JVS.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 641 OF 2019

Rubabuddin Shaikh	}	Appellant
versus		
Central Bureau of Investigation & Ors.	}	Respondents

WITH
CRIMINAL APPEAL NO. 656 OF 2019

Nayabuddin Shaikh	}	Appellant
versus		
The Central Bureau of Investigation & Ors.	}	Respondents

Mr. Gautam Tiwari with Ms. Tasneem Khatau, Mr. Suraj Jagtap, Ms.Nidhi Mishra, Ms.Vaishnavi Dubey & Mr.Bhavesh Thakur i/by Probus Legal for the Appellants.

Mr. Anil C. Singh, Additional Solicitor General a/w Mr.Kuldeep Patil, Mr.Aditya Thakkar Mr. Chaitanya Chavan, Mr. Adarsh Vyas, Mr. Krishnakant Deshmukh, Mr. Rajdatt Nagre, Ms.Saili Dhuru, Mr.Anay Joshi, Mr. Sumitkumar Nimbalkar, Mr.Digvijay Kachare and Ms.Sanika Joshi of Respondent No.1-CBI.

Mr. Amit Desai, Senior Advocate with Mr. Madhusudan Pareek, & Mr.Gopal Shenoy Advocates for Respondent Nos.2, 3 & 8 to 11.

Mr.Devendra Shukla a/w Mr.Harekrishna Mishra & Mr.Shabi A. Moulvi for the Respondent No.4.

Mr.Khan Abdul Wahab, Ms.Shifa Khan, Mayanka S.R., Fardin Shaikh, Abdul Hafeez Kotawala, Nitin Mane & Shahabuddin Shaikh for the Respondent No.5.

Mr.Ishan Jani a/w Mr.Farhad Panthaki for Respondent No.6 & 7.

Mr. Maitreya G. Shukla for Respondent No.12.

Mr.Hitesh P. Shah for the Respondent No.14 & 23.

Mr.Sachin R.Pawar a/w Mr.Devang S.Mhatre i/b Mr.Sagar S.Patil for the Respondent No.18 to 22.

Mrs.M.M.Deshmukh, I/C PP with Mr.J.P.Yagnik, Addl.PP for the Respondent No.24 – State.

CORAM: SHREE CHANDRASHEKHAR, CJ. &
GAUTAM A. ANKHAD, J.

RESERVED ON : 16th JANUARY 2026
PRONOUNCED ON : 7th MAY 2026

JUDGMENT

Per, Shree Chandrashekhar, CJ.:

The judgment of acquittal rendered on 21st December 2018 in Sessions Case Nos. 177 of 2013, 178 of 2013, 577 of 2013 and 312 of 2014 by the Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai has been challenged by Rubabuddin Shaikh and Nayamuddin Shaikh who are the brothers of Sohrabuddin Shaikh.

2. Crime No. 5 of 2005 was registered on 26th November 2005 by Ravindrabhai Laxmanbhai Makwana who was a Police Head Constable with the Anti Terrorist Squad at Ahmedabad in respect of the police encounter of Sohrabuddin Shaikh. However, pursuant to an order passed by the Hon'ble Supreme Court on 14th January 2006, a preliminary enquiry *vide* PE No.66 of 2006 was registered on 27th June 2006 by the Criminal Investigation Department (CID), Gujarat Police. Later on, a charge-sheet was laid against certain accused persons in the Court of Additional Chief Metropolitan Magistrate, Ahmedabad. Rubabuddin Shaikh who is the brother of Sohrabuddin Shaikh being dissatisfied by the investigation carried out by the Gujarat CID Police approached the Hon'ble Supreme Court in Criminal Writ Petition No. 6 of 2007 for transfer of the investigation to the CBI. By an order dated 12th January 2010, the CBI was directed to conduct further investigation and, in

compliance thereof, it registered Crime Nos.4/S/2010 and 3/S/2010. The investigation in these cases was conducted by several officers of the CBI and charge-sheets were laid against 38 accused persons. Still not satisfied, Rubabuddin Shaikh raised a serious objection to the trial being conducted at Ahmedabad as the Gujarat Police officers were involved in the case. In Transfer Petition (Criminal) No. 44 of 2011, an order was passed on 27th September 2012 by the Hon'ble Supreme Court for transfer of the case from Ahmedabad to Mumbai. Thereafter, these cases were clubbed together by virtue of an order passed on 8th April 2013 by the Hon'ble Supreme Court in Writ Petition (Criminal) No. 149 of 2012.

3. In the trial of these cases, the prosecution examined 210 witnesses and relied on circumstantial evidence but the prosecution could not establish the charges framed against the accused persons. As many as 92 witnesses turned hostile and did not support the prosecution story of the killing of Sohrabuddin Shaikh, his wife Kausar Bi and Tulsiram Prajapati in a fake encounter in furtherance of a criminal conspiracy between the police officers, politicians etc. During the trial, 13 accused persons were discharged by separate orders dated 30th December 2014, 26th February 2015, 31st March 2015, 27th April 2015, 28th April 2015, 29th April 2015, 13th July 2015, 24th July 2017, 1st August 2017, 18th August 2017 and 10th September 2018. The charges against three accused persons were dropped by the orders passed on 25th August 2016, 4th February 2015 and 2nd March 2015. And, the respondent nos.2 to 23 have been acquitted by the Special Court by the judgment under challenge.

4. The trial Judge painstakingly examined the testimony of the prosecution witnesses, most of whom had though turned hostile.

The trial Judge held that there was no iota of evidence that the prosecution could adduce to prove that any politician was involved in the conspiracy or there was a politician-police nexus which led to fake encounters in which Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati were murdered. The trial Judge held as under: -

> *"242. The court has heard both the sides at length and sufficient opportunity have been given to both the side to put their case at length. I have discussed the evidence of almost all the witnesses as referred herein above and while discussing I have also tried to appreciate the evidence given by those witnesses. But I would like to discuss little further by saying that so far as two most important witness namely PW No. 15 Nathubha and PW No. 31 Bhailal who are witness to incident which took place at Vishala Circle, Sarkhej has not supported the case of prosecution. Cross examination conducted by prosecution of this two witnesses do not bring anything to substantiate the credibility of these two hostile witness and therefore I have no hesitation to conclude that as this two witnesses are hostile case now is only based on circumstances. It being so prosecution is now burden with proving every link and circumstance leaving no doubt about involvement of an accused in any of the link forming change of circumstance. Considering this aspect if I further appreciate in addition to what I appreciated for each witness as referred above I would say that so far as medical evidence is concerned there is no doubt to come to the conclusion that Sohrabuddin and Tulsiram succumbed to fire arm injuries. At the same time considering evidence of ballistic opinion along with other evidence prosecution has unable to firstly established that fire arm seized by prosecution were actually used by accused persons as there is no evidence to link seized fire arms being used by accused persons for the purpose of firing of Sohrabuddin. As a matter of fact the cartridges alleged to be seized from accused no.7, 8 and 9 in C.R. No.5/05 were not examined by the ballastic expert to match the same with the service pistol and revolver collected by Dy.S.P. Shri. Padheria from the Arms and Ammunition Section of Reserve Police Udaipur, alleged to be allotted the accused no. 7, 8 and 9. Therefore, there is also failure of investigation so as to establish empties recovered from scene of offence with concerned fire arms as well as imprint on empties etc. as narrated by witness and discussed herein above so as to establish that particular fire arm was used for particular fire arm injury as well as empties recovered from scene of occurrence. It is also pertinent to note here that one of the accused i.e. accused No. 25 had fire arm injury on his person to establish that encounter was fake it was*

alleged that it was a self inflicting injury but medical evidence more particularly Dr. Bhojak clearly establishes that fire arm injury of accused No. 25 was not self inflicting that itself is sufficient to discard the case of prosecution so far as fake encounter of Tulsiram is concerned.

243. If one looks to material of investigation carried out by local police which implicates Gujarat and Rajasthan Police and purpose of implicating police of both states was to allege that encounters were fake but somehow element of police politician nexus was brought by certain witness by placing certain facts about influencing witnesses by tempting them and by offering huge amount of Rs. 50 lacs also by alleging that third person in the bus travelling with Sohrabuddin and Kausarbi was Tulsiram also alleging that politician were interested in murdering Sohrabuddin as he was extorting money from marble lobby of Rajasthan and Tulsiram was murdered as he was witness to abduction of Sohrabuddin and Kausarbi. On the basis of improved version of almost all witnesses who in their earlier had not said anything about politician and political nexus but somehow after year they come out with such nexus theory. And they also came out with further theory that this incident of Sohrabuddin, Kauarbi and Tulsiram having taken place pursuant to incident of firing at the office of popular builder at Ahmedabad. I have no hesitation to conclude that the evidence which has been laid and adduced and as discussed and appreciated vividly prosecution has though tried but has failed to prove any such politician police nexus as allegation of influencing witness for withdrawing petition filed before Hon'ble Supreme court by offering Rs. 50 lacs is not only proved by prosecution but there appears to be conflicting and contradictory version about it. Further there is no material much less anything to whisper even about proving even prima facie element of extortion from marble lobby of Rajasthan by politicians who were initially arraigned as accused by CBI investigators. I also do not find any connection with popular builder office firing case with the present case of Sohrabuddin, Kausarbi and Tulsiram. prosecution had vehemently argued about larger conspiracy by connecting the case of Tulsiram with the case of Sohrabuddin and Kausarbi as Tulsiram was witness to case of Sohrabuddin and Kausarbi but certain witness more particularly PW No. 181 had denied the aspect of third person being Tulsiram and according to him third person was Kalimuddin. Further certain witnesses on whom heavy reliance has been placed by prosecution their evidence scrutinized minutely is fully based on their hearsay evidence which is of no use. Therefore the exercise undertaken by CBI investigators and CID Crime and the evidence as adduced by prosecution and even the investigator themselves if look in its totality do not either prove nor even prima

facie established such nexus."

5. Mr. Gautam Tiwari, the learned counsel for the appellants contended that there are witnesses who tendered evidence on several important aspects of the prosecution case but the trial Judge did not consider their testimony in the right perspective. He further contended that the judgment of acquittal delivered on 21st December 2018 is perverse and based on unwarranted assumptions and manifest erroneous appreciation of evidence. The Special Judge ignored the relevant materials, rendered contradictory findings and failed to appreciate the prosecution evidence against the respondent nos. 2 to 23 in a judicious manner. The learned counsel relied on the judgments in *"M.G. Agarwal"*[1], *"Zahira Habibulla H. Sheikh,"*[2] *"Chandrappa"*[3] and "*Banne*" and contended that the appellate Court has full power to review, reappreciate and reconsider the evidence and it is entitled to reach its own conclusions regarding the guilt or innocence of the accused. He referred, in particular, to *"Banne"*[4], wherein the Hon'ble Supreme Court indicated a few circumstances in which the appellate Court would be justified to interfere with the judgment of acquittal. The paragraph 28 of the said judgment reads as under:-

> *"28. Following are some of the circumstances in which perhaps this Court would be justified in interfering with the judgment of the High Court, but these are illustrative not exhaustive:-*
>
> > *(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;*
> >
> > *(ii) The High Court's conclusions are contrary to evidence and documents on record;*
> >
> > *(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;*
> >
> > *(iv) The High Court's judgment is manifestly unjust and*

1 *M. G. Agarwal v. State of Maharashtra: 1962 SCC OnLine SC 22.*
2 *Zahira Habibulla H. Sheikh v. State of Gujarat: (2004) 4 SCC 158.*
3 *Chandrappa v. State of Karnataka: (2007) 4 SCC 415.*
4 *State of U. P. v. Banne: (2009) 4 SCC 271.*

> *unreasonable based on erroneous law and facts on the record of the case;*
>
> *(v) This Court must always give proper weight and consideration to the findings of the High Court;*
>
> *(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."*

6. *Per contra*, Mr. Amit Desai, the learned senior counsel appearing for the respondent nos. 2, 3 and 8 to 11 contended that the High Court in exercise of the powers under section 378 of Cr. P.C. can interfere with the judgment of acquittal where the only possible conclusion after re-appreciation of the evidence is that the guilt of the accused persons has been established beyond a reasonable doubt. It is further submitted that appreciation of only a part of the materials before the trial Court is not re-appreciation of evidence at all and the High Court must bestow its consideration to the reasons which weighed with the trial Court in acquitting the accused. Mr. Amit Desai, the learned senior counsel contended that this is not a case for interference because the trial Court appreciated the evidence of each witness piece by piece and arrived at its decision after a thorough appreciation of the evidence. Mr. Amit Desai, the learned senior counsel referred to *"Logendranath Jha"*[5] and contended that the power to direct a retrial is to be exercised only in exceptional cases. The learned senior counsel further submitted that there was no suggestion before the trial Court of unfair trial and there is no concept of derivative conspiracy. The remand of the matter for fresh trial is not legally permissible and the witnesses if they re-affirm their statements under section 161 of Cr.P.C. on their re-examination shall be labeled as unreliable witness who made two contradictory statements on oath. Supporting him, the learned counsel for the

5 *Logendranath Jha v. Polailal Biswas: 1951 SCC 856.*

other accused persons contended that the prosecution story of fake encounter was a politically motivated attempt to frame a political figure and certain police officers. The prosecution, however, failed in its attempt and the witnesses who were set up by the prosecution did not support it in the Court. It was submitted that the decision of the trial Judge is a well reasoned judgment which is required to be affirmed by the High Court.

7. This is the prosecution story that Sohrabuddin Shaikh took his wife Kausar Bi to Hyderabad for her medical treatment and Eid celebrations. They were travelling with Tulsiram Prajapati on 22nd November 2005 from Hyderabad to Sangli in a luxury bus bearing No. KA-05-5051 which was owned by M/s. Sangita Travels. They were going to Sangli for a surgical operation of Kausar Bi by Dr. Vinay Jayaram Pataki but before they could arrive in Sangli and, more precisely, about 15 km away from Zahirabad a few policemen travelling in Tata Sumo and Qualis Jeep intercepted the said bus and abducted Tulsiram Prajapati who was occupying Seat No. 31, Sohrabuddin Shaikh who was on Seat No. 29 and Kausar Bi who was sitting by his side on Seat No. 30. The policemen then proceeded with them and headed towards Bharuch. After travelling about 2 kms., Kausar Bi was asked to sit in Qualis Jeep with her husband and they were taken to Ahmedabad. The Rajasthan Police brought Tulsiram Prajapati to Udaipur in another vehicle. This is the further case of the prosecution that Sohrabuddin Shaikh and Kausar Bi were brought to Disha Farmhouse in the night of 23rd November 2005 which was owned by Girishbhai Chotabhai Patel. At that time, they were accompanied by the accused persons, namely, Narainsinh Harisinh Dabhi, Balkrishna Rajendraprasad Chaubey and Ajaykumar Bhagwan Das Parmar. In the evening of 25th

November 2005, Sohrabuddin Shaikh was taken to Arham Guesthouse and then was moved towards GSB Pole which was somewhere between Narol and Vishala Circle where he was shot dead at around 1:30 a.m. to 2:00 a.m. and the incident was projected as an encounter. Kausar Bi is traceless and her dead body has not been recovered. However, the prosecution claims that she was taken out from Disha Farmhouse and killed on 26th November 2005. Her dead body was burnt near Ilol village in Gujarat and her remains were disposed in Narmada river. On 28th December 2006, Tulsiram Prajapati was also killed in a fake encounter near Himmatnagar Railway Station in Gujarat. This is the defence of the accused persons that the incident happened when Tulsiram Prajapati was brought to Ahmedabad for a Court appearance. While going back to Udaipur, he attempted to escape from the police custody by throwing chilli powder at the face of the escorting guards and it was in an attempt to apprehend him that the police was constrained to fire at him.

8. Mr. Gautam Tiwari, the learned counsel for the appellants relied on the testimonies of 77 prosecution witnesses which are sufficient to convict the respondent nos.2 to 23. The learned counsel stated that the passengers of the luxury bus bearing no. KA-05-5051 owned by M/s. Sangita Travels, its employees and cousin of the owner of the Qualis Jeep were examined by the prosecution on the point of abduction of Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati and it can be inferred that they supported the prosecution case. PW-2 Sharad Krushnaji Apte and PW-3 Amit Sharad Apte were passengers in the bus bearing No.KA-05-5051. PW-7 Gaziuddin Jamaluddin Chabuksawar was the cleaner of the said bus. These witnesses were examined by the

prosecution to establish that two male and one burka-clad female were traveling together in the bus which started from Hyderabad to Sangli. PW-2 Sharad Krushnaji Apte stated that he visited Hyderabad in November 2005 to attend the function organized on the occasion of the publication of a book. He stated that on his journey back by the said bus, he reached Miraj at around 8:00 am or 9:00 am. He stated in the Court that he cannot remember any details about the journey and the CBI asked him to sign a statement which was in Gujarati. He further stated that Mr. A.D. More who was from CBI brought him to a Court at Sangli and took his signature over his statement, the contents of which he was not knowing. In cross-examination by the prosecution, PW-2 denied that he gave any statement to the CBI about the incident in the night when he was traveling back from Hyderabad. He denied that his statement in Gujarati was translated to him by his son. He further denied that he identified the lady in burka and her two companions from the picture shown to him by the police. He further denied that he made a voluntary statement before the Chief Judicial Magistrate, Sangli and narrated the entire incident of the night of 22nd and 23rd November 2005. PW-3 Amit Sharad Apte stated in his examination-in-chief that the CBI officer recorded his statement and took his signature on the back of the photographs shown to him. He further stated that the Gujarat CID Police had previously made enquiry from him and took his statement in Gujarati. In the cross-examination by the prosecution, PW-3 Amit Sharad Apte denied that he visited Hyderabad with wife and parents to attend a book publication function in November 2005 or that they came back to Sangli on 23rd November 2005. He further denied that they traveled through Sangita Travels from Hyderabad

to Sangli on the night of 22nd November 2005 and they were occupying the Seat Nos.13 to 16. He denied the suggestion from the prosecution that the bus took a halt at a Dhaba for half an hour around 11:00 pm and they took snacks and tea and at that time he had seen the face of a lady in burka who was sitting across the table. He further denied that the bus was abruptly stopped by a Qualis around 1:30 am and three persons entered the bus on the pretext of a checking and claiming that they were police officers. He also denied that three persons were taken out of the bus and then the bus proceeded for Miraj where it reached in the morning. He denied that he gave another statement to the Gujarat CID Police either on 22nd September 2006 or 31st March 2007. He further denied that he could recognize the woman in burka and two other persons who were travelling with her. PW-7 Gaziuddin Jamaluddin Chabukswar stated in the Court that he was a cleaner but denied that he was travelling on the bus. The prosecution sought permission of the Court to declare him hostile when he said that no enquiry was made by the police from him. In the cross-examination by the prosecution, PW-7 denied that he was working as a cleaner on the bus bearing No.KA-05-5051 which was traveling from Hyderabad to Belgaum. He denied the suggestion that there were 35 passengers including a lady in burka travelling in the said bus which had started from Hyderabad at 5:00 pm or that the bus stopped at G.M.Rao Dhaba for dinner. He denied that the bus was intercepted by a Qualis near Talola village and three persons entered the bus saying that they were police officers and wanted to conduct a check. He further denied that three passengers including a lady in burka were taken out from the bus by the police officers or he was shown photograph of the lady and her companion

passengers whom he could recognize. He further denied that the bus driver asked him to count the number of passengers and he found that passengers on Seat Nos. 29, 30 and 31 were missing. Mr. Gautam Tiwari, the learned counsel contended that the testimony of PW-7 who admitted his signature over his statements made on 1st April 2004, 11th July 2006, 13th July 2006 and 10th January 2007 cannot be ignored and such statements made by him under section 164 of Cr.P.C. could not have been ignored by the trial Judge. However, this is pertinent to note that PW-7 denied that CBI recorded his statement on 17th February 2010 and 10th February 2012. He flatly refused in the Court that he was a witness of the incident which took place near village Talola or that he had narrated the entire incident to the Gujarat CID police or the CBI.

9. P.W.-20 Saleema Begum @ Appa who is the sister of Sohrabuddin Shaikh also resiled from her statement allegedly made by her before the police under section 161 of Cr.P.C. Her evidence was recorded through video conferencing in presence of the prosecutor and the counsels for the accused persons. She has stated in her cross-examination that her elder brother Nayamuddin was a property broker. He was facing a charge for the murder of the DIG Shri Vyas. She denied any knowledge about the friends of her brother and stated that none of her brother's friends ever visited her residence. In the cross-examination by the prosecution, PW-20 denied that Shri Shankar Shamal Giri, the Deputy Superintendent of Police (CBI), visited on 2nd March 2010 at Hyderabad and enquired from her about the police encounter of Sohrabuddin Shaikh and Kausar Bi. She denied her statement which according to the prosecution she had given before the CBI and stated that

Sohrabuddin Shaikh and Kausar Bi did not visit her in 2005.

10. PW-208, Rubabuddin Shaikh is the brother of Sohrabuddin Shaikh. He stated in the Court that Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapti traveled from Jharania to Indore for medical treatment some time in mid-November 2005. They had gone there for Eid celebrations before leaving for Sangli. He stated that he tried to contact Sohrabuddin Shaikh through mobile phone between 23rd to 25th November but his attempts were met with suspicious responses from unknown persons including a person named Rajesh who answered the phone call. His subsequent attempts to reach Sohrabuddin Shaikh were not successful and he received out-of-coverage messages. On 26th November 2005, he received a news from his brother that Sohrabuddin Shaikh was killed in police encounter in Ahmedabad. His brother Nayamuddin informed him that it was a fake encounter in which Sohrabuddin Shaikh was murdered but in the initial news reports Sohrabuddin Shaikh was labeled as a member of Lashkar-e-Taiba. He met Mr. Parmar at ATS office for claiming the body of Sohrabuddin Shaikh on 27th November 2005 at Ahmedabad where he had visited with his relatives. He examined the body of Sohrabuddin Shaikh and observed eight bullet wounds which appeared to have been shot from a close distance. He further stated that Mr. Parmar did not provide any information or clue about the reason for the killing of Sohrabuddin Shaikh and whereabouts of missing Kausar Bi. He also stated that the family returned to Jharania to perform the last rites of Sohrabuddin Shaikh but Kausar Bi's status remained an unresolved mystery. PW-181 who is another brother of Sohrabuddin Shaikh deposed in the Court on the similar lines as spoken of by his brother Rubabuddin Shaikh. He stated in the Court that he heard about the abduction and killing of

Sohrabuddin Shaikh and disappearance of Kausar Bi.

11. PW-34 Dr. Dharmesh Somabhai Patel stated in the Court that he observed the following injuries on the dead body of Sohrabuddin Shaikh:-

> *"5. No injury was found on external genitalies and penis found circum size. On external examination we found the following external injuries on the body:*
>
> *1. One firearm oval shape entry wound of size 0.5 x 0.8 cm surrounded by read color abrasion collor extend more on upper half of width 0.5 cm and width of lower half of abrasion collor of 0.2 cm was present over right side of forehead, 13 cm above angle of right mandible, 9 cm right to mid line and it was 173 above right heal.*
>
> *2. One horizontal spindle shape firearm exit wound of size 1.2 x 0.5 cm present on left temporal region 11.5 cm above left angel of mandible, 15 cm left to mid line of head (superior surface), 5 cm above tragus of left ear. It was 171 cm above left heel.*
>
> *3. One firearm entry wound of size 0.8 x 0.8 cm and of 0.6 cm diameter and surrounded by red colour abrasion collor of size 1 mm on left side of chest 3 cm left to mid line and 25 cm above left anterior superior illiac spile and it was 126 cm above heel.*
>
> *4. Multiple red colour contused abrasion present in area of 8 x 8 cm size varying from 0.1 x 0.1 cm to 1 x 0.8 cm in left lower chest 21 cm above left anterior superior illiac spile and it was 8 cm left to mid line and 122 cm above left heel.*
>
> *5. One firearm exit wound of size 0.8 x 0.8 cm present in the back of left lower chest 6 cm left to mid line and 123 cm above left heel.*
>
> *6. One firearm entry wound of size 0.4 x 0.4 cm with red colour abrasion collor of size 0.3 cm present on back of right thigh 73 cm above right heel and 13 cm away to gluteal fold (mid line).*
>
> *7. One firearm exit wound of size 0.6 cm diameter present on medial and inner aspect of right thigh and was 78 cm above right heel.*
>
> *8. One firearm entry wound of size 0.8 * 0.5 cm present on medial and inner aspect on left thigh and was 79 cm above left heel.*
>
> *6. No palpable fracture was found on limbs. All described external*

injuries were antimorterm. After completing external examination. All this external examination which I described above was taken note of on the Post Morterm report at the time of examination. Thereafter a dead body was sent to radiology department of Civil Hospital Ahemadabad for X-Ray examination. The dead body came along with 12 X-Ray films and the report of radiologist.

7. Thereafter we conducted internal examination of the dead body and found following injuries:

*1. Red colour scalp contusion of size 4 * 4 cm present beneath injury no. 1 of column no. 17 in right temporal region.*

*2. Red colour scalp contusion of size 6 * 5 cm present beneath injury no. 2 of column no. 17 in left temporal region.*

We found following fracture of scalp:

*i) 0.3 cm circular perforating fracture of entry wound in right temporal skull bone with haemetoma of size 3 * 3 cm beneath injury no. 1 of scalp. It was over coronal suture and 7 cm away from saggital suture (right side)*

*ii) Irregular perforating fracture of left temporal bone of size 2 * 2 cm present 2.5 cm behind left coronal suture and 12 cm left to mid line corresponding to injury no. 2 in column no. 17. It was surrounded by blood and blood clots.*

On examination of the brain we found the following injuries:

i) Meninges and dura shows circular opening corresponding to injury no. 1 of column no. 17 and irregular tear corresponding to injury no. 2, in right and left imporal region of meninges respectively. Red colour contisued laceration of brain from right temporal lobe to left temporl lobe of brain perforating intervening structure of brain, making 5 track corresponding to injury no. 1 in column no. 17 and injury no. 2 in column no. 17, clotted blood found in the course of track.

On examination of internal chest we found the following injuries:

i) 0.8 x 0.8 cm firearm entry wound in left 7 deg inter costal space below left 7th rib beneath injury no. 3 of column no. 17.

ii) 0.8 x 0.8 cm firarm exit wound present 6 cm left to mid line and 123 cm above left heel corresponding to injury no. 5 as column no. 17 on left side of back of chest.

iii) Left lower pleura was teared corresponding to injury no. 3 and 5 of column no. 17 and was through and through, trachea was conjusted, right lung was pale. Left side of chest cavity contain around 800 ml of blood. Perforating injury of base of

lower lobe of left lung through and through corresponding to injury no. 3 and 5 of column no. 5 17 respectively. Blood and blood clots found in track about 10 CC of blood found in pericardial sac with perforating injury of lower part of pericardiam through and through corresponding to injury no. 3 and 5 of column no. 17 respectively. Endomyocardiam, myocardiam heart valves were normal and coronaries were patent.

We examined abdominal cavity and found about 100 CC of blood in peritoneal cavity. Performation was present in left diaphragm surrounded by blood and blood clots. Oral cavity teeth and tongue were normal. Esophagus was normal.

On examination of stomach we found upper end of stomach was perforated through and through corresponding to injury no. 3 and 5 of column no. 17. Red colour contusion was present in surrounding of upper end of stomach wall. Stomach contained blood and blood clots. No abnormal smell was present. Stomach contained semi digested food. Feaces and flatus found in intestine. On examination of liver, upper part was perforated through and through and surrounding areas showed red colour contusion corresponding to injury no. 3 and 5 of column no. 17. Blood and blood clots found at side of injury. Spleen and kidney were pale. Bladder was empty."

12. PW-34-Dr. Dharmesh Somabhai Patel deposed in the Court that a team of five doctors conducted postmortem over the dead body of Sohrabuddin Shaikh. He found several bullet injuries on different parts of the body. The cause of the death was shock and hemorrhage due to injuries sustained by the victim. He stated in the Court that no burn marks or smoke deposits were found, the fire-arm injuries which would ordinarily be present if a person is fired at close range. He further noted that no cadaveric spasm was observed by him while conducting the postmortem examination over the dead body of Sohrabuddin Shaikh, which generally may occur when the death is associated with extreme physical or emotional stress such as fear. These findings clearly rule out any possibility of fake encounter of Sohrabuddin Shaikh.

13. PW-15 Nathubha Jadeja and PW-31 Bhailalbhai Rathod who

are said to have witnessed the incident at Vishala Circle did not support the prosecution case and their cross-examination by the prosecution did not elicit any statement from them which could be utilized to render a finding on the complicity of the accused persons. The trial Judge held that the prosecution failed to establish that the seized fire-arms were used in the encounter for firing at Sohrabuddin Shaikh. The cartridges seized from the accused persons were not examined by the ballistic expert and there was no evidence to connect those cartridges with the service pistol and revolver collected by Mr. G. B. Padheria who was the Deputy Superintendent of Police with the Reserved Police, Udaipur. PW-43 and PW-44 who are the Panch witnesses connected with Sohrabuddin Shaikh's postmortem etc. were declared hostile. They stated in the Court that they were asked to sign the *Panchanama*. The trial Judge further took note of the injuries suffered by the accused no. 25 which was said to be the self-inflicted injury but the medical evidence tendered by Dr. Pinalben Bhojak did not support that the injury was self-inflicted.

14. PW-207 is a co-accused and jail-inmate of Tulsiram Prajapati who was involved in Hamid Lala murder case and Popular Builder firing case. He stated in the Court that Sohrabuddin Shaikh was abducted on the information provided by him to Vanzara. After abduction, they were kept in the farmhouse at Ahmedabad and he heard sound of firing. He was detained at the farmhouse 2-3 days and then handed over to Rajasthan police. PW-207 is not an eye witness to the occurrence. He did not give any particulars of the Farmhouse or any material information and made a parrot-like statement in the Court. His testimony is full of omissions and contradictions. In view of his criminal antecedents and implication

in Hamid Lala murder and Popular Builder firing case, it was contended that he had a motive to implicate the police. Moreover, the story of firing at the Farmhouse as narrated by him is contrary to the prosecution story that Sohrabuddin Shaikh and Kausar Bi both were taken out from Disha Farmhouse and killed at different places. Contrary to the prosecution case, PW-207 Mohd. Azam Khan who is projected as an important witness stated in the Court that Tulsiram Prajapati was in the adjoining room when he heard the sound of firing. He was informed by Tulsiram that the dead bodies of Sohrabuddin Shaikh and Kausar Bi were found in the Disha Farmhouse. On the contrary, this is the prosecution case that the mortal remains of Kausar Bi was found in a riverbed. It is well settled that when the foundation of the prosecution case is not proved, the entire case must fail and the accused person is entitled for discharge or acquittal.

15. PW-1, PW-15, PW-30, PW-31 and PW-60 are the main witnesses who were examined by the prosecution to establish its theory that a team from the ATS, Ahmedabad traveled to Hyderabad in a Qualis but these witnesses did not support the prosecution's case. According to the prosecution, Mr. Rajkumar Pandian who was posted as Superintendent of Police with ATS of Gujarat Police also arrived at Hyderabad by Air and took help of DIG Shri E. Radhakrishnaiah, a DIG with CRPF, Hyderabad, and requested him to make arrangements for his accommodation. He was put-up at Police Mess and to establish his stay there the prosecution produced Mess Register etc. PW-1 R. Nawal Kishor Rai was Police Head Constable with the Telangana State Police, Kondapur and working at the Police Officers' Mess. This witness deposed in the Court that his official duty included handing over the room keys to

the allottee on the instructions of the Mess Manager. He stated that there is a room service ledger maintained by the reception and the Secretary of the Police Officers' Mess used to be an officer in the rank of Superintendent. He, however, stated that his statement was not recorded by the police or CBI and he was deposing for the first time in the Court. PW-60 Radhakrishnaiah was examined as the person who had made arrangement for the stay of SP Rajkumar Pandian on 21st November 2005. He stated that Rajkumar Pandian requested him to arrange a room for his stay in the Officers mess. He made certain statements regarding mess bill, gate entry and mess register etc. at the CRPF campus. But his testimony does not help the prosecution to establish any incriminating circumstance against the accused persons or even against SP Rajkumar Pandian. On the contrary, PW-60 stated in the Court that he observed overwriting and additions in few pages in the gate register maintained at the CRPF campus. PW-60 deposed in the Court that there were interpolations in the entry gate register and the register did not contain any reference to any vehicle with a Gujarat registration. Moreover, Rajkumar Pandian who was arrayed as A2 has been discharged by the Court. PW-168 who was the supervisor at police canteen in the CRPF premises at Hyderabad denied in his cross-examination the entries in the register maintained at the residence of DIG about the entry of SP Rajkumar Pandian, Shrinivas Rao, Parmar and Shri Dhabi. He denied that he gave any statement to Dy SP. S. S. Giri on 23rd February 2010. PW-33 is a police constable of Rajasthan Police who was attached with SP Dinesh M. N. at Udaipur. He is another hostile witness whose cross-examination was sought to be relied upon by Mr. Gautam Tiwari, the learned counsel for the appellants. PW-33 denied in his

cross-examination that he picked up the police officials of Rajasthan Police and came to the ATS office at Ahmedabad or to have brought four police officers from Ahmedabad to Udaipur on 26th November 2005. He denied that he made any statement to the CBI on 20th May 2007 or that he learnt at the ATS office about an encounter killing of Sohrabuddin Shaikh.

16. P.W.15-Nathuba Jadeja and P.W.30-Gurudayal Singh Gangasahay Chaudhary were the drivers who drove the police team to Hyderabad on 21st November 2005. They came by a Qualis car bearing No.GJ-A-25-7007 which belonged to Premjibhai Kanjibhai Cham. On 26th November 2005, PW- 15-Nathuba Jadeja brought the officials of Rajasthan police and N.H.Dhabi, the respondent no.3, who was from Gujarat police, in a Maruti car at a place between Narol Circle and Visala Circle. Around 2:00 am, Bhailalbhai Koderbhai Rathod came there in another car and the police officials alighted there and staged a fake encounter killing Sohrabuddin Shaikh in cold blood. PW-11, who was the watchman and brought Qualis to the residence of PW-17, stated in the Court that he brought Qualis to the residence of PW-17 on the instructions of PW-12. The said vehicle was taken to Porbandar later on at the residence of PW-17. PW-12 who is the cousin of PW-17 stated in the Court that PW-17 owns residential properties at Porbandar and Ahmedabad. He further stated that a Qualis bearing GJ-25-A-7007 might have been purchased by PW-17. The said vehicle was in his possession between 18th to 23rd November 2005 and no one had asked the said vehicle from him. He denied in the cross-examination that PW-17 called him in the night of 18th November 2005 and said that the Qualis has been requisitioned by SP Rajkumar Pandian. He further denied that Rajkumar Pandian

called him around 8:00 p.m. on 23rd November 2005 and told him that he was sending the Qualis at Judges bungalow. He further denied that he called PW-11 and asked him to bring the Qualis from Judges bungalow police chowki. He accepted that PW-17 had acquaintance with Rajkumar Pandian since the time he was serving as Deputy Superintendent of Police at Porbandar. He denied to have made any statement before Gujarat CID police or the CBI. He further denied that the Qualis was used by Rajkumar Pandian between 18th to 23rd November 2005. PW-30 was posted as a driver at the ATS office, Ahmedabad and attached to SP Rajkumar Pandian. He did not identify any accused persons who were present in the Court on the date of his testimony. He denied that the logbook shown to him was for the Maruti Fronty and written in his handwriting. He denied that he was asked by any ATS officer to travel to another place for secret inquiry. He denied in the cross-examination that the ATS Inspector, Shri Dhabi asked him around 7:00 p.m. on 20th November 2005 to accompany him for secret operation and he started on the Qualis with Nathuba Jadeja as the driver and Ajay Parmar, Santram Sharma and Shri Dhabi. He denied having travelled from Surat to Aurangabad and reached to Hyderabad around 9:30 p.m. on 21st November 2005 via Aurangabad. He further denied that he was asked by Shri Dhabi to change the numberplate of Qualis or that Ajay Parmar and Santram Sharma brought a numberplate bearing AP-11 which was affixed to the Qualis. He further denied that SP Rajkumar Pandian met the group of police personnel including seven from Andhra Pradesh police around 5:00 p.m. on 22nd November 2005 and he started on a Tata Sumo with three Andhra Pradesh policemen. He denied every suggestion made by the Prosecutor in the cross-

examination. He also denied that his statement was recorded by Gujarat CID police on 19th January 2007 or 4th April 2007. He further denied to have made a statement before the CBI on 4th March 2010 wherein he denied to have spoken about the incident. He declined to own his video recorded statement and said that his statements were obtained from him by pressurizing and threatening him that he shall be removed from service.

17. PW-32 was working at ATS, Ahmedabad. He registered Crime No.5 of 2005 and stated that he recorded the information of Sohrabuddin Shaikh's encounter in the Station Diary and forwarded the same for investigation to M. L. Parmar who was the Deputy Superintendent of Police. He brought the Muddemal property to the FSL at Gandhinagar and obtained the acknowledgment thereof. He denied that the CBI recorded his statement at Gandhinagar. He stated that the ATS did not record his statement. He stated that he did not communicate to the Control Room the encounter of Sohrabuddin Shaikh and he had no idea about the members of the police team which participated in the encounter. The statement of PW-92 who was the owner of motorcycle bearing No.GJ-01-DM-8039 in respect to which the theft report was lodged *vide* C.R. No.757 of 2005 and the statement of PW-138 who was the owner of the scooter No.RJ-27-3M-3523 to the effect that the said motorcycle and the scooter were found stolen/missing and later on recovered does not provide any chain in the link of circumstances. Similarly, the statement of PW-123, who provided information relating to the vehicle bearing registration No.AP-12J-6364 to the effect that such registration number was not allotted to any vehicle is also not worth for examination.

18. This is the prosecution case that Sohrabuddin Shaikh had spoken to PW- 5 Dr. Prakash Bandivadekar about the gynecological problem of his wife Kausar Bi. Dr.Prakash Bandivadekar then referred him to PW- 4-Dr. Dr. Vinay Jayram Pataki who was to conduct the fallopian tube operation of Kausar Bi in the clinic at Sangli. That is how, Sohrabuddin Shaikh and Kausar Bi had planned to come to Sangli after visiting Kalimuddin at Hyderabad. All these informations were supplied by Tulsiram Prajapati to the Gujarat Police and they were made aware of the return plan of Sohrabuddin Shaikh and his wife on 22nd November 2005 for Sangli. The team of Gujarat and Rajasthan Police had left Gandhinagar on 20th November 2005. The prosecution examined PW-4 Dr.Vinay Jayaram Pataki and PW-5 Dr.Prakash Bandivadekar to establish a vital link in the chain of circumstances that Kausar Bi was to be operated in the hospital of PW-4 at Sangli and that was the purpose for which Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati were travelling in a luxury bus owned by M/s. Sangita Travels on 22nd November 2005.

19. PW-4 is a doctor who, according to the prosecution, was to perform a surgery because Kausar Bi suffered from infertility and a blockage in her fallopian tubes. He stated in his examination-in-chief that he was practicing at Atpadi, Sangli and had known PW-5 Dr.Prakash Satappa Bandivadekar who was practicing at Indore since 1992. He was in regular touch with PW-5, who contacted him in November 2005 for the surgery of Kausar Bi. He admitted in the cross-examination that he is not a Gynecologist and he did not provide the telephone number of PW-5 to the CBI. He denied the suggestion that he received any call from PW-5 about Sohrabuddin Shaikh or Kausar Bi and that was the reason he did not share the

call details of their alleged conversation with the CBI. He further admitted in the Court that his statement recorded under section 161 of Cr.P.C. was not read over to him. The testimony of PW-4 does not take the prosecution story any further except that he had discussion with the PW-5 regarding the operation of Kausar Bi. PW-5, who stated that Sohrabuddin Shaikh, his wife and mother were his patients, was examined by the CBI on the point that Sohrabuddin Shaikh, his wife and Tulsiram Prajapati were taken by him in Maruti Omni and dropped them on the highway. He has stated that Sohrabuddin Shaikh wanted to travel to Hyderabad in December 2005 and asked him to bring Maruti Omni to a petrol pump where he arrived with his younger brother, Munna, wife Kausar Bi and Tulsiram Prajapati. Sohrabuddin Shaikh had two vehicles and one of which was Maruti Omni that he left with him and Sohrabuddin Shaikh used to travel in another vehicle which was Maruti Esteem. This witness further stated about the gynecological problem of Kausar Bi and the planned visit of Sohrabuddin Shaikh from Hyderabad to Sangli for her operation. He further stated that Sohrabuddin Shaikh called him from Hyderabad and asked him to inform PW-4 that he was planning to come to Sangli from Hyderabad the next day. His statement was recorded by the Gujarat Police and in the Court of Magistrate at Kolhapur under section 164 of Cr.P.C. on 15th May 2012. He identified the photograph of Tulsiram Prajapati which was shown to him in the examination-in-chief as the photograph of a person which was shown to him by the CBI in Kalamba Jail at Kolhapur.

20. The testimony of PW-5 has been seriously challenged as laced with oblique motive. PW-5 admitted in the cross-examination that he has a formidable criminal past. He was accused in three murder

cases and convicted for life in a murder case. He was accused of attempting to commit murder and a case of police firing. All the crimes were registered at Chandgad in the district of Kolhapur. His family had filed three criminal cases against the persons who were accused of killing his brother. He further admitted in the Court that three Police Officers were made accused in the cross cases but they were subsequently acquitted by the Court. His brother Ramchandra Bandivadekar was a lawyer who had filed a cross case against the police officers. In the said incident, the police fired in self-defence and caused death of his brother. Shiva Gavade and Raja Gavare were accused with him in a murder case. PW-5 was accused in two other murder cases with his brother Adv. Ramchandra Bandivadekar and Pundlik Bandivadekar. He was also an accused along with Raja Gaware and Shivaji Gavade in the police firing case. He further stated that the police implicated Sohrabuddin Shaikh and Tulsiram Prajapati in a murder case in 2005 and police referred them as Sohrabuddin Gang. It was Bandivadekar Gang and known as rival gang since 1996. He was in jail for seven years in connection to the criminal cases. He stated that Sohrabuddin Shaikh called him from Hyderabad in 2005 and he gave his mobile number to the Gujarat police but did not provide his number to the CBI or stated before the Magistrate at Kolhapur. He denied any telephonic conversation or that Nayamuddin ever met him at Indore after December 2005. Pertinently, he stated in the Court that he made an incorrect statement before the Magistrate at Kolhapur. He stated that he gave his statement before the Magistrate when he was produced by the CBI from jail on the basis of his previous statement made before the Gujarat CID police and as per the instructions of the CBI. He admitted long standing

village political rivalry since 1996. He further admitted that there were numerous cases registered against Sohrabuddin Shaikh and he was a wanted accused person in many cases. He denied any friendship with Tulsiram Prajapati or that he ever resided with Sohrabuddin Shaikh at Indore. He admitted in the cross-examination that he had no documentary proof to show that Sohrabuddin Shaikh and his family were his patients. Quite clearly, the prosecution miserably failed in its attempt to establish that Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati had gone to Hyderabad and were travelling to Sangli for the treatment of Kausar Bi in a luxury bus of M/s. Sangita Travels.

21. Tulsiram Prajapati was traced out around 10.00 p.m. near Ambaji. He was picked up by the Special Police escort team comprising of S.I. Narayan Singh, Yudhvir Singh, Kartar Singh and constable Dalpat Singh on 26th November 2005 around 3:00 pm from the house of Chandan Kumar Jha. He was staying there in the alias name Sameer. He was arrested in Crime Register No.214 of 2004 at Hathipole Police Station which was registered for the murder of Hamid Lala. He was lodged at Udaipur Central Jail and the Gujarat Police used to take him on production warrant to Ahmedabad in Popular Builder firing case (Crime Register No.1124 of 2004). The specially formed police team boarded Ahmedabad–Udaipur Train No.9944 around 11.15 p.m. on 26th December 2006 for bringing Tulsiram Prajapati to Udaipur. However, he attempted to escape by throwing chilli powder in the eyes of escorting parties in the early hours of 27th December, 2006 somewhere between Raigad and Shamalaji Railway Stations, when the train was moving at a very slow speed because some repair and maintenance work were going on.

22. PW-67 was the part of police team which arrested Tulsiram Prajapati at Bhilwara. He stated in the Court that he received an information on 29th November 2005 from Sudhir Joshi that Tulsiram Prajapati who was suspect in Hamid Lala murder case was hiding at Bhilwara. The police team was led by the informer to the residence of Chandan and Komal Jha where Tulsiram Prajapati was hiding in fake name of Sameer. He further stated that the arrest of Tulsiram Prajapati was formally recorded in Crime No.214 of 2004. He gave his statement under section 164 of Cr.P.C. But he stated in the Court that his statement under section 164 of Cr.P.C. was recorded under intimidation and threat from Kandaswami and Amitabh Thakur at the CBI office on 1st July 2011. Under such pressure, he made a statement on 4th July 2011 that Tulsiram Prajapati was arrested on 26th November 2005 and not on 29th November 2005 and, that, he had attended to D. G. Vanjara and certain politicians at Jagmandir. PW-81 and PW-82 were part of the escort team which brought Tulsiram Prajapati from Udaipur to Ahmedabad. PW-81 denied that he made any voluntary statement before the CBI on different dates or before the Magistrate at Navi Mumbai. PW-81 denied that Abdul Rehman had informed him about any statement made by Tulsiram Prajapati that he was agitated on account of encounter of Sohrabuddin Shaikh and he intended to seek revenge. He denied that ASI Narayan Singh informed on 25th December 2006 that he was instructed by SP Dinesh M. N. to escort Tulsiram Prajapati to Ahmedabad. PW-82 denied in his cross-examination that he was escorting the under-trial prisoners Tulsiram Prajapati and Mohammed Azam for their production before the Metropolitan Magistrate, Court No.13, Ahmedabad on 27th November 2006. He further stated that he had

made certain statements at the instance of the CBI which showed him entries in the general diary maintained at the Reserve Police Line, Udaipur. He further denied that the prisoners were taken from Udaipur on 27th November 2006 and reached Ahmedabad on 28th November 2006 and returned to Udaipur on 29th November 2006.

23. PW-120 Dr. Rakesh M. Patel stated in the Court that he observed the following injuries on the dead body of Tulsiram Prajapati: -

> *"5. The external injuries found on the body were -*
>
> *1. A circle wound (1x1 cm) on left chest with inverted margin and dried blood of dark red colour, it was located at 17½ inches below scalp and 2 inches found left neeple and 2 inches lateral to median plane.*
> *2. A vertical ovel wound (1x0.75 cm) interior part with inverted skin margin with dried blood of dark red colour in it. It was located at 11 inches from scalp and 4 inches from shoulder tip and 8 inches from left L-blow joint.*
> *3. A circle wound (1x1 cm) on left loin with inverted skin margin with dried blood in it. It was located at 24 inches from scalp and 7 inches from midline and 7 inches from umbilicus.*
> *4. An irregular tranverse wound (3.5x1.4 cm) with everted skin margin with muscle tendun protruded and dried red blood over it on loin posterior part. It was located at 25 inches from scalp and ½ inch left from midline of vertebra and 42 inches from heel.*
> *5. A swelling (2x1x0.5 cm) on left side on posterior part of lower chest, 19 inches from scalp and 1 inches from midline.*
> *6. A swelling of right eye with blackness (hematoma).*
>
> *There was compound fracture humerus neck on palpation. All these injuries were antemortem.*
>
> *6. The internal injuries which were found during examination are as under -*
>
> *1. There was small hematoma on occipital region of scalp.*
> *2. There was tranver liner fracture of occipital region of scalp (7cm).*
> *3. There was extradural and subdural minimal hematoma on occipital region of brain with clotted blood.*
>
> *No other abnormalities found in meninges and brain tissue.*
>
> *a. There was no fracture on ribs pluera was normal a.*
>
> *b. Larynx and trachea – normal*

c. Right lung - normal and collapse due to plenty of blood in right plural cavity.
d. Left lung normal and collapse due to plenty of blood in right plural cavity.
e. There was a tear on pericardium on left ventricle area with blood in it.
f. Heart A vertical slit like hole (1x0.5) on left ventricle penetrating septum and left atrium (1x0.5) cm with shifting of heart from its original position.
g. Large vessels - Large vessels like Aorta and inferior and superior venacava are empty due to profuse bleeding inside and out side body.

24. PW-77 who was Deputy Superintendent of Police at Ujjain interrogated Tulsiram Prajapati at Udaipur after his arrest. He gave the criminal antecedents of Sohrabuddin Shaikh and Tulsiram Prajapati and stated in the Court that Tulsiram Prajapati stated before him that he had fired some person at Chandgad at the instance of PW-5. The story of Tulsiram Prajapati writing an application to NHRC is not supported by PW-96 who was a jail-inmate of Tulsiram Prajapati. He admitted in his cross-examination that he had not written or despatched any application to any authority about Tulsiram Prajapati. PW-121 also denied drafting application under the dictation of PW-96. He further denied that the CBI ever showed him another application in this behalf or he identified his handwriting. He also has criminal antecedents. The prosecution witnesses did not support its case that Tulsiram Prajapati was killed in cold blood and projected the same as a police encounter. No prosecution witness came forward and deposed in the Court that he saw the murder of Tulsiram Prajapati by the Gujarat and Rajasthan policemen. There is no answer by the prosecution to the fire-arm injuries suffered by Ashishkumar Pandya to his upper left arm. There is no reason to disbelieve the defence story that on 28th December 2006 at around 4:30 am Aashish Arunkumar Pandya, PC Yuveersingh, ASI Narayansingh

and PC Kartarsingh were searching for Tulsiram Prajapati. On patrolling, they saw three persons in a Matador vehicle one of whom was Tulsiram Prajapati. The patrolling party tried to stop them but Tulsiram Prajapati fired a bullet which hit on the left side of the mudguard of the police jeep. These persons started running away and did not surrender. Tulsiram Prajapati again fired a shot which hit Aashish Arunkumar Pandya and in return police party fired shots which hit him and he was declared dead at Simji Hospital. The prosecution failed to adduce any evidence to establish a conspiracy between respondent nos.2 to 23 to eliminate Tulsiram Prajapati when he was being taken back to Udaipur after his production in a Court at Ahmedabad.

25. According to the prosecution, Kausar Bi was burnt to death on 27th November 2005 and her body was disposed of on 28th November 2005 in Narmada river near village Ilol in Gujarat. Tulsiram Prajapati was also shown as shot by the police at Ambaji in Gujarat in the morning of 28th December 2006. The prosecution set up a case that Kausar Bi was shifted from Disha Farmhouse on 26th November 2005 and murdered. They had decided to put the dead body on fire and collected fire wood and arranged a Tata-407 vehicle bearing No.GJ-2V-5287 for carrying the fire wood but the vehicle broke down and they arranged another Tata-407 vehicle bearing no.GJ-A-25-7007 and proceeded to Ilol but the second vehicle also got stuck in the river bed of Narmada at village Ilol. The respondent no.4-Balkrishna Rajendraprasad Chaubey, the respondent no.10-Naresh Vishubhai Chauhan and the respondent no.11-Vijay Kumar Arjunbhai Rathod carried the fire wood and put the dead body on pyre. The burnt remains of Kausar Bi were collected and disposed of in Narmada river. Most of the witnesses

produced by the prosecution in its attempt to establish that Kausar Bi was burnt to death did not support its case. None of the prosecution witnesses out of those seventy seven witnesses on whom Mr. Gautam Tiwari, the learned counsel for the appellants relied on in course of his arguments are eye witness. Any part of the testimony of these witnesses does not establish any circumstance which can be relied upon by the prosecution to establish an unbroken chain of circumstances leading to the guilt of the respondent nos.2 to 23.

26. Except Rajendrakumar Laxmandas Jirawala, the other twenty accused persons were the public servants. The prosecution failed to establish its story of fake encounter. The defence set up by those twenty accused persons was a probable story and they shall deem to have been discharging their official duty in course of which the police fired at Sohrabuddin Shaikh and Tulsiram Prajapati. The trial Judge referred to the decision in *"D.T. Virupakshappa"*[6] and held that the accused persons except Rajendrakumar Laxmandas Jirawala were acting or purporting to act in discharge of their official duty and, therefore, entitled to the protection under section 197 of Cr.PC. The trial Judge held that the Magistrate could not have taken cognizance of the offence without previous sanction of the State government and they cannot be convicted for that reason also. The trial Judge further held that there was a reasonable nexus between the alleged offending act and discharge of official duty by the respondents who are public servants. The trial Judge discussed this aspect of the matter and the relevant findings on this issue are reproduced as under: -

> *"245. It is not in dispute that the 21 accused, except accused*

6 *D. T. Virupakshappa v. C. Subhash: (2015) 12 SCC 231.*

no. 19 Shri. Jeerawala, are public servants not removable from their office save by or with the sanction of the Government. Procedure for prosecuting a public servant for offences under Indian Penal Code, is specifically provided for under Section 197 of Code of Criminal Procedure. Section 197(1) specifically provides that "When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

246. In as much as the word 'shall' has been used in Section 197 of the Code of Criminal Procedure, it goes without saying that sanction from the Competent Authority of the public servant is a sinequanon and a condition precedent for prosecuting a public servant accordingly nature. Sanction in this regard is and absolutely mandatory in It hardly needs to be mentioned that an official act or official duty means an act or duty done by an officer in his official capacity. The official act can be performed in the discharge of official duty as well as in dereliction of it. Therefore, the court is supposed to focus on the 'act' of the public servant. If the 'act' is related to the performance of the official duties of the accused public servant, then sanction for his prosecution is necessary. For getting protection of Section 197 of the Code of Criminal Procedure, the offence alleged to have been committed by the accused public servant must have something to do with the discharge of official duty. In other words, if allegations against the accused public servant sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty, then bar of Section 197 of the Code of Criminal Procedure applies at the threshold itself. If offence is committed within the scope of official duty, then sanction is must. Similarly, if the offence is within the scope of the official duty but in excess of it, then also the protection of sanction under Section 197 of the Code of Criminal Procedure can be claimed by a public servant. It is well settled that if the act is done under the colour of office, in purported exercise of official duty, then also for prosecuting the public servant, sanction is must. If the act has been found to have been committed by the public servant in discharge of his duty, then such act is to be given liberal and wide construction, so far as its official

nature is concerned. In the matter of D.T. Virupakshappa vs. C.Subhash 22 , the Honourable Supreme Court (2015) 12 SCC 231 has held thus in paragraph 32 of its judgment :

> *"32 The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood. (Emphasis supplied) In our view, the above guidelines squarely apply in the case of the appellant herein. Going by the factual matrix, it is evident that the whole allegation is on police excess in connection with the investigation of a criminal case. The said offensive conduct is reasonably connected with the performance of the official duty of the appellant. Therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government. The High Court missed this crucial point in the impugned order."*

249. In the case in hand also, the twenty one accused were acting in discharge of his official duty and the alleged offence was committed while acting or purporting to act in discharge of their official duty by the twenty one accused. The cognizance of the offence alleged against him cannot be taken except with the previous sanction of the Appropriate Authority.

27. Mr. Gautam Tiwari, the learned counsel for the appellants contended that the testimony of a hostile witness cannot be rejected altogether and the prosecution can rely on a part of the

evidence tendered by such a witness. The vexed question as to what is the worth of testimony of a witness, who did not support the case of the party calling him, was settled by a Full Bench of Calcutta in "*Praphulla Kumar Sarkar*"[7] wherein Rankin, C.J. expressed his opinion as under:

> *"In my opinion, the fact that a witness is dealt with under section 154 of the Evidence Act, even when under that section he is "cross-examined" to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is, moreover, no rule of law that if a jury thinks that a witness has been discredited on one point they may not give credit to him on another. The rule of law, is that it is for the jury to say."*

28. The testimony of a hostile witness is not rejected in entirety and a portion of evidence of a hostile witness which is consistent with the case of the prosecution or to the extent it probabilizes the defence story can be relied upon by the parties. Under section 154 of the Evidence Act, the witness who does not support the party calling him can be cross-examined with the leave of the Court. It may so happen that the witness on account of lapse of time, loss of memory or forgetfulness was not consistent or omitted or completely resiled from his previous statement. The witness, however, in his cross-examination may recollect his previous statement and admit to have made such statement before the police. But the difficulty arises in such cases where the witness denies everything and takes a firm stand that he never made any statement before the police in support of the prosecution case. The Evidence Act does not provide any solution and rightly so, because the statement of a witness before the police in course of the investigation recorded either under section 161 or section 164 of Cr. P.C. is not usable by the prosecution. There is no way to find

7 *Praphulla Kumar Sarkar v. Emperor: 1931 SCC OnLine Cal. 7.*

out whether the witness was set up by the prosecution or his statement as shown to have been recorded in course of the investigation was ever given by him. This is also not possible to ascertain whether such a witness was making a truthful statement in the Court or he was lying. However, this shall not be a natural consequence in such a case that the evidence of a witness who has been characterized as a hostile witness is completely effaced. In *"Sat Paul Singh"*[8], the Hon'ble Supreme Court observed that in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court his evidence is not washed out of the record and a portion of his testimony can still be believed. In "*Anil Rai"*[9], the Hon'ble Supreme Court held that the evidence of hostile evidence is not to be rejected in toto and the portion of his testimony which is found to be credible and corroborated by other evidence can be relied upon. The purpose of cross-examination of its own witnesses by the prosecution was elaborated upon in "*Bhajju"*[10]. The Hon'ble Supreme Court held that it is admissible to use the examination-in-chief and cross-examination of a witness by the prosecutor to the extent such evidence supports the prosecution case. In "*Bhajju"*, the Hon'ble the Supreme Court held as under:

> *"35. ….. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-*

8 *Sat Paul Singh v. Delhi Administration: (1976) 1 SCC 727.*
9 *Anil Rai v. State of Bihar: (2001) 7 SCC 318.*
10 *Bhajju @ Karan Singh v. State of Madhya Pradesh: (2012) 4 SCC 327.*

examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution."

29. The statement of PW-10, PW-15, PW-30, PW-31 and PW-96 could have been used by the prosecution to a limited extent provided these witnesses had stuck to their previous statements made under section 164 of Cr.P.C. This is well settled that the statements of a witness recorded under section 164 of Cr.P.C. cannot be treated as substantive evidence. The statement of a witness recorded in the course of investigation under section 161 or under section 164 of Cr.P.C. can be used by the defence to contradict a witness who makes a different statement while deposing in the Court.

30. This is no ground to draw an inference that the trial was not being conducted properly because 92 prosecution witnesses turned hostile. These witnesses were cross-examined by the prosecution and they flatly denied to have made any statement before the police in support of the prosecution case. This is also not a significant fact that the statement of a few witnesses such as PW-96, PW-205 and PW-207 recorded under section 164 of Cr.P.C. were not shown to them in their cross-examination. Even assuming for a moment that these witnesses would have admitted their statements under section 164 of Cr.P.C., they were liable to be held unreliable witness in the face of the contradictory statements made by them in the Court. The orders dated 21st December 2018 passed in the applications made under section 311 of Cr.P.C. were not challenged. As the story in this case unfolds, it is difficult to infer that such applications were bona-fide and, moreover, those applications were opposed by the prosecution.

31. The prosecution failed to establish that Sohrabuddin Shaikh and Kausar Bi were abducted by the Gujarat and Rajasthan police in the early hours of 23rd November 2005 from a luxury bus owned by M/s. Sangita Travels from a place near Jahirabad. Tulsiram Prajapati, who according to the prosecution, was allowed to go to Bhilwara and later on taken into custody, did not make any statement in the Court when he was produced in the Court. The burden under section 106 of the Evidence Act shall not shift on the respondent-accused persons to offer an explanation as to how and when Sohrabuddin Shaikh and Kausar Bi parted company with them. The reliance placed by Mr. Tiwari, the learned Counsel for the appellant on "*Balveer Singh*"[11]; "*Mir Mohammed Omar*"[12]; "*Sucha Singh*"[13] and "*Chaman*"[14] is clearly misplaced. In "*Shambhu Nath Mehra*"[15], the Hon'ble Supreme Court held that the burden of proof in a criminal case is on the prosecution and it is not relieved of that duty by virtue of section 106 of the Evidence Act. The Hon'ble Supreme Court held as under:

> *"11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on*

11 *Balveer Singh v. State of Uttarakhand: (2023) 16 SCC 575.*
12 *State of West Bengal v. Mir Mohammed Omar & Ors.: (2000) 8 SCC 382.*
13 *Sucha Singh v. State of Punjab: (2001) 4 SCC 375.*
14 *Chaman & Anr. v. State of Uttarakhand: (2016) 12 SCC 76.*
15 *Shambhu Nath Mehra v. State of Ajmer: AIR 1956 SC 404.*

> *an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. R. [Attygalle v. R., 1936 SCC OnLine PC 20] and Seneviratne v. R. [Seneviratne v. R., 1936 SCC OnLine PC 57]".*

32. Tulsiram Prajapati was accompanied by another inmate, namely, Mohd. Azam. Whenever he was taken to Ahmedabad on production warrant he expressed his apprehension to him that he may be killed in fake encounter. He also informed Md. Azam that Sohrabuddin Shaikh and Kausar Bi were killed in a fake encounter. The prosecution produced a few witnesses who spoke before the police in the course of the investigation that Tulsiram Prajapati had disclosed to them that a conspiracy to kill Sohrabuddin Shaikh was hatched and he also may be killed in a fake encounter case because he was only eye witness. Tulsiram Prajapati had expressed the apprehension of fake encounter by the police to kill him and made written representations to the National Human Rights Commission, District Collector at Udaipur and the Ahmedabad Court. According to Mr.Tiwari, the learned Counsel for the appellant, the statements made by PW-7, PW-9 and PW-11 should be treated as *res gestae* and taken into consideration by the trial court in support of the prosecution case. The doctrine of *res gestae* comes in to aid to the prosecution to tie the loose ends in the case. Illustration (a) in section 6 of the Evidence Act engrafts the principles of *res gestae. Res gestae* evidence is admitted in evidence as an exception to the rule of hearsay because it is thought that a statement made naturally and spontaneously leaving no room for misunderstanding and manipulation, would be true. In *"Kamal Ahmed Mohammed Vakil Ansari"*[16], the Hon'ble Supreme Court held that the test to determine admissibility under the rule of "*res gestae"* is embodied

16 *State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari & Ors.: (2013) 12 SCC 17.*

in words “are so connected with a fact in issue as to form a part of the same transaction”. Mr. Tiwari submitted that the statements made by Tulsiram Prajapati as to the death of Sohrabuddin Shaikh and Kausar Bi to a few witnesses shall fall within the purview of section 6 of the Evidence Act. Those witnesses, however, did not support the prosecution case that Tulsiram Prajapati had made any statement before them that Sohrabuddin Shaikh and Kausar Bi were killed in a fake encounter. These witnesses were examined in the Court about six years after the occurrence. This is not the case of prosecution that these witnesses made statements about the killing of Sohrabuddin Shaikh and Kausar Bi immediately after the occurrence. The statements, if any, made by these witnesses to Tulsiram Prajapati were not contemporaneously arising out of the occurrence.

33. The prosecution failed to establish motive for staging a fake encounter and this is a circumstance which shall weigh in favour of the respondents. The Investigating Officer stated in the Court that there was no material to show that any of the respondents received political or monetary benefit. He further admitted that the Police Officers facing trial were acting under the instructions of their superiors and he had requested for the discharge of respondent nos.10, 11 and 14 because he did not find any material against them. The learned counsel for the appellants clearly misunderstood and misinterpreted the scope of sections 6 and 32 of the Evidence Act. The statements allegedly made by Tulsiram Prajapati to PW-72, PW-96, PW-139, PW-174, PW-205, PW-207 and PW-208 that he was providing information to the Gujarat and Rajasthan Police to trace Sohrabuddin Shaikh and he feared that he would be eliminated in a fake encounter cannot be treated as a dying

declaration. Mr. Gautam Tiwari, the learned counsel for the appellants contended that the time gap alone is not sufficient to make statements made by Tulsiram Prajapati as irrelevant. However, the prosecution witnesses did not confirm the story of Tulsiram Prajapati making such statements before them. Such statements even if made by Tulsiram Prajapati shall not fall under the purview of section 32 of the Evidence Act as it does not relate to the cause of death or exhibits circumstances leading to his death. A mere statement that he would be killed in a fake encounter does not exhibit any circumstance leading to the death of Tulsiram Prajapati.

34. This is not a rule of law or rule of procedure that the testimony of a witness having criminal antecedent should be disbelieved. The Court, however, should be cautious to scrutinize the testimony of a witness like PW-5, PW-75, PW-76, PW-205 and PW-207 who have formidable criminal past. Sohrabuddin Shaikh was a dreaded criminal wanted by Gujarat and Rajasthan Police in several cases. He was projected as a master mind to eliminate Hamid Lala in a fight of primacy. The appellant Rubabuddin Shaikh had no personal knowledge of the events. He did not inform the police about the presence of Tulsiram Prajapati with Sohrabuddin Shaikh and Kausar Bi. Even after filing of the charge-sheet by the Gujarat CID Police, he did not reveal that the third person with Sohrabuddin Shaikh and Kausar Bi was Tulsiram Prajapati. In cross-examination, he admitted that he made a statement before the Inquiry Committee that Kalimuddin was the third person with Sohrabuddin Shaikh and Kausar Bi. The appellant-Nayamuddin Shaikh stated in the Court that Tulsiram Prajapati was not with Sohrabuddin Shaikh and Kausar Bi in the Maruti van in which

they proceeded from Indore to Hyderabad. He further stated that Tulsiram Prajapati was not with them when Sohrabuddin Shaikh and Kausar Bi started from Hyderabad to Sangli. He has also admitted in his cross-examination that Sohrabuddin Shaikh and Kausar Bi had no plans to visit Sangli when they had left from Indore. He admitted that his statement made in the Court was based on the information given to him by Kalimuddin, who was not examined in the trial.

35. The case of the prosecution is based on circumstantial evidence and there are several broken links in the chain of circumstances. In a case based on circumstantial evidence, the law requires that the circumstances relied upon by the prosecution must be fully established and form a complete chain of circumstances which point out only to the guilt of the accused person and rule out any other hypothesis consistent with the innocence of the accused persons. In *"Hanumant"*[17], the Hon'ble Supreme Court held as under :-

> *"**12.** It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ext. P-3A or outside and we are constrained to observe that the courts below have just fallen into the error against which warning was uttered by Baron Alderson in the abovementioned case."*

36. Tulsiram Prajapati was an accused and the alleged

17 *Hanumant v. State of M. P.: (1952) 2 SCC 71.*

information supplied by him to the prosecution witnesses does not establish the conspiracy theory. The story of three persons travelling together in a luxury bus and one of whom a "burka-clad lady" does not establish that Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati were travelling together in the night of 22nd January 2005. No prosecution witness came forward to say that he knew Sohrabuddin Shaikh or Kausar Bi or Tulsiram Prajapati and he had seen them travelling together from Hyderabad to Sangli. Similarly, no witness claimed or identified Narainsinh Harisinh Dabhi, Balkrishna Rajendraprasad Chaubey and Ajaykumar Bhagwan Das Parmar in the dock and said that they were the persons who had abducted Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati in the night of 22nd January 2005 near Zahirabad. Simply put, the prosecution did not produce a single witness who deposed in the Court that they had prior acquaintances with the respondent nos.2 to 23 and they identified them in the Court as the accused persons involved in the killing of Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati.

37. The offence of criminal conspiracy emanates from an agreement to commit an offence. However, mere intention of two or more persons to commit a crime does not constitute a criminal conspiracy. It is the agreement of two or more persons to do an unlawful act by unlawful means and the Court must inquire whether two persons were independently pursuing the same act or they came together to pursue the same unlawful object. It is also necessary to see whether some kind of physical manifestation of the agreement is established. Some evidence regarding mere transmission of thought or sharing of a desire to commit an unlawful act is not sufficient. It is stated in the *"Halsbury Laws of*

England" [4th edition, Vol. 11, paragraph no.58] that the essence of the offence of conspiracy is the fact of combination by agreement; the agreement may be express or implied, or in part express or in part implied. In *"Saju"*[18], the Hon'ble Supreme Court held that the onus lies on the prosecution to prove affirmatively that the accused was directly and personally connected with the acts or omissions in commission of a crime. Section 10 of the Evidence Act provides that the evidence of action or statement made by one of the accused persons can be used against the other if there is a reasonable ground to believe that two or more persons had conspired for committing an offence. In *"Sardar Shardul Singh Caveeshar"*[19], the Hon'ble Supreme Court held that there should be a prima-facie evidence that a person was a party to the conspiracy before his acts can be used against the co-conspirator. In *"Mirza Akbar"*[20], the Privy Council rendered its opinion that section 10 of the Evidence Act must be construed in accordance with the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The evidence receivable under section 10 must be in reference to the common intention and the expressions used in section 10 are not capable of being widely construed. In *"Param Hans Yadav"*[21], the Hon'ble Supreme Court held that it is difficult to support the charge of conspiracy with direct evidence but a clear link has to be established and the chain of circumstances must be shown complete, if the prosecution relies upon circumstantial evidence. We do not see any ground to hold that the prosecution

18 *Saju v. State of Kerala: (2001) 1 SCC 378.*
19 *Sardar Shardul Singh Caveeshar v. State of Maharashtra: (1963) SCC OnLine SC 26.*
20 *Mirza Akbar v. The King Emperor: 1940 SCC OnLine PC 27.*
21 *Param Hans Yadav & Anr. v. State of Bihar & Ors.: (1987) 2 SCC 197.*

has established by circumstantial evidence the complicity of the respondent nos.2 to 23 in the conspiracy to murder Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati by projecting a case of fake encounter.

38. The discharge of 16 accused persons against whom the prosecution relied on the same set of evidence cannot be overlooked. That decision of the trial Court has now become final. The very foundation of the prosecution case is demolished and the conspiracy theory must be held not proved. Mr. Amit Desai, the learned senior counsel submitted that from the very beginning the prosecution theory aligned with a particular narrative with strong political overtones and attempted to foist liability on a particular political person and a select group of police officers. The investigation was done by a different Investigating Agency which is said to be highly skilled and equipped with scientific investigation and the trial was conducted in a State where the ruling party was different.

39. At no point of time it was stated before the trial Court that it was an unfair trial. The investigation in the matter was transferred to the CBI presumably to ensure fair investigation. A senior Public Prosecutor was appointed to ensure that the prosecution case does not falter and he rendered his fullest duty. The trial of this case was transferred from the State of Gujarat under the direction of the Hon'ble Supreme Court in Transfer Petition (Criminal) No. 44 of 2011 titled *"CBI v. Dahyaji Gobarji Vanzara & Ors."*. The Hon'ble Supreme Court observed that the decision to relocate the proceedings is a prophylactic measure, specifically intended to insulate the trial court from extraneous pressures and undue stress that may arise from the high-profile nature of the case. The Court

further observed that such a transfer is essential to uphold the sanctity of the judicial process and to dispel any potential misgivings or perceptions of bias in the public mind, thereby ensuring that the principles of a fair and impartial trial are not only followed but are seen to be followed.

40. The foundation of the prosecution story is not established at all inasmuch as the prosecution failed to establish the abduction of Sohrabuddin Shaikh, Kausar Bi and Tulsiram Prajapati, their illegal detention at Disha Farmhouse and Arham Farmhouse and the alleged fake encounter. There is no evidence to connect the weapon which is said to be used in the crime with the bullet recovered from the thigh of Sohrabuddin Shaikh. No record was produced to establish that the said revolver was issued to a particular accused person. The cartridge recovered from the thigh of Sohrabuddin Shaikh is said to have been fired from one of the five revolvers. The Panch witnesses stated in the Court that they put their signatures as asked by the police officer. There is no direct evidence of encounter of Sohrabuddin Shaikh or Kausar Bi or Tulsiram Prajapati. There is also no evidence to establish the presence of the accused persons at the place of occurrence and at the time of occurrence. There is no evidence that the respondent nos. 2 to 23 arrived at Hyderabad and stayed in the Officer's Mess with Rajkumar Pandian. The register in the Mess which could have indicated bookings for the said accused was found tampered and Rajkumar Pandian has been discharged from the criminal liability. At best, it could be said on the basis of the testimony of the bus passengers and two drivers that the victims had gone to or coming from Hyderabad. The learned counsel for the appellants relied on the testimony of 77 witnesses out of whom 39 persons are hostile

witness. The appellants themselves are not the eye witnesses and their testimony does not travel beyond hear-say evidence. Eight prosecution witnesses spoke about the apprehension expressed by Tulsimram Prajapati that Sohrabuddin Shaikh might be killed but three persons out of them did not support the prosecution version. The remaining 38 prosecution witnesses comprised of the appellants, their friends, two doctors and panchas who do not provide a foundation for the prosecution to establish the complicity of the respondents in the crime. The hostile witnesses were put to intense cross-examination but nothing material could be elicited by the prosecution from them to support its case.

41. A judgment of acquittal cannot be interfered in a casual or cavalier manner and it is not permissible in law to overturn the judgment only on the ground that another view is possible. The High Court must take a holistic view and not a myopic view of re-appreciation of the evidence and render its judgment keeping in mind the cardinal principle of criminal jurisprudence that there is presumption of innocence in favor of the accused. Such presumption continues at all stages of the trial and gets concretized when the trial ends in the acquittal. The judgment of acquittal strengthens the presumption of innocence of the accused and a higher threshold is required to rebut the same in an appeal against acquittal. In *"D. Stephens"*[22], the Hon'ble Supreme Court emphasized that the power of the Court against an order of acquittal should be exercised only in exceptional cases where the interest of public justice requires interference for the correction of manifest illegality, or to prevent gross miscarriage of justice. In

22. *D. Stephens v. Nosibolla : 1951 SCC 184*

"*Mallappa*"[23], the Hon'ble Supreme Court observed that the first thing that has to be seen in an appeal against acquittal is whether the trial Court thoroughly appreciated the evidence on record and gave its due consideration to all material pieces of the evidence. Secondly, it should be examined whether the findings of the trial Court are illegal or affected by such error of law or fact that requires reversal of the judgment. But the judgment of acquittal cannot be reversed on a mere difference of opinion and where it is found that the view taken by the trial Court is a fairly possible view. The judgment of acquittal cannot be set aside if the appreciation of evidence by the trial Court does not suffer from any flaw and the view taken by it was a reasonable view. In "*Ramesh*"[24], the Hon'ble Supreme Court observed that the High Court is required to deal with various grounds on which the judgment of acquittal is based and to dispel those grounds by cogent reasons. The Hon'ble Supreme Court further held that even if it can be said in a particular case that another view is possible that itself shall not be sound ground to set aside the judgment of acquittal. In "*Mallappa*", the Hon'ble Supreme Court elaborated upon the position of law on the scope of intervention with a judgment of acquittal observing as under: -

> *"**25.** We may firstly discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused, unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretised when the case ends in acquittal. It is so because once the trial court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in*

23 *Mallappa & Ors. v. State of Karnataka: (2024) 3 SC 544.*
24 *Ramesh & Anr. v. State of Karnataka: (2024) 9 SCC 169.*

appeal.

26. *No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.*

27. *It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The "two-views theory" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results into two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. And therefore, when two views are possible, following the one in favour of innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law."*

42. The trial Court applied the correct and settled legal principles in law. Its conclusions are not contrary to the evidence and documents on record. This also cannot be held that the judgment of the trial Court is manifestly unjust and unreasonable based on erroneous law and facts. The findings recorded by the trial Court are not perverse. The judgment of acquittal by the trial Court on 21st December 2018 is rendered on consideration of the relevant materials on record keeping in mind the fundamental principles of criminal jurisprudence that the prosecution must establish its case beyond reasonable doubt. We find no ground to interfere with the

judgment rendered by the Special Judge on 21st December 2018 in Sessions Case Nos.177 of 2013, 178 of 2013, 577 of 2013 and 312 of 2014.

43. While the judgment in the Acquittal Appeals was under Circulation, an application for impleadment vide Interim Application No.1172 of 2026 was filed by Mr. Maniar Kalpesh Kumar. Through this Interim Application, the applicant seeks to challenge the discharge of A-16 Amit Anilchandra Shah by an order dated 30th December 2014 passed in Discharge Application (Exhibit–232) filed by A-16. This Interim Application has been opposed by the CBI which has filed its written submissions through the Additional Solicitor General of India. The CBI had brought on record a copy of the order dated 30th December 2014 passed by the Special Judge in the aforementioned Discharge Application, a copy of the order dated 23rd November 2015 passed in Criminal Revision Application (Stamp) No. 413 of 2015 which was filed by Rubabuddin Shaikh and a copy of the order dated 11th March 2016 in Criminal Application No.1248 of 2015 which was filed by Harsh Mander who is a resident of Vasant Kunj, New Delhi. The order passed in Criminal Application No.1248 of 2015 was challenged before the Supreme Court in Special Leave Petition (Cri) No.5000 of 2016 which came to be dismissed on 1st August 2016. These materials are suppressed by Mr. Maniar Kalpesh Kumar who is aged about 53 years, engaged in business and a resident of Goregaon (East), Mumbai. The applicant does not state how he gathered information about the judgment in these cases having been reserved. The applicant is not a witness in Crime No.5 of 2005 which was re-registered by the CBI. He does not indicate how he is concerned with the pending Criminal Acquittal Appeals and why he

has surfaced about two decades after Crime No.5 of 2005 was registered. We have, therefore, no hesitation to observe that Interim Application No.1172 of 2026 has been filed with an oblique motive and at the instance of some political adversary of A-16.

44. Criminal Appeal Nos.641 and 656 of 2019 are dismissed.

45. Interim Application No.1172 of 2026 is disposed of.

[GAUTAM A. ANKHAD J.] **[CHIEF JUSTICE]**

PRAVIN DASHARATH PANDIT

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