

SC 128 OF 2013**Order no. 100 Dated 17.08.2017**

Today is fixed for passing order.

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

Ld. Advocates for the above named accused persons filed three petitions 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.

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

Hazira filed by the ld. Spl. P.P.

Record is put up now, for order.

Perused and considered.

To begin with, the wife of the deceased Madan Tamang, had sworn an affidavit, although at the prompting of this court, submitting that a batch of petitions were pending before the Hon'ble Supreme Court, in Writ Petition no. W.P. 159 of 2012, in which prayer

for de novo investigation, stay of proceedings of the instant case and cancellation of the bail application of the 23 accused persons granted by the Hon'ble Calcutta High Court in CRM nos. 5221-5224 of 2015 and 5294 of 2015. Therefore, this court was in half a mind, not to dispose of the instant discharge prayer and the hearing on the point of consideration of the charge, in the instant case on the ground, that not only prejudice would be caused to the applications filed before the Hon'ble Supreme Court, by the wife of the deceased, but judicial discipline and propriety also demanded, that when the Hon'ble Supreme Court was in seisin of the above matter, this court should refrain from passing any order and solicit necessary instruction from the Hon'ble Supreme Court. But yesterday i.e. on 16.8.2017 a petition was filed on behalf of the widow of the deceased praying that the discharge petitions may be rejected and charge may be framed against the accused persons as early as possible, indicating that the widow was least interested with the fate of the petitions, pending before the Hon'ble Supreme Court. Such being the situation, when the widow of the deceased Madan Tamang, herself was not so keen, with the outcome of the hearing of the petitions, pending before the Hon'ble Supreme Court, which would definitely be affected by the passing of the instant order and with the deadline of the Hon'ble Calcutta High Court, looming over this court, to conclude the framing of charges against the accused persons within the 17th of August 2017, this court desists from indulging in ethical niceties and proceeds, to pass the order on the discharge petitions as well as the hearing on the point of consideration of charges against the accused persons.

In respect of the accused persons namely Asha Gurung, Sushma Rai, Sandha Gurung, Urmila Rumba, Anita Lakhandri, Kabita Dahal, Babita Ganguly and Sona Sherpa, it had been argued that accused Sushma Rai, had been implicated by the testimony of single witness Sailesh Rai, but in this respect, it can be stated that for the purpose of framing charge, the prima-facie involvement of the accused Sushma Rai, is enough and the same stands established. Moreover, there are other linking evidence, like usage of mobile phone, which at this stage is sufficient to go to trial. With regard to the other accused persons named above, there are sufficient evidence on record to prima-facie establish their involvement in the alleged offence. Mere non-mentioning of their names, by some witnesses, could not be a ground to discharge them, at this stage. That apart the legality and technicality of the statements, made by witness Smriti Dahal, implicating the above named accused, by different statements can be challenged after the trial, and not at

this stage. Under the circumstance, their prima-facie involvement, being well established and they are liable to face trial.

In respect of the accused persons namely Alok Kantamoni Thulung @ Rai, Keshab Raj Pokhrel, Puran Thami, Kismat Chhetri, Dinesh Gurung @ Karate Kaila, Tenjing Khambachi, Naresh Rai, Nagendra Pradhan and Keshar Rai it had been submitted, that the allegations under section 147, 148, 149 of I.P.C. had not been attracted, but in this respect, it can be stated that at this stage, the application of the above mentioned sections, against the accused persons, cannot be adjudicated without trial. That apart, as earlier discussed, the legality and technicality of the statement, made by the witness Smriti Dahal, during different dates cannot be challenged, at this stage and should be challenged at the end of the trial.

In respect of the accused Subhash Tamang, Prasant Chhettri @ Yogen Rai, Ashish Tamang, Sudesh Rai Majhi, Sunil Rai, Tilak Rai, Dipen Malay, Arun Moktan, Sanjay Tamang, Bhanu Rai, Kamal Sinha, Dawa Sangey Sherpa, Suraj Singh, Amol Lama, Prabin Subba, Goutam Tamang, Ruden Sada Lepcha, Edwin Sanchabir Subba, Khagen Tamang and Ranjit Rai it has been submitted that the accused persons namely Goutam Tamang, Ruden Sada Lepcha, Edwin Sanchabir Subba, Khagen Tamang and Ranjit Rai, had been named by witnesses, during the final charge sheet but who had not named them during their earlier examination. But in order to verify the reason for such lapses, it is necessary to face trial and only after cross examination, the benefit if any will accrue to the above named accused persons. Under the circumstances the above named accused persons are bound to face trial. In respect of the above two accused persons namely Subhash Tamang, Prasant Chhettri @ Yogen Rai, it has been submitted that they were merely injured persons and that there was no evidence to link their involvement in the offence. But on perusal of the materials on record, prima-facie involvement of the accused persons, cannot be ruled out and as such they need to face trial. As regard the remaining accused persons, namely Ashish Tamang, Sudesh Rai Majhi, Sunil Rai, Tilak Rai, Dipen Malay, Arun Moktan, Sanjay Tamang, Bhanu Rai, Kamal Sinha, Dawa Sangey Sherpa, Suraj Singh, Amol Lama, Prabin Subba, materials on record, clearly indicate prima-facie involvement in the alleged offence. As such they also need to face trial.

In respect of accused persons namely Pradeep Pradhan @ Bhupendra Pradhan, Jiten Tamang, Harka Bahadur Chhettri, Binoy Tamang, Ramesh Alay, Debendra

Sharma, Dinesh Theeng, it has been submitted that the main allegation against the above mentioned accused persons, is that of conspiracy to commit the offence of the murder of Madan Tamang. It had also been submitted that the main evidence against them is mere conjecture and no direct evidence is forthcoming from the prosecution side and therefore the ingredients necessary to frame charge is missing and the accused persons mentioned above are liable to be discharged and they have relied on the ruling passed in State of Bihar vs. Ramesh Singh reported in 1977 Supreme Court cases (Cri) 533 Hukam Singh and Ors. Vs. State of Rajasthan 2000 Supreme Court Cases (Cri) 141, Rosy and Another vs. State of Kerala and Others- 2000 Supreme Court Cases (Cri) 379, Banti alias Guddu vs. State of M.P.- 2004 Supreme Court Cases (Cri) 294, State of M.P. vs. Sheetla Sahai and others reported in (2009) 8 Supreme Court Cases 617 and Satish Mehra vs. State (NCT of Delhi) & another reported in (2012) 13 Supreme Court Cases 614.

It is settled principle of law that in most cases of criminal conspiracy, there would be no direct evidence and the circumstances surrounding the incident, would establish the criminal meeting of minds. In this regard, there is evidence in the common call details record, of before and after the incident, against the above named accused persons and therefore to a certain extent, points to the criminal meeting of minds, with regard to the offence. Under such circumstance the prima-facie involvement of the accused persons cannot be ruled out. In this regard the ratio of the decision, emanating from the judgement of Sheetla Sahai (Supra) also does not come to the aid of the above named accused persons as the principles are based on a different set of facts. Similarly, the judgement of Satish Mehra (Supra) is also of no help to the above accused persons as the prima-facie involvement in the allegation of brutal daylight murder of the deceased Madan Tamang, and that also, for political space, has already been established and therefore the question of not facing trial does not arise. Similarly, the cases of Hukam Singh (Supra), Banti alias Guddu (Supra) and Rosy (Supra) also do not come to the benefit of the accused persons for the simple reason that prima-facie evidence exists against the accused persons and therefore they need to face trial.

In respect of accused Pemba Tshering @ Ola and Roshan Giri it has been submitted that the accused persons Pemba Tshering @ Ola was an Advocate and the evidence against him was of being present at the spot and brandishing of weapon, but at this stage even a solitary testimony, would form prima-facie evidence of involvement and the compulsion to face trial, arises. As regards the accused Roshan Giri, the submissions

made in favour of his non-involvement, cannot be accepted on the ground, that there are sufficient prima-facie evidence to show the involvement, of the accused in the alleged offence. In this regard reliance has been laid on the following judgements –

Reported in (2014)11 Supreme Court Cases 709 – State of T.N. vs. N. Suresh Rajan, JT 2008 (6) SC 299 – Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra, (2017) 2 Supreme Court Cases (Cri) 510 & (2017) 5 Supreme Court Cases 163 – State of Uttar Pradesh & Ors vs. Subhash Chandra Jaiswal & Ors., JT 2007(3) SC 229 – Harishchandra Prasad Mani & Ors. Vs. State of Jharkhand & Anr., (2002)2 Supreme Court Cases 135 – Dilawar Balu Kurane v. State of Maharashtra, (1990) 4 Supreme Court Cases 76 – Niranjana Singh Karam Singh vs. Jitendra Bhimraj Bijjaya & ors., (1979) 3 Supreme Court Cases 4 – Union of India vs. Prafulla Kumar Samal & Anr., JT 1998 (6) SC 371 – Suresh Budharmal Kalani @ Pappu Kalani v. State of Maharashtra, JT 2007 (1) SC 82 – Subhash Harnarayanji Laddha v. State of Maharashtra and SLP (Cri) No. 6374 of 2010 – Sajjan Kumar vs. Central Bureau of Investigation.

The ratio of N.Suresh Rajan (Supra) would not be applicable, as it is based on completely different facts. Moreover, strong suspicion becomes a relative phrase, as the facts of this case is a cold day light murder and therefore any suspicion would have to be held to be a strong suspicion. Similarly, the ratio of Yogesh @ Sachin Jagdish Joshi (Supra), Subhash Chandra Jaiswal & Ors. (Supra), Harishchandra Prasad Mani & Ors. (Supra), Dilawar Balu Kurane (Supra), Niranjana Singh Karam Singh (Supra), Prafulla Kumar Samal & Anr. (Supra), Suresh Budharmal Kalani @ Pappu Kalani (Supra), Subhash Harnarayanji Laddha (Supra) and Sajjan Kumar (Supra) are based on different sets of fact and therefore in applicable to the instant case.

In respect of the accused Rabin Subba it has been admitted that the de-facto complainant had named him under section 161 of the Cr.P.C. and as such for the point of framing of charge that should be enough to show the prima-facie involvement of the accused.

In respect of accused, Bimal Gurung, it had been argued that the accused was charge sheeted, mainly because he is the founding president of GJMM and the allegation against him are vague allegations, of no evidentiary value. It is a fact that the accused Bimal Gurung, even though named in the FIR, is merely an accused by way of conjecture. All the evidences leading against him with regard to his involvement in the offence, is by

way of conjecture and therefore it is of no evidentiary value. In the absence of any direct evidence or circumstances engulfing the accused with the offence of murder of the deceased Madan Tamang, there remains no evidence compelling him to face trial. In this regard the principle espoused in the judgement passed in State TR. INSP. Of Police vs. A. Arun Kumar and another in Criminal Appeal No. 2602 of 2014 passed on 17.12.2014, states that the evidence which the prosecution proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence then there will be no sufficient ground of proceeding with the trial. Hence, when there is no evidence, apart from the conjectural evidence, forthcoming from the prosecution side and in view of the above principle there would be no evidence worth taking the accused to trial. Under the circumstance the accused Bimal Gurung, is liable to be discharged from this case.

At the time of hearing, even though the prosecution did not go on appeal against the order dated 25.7.2017, the Id. Spl. P.P. tried to impress, that the order was erroneous by virtue of the bail being granted by this court and therefore under the provision of sections 437(5) of the Cr.P.C. and 439(2) of the Cr.P.C. this court was empowered to issue warrant of arrest on non-attendance of the accused / petitioners of CRM no. 5221-5224 of 2015 and 5294 - 5295 of 2015. In this respect it can be clarified that the bail granted by this court, to the petitioners of the above CRM nos., arose from the Hon'ble High Court's direction and therefore the question of application under sections 437(5) and 439(2) of the Cr.P.C., does not arise. This is further vindicated by the fact, that the Hon'ble court had granted a liberty to the CBI, to pray for cancellation of the anticipatory bail order and thereby withheld the power of this court, to take coercive measures under sections 437(5) and 439(2) of the Cr.P.C. Under the circumstances this contention on behalf of the prosecution also fails and therefore the prosecution is directed to take necessary steps to ensure the appearance of the accused persons mentioned in the CRM nos. 5221-5224 of 2015 and 5294 - 5295 of 2015, on the date fixed for framing of the charge.

Since a petition has been filed wherein it has been mentioned that the communication of rail and road between North Bengal and Kolkata has been disrupted and therefore the date for framing of charge be fixed after 23rd of August 2017, the prayers stands allowed considering the disturbances by way of natural calamities. All the

remaining accused persons shall remain present on the date fixed failing which coercive methods would be adopted.

Hence, it is,

ORDERED

that the accused person namely, Bimal Gurung, stands discharged from this case, under section 227 of the Cr.P.C.

To 28.08.2017 for framing of charge against the accused persons in the following manner :-

<u>Name of the accused persons</u>	<u>Charges to be framed</u>
1) Binoy Tamang	- 120B/150/506/302 of I.P.C.
2) Ramesh Alay	- 120B/150/506/302 of I.P.C.
3) Harka Bahadur Chhettri	- 120B/150/506/302 of I.P.C.
4) Pradeep Pradhan	- 120B/150/506/302 of I.P.C.
5) Roshan Giri	- 120B/150/506/302 of I.P.C.
6) Asha Gurung	- 120B/147/148/149/427/506/302 of I.P.C.
7) Debendra Sharma	- 120B/150/506/302 of I.P.C.
8) Dinesh Thing	- 120B/150/506/302 of I.P.C.
9) Keshav Raj Pokhrel,	- 147/148/149/427/506/302/34 of I.P.C.
10) Arun Moktan,	- 147/148/149/427/506/302/34 of I.P.C.
11) Tenzing Khambachay (Sherpa),	- 147/148/149/427/506/302/34 of I.P.C.
12) Kamal Sinha,	- 147/148/149/427/506/302/34 of I.P.C.
13) Puran Thami,	- 147/148/149/427/506/302/34 of I.P.C.
14) Keshar Rai,	- 147/148/149/427/506/302/34 of I.P.C.
15) Dawa Sangey Sherpa,	- 147/148/149/427/506/302/34 of I.P.C.
16) Suraj Singh,	- 147/148/149/427/506/302/34 of I.P.C.
17) Kismat Chhettri,	- 147/148/149/427/506/302/34 of I.P.C.
18) Alok Kantamoni Thulung,	- 147/148/149/427/506/302/34 of I.P.C.
19) Sanjoy Tamang,	- 147/148/149/427/506/302/34 of I.P.C.
20) Bhanu Rai,	- 147/148/149/427/506/302/34 of I.P.C.
21) Amol Lama,	- 147/148/149/427/506/302/34 of I.P.C.
22) Nagendra Pradhan,	- 147/148/149/427/506/302/34 of I.P.C.
23) Ashis Tamang,	- 147/148/149/427/506/302/34 of I.P.C.
24) Sona Sherpa,	- 147/148/149/427/506/302/34 of I.P.C.
25) Rabin Subba,	- 120B/147/148/149/427/506/302 of I.P.C.
26) Dinesh Gurung @ Karate Kaila	- 147/148/149/427/506/302/34 of I.P.C.
27) Anita Lakhandri,	- 120B/147/148/149/427/506/302 of I.P.C.

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| 28) Sandhya Gurung, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 29) Kabita Dahal, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 30) Miss. Urmila Rumba | - 120B/147/148/149/427/506/302 of I.P.C. |
| 31) Jiten Tamang, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 32) Pemba Tshering Ola, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 33) Sushma Rai, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 34) Dipen Malay, | - 120B/147/148/149/427/506/302 of I.P.C. |
| 35) Tilak Rai @ Sotong | - 120B/147/148/149/427/506/302 of I.P.C. |
| 36) Babita Ganguly, | - 147/148/149/427/506/302/34 of I.P.C. |
| 37) Naresh Rai, | - 147/148/149/427/506/302/34 of I.P.C. |
| 38) Prabin Subba, | - 147/148/149/427/506/302/34 of I.P.C. |
| 39) Sunil Rai, | - 147/148/149/427/506/302/34 of I.P.C. |
| 40) Subhash Tamang, | - 147/148/149/427/506/302/34 of I.P.C. |
| 41) Prasant Chhetri @ Yogen, | - 147/148/149/427/506/302/34 of I.P.C. |
| 42) Sudesh Rai Majhi, | - 147/148/149/427/506/302/34 of I.P.C. |
| 43) Khagen Tamang | - 120B/147/148/149/427/506/302 of I.P.C. |
| 44) Ruden Sada Lepcha | - 120B/147/148/149/427/506/302 of I.P.C. |
| 45) Edwin Sanchabir Subba | - 120B/147/148/149/427/506/302 of I.P.C. |
| 46) Ranjit Rai | - 120B/147/148/149/427/506/302 of I.P.C. |
| 47) Gautam Tamang | - 120B/147/148/149/427/506/302 of I.P.C. |

Prosecution to take steps accordingly.

D/C. by me.

Chief Judge
City Sessions Court, Calcutta.

Chief Judge
City Sessions Court, Calcutta.