

Reserved On:- 01/04/2026**Pronounced On : 10/04/2026****IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL REVISION APPLICATION NO. 6 of 2009****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR**

Approved for Reporting	Yes	No
	√	

DHANJI BHIMJI AHIR
Versus
STATE OF GUJARAT

Appearance:

MR BHARAT K DAVE(246) for the Applicant(s) No. 1

MR J M PANCHAL(529) for the Applicant(s) No. 1

MR K J PANCHAL(2422) for the Applicant(s) No. 1

MR ROHAN RAVAL, APP for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR**CAV JUDGMENT**

[1.0] Present criminal revision application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") has been preferred by the applicant herein – original accused No.2 – Dhanji Bhimji Ahir requesting to quash and set aside the order dated 01.01.2009 passed below Exh.50 by the learned Additional Sessions Judge and Presiding Officer, 4th Fast Track Court, Gandhidham – Kachchh in Sessions Case No.38 of 2002, whereby the learned Judge rejected the discharge application filed by the applicant under Section 227 of the CrPC.

FACTUAL MATRIX:

[2.0] A complaint being I-CR No.14/2002 came to be filed on 21.01.2002 against the present applicant and another for the offence punishable under Sections 364, 307, 302, 323, 504 and 114 of the Indian Penal Code, 1860 (for short "IPC") and Sections 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act alleging that one Pratapbhai Bhimjibhai Damor was brought in a burnt condition to Rambaug Hospital on 21.02.2002 in the evening at about 5.15 p.m. It is the case of prosecution that Medical Officer of Government Hospital recorded statement of the injured wherein the injured person has stated that accused No.1 accompanied him in his Maruti Car No.GJ-12-P-2064 and accused No.1 sprinkled petrol and set him at fire by means of match stick and ran away.

[2.1] After carrying out investigation, the Investigating Officer filed the charge-sheet and as the case was sessions triable, it came to be committed to the Court of learned Additional Sessions Judge and numbered as Sessions Case No.38 of 2002. The applicant and accused No.1 filed an application Exh.50 under Section 227 of the CrPC seeking discharge which came to be dismissed by the learned Additional Sessions Judge vide the impugned judgment and order. Hence, being aggrieved and dissatisfied, the applicant has preferred the present revision application.

SUBMISSIONS ON BEHALF OF REVISIONIST:

[3.0] Learned Senior Advocate Mr. J.M. Panchal assisted by learned advocate Mr. Bharat K. Dave appearing for the applicant has submitted that the learned Judge has committed an error in rejecting the discharge application filed by the applicant

without assigning any reason and/or the reason assigned by the learned Judge is not germane in law and discharge application is not decided in the correct perspective of law and on irrelevant considerations like ulterior motive and prolonging trial and in two lines the order rejecting discharge application is passed. He has further submitted that the learned Judge failed to consider the improbable story narrated in the FIR and accepted the same and hence, question does not arise to believe that the deceased was kidnapped in the car and that too after kidnapping the deceased, he was brought to his home. Even, in the first wardi given to the police station by the Doctor, nowhere is stated about the involvement of the present applicant and involvement of only accused No.1 is found. He has further submitted that in second dying declaration involvement of present applicant has surfaced but if said second dying declaration is considered, it appears that the applicant was under the influence of alcohol which was beyond the permissible limit. In this regard, he has relied on the post-mortem report more particularly column No.17 wherein 86% burn injuries are mentioned and therefore, question of deceased being unconscious does not arise. Not only that, one rickshaw driver who brought the deceased to hospital has not stated anything about the involvement of the present applicant and even nowhere the name of present applicant is specifically stated.

- [3.1] He has further submitted that the learned Judge failed to consider the infirmities in the dying declaration as incident took place on 21.02.2002 between 15.30 hours to 16.30 hours and deceased died on 22.02.2002 at 1.30 a.m. i.e. after about 9 to 10

hours. Further, in two dying declarations there are inconsistencies as, in one dying declaration it is coming forth that the deceased was conscious which is doubtful as the deceased was not in fit mental state to state anything when brought to the hospital and therefore, said dying declaration does not inspire any confidence with regard to the case of prosecution as regards involvement of the present applicant. Further, in the first wardi, name of applicant is not mentioned and even there was no motive for the applicant to kill the deceased. Thus, the learned Judge has failed to consider infirmities in the dying declaration and material collected during the investigation is not sufficient to put the applicant – accused No.2 on trial.

- [3.2] He has further submitted that the subsequent allegation against the applicant is that he caught hold of the deceased and accused No.1 sprinkled petrol upon him however, there is no any incriminating material and/or scientific evidence against the applicant has come on record. He has relied on the decision of the Hon'ble Supreme Court in the case of **Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra** reported in **2008 CrLJ 3872** and argued about the scope of discharge. He has also relied on the decision in the case of **Sanjay Kumar Rai vs. State of Uttar Pradesh** reported in **(2022)15 SCC 720** and submitted that the Court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and therefore, he has submitted that dying declaration is required to be considered while framing the charge. He has also relied on the decision of Hon'ble Supreme Court in the case of **Shiv Pratap Singh Rana**

vs. State of Madhya Pradesh and Another reported in **(2024)8 SCC 313** and submitted that if two statements recorded before the police under Section 161 of the CrPC and the infirmities in two statements then the question does not arise to put the applicant – accused on trial more particularly when the story of prosecution is improbable.

- [3.3] Further, he has submitted that even the offence is not properly investigated and no any evidence is collected to substantiate as to for what reason demand of Rs.10 lakh was made or no any document is executed for house. He has further submitted that there was no motive for the present applicant – accused and no any evidence is collected in this regard. Not only that, no incriminating material is collected from the alleged car involved in the offence to prove the complicity of the present applicant – accused in the offence and merely based on statement, present applicant is implicated in the offence and even otherwise, in case of more than one dying declaration having contradictions in version, Court has to give benefit of doubt to the accused. In this regard, he has relied on the decision of Hon'ble Supreme Court in the case of **Sanjay vs. State of Maharashtra** reported in **(2007)9 SCC 148** and in the case of **Kashi Vishwanath vs. State of Karnataka** reported in **(2013)7 SCC 162** and submitted that dying declaration ought to have been voluntary and truthful. Herein, dying declaration is doubtful and he has further argued that in the present case, section 226 of the CrPC is not complied with and without following the said provision, learned Judge has proceeded further and mechanically rejected the discharge application of the applicant and framed the charge. He has also relied on the decision of the Hon'ble Supreme Court

in the case of **Anokhilal vs. State of Madhya Pradesh** reported in **2019 INSC 1399** and submitted that right to fair trial is fundamental right of the applicant – accused, which has not been provided by the learned Judge before framing the charge against the present applicant. Hence, he has requested to allow the present revision application and discharge the present applicant – accused No.2.

SUBMISSIONS ON BEHALF OF RESPONDENT – STATE:

- [4.0] Learned APP has vehemently opposed the present application by supporting the impugned judgment and order passed by the learned Judge and submitted that only with a view to protract or prolong the trial, the applicant preferred the discharge application which has been rightly rejected by the learned Judge which does not call for any interference at the hands of this Court. He has submitted that the applicant has committed serious offence which has been established in the charge-sheet filed against the applicant.
- [4.1] He has further submitted that the charge is framed on 01.01.2009 and hence, question does not arise to quash and set aside the charge as ample opportunity was given to the applicant and earlier one discharge application Exh.3 came to be dismissed against which Criminal Revision Application No.804/2006 was filed before the coordinate Bench of this Court by the applicant which was rejected on 04.05.2007 and after a long span of two years, another application Exh.4 seeking discharge was filed by the applicant which also came to be rejected by the learned Sessions Judge by a reasoned order and hence, only with ulterior motive just with a view to protract

the litigation, discharge application came to be filed by the applicant and hence, he has requested to dismiss the present application.

- [4.2] He has further submitted that the role of the present applicant is clear and his name is specifically mentioned in alongwith other co-accused in the FIR and during the course of hearing it is submitted that the co-accused i.e. accused No.1 has expired. Hence, under the pretext of fair trial on one or another pretext, trial is being protracted and prosecution case is adversely affect due to such delay. Further, ample evidence in form of dying declaration is collected during the investigation and motive is clear as there was illicit relationship between wife of deceased and accused No.1 and present applicant was having motive of getting posted at the place of deceased and having proximity and close relationship with accused No.1 who happens to be the Sarpanch of said village. Hence, considering the scope of revision, he has requested to dismiss the present application.

FINDING AND ANALYSIS:

- [5.0] Having heard learned advocates appearing for the respective parties and perusing the record, it appears that the complaint is filed at the instance of deceased Pratapbhai Bhimjibhai, wherein it is alleged that accused No.1 Govind Samat Ahir – Chavda had sprinkled petrol on the deceased and set the deceased ablaze while the present applicant – accused No.2 was in company of accused No.1 and caught hold of the deceased. Further, as per the prosecution case, alleged incident took place on 21.02.2002 at around 3.30 p.m. while deceased left his Taluka Panchayat Office, Bhachau by his Maruti Car No.GJ-12-P-2064, at that time,

accused No.1 and present applicant were standing nearby bus-stop and they stopped the car and deceased was forcibly made to sit on the rear seat of the car and car was driven by accused No.1 and the deceased was taken on the backyard of his residential home at Adipur and at about approximately 10 feet, present applicant caught hold of the deceased and accused No.1 sprinkled petrol and lit the match stick and set the deceased ablaze. Thereafter, the deceased was initially shifted to Rambaug Hospital, Gandhidham for treatment and the Medical Officer recorded the history and thereafter, the deceased was shifted for further treatment to G.K. General Hospital, Bhuj. The dying declaration of the deceased came to be recorded and complaint was recorded initially for the offences punishable under Sections 307, 365, 323, 504 and 114 of the IPC read with Section 3(2)(v) of the Atrocities Act. During the treatment, the deceased succumbed to burn injuries and therefore, subsequently charge under Section 302 of the IPC came to be added and charge-sheet is filed against accused persons after investigation.

- [5.1] Going through the record, it appears that earlier discharge application Exh.3 came to be filed by the applicant which came to be dismissed and against the said dismissal, applicant preferred Criminal Revision Application No.804/2006 which came to be rejected by the coordinate Bench on 04.05.2007 by a reasoned order. After dismissal of second discharge application, charge is framed for the offence under Sections 302, 365, 323, 504 and 114 of the IPC read with Section 3(2)(v) of the Atrocity Act on 01.01.2009. It further appears that present revision application is filed mainly on three grounds.

- (i) There are more than one inconsistent dying declarations.
- (ii) Considering the burn injuries and the fact that deceased was under the influence of alcohol at the time of incident, the deceased was not in fit mental state of mind.
- (iii) Learned Sessions Judge failed to comply with the provisions of section 226 of the CrPC as prosecution failed to open the case and straightway charge came to be framed.

SCOPE OF DISCHARGE:

Prior to adverting to the submissions made on behalf of the respective parties, it would be expedient to discuss about the scope of discharge.

[6.0] Under Section 227 of the CrPC, after considering the entire material placed on record and after hearing the arguments of the accused as well as the prosecution, if the Court reaches to the conclusion that there is no sufficient ground for proceeding against the accused and that the commencement of trial will only waste the valuable time of the Court, the Court may discharge the accused. The Hon'ble Supreme Court in the case of **P. Vijayan vs. State of Kerala [(2010) 2 SCC 135]** and **Ram Prakash Chaddha vs. The State Of Uttar Pradesh [(2024)10 SCC 651]** observed and held that at the time of framing of charge, Court has to consider the following aspects.

- (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima

facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

- (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
- (iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.
- (iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.
- (v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.
- (vi) At the stage of Sections 227 and 228 of the CrPC, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging

therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

- (vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.
- (viii) 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 offence, then, there will be no sufficient ground for proceeding with the trial.
- (ix) It is open to the accused to explain away the materials giving rise to the grave suspicion.
- (x) There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

[6.1] The above parameters which govern the exercise of jurisdiction have found expression in several decisions of the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of **The State of Rajasthan vs. Ashok Kashyap** reported in **(2021)11 SCC 191** and **State of Karnataka vs. M.R. Hiremath [(2019)7 SCC 515]** has observed that at the stage of considering an

application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution should be true and the Court should evaluate the material in order to determine whether the facts emerging from the material, taken on its face value discloses the existence of the ingredients necessary to constitute the offence. It is also observed that at the stage of discharge, the probative value of the materials has to be gone into and the Court is not expected to go deep into the matter. Whereas what is needed to be considered is whether there is a ground for convicting the accused has been made out. To put it differently, if the Court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge but for the conviction of the accused the Court should come to the conclusion that the accused has committed the offence. Hon'ble Apex Court further observed in this case that the law does not permit a mini trial at the stage of discharge. The scope of discharge is very limited. At the stage of framing of charge, the prosecution merely needs to display a prima facie case *qua* the accused from the material available on record and trial may thereafter commence.

- [6.2] However, at the stage of deciding a discharge application, the accused may opt to refer to and rely upon sterling quality evidence to seek his discharge, and if, on the basis of such unimpeachable record, the Judge is satisfied on the aforesaid legal precepts that the accused is entitled to an absolute exoneration from the alleged crime, it is well within the law for the accused to be discharged the settled position of law is that the Judge while considering the question of framing the

charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before the Court discloses grave suspicion against the accused which has not been properly explained to the Court, then in such a case the Court will be fully justified in framing the charge and proceed with the trial.

[6.3] On other hand, if the Judge is satisfied that the evidence produced before the Court gives rise to some suspicion but not grave suspicion then the Judge will be fully justified in discharging the accused. At this stage it is appropriate to refer to the decision of the Hon'ble Supreme Court in the case of **Sajjan Kumar vs. CBI [(2010)9 SCC 368]** wherein it is settled that at the time of framing of charge, accused is not concerned with the proof and guilt or sufficiency of evidence for conviction. In the case of **State of Bihar vs. Ramesh Singh [(1977)4 SCC 39]** and subsequently in the case of **Union Of India vs Prafulla Kumar Samal & Anr. [(1979)3 SCC 4]**, the Supreme Court has clarified the test as to whether material on record taken at its face value discloses the essential ingredients of the alleged offence and gives rise to direct or grave suspicion against the accused. At the same time, the Supreme Court expressly cautioned against conducting roving inquiry or weigh the evidence as if at trial. Meaning thereby, at the time of framing of charge, mini trial or roving inquiry is not permissible.

(i) INCONSISTENCIES IN DYING DECLARATION:-

[6.4] Now, in aforesaid background, the contentions raised by the

applicant that, there is no sufficient ground to prosecute or to put the accused on trial considering the inconsistencies and improbable evidence on the record is mainly on the ground that in the first dying declaration, which is in the form of history given before the Medical Officer of Rambaug Hospital, Gandhidham and pursuant to which wardi was given to Adipur Police Station wherein no name is given and history is given as, "petrol thrown on him by somebody". Thereafter, deceased was shifted to G.K. General Hospital where he had given his second dying declaration which was recorded by the Executive Magistrate wherein he has stated about the involvement of present applicant i.e. accused No.2 and accused No.1. Thereafter, the complaint was registered. In the complaint also, he has stated about the involvement of two accused and reiterated the same facts of dying declaration recorded before the Executive Magistrate. In aforesaid two documents namely the complaint and dying declaration, allegations with specific role and involvement of accused No.1 and accused No.2 are made.

- [6.5] Learned Senior Advocate has further drawn attention to the statement of one Habib Ismail Chada who is serving as Dispensary Servant in Rambaug Hospital, Gandhidham, who has stated that he was present at the time when Dr. Makwana was giving treatment to the deceased and at that time Dr. Makwana had asked the deceased about the incident to which the deceased stated about the involvement of one Govind Chavda (accused No.1) and statement of Dayal Jayram Udasi who was in the company of deceased in rickshaw while the deceased was shifted to Rambaug Hospital and in his statement the said

witness has stated about the involvement of one "Aayar". Statement of aforesaid two witnesses are recorded on 24.02.2002 and another statement on same day is recorded by Jagdish Satyanarayan Damor, who was in the company of deceased while deceased was being shifted from Gandhidham to G.K. General Hospital, Bhuj in ambulance and he has stated about involvement of two accused. If we peruse the record it appears that on 21.02.2002, incident took place between 15.30 p.m. to 16.30 p.m. First wardi was given to Adipur Police Station on 21.02.2002 and pursuant to the said wardi, on the same day, complaint came to be registered which is given by the deceased and at 23.10 p.m., complaint came to be registered. On 21.02.2002, dying declaration was recorded between 7.35 p.m. to 7.52 p.m. by the Executive Magistrate wherein the Doctor had put his endorsement that deceased was in fit mental condition and was able to give statement and after obtaining the fitness endorsement, statement of deceased i.e. dying declaration was recorded and thereafter, at 1.30 a.m. of 22.02.2002, deceased succumbed to burn injuries and died.

- [6.6] Thus, it is clear that the deceased was in fit mental condition when he gave his statement before the Executive Magistrate, which was prior in point of time and on the same line, the complaint was also given by the deceased which was also prior in point of time and after two days, statement of other witnesses have been recorded by the police who were not having any personal knowledge but were in the nature of hearsay evidence. Hence, this Court is of considered view that statement given by the deceased before the Executive Magistrate was given in fit mental condition and was in earlier

point of time and on the same line the complaint came to be filed and subsequently, the deceased died. Hence, statements of two witnesses recorded subsequently on 24.02.2002 are irrelevant at this stage to consider as material / evidence for the purpose of framing of charge because at the time of framing of charge, Court has to consider whatever evidence is available in legal and permissible form. It is evident that, in light of Section 32 of the Indian Evidence Act, the dying declaration recorded by the Executive Magistrate after duly verifying the fitness of the deceased and the subsequent complaint registered on its basis are both relevant and admissible in evidence. Furthermore, the two dying declarations / statements are consistent with each other and said dying declarations are properly relied upon by the learned Sessions Judge while framing the charge against the present applicant.

- [6.7] The principle on which the dying declaration is admissible in defined in section 32(1) of the Indian Evidence Act which provides that, when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, such statement is relevant in every case. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The principle on which a dying declaration is admissible in evidence is indicated in the Maxim "***Nemo Moriturus Praesumitur Mentire***", which means that a man will not meet his maker with a lie in his mouth. Thus, it is clear that a dying declaration may be relating to, a) As to the cause of death

of the deceased b) As to "any of the circumstances of the transaction" which resulted in the death of the deceased". If we look the dying declaration, it is dictated by the deceased and names of accused including the present applicant is clearly mentioned and his role is also stated that he had caught hold of the deceased and dying declarations are relevant and admissible evidence.

[6.8] Now, coming back to another statement given by the deceased to Doctor and in turn Doctor has given a Wardi to Adipur Police Station and is hearsay in nature and under Section 60 of the Indian Evidence Act, hearsay evidence is not admissible and for the sake of argument, if we consider the said document as dying declaration, even though more than one dying declarations are available on record and in that event what is essentially required to be considered is the fitness and state of mind of the deceased while he was getting recorded the statement / dying declaration and consistent statement which inspires confidence is required to be accepted and in this regard, law is very well settled by the Hon'ble Supreme Court in the case of **Dayaram vs. State of Madhya Pradesh [AIR 2019 SC 5739]** and **Laxman vs. State of Maharashtra [(2002)6 SCC 710]** and as the FIR is also given by the deceased and is prior in point of time and thereafter the deceased succumbed to injuries at 1.30 a.m. is also relevant and is required to be considered in view of the decision of the Hon'ble Supreme Court in the case of **Dharam Pal vs. State of U.P. [(2008)17 SCC 337]**. Even otherwise, evidentiary value of the said two dying declarations is also subject matter of trial and at the time of appreciation of evidence, the Court has to consider it based on evidence

adduced or produced by the prosecution on record independently or in light of the supporting or corroborative evidence and possibility cannot be ruled out that word "Ayar" may be used as a dialect instead of "Ahir". Hence, the argument canvassed by the learned Senior Advocate for the applicant *qua* inconsistency or improbability in dying declarations is not accepted.

(ii) **MENTAL FITNESS OF DECEASED WHILE MAKING STATEMENT:-**

[7.0] So far as second argument made by the learned Senior Advocate Mr. Panchal on behalf of the applicant with regard to doubting the mental fitness and mental state of deceased when he gave the dying declaration is concerned, perusing the record, it appears that Doctor has stated that while the deceased was brought to Rambaug Hospital, Gandhidham, deceased was conscious and was in fit mental condition. Not only that, doctor has put an endorsement that at the time of recording the statement, mental condition of deceased was fit and he was able to give the statement and after receiving such endorsement of the Doctor, the Executive Magistrate has recorded the statement of deceased. Hence, deceased was in fit mental condition to give the statement as stated earlier in paragraph Nos.[6.5] to [6.7].

[7.1] Now, adverting the argument canvassed on behalf of the applicant that as per the P.M. report, deceased was under the influence of alcohol and percentage of ethyl alcohol was found 0.125 ml, which was beyond the permissible limit and hence, deceased was not in fit mental state and was not able to give

the statement is concerned, said argument is not acceptable at this stage on more than one following grounds:

- (i) The deceased was found in fit mental condition and when he was shifted to hospital, he was conscious and doctor has opined about his mental condition.
- (ii) Even otherwise, presence of ethyl alcohol in blood depends on various factors. The presence of alcohol is mentioned in P.M. report and post-mortem is conducted obviously subsequent to death.
- (iii) As per the medical science and research, many factors can influence the percentage or presence of ethyl or alcohol in blood and it may vary due to different reasons and blood alcohol level results may vary including the percentage of Blood Alcohol Contents (BAC).
- (iv) In certain circumstances, it may be lower or higher. Timing of the test always affects the accuracy of result. The blood alcohol test can detect alcohol in the system for upto about 12 hours after the last drink.
- (v) Herein, long time gap is there between the time of incident and conducting of post-mortem. Even if we consider other factors for 'BAC' like age, weight, type of alcohol consumed, how quickly it was drunk and how much ate before the drink and if a person is taking medicines and further sensitivity / tolerance to alcohol is also one of the criteria. All these issues are subject to evidence.
- (vi) Not only that, as per the forensic science, ethanol may be found in the blood of a deceased person even if they did not consume alcohol before death and many a times,

during the post-mortem, 'BAC' level is affected multifold due to (1) Putrefaction: after death, microorganisms (bacteria and yeast) begin to break down body tissues and ferment glucose, leading to "neo-formation" of alcohol and (2) Forensic Differentiation: Pathologists use specific markers like Ethyl Glucuronide (EtG) or Ethyl Sulfate (EtS) – metabolites produced only during live metabolism to distinguish between pre-death consumption and post-death production.

- (vii) Even, certain health factors can influence how much ethanol is present or how long it stays in the blood unlike in case of Diabetes / liver disease / genetic variations, differences in enzymes like Alcohol Dehydrogenase (ADH) and Aldehyde Dehydrogenase (ALDH) can significantly affect how quickly an individual's body processes ethanol.
- (viii) As per the medical research, due to endogenous production (internal synthesis) also, even without drinking, the human body naturally contains minute amounts of ethanol (typically 0.01 – 0.09 mg/dL) due to internal metabolic activities like (a) microbial fermentation, bacteria and fungi in the gastrointestinal tract (such as *Saccharomyces cerevisiae* and *Candida* species) ferment dietary carbohydrates into ethanol; (b) auto-brewery syndrome (ABS), in rare cases of gut dysbiosis, these microbes overgrow and produce intoxicating levels of ethanol from consumed sugars and starches; (c) metabolic by-products, ethanol can be a trace by-product of normal cellular metabolism, such as the oxidation of certain amino acids or the reduction of.

- [7.2] Hence, merely in the post-mortem report, 0.012 ml alcohol level is mentioned in the report is not a ground to presume that the deceased was unfit / in mental state to give the statement. Hence, the argument that the statements wherein the deceased had given the name of applicant – accused No.2 is required to be discarded is also a matter of evidence more particularly in light of endorsement put by the Doctor about the mental state and condition and fitness of the deceased to record the statement. Hence, such an argument made by the learned Senior Advocate for the applicant is not acceptable coupled with medical science and research.
- [7.3] In view of aforesaid discussion and in view of the decision of the Hon'ble Supreme Court in the case of **Parasa Raja Manikyala Rao And Anr vs State Of A.P.** reported in **AIR 2004 SC 132**, wherein it is observed that, *...Each case, more particularly a criminal case depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore on which side of the line a case falls, the broad resemblance to another case is not at all decisive,* authorities relied on by the learned Senior Advocate on the case of **Sanjay (Supra); Kashi Vishwanath (Supra); Yogesh @ Sachin Jagdish Joshi (Supra); Sanjay Kumar Rai (Supra); Shiv Pratap Singh Rana (Supra)** and **Anokhilal (Supra)** would not avail any assistance to the applicant more particularly in the peculiar facts of the case on hand since the said authorities would avail assistance to accused after

appreciation of evidence but not at the stage of framing of charge.

[7.4] Another argument canvassed by learned Senior Advocate Mr. Panchal is that the offence under Section 365 of the CrPC is not made out and hence, question does not arise to kidnap the person and after kidnapping bring home to his home. But, if we peruse the investigation papers, it appears that accused was residing with another lady at Bhachau and at the place of offence, his wife was residing and after the incident, she did not open the door of her house also. Not only that, from the investigation papers and statement recorded by the Investigating Officer of witnesses clearly reveals that accused No.1 and wife of deceased were having illicit relationship and accused Nos.1 and 2 being Sarpanch and Talati respectively, having good relationship and present applicant – accused No.2 who caught hold of the deceased having the interest to get transferred at the place of the deceased and even prior to incident the witnesses have stated about the relationship of both the accused and role played by the applicant prior to death of the deceased. Considering the aforesaid fact, argument canvassed by learned Counsel that there was no motive or no offence is made out is not acceptable.

(iii) COMPLIANCE OF SECTION 226 OF THE CRPC:-

[8.0] Further, learned Senior Advocate for the applicant has submitted that provision of section 226 of the CrPC is not complied with by the learned Sessions Judge. If we consider the provision of Chapter XVIII of the CrPC, Sections 226 to 228 are very clear as the accused is brought before the Court after

committal, prosecution has to open the case disclosing the charge brought against the accused and further, has to state as to on what evidence he proposes to establish the guilt of the accused. In other words, the opening of case under Section 226 of the CrPC which enables the accused to know about the grounds and charges levelled against him by the prosecution and after giving an opportunity of being heard to the accused, if prosecution is able to show sufficient ground to put the accused on trial, which includes the opportunity to file the discharge application and accused prefers discharge application knowing as to what are the grounds against him to proceed and to put him on trial, the learned Sessions Judge has to decide the discharge application.

[8.1] Further, at the earlier point of time, while discharge application Exh.3 was filed, prior to that, accused had preferred an application for providing the document and order was passed and same order was assailed by way of Criminal Revision Application No.388/2006 and same was also subsequently disposed of as having become infructuous. Thus, it is clearly reveals from the record that at earlier occasion while application Exh.3 was decided, at that time, case was opened and even next time also, case was opened and prosecution has made submission to put the accused on trial based on material or evidence collected during the investigation and conversely the accused has preferred the discharge application stating that no sufficient or ample material to put the accused on trial which clearly reveals the compliance of section 226 of the CrPC.

[8.2] Herein, the applicant – accused No.2 was well-versed with the

grounds and documents based on which he is going to be put on trial and therefore, he filed second discharge application as he was knowing about the charges and grounds to put him on trial since inception and thereafter, he has filed the second discharge application and after giving an opportunity of being heard and after hearing at length both the parties, discharge application came to be dismissed. Hence, perusing the record & proceeding, it appears that ample opportunity is given to the applicant – accused to defend himself and he has filed discharge application twice and prosecution has opened the case and it appears that there being sufficient ground to put the accused on trial, the discharge application came to be rejected and charge was framed on 01.01.2009. Hence, argument canvassed by learned Senior Advocate for the applicant that provisions of section 226 of the CrPC is not complied with is not acceptable as it appears that it is nothing but only an attempt to get quash the impugned order and get the matter remitted back to the learned Sessions Court.

[8.3] Further, learned Senior Advocate Mr. Panchal has submitted that when discharge application came to be dismissed, on the same day, charge is framed. It is needless to say that after giving an opportunity to the applicant, discharge application came to be dismissed and thereafter, the charge came to be framed. At that time the accused never made any request stating that he wants to challenge the rejection of discharge application but going through the record i.e. application Exh.74, it appears that learned advocate for the applicant had filed the application subsequent to framing of charge stating that discharge application Exh.50 came to be dismissed and Court has framed

the charge against the accused but accused are entitled to challenge the said order and requested to grant adjournment for one month. Considering the fact that as said application was filed after framing of charge, time was granted upto 13.01.2009 to prefer appropriate proceeding before this Court. Hence, it appears that charge is framed and accused person is confined to order and thereafter, they have made up their mind to challenge the order of rejection of second discharge application.

[8.4] Perusing the record as well as the order impugned passed by the learned Sessions Judge, it speaks volume about the conduct of accused. Learned Sessions Judge has heard the accused at length and **taken note of 4th round initiated by the accused to prolong the matter and accused succeeded in prolonging the matter at the stage of framing of charge since long.** Earlier application Exh.3 for discharge under Section 3(2)(v) of the Atrocity Act came to be dismissed which came to be challenged before the coordinate Bench of this Court by way of filing Criminal revision Application No.804/2006 which came to be rejected though similar type of second application Exh.33 was filed and Court has taken note that with ulterior motive and only with a view to delay the trial. It is pertinent to note that at earlier point of time framing of charge under Section 302 and allied IPC offences was not challenged.

[8.5] So far as another argument made by the learned Senior Advocate Mr. Panchal with regard to more than one dying declaration is not dealt with by the learned Sessions Judge is concerned, the learned Sessions Judge has stated in the impugned judgment about the involvement of both the accused

as their names are narrated by the deceased in both the dying declarations which clearly reveals involvement of both the accused and ample evidence is collected against both the accused and sufficient material was placed before the Court for framing of charge and therefore, the discharge application came to be dismissed. Hence, no error has been committed by the learned Sessions Judge in dismissing the discharge application. Not only that, learned Sessions Judge has also taken note of the fact that if the applicant attempts to prolong the matter the learned Sessions Judge will be compelled to cancel the bail granted to the accused person which clearly reveals the intention of the applicant – accused to prolong the trial. It is sorry state of affairs that the alleged incident took place in the year 2002 and till date not a single witness is examined and though earlier discharge application was dismissed, another discharge application was filed which was also dismissed and on 01.01.2009, order dismissing discharge application was assailed by way of present revision application on 13.01.2009 and Interim relief was granted by the coordinate Bench on 21.01.2009 and thereafter the matter was listed final hearing on 28.01.2009 though the matter was not heard finally and not decided atleast during the period of more than 24 years from the date of alleged incident and for more than 16 years, matter remained pending at the stage of final hearing before this Court.

[8.6] *Be that as it may*, considering the case on hand, it appears that under the pretext of fair trial, accused is able to prolong the matter since long and learned Sessions Judge has taken note of the conduct of the accused and fair trial is not only for the

accused. In this regard, reference is required to be made to the decision of the Hon'ble Supreme Court in the case of **State (NCT of Delhi) vs. Shiv Kumar Yadav and Another** reported in **(2016)2 SCC 402** wherein in paragraph No.11, it is has been held that, "*it is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom.*" Herein, by adopting one or another dilatory tactics, the applicant – accused has protracted the trial and clogged the judicial system. It is worth to mention that the applicant even after dismissal of discharge applications before the learned Sessions Judge and once before this Court, once again second discharge application was filed which came to be dismissed and against the same, present revision application is filed and the sole intention of the applicant – accused is nothing but only to see to it that the matter is remanded back so that the applicant can kill time as per his whims and caprice and once again may enjoy another round of litigation.

- [9.0] In view of above, whether the defence raised by the present applicant is bonafide or not, all these aspects are required to be considered at the time of full-fledged trial as the learned Special Judge is satisfied that *prima facie* case is made out and there is sufficient material and evidence and ground for framing of charge and the Court has not gone into the merits of the case and considered on the basis of material on record that the accused is likely to be convicted or not. Hence, the order passed by the learned Special Judge does not call for any interference as at the time of framing of the charge, Court has not to weigh

evidence and come to conclusion as to whether or not there is a possibility of recording conviction. Court has to only see as to whether there is sufficient ground or material against the accused based on which accused may be put to trial.

- [9.1] In view of the law laid down by the Hon'ble Apex Court in the case of *P. Vijayan (Supra)*, *Ashok Kashyap (Supra)* and *M.R. Hiremath (Supra)*, and in the case of **State of Tamil Nadu Through Inspector of Police vs. N. Suresh Rajan & Ors.** reported in **(2014)11 SCC 709** and in view of the fact that on the basis of all the material on record, the learned Special Judge has satisfactorily come to conclusion that the applicant – accused might have committed an offence and sufficient material is available to put the applicant – accused on trial.
- [9.2] *Ergo*, the right of accused to prove the innocence arises only during the trial and not at the stage of framing of charge. Further, at the time of framing the charge, the Court must have to evaluate the evidence as if determining the guilt or innocence of accused. Even if accused argues that some material is unreliable, incomplete or contrary, it is well settled principle of law that such contentions are matters of trial and not for discharge or quashing and even if for the sake of argument, the accused is permitted to raise such defences, it is nothing but would convert the discharge stage into a mini trial to decide the sanctity or legality of dying declaration which is illegal and also impermissible.
- [9.3] It is needless to say that the revisional jurisdiction can be exercised where there is a palpable error or non-compliance

with the provision of law and where decision is completely erroneous and where the judicial discretion is exercised arbitrarily. Herein, if we examine the reasons assigned by the learned Special Judge, it appears that learned Special Judge has already appreciated the facts and finding of fact not to be upset unless it is found perverse and finding of fact not to be substituted keeping in mind the ratio of Hon'ble Supreme Court in the case of **Amit Kapoor vs. Ramesh Chander & Anr.** reported in **(2012)9 SCC 460** as no perversity is found in the reasons assigned by the learned Special Judge. The learned Special Judge has assigned well-founded reasons while rejecting the application under Section 227 of the CrPC and such findings are based on evidence led before it and hence also, no interference at the hands of this Court in exercise of revisional jurisdiction is required.

- [9.4] It would also be appropriate to refer to the decision of the Hon'ble Supreme Court in the case of **Malkeet Singh Gill vs. State of Chhatisgarh** reported in **(2022)8 SCC 204** wherein the Hon'ble Supreme Court held that section 397/401 CrPC vests jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding and as to the regularity of any proceedings of such inferior court. The object of the provision is to set right a patent defect or an error of jurisdiction of law. There has to be well-founded error which is to be determined on the merits of individual case. It is also well settled that while considering the same, the Revisional Court does not dwell at length upon the facts and evidence of the case to reverse those findings. It is a settled legal proposition that if the Court below recorded the finding of fact, the

question of re-appreciation of evidence by the revisional Court does not arise unless it is found to be totally perverse.

CONCLUSION:-

[10.0] In wake of aforesaid conspectus, present criminal revision application stands **dismissed**. Resultantly, the impugned order dated 01.01.2009 passed below Exh.50 by the learned Additional Sessions Judge and Presiding Officer, 4th Fast Track Court, Gandhidham – Kachchh in Sessions Case No.38 of 2002 is hereby confirmed.

As the offence is registered way back in the year 2002, learned Additional Sessions Judge, Gandhidham-Kachchh is directed to expedite the trial by conducting trial on day to day basis. Rule is hereby discharged. Records and proceedings be sent back forthwith to the learned trial Court. Interim relief granted earlier stands vacated forthwith. It is needless to say that the observations made herein are tentative in nature.

Sd/-
(HASMUKH D. SUTHAR, J.)

Ajay