SC 318/2022
STATE Vs. MOHD. ILYAS @ ILLEN
FIR No 296 /2019
PS (Jamia Nagar)

04.02.2023

ORDER ON CHARGE

1. Vide this order, this Court shall determine whether charges, as levelled by the prosecution, qua the accused persons, are to be framed or not.

FACTS

2. Before adverting to the rival contentions of the parties, the facts of the present case, as alleged by the prosecution, are hereby succinctly recapitulated: It was alleged that on 12.12.2019, an information was received that students of Jamia Milia Islamia University had given a call to gather at Gate no.7 on 13.12.2019 and march towards Parliament House. It was alleged that maximum police staff of South and South-East District was mobilized and deployed at 10 AM in the area of Jamia Milia Islamia University. At about 02:00 PM approximate gathering of 700-800 consisting of students of university as well as residents of Jamia Nagar area started to march towards the barricades placed near Y point of Sukhdev Vihar. It was further alleged that the protesters were asked to stop and not to march towards Parliament as prohibitory orders u/s 144 Cr.PC have been imposed and that the Parliament Session has been closed sine die. Protesters were raising slogans against the said bill as well as the Government of India. Some protesters forcefully crossed the first line of police officers manning the barricades at gate no.1

3. It was also alleged that some of the leaders belonging to different political parties including AAP and Congress started addressing the gathering and started pushing the barricades. The gathering was given directions and warnings by loud hailer informing them that they cannot go to Parliament as in view of orders issued u/s 144 Cr.PC. The protest took a violent turn and the protesters succeeded in breaking the second line of the barricades placed at Holy family road Y point, Sukhdev Vihar. It was alleged that the protesters were again warned but they, instead of retreating, became more aggressive and later on started throwing stones at the police. After repeated warnings, mild force and gas Shells were used to disperse the crowd. The crowd thereafter entered in the university area and kept on pelting stones on the police party. It was also alleged that in order to control further damage to public property and life, a requisition of outside force was made and reserve force reached the spot. After a continuous confrontation for about 02 hours, the police were able to contain the violent mob. Thus, the present FIR No. 296/2019, PS Jamia Nagar came to be registered.

FILING OF CHARGESHEETS

4. The **chargesheet** was filed qua accused Mohd Ilyas @Allen on 21.04.2020. A **supplementary** chargesheet was also filed against him alongwith Complaint u/s 195 CrPC filed by DCP, South-East. Thereafter, a **second** supplementary chargesheet was filed before the Court against 11 other accused persons namely Mohammad Qasim, Mahmood Anwar, Shahzar Raza Khan, Mohd Abuzar, Mohd Shoaib, Umair Ahmad, Bilal Nadeem, Sharjeel Imam, Asif Iqbal Tanha, Chanda Yadav and Safoora

Zargar . The above 12 accused persons were charge-sheeted u/s 143/147/148/149/186/353/332/333/323/341/308/427/435/ 120B/34 IPC r w 3 / 4 PDPP Act.

5. Thereafter, a **third** supplementary chargesheet was filed on 01.02.2023, during the continuation of arguments on charge whereby the investigative authorities sought to establish that the witnesses have identified the accused persons herein on the basis of photographs.

CONTENTIONS OF LD SPECIAL PUBLIC PROSECUTOR AND LD COUNSELS FOR THE ACCUSED PERSONS

6. At the outset, it would be imperative to acknowledge the invaluable assistance rendered by the Ld. Special Public Prosecutor Sh. Madhukar Pandey. He meticulously elucidated the prosecution version, and the law on unlawful assembly, in a lucid manner. On the other hand, all the Ld Counsels for the accused vociferously defended the accused persons herein, and they too made impassioned pleas to exonerate and discharge the accused persons. Arguments on the aspect of charge were heard *in extenso.* Written submissions were also placed on record.

7. Both sides had placed reliance on several judgments. In the chargesheet, the prosecution had recapitulated the role of each accused in following tabular form titled 'memo of evidence'.

MEMO OF EVIDENCE

S. No.	Name & Address	Evidence against accused
1	Mohd. Abuzar, S/o Abrar Ahmad, R/o C18, 3rd Floor flat No. 14, Corner Apartment, Johri Farm, Jamia Nagar, Delhi	He was detained from the spot at PS Badarpur u/s 65 B DP Act.His Mobile Location ascertains his presence at the spot.

	Occupation :- Ex- Student	Disclosure statement of the accused. His name was disclosed by co-accused Mohd. Shoaib
2	Umair Ahmad, S/o Affam Ahmad, R/o Jamila Clinic Station road Mohammadabad Gohna, District Mau, U.P. Occupation :- Ex- Student	He is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. His Mobile Location ascertains his presence at the spot. Disclosure statement of the accused. His name was disclosed by the witness Bilal Ibnu Shahul.
3	Mohd. Shoaib, S/o Nasim Uddin Khan, R/o C18, 3rd Floor flat No. 14, Corner Apartment, Johri Farm, Jamia Nagar, Delhi Occupation :- Student	He was detained from the spot at PS Badarpur u/s 65 B DP Act. His Mobile Location ascertains his presence at the spot. Disclosure statement of the accused. His name was disclosed by the co-accused Mohd. Abuzar and Mohd. Qasim.
4	Asif Iqbal Tanha, S/o Mujabullah, R/o D-122, Abul Fazal Enclave Thokar No. 3. Shaheen Bagh, New Delhi. Occupation:- Student	He was detained u/s 65B DP Act at PS Badarpur on 13.12.2019. His mobile location is at Jamia Millia Campus from 12:54 PM to 08:03 PM.
5	Sharjeel Imam, S/o Late Akhtar Imam, R/o 104 JNU Campus, New Delhi Occupation :- Student	He confessed in his speech delivered on 16.01.2020 at Aligarh Muslim University, Uttar Pradesh. Location of his mobile phone. Disclosure of accused.
6	Mahmood Anwar, S/o Anwar Ahmad, R/o K-2/A Abul Fazal Enclave, Part-1, Jamia Nagar, Delhi. Occupation :- Student	He is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. His Mobile Location ascertains his presence at the spot.
7	Mohd. Qasim, S/o Mohd. Najim Uddin, R/o 35/339 Pratap Nagar, Sanganer Jaipur, Rajasthan. Occupation :- Ex-Student	He is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. His Mobile Location ascertains his presence at the spot.
8	Mohd. Bilal Nadeem, S/o Iqbal Nadeem, R/o Block 1/534, Street No. 7, Sangam vihar, Delhi. Occupation :- Ex-Student	He is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. His Mobile Location ascertains his presence at the spot.
9	Shahzar Raza Khan, S/o Jafar Khan, R/o H. No. 463 Main Market Aliganj Bareilly, U.P. Occupation :- Ex-Student	He is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019.

		Disclosure statement of the accused. His name was disclosed by the co-accused Umair Ahmad and Mohd. Qasim.
10	Chanda Yadav, D/o Lt. Babu Ram Yadav, R/o Vill bairath, Ramgarh Distt, Chandoli UP, Mob No. 9958864819 Occupation :- Student	She is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. Her Mobile Location ascertains his presence at the spot. Disclosure statement of the accused. Her name was disclosed by the co-accused Mohd. Abuzar, Mohd. Shoaib, Mohd. Qasim, Mahmood Anwar, Shahzar Raza, Bilal Nadeem.
11 12 .	Safoora Zargar, W/o Saboor Sirwal, R/o Flat No. 310, Sarang Residency, GH-4 Sector 21 C, Part-3, Faridabad Haryana, Mob No. 9958511146 Occupation :- Student Role of accused Mohd Ilyas @ Illen was spelt out in the chargesheet as being a member of the unlawful assembly. A newspaper cutting has been filed where he can allegedly be seen hurling a burning trye.	She is present at the place of riots as seen in the video recorded by the private photographer hired by the SHO Jamia Nagar on 13.12.2019. Her Mobile Location ascertains his presence at the spot. Disclosure statement of the accused. Her name was disclosed by the co-accused Mohd. Abuzar, Mohd. Shoaib, Mohd. Qasim, Mahmood Anwar, Bilal Nadeem.

8. Ld. Spl PP for State submitted that the accused have been implicated under Section 141 IPC r/w Section 149 of IPC. Ld. Spl PP for State invited the Court's attention to clause (2) and (3) of Section 141 IPC. It was contended that in New Delhi District, Section 144 CrPC prohibitory order was invoked. Thus, he contended that the police of Jamia Nagar had put barricades at Gate no. 3 to prohibit the crowd from proceeding towards New Delhi District. It was further submitted that there were even loudspeakers asking the crowd not to proceed further. Thus, it

was contended that accused resisted the execution of law and thus their act is hit by clause (2) of Section 141 IPC.

9. Ld. Spl PP submitted that the crowd crossed the barricades and broke the signposts and thus they are liable to be punished under Prevention of Damage to Public Property Act (PDPP). It was further submitted that stone pelting ensued whereby 15 police officers sustained injuries and thus Section 308 IPC was also invoked. Ld. Spl PP for State further contended that the accused are prima facie guilty under Clause (5) of Section 141 IPC as the police personnel, at the barricades, were legally bound to forbid the crowd from proceeding beyond the barricades. Thus, Ld. Spl PP for State submitted that it has been established beyond doubt that the assembly was an unlawful assembly as defined under Section 141 of the IPC.

10. Ld. Spl PP for State submitted that according to Section 149 of IPC, every member of an unlawful assembly would be guilty of an offence committed by the assembly, and in the present case, there was common object of the unlawful assembly to go to the Parliament. It was further submitted that the mob was willing to go to any length to achieve their common object. It was also submitted that the assembly knew that in pursuance of their common object, certain offences are likely to be committed and as such the accused herein ought to be charged under Section 149 IPC.

11. To substantiate his claim, Ld. Spl PP for State placed reliance on ***State of Maharashtra Vs Ramlal Devappa Rathod & Ors, (2015) 15 SCC 77, Masalti Vs State of Uttar Pradesh 1(1964) 8 SCR 133, State of Uttar Pradesh Vs Kishanpal and Others***

(2008) 16 SCC 73, and Lal Ji And Other Vs State Vs. U.P Criminal Appeal No. 227 of 1983

12. On the basis of ***Masalti (supra)***, Ld. Spl PP for State submitted that it was not necessary to show that an overt act is to be done and it has to be shown simply that the accused persons were part of an unlawful assembly. Ld. Spl PP for State submitted that the manner and demeanor of the mob is to be inferred, and according to the same, their object was clear.

13. Ld. Spl PP for State further submitted that testimony of a single witness would be enough to convict the accused persons herein. It was submitted that the entire incident could not possibly be captured on camera, and that there is sufficient ocular evidence on record. It was also submitted that it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to the accused persons. It was further submitted that the accused were not bystanders or onlookers even as per the CCTV footage. It was also contended that apprehension of violence by the assembly would be sufficient to prosecute the accused herein even if they departed without causing any damage.

14. *Per contra*, Ld Counsels for the accused persons vehemently refuted the allegations. They submitted that the present case is one where the accused ought to be discharged. On behalf of each of the accused written submissions were filed and arguments were led, the gist whereof is as hereunder:

i. On behalf of accused **Mohd. Abuzar**, it was submitted that the CDRs only establish that the accused was in the vicinity of the scene of crime, as his residence C-18, Flat No 14, Johri Farm, Jamia Nagar, Delhi is close to the site. It was submitted that no

overt act or participation in the act of rioting has been specifically attributed to the applicant nor has any evidence been led to show any connection between the applicant and the offences as alleged, or in the participation in the unlawful assembly. It was further submitted that he was rounded up by the police with others, and detained in PS Badarpur. His disclosure statement was recorded on 26.11.2020, almost a year after the incident.

ii. On behalf of accused **Umair Ahmad**, it was submitted that the protest was peaceful when the accused was present at the spot at around 3:00 pm. It was submitted that at the time of protest, there was no administrative order prohibiting congregation of people at the spot.The presence of the accused at the protest site was natural, as he was a bonafide student of Jamia University and was residing in Ambedkar Boys Hostel in the campus itself. It was submitted that disclosure statement of the accused would not be admissible as per law. It was submitted that the accused had left the protest site before the violence occurred. Lastly, it was contended that the only piece of evidence against the accused was the factum of him being present at the spot. Even as per statement of eye witnesses including Bilal Ibnu Shahul, the accused was merely present at the spot, and no overt action or participation in commission of the offences has been attributed to the accused.

iii. On behalf of accused **Mohd. Shoaib**, it was submitted that even a perusal of DD No. 5 B dtd 14.12.2019 PS Badarpur nowhere reflects contravention of any reasonable directions, let alone violence committed by the accused. It was submitted that there is

no material on record either in the DD or in the statement of witnesses which would show any suspicion let alone grave suspicion that the applicant committed any of the offences.

iv. On behalf of accused **Asif Iqbal Tanha**, it was submitted that he was a student of Jamia Milia University, and is presence thereat is but natural. It was submitted that apart from his presence and his detention at PS Badarpur, there is not even an iota of direct evidence viz. photos or videos or testimony of eye witnesses that would establish the complicity of the accused in the commission of the offences herein.

v. On behalf of accused **Sharjeel Imam**, it was submitted that the speech delivered by him on 13.12.2019 was admittedly delivered at around 7:30 PM, much after the alleged rioting. It was also submitted that as per the CDR, he was at the place of occurrence from 01:57PM to 3:51 PM. It was brought to the fore that the case of the prosecution was that the protestors assembled at the place of occurrence only around 3:30 PM. Thus, it was remonstrated that the accused left the spot immediately after 20 minutes, and thus he was not part of the assembly that turned unlawful later on.

vi. On behalf of accused **Mahmood Anwar**, it was submitted that the accused was a bonafide student of Jamia University and had left the spot before the ensuing violence.

vii. On behalf of accused **Mohd. Qasim,** submissions were made on similar lines as those of accused Umair Ahmad. It was also brought to the fore that mere presence of the accused at the spot as per CDRs would be grossly insufficient to inculpate the accused in as much as the Hostel, Library, Classroom and

canteen would fall in the same range. There were no witnesses, as is apparent from the chargesheets, which could lend credence to the assertions of the prosecution that the accused was present at the spot *and* was a part of the riotous mob.

viii. On behalf of accused **Mohd, Bilal Nadeem** it was submitted that as per the photographs and videos, he was shown merely standing behind the barricades. It was contended that there was nothing on record that the accused was pelting stones on the police officials. It was submitted that the allegations levelled by the prosecution do not make out any offence against the accused persons.

ix. On behalf of accused **Shahzar Raza Khan**, submissions were made on similar lines as those of accused Umair Ahmad.

x. On behalf of accused **Chanda Yadav**, it was submitted that no prohibitory order u/s 144 CrPC, as purported by the police, has been placed on record. It was submitted that the accused was merely a bystander and she was not even a part of the violent mob trying to push the barricades. Mere presence at the spot would not reflect criminality on her part. None of the witnesses have attributed any role to her barring her presence near the barricade.

xi. On behalf of accused **Safoora Zargar**, it was submitted that it is unclear from the chargesheet as to when and how the gathering of students turned into an unlawful assembly. It was submitted that the accused was not identified in any of the videos, and only a lady wearing a scarf covering her face was being identified as Safoora Zargar. It was submitted that the presence of accused as per CDRs is because of the reason that she is a resident of

Ghaffar Manzil, Jamia Nagar, which is adjacent to the Jamia University Campus.

xii. On behalf of accused **Mohd. Ilyas,** it was submitted that the prosecution has filed only a newspaper photograph highlighting his culpability in the matter.

DECISION

LAW ON DISCHARGE

15. In order to adjudicate upon rival claims, it would be apposite to refer to Section 227 CrPC, and the same reads as thus:

> *"**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."*

16. To fathom the above bare text, it would be imperative to refer to certain judgments, which govern the principles qua the scope and object of Section 227 CrPC.

17. One such *locus classicus* is ***P.Vijayan v State of Kerala & Anr (2012) 2 SCC 398.*** The principles pertaining to discharge from this verdict can be culled out as under:

> *"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.*
> *That in exercising his jurisdiction under Section 227 of the Code **the Judge which under the present Code is a senior and experienced 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 appearing in the case and*

so on

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.*

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.***

*Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor. S****uspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge.***

The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution

If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial*.*

FILING OF SEVERAL CHARGESHEETS

18. It is of utmost significance to note that the prosecution did not end with filing of a chargesheet and two supplementary chargesheets. It is with dismay that this Court notes that a **third** supplementary charge sheet was filed, *after* considerable arguments on charge were heard, and a day before the conclusion

of final arguments qua the aspect of charge. It is pertinent to note that no leave of the Court was taken for filing of the same. Rather, the third supplementary chargesheet begins with a patently wrong statement. The following extracts of the third supplementary chargesheet are reproduced hereunder:

> *" In continuation to previous chargesheets filed before the Hon'ble Court against the accused persons and during further investigation of the present case, on 01.12.2022 an application for seeking permission to provide sealed DVD along with sample seal was filed before the Hon'ble Court* ***for conducting further investigation*** *and sending the said DVD to FSL for checking & confirmation of video's continuity and integrity."*

19. The abovementioned application filed by the prosecution was for the sole purpose of handing over DVD attached with the Court file, only to send the same to FSL to check continuity and integrity. This interpolation i.e of moving the application '*for conducting further investigation*' by the concerned police officers in the third supplementary chargesheet is highly deplorable, for no such permission was either sought, nor given, as is apparent from a perusal of application of the IO dated 01.12.2022 or from order dated 13.12.2022 passed by this court, whereby the application was allowed.

20. For instances like these, to check executive overreach, the Hon'ble Supreme Court in ***Vinay Tyagi v. Irshad Ali*****, (2013) 5 SCC 762** ordained as hereunder:

> *"49. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct "further investigation" or file supplementary report with the leave of the court,* ***the investigating agencies have not only***

> ***understood but also adopted it as a legal practice <u>to seek permission of the courts to conduct "further investigation</u>" and <u>file "supplementary report" with the leave of the court.</u>*** *The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the court to conduct "further investigation" and/or to file a "supplementary report" will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.*
>
> *50. Such a view can be supported from two different points of view: firstly, through the doctrine of precedent, as aforenoticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea expositio.* ***Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused."***

21. Admittedly, no such leave of the Court was taken. Rather, the IO has made interpolations in the third supplementary chargesheet, as discussed above. Significantly, the third supplementary chargesheet has been filed during the period when considerable arguments were already addressed, and when the accused persons had filed their written submissions.

22. At this juncture, it would be apt to refer to ***Surender @ Tannu v State NCT of Delhi in Cr Rev Petition 197/2018, Neutral Citation No-2022/DHC/002316***, wherein the aspect of filing of supplementary chargesheet has been delved at length:

> "*30. On the question at hand, the Patna High Court in Manilal Keshri v. State of Bihar, 2006 SCC OnLine Pat*

635, has made the following observations:

"10. Admittedly, there is no legal bar against further investigation. Section 173(8) of the Criminal Procedure Code does not restrict reopening of the case in which charge-sheet has already been submitted and cognizance has been taken. ***Only precondition is that the reopening must be on the basis of fresh material, which were not available earlier <u>and</u> also that permission should be taken from Court****. In (1979) 2 SCC 322 : AIR 1979 SC 1791 : (1979 Cri LJ 1346) (Ram Lal Narang v. The State of Bihar), 1976 (2) PLJR 158 (S.N. Singh v. The State of Bihar) 1994 (2) PLJR 96 : (1994 Cri LJ NOC 112) (Yamuna Pathak v. The This is a digitally signed Judgement. NEUTRAL CITATION NO: 2022/DHC/002316 CRL.REV.P. 197/2018 Page 20 of 36 State of Bihar). In (1979) 2 SCC 322 : AIR 1979 SC 1791 : (1979 Cri LJ 1346), it has been held "neither Section 173 nor Section 190 lead us to say that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance by the authority, permits repeated investigations on discovery of fresh facts. Police can exercise such right as often as necessary when fresh information comes to the light." In 1994 (2) PLJR 96 : (1994 Cri LJ NOC 112) also it has been held "supplementary charge-sheet submitted by police on basis of material already collected,* ***submission of supplementary charge-sheet not on the basis of fresh evidence but only on reconsideration of evidence already collected at time of earlier submission of charge-sheet is not contemplated under Section 173(8)*** *of the Criminal Procedure Code.*

11. In the present case, admittedly, there was rid fresh material for submission of the second charge-sheet. ***The second charge-sheet was submitted only on reconsideration of evidence already collected at the time of earlier submission of the charge-sheet. In this view the second charge-sheet as well as order taking cignizance cannot be considered in consonance with the provision of Section 173(8) of the Criminal Procedure Code."***

23. A perusal of the third supplementary chargesheet reveals that the very same photographs have been filed, which are already a part of the record. Statements of those witnesses have been recorded herein, whose statements were already recorded in the previous

chargesheet. The photo identification by the witnesses have been carried out after almost 3 years of the incident. It is not a case where the whereabouts of the witnesses were not known. Barring two, others were all police witnesses. Photo identification of accused persons has been done highly belatedly, after filing of written submissions by the accused, making the case of prosecution suspect. Even in this third chargesheet, the witnesses merely aver that the accused were part of the protests, and some were 'speaking loudly' and 'were arguing with the police'. No overt act has been attributed to them even in the present chargesheet. During the course of arguments, the question of nonidentification of accused by police witnesses was raised, and ostensibly, to fill this lacuna, the present chargesheet has been filed. A Section 144 CrPC prohibitory order, that too in the area of New Delhi District, has been filed now, after lapse of so many years. No explanation has been forthcoming as to why this notification was not filed earlier. In any case, this notification/prohibitory order would be redundant, as the area in question is South Delhi, and not New Delhi.

24. In short, the investigative agency has not adduced fresh evidence, rather has sought to present the same old facts in the garb of 'further investigation' by filing another supplementary chargesheet. In the present case, it has been most unusual of the police to file one chargesheet and not one but three supplementary chargesheets, with really nothing new to offer. This filing of a slew of chargesheets must cease, else this juggernaut reflects something beyond mere prosecution, and would have the effect of trampling the rights of accused persons.

MERE PRESENCE AT A PROTEST SITE IS INSUFFICIENT TO ARRAY THE PROTESTOTS AS ACCUSED PERSONS

25. The judgments relied by Ld Counsels for the accused persons pivot around the proposition of law that mere presence of a person at a protest site is insufficient to sustain an allegation qua the person being a member of such an assembly.

26. In this context, it would be useful to refer to ***Musa Khan & Ors. V State of Maharashtra (1977) 1 SCC 733,*** a verdict passed by the Full Bench of Hon'ble Supreme Court:

> ***"It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge.*** *In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another."*

27. In the present case, the abovementioned memo of evidence filed by the prosecution elucidates the role played by each of the 12 accused. What is to be seen is whether the allegations levelled by the prosecution, even make out an *ex facie* case against the accused, on the anvil of the above parameters of ***P Vijayan (supra).***

28. A perusal of the record, and of the written submissions filed by

all the accused persons allude to the fact that although they were present at the spot, but they were not part of the unlawful assembly. No overt act or participation in the commission of offences was attributed to them. There are no eyewitnesses who could substantiate the version of the police that the accused persons were in anyway involved in the commission of the offences. Thus, mere presence of the accused at the spot sans any overt acts, cannot inculpate them.

NO SECTION 144 CrPC AT THE PROTEST SITE

29. Interestingly, though some police witnesses averred in their statements that Section 144 CrPC was in force at that time, no such notification was placed on record up until recently. Even the DCP Sh RP Meena averred before this Court on 15.10.2022 that there was no written prohibition u/s 144 CrPC operative at the time of commission of the offence. During arguments, it was urged on behalf of the State that Section 144 CrPC was in place near Parliament. However, there was no evidence on record to substantiate the same at the time of filing one chargesheet and two supplementary chargesheets. It was only when the third supplementary chargesheet was filed, that the order of Sec 144 CrPC, that too near the Parliament, was filed. Even then, it cannot be said with certainty that the accused herein would definitely march thereto. The fact of the matter is that there was no prohibitory order u/s 144 CrPC in force in the area where protests took place.

WHETHER THE ACCUSED SHARED A COMMON OBJECT?

30. In this context, it would be germane to delve into ascertaining whether the accused were part of an unlawful assembly and

whether they shared the common object of the unlawful assembly. It was contended by Ld Spl PP for the State that Section 144 CrPC was in place at New Delhi District, and the accused were resisting the execution of law by proceeding towards the said place. Thus, according to him, the acts of the accused are covered within the ambit of Section 141(2) and Section 141(3). This contention is bereft of any justification inasmuch as there is no shred of evidence that the accused herein *crossed* the barricades put by the police. The diktat of the police was to ‘not proceed further’. None of the police witnesses, when speaking specifically of the accused herein, have given statements u/s 161 CrPC qua breaking of barricades by the accused herein. In fact, the witnesses cited by the police, as per the ‘memo of evidence’ do not inculpate the accused persons in any manner. They only harp on the factum of accused persons being present at the spot. No test identification parade was carried out during investigation by the prosecution witnesses up until filing of the third supplementary chargesheet. Even then, the photographs and videos on which the prosecution sought to place reliance on only demonstrate that the accused persons were standing *behind* the barricades. Another accused Chanda Yadav was seen *peacefully* standing somewhere on top, *with* a police official. One accused Safoora Zargar was allegedly in a *muffled* face. There is nothing on record to even prima facie suggest that the accused herein were part of some riotous mob. None of the accused herein were brandishing any weapon or throwing any stones etc. Thus, prima facie there is no evidence qua the accused herein that they resisted the execution of any law. Surely

prosecutions cannot be launched on the basis of conjectures and surmises, and chargesheets definitely cannot be filed on the basis of probabilities.

31. As far as common object is concerned, it would be useful to be mindful of the observation of the Hon'ble Supreme Court in ***State of Karnataka v Chikkahottappa @ Varade Gowda & Ors Crl Appeal No. 313 of 2001***:

> *"8. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly,* ***it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section.*** *The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members* ***and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.*** *An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence.* ***The word `knew' used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of `might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.*** *That, however, does*

not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would also be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore AIR 1956 SC 731). These aspects were also recently highlighted in Chandra & Ors. v. State of U.P. and Anr. [2004 (5) SCC 141].

32. The chargesheet fails to elaborate what inculpatory or unlawful common object has been attributed to the accused. Also, there isn't an iota of evidence qua sharing of the common object by the accused with each other, and with the crowd in general.
33. Significantly, in the present case, the test of 'positive knowledge' is conspicuously missing in the chargesheet. It is not the case of the prosecution that the accused were armed, or were carrying weapons or sticks or even stones. There is no evidence on record which reflects that the accused herein were even aware that other protestors were armed or not. The accused were protesting against a piece of legislation, and sloganeering against enactment thereof. *Positive knowledge* that their sloganeering would result in such a maelstrom, is something that cannot be attributed to them sans any cogent proof.

DOES THE CHARGESHEET PASS THE MUSTER OF MASALTI (SUPRA)?

34. The allegations qua each of the accused basically revolve around the fact that their presence was established on the spot where the

incident took place. The scientific evidence that the State collected was CDR locations. The other incriminating evidence sought to be put forth was the fact that some of the accused were detained on the spot. Barring the above, there were no eyewitnesses who saw the accused persons perpetrate any act of violence or instigation. There is no statement by any of the injured policemen or public witnesses attributing any overt role to the accused persons herein. Thus, the accused were sought to be made vicariously liable for the acts of the mob. To adjudicate this issue, it would be imperative to refer to the *cause celebre* ***Masalti v State of Uttar Pradesh.***

35. ***Masalti (supra)*** is a Hon'ble Special Bench seminal verdict which quintessentially governs the law on the requirement of number witnesses to establish the case of prosecution, in cases of unlawful assembly. It particularly lays down the law for *dealing with cases of those accused who are sought to be made vicariously responsible for the acts committed by others, only by virtue of their alleged presence as members of the unlawful assembly without any specific allegations of overt acts committed by them,* It ordains as under:

> *"16 Mr. Sawheny also urged that the test applied by the High Court is convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true;* ***but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the***

test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. *Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. It at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case"*

36. It cannot be gainsaid that the preset case is squarely covered by ***Masalti*** inasmuch as all the accused are sought to be made vicariously liable, as no overt act is attributable to them. Ld Spl PP contended that the above rule in ***Masalti*** is only a rule of prudence. To fortify his submission, he placed reliance on ***Ramlal Devappa (supra)***, particularly the following extracts:

"*We do not find anything in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] which in any way qualifies the well-settled principle that the conviction can be founded upon the testimony of even a single witness if it establishes in clear and precise terms, the overt acts constituting the offence as committed by certain named assailants and if such testimony is otherwise reliable. The test adopted in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] is required to be applied while dealing with cases of those accused who are sought to be made vicariously responsible for the acts committed by others, only by virtue of their alleged presence as members of the unlawful assembly without any specific allegations of overt acts committed by them, or where, given the nature of assault by the mob, the Court comes to the conclusion that it would have been impossible for any particular witness to have witnessed the relevant facets constituting the offence.* ***The test adopted in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] as a rule of prudence cannot mean that in every case of mob violence there must be more than one eyewitness****. The trial court was therefore perfectly*

right and justified in relying upon the testimony of sole witness PW 12 Sarojini and the High Court completely erred in applying the test laid down in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] . The view taken by the High Court being completely erroneous and unsustainable, in this appeal against acquittal, we have no hesitation in setting it aside and restoring that of the trial court."

37. However, this contention of Ld Spl PP cannot be countenanced. The facts of ***Ramlal Devappa*** are distinguishable. Therein, the wife of the deceased had seen the assailants commit the *overt act* namely, of killing her husband. Under these circumstances, reliance on her sole testimony was sufficient to indict the accused. Therefore, the term 'rule of prudence' was used. However, in the present case, no overt act has been attributed to the accused herein. In fact, from the following extract of ***Ramlal Devappa*** itself, it is pellucid that ***Ramlal Devappa*** is only reiterating the law laid down in ***Masalti***:

> *"24 The liability of those members of the unlawful assembly who actually committed the offence would depend upon the nature and acceptability of the evidence on record.* ***The difficulty may however arise, while considering the liability and extent of culpability of those who may not have actually committed the offence but were members of that assembly****. What binds them and makes them vicariously liable is the common object in prosecution of which the offfence was committed by other members of the unlawful assembly. Existence of common object can be ascertained from the attending facts and circumstances. For example, if more than five persons storm into the house of the victim where only few of them are armed while the others are not and the armed persons open an assault, even unarmed persons are vicariously liable for the acts committed by those armed persons. In such a situation it may not be difficult to ascertain the existence of common object as all the persons had stormed into the house of the victim and it could be assessed with certainty that all were guided by the common object, making every*

one of them liable. Thus when the persons forming the assembly are shown to be having same interest in pursuance of which some of them come armed, while others may not be so armed, such unarmed persons if they share the same common object, are liable for the acts committed by the armed persons. But in a situation where assault is opened by a mob of fairly large number of people, it may at times be difficult to ascertain whether those who had not committed any overt act were guided by the common object. There can be room for entertaining a doubt whether those persons who are not attributed of having done any specific overt act, were innocent bystanders or were actually members of the unlawful assembly. It is for this reason that in Masalti this Court was cautious and cognizant that no particular part in respect of an overt act was assigned to any of the assailants except Laxmi Prasad. It is in this backdrop and in order to consider

"whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly".

this Court at SCR pp. 148-49 in Masalti observed that his <u>participation as a member of the unlawful assembly ought to be spoken by more than one witness in order to lend corroboration</u>. The test so adopted in Masalti was only to determine liability of those accused against whom there was no clear allegation of having committed any overt act but what was alleged against them was about their presence as members of the unlawful assembly. *The test so adopted was not to apply to cases where specific allegations and overt acts constituting the offence are alleged or ascribed to certain named assailants. If such test is to be adopted even where there are specific allegations and overt acts attributed to certain named assailants, it would directly run counter to the well-known maxim that "evidence has to be weighed and not counted" as statutorily recognised in Section 134 of the Evidence Act."*

38. Thus, a conspectus of the aforesaid verdicts makes it pellucid that the above ratio of ***Masalti*** is the extant law of the land. Now, to establish vicarious liability, the prosecution has placed reliance

on certain witnesses, list whereof forms part of the 'memo of evidence' reproduced above in para 6. As far as Safoora Zargar is concerned, she is allegedly in a muffled face, even as per the photos attached. Under these circumstances, it is difficult to believe the version of the police that they were able to identify her. Further, up until filing of belated chargesheets, for accused Asif Iqbal Tanha, Sharjeel Imam, Mahmood Anwar, Mohd Qasim and Mohd Bilal Nadeem there were no eyewitness confirming their presence on the spot. It is only in the third supplementary chargesheets that witnesses have identified them. As discussed earlier, the third supplementary chargesheet is an afterthought, and ought not to be considered. Thus, the prosecution is unable to fulfill the test laid down by ***Masalti (supra)***. The prosecution has recorded statements of a number of police witnesses who were on the spot. All their statements are starkly similar, and all of them averred that they could recognize the rioters. However, for a considerable period of time, no test identification parade was held, and this fact has not been explained by the police. This fact assumes significance in light of statement of one of the police witnesses Ct Dharmender, who in the very first chargesheet, in his statement u/s 161 CrPC categorically identified Mohd Illyas@ Allen. It seems strange that Ct Dharmender has identified an accused, but rest of the police witnesses only made identical statements that they can recognize the rioters, without actually identifying any one, despite filing of not one but three chargesheets. They could identify the accused only after filing of third supplementary chargesheet. Is the police so unsure about its case? Further, it is equally strange that statements of two

independent witnesses namely Nizam and Salauddin were recorded on 02.12.2020, almost a year after the incident, when they were caretaker and peon respectively in Jamia University, and could be easily available for investigation. No explanation has been forthcoming for such belated recording of statements. Further, these two witnesses also mentioned names of other persons like Zuber Mewati, Muddasir, Mubasshir, Sharif Ali etc, but they were not made accused for reasons best known to the police. They even identified Bilal Ibnu Shahul in the crowd, yet Bilal was not made an accused rather he was made a police witness, is also a fact which makes one view version of the police with circumspection. It is apparent that the police has arbitrarily chosen to array some people from the crowd as accused, and others from the same crowd, as police witnesses. This cherry picking by the police is detrimental to the precept of fairness.

39. Ultimately, ***State of UP v Dan Singh (1997) 3 SCC 747*** provides is the beacon that illumines the law on this subject, in unequivocal terms as thus:

> *"If we accept the testimony of PW 1 and PW 7 in its entirety then all the respondents must be regarded as being members of the unlawful assembly and provisions of Section 149 IPC would be applicable to them. Even though we see no reason to disregard their evidence, nevertheless,* ***keeping in mind the observations of this Court in Masalti case [AIR 1965 SC 202 : (1964) 1 An LT 19] , we feel that even though a very large number of members of the unlawful assembly had taken part in the attack on the Doms, it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least four eyewitnesses.*** *Applying this test, we find that apart from Respondent 5 Hayat Singh, Respondent 4 Jai Singh, Respondent 18 Khushal Singh, Respondent 21 Bache Singh, Respondent 22 Dev Singh, Respondent 26 Mus Dev and PW 28 Aan Singh have been identified by less than four*

eyewitnesses. This being so, we give the benefit of doubt and their acquittal by the High Court is upheld."

40. As per the initial 'memo of evidence' filed in the chargesheet, for accused Mohd Abuzar, Umair Ahmad, Mohd Shoaib and Shahzar Raza Khan there were two other *co-accused* (not witnesses) confirming their presence on the spot. For accused Chanda Yadav and Safoora Zargar, it is the testimony of *other co-accused* (again, not witnesses) that the prosecution was relying upon to establish presence at the spot. The presence of these persons are based merely on disclosure statements of the co-accused themselves, and thus cannot be relied upon. It is no longer *res integra* that only confessional statement of a co-accused cannot form the basis for framing of charge against other accused. Ergo, it is writ large that the prosecution has not passed the muster of ***Masalti***.

WHETHER THERE IS PRIMA FACIE PROOF OF CONSPIRACY?

41. The charge sheet does not even contain a whisper or insinuation that the accused persons acted in tandem or that they coalesced at the spot after confabulating to do so. Meeting of minds for committing an illegal act or an act by illegal means is a sine qua non for criminal conspiracy. No such meeting of minds has been alleged in the chargesheet, nor can any such inference be drawn from the statements of witness recorded u/s 161 CrPC. None of the witnesses have averred qua common object, if any, shared by the accused persons. Agreement is essential. No 'toolkit' has also been placed on record which could lend credence to the assertions of the prosecution that the accused acted in concert.

42. In ***Yogesh v. State of Maharashtra*, (2008) 10 SCC 394,** it was expounded as thus:

> *"271. … 'The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties.* ***Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough****."*

43. In this context, the prosecution did not place any WhatsApp chats, or SMSs, or even proof of the accused persons interacting with each other, which could lend credence to the assertions of the State that there existed a conspiracy between the accused persons or that there was some agreement. Even in the photographs, all the twelve accused are not standing side by side. In the video also, they are not seen signaling or talking to each other. Resultantly, the charge qua conspiracy too cannot be sustained.

CONCLUSION

44. There were admittedly scores of protestors at the site. It cannot be gainsaid that among the multitude, some anti-social elements within the crowd created an environment of disruption and did create havoc. However, the moot question remains: whether the *accused persons herein* were even prima facie complicit in taking part in that mayhem? The answer is an unequivocal 'no'. Marshalling the facts as brought forth from a perusal of the chargesheet and three supplementary chargesheets, this Court cannot but arrive at the conclusion that the police were unable to apprehend the actual perpetrators behind commission of the offence, but surely managed to rope the persons herein as

scapegoats.

45. The prosecution has *ex facie* been launched in a perfunctory and cavalier fashion against the abovementioned persons, except qua Mohd Ilyas@Allen. To allow the persons charge-sheeted to undergo the rigmarole of a long drawn trial, does not augur well for the criminal justice system of our country. Furthermore, such a police action is detrimental to the liberty of citizens who choose to exercise their fundamental right to peacefully assemble and protest. Liberty of protesting citizens should not have been lightly interfered with. It would be pertinent to underscore that dissent is nothing but an extension of the invaluable fundamental right to freedom of speech and expression contained in Article 19 of the Constitution of India, subject to the restrictions contained therein. It is therefore a right which we are sworn to uphold. As laid down in ***P Vijayan (supra)***, this Court is duty bound to lean towards an interpretation which protects the rights of the accused, given the ubiquitous power disparity between them and the State machinery.

46. The desideratum is for the investigative agencies to discern the difference between dissent and insurrection. The latter has to be quelled indisputably. However, the former has to be given space, a forum, for dissent is perhaps reflective of something which pricks a citizen's conscience. "*Conscience is the source of dissent, asserts Gandhi. When something is repugnant to our conscience, we refuse to obey it. This disobedience is constituted by duty. It becomes our duty to disobey anything that is repugnant to our conscience*"[1]. Recently, the Hon'ble Chief

[1] https://www.mkgandhi.org/articles/Mahatma-Gandhi-supreme-artist-of-disobedience.html#:~:text=Conscience%20is%20the%20source%20of%20dissent%2C%20asserts%20Gandhi.,is%20repugnant%20to%20our%20conscience.

Justice of India, Hon'ble Justice D Y Chandrachud observed that *"The destruction of spaces for questioning and dissent destroys the basis of all growth — political, economic, cultural and social. In this sense, dissent is a safety valve of democracy,"*[2]. The subtext is explicit i.e dissent has to be encouraged not stifled. However, the caveat is that the dissent should be absolutely peaceful, and should not degenerate into violence.

47. In the present case, the investigative agencies should have incorporated the use of technology, or have gathered credible intelligence, and then only should have embarked on galvanizing the judicial system qua the accused herein. Else, it should have abstained from filing such an ill-conceived chargesheets qua persons whose role was confined only to being a part of a protest

48. In view of the above *in extenso* analysis, considering the fact that the case of the State is devoid of irrefragable evidence, all the persons charge-sheeted barring Mohd Ilyas@Allen are hereby **discharged** for all the offences for which they were arraigned. They be set at liberty, if not wanted in any other case. Photographs of Mohd Ilyas@Allen have been clearly shown in a newspaper, hurling a burning tyre, an overt act has been ascribed to him, and he has been duly identified by Ct Dharmender and some other police witnesses. Therefore, charges levelled in the chargesheet be framed qua accused Mohd Ilyas@Allen only. Needless to say, the investigative agency is not precluded from conducting further investigation in a fair manner, with the leave of the Court, in order to bring to book, the *actual* perpetrators,

[2] https://www.thehindu.com/news/national/blanket-labelling-of-dissent-as-anti-national-hurts-ethos-of-democracy-justice-chandrachud/article61631014.ece

with the adjuration not to blur lines between dissenters and rioters, and to desist from henceforth arraigning innocent protesters.

49. Put up on 10.04.2023 for framing charges qua accused Mohd Ilyas@Allen.

50. At request, copy of the order be given dasti to both sides.

(ARUL VARMA)
ASJ-04 + Spl. Judge (NDPS) South East District,
Saket Court, New Delhi: 04.02.2023