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(2010) 9 Supreme Court Cases 368

(BEFORE P. SATHASIVAM AND ANIL R. DAVE, JJ.)

SAJJAN KUMAR . . Appellant;

Versus

CENTRAL BUREAU OF INVESTIGATION . . Respondent.

Criminal Appeal No. 1803 of 2010†, decided on September 20, 2010

A. **Criminal Procedure Code, 1973 — Ss. 227 and 228 — Framing of charge/Discharge of accused — Exercise of jurisdiction — Scope — Explained — Appreciation of evidence — Impermissibility — Held, at the stage of framing of charge under S. 228 or while considering discharge petition filed under S. 227, it is not for Magistrate or Judge concerned to analyse all the materials including pros and cons, reliability or acceptability thereof, etc. — It is at the trial, that Judge concerned has to appreciate evidentiary value, credibility or otherwise of the material, veracity of various documents and is free to take a decision one way or the other — On facts held, though PWs 1, 2, 8 and 10 did not whisper a word about involvement of appellant in anti-Sikh riots of 1984 at the earliest point of time yet it cannot be presumed that there is no case to proceed against appellant — Hence, it could not be concluded that framing of charges against appellant by trial Judge (23 yrs later) was either bad in law or abuse of process of law or without any material basis — Inasmuch as trial related to incident of 1984, trial Judge directed to make sincere efforts for expeditious disposal of case — Penal Code, 1860 — S. 120-B r/w Ss. 153-A, 295, 302, 395, 427, 436, 339 & 505 and S. 109 r/w Ss. 147, 148, 149, 153-A, 295, 302, 395, 427, 435, 339 & 505 — Criminal Trial — Particular offences — Communal riots — Criminal Trial — Practice and Procedure — Time-bound/Expeditious disposal (Paras 19 to 24, 44 and 45)**

Union of India v. *Prafulla Kumar Samal*, (1979) 3 SCC 4 : 1979 SCC (Cri) 609; *Dilawar Balu Kurane* v. *State of Maharashtra*, (2002) 2 SCC 135 : 2002 SCC (Cri) 310, *relied on*

B. **Criminal Procedure Code, 1973 — Ss. 227 and 482 — Discharge — Grounds for — Delay in proceedings — Continuation of prosecution and framing of charges on basis of statements made by PWs after a gap of about 23 years — Propriety — Held, though delay may be a relevant ground, however, in light of materials available before court through CBI, without testing the same at trial, proceedings cannot be quashed merely on ground of delay — Those materials have to be tested in context of prejudice to accused only at trial — Constitution of India — Art. 21 — Criminal Trial — Practice and Procedure — Delay/Laches/Limitation — Fair and Speedy trial (Paras 31 to 39)**

P. Vijayan v. *State of Kerala*, (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488, *relied on*

Vakil Prasad Singh v. *State of Bihar*, (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95; *Abdul Rehman Antulay* v. *R.S. Nayak*, (1992) 1 SCC 225 : 1992 SCC (Cri) 93; *Japani Sahoo* v. *Chandra Sekhar Mohanty*, (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388, *considered*

† Arising out of SLP (Crl.) No. 6374 of 2010. From the Judgment and Order dated 19-7-2010 of the High Court of Delhi at New Delhi in Crl. Rev. Petition No. 261 of 2010

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C. **Criminal Procedure Code, 1973 — Ss. 227, 228 and 401 — Revision against dismissal of discharge petition and framing of charges — Observations by High Court while dismissing revision — Effect on trial court — Need for independent application of mind by trial court — Apprehension expressed that if observations concerned of High Court were allowed to stand, trial Judge would have no other option but to convict appellant which would be against all canons of justice — Held, it is for trial Judge to evaluate all materials including evidentiary value of testimonies of PWs, alleged contradictory statements, delay and the conduct of Delhi Police in filing status report and further investigation by CBI — Clarified that all observations concerned of High Court would not affect ultimate analysis and final verdict of trial Judge (Paras 40 to 43)**

Common Cause v. *Union of India*, (1999) 6 SCC 667 : 1999 SCC (Cri) 1196, *considered*

The present case arose out of the 1984 anti-Sikh riot cases in which thousands of Sikhs were killed. The investigation pertaining to the death of family members of Smt *J*, PW 1 was reopened by the Anti-Riot Cell of Delhi Police in the year 2002 and after investigation, a closure report was filed on 15-12-2005/22-12-2005. Thereafter, on 31-7-2008, a status report was filed by Delhi Police before the Metropolitan Magistrate. Pursuant to the recommendation of Justice Nanavati Commission, the Government of India entrusted the investigation to CBI on 24-10-2005. CBI registered a formal FIR on 22-11-2005. The closure report was filed by Delhi Police on 15-12-2005/22-12-2005, when a case had already been registered by CBI on 22-11-2005 and the documents had already been transferred to CBI. (Paras 3 and 4)

After fresh investigation, CBI filed a charge-sheet on 13-1-2010. After committal, charges were framed on 15-5-2010. The appellant filed a petition for discharge raising various grounds in support of his claim. Since he was not successful before the Special Court, he filed a revision before the High Court and by the impugned order High Court dismissed his criminal revision and directed the trial court for early completion of the trial since the same was pending from 1984. (Para 5)

Directing as above, the Supreme Court dismissed the appeal.

P-D/46771/CR

Advocates who appeared in this case :

H.P. Rawal, Additional Solicitor General, U.U. Lalit, Dushyant Dave and H.S. Phoolka, Senior Advocates (S.A. Hashmi, A.K. Sharma, Anil Kr. Sharma, Ms Parerna Kumari, Sangram Saron, Amit Anand Tiwari, Yashvardhan, Ms Kamma Vohra, Jagjit Singh Chhabra, Ms Shweta Verma, D.P. Singh, Avneet Toor, Ms Tarannum Cheema, A.K. Sharma and T.A. Khan, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488, *P. Vijayan* v. *State of Kerala* 381*g-h*, 382*d-e*
2. (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95, *Vakil Prasad Singh* v. *State of Bihar* 380*a*, 381*b-c*, 383*a*
3. (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388, *Japani Sahoo* v. *Chandra Sekhar Mohanty* 383*b*
4. (2002) 2 SCC 135 : 2002 SCC (Cri) 310, *Dilawar Balu Kurane* v. *State of Maharashtra* 374*d-e*, 375*b*

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5. (1999) 6 SCC 667 : 1999 SCC (Cri) 1196, *Common Cause* v. *Union of India* 383*f-g*
6. (1992) 1 SCC 225 : 1992 SCC (Cri) 93, *Abdul Rehman Antulay* v. *R.S. Nayak* 380*a-b*, 381*b*, 381*e-f*, 383*a*
7. (1979) 3 SCC 4 : 1979 SCC (Cri) 609, *Union of India* v. *Prafulla Kumar Samal* 374*d-e*, 374*d-e*, 375*b*, 375*e-f*

The Judgment of the Court was delivered by

P. SATHASIVAM, J.— Application for intervention is allowed. Leave granted.

2. This appeal is directed against the order of the High Court of Delhi at New Delhi dated 19-7-2010 whereby the learned Single Judge confirmed the order dated 15-5-2010 passed by the District Judge VII/NE-cum-Additional Sessions Judge, Karkardooma Courts, Delhi in SC No. 26/10, RC SII 2005 S0024. By the said order, the Additional Sessions Judge has ordered the framing of charges against the appellant for offences punishable under Section 120-B read with Sections 153-A, 295, 302, 395, 427, 436, 339 and 505 of the Penal Code, 1860 (hereinafter referred to as "IPC") and for the offences under Section 109 read with Sections 147, 148, 149, 153-A, 295, 302, 395, 427, 435, 339 and 505 IPC, besides framing of a separate charge for offence punishable under Section 153-A IPC and rejected the application for discharge filed by the appellant.

Brief facts

3. The present case arises out of 1984 anti-Sikh riot cases in which thousands of Sikhs were killed. Delhi Police has made this case a part of FIR No. 416 of 1984 registered at Police Station Delhi Cantt. In this FIR, 24 complaints were investigated pertaining to more than 60 deaths in the area. As many as 5 charge-sheets were filed by Delhi Police relating to 5 deaths which resulted in acquittals. One supplementary charge-sheet about robbery, rioting, etc. was also filed which also ended in acquittal. The investigation pertaining to the death of family members of Smt Jagdish Kaur, PW 1 was reopened by the Anti-Riot Cell of Delhi Police in the year 2002 and after investigation, a closure report was filed in the court on 15-12-2005/ 22-12-2005.

4. After filing of the closure report in the present case, on 31-7-2008, a status report was filed by Delhi Police before the Metropolitan Magistrate, Patiala House Court, New Delhi. Pursuant to the recommendation of Justice Nanavati Commission, the Government of India entrusted the investigation to the Central Bureau of Investigation (hereinafter referred to as "CBI") on 24-10-2005. On receipt of the said communication, the respondent CBI registered a formal FIR on 22-11-2005. The closure report was filed by Delhi Police on 15-12-2005/22-12-2005, when a case had already been registered by CBI on 22-11-2005 and the documents had already been transferred to the respondent CBI.

5. After fresh investigation, CBI filed a charge-sheet bearing No. 1/2010 in the present case on 13-1-2010. After committal, charges were framed on 15-5-2010. At the same time, the appellant has also filed a petition for

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discharge raising various grounds in support of his claim. Since he was not successful before the Special Court, he filed a revision before the High Court and by the impugned order dated 19-7-2010, after finding no merit in the case of the appellant, the High Court dismissed his criminal revision and directed the trial court for early completion of the trial since the same is pending from 1984.

6. Heard Mr U.U. Lalit, learned Senior Counsel for the appellant, Mr H.P. Rawal, learned Additional Solicitor General for the respondent CBI and Mr Dushyant Dave, learned Senior Counsel for the intervenor.

Submissions

7. After taking us through the charge-sheet dated 13-1-2010, statements of PW 1, PW 2 and PW 10, order dated 15-5-2010 framing charges by the District Judge, Karkardooma Courts, Delhi and the impugned order of the High Court dated 19-7-2010, Mr Lalit, learned Senior Counsel for the appellant submitted that:

(*i*) the statement of Jagdish Kaur is highly doubtful and later she made an improvement, hence the same cannot be relied upon to frame charge against the appellant;

(*ii*) reliance on the evidence of Jagsher Singh, PW 2 who gave a statement after a gap of 25 years cannot be accepted;

(*iii*) the statement of Nirprit Kaur, PW 10 is also not acceptable since the same was also made after a gap of 25 years of the occurrence;

(*iv*) other witnesses who were examined in support of the prosecution specifically admitted that they did not see the appellant at the time of alleged commission of offence;

(*v*) inasmuch as the charge has been framed after 25 years of occurrence, proceeding against the appellant, at this juncture, is violative of his constitutional right under Article 21;

(*vi*) after filing of the closure report by Delhi Police, by following the procedure, the present action of CBI conducting further reinvestigation and filing charge-sheet based on fresh and improved materials is impermissible in law;

(*vii*) follow-up action based on the recommendation of Justice Nanavati Commission is also impermissible at this juncture;

(*viii*) many remarks/observations made by the High Court are uncalled for and based on conjectures and surmises and also without there being any material on record. If those observations are not deleted from the order of the High Court, it would amount to directing the trial Judge to convict the appellant without proper proof and evidence.

8. On the other hand, Mr H.P. Rawal, learned Additional Solicitor General appearing for CBI submitted that in view of categorical statement by the victims before Justice Nanavati Commission and its recommendation which was deliberated in Parliament, the Government of India took a decision to entrust further reinvestigation in respect of 1984 anti-Sikh riots

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through CBI. According to him, the present action by CBI and framing of charges against the appellant and others is in consonance with Sections 227 and 228 of the Code of Criminal Procedure (hereinafter referred to as "CrPC"). He also submitted that at the stage of framing of the charges, the material on record has not to be examined meticulously; a prima facie finding of sufficient material showing grave suspicion is enough to frame a charge. He pointed out that there is nothing illegal with the order framing charge which was rightly affirmed by the High Court. He further submitted that the High Court has not exceeded in making observations and, in any event, it would not affect the merits of the case.

9. Mr Dushyant Dave, learned Senior Counsel for the intervenor, while reiterating the stand taken by the learned Additional Solicitor General supported the order of the District Judge framing charges as well as the order of the High Court dismissing the criminal revision filed by the appellant. He pointed out that it is not a case for interference under Article 136 of the Constitution of India. No prejudice would be caused to the appellant and he has to face the trial. He further contended that the delay cannot be a ground for interference.

Relevant provisions

10. Before considering the claim of the parties, it is useful to refer to Sections 227 and 228 CrPC which are reproduced below:

> "227. *Discharge*.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> 228. *Framing of charge*.—(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—
>
> (*a*) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the First Class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the First Class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;
>
> (*b*) is exclusively triable by the court, he shall frame in writing a charge against the accused.
>
> (2) Where the Judge frames any charge under clause (*b*) of sub-section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

It is clear that the Judge concerned has to consider all the records of the case, the documents placed, hear the submission of the accused and the prosecution and if there is "*not sufficient ground*" (emphasis supplied) for

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proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in Section 227, if the Judge is of the opinion that "*there is ground for presuming*" (emphasis supplied) that the accused has committed an offence, he is free to direct the accused to appear and try the offence in accordance with the procedure after framing charge in writing against the accused.

Statements of PW 1, PW 2, PW 8 and PW 10

11. Mr Lalit, learned Senior Counsel for the appellant pointed out that the prosecution, for framing the impugned charges, heavily relied on the statements of Jagdish Kaur, Jagsher Singh and Nirprit Kaur. He also took us through their statements made at various stages which are available in the paper book. It is true that Jagdish Kaur, PW 1 in her statement under Section 161 CrPC dated 20-1-1985, did not mention the name of the appellant. Even in the affidavit dated 7-9-1985, filed before Justice Ranganath Misra Commission she has not whispered a word about the role of the appellant. According to him, for the first time i.e. in the year 2000, after a gap of 15 years an affidavit was filed before Justice Nanavati Commission, wherein she referred the name of the appellant and his role along with certain local Congress workers. According to Mr Lalit, except the above statement in the form of an affidavit before Justice Nanavati Commission, she had not attributed anything against the appellant in the categorical statements made on 20-1-1985 as well as on 7-9-1985 before Justice Ranganath Misra Commission.

12. Mr Lalit also pointed out that even after submission of Justice Nanavati Commission's Report and entrusting the investigation to CBI, she made a statement before CBI officers at the initial stage by mentioning "that the mob was being led by Congress leaders". Only in the later part of her statement, she mentioned that "she learnt that Sajjan Kumar, Member of Parliament was conducting meeting in the area". She confirmed the statement in the form of an affidavit dated 7-9-1985 filed before Justice Ranganath Misra Commission as well as her deposition with regard to the appellant before Justice Nanavati Commission on 8-1-2002. No doubt, in the last part of her statement, it was stated that in the year 1984-1985, the atmosphere was totally against the Sikh community and under pressure she did not mention the name of Sajjan Kumar. She also informed that she could not mention his name for the safety of her children.

13. The other witness Jagsher Singh, first cousin of Jagdish Kaur, in his statement recorded by CBI on 7-11-2007 i.e. after a gap of 23 years, mentioned the name of the appellant and his threat to Sikhs as well as to Hindus who had given shelter to Sikhs. According to Mr Lalit, this witness mentioned the name of the appellant for the first time before CBI nearly after 23 years of the incident which, according to him, cannot be relied upon.

14. The other witness relied on by the prosecution in support of framing of charges is Nirprit Kaur, PW 10. It is pointed out that she also made certain statements to CBI after a gap of 23 years and she did not mention the name

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of the appellant except stating that one Balwan Khokhar who is alleged to be a nephew of Sajjan Kumar, came to her house for discussing employment for her nephew as driver.

15. The other statement relied on by the prosecution in support of framing of charges against the appellant is that of Om Prakash, PW 8. He narrated that during the relevant time he had given shelter to a number of women and children of Sikh community including Jagdish Kaur, PW 1. Mr Lalit pointed out that in his statement, he did not even utter a word about the appellant but at the end of his statement on being asked, stated that he knew Shri Sajjan Kumar, Member of Parliament. However, he further stated that he did not see him in that mob or even in their area during the said period. In the last sentence, he expressed that he had heard from the people in general that Sajjan Kumar was also involved in the 1984 riots.

16. By pointing out the earlier statement of Jagdish Kaur, PW 1, recorded by CBI, her affidavit before Justice Nanavati Commission and the statement of Jagsher Singh, PW 2; Nirprit Kaur, PW 10 and Om Prakash, PW 8 before CBI, Mr Lalit submitted that there was no assertion by anyone about the specific role of the appellant except the bald statement and that too after 23 years. In such circumstances, according to him, the materials relied on by the prosecution are not sufficient to frame charges. According to him, mere suspicion is not sufficient for which he relied on the judgments of this Court in *Union of India* v. *Prafulla Kumar Samal*[1] and *Dilawar Balu Kurane* v. *State of Maharashtra*[2].

17. In *Prafulla Kumar Samal*[1] the scope of Section 227 CrPC was considered. After adverting to various decisions, this Court has enumerated the following principles: (SCC p. 9, para 10)

> "(*1*) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
>
> (*2*) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.
>
> (*3*) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
>
> (*4*) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court

1 (1979) 3 SCC 4 : 1979 SCC (Cri) 609
2 (2002) 2 SCC 135 : 2002 SCC (Cri) 310

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cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

18. In *Dilawar Balu Kurane*[2], the principles enunciated in *Prafulla Kumar Samal*[1] have been reiterated and it was held: (*Dilawar Balu Kurane case*[2], SCC pp. 140-41, paras 12 & 14)

"*12*. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see *Union of India* v. *Prafulla Kumar Samal*[1]).

* * *

14. We have perused the records and we agree with the above views expressed by the High Court. We find that in the alleged trap no police agency was involved; the FIR was lodged after seven days; no incriminating articles were found in the possession of the accused and statements of witnesses were recorded by the police after ten months of the occurrence. We are, therefore, of the opinion that not to speak of grave suspicion against the accused, in fact the prosecution has not been able to throw any suspicion. We, therefore, hold that no prima facie case was made against the appellant."

19. It is clear that at the initial stage, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of

2 *Dilawar Balu Kurane* v. *State of Maharashtra*, (2002) 2 SCC 135 : 2002 SCC (Cri) 310

1 *Union of India* v. *Prafulla Kumar Samal*, (1979) 3 SCC 4 : 1979 SCC (Cri) 609

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the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce proves the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

20. A Magistrate enquiring into a case under Section 209 CrPC is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 CrPC, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

Exercise of jurisdiction under Sections 227 and 228 CrPC

21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(*i*) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(*ii*) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(*iii*) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(*iv*) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(*v*) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and

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must be satisfied that the commission of offence by the accused was possible.

(*vi*) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(*vii*) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

22. With the above principles, if we discuss the statements of PW 1, PW 2 and PW 10 as well as of PW 8, it cannot be presumed that there is no case at all to proceed. However, we are conscious of the fact that the very same witnesses did not whisper a word about the involvement of the appellant at the earliest point of time.

23. It is the grievance of the appellant that the High Court did not take into account that the complainant Jagdish Kaur, PW 1 had not named him in her first statement filed by way of an affidavit dated 7-9-1985 before Justice Ranganath Misra Commission nor did she name him in her subsequent statements made before Delhi Police (Riots Cell) and in her deposition dated 8-1-2002 before Justice Nanavati Commission except certain hearsay statement. It is the stand of Jagdish Kaur, PW 1, the prime prosecution witness, that apart from her statement dated 3-11-1984, she has not made any statement to Delhi Police at any stage. However, it is also the claim of CBI that the alleged statements of Jagdish Kaur, PW 1, dated 20-1-1985 and 31-12-1992 are doubtful. Likewise, Nirprit Kaur, PW 10 in her statement under Section 161 CrPC, has denied having made any statement before Delhi Police.

24. At the stage of framing of charge under Section 228 CrPC or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the materials including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other.

Investigation by CBI

25. Learned Additional Solicitor General has brought to our notice the Letter dated 24-10-2005 from Mr K.P. Singh, Special Secretary (H) to Mr U.S. Mishra, Director, Central Bureau of Investigation, North Block, New Delhi. A perusal of the said Letter shows that in reply to the discussion held in the Lok Sabha on 10-8-2005 and the Rajya Sabha on 11-8-2005 on the Report of Justice Nanavati Commission of Inquiry into the 1984 anti-Sikh

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riots, the Prime Minister and the Home Minister had given an assurance that wherever the Commission has named any specific individuals as needing further examination or reopening of case the Government will take all possible steps to do so within the ambit of law.

26. The Letter further shows that based on the assurance on the floor of Parliament, the Government examined the Report of Justice Nanavati Commission, its recommendations regarding investigation/reinvestigation of the cases against (*a*) Shri Dharam Das Shastri, (*b*) Shri Jagdish Tytler, and (*c*) Shri Sajjan Kumar. The Letter further shows that the Government had decided that the work of conducting further investigation/reinvestigation against the abovementioned persons as per the recommendations of Justice Nanavati Commission should be entrusted to CBI. Pursuant to the said decision, the Home Department forwarded the relevant records connected with the cases against the abovementioned persons. It also shows that those additional records/information required in connection with investigation are to be obtained from Delhi Police.

27. The materials placed by CBI show that Justice Nanavati Commission submitted its Report on 9-2-2005, its recommendations were discussed by the Lok Sabha on 10-8-2005 and the Rajya Sabha on 11-8-2005, Government of India asked CBI to inquire those recommendations on 24-10-2005 and FIR No. 416 of 1984 dated 4-11-1984 of Police Station Delhi Cantt. was re-registered by CBI as Case No. RC-24(S)/2005-SCU.I/CBI/SCR.I/New Delhi. Pursuant to the same, on 22-11-2005, investigation was taken up and it revealed that the accused persons committed offences punishable under Section 109 read with Sections 147, 148, 149, 153-A, 295, 302, 396, 427, 436, 449, 505 and 201 IPC and accordingly filed the charge-sheet. It is relevant to note that no one including the appellant has challenged the appointment of CBI to inquire into the recommendations made by Justice Nanavati Commission.

Status report by Delhi Police

28. Mr Lalit heavily relied on the status report of Delhi Police and consequential order of the Magistrate. By pointing out the same, he contended that CBI is not justified in reopening the case merely on the basis of observations made by Justice Nanavati Commission. The following conclusion in the Status Report dated 31-7-2008 filed by Delhi Police was pressed into service:

> "From the investigation and verification made so far it was revealed that:
>
> (*a*) There is no eyewitness to support the version of the complaint of Smt Jagdish Kaur.
>
> (*b*) The complaints and affidavits made by Smt Jagdish Kaur are having huge contradictions:
>
> (*i*) In her first statement recorded by local police during the investigation, she did not name any person specifically and also stated that she could not identify anyone among the mob.

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(*ii*) She even did not name Shri Sajjan Kumar in her statement recorded by the IO of the Special Riot Cell after a gap of seven years.

(*iii*) She suspected the involvement of one Congress leader Balwan Khokhar in these riots but she had not seen him personally. She was told by one Om Prakash who was the colleague of her husband, about the killing of her husband and son.

(*iv*) In the statement recorded on 22-1-1993 under Section 161 CrPC during the course of further investigation, the witness Om Prakash stated that he had seen nothing about the riots. Jagdish Kaur stayed at his house from 1-11-1984 to 3-11-1984 but she did not mention the name of any person who was indulged in the killing of her husband and son."

29. It is seen from the report that taking note of lot of contradictions in the statement of Jagdish Kaur, PW 1 before the Commissions and before different investigating officers and after getting legal opinion from the Public Prosecutor, closure report was prepared and filed before the Metropolitan Magistrate, Patiala House Courts, New Delhi on 31-7-2008. It is further seen that before accepting the closure report, the Magistrate issued summons to the complainant i.e. Smt Jagdish Kaur number of times and the same were duly served upon her by the officers of the Special Riot Cell but she did not appear before the court. In view of the same, the Magistrate, on going through the report and after hearing the submissions and after noting that the matter under consideration is being further investigated by CBI and the investigation is still pending and after finding that no definite opinion can be given in respect of the closure report, without passing any order closed the matter giving liberty to the prosecution to move appropriate motion as and when required.

30. Mr Lalit, learned Senior Counsel, by placing a copy of the final report under Section 173 CrPC by Delhi Police as well as the endorsement therein including the date on which the said report was filed before the court, submitted that the action taken by Delhi Police cannot be faulted with. In other words, according to him, till the entrustment of further investigation by CBI, Delhi Police was free to proceed further and there is no error in the action taken by Delhi Police. In view of the order dated 31-7-2008 of the Magistrate, declining to give definite opinion on the closure report since the same was under further investigation by CBI, we are of the view that no further probe/enquiry on this aspect is required.

Delay

31. The learned Senior Counsel appearing for the appellant further submitted that because of the long delay, the continuation of the prosecution and framing of charges merely on the basis of certain statements made after a gap of 23 years cannot be accepted and according to him, it would go against the protection provided under Article 21 of the Constitution.

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32. Mr Lalit heavily relied on SCC para 20 of the decision of this Court in *Vakil Prasad Singh* v. *State of Bihar*[3] which reads as under: (SCC pp. 361-62)

"*20.* For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (*Abdul Rehman Antulay case*[4], SCC pp. 270-73, para 86)

(*i*) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily;

(*ii*) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial;

(*iii*) in every case, where the speedy trial is alleged to have been infringed, the first question to be put and answered is—who is responsible for the delay?;

(*iv*) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on—what is called, the systemic delays;

(*v*) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case;

(*vi*) ultimately, the court has to balance and weigh several relevant factors—'balancing test' or 'balancing process'—and determine in each case whether the right to speedy trial has been denied;

(*vii*) ordinarily speaking, where the court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial;

(*viii*) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is

3 (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95

4 *Abdul Rehman Antulay* v. *R.S. Nayak*, (1992) 1 SCC 225 : 1992 SCC (Cri) 93

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the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint;

(*ix*) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis."

33. After adverting to various decisions including *Abdul Rehman Antulay* v. *R.S. Nayak*[4], this Court further held: (*Vakil Prasad Singh case*[3], SCC pp. 363-64, paras 24-25)

"*24.* It is, therefore, well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case.

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

34. Considering the factual position in *Antulay case*[4], namely, alleged demand of a sum of ₹1000 as illegal gratification for release of payment for the civil work executed by a contractor, a charge was laid against the Assistant Engineer in the Bihar State Electricity Board and taking note of considerable length of delay and insufficient materials, based on the above principles, ultimately the Court after finding that further continuance of criminal proceedings pending against the appellant therein is unwarranted, quashed the same. Though the principles enunciated in the said decision have to be adhered to, considering the factual position being an extraordinary one, the ultimate decision quashing the criminal proceedings cannot be applied straightaway.

35. In *P. Vijayan* v. *State of Kerala*[5] this Court while considering the scope of Section 227 CrPC upheld the order dismissing the petition filed for

4 (1992) 1 SCC 225 : 1992 SCC (Cri) 93
3 *Vakil Prasad Singh* v. *State of Bihar*, (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95
5 (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488

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discharge and permitted the prosecution to proceed further even after 28 years. In that case, from 1970 till 1998, there was no allegation that the encounter was fake and only in the year 1998 reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers were involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organisations before the High Court of Kerala with a prayer that the investigation may be transferred to the Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter-affidavit dated 11-1-1999 in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. He also stated that the appellant was present when the incident occurred. By order dated 27-1-1999, the learned Single Judge of the High Court of Kerala passed an order directing CBI to register an FIR on the facts disclosed in the counter-affidavit filed by Constable Ramachandran Nair. Accordingly, CBI registered an FIR on 3-3-1999 in which Constable Ramachandran Nair was named as Accused 1, Mr Lakshmana was named as Accused 2 and Mr P. Vijayan, the appellant, was named as Accused 3 for an offence under Section 302 IPC read with Section 34 IPC. After investigation, CBI filed a charge-sheet before the Special Judge (CBI), Ernakulam on 11-12-2002 wherein all the abovementioned persons were named as A-1 to A-3 respectively for an offence under Sections 302 and 34 IPC.

36. The appellant P. Vijayan in *P. Vijayan case*[5] filed a petition under Section 227 of the Code on 17-5-2007 for discharge on various grounds including on the ground of delay. The trial Judge, by order dated 8-6-2007, dismissed the said petition and passed an order for framing charge for offences under Sections 302 and 34 IPC. Aggrieved by the aforesaid order, the appellant Vijayan filed Criminal Revision Petition No. 2455 of 2007 before the High Court of Kerala. By an order dated 4-7-2007, the learned Single Judge of the High Court dismissed his criminal revision petition. The said order was challenged by Mr P. Vijayan before this Court. Taking note of all the ingredients in Section 227 of the Criminal Procedure Code and the materials placed by the prosecution and the reasons assigned by the trial Judge for dismissing the discharge petition filed under Section 227, this Court confirmed the order of the trial Judge as well as the order of the High Court. Though, there was a considerable lapse of time from the alleged occurrence and the further investigation by CBI inasmuch as adequate material was shown, the Court permitted the prosecution to proceed further.

37. Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though Mr Lalit heavily relied on para 20 of the decision of this Court in

5 *P. Vijayan* v. *State of Kerala*, (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488

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Vakil Prasad Singh case[3], the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e. 21, 23, 24, 27 and 29 pointed out that the principles enunciated in *Abdul Rehman Antulay case*[4] are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

38. Mr Dave, learned Senior Counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in *Japani Sahoo* v. *Chandra Sekhar Mohanty*[6]. In SCC para 14, C.K. Thakker, J. speaking for the Bench has observed: (SCC p. 401)

> "*14.* … It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution *solely* on the ground of delay."
>
> (emphasis in original)

39. In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay. As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial.

Observations by the High Court

40. Coming to the last submission about the various observations made by the High Court, Mr Lalit pointed out that the observations/reference/conclusion in paras 64, 65, 69, 70, 72, 73 and 50 are not warranted. According to him, to arrive at such conclusion the prosecution has not placed relevant material. Even otherwise, according to him, if the same are allowed to stand, the trial Judge has no other option but to convict the appellant which would be against all canons of justice.

41. Mr Lalit further submitted that even if it is clarified that those observations are to be confined for the disposal of the appeal filed against framing of charges and dismissal of discharge petition and need not be relied on at the time of the trial, undoubtedly, it would affect the mind of the trial Judge to take independent conclusion for which he relied on a judgment of this Court in *Common Cause* v. *Union of India*[7]. He pressed into service para 177 which reads as under: (SCC p. 751)

> "*177.* Mr Gopal Subramanium contended that the court has itself taken care to say that CBI in the matter of investigation, would not be influenced by any observation made in the judgment and that it would independently hold the investigation into the offence of criminal breach

3 *Vakil Prasad Singh* v. *State of Bihar*, (2009) 3 SCC 355 : (2009) 2 SCC (Cri) 95
4 *Abdul Rehman Antulay* v. *R.S. Nayak*, (1992) 1 SCC 225 : 1992 SCC (Cri) 93
6 (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388
7 (1999) 6 SCC 667 : 1999 SCC (Cri) 1196

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of trust or any other offence. To this, there is a vehement reply from Mr Parasaran and we think he is right. It is contended by him that this Court having recorded a finding that the petitioner on being appointed as a Minister in the Central Cabinet, held a trust on behalf of the people and further that he cannot be permitted to commit breach of the trust reposed in him by the people and still further that the petitioner had deliberately acted in a wholly arbitrary and unjust manner and that the allotments made by him were wholly mala fide and for extraneous consideration, the direction to CBI not to be influenced by any observations made by this Court in the judgment, is in the nature of palliative. CBI has been directed to register a case against the petitioner in respect of the allegations dealt with and findings reached by this Court in the judgment under review. Once the findings are directed to be treated as part of the first information report, the further direction that CBI shall not be influenced by any observations made by this Court or the findings recorded by it, is a mere lullaby."

42. On the other hand, the learned Additional Solicitor General highlighted that these observations by the High Court are based on the materials placed and, in any event, it would not affect the interest of the appellant in the ultimate trial.

43. In view of the apprehension raised by the learned Senior Counsel for the appellant, we also verified the relevant paragraphs. In the light of the fact that it is for the trial Judge to evaluate all the materials including the evidentiary value of the witnesses of the prosecution such as Jagdish Kaur, PW 1; Jagsher Singh, PW 2; Nirprit Kaur, PW 10 and Om Prakash, PW 8, alleged contradictory statements, delay and the conduct of Delhi Police in filing the status report and on the basis of further investigation by CBI, we clarify that all those observations of the High Court would not affect the ultimate analysis and final verdict of the trial Judge.

Conclusion

44. In the light of the above discussion, we are of the view that it cannot be concluded that framing of charges against the appellant by the trial Judge is either bad in law or abuse of process of law or without any material. However, we clarify that dehors those comments, observations and explanations emanating from the judgment of the learned Single Judge, which we referred in para 26, the trial Judge is free to analyse, appreciate, evaluate and arrive at a proper conclusion based on the materials being placed by prosecution as well as the defence.

45. Inasmuch as the trial relates to the incident of the year 1984, we direct the trial Judge to take sincere efforts for completion of the case as early as possible for which the prosecution and the accused must render all assistance. Interim order granted on 13-8-2010 is vacated.

46. With the above observation and direction, the appeal is disposed of.