

Sessions Case no. 128 of 2013Order no. 97 dated 10.08.2017

Today is fixed for further hearing on the point of consideration of charge and hearing of the discharge petition.

Accused 1) Keshav Raj Pokhrel, 2) Arun Moktan, 3) Tenzing Khambachay (Sherpa), 4) Kamal Sinha, 5) Edwin Sanchabir Subba, 6) Goutam Tamang, 7) Puran Thami, 8) Keshar Rai, 9) Dawa Sangey Sherpa, 10) Suraj Singh, 11) Kismat Chhettri, 12) Alok Kantamoni Thulung, 13) Sanjoy Tamang, 14) Bhanu Rai, 15) Amol Lama, 16) Nagendra Pradhan, 17) Ashis Tamang, 18) Khagen Tamang, 19) Sona Sherpa, 20) Ruden Sada Lepcha, 21) Rabin Subba and 22) Dinesh Gurung @ Karate Kaila 23) Anita Lakhandri, 24) Sandhya Gurung, 25) Kabita Dahal and 26) Miss. Urmila Rumba are present by filing haziras.

Accused 1) Jiten Tamang, 2) Bimal Gurung @ Daju, 3) Smt. Asha Gurung, 4) Pemba Tshering Ola, 5) Roshan Giri, 6) Binay Tamang, 7) Sushma Rai, 8) Dinesh Theeng, 9) Devendra Sharma, 10) Dipen Malay, 11) Tilak Rai, 12) Babita Ganguly, 13) Naresh Rai, 14) Prabin Subba, 15) Harka Bahadur Chettri 16) Sunil Rai, 17) Ranjit Rai, 18) Subhash Tamang, 19) Pradeep @ Bhupendra Pradhan and 20) Prasant Chhettri @ Yogen, 21) Sudesh Rai Majhi and 22) Col. Ramesh Allay are absent.

Ld. Advocates for the above named accused persons filed four petitions along with annexures under section 317 Cr.P.C., praying for permission to represent the accused persons, by them, after serving the copy to the ld. Spl. P.P.

In view of the observation made in the earlier order dated 25.07.2017 and in view of the directions passed by the Hon'ble court in CRM no. 5221 of 2015 since the prosecution could not ensure the appearance of the accused persons the prayer u/s. 317 of Cr.P.C., stands allowed.

Hazira filed on behalf of Bharati Tamang (widow of the deceased) through her advocate.

Discharge petition dated 30.01.2017 filed on behalf of accused 1) Subhash Tamang, 2) Prasant Chhettri @ Yogen Rai, 3) Ashish Tamang, 4) Sudesh Rai Majhi, 5) Sunil Rai, 6) Tilak Rai, 7) Dipen Malay, 8) Arun Moktan, 9) Sanjay Tamang, 10) Bhanu Rai, 11) Kamal Sinha, 12) Dawa Sangey Sherpa, 13) Suraj Singh, 14) Amol Lama, 15) Prabin Subba, 16) Goutam Tamang, 17) Ruden Sada Lepcha, 18) Edwin Sanchabir Subba, 19) Khagen Tamang and 20) Ranjit Rai is taken up for hearing and also hearing on the point of consideration of charge.

Ld. Lawyer for the above named accused /petitioners has stated that the allegation against the above petitioners cannot be clubbed in a single form but the above petitioners need to be divided into three groups, consisting of petitioners no. 1 & 2 and petitioners no. 3 to 15 in one group and the remaining petitioners no. 16 to 20 in one group. Therefore,

Contd. .. Order no. 97 dated 10.08.2017

he started his submission for petitioners no. 16 to 20, by stating that, against the above petitioners / accused, only two witnesses could be found, who are CSW- 1 and CSW- 10, in the investigation for CID and both the above witnesses were again cited as CSW-1 and CSW -8, respectively by the CBI, during their final charge sheet, but the above two witnesses were not cited as witnesses, during the first investigation by CBI. He has then pointed out that the CSW-1, during his earlier examination on 28.5.2010, did not name the above petitioners, but during his subsequent examination on 28.01.2011, after eight months had implicated the above petitioners nos. 16 to 20. Similarly, CSW-10 during her examination on 01.06.2010 had not named the above petitioners whereas during her examination on 01.02.2011 after eight months, had implicated them. Therefore, the argument forwarded, is, the testimony of the above witnesses would be of no value legally and therefore, the petitioners should not be subjected to the rigours of trial.

He has then made submissions in respect of petitioners no. 1 and 2 and in this respect also, he has pointed out that three witnesses had been examined by the CID, as CSW-7, CSW -11 and CSW -12, whereas another witness had been examined during both the CBI investigation as CSW-5 and CSW-31. The argument forwarded in this respect is that the statements of the above CSW nos. 7, 11 and 12 indicate that on the date of incident the petitioners nos. 1 and 2 along with one Sangey Yelmo and Prabes Tamang had been admitted in injured condition, in the hospital and while Prabes Tamang had been examined and his explanation had been accepted, whereas the petitioner nos. 1 and 2 were neither examined, but they were made accused in this case for murder of Madan Tamang. That apart, it has been argued that CSW – 5, during his examination on 09.09.2010, named the petitioner nos. 1 and 2, but in a hearsay capacity, but again during the examination 8.6.2011 he did not name the above named petitioners. The only evidence against the petitioner nos. 1 and 2 is hearsay and the fact that the petitioners were merely injured with no linking evidence to show that the petitioners had been injured in the incident of 21.05.2010, or that they were involved in the said incident. He, therefore, prays for discharge of the above named petitioners.

He has then made submissions in respect of petitioners no. 3 and 15 and in this respect also, he has pointed out that sufficient materials were not forthcoming and as such they were also liable to be discharged. He thereafter, submits that the direction passed in WP nos. 15306 (W) of 2017 to frame charges was not in accordance with law and therefore the direction should be treated as obiter dicta.

The discharge prayer of 48 accused persons has been completed. At this stage Id. Spl. P.P. submits that he wishes to make reply on some points.

Firstly, he has argued on the point, that as this court had held the direction passed by the Hon'ble court in CRM no. 5222 of 2015, as the command of the superior court therefore, this court should also hold the direction to frame charges in W.P. 15306(W) of 2017 and

Contd. .. Order no. 97 dated 10.08.2017

should frame charges against all the accused persons as that would also comprise to be a command by the superior court. Moreover, he has further stated that though submissions were made that only grave suspicion should be the criteria for framing charges but as grave suspicion or suspicion have not been defined anywhere, therefore, in a murder charge any suspicion should be held to be grave suspicion and charges should be framed against the accused persons. Furthermore, he has argued that the court should not hold a mini trial, because at this stage the court needed to be satisfied with only the prima-facie element of evidence and should not bother as to whether the case shall end in acquittal or conviction. He has also pointed out that against accused Roshan Giri there were as many as 20 witnesses u/s. 161 Cr.P.C. and three witnesses u/s. 164 of Cr.P.C. Similarly, against Sushma Rai, Sandhya Gurung, Goutam Tamang, Miss. Mamta Rai, Anita Lakhandri, Ruden Sada Lepcha @ Ruden Lepcha, Edwin Sanchabir Subba @ Edwin Subba, Khagen Tamang, Ranjit Rai, Kabita Dahal @ Hingman and Jiten Tamang, there were 7 witnesses u/s. 161 of the Cr.P.C. and one u/s. 164 of the Cr.P.C. Similarly, against accused Asha Gurung, there were 17 witnesses u/s. 161 of the Cr.P.C. and two u/s. 164 of the Cr.P.C. Similarly, against accused Urmila Rumbha, there were 4 witnesses u/s. 161 of the Cr.P.C. and 3 witnesses u/s. 164 of the Cr.P.C. Similarly, against accused Pemba Tshering @ Ola, there was one witness u/s. 161 of the Cr.P.C. and 1 witness u/s. 164 of the Cr.P.C. Similarly, against accused Sona Sherpa, there were 11 witnesses u/s. 161 of the Cr.P.C. and one witness u/s. 164 of the Cr.P.C. Similarly, against accused Binoy Tamang, Col. Ramesh Allay, Pradeep Pradhan and Dr. Harka Bahadur Chhettri, there were 16 witnesses u/s. 161 of the Cr.P.C. and 3 witnesses u/s. 164 of the Cr.P.C. Similarly, against accused Prasant Chhettri, there were 4 witnesses u/s. 161 of the Cr.P.C. Similarly, against accused Alok Kantamoni, Puran Thami, Keshab Raj Pokhrel, Kishmat Chhettri and Dinesh Gurung, there were 107 witnesses u/s. 161 of the Cr.P.C. and 4 witnesses u/s. 164 of the Cr.P.C. Similarly, against accused Bimal Gurung, there were 24 witnesses u/s. 161 of the Cr.P.C. and 6 witnesses u/s. 164 of the Cr.P.C. Similarly, against remaining 30 accused persons, there were 131 witnesses u/s. 161 of the Cr.P.C. and 9 witnesses u/s. 164 of the Cr.P.C.

He has further submitted that it was wrongly submitted before the court, that Suraj Limbu had not made any statement regarding the handing over of the mobile or SIM card to accused Roshan Giri whereas such a statement made by Suraj Limbu, was existing with the record. That apart he has submitted 164 of the Cr.P.C. statement made by Smriti Dahal, was later on clarified by her statement under section 161 Cr.P.C., as law did not provide for re-examination of the witness u/s. 164 Cr.P.C., whereas the witness could be examined as many number of times u/s. 161 of the Cr.P.C., as and when the occasion arose. Moreover, the initial statement was made immediately, after the incident and therefore, the

Contd. .. Order no. 97 dated 10.08.2017

witness may have been perplexed with the aftershock of the incident and therefore, may have failed to state the names of all the persons involved or their names properly.

At this stage ld. Spl. P.P. prays for further adjournment to make submissions on the morrow.

To date i.e. 11.8.2011 for further submission by the ld. Spl. P.P.

D/C. by me.

Chief Judge  
City Sessions Court, Calcutta.

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