be enough to conclude that the petitioner-accused has suffered prejudice. Merely because the evidence that late Sh. Rajiv Gandhi may have led in

support of the petitioner's claim, as aforesaid, is lost, the petitioner is not irreparably handicapped. He can still establish his defence by producing numerous other witnesses who may have been present with late Sh. Rajiv Gandhi after the demise of late Smt. Indira Gandhi to condole her death.

66. It appears that it is the petitioner-accused, who has benefited from the delay in: the conduct of the investigation; the recording of statement of witnesses, and; the filing of charge sheet. Delay may have, in fact, prejudiced the case of the prosecution, with the disappearance of witnesses and fading of memories.

67. The circumstances of this case and the nature of the offences is certainly not such as to justify the quashing of the charges against the petitioner-accused in the interest of justice. On the contrary, the interest of justice requires that the offences allegedly committed by the accused persons are expeditiously tried to preserve the rule of law in the society. As noticed above, the charge against the accused broadly is of instigating a communal riot and killing of innocent persons belonging to the Sikh community. The nature of the alleged offences is extremely serious and strike at the secular foundation of the nation. The alleged offences attract the most severe punishments.

68. The delay in the present case appears to be a result of what the Supreme Court called "systemic delays". The issue of

delay has also to be considered in the light of the rights of other stake holders interested in the prosecution of the accused in such heinous crimes. The rights of the victims who have suffered during the 1984 anti sikh riots are also at stake [see **Zahira Habibulla H. Sheikh & Anr. V. State of Gujarat & Ors. (2004) 4 SCC 158**]. The trust of the public in the efficacy of criminal justice system is at stake. The people of this country are waiting for closure of the riot cases after a full-fledged trial.

69. In relation to crimes committed during communal violence the Supreme Court in **Zahira Habibulla H. Sheikh** (supra) has gone to the extent of quashing the acquittal of the accused by the trial Court which had been upheld by the High Court in appeal upon finding that the justice delivery system had been taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The Supreme Court had found that the investigation in the said case was perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. Before the CBI stepped into the investigation of the present case, it prima facie appears that the investigating agency i.e. Delhi Police did not better. It failed to record the evidence of crucial witnesses and proceeded to file an untraced report even though the investigation had been transferred to the CBI.

70. The facts of this case also demonstrate the inexplicable manner in which the Delhi Police sought to hurriedly file a cancellation report on 17/22.12.2005, even though the investigation had already been entrusted to the CBI in October, 2005 and the records were given to the CBI vide letter dated 08.11.2005. What prompted Delhi Police to then file a cancellation report even though it had been divested of its jurisdiction to proceed in the matter remains a moot question. This aspect was noted by the learned Magistrate when the cancellation report was placed before him. While passing the order dated 31.07.2008, the learned M.M. took note of the fact that the investigation had been entrusted to the CBI. Consequently he did not accept the cancellation report and merely consigned the file to the record room.

71. If the Government of the day has displayed the objectivity to rise above political considerations, and to take steps to bring the culprits to justice for such heinous crimes against the society, though belatedly, by divesting the Delhi Police of its power and jurisdiction to deal with the matter and by placing the investigation of the FIR in question in the hands of the CBI, such conduct of the Government deserves to be appreciated and commended. The endeavour of the petitioner to put spokes in the wheels of justice on the ground of delay is meritless and, therefore, must fail.

72. It is not for me, at this stage of the proceedings, to come to any definite conclusion regarding the reasons for the delay in the

conduct of the investigation; the recording of the statement of the witnesses by the CBI and; filing of the chargesheet. However, I cannot lose sight of the fact that the petitioner accused was a sitting Member of Parliament of the ruling Congress-I party, the leader whereof had been assassinated, which triggered the large scale anti sikh riots.

73. As to whether the delay in the recording of the statements of the prosecution witnesses, in the facts of the case, would be fatal to the case of the prosecution or not cannot be judged at this stage. That would be a matter for the trial Court to consider after holding a trial. I have examined the aspect of delay in the context of the issue as to whether the petitioner should have been discharged on this ground. In **P. Vijayan** (supra) the aspect of delay was consciously noted by the Supreme Court. In spite of that Supreme Court dismissed the appeal preferred by the accused P. Vijayan even though the co-accused constable Ramachandran Nair, who had made the confessional statement, had already died.

74. The last submission of Mr. Sharan is that the registration of FIR by the CBI is incompetent inasmuch, as the CBI could not have registered a fresh First Information Report, when the earlier FIR bearing no.416/84 had already been registered. He submits that there could not be parallel proceedings in respect of the same alleged offences, one arising out of FIR No.416/84 and the other arising out of CBI Case RC-24(S)/2005-SCU.I/SCR-I. Mr. Sharan

submits that there could not be two final reports, one in the form of an untraceable report and the other in the form of a charge sheet in respect of the same set of alleged offences. He further submits that no fresh investigation or re-investigation is permissible under the law. Moreover, if in pursuance of further investigation, report under section 173(8) of Cr PC was required to be filed, it should have been filed before the same Court where cancellation report was submitted, and not before the Special Court.

75. Mr. Sharan submits that the learned MM vide his order dated 31.07.2008 had consigned case file to records as it was informed to the said Magistrate that the CBI is investigating the case. While passing the said order, the learned MM had granted liberty to the State to move appropriate motion in respect of the untraced report, as and when required.

76. The aforesaid submissions were raised by the petitioner before the learned Trial Court and the same has been exhaustively dealt with by it. It is a matter of record that after consideration of the report and recommendation of Justice Nanavati Commission, vide D.O. No.U13018/5/2005-Delhi dated 24.10.2005, the Govt. of India, Ministry of Home Affairs directed the CBI to investigate the case FIR No.416/84 registered at police station Delhi Cant and FIR No.416/84 dated 04.11.1984 P.S. Delhi Cant was re-registered and entrusted to Sh. Manoj Panjarkar, DSP, CBI, SCR-I, New Delhi for further investigation. Accordingly, the case FIR No.416/84 of police

station Delhi Cant was re-registered by the CBI as case No. RC-24(S)/2005-SCU.I/SCR-I on 22.05.2005 and investigation was taken up. The CBI investigated the killing of Kehar Singh, Gurpreet Singh, Raghvinder Singh, Narender Pal Singh and Kuldeep Singh, which had not been tried earlier by any Court and constituted the subject matter of the charge sheet in question.

77. The aforesaid submissions have been rejected by the Trial Court, and in my view, rightly so, in light of Rule 10.5 of the CBI Manual, which reads as follows:

"10.5 In case of investigation being transferred to the DSPE by the local Police or any other law enforcement authority, the original First Information Report registered by them may be reproduced with all its details such as FIR number, date of registration, name of the Police Station, sections of law etc. Neither the contents nor the sections of law under which the case was originally registered may be changed. It must be remembered that it would not be treated as fresh FIR but a new number as per prevalent scheme of DSPE may be assigned for the purpose of maintaining uniformity in record keeping in CBI."

78. In all cases of CBI, which are entrusted to it for investigation, the CBI in accordance with Rule 10.5 of Manual, renumbers it, but does not change the contents of the earlier FIR. Therefore, merely giving of a new number to the FIR by the CBI, which is their practice and obligation as per their Manual, does not make it the second FIR.

79. I have already noticed the inexplicable manner in which, despite the investigation being entrusted to the CBI in October 2005, and the records being given to the CBI vide letter dated 08.11.2005, Delhi Police proceeded to file the cancellation report on 17.12.2005/22.12.2005. In fact, the Delhi Police had no jurisdiction to file the untraced report on 17.12.2005/22.12.2005 as was sought to be done by them. The learned MM before whom a fresh status report was filed on 31.07.2008 was conscious of the entrustment of the investigation to the CBI and consequently did not accept the untraced report filed by the Delhi Police. After taking note of the development that the investigation of the case stand transferred to the CBI, the learned MM merely consigned the case file to records as the CBI was investigating the case and granted liberty to the State to move appropriate motion in respect of the untraced report as and when required.

80. For a report submitted under section 173(2) of the Cr PC to be actionable, it is essential that the same should be submitted by the duly empowered/authorized officer. The untraced report submitted by Delhi Police was not by an authorized/empowered officer inasmuch, as the investigation of the case on the relevant date stood transferred to the CBI. Moreover, the investigation was not complete as, even according to the untraced report submitted by Delhi Police, the Complainant Jagdish Kaur had not joined the investigation. The endeavour of Delhi Police to rush with the filing

of the untraced report despite the transfer of the investigation to the CBI, prima facie, appears to be clandestine and calls for a high level enquiry. The enquiry should be made into the issue as to whether there was justification for the concerned police officers to file the untraced report even after the investigation stood transferred to the CBI, and if no satisfactory explanation is found, to enquire into the conduct of the concerned officer of Delhi Police, who proceeded to file the untraced report, despite having no authority to do so.

81. The learned Trial Court was right in observing that in the circumstances of the case, the mere fact of filing of a cancellation report does not tantamount to a concluded trial and does not bar subsequent investigation. The Supreme Court in ***State of Rajasthan v. Aruna Devi & Ors., (1995) SCC 1***, has held that in a case where the police initially filed a cancellation report, but in the course of further investigation, sufficient material is brought on record and subsequently a report in terms of section 170 Cr PC is filed, it could not be said that the accused cannot be put to trial in view of the earlier cancellation report. As noticed herein above, the present case of cancellation report filed by the Delhi Police was incompetent and the same had been filed without a complete investigation. Therefore, the aforesaid submission of Mr. Sharan is rejected.

82. As regards the submission that the CBI ought to have filed the charge sheet before the same Court, in my view, the same has also been rightly rejected by the Trial Court. Since the Special Courts are dealing with CBI cases, the CBI could have filed the charge sheet before the designated court only and not before the Court of the learned Metropolitan Magistrate. It is fallacious for the petitioner to contend that two prosecutions are pending against him and the other accused in relation to the same offences. The learned Metropolitan Magistrate has consigned the case file to record. Since the investigation stood transferred to the CBI, and the FIR was re-registered/re-numbered, the case is now being proceeded with in the court of the learned ASJ i.e. the Special Court. There is no question of the petitioner and other accused being tried by the court of the learned Metropolitan Magistrate in these circumstances.

83. No other submissions were advanced before me by the petitioner.

84. In the light of the aforesaid discussion, I find no merit in this petition and dismiss the same. However, keeping in view the fact that the case relates to FIR registered in the year 1984, and in light of the Supreme Court decision in **A.R. Antuley** (supra), I direct the Trial Court to expedite the trial and not grant any unnecessary adjournments either to the prosecution or to the accused. It is hoped that the trial shall be completed and the judgment delivered by the Trial Court within one year from today.

85. A copy of this judgment be forwarded to the Commissioner of Police. He is directed to examine the justifiability of the action of Delhi Police in filing the untraced report before the learned M.M. after the transfer of the investigation to the CBI, and if no satisfactory explanation is found, to fix the responsibility and to take appropriate disciplinary action against the officers responsible for unauthorizedly filing the cancellation report before the learned Magistrate on 17/22.12.2005, even though the investigation already stood entrusted to the CBI in October 2005 in relation to the FIR in question. The result of the enquiry and the action taken shall be placed before this Court by the Commissioner of Police within six months from today.

(VIPIN SANGHI)
JUDGE

JULY 19, 2010
rsk/akc/sr