The High Court of Madhya Pradesh

M.Cr.C. No. 35271/2019
Shambhu Singh Chauhan Vs. State of MP
and

M.Cr.C. No. 42189/2019
Shivnath Singh Sikarwar vs. State of MP

Gwalior, dtd. 06/03/2020

Shri Anil Kumar Mishra with Shri S.S. Rajput, counsel for the applicants in both petitions.

Shri Somnath Seth, Public Prosecutor for the respondent/ State in both petitions.

O R D E R

Per G.S. Ahluwalia J.

By this common order, M.Cr.C.No.42189 of 2019 filed by S.S. Sikarwar, shall also be decided.

(2) For the sake of convenience, the facts of M.Cr.C. No.35271 of 2019 shall be taken into consideration.

(3) These petitions under Section 482 of Cr.P.C. have been filed against the Judgment dated 25-9-2017 passed by this Court in Criminal Appeals No.840/2004, 782/2004, 45/2005, 104/2005 and 609/2013 seeking the following relief(s):-

> 1. It is most humbly submitted that petition filed on behalf of the petitioner may kindly be allowed and observations and directions made by this Hon'ble High Court particularly in para 22 and 23 may kindly be recalled in the interest of justice.
> 2. Any other relief which the Hon'ble High Court deems fit in favor of the present petition according

with the facts and circumstances of the case be granted in the interest of justice.

(4) The necessary facts for disposal of the present petition in short are that by judgment and sentence dated 8-11-2004 passed by Vth A.S.J., Gwalior, in Sessions Trial No.30/2004, Kallu, Naval Singh @ Navla, Ballu @ Balram, Ramratan, Jaswant, Ramras were convicted for offence under Section 364A read with Section 120B, 363 read with Section 120, 365 read with Section 120B and under Section 13 of M.P.D.V.P.K. Act whereas Dayaram was convicted by judgment and sentence dated 18-7-2012 passed by Special Judge (MPDVPK Act) Gwalior in Sessions Trial No. 15/2010 for offence under Sections 363,364A of I.P.C and under Section 11/13 of MPDVPK Act.

(5) All the accused persons filed Criminal Appeals which were registered as Cr.A. No.840/2004, 782/2004, 45/2005, 104/2005 and 609/2013. All the Criminal Appeals were decided by common Judgment dated 25-9-2017 and all the accused persons, namely Kallu, Naval Singh @ Navla, Ballu @ Balram, Ramratan, Jaswant, Ramras, and Dayaram were acquitted of all the charges. However, considering the conduct of the prosecution witnesses, namely Shanti Swaroop Sharma (P.W.2), Vijay Choudhary (P.W.3), Ajay Choudhary (P.W.4), Jaishankar @ Vicky (P.W.5), Atal Bihari (P.W.6), Purshottam Bajpai (P.W.7), Vikas @ Vijay (P.W.8) as well as S.S. Sikarwar (P.W.12), S.S. Chouhan (P.W.13), Manoj Sharma (P.W.14) and Ramesh Dande (P.W.15), it was held that the above

mentioned prosecution witnesses have deliberately given false evidence before the Court. Accordingly, the Trial Court was directed to initiate proceedings against the above-mentioned witnesses for giving false evidence before the Court of law.

(6) **Shanti Swaroop Sharma** (P.W.2) filed a **Special Leave to Appeal (Cri) No.s 10103-10107/2017** which was dismissed by Supreme Court by order dated **26-7-2019.**

(7) The **State of Madhya Pradesh**, had also filed **S.L.P. (Cri) No. 9715-9719 of 2017** which was dismissed by Supreme Court by order dated **26-7-2019**. Further a review petition was filed by the **State of Madhya Pradesh**, which was registered as **Review Petition (Cri) No. 45-49 of 2010** which was dismissed by order dated **21-1-2020.**

(8) Similarly, **Jaishankar @ Vicky** (P.W.5)**, Vijay Choudhary** (P.W.3), **Ajay Choudhary** (P.W.4), **Atal Bihari** (P.W. 6), **Purushottam Bajpai** (P.W. 7) **and Vikash @ Vijay** (P.W.8) had **SLP (Cri) No. 10108-10112/2017** which too was dismissed by order dated **26-7-2019.**

Thus, it is clear that not only the S.L.P. as well as review petition filed by the State has been dismissed, but the S.L.Ps. filed by some of the persons, against whom prosecution has been ordered, have also been dismissed.

(9) However, it is submitted by the Counsel for the applicant, that since, the S.L.P.s have been dismissed in *limine*, therefore, the doctrine of merger would not apply, and this Court can entertain the application

filed by the applicant for recall of direction for prosecution given by this Court. To buttress his contentions, the Counsel for the applicant has relied upon the Judgment passed by the Supreme Court in the case of **Kunhayammed Vs. State of Kerala** reported in **(2000) 6 SCC 359.**

(10) Considered the submission made by the Counsel for the applicant.

(11) The applicant is one of the person, against whom prosecution has been ordered for giving false evidence before the Court. As already pointed out, the S.L.Ps. filed by some of the similarly situated persons like Shanti Swaroop Sharma (P.W.2), Jaishankar @ Vicky (P.W.5), Vijay Choudhary (P.W.3), Ajay Choudhary (P.W.4), Atal Bihari (P.W.6), Purushottam Bajpai (P.W.7) and Vikash @ Vijay (P.W.8) have already been dismissed. Even the S.L.P. and Review filed by the State has also been dismissed. Dismissal of review petition is indicative of fact, that the Supreme Court did not find any error apparent on the face of record.

(12) The Supreme Court in the case of **Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.,** reported in **(2019) 4 SCC 376** has held as under : -

> **"26.** From a cumulative reading of the various judgments, we sum up the legal position as under:
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> **26.1.** The conclusions rendered by the three-Judge Bench of this Court in *Kunhayammed* and summed up in para 44 are affirmed and reiterated.
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> **26.2.** We reiterate the conclusions relevant for these cases as under: (*Kunhayammed case*, SCC p. 384)
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> "(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special

leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v*) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

26.3. Once we hold that the law laid down in *Kunhayammed* is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of *Kunhayammed case."*

(13) It is submitted by the Counsel for the applicant, that he has not filed S.L.P. against the judgment passed by this Court in Cr.A. No.840 of 2004. Accordingly, the applicant is heard on merits.

(14) It is submitted by the Counsel for the applicant that he has filed

the present application for recall of the directions given by this Court in para 22 and 23 of Judgment dated 25-9-2017 passed in Cr.A. No. 840 of 2004.

(15) Section 362 of Cr.P.C. reads as under :

> **"362. Court not to alter judgment**.— Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

(16) In view of the bar contained under Section 362 of Cr.P.C., this Court cannot review its own order except to correct a clerical or arithmetical error.

(17) The Supreme Court in the case of **Mohd. Zakir vs. Shabana,** reported in **(2018) 15 SCC 316** has held as under :-

> **"3.** The High Court should not have exercised the power under Section 362 CrPC for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not under Section 362 CrPC. The whole purpose of Section 362 CrPC is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28-4-2017."

(18) However, it is submitted by the Counsel for the applicant, that the applicant has not sought review of Judgment dated 25-9-2017, but has

sought recall of the observations and directions given in para 22 and 23 of the Judgment.

(19) Considered the submissions made by the Counsel for the applicant.

(20) There is a difference between review and recall.

(21) The Supreme Court in the case of **Vishnu Agarwal Vs. State of U.P. And another reported in AIR 2011 SC 1232** has held as under :

> **''8**.In our opinion, Section 362 cannot be considered in a rigid and over-technical manner to defeat the ends of justice. As Brahaspati has observed :
> "Kevalam Shastram Ashritya Na Kartavyo Vinirnayah Yuktiheeney Vichare Tu Dharmahaani Prajayate"
> which means:
> "The Court should not give its decision based only on the letter of the law.
> “”For, if the decision is wholly unreasonable, injustice will follow.
> **9**.Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the Order dated 2.9.2003 and not for review. In Asit Kumar v. State of West Bengal and Ors., 2009 (1) SCR 469 : (AIR 2009 SC (Supp) 282), this Court made a distinction betweena recall and review which is as under:-
> "There is a distinction between ..... a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh and Ors. [2007 (11) SCC 374] : (AIR 2007 SC 1386) cancelling certain licences was passed without giving opportunity of hearing to the

persons who had been granted licences."

(22) In the present application, the applicant has sought recall of observations and directions given in para 22 and 23 of the judgment by which the prosecution of the witnesses as well as the applicant and other persons has been ordered.

(23) The moot question for consideration is that whether the application filed by the applicant is maintainable in the light of Section 362 of Cr.P.C. or not?

(24) It is the case of the applicant, that since, it is a well established principle of law that no stricture or remark should be passed against any person, without affording any opportunity of hearing, and since, no opportunity of hearing was given to the applicant, before directing for his prosecution, therefore, the observations as well as the direction given in para 22 and 23 of the Judgment may be recalled. To buttress his contentions, the Counsel for the applicant has relied upon the judgments passed by the Supreme Court in the case of **State Govt. of NCT of Delhi Vs. Pankaj Choudhary,** reported in **(2019) 11 SCC 575. Iqbal Singh Marwah and another Vs. Meenakshi Marwah and another,** reported in **(2005) 4 SCC 370, S.K. Viwambaran Vs. E. Koyakunju and others** reported in **(1987) 2 SCC 109, State of U.P. Vs. Mohd. Naim** reported in **AIR 1964 SC 703, Manish Dixit and others Vs. State of Rajasthan** reported in **(2001) 1 SCC 596.**

(25) Considered the submissions.

(26) Section 340 of Cr.P.C. reads as under :

> **"340. Procedure in cases mentioned in Section 195**.—(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (*b*) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—
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> (*a*) record a finding to that effect;
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> (*b*) make a complaint thereof in writing;
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> (*c*) send it to a Magistrate of the first class having jurisdiction;
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> (*d*) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
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> (*e*) bind over any person to appear and give evidence before such Magistrate.
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> (2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.
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> (3) A complaint made under this section shall be signed,—
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> (*a*) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;
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> (*b*) in any other case, by the presiding officer of the Court [1][or by such officer
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> (4) In this section, “Court” has the same meaning as

in Section 195."

(27) The Supreme Court in the case of **K.T.M.S. Mohd. Vs. Union of India** reported in **(1992) 3 SCC 178** has held as under :-

> **"35.** In this context, reference may be made to Section 340 of the Code of Criminal Procedure under Chapter XXVI under the heading "Provisions as to Offences Affecting the Administration of Justice". This section confers an inherent power on a court to make a complaint in respect of an offence committed in or in relation to a proceeding *in that court*, or as the case may be, in respect of a document produced or given in evidence in a proceeding *in that court*, if *that court* is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (*b*) of sub-section (1) of Section 195 and authorises *such court* to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding *in that court*" show that the court which can take action under this section is only the court operating within the definition of Section 195(3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution inbuilt in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by Section 340 of the Code should be used with utmost care and after due consideration. The scope of Section 340(1) which corresponds to Section 476(1) of the old Code was examined by this Court in *K. Karunakaran* v. *T.V. Eachara Warrier* and in that decision, it has observed: (SCC pp. 25 and 26, paras 21 and 26)
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> "At an enquiry held by the Court under Section 340(1), CrPC, irrespective of the result of the main case, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified

> offence and whether it is also expedient in the interest of justice to take such action.
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> … The two per-conditions are that the materials produced before the High Court make out a prima facie case for a complaint and secondly that it is expedient in the interest of justice to permit the prosecution under Section 193 IPC."
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> **36.** The above provisions of Section 340 of the Code of Criminal Procedure are alluded only for the purpose of showing that necessary care and caution are to be taken before initiating a criminal proceeding for perjury against the deponent of contradictory statements in a judicial proceeding."

(28) The Supreme Court in the case of **Pankaj Chaudhary (Supra)** has held as under :-

> **"49.** There are two preconditions for initiating proceedings under Section 340 CrPC:
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> (*i*) materials produced before the court must make out a prima facie case for a complaint for the purpose of inquiry into an offence referred to in clause (*b*)(*i*) of sub-section (1) of Section 195 CrPC, and
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> (*ii*) it is expedient in the interests of justice that an inquiry should be made into the alleged offence.
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> **50.** Observing that the court has to be satisfied as to the prima facie case for a complaint for the purpose of inquiry into an offence under Section 195(1)(*b*) CrPC, this Court in *Amarsang Nathaji* v. *Hardik Harshadbhai Patel* held as under: (SCC pp. 117-18, paras 6-8)
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> "*6*. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion

that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See *K.T.M.S. Mohd.* v. *Union of India*.) The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.

7. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See *Pritish* v. *State of Maharashtra*.)

8. In *Iqbal Singh Marwah* v. *Meenakshi Marwah*, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration: (SCC pp. 386-87)

‘*23*. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(*b*), as the section is conditioned by the words “court is of opinion that it is expedient in the interests of justice”. This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should .be made into any of the offences referred to in Section 195(1)(*b*). This expediency will normally be judged by the court by weighing not the magnitude of injury

suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint.' "

The same principle was reiterated in *Chintamani Malviya* v. *High Court of M.P.*

51. It has been consistently held by this Court that prosecution for perjury be sanctioned by the courts only in those cases where perjury appears to be deliberate and that prosecution ought to be ordered where it would be expedient in the interest of justice to punish the delinquent and not merely because there is some inaccuracy in the statement. In *Chajoo Ram* v. *Radhey Shyam*, this Court held as under: (SCC pp. 779-80, para 7)

"*7*. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge. In the present case we do

> not think the material brought to our notice was sufficiently adequate to justify the conclusion that it is expedient in the interests of justice to file a complaint. The approach of the High Court seems somewhat mechanical and superficial: it does not reflect the requisite judicial deliberation…."

(29) Thus, it is clear that before taking action under Section 340 of Cr.P.C., the Court is required to see as to whether :-

> (*i*) materials produced before the court makes out a prima facie case for a complaint for the purpose of inquiry into an offence referred to in clause (*b*)(*i*) of sub-section (1) of Section 195 CrPC, and
> (*ii*) it is expedient in the interests of justice that an inquiry should be made into the alleged offence.

(30) Both the ingredients have been considered by this Court while passing Judgment dated 29-5-2017.

(31) This Court in its Judgment dated 25-9-2017 has observed as under :-

> (22) In the present case, as already held by this Court, the sole intention on the part of Vijay Choudhary (P.W.3) appears to be to grab the land of the appellant Jaswant, Ramratan and Ramras therefore, a false story of kidnapping of Jaishanker @ Vicky was cooked up. The police has also not discharged its duty honestly. It appears that the investigating officers were hand in glove with Vijay Choudhary (P.W.3). Right from day one, the police had confined its investigation on the statements of Vijay Choudhary (P.W.3) and his family members. In spite of the fact, that in the F.I.R. itself, it was clear that Girraj Chourasia is alleged to have seen the incident of Kidnapping, but even then the police did not care to examine Girraj Chourasia. Even the investigating officer Manoj Mishra (P.W.14) has not given explanation for not recording the statement of Girraj Chourasia. Even no attempt was made to find out Girraj Chourasia. Thereafter, knowing fully well that Shanti Swaroop Sharma (P.W.2) is

not the eye witness, inspite of that, the spot map Ex. P.8 was prepared on his instructions, although the area of incident is undisputedly a densely populated area. Even the police did not obtain the signatures of any other witness on the spot map Ex. P.8, and no explanation has been offered by the prosecution for not obtaining the signatures of any witness on the spot map Ex. P.8. Further, when Ajay Choudhary (P.W.4) handed over the letter Ex. P.9 to the police on 2-12-2003, he was not interrogated by the police as to how he got the letter. Ajay Choudhary (P.W.4) has admitted that he did not inform the police that Kallu and Navla have delivered the Letter Ex. P.9. Even the police did not try to apprehend the person, to whom the amount of ransom was to be given. No trap was laid. It is admitted by the witnesses, that the police party was regularly visiting the house of Vijay Choudhary (P.W.3) but inspite of that, neither Vijay Choudhary (P.W.3) informed the police that Kallu and Navla would come to receive the amount of ransom, nor the police took any steps in this regard. Further there is nothing on record to show that how Manoj Mishra (P.W.14) came to know that Jaswant and Ramras are hiding in he forest. Nothing has been mentioned that whether any police party had gone to arrest the appellants Jaswant and Ramras or whether Manoj Mishra (P.W. 14), went to arrest the appellants Jaswant and Ramras, all alone. An attempt was also made by Manoj Mishra (P.W.14) to show that Jaswant and Ramras were staying in Forest by showing the seizure of some utensils and kerosene oil and one piece of chappati. The names of Jaswant, Ramras, Ballu and Dayaram were already disclosed in the F.I.R., but still, nothing has been disclosed by the prosecution, as to what actions were taken by the investigating officer to arrest Jaswant, Ramras and Ballu. There is nothing on record to show that from the date of Kidnapping till the date of arrest, whether any search was made in the houses of Jaswwant, Ramras and Ballu or not? Further the intentions of police personals also appear to be doubtful. Vijay Choudhary (P.W.3) had given an affidavit on 1-3-2004 that he is the owner of the amount recovered from the appellants. Although Vijay Choudhary (P.W.3) has denied the suggestion in para 33 of his cross examination that he had given the affidavit as the police personals were trying to usurp the amount, but also admitted that he had also heard that two police personals were placed under suspension. However, he denied the suggestion that those police personals were placed under suspension as they were

trying to grab the amount. The affidavit was given by Vijay Choudhary (P.W.2) on 1-3-2004 whereas according to the prosecution case, the appellant Jaswant and Ramras were arrested on 28-2-2004 and the amount of Rs. 4,45,000 was seized from their possession i.e., just one day prior to submission of affidavit by Vijay Choudhary (P.W.3). Kallu was arrested on 2-3-2004 and an amount of Rs. 1,00,000 was seized. Vijay Choudhary (P.W.3) had given the affidavit on 1-3-2004 and from the evidence of Ramesh Dande (P.W.15) it is clear that he was given the investigation on 1-3-2004, although the reason assigned by this witness is that Manoj Mishra (P.W.14) had gone on leave because of death of his father. Thus, it is clear that the investigation was done by different investigating officers. Thus, the role of the investigating officers also doesnot appear to be very convincing. The investigating Officer Manoj Mishra (P.W.14) did not examine any witness and did not offer any explanation for not doing the same. Even the prosecution did not examine any independent witness although the same were cited as witness. Even one Girraj Chourasia was also cited as a witness, but he was given up. When the appellant Dayaram was being tried, once again Girraj Chourasia was cited as a witness, but he was not examined. Thus, this Court is of the view that it is not a case of faulty investigation but it appears to be a case of tainted investigation done deliberately, with an intention to falsely implicate the appellants, at the instance of Vijay Choudhary (P.W.3) and others.

The Supreme Court in the case of **Dayal Singh and others Vs. State of Uttaranchal** reported in **AIR 2012 SC 3046** has held as under:-

> **"16**.The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook

> it, whether it did or did not cause prejudice to the case of the prosecution…… "
>
> ***(Underline supplied)***

(32) Thus, before directing the prosecution of the witnesses for giving false evidence before the Court, this Court has considered in detail and has come to a conclusion that the perjury appears to be deliberate. Furthermore, if this Court reopens the entire judgment in order to find out as to whether the above-mentioned two ingredients were taken into consideration or not, then certainly that exercise would come within the ambit of Section 362 of Cr.P.C. which is not permissible.

(33) Now, the only question which requires consideration is that whether it was obligatory on the part of the Court to hold a preliminary enquiry before directing prosecution for giving false evidence before the Court or not and whether an opportunity of hearing was required to be given to the applicant or not?

(34) By proceeding under Section 340 of Cr.P.C., a Court does not record the guilt of an accused, but it is merely of a *prima facie opinion* that it is expedient in the interests of justice that an inquiry should be made into the alleged offence. Therefore, where a Court is otherwise in a position to form an opinion regarding making of complaint, then the Court may dispense with the preliminary inquiry. Therefore, mere absence of any preliminary enquiry would not vitiate a *prima facie opinion* formed by this Court.

(35) A three Judge Bench of the Supreme Court in the case of **Pritish Vs. State of Maharashtra,** reported in **(2002) 1 SCC 253** has held as under :-

> **"18.** We are unable to agree with the said view of the learned Single Judge as the same was taken under the impression that a decision to order inquiry into the offence itself would prima facie amount to holding him, if not guilty, very near to a finding of his guilt. We have pointed out earlier that the purpose of conducting preliminary inquiry is not for that purpose at all. The would-be accused is not necessary for the court to decide the question of expediency in the interest of justice that an inquiry should be held. We have come across decisions of some other High Courts which held the view that the persons against whom proceedings were instituted have no such right to participate in the preliminary inquiry (vide *M. Muthuswamy* v. *Special Police Establishment*)."

(36) The Supreme Court in the case of **Amarsang Nathaji Vs. Hardik Harshadbhai Patel** repored in **(2017) 1 SCC 113** has held as under :-

> **"7.** In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See *Pritish* v. *State of*

Maharashtra.)"

(37) The Supreme Court in the case of **State of Goa vs. Jose Maria Albert Vales,** reported in **(2018) 11 SCC 659** has held as under :

> **"31.** It is no longer res integra that the preliminary enquiry, as comprehended in Section 340, is not obligatory to be undertaken by the court before taking the initiatives as contained in clauses (*a*) to (*e*) while invoking its powers thereunder. Section 341 provides for an appeal against an order either refusing to make a complaint or making a complaint under Section 340, whereupon the superior court may direct the making of the complaint or withdrawal thereof, as the case may be. Section 343 delineates the procedure to be adopted by the Magistrate taking cognizance. This provision being of determinative significance is quoted hereinbelow:
>
> "**343.** ***Procedure of Magistrate taking cognizance***.—(1) A Magistrate to whom a complaint is made under Section 340 or Section 341 shall, notwithstanding anything contained in Chapter XV, *proceed, as far as may be, to deal with the case as if it were instituted on a police report*.
>
> (2) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage, adjourn the hearing of the case until such appeal is decided."
>
> *(Underline supplied)*

(38) Thus, even without holding a preliminary enquiry, a Court can take initiatives as contained in Clauses(a) to (e) of Section 340(1) of Cr.P.C.

(39) In the present case, this Court after considering each and every aspect of the matter in detail, had formed a *prima facie* opinion that it is

expedient in the interests of justice that an inquiry should be made into any offence referred to in Section 195(b)(i) of Cr.P.C. i.e., prosecution of the persons mentioned in para 23 of the judgment, for giving false evidence before the Court. Therefore, this Court is of the considered opinion, that it was not obligatory to conduct a preliminary enquiry after giving an opportunity of hearing to the applicant. Therefore, it is held that the present case is hit by Section 362 of Cr.P.C.

(40) The Supreme Court in the case of **Sooraj Devi v. Pyare Lal,** reported in **(1981) 1 SCC 500** has held as under :-

> **"5.** The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code (*Sankatha Singh* v. *State of U.P.*). It is true that the prohibition in Section 362 against the court altering or reviewing its judgment is subject to what is "otherwise provided by this Court or by any other law for the time being in force". Those words, however, refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail."

(41) Further, this petition was filed on 20-8-2019 i.e., after near about 2 years of passing of judgment dated 25-9-2017. Thus, this petition also suffers from delay and laches, as well as the S.L.P.s filed by the similarly situated witnesses have also been dismissed by the Supreme Court.

(42) Accordingly, this petition fails and is hereby **Dismissed.**

(43) M.Cr.C.No.42189 of 2019 filed by S.S.Sikarwar is also **Dismissed.**

(Sheel Nagu)
Judge

(G.S. Ahluwalia)
Judge

mkb*