IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1954 OF 2019

Mehrunnisa Kadir Shaikh,
Age : 55 Years, R/o. 605, Building 24,
Shanti Niketan, Vikash Prakalp Sewak Nagar,
Goregaon East, Mumbai – 400 063 ...Petitioner

Versus

1. The State of Maharashtra,
(Through Ghatkopar Police Station).

2. Sanjay S. Khedekar,
Age : Adult, Occu. : Police Sub-Inspector,
R/o. Building No. 213, Flat No.8402,
Police Officer Quarters,
Kannamwar Nagar, Vikhroli East,
Mumbai – 400 081.

3. Raghunath V. Kolekar,
Age : Adult, Occu. : Police H.C.,
R/o. Room No.116/4/8, Hanumane
Lane, Near Sandesh Vidyalaya,
Suryanagar, Vikroli (W), Mumbai – 83.

4. Sayaji S. Thombare,
Age : Adult, Occu. : Police Naik,
R/o. Building No. 70, Room No.2071,
Pant Nagar, Ghatkopar (E), Mumbai – 400 0086.

5. The Director,
Central Bureau of Investigation ...Respondents

Mr. Yug Mohit Chaudhary, Advocate for Petitioner.

Mr. Niranjan Mundargi a/w Mr. Laxman R. Shahapur a/w Mr. Rohit Mishra a/w Kartikey Mishra, Advocate for Respondent Nos. 2 to 4.

Mr. H.S. Venegavkar, Special P. P. for Respondent No.5 – CBI.

Mr. Arfan Sait, APP for Respondent – State.

CORAM : PRAKASH D. NAIK, J.
RESERVED ON : 29th JULY, 2022.
PRONOUNCED ON : 27th MARCH, 2023

JUDGMENT :

1. The Petitioner has challenged the order dated 3rd January, 2018 passed by learned Special Judge (CBI) below Exh.1 in Sessions Case No.826 of 2014 directing that the record and proceedings in C.C. No.1170/PW/2010 be transferred to Court of learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai for trial of offences punishable under Sections 120-B r/w 323, 342 of Indian Penal Code (for short 'IPC').

2. The Petitioner is the mother of deceased Altaf Kadir Shaikh who according to her died due to custodial torture inflicted by the Accused/Respondent Nos.2 to 4.

3. The Petitioner's contention is that on 11th September, 2009 at about 04:00 hours in the morning, the Petitioner heard a knock at her door. Three persons were standing outside. They asked whether Altaf is available. She told them that he is sleeping. All of them came inside her house and on seeing Altaf sleeping they started beating, slapping and kicking him. One of them disclosed that he was Sub-Inspector Khedekar from Ghatkopar Police Station and had come to pick up Altaf for his presence is required by the SHO of Ghatkopar Police Station. She requested him that since the SHO will not be present at the wee hours, she will drop Altaf at the

Ghatkopar Police Station early morning. P.S.I. Khedekar did not listen to her request and kept on slapping Altaf. Three of them caught hold of Altaf by his collar and back of his pant and dragged him to the auto rickshaw by kicking and punching him constantly. They pulled Altaf's hair and slapped him on his face. They threw him in auto rickshaw and took him to Ghatkopar Police Station. Sub-Inspector Khedekar had told the Petitioner that she should visit the Police Station in the morning. Two Policemen visited Petitioner's house. They told her that she have been called at Ghatkopar Police Station for recording her statement. She accompanied them. On the way she was informed that Altaf has been hit on the head and he was admitted in Rajawadi Hospital. She was taken to Rajawadi Hospital. On reaching Rajawadi Hospital, the Petitioner found her son's body lying on the stretcher. His body had unbuttoned shirt and underwear. His body had bruises. Injury marks were present at his head, hands, arms, back, legs, ears and blood was oozing. Lady Nayab Tahsildar was present. She was recording Panchanama. Petitioner's thumb impression and her elder son's signatures were attested on written and blank papers stating that Altaf's body and Panchanam is required to be sent for conducting postmortem urgently. Postmortem was conducted by panel of five Doctors. Petitioner was

informed that she will get postmortem report within ten days. Petitioners husband visited J.J. Hospital for collecting Postmortem Report. He was told by hospital authorities that the report has been sent to Assistant Commissioner of Police. Thereafter, it was informed that, Postmortem Report had been sent to New Delhi. ADR report was filed vide ADR No. 184 of 2009. The Petitioner filed complaint agitating about the death of Altaf Shaikh in Police custody and seeking investigation. No FIR was registered.

4. The Petitioner filed Criminal Writ Petition No. 2613 of 2009 before this Court contending that her son Altaf was killed in Police custody. Directions were sought that case be registered against the Police Officers, who according to her were responsible for the murder of her son. This Court made several observations regarding conduct of Police and held that *prima facie* the death of deceased Altaf Shaikh has taken place in the Police Station as a result of torture. Vide order dated 16th October, 2009, it was directed that case be registered against the concerned Police Officials and the persons who conducted the inquest for offences under Sections 302, 201 and 330 of IPC. It was further directed that the investigating agency may add or delete the offences as a result of investigation, if they find that there is evidence of some

other offence or there is no evidence of offence in which the Court directed registration of the case. The CBI Mumbai was directed to take up the investigation immediately and DCB, CID, who was conducting an inquiry was directed to handover all the papers relating to the matter to CBI immediately. The Superintendent of Police, CBI, Mumbai was directed to conduct the investigation in all earnestness, unmoved by any observations made in the said order.

5. The order dated 16th October, 2009 was challenged by the Respondent Nos. 2 to 4 before the Apex Court by preferring special leave petition. Vide order dated 23rd November, 2009 the Apex Court directed that FIR be registered regarding death of Altaf Kadir Shaikh and matter be investigated by CBI without being influenced by any of the observations made by the High Court. It was further directed that till the report of CBI is received no action shall be taken against any of the officials. CBI shall exercise usual powers of investigation and submit the report expeditiously.

6. The CBI registered the FIR bearing no. BSI/2009/S/0004 on 27th November, 2009 for offences under Sections 302, 201 and 330 of IPC. In the FIR, it was stated that, on 11th September, 2009 at about 4:00 am, Officials of Ghatkopar Police Station namely Sanjay S. Khedekar, P.S.I. Mr. Raghunath Khedekar, Head Constable

and Sayaji B. Thombre, Police Naik came to the residence of Altaf Kadir Shaikh and picked him. They carried him to the Ghatkopar Police Station. He was detained at detection room of Ghatkopar Police Station. Subsequently, at about 09.:00 a.m. Shri. Zendekar, Senior Police Inspector Ghatkopar Police Station while on routine round in the Police Station noticed Altaf Kadir Shaikh sleeping in the detection room. When he tried to wake him up, there was no response. Altaf Kadir Shaikh was immediately removed to Rajawadi Hospital where he was declared dead before admission. Inquest of the body of deceased was conducted by Ms. V. V. Rane, Resident Nayab Tahsildar, Kurla-Mulund which revealed no external injuries on his body. The postmortem examination of his body was conducted by the panel of Doctors of Department of Forensic Medicine, Grant Medical college and Sir J.J. Hospital Mumbai. The postmortem report given by the five Doctors shows eight external and two internal injuries.

7. The CBI conducted investigation. Statements of witnesses were recorded. Charge-sheet was filed before the Court of learned Additional Chief Metropolitan Magistrate only for the offences punishable under Section 120-B, 323 and 342 of IPC. The learned Magistrate took cognizance of charge-sheet on 11th March, 2013.

Charges were framed under Section 120-B, 323 and 342 of IPC against the accused. The Criminal Writ Petition No.2613 of 2009 was heard for considering prayer for compensation and vide order dated 19th June, 2014, it was directed that trial Court to dispose of the trial within one year and also clarified that the trial court would be entitled to consider independently the question of compensation. The charge-sheet filed by CBI indicate that, on 11th September, 2009 the Respondent Nos. 2 to 4 entered into criminal conspiracy with each other, the object of which was for voluntarily causing hurt and wrongful confinement of Altaf Kadir Shaikh. In pursuance of said criminal conspiracy, on 11th September, 2009, the Accused visited residence of Altaf and assaulted him. He was dragged to auto rickshaw. Assault at the hands of Accused resulted into several injuries to him. He was taken to Police Station and confined in enclosure of detection room. The Police did not make any entry in the station diary of Ghatkopar Police Station nor recorded arrest Panchanama. On 11th September, 2009 at 9:00 hours Shri. Zendekar, Senior Police Inspector of Ghatkopar Police Station directed Accused No.2 to wake up Altaf Shaikh. When Accused No.2 tried to wake him up, he did not respond. Altaf Shaikh was taken to Rajawadi Hospital where he was declared brought dead by Doctor at about 9:46 am. Inquest proceedings of

deceased Altaf were conducted at Rajawadi Hospital by Accused No.4 from 3:00 pm to 3:45 pm on 11th September, 2009 which revealed no fresh external injury, though postmortem report mentions eight external injuries on body of deceased. During investigation exhibits such as CD's of videography and photographs of autopsy, inquest report, histopathology report, neuropathology report etc. were sent to Department of Forensic Medicine and Toxicology, All Indian Institute of Medical Sciences, New Delhi. The three Doctors gave opinion that, injuries mentioned in postmortem report of the deceased are linear abrasions, abrasion and contusions. The abrasions are varying from 0.2 x 0.2 cm to 2 x 0.5 cm and two contusions are of the size of 4 x 3 cm and 2 x 1 cm. Such small injuries are likely to be missed on examination by a non-medical person particularly in an uncleaned dead body. However, Medical Officer may observe them on detailed examination at the time of postmortem examination. The injuries are likely to be better appreciated on proper washing/cleaning of dead body. Smt. Vandana Rane was name as Accused in FIR. However, in view of the opinion of Doctors of AIIMS, New Delhi, she is not being prosecuted/sent up for trial as there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of her to the Court. Smt. Vandana Rane may be

discharged. After postmortem, brain and viscera of the deceased Altaf Kadir Shaikh were sent for neuropathological, histopathological and chemical examination/analysis at Sir J.J. Hospital, Mumbai and F.S.L. Kalina, Mumbai. Based on above reports, the Doctors, who conducted postmortem issued final cause of death of Altaf Shaikh as 'Death due to Acute Alprazolam and Ethyl Alcohol Toxicity with contusion of scalp with sub-Arachnoid Heamorrhage with pneumonia associated lesion tatty liver.' The opinion of Doctors of AIIMS, New Delhi was obtained about final cause of death on 19th July, 2010 that cause of death could be respiratory failure due to combined additive effect of toxicity of Alprazolam and Ethyl Alcohol and Lung Pneumonia. The above facts disclose commission of offences of criminal conspiracy punishable under Section 120-B of IPC, voluntarily causing hurt punishable under Section 323 of IPC and causing wrongful confinement punishable under Section 342 of IPC by Accused Nos. 1 to 3 (Respondent Nos. 2 to 4). The offence under Section 302, 201 and 330 of IPC are not made out against the Accused in the absence of legal evidence. Sanction under Section 197 of Cr.P.C. has been obtained for prosecution of Accused.

8. The complainant filed protest petition on 16th September, 2013 requesting the Court to commit the case to the Sessions Court

for trial under Section 120-B, 302, 323, 342 and 330 of IPC. The learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai vide order dated 3rd November, 2014 allowed the protest petition. The case was committed to Human Rights Court i.e. Court of Sessions Mumbai specified under Section 30 of the Protection of Human Rights Act, 1993 vide Government Notification No.CRC.102K/(117)-IX dated 30th May, 2001, for trial of offences under Sections 302, 323, 330 and 342 r/w 34 of IPC. The Accused were directed to appear before the Human Rights Court. Pursuant to the said order the case was committed to the Court of Sessions and it was assigned to the Special Judge, CBI.

9. The Respondent Nos. 2 to 4 challenged the Order dated 3rd November, 2014 by preferring Criminal Revision Application No.378 of 2015. As the case was already committed to the Court of Sessions. The revision application was disposed off vide order dated 11th March, 2015 with liberty to Respondent Nos. 2 to 4 to point out their grievances regarding the subject matter of revision to the Sessions Court where there case is pending.

10. The learned Special Judge heard the parties on the point of framing of charge. Vide order dated 3rd January, 2018, the learned Special Judge (CBI), Sessions Court for greater Bombay

remanded the case back to the Court of learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai for trial of the offences punishable under Sections 120-B r/w 323, 342 of IPC. The Accused were directed to appear before the Court of learned Magistrate.

11. Learned Advocate for the Petitioner Dr. Choudhary submitted as under :-

i. The impugned order dated 3rd January, 2018 is contrary to law and evidence on record.

ii. The conduct of Respondent Nos. 2 to 4 was suspicious right from inception. The inquest Panchanama was fabricated by suppressing injuries on the person of the deceased

iii. The learned Magistrate has passed the order dated 3rd November, 2014 by analyzing the documents on record and opined that offence under Sections 302, 323 and 342 of IPC are made out.

iv. The offence under Sections 302, 323, 330 and 342 r/w 34 of IPC are made out against the Accused which are out of violation of Human Rights.

v. The Apex Court had directed registration of FIR against the Accused regarding death of Altaf Kadir Shaikh.

The FIR was then registered on 27th November, 2009 under Sections 302, 201 and 330 of IPC. Charge-sheet was filed. However, the CBI had erroneously dropped the charge under Section 302 and 330 of IPC. There is sufficient material to file charge-sheet for said offences.

vi. Human Rights Courts were setup by notification issued by Law and Judiciary Department, Mantralaya Mumbai vide notification dated 30th May, 2001 with a view to provide better protection of human rights and for matters connected there with and incidental thereto and so that the offences arsing out of violation of human rights are tried expeditiously. Custodial deaths have been long considered as a grave infraction of human rights.

vii. Section 2(d) defines human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by Courts in India. Section 30 of the Protection of Human Rights Act provides that for the purpose of providing speedy trial of the offences arising out of violation of human rights, the State Government with the concurrence of the Hon'ble Chief Justice of the High

Court by notification specify for each district a Court of Sessions to be Human Rights Courts to try the offences.

viii. The Special Court failed to comprehend that any form of torture or cruel inhuman or degrading treatment whether it occurs during investigation or otherwise would amount to violation of fundamental right and liberty as envisaged under Article 21 of the Constitution of India.

ix. The CBI had submitted a charge-sheet under Sections 323 and 342 of IPC against the Accused for commission of offences of inflicting cruel and inhuman treatment upon the deceased and forcing him to wrongful confinement without following due process of law.

x. The deceased was taken to Ghatkopar Police Station by the Police without showing any lawful arrest, preparing arrest memo or making any entry about his arrest in the lockup registered or station diary and wrongfully confined him in the detention room of the Police Station where the deceased died on the same morning.

xi. Learned Special Judge has miserably failed to appreciate that the facts on record disclosed *prima facie* material to frame charges for commission of offences under Section 302 and 330 of IPC.

xii. The postmortem report discloses eight external injuries and two internal injuries leading to haemorrhage which are grave in nature and capable of causing death of the deceased.

xiii. Learned Special Judge has heavily relied upon the report of AIIMS, Delhi dated 19th July, 2010 and arrived at the conclusion that the only offences which are made out against the Accused are under Section 323, 342 r/w 120-B of IPC. The Court had ignored the postmortem report and the final report regarding the cause of death of the deceased issued by the committee of J.J. Hospital. The Court has also brushed aside the statements of Medical Officers which indicate that the death of deceased could be caused by the injuries suffered by him.

xiv. In the event of conflicting medical opinion regarding cause of death primacy must be give to the medical witness who had an opportunity to examine the deceased over the reports which were received after a period of one year from the date of incident of death given by the Medical Officers who had no opportunity of examining the dead body.

xv. The postmortem report given by the Doctors who examined the dead body does not reflect the presence of any

external toxic elements like. Alprazolam or Ethyl Alcohol in the body of the deceased.

xvi. The crime is of serious nature. The victim was tortured while he was in custody of Accused. He was subjected to assault. There is violation of human rights. The opinion formed by the Sessions Court was illogical. *Prima facie* case was made out to frame charge under Sections 120-B, 302 and 330 of IPC. At the stage of framing of charge the Court is not required to conduct roving inquiry. The evidence on record was sufficient to *prima facie* form an opinion that the death of deceased was caused by the Accused while he is in custody.

xvii. There is no necessity of sanction under Section 197 of Cr.P.C. in this case. The victim was assaulted by Police, which resulted into his death, such act cannot be said to be committed in discharge of duty.

xviii. Section 216(5) of the Cr.P.C. provides that, if the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same fact as those on which the altered or added charge is

founded.

xix. Although the charge was framed by the Court of learned Magistrate, the said Court was not precluded at subsequent stage to commit the case to the Court of Sessions when it was noticed that the offence triable by the Sessions Court is made out.

xx. The learned Sessions Judge could not have ignored the opinion of Sir J.J. Hospital, Mumbai regarding cause of death. Assuming that, opinion given by AIIMS Hospital, Delhi is contrary, at this stage the Court could not have brushed aside the opinion of Doctors, who conducted postmortem.

12. Learned Advocate for the Petitioner has relied upon the following decisions :-

i. *D.K. Basu V/s. State of West Bengal and Ors., (2015) 8 SCC 744.*

ii. *Paramvir Singh Saini V/s. Baljit Singh, (2021) 1 SCC 184.*

iii. *Rasiklal M. Gangani V/s. Govt. of Goa and Ors., 2004 BOM LR 626.*

iv. *R.S. Mishra V/s. State of Orissa and Ors., (2011) 2 SCC 689.*

v. *Jagdish Ram V/s. State of Rajasthan and Anr., (2004) 4 SCC 432.*

vi. *M/s. India Carat Pvt. Ltd. V/s. State of Karnataka and Anr., (1989) 2 SCC 132.*

vii. *Nupur Talwar V/s. Central Bureau of Investigation, Delhi and Anr., (2012) 2 SCC 188.*

viii. *State of Bihar V/s. Ramesh Singh, AIR 1977 SC 2018.*

ix. *State of M.P. V/s. S.B Johari, AIR 2000 SC 665.*

x. *Eshwaraiah and Anr. V/s. State of Karnataka, (1994) 2 SCC 677.*

xi. *Tanviben Pankajkumar Divetia V/s. State of Gujrat, (1997) 7 SCC 156.*

xii. *Nasimbanoo widow of Allanoorkhan V/s. State of Maharashtra, 2011 ALL MR (Cri.) 3875.*

xiii. *Ranjan and Others V/s. State, Hon'ble Supreme Court Judgment dated 1st April, 2008 in Criminal Appeal No.579 of 2008.*

xiv. *State of Andhra Pradesh V/s. Thakkidiram Reddy, AIR 1998 SC 2702.*

xv. *P. P. Unnikrishnan V/s. Puttiyottil, (2000) 8 SCC 131.*

xvi. *S. P. Vaithianathan V/s. K. Shanmuganathan (1994) 4 SCC 569.*

xvii. *Choudhury Parveen Sultana V/s. State of W.B., (2009) 3 SCC 398.*

xviii. *Devinder Singh and Ors. V/s. State of Punjab, (2016) 12 SCC 87.*

13. Learned Advocate for the Respondent Nos. 2 to 4 submitted that the expert opinion received about cause of death from AIIMS, Delhi completely rules out the allegations of custodial death. There is sufficient material on record to indicate that, the deceased has consumed intoxicants which has caused his death. For the alleged assault witnessed by the complainant and other witnesses Section 323 of IPC has been invoked against the Respondents. To constitute the offence under Section 302 of IPC there has to be material before the Court. The CBI has conducted investigation and filed charge-sheet for the offence under Section 323 and 342 of IPC. On the basis of inferences the accused cannot be prosecuted for grave charge. The allegations of assault causing death of the victim are false. The deceased was externee. He had committed breach of externment order. He was suspected to be involved in fresh crimes. He was required to be interrogated. He was found to be under the influence of intoxicants. The first informant has suppressed the vital facts. There is strong evidence to indicate that he had consumed Alphrazolam tablets. He was taken to Police Station for interrogation. He was found dead and thereafter taken to Hospital immediately. ADR was registered. Inquest Panchanama was recorded. Statements of mother of the deceased and his brother were recorded. They did not made

grievance about the assault by Police. ADR inquiry was handed over to DCB, CID. CBI had investigated the case and did not find any evidence to constitute offence under Section 302, 201 and 330 of IPC. The statements of witnesses were recorded. The panel of five Doctors of J.J. Hospital who conducted the postmortem has given certificate of final cause of death after examining several reports i.e. Viscera, Tissues, Penial Web, Brain, Blood, CA histopathology, seminal stain examination, neuro-path examination and the opinion was mentioned as acute Alprazolam and ethyl alcohol toxicity with contusion of scalp with Sub-Arachnoid Heamorrhage with pneumonia associated lesion fatty liver. Since, the final cause of death given by the panel of Doctors shows that the deceased has died due to multiple causes, the CBI had decided to seek clarity on the actual cause which has resulted into death of the deceased. Vide letter dated 19th February, 2010, CBI submitted all documents, reports, video CD etc. to the department of forensic medicine and toxicology, AIIMS, Delhi for their expert opinion. Vide report dated 19th July, 2010 submitted by AIIMS, Delhi it was opined that cause of Sub-Arachnoid Heamorrhage could be trauma, Intoxication, asphyxia and spontaneous (natural). In 85 % of spontaneous SAH the cause is rupture of cerebral aneurysm. Sub-Arachnoid Heamorrhage can also be seen in case of alchoholic

intoxication. It can cause symptoms that may include headache, decreased level of consciousness and hemiparesis. External injury can cause sub-arachnoid heamorrhage and can result in death of person. In the present case the finding of sub-arachoid heamorrhage are minimal and unlikely to cause death. Considering the findings as mention in postmortem report, FSL reports, histopathology report, photographs and on examination of video CD of inquest and postmortem examination the Doctores were of the opinion that the cause of death in this case could be respiratory failure due to combined additive effect of toxicity of Alprazolam and ethyl alcohol and lung pneumonia. In the light of the aforesaid opinion the Respondents cannot be charged for the offences under Section 302 and 330 of IPC. After the filing of charge-sheet by CBI the Court of learned Magistrate had framed charges under Section 323, 342 and 120-B of IPC. Thereafter, the complainant filed a protest petition before the learned Magistrate with a prayer to commit the the case to the Court of Sessions for trial under Section 120-B, 302, 323, 342 and 330 of IPC. The protest petition was opposed by the Respondents by filing reply. Without appreciating the material brought on record by Respondent No.5, the learned Magistrate allowed the protest petition and committed the case to Human Rights Court. After

framing of charges by the Court of learned Magistrate there was no reason for the said Court to allow the protest petition and commit the case to the Court of Sessions. The learned Sessions Judge has assigned reasons of remanding the case back to the trial Court with an observation that the offences under Section 302 and 330 of IPC are not made out. Without cogent evidence the Accused cannot be subjected to trial for serious offences. Sanction was granted only for offences under Sections 120-B, 323 and 342 of IPC. The deceased was involved in several cases. In three cases he was convicted and other cases are pending for trial. He was externed from several areas. During the operation of externment order he had illegally entered Mumbai by violating the said order. The information was received that he was involved in the case of robbery and in order to make inquiry the deceased was picked up by the Police. Chage-sheet was not filed for violation of Human rights. Hence, the petition may be dismissed.

14. Learned Advocate Mr. Venegavkar appearing Respondent No.5 submitted that the charge-sheet filed by CBI makes out the offence under Sections 120-B, 323 and 342 of IPC. The medical opinion collected during the investigation from AIIMS, Delhi rules out the possibility of death of victim caused by the Respondents.

Final opinion regarding cause of death by Doctors at J.J. Hospital also refers to presence of intoxicants as cause of death. Hence, on completing investigation charge-sheet was filed for the aforesaid offences. Sanction was granted by Government under Section 197 of Cr.P.C. for the said offences. The charges under Sections 302 and 330 were dropped. The learned Sessions Judge has rightly remanded case the back to the first Court for trial of Respondents for aforesaid offences. There is no reason to set aside the order passed by the Special Court / Sessions Court.

15. In the case of *D.K. Basu V/s. State of West Bengal and Ors. (Supra),* it is observed that Section 30 of Protection of Human Rights Act, 1993 provides that, the State Government shall specify with the concurrence of the Hon'ble Chief Justice of the High Court, for each district a Court of Sessions to be a Human Rights Court so that the offences arising out of violations of Human Rights are tried and disposed of speedily. Section 30 provides speedy trial of the offences arising out of violation of Human Rights. In the case of *Paramvir Singh Saini V/s. Baljit Singh* (Supra), it is observed that whenever there is information of force being used at Police Stations resulting in serious injury and or custodial deaths, it is necessary that person be free to complaint for redressal of the

same. Such complaints may not only be made to the State Human Rights Commission, which is then to utilize its powers more particularly under Section 17 and 18 of the Protection of Human Rights Act, 1993 for redressal of such complaints but also to Human Rights Courts which must then be set up in each district of State/Union Territory under Section 30 of the Act. In the case of *Rasiklal M. Gangani V/s. Govt. of Goa and Ors.* (Supra) it was observed that, since the Human Rights Act has not specified any special provision relating to the cognizance and the trial of the offence, the provisions of the Code of Criminal Procedure would govern the trial of cases before the Human Rights Court. The Sessions Court though designated as a Human Rights Court continues to be a Court of Sessions and therefore unless it is otherwise stated in the Act the Human Rights Court would not be a Court of original jurisdiction. It cannot directly take cognizance of a complaint filed before it. A reference may usefully be made to Section 193 of the Code of Criminal Procedure, which provides that except as otherwise expressly provided by this Code or by any other Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original Jurisdiction unless the case has been committed to it by a Magistrate under this Code.

16. The Petitioner's son Altaf Kadir Shaikh died on 11th September, 2009. It is not disputed that on the date of incident the deceased was at home and that the Policemen had visited his house. It is also not disputed that the deceased was taken into custody by the Police who visited the house of the Petitioner and was purportedly taken to the Police Station for inquiry. On the same day he was found dead. It is not disputed that the deceased died while in custody of Police. The question involved in this case is whether the deceased was subjected to torture / assault by Policemen which has resulted in his death. There cannot be debate that the death of the suspect / Accused while in custody of the Police on account of torture and assault by Police would amount to murder. The complaint was made by the Petitioner alleging that the deceased was tortured by Police which has resulted in death. Cognizance of complaint was not taken by the Police. The Petitioner who is mother of deceased was constrained to approach this Court by preferring Criminal Writ Petition No.2613 of 2009. This Court had made critical observations about the conduct of Police, preparation of inquest, finding of injuries on the body of the deceased and the cause of death. The Division Bench of this Court directed that the case be registered against the concerned Police Officials and persons who conducted inquest for the offences under

Section 302, 201 and 330 of IPC. The investigation was transferred to CBI. The Apex Court directed that FIR be registered regarding death of Altaf Kadir Shaikh and matter be investigated by CBI without being influenced by any of the observations made by the High Court. FIR was registered by CBI on 27th November, 2009 under Section 302, 201 and 330 of IPC. The CBI filed a charge-sheet under Section 120-B, 323 and 342 of IPC. Thus, the CBI had indicted Respondent Nos. 2 to 4 to the extent of offence of conspiracy, assault and wrongful restraint. The Court of learned Magistrate had thereafter framed the charge. Subsequently protest petition was filed by the Petitioner and at that point of time the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai vide order dated 3rd November, 2014 allowed the protest petition and committed the case to the Human Rights Court i.e. Court of Sessions for trial of offences under Sections 302, 323, 330 and 342 r/w 34 of IPC. It is pertinent to note that the learned Magistrate has taken efforts to peruse the documents on record and after analyzing them proceeded to pass the aforesaid order. It was observed that the Respondent Nos. 2 to 4 are Police Sub-Inspector, Police Head Constable and Police Naik attached to Ghatkopar Police Station. They visited the house of deceased on 11th November, 2009 and it is the prosecution case that the

deceased was assaulted and dragged into auto rickshaw and wrongfully detained in detention room of Ghatkopar Police Station. He was found dead in the enclosure of detection room. He was shifted to Rajawadi Hospital. He was declared dead. The Court then referred to the external injuries and internal injuries suffered by deceased and the provisional opinion regarding cause of death given by the Doctors at J.J. Hospital and final opinion given by the Doctors who conducted the postmortem. The learned Magistrate also made reference to the opinion of All Indian Medical Institute of Medical Science, Delhi. Reference was also made to the statements of witnesses recorded during the investigation. On analyzing the factual matrix it was observed that, even after taking cognizance of the offences against particular Accused at subsequent stage without resorting to Section 319 of Cr.P.C., the Court has power to direct additional Accused to face the trial and the said analogy referred to the said decision could be applicable in the present case. Reference was also made to Section 216 of Cr.P.C. which empowers Court to alter or add any charge at any time before the Judgment and observed that for exercising such powers recording of evidence is not necessary. It was further observed that the statement of family members of the deceased and neighbours *prima facie* show that the Accused / Police Official while taking the

deceased in their custody have mercilessly assaulted him and dragged him in rickshaw and took him to Police Station where he was illegally detained and found dead. The Court took into consideration the report of Doctors at J.J. Hospital who conducted the postmortem and their statements. The Court also referred to reports of Doctors of AIIMS, Delhi and then observed that when there are two contrary opinions of the teams of the Doctors, at the stage of *prima facie* case the opinion of the Doctors must be given predominance over the opinion given by the other Doctors who have not conducted the postmortem. The Court is not competent to decide as to whose opinion is correct and such question would be decided only in the course of trial by the Competent Court. Only the Competent Court has final voice of such question of facts and the Court is required to find out *prima facie* case which means possibility of death of deceased by assault. Considering the fact that deceased died in the custody of the Accused, he had two contusions resulting into sub-arachnoid heamorrhage which could be the cause of death of the deceased, *prima facie* there is sufficient material to show that the deceased died homicidal death which is an offence punishable under Section 302 of IPC. It was also observed that there is evidence to support the charge for an offence under Section 330 of IPC. By assigning cogent reasons and with

elaborate order the learned Magistrate allowed the protest petition and committed the case to the Human Rights Court / Sessions Court.

17. Although, while disposing of the revision application preferred by respondent Nos. 2 to 4, challenging the order of learned Additional Chief Metropolitan Magistrate by reserving liberty to point out their grievances regarding the subject matter of revision to the Sessions Court where the case is now pending, it has to be noted that the Sessions Court was at the stage of framing of charge and the impugned order indicate that both sides were heard on the point of framing charge. The learned Sessions Judge vide impugned order has observed that, CBI has filed a charge sheet and in the charge-sheet there are no allegations for prosecution arising out of violation of Human Rights. The charge-sheet is supported with sanction order dated 30th December, 2010 as the Accused were public servants. Sanction was granted to prosecute the Accused under Section 120-B, 323 and 342 of IPC. Provisions of Section 197(2) is applicable to Police Officers as defined in Bombay Police Act. In the instant case, the Government of Maharashtra has granted sanction to prosecute the Accused for the offences under Section 120-B, 323, 342 of IPC only. After presentation of charge-

sheet the learned Magistrate had taken cognizance for offences punishable under Sections 120-B, 323, 342 of IPC only. On perusal of charge-sheet it appears that on 11th September, 2009 the Respondent Nos. 2 to 4 while working in the Detection Department of Ghatkopar Police Station entered into criminal conspiracy with each other, the object of which was for voluntarily causing hurt and wrongful confinement of Altaf Kadir Shaikh. In furtherance of conspiracy the Accused visited the residence of deceased. He was assaulted, picked up and dragged by them to the auto rickshaw. The assault resulted in several injuries to him. He was taken to Ghatkopar Police Station where he was confined by them at the detection room of the Police Station. The Police did not make any entry in the station diary in respect of bringing Altaf Kadir Shaikh to the Police Station. The Respondent No.2 did not make any arrest Panchanama in this regard. On 11th September, 2009 in the morning at 9 hours while Senior P.I. was having round of Police Station. He visited detection room and found that the deceased was not responding. He was taken to hospital where he was declared dead. Inquest was conducted at Rajawadi Hospital by Nayab Tahsildar which revealed no fresh external injury though the postmortem in respect deceased mentions eight external injuries on the body of the deceased. Exhibits such as C.Ds., videography,

photographs of the autopsy, Inquest report, Histopathology report and Neuropathology report etc. were sent to Department of Forensic Medicine and Toxicology, AIIMS, Delhi by CBI. The opinion was received that the cause of death in this case could be respiratory failure due to combine additive effect of toxicity of Alphrazolam and Ethyl Alcohol and lung pneumonia. Considering the said report the learned Special Judge had given a finding that the charge-sheet discloses the offences punishable under Section 120-B, 323 and 342 of IPC and offence under Sections 302, 201 and 330 of IPC are not made out. The case was remanded back to the Court of learned Magistrate.

18. It is relevant to note that the charge-sheet filed by CBI indicts the Respondents on the charges of conspiracy, assault and wrongful confinement. There was no station diary entry about victim being brought for enquiry and there was no arrest panchnama. The incident of picking up victim from his residence, assault and dragging him towards Auto-rickshaw is supported by statements of witnesses.

19. The postmortem report referred to external and internal injuries which are as follows :-

External Injuries :

i. A contusion present on left side of back over lumber region of size 4x3 cm, red colour, subcut. Deep on dissection

ii. A contusion present on right tibial tuberosity of size 2 cm x1 cm, red colour, subcutaneous deep.

iii. Four Abrasions of size 1 cm x 0.5 cm, 0.2 x 02 cm, 0.2 x 08 cm, 2 cm x 0.5 cm present on shin of right leg, red colour.

iv. Linear abrasion of size 4 cm x 0.2 cm present on shin of right let at lower 1/3rd anteriorly, red colour.

v. Four abrasion of size 0.5 cm x 0.5 cm, each present on just above and lateral aspect of left knee, red colour.

vi. Linear abrasion of size 2cm x 0.5 cm present on left knee, red colour.

vii. Old healed abrasion of size 0.5 cm x 0.5 cm on left index finger at its terminal phalynx.

viii. Four linear abrasions of size 0.5 cm x 0.2 cm each, irregular present on left tibial shin region, middle 1/3rd part of lower limb below knee, red colour.

Internal Examination :

Head:

(a) Scalp Findings:

i. A contusion under scalp at high Parietal Region of 6 cm x 5 cm in size, periosteal deep, dark red colour.

ii. A contusion present on left tempero-occipital region at

base of 4 cm x 4 cm, periosteal deep, dark red colour.

(b) <u>Skull:</u>

Skull is intact, and no E/o fracture seen.

(c) <u>Meninges, meningeal spaces & Cerebra/vessels :</u>

(Hemorrhage & its location, abnormal smell etc.)

Meninges are congested.

i. Sub-Arachnoid Heamorrhage seen on left frontal lobe at inferior surface of size 4 cm x 3 cm, dark red colour.

ii. Sub-Arachnoid Heamorrhage seen on right parietal region, diffuse of size 3 cm x 2 cm dark red colour.

20. The Doctors at Sir J.J. Hosptial, who conducted the postmortem gave provisional opinion regarding cause of death as 'Evidence of contusion of scalp with Sub-Arachnoid Haemorrhage.' The final opinion was reserved pending Histopathology, Chemical Analysis and accessory Examination. The Doctors at Sir J.J. Hospital gave final opinion on 6th November, 2009 as 'Death due to acute Alphrazolam and ethyl alcohol toxicity with contusion of scalp with sub-arachnoid haemorrage with pneumonia associated lesion fatty liver.'

21. The CBI called for report from AIIMS, Delhi by forwarding documents/reports. Thus, report was submitted by authority, who

were not party to postmortem. Vide report dated 19th July 2010, apart from other opinion with regards to questions put-forth by CBI for opinion, the prime opinion given by AIIMS, Delhi regarding cause of death is "considering the findings as mentioned in postmortem report, FSL Reports, Histopathology Report, Photographs and on examination of video CD of Inquest and Postmortem Examination, cause of death in this case could be respiratory failure due to combined additive effect of toxicity of Alprazolam and Ethyl Alcohol and lung pneumonia". It is pertinent to note that while postmortem report was recorded, there was no semblance of either consumption of Alprazolam or Ethyl Alcohol. The cause of death referred to contusion of scalp with sub-arachnoid haemorrage. However, final opinion of team of J.J. Hospital indicated death due to acute Alprazolam and Ethyl Alcohol Toxicity with contusion of scalp with sub-arachnoid haemorrage with pneumonia associated lesion fatty liver. This opinion indeed include contusion of scalp with sub-arachnoid haemorrage as one of the cause of death. The opinion of AIIMS, Delhi is mostly extraneous to postmortem report. Thus, there are two contradictory opinions. It is pertinent to note that, postmortem was conducted by the Doctors attached to J.J. Hospital. The CBI had sought opinion from the Medical Officers of AIIMS, Delhi who

were not party for conducting the postmortem. There opinion was based on the documents forwarded to them.

22. It is a settled law that if on the basis of material on record Court could come to the conclusion that commission of offence is probable consequence, a case for framing of charge exists. If the Court were to think that the Accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the Accused has committed the offence. At the stage of framing of charge probative value of material on record cannot be gone into, the material brought on record by the prosecution has be accepted as true at that stage. At *prima facie* stage the strong suspicion that the Accused may have committed the grave offence would be sufficient to apply the grave offence against the Accused. The statements of family members of the deceased and neighbours were recorded during the investigation, the said statements *prima facie* shows that Respondents/Accused while taking the deceased in their custody assaulted him and dragged him to auto rickshaw and took him to the Police Station where he was detained. The Doctors at J.J. hospital who conducted postmortem had advantage of giving an opinion as they have observed injuries including two fatal scalp

injuries i.e. contusion under scalp at high parietal region of 6 cm x 5 cm in size. Periosteal deep, dark colour and contusion on left tempero-occipital region at base of 4 cm x 4 cm, periosteal deep, dark red colour. The Doctors, on internal examination found sub-arachnoid heamorrhage at left frontal lobe at interior surface and on right parietal region. This was not the stage to appreciate the evidence and therefore the learned Sessions Judge has failed to notice this fact and committed an error while passing the impugned order.

23. I have perused the statements of Dr. Bhalchandra Gopinath Chikhalkar, Dr. Gajanan Sheshrao Chavan, Dr. Ashutosh Harshwardhan Meshram and Dr. Anand Parshuram Raymane their version depicts the death of deceased Altaf Shaikh might have occurred due to individual reason or on account of collective reasons mentioned in final opinion. Their statements indicate that the death is due to assault resulting into sub-arachnoid heamorrhage or may be due to other reasons. The Doctors have also stated two contusion injuries are sufficient to lead death of the deceased and those injuries could be due to assault by hard and blunt object. The case of contusion of scalp with sub-arachnoid heamorrhage is more likely to cause death. More probable reason

for the death of deceased is contusion injuries to the scalp resulting into sub-arachnoid heamorrhage thereby it is homicidal death. On the other hand the team of three Doctors gave their final opinion that cause of death in this case is could be respiratory failure due combine additive effect of toxicity of Alprazolam and Ethyl Alcohol and lung pneumonia and not sub-arachnoid heamorrhage. Even if there is debate in respect to cause of death on the basis of the opinion of the Doctors of J.J. Hospital the Accused cannot be absolved at this stage from the charge under Section 302 of IPC.

24. The postmortem of the victim was conducted by panel of five doctors attached to J.J. Hospital namely Dr. Balchandra Gopinath Chikhalkar, Dr. Gajanan Sheshrao Chavan, Dr. Ashutosh Harshwardhan Meshram, Dr. Anand Parshuram Rajmane and Dr. M. E. Bansude. During the course of investigation, their statements are recorded. Dr. Balchandra Chikhalkar in his statement dated 20th January 2010 stated that, he has been working in Sir J.J. Hospital, Mumbai for the past twelve years. He has conducted around 4,000 postmortems. According to him on 11th September 2009, the dean of Grant Medical Collage received a letter from Senior Police Inspector, Ghatkopar Police Station requesting them to form a panel of doctors to conduct postmortem of Altaf Kadir Shaikh. The

panel comprised of him, Dr. G. S. Chavan, Dr. A.H. Meshram, Dr. M.E. Bansude and Dr. A.P. Raymane, conducted postmortem of Altaf Shaikh. He has referred to external and internal injuries on the body of deceased Altaf Shaikh, which were also reflected in postmortem report. He stated that, no specific odour being perceived him while examining the stomach. Generally on examination of stomach of alcoholic persons under intoxication, they perceived odour of alcohol which was absent in the said case. As per inquest conducted by Naib-Tahsildar, only one old external injury was found on left knee of Altaf Shaikh. Whereas in the postmortem report Eight visible external injuries were noted. The external injuries mentioned in the postmortem report were visible with the neked eye and it did not not require washing to be seen. Secretion was seen coming out of nose of deceased due to severe pulmonary oedema or due to depression of respiratory centers at the time of death. It's cause may be due to respiratory insufficiency or depression. Bleeding was observed from left ear pinna due to the punctured part of the pinna of the left ear. It exhibit signs of external injury caused from hard and blunt object. Contusion present on the left side of back over lumbar region of 4cm X 3cm has been caused due to the impact of hard and blunt object like wooden block or heeled shoes. Contusion present on the right

tibial tuberosity of size 2cm X 1cm has been caused due to the impact of hard and blunt object like wooden stick. Four abrasions found on shin of right leg are caused due to the frictional dragging force over the rough surface. The other abrasions found on the body are caused due to the frictional dragging force over the rough surface. The contusion found under scalp had high parietal region of 6cm X 5cm in size periosteal deep occurs due to the impact with hard and blunt object. This injury alongwith associated internal injuries of brain can lead to death of person . The contusion found under the scalp at left tempero-occipital region are based of 4cm X 4cm in size periosteal deep occurs due to the impact with hard and blunt object. This injury along with associated internal injuries of brain can lead to death of person. Meninges can be secondary to the impact on head or it can occur due to intoxication. The sub-arachnoid haemorrhage is caused due to the secondary effect of the trauma (impact on the head with hard and blunt object). It will interfere with the functioning of vital centres of nervous system. In some cases sub-arachnoid haemmorrhage may occur due to intoxication but its chances are very limited. Sub-Arachnoid haemmorrhage associated with the contusions under the scalp indicates association of external injury with it. It may lead to the death of person. The contusion found under the scalp at high

parietal region corresponds to sub-arachnoid haemmorrhage found at the right parietal region whereas contusion found under the scalp at left tempero-occipital region may lead to sub-arachnoid haemmorrhage at the left frontal lobe at the inferior surface. The final cause of death certificate is based on findings by the Forensic Science Laboratory, Mumbai histopathology report and neuropathology report as well as gross postmortem findings. Contusion of scalp with sub-arachnoid haemmorrage due to external injury were observed autopsy. All of them are individual causes and are not linked to each other except contusion of scalp with sub-arachuoid haemmorrage. Death would have occurred as a result of the combination of all causes mentioned in the final death certificate. However, individual causes may lead to death of a person. Contusion of scalp with sub-arachnoid haemmorrage is more likely to cause death. Dr. Gajanan Chavan in his statement dated 19th January 2010 stated that, no specific odour was perceived by him while examining stomach. It is suggestive of no evidence of poisoning and consumption of alcohol. External injuries were visible. Contusion on the right tibial tuberosity is due to impact with hard and blunt object. Abrasions found on the body due to dragging on the rough surface. Contusion found under scalp at high perietal region periosteal deep is due to impact with

hard and blunt object and it may lead to death of a person. Contusion found under the scalp at left tempero-occipital region periosteal deep due to impact with hard and blunt object and it may lead to death of person. Sub-arachnoid haemorrhage found on left frontal lobe at inferior surface and right parietal region of deceased due to rupture of blood capillaries. It causes irritation of the neurons. Intoxication may lead to sub-arachnoid haemorrhage at terminal level. External injury to the head can also lead to sub-arachnoid haemorhage. Sub-arachnoid haemorrhage can lead to death of person. There are two components for death i.e. acute Alpazolam and Ethly Alcohol Toxicity and the other being the contusions of scalp caused due to external injury. Both these conditions may cause sub-arachnoid Haemorrhage. These two components are possible to cause death individually or collectively of these two components, contusion of scalp with sub-arachnoid haemorrhage is more likely to cause death. Dr. Ashutosh Meshram in his statement dated 25th January 2010 has reiterated the version of the aforesaid doctors. According to him contusion found under the scalp at left tempero-occipital region is due to impact with hard and blunt object and it will lead to death of person. Death of deceased might have occurred due to individual reason or collective reasons as mentioned in the certificate. Statement of Dr.

Anand Rayamane is similar to the version of other medical officers. Dr. Mahadev Bansude in his statement dated 27th January 2010 has given similar opinion. According to him contusion found on scalp at high perietal region is due to the impact with hard and blunt object and it can lead to death of person. Contusion found under the scalp at left tempero occipital region due to the impact with hard and blunt object and it can lead to death of person. Sub-arachnoid heamorrhage can be caused due to hard and blunt object on the head or due to acute intoxication. External injury can lead to sub-arachnoid haemorrhage and cause death in person. The death of deceased might have occurred either due to individual reason or on account of collective reasons mentioned in the certificate.

25. On analysis of evidence before trial Court, prima facie offences under Section 120-B, 302, 342, 330 of IPC is made out. The case is triable by Court of Sessions.

26. The learned Sessions Judge has observed that sanction was granted only for the offences for which the charge-sheet was filed. Taking into consideration the nature of acts attributed to the Respondents, it cannot be said that the accused had committed acts in discharge of official duty. There is no requirement of sanction under Section 197 of Cr.P.C. The act of public servant to assault the

person in custody resulting into death cannot be said to be an act committed during the course of discharge of official duty.

27. The offence under Section 302 of IPC is triable by Court of Sessions. In pursuance to order dated 3rd November 2014 passed by learned Additional Chief Metropolitan, case was assigned to Special Judge (CBI), Sessions Court and proceedings are at the stage of framing charge. The charge-sheet was filed for offences as stated above. Section 323 of Cr.P.C. empowers the Court of Magistrate to commit the case to Court of Sessions if it appears to him at any stage of the proceedings that the case is one which ought to be tried by Court of Sessions. On investigation charge-sheet was filed before regular Court. The Sessions Court was concerned with issue of framing of charge. The Sessions Court before whom the case is pending shall proceed with the case after framing the charge. While remanding the case back to Court of learned Magistrate, the learned Special Judge has travelled beyond scope of section 218 of Cr.P.C. Prima facie offences under Section 120-B, 302, 330 and 342 of IPC are made out for framing charge against Respondent Nos. 2 to 4.

28. In the case of *P. P. Unnikrishnan V/s. Puttiyottil (Supra),* it is held that if a Police Officer dealing with law and order duty uses

force against unruly persons, either in his own defence or in defence of others and exceeds such rights it may amount to an offence. But such offence might fall within the amplitude of Section 197 of the Code as well as Section 64(3) of the Kerala Police Act, but a Police Officer assaults a prisoner inside a lockup he cannot claim such act to be connected with a discharge of his authority or exercise of his duty unless he establishes that he did such act in his defence or in defence of other or any property. If a Police Officer wrongfully confines a person in the lockup beyond a period of 24 hours without the sanction of a Magistrate or order of a Court. It would be an offence for which he cannot claim any protection in the normal course, nor he can claim that such act was done in exercise of his official duty. A policemen keeping a person in the lockup for more than 24 hours without authority is not merely abusing his duty but his acts would be outside the coutours of his duty or his authority. In the case of *S. P. Vaithianathan V/s. K. Shanmuganathan (Supra),* it was observed that before a prosecution is terminated has barred by Section 53 of Tamilnadu District Act, the Accused must show that on the allegations made in the complaint it acts *ex-facie* appears that the Act complained of was done under the provisions of the Act or under the provisions of any other law for the time being in force where under powers are

conferred on the Police. It is no part of duty under the Act, Code or any other law conferring power on the Police to beat and torture the suspect when he presented himself before the Police in response to the summons. By no stretch of reasoning can it be said that the action of Police torturing the suspect was in discharge of any duty or function under the Act or under any other law. Only since, the suspect was called through a summons issued under the law the conduct of beating or torturing him on his appearance cannot establish any nexus between the official Act of issuance of summons and the action of Police on the appearance of the suspect. In case of *Choudhury Parveen Sultana V/s. State of W.B. (Supra),* it was observed that, all acts done by public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 of Cr.P.C. On the other hand, there can be cases of misuse and or abuse of powers vested in a public servant which can never be said to be part of the official duties required to be performed by him. In the case of *Bhagwan Prasad Shriwastava V/s. N.P. Mishra, (1970) 2 SCC 56,* it was observed that the underlying object of Section 197 of Cr.P.C. is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of

causing embarrassment and harassment to the said official. However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 of Cr.P.C. and have to be considered dehorse the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned. In the case of *Devinder Singh and Ors. V/s. State of Punjab through CBI (Supra),* the question of whether in view of provisions content in Section 6 of the Punjab Disturbed Areas Act, 1983 the prosecution or other legal proceedings relating to Police Officers can be instituted without prior sanction of the Central Government. The Appellants were the Officers of Punjab Police. They were entrusted duties and responsibilities of maintaining public order and peace. There was sudden spurt in terrorist activities resulting in collapse of civil administration. Civilians and man in uniform were killed. Four persons were killed in encounter with the Police. The prosecution alleged that they were killed in fake encounter. The Hon'ble Supreme Court referred to several decisions on the issue of grant of sanction to prosecute public servants and summarized the principles emerging from the said decisions. It was observed that

once act or omission has been found to have been committed by public servant by discharging his duty it must be given liberal or vide constructions so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities so that Section 197 of Cr.P.C. has to be construed narrowly and restricted manner. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him or protection under Section 197 of Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor is it possible lay down such rule. In case of assault made if intrinsically connected with a related to performance of official duties, sanction would be necessary under Section 197 of Cr.P.C. but such relation to duty should not be pretended or a fanciful claim. The offence must be directly or reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 of Cr.P.C. would apply. It is pertinent to note that in the case before the Hon'ble Supreme Court, the allegation as per the prosecution case was that it was a case of fake encounter or death caused by torture whereas the defence of the Accused person is that it was a case in discharge of official duty and

deceased was involved in the terrorist activities and while maintaining law and order the incident has taken place. The incident was in the course of discharge of official duties. The Apex Court while concluding the Judgment has observed that it would be open to the Accused to adduce the evidence in defence and to submit such other material on record indicating that the incident had taken place in discharge their official duties. The trial Court has *prima facie* to proceed on the basis of the prosecution version and can redecide the question afresh in case from the evidence adduced by the prosecution or by the Accused or in any other manner it comes to the notice of the Court that there was reasonable nexus of the of the incident is discharge of official duties, the Court shall reexamine the question of sanction and take decision in accordance with law.

29. In the present case, the case of the prosecution is that the deceased was dragged from the house and assaulted by the Respondents. There was no station diary entry about the custody of the deceased. There was no arrest memo. The deceased was taken to Police Station. He had suffered external and internal injuries.

30. In the case of *R.S. Mishra V/s. State of Orissa and Ors. (Supra),* it was observed that the material in case diary revealed

two distinct offences of the same nature, then it is appropriate to frame charge for the more grievous offence or to frame charge for both the offences distinctly and separately. When material on record reveals a higher offence, it is expected that charge will be framed for grievous offence which will not be diluted. In *Jagdish Ram V/s. State of Rajasthan and Anr. (Supra),* it is held that, notwithstanding the opinion of the Police, Magistrate is empowered to take cognizance if the material on record mix out a case of the said purpose. The investigation is exclusive domain of the Police. The taking cognizance of offence is an area exclusively within the domain of a Magistrate. At this stage the Magistrate has to be satisfied whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. In the case of *M/s. India Carat Pvt. Ltd. V/s. State of Karnataka and Anr. (Supra),* it was observed that upon receipt of Police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code. Even if the Police report is to the effect that no case is made out against the Accused, the Magistrate can take into account the statements of witnesses examined by the Police during investigation and take cognizance of the offence complained of and order the issue of process to the

Accused. Section 190(1)(b) does not lay down that the Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made a case against the Accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case. If he thinks fit in exercise of his powers under Section 190(1)(b) and direct the issue of process to the Accused. In the case of *Nupur Talwar V/s. Central Bureau of Investigation, Delhi and Anr. (Supra),* it is held that Section 190 of the code lays down the conditions which are requisite for the initiation of criminal proceedings. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and material before him. In doing so, the Magistrate is not bound by the opinion of the Investigating Officer and is competent to exercise his discretion irrespective of the views by the Police in its report and may *prima facie* find out whether an offence has been made out or not. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate should be sparingly interfered with, unless it is perverse and based on no material. The Court should exercise utmost restraint and caution before interfering with an order of taking cognizance by the Magistrate,

otherwise the trial would be stalled. The Superior Court should maintain this restraint to uphold or rule of law and sustained the faith of the common man in the administration of justice. In the case of *State of Bihar V/s. Ramesh Singh (Supra),* it is observed that at the beginning and initial stage of the trial the truth, veracity and effect of the evidence which the prosecution proposes to adduce or not to be meticulously judged. Nor any weight is to be attached to the probable defence of the Accused. It is not obligatory for the judge at the stage of trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the Accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the Accused is not exactly to be applied at the stage of deciding the matter under Sections 227 or 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the Accused or whether the trial is sure to end in his conviction. From suspicion against the Accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is 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. In the case of *State of M.P. V/s. S.B Johari (Supra),* it was held that the High Court had appreciated and weighed the material on record for coming to the conclusion that charge against the Accused could not have been framed. It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the Accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the material produced was sufficient or not for convicting the Accused.

31. In the case of *Eshwaraiah and Anr. V/s. State of Karnataka (Supra),* it was observed that the opinion of autopsy surgeon who conducted the postmortem examination is preferably and superior to the opinion of a person who has not done so himself. Similar view has been expressed in the case of *Tanviben Pankajkumar Divetia V/s. State of Gujrat (Supra).* In the case of *Nasimbanoo widow of Allanoorkhan V/s. State of Maharashtra (Supra),* it was noted that opinion by Doctors who have not seen the corpse and organs inside is an opinion and becomes a remote to the facts sought to be commented. In the case of *Ranjan and Others V/s. State (Supra),* the conviction for an offence under Section 302 of

IPC was confirmed. On the facts that cause of death was head injury resulting in sub-arachnoid heamorrhage. Similar view was taken in *State of Andhra Pradesh V/s. Thakkidiram Reddy (Supra).*

32. In the light of the principles enunciated in several decisions and factual matrix of this case, it will have to be held the learned Sessions Judge/Special Judge has passed erroneous order while dealing with issue of framing charge and remitted the case back to the trial Court for prosecution of the Accused for offences under Sections 120-B r/w 323, 342 of IPC. In exercise of the powers under Article 227 of Constitution of India and inherent powers under Section 482 of Code of Criminal Procedure, the impugned order passed by the Special/Sessions Court is required to be set aside.

33. Hence, I pass the following order;

ORDER

i. Criminal Writ Petition No.1954 of 2019 is allowed.

ii. The impugned order dated 3rd January, 2018 passed below Exh-1 in Sessions Case No. 826 of 2014 by Special Judge (CBI) City Civil and Sessions Court, Greater Bombay is quashed and set aside.

iii. The Special Judge (CBI)/ Sessions Court is directed to frame charges against the Respondent Nos.2 to 4 in Sessions Case No.826 of 2014 for offences under Sections 120-B r/w 302, 330 & 342 IPC and any other charges if made out and proceed with the case expeditiously.

iv. It is clarified that, the observation made in this order are only for adjudicating the issue involved in this petition and the trial Court shall proceed with the case in accordance with law.

v. The trial Court is directed to conclude the trial expeditiously within a period of one year from the date of receipt of this order.

vi. The Respondent Nos.2 to 4 shall appear before the trial Court (Special Judge[CBI] / Sessions Court) on 24th April 2023.

vi. The Registry is directed to forward this order to the Sessions Court immediately.

[PRAKASH D. NAIK, J.]