IN THE COURT OF PRINCIPAL SESSIONS JUDGE, SRINAGAR.

Present: Rashid Ali Dar

In the case of:-

Abdul Khaliq, Aged 59 years S/O Abdul Subhan , Sub Inspector of J&K Police, presently lodged at Srinagar Jail through his next friend Shazad Ahmad aged 28 years S/O Ali Mohammad Ganie R/O Sogam Kupwara.

...Petitioner.

vs

1. **Farooq Ahmad Wani S/O Late Abdul Khaliq Wani R/O Chana Mohalla Rainwari, Srinagar.**
2. SHO, Police Station Nowhatta,
3. Sr. Superintendent of Police, Srinagar, Kashmir,
4. Inspector General of Police, J&K, Sriangar, Kashmir,
5. Mohammad Akram, Police Constable, presently lodged in Jail.

...Respondents.

In the matter of:-

Application seeking release of applicant on bail.

Mr. Ankur Sharma Advocate for the petitioenr. Mr. Aijaz Ahmad Dhar Advocate for respoondent No. 1. Mr. Syed Maqbool PP for the State/respodnents 2 to 4.

O R D E R:

In pursuance of the order passed on **28.07.2017** by the Hon'ble High Court (Lord Chief Justice) in M.P.No. 01/2017, the entire record i.e bail application/transfer application was directed to be placed before the Principal District & Sessions Judge, Srinagar. However, the entire record was not received and accordingly request was made to Registrar Judicial for making available the main file which had been submitted before Hon'ble High Court in pursuance of Order passed by this court on 31.12.2015 and pending before the Hon'ble High Court as *Cr. Ref. No. 01/2016.*

The counsel for the petitioner has not appeared on various dates particularly in the proceedings conducted after 05.08.2017. Only the learned PP and the counsel for the complainant

appeared in the proceedings conducted after 05.09.2017. Learned counsel for the complainant has been heard in the matter who has raised various pleas regarding the maintainability of the petition. According to him no ground exists on which the petitioner can be admitted to bail and of which reference is made herein-after.

In the petition presented for grant of bail before the Hon'ble High Court the petitioner Abdul Khaliq who has been arrayed as accused No. 1 has taken the following pleas:

i) *That the petitioner has caused his appearance before the learned trial court on 01.12.2015 and thereafter was taken in custody in connection with a private criminal complaint, preferred by one Farooq Ahmad Wani, in which the learned trial court had taken cognizance for the commission of offence under section 304(Part-II) of the RPC against the applicant. It is respectfully submitted that since 01.12.2015, till the date of filing of this instant application, the applicant is in custody in connection with the pendency of a criminal complaint lodged against him and one another, in which the cognizance for the commission of offence under section 304 (Part-II) RPC stands taken. Relevant to state here that offence under section 304(Part-II) i.e culpable homicide not amounting to murder carries a maximum imprisonment for a period of 10 years.*

ii) *That before adverting to the facts and circumstances leading to the filing of instant bail application at Jammu Wing of the Hon'ble High Court, it is desirable to outline factual matrix leading to the filing of instant petition/application.*

iii) *That the petitioner was posted as Assistant Sub Inspector of Police at Police Station Nowhatta Srinagar, in the month of January 2010, when he was deputed for the maintenance of law and order situation in the areas under jurisdiction of the police station supra.*

iv) *That on 31.01.2010 while petitioner was discharging his duties for the maintenance of law and order in the wake of heavy stone pelting witnessed in the area, the petitioner who was a part of police party, employed for the purpose of containing violent procession in order to restrain stone pelting by the miscreants, had to take recourse to firing of tear smoke shells on the miscreants who were instrumental in stone pelting and causing disturbance of peace and tranquility of the area.*

Incidentally, one of the tear smoke shell fired by the police party of which the applicant/petitioner was a part, hit one boy namely Wamiq Farooq, who succumbed to the injuries and in respect of the said incident FIR No. 12/2010 was registered at Police Station Nowhatta Srinagar against several miscreants for the commission of various offences under RPC.

It is relevant to state here that the father of the deceased boy preferred a complaint against the petitioner and one another for the commission of offence under section 302, the said complaint upon being preferred before the learned Chief Judicial Magistrate, Srinagar was directed to be enquired into by a Magistrate under section 202 of Cr.P.C after the learned Chief Judicial Magistrate, Srinagar directed postponement of the issuance of process in the complaint supra.

The petitioner further submits that even before the filing of the said complaint the father of the deceased had preferred an application before the court of learned CJM, Srinagar on 11.02.2010, for the registration of FIR and in the said complaint the applicant was not named, the complaint was forwarded to the SSP Srinagar for necessary action in accordance with the law on 15.02.2010 by the learned Chief Judicial Magistrate.

v) *That consequent upon the direction issued by the learned Chief Judicial Magistrate non 15.02.2010, the Sr. Superintendent of Police submitted a report before the court, in which it was intimated that the occurrence in respect of which the complaint was preferred by the father of the deceased was under investigation in FIR 12 of n2010. However, when the report submitted by SSP concerned was pending consideration, the father of the deceased preferred a composite application before the court of learned CJM, Srinagar, the reference of which is made in the preceding paragraph, in which the learned CJM Srinagar by virtue of order dated 11.05.2010 directed a detailed enquiry under section 202 of code of Criminal Procedure. The enquiry so ordered on 11.05.2010 was later concluded by the concerned Magistrate and the report of the same was also submitted before learned CJM Srinagar. It is further stated that after receipt of report, the learned Chief Judicial Magistrate by virtue of order dated 05.02.2011 directed the Inspector General of Police concerned to constitute a Special Investigation (SIT) to investigate the matter.*

vi) *That the order dated 05.02.2011, directing the constitution of Special Investigation Team was assailed by the State before the court of learned Principal Sessions Judge, Srinagar in a Revision Petition No. 15/Revision. However, the criminal revision preferred against the order dated 05.02.2011 was dismissed by*

the learned Principal Sessions Judge, Srinagar by virtue of order dated 02.05.2011. Relevant to state here that at the time of dismissal of revision petition, the learned Principal Sessions Judge, Srinagar further directed the registration of fresh FIR in respect of incident reported in the complaint.

vii) *That the order passed by the learned principal Sessions Judge, Srinagar was further assailed before the Hon'ble High Court in petition under section 561-A Cr.P.C No. 64/2011 and the same was dismissed and the order of learned Principal Sessions Judge, Srinagar was upheld. Thereafter, a special leave petition was preferred before the Hopn'ble Apex Court and by virtue of order dated 19.03.2012, the Hon'ble Supreme Court was pleased to entertain the special leave to appeal on a limited issue insofar as the challenge to direction issued by the learned Pr. Sessions Judge, Srinagar providing for registration of fresh FIR.*

viii) *That after passing of order dated 19.03.2012 by the Hon'ble Supreme Court, the court of learned CJM, Srinagar proceeded ahead with the matter in respect of the complaint and the enquiry report so received as well as the report of Special Investigation Team and later by virtue of order dated 22.08.2013, directed the issuance of process against the petitioner and one another for the commission of offence under section 304(Part-II) and accordingly directed the issuance of process in respect whereof. The order dated 22.08.2013 by virtue of which the cognizance was taken, was challenged by the petitioner before the court of learned Principal Sessions Judge, Srinagar and the criminal revision preferred against the order dated 22.08.2013 came to be transferred to the Court of learned 2nd Additional Sessions Judge, Srinagar and by virtue of order dated 25.02.2014, the criminal revision preferred against the order dated 22.08.2013 was also dismissed by virtue of order dated 25.02.2014.*

The order of the learned 2nd Addl. Sessions Judge, Srinagar was further assailed before the Hon'ble High Court under 561-AQ Cr.P.C No. 40/2014 and later inn view of the order passed by the Hon'ble Apex ,Court in special leave to appeal preferred by the State, the Hon'ble High Court dismissed the petitioner preferred by the petitioner and as a consequent thereof the proceedings in respect of the criminal complaint initiated against the petitioner and one another were further continued and by virtue of order dated 19.11.2015, the learned Forest Magistrate, Srinagar was pleased to direct the issuance of fresh non-bailable warrants against the petitioner.

ix) *That the petitioner surrendered before the learned trial court on 01.123.2015 and ever since the date of surrender till the date of filing of instant application, the petitioner is in custody in connection with the pendency of the criminal complaint against him and one another for the commission of offence under section 304(Part-II) for which the cognizance has been taken by the learned trial court. However, later the case was committed to the court of Sessions and thereafter the proceeding in respect of the complaint proceeded before the court of learned 2nd ADDL. Sessions Judge, Srinagar.*

x) *That after the applicant/petitioner has surrendered before the learned trial court, the petitioner was taken min custody and thereafter he preferred an application for grant of bail before the learned trial court and the proceeding in respect of the said application along with the complaint under reference continued. However, the complainant and the private counsel so engaged by the complainant had always intervened and obstructed the consideration of bail application of the applicant and several dates were fixed for the consideration of the bail application. But on one pretext or the other, the complainant and the counsel so engaged by the complainant have made every endeavor to delay the consideration of bail application in order to prolong the custody nof the petitioner. It is further submitted that the complainant and the counsel so engaged by the complainant had even gone to the extent of extending threats to the Presiding Officer of the court, the factum of which is recorded by the learned 2nd Addl. Sessions Judge, Srinagar in order dated 29.12.2015, wherein the learned 2nd Addl. Sessions Judge, Srinagar has expressed his inability to hear the complaint and the bail application in view of the threat extended by the complainant and private counsel so engaged by him. The petitioner humbly submits that though the petitioner was arrested on 01.12.2015, consequent upon his surrender before the court, the petitioner was not able to get proper legal assistance from the counsel so engaged by him as the atmosphere in the court premises was so such hostile and discouraging that even the petitioner and his counsels were threatened time and again by the complainant and several other persons, who used to come to the court premises, as and when the hearing of the matter was fixed.*

xi) *That the threat perception faced by the petitioner in prosecuting the criminal complaint as well as the bail application is further substantiated from the fact that the court of learned 2nd Addl. Sessions Judge, Srinagar had even taken judicial notice of the threats extended to the court itself and resultantly the complaint alongwith connected application for bail were*

submitted/transferred to the court of learned Principal Sessions Judge, Srinagar by virtue of order dated 29.12.2015.

xii) That the pain and sufferings of the petitioner were further intensified, rather prolonged by continuous incarceration, when after the matter was submitted to the court of learned principal Sessions Judge, Srinagar, the learned Principal Sessions Judge, Srinagar instead of taking corrective steps in the matter, has instead further submitted the record of the complaint to the learned Registrar Judicial of Srinagar wing of J&K High Court and the same was treated as a criminal Reference No. 1 of 2016 which is pending adjudication before the Hon'ble High Court at Srinagar wing. Relevant to state here that the aforesaid Criminal Reference is clubbed with criminal Transfer Application No. 01 of 2016, preferred by the co-accused. The atmosphere either in the District Court Sriangar or in the Srinagar wing of Hon'ble High Court of J&K is so much hostile and threatening against the petitioner and all those who make efforts to assist the petitioner for the prosecution of his case that the petitioner is prevented from prosecuting his case fairly without any threat or fear and owing to the said reasons, the petitioner is unable to get proper legal assistance in the matter as the threat perception to the petitioner and the lawyers engaged by him is with large on the face of the current/prevailing scenario, which is even discernible from the order dated 29.12.20156 passed by learned 2nd Addl. Session Judge, Srinagar in which even threatening to presiding Officer is benign noticed. It is stated that because of reasons indicated above, the petitioner is unable to engage any lawyer at Srinagar as even the lawyers have shown their helplessness to defend the petitioner and as such he is constrained to approach this court through the medium of instant application.

xiii) *That the petitioner further states that he is in custody since 01.12.2015 and practically he is suffering incarceration without any trial or any proceeding from the past almost one and a half year more particularly when the offence in respect of which the cognizance has been taken against the petitioner is not the one punishable with imprisonment for life or death penalty. There is no legal justification for continuous retention of petitioner in custody. Even it is not discernible that how the record of the complaint submitted by the Principal Sessions Judge is entertained as a criminal reference more particularly when no question, as envisaged under section 432 Cr.P.C ni8s apparent which require determination by the Hon'ble High Court for the just adjudication of the criminal complaint. Rather, the pendency of criminal reference on the face of facts and circumstances under which it is entertained fully justifies its*

determination only for transferring criminal proceedings from Srinagar to Jammu and for no other purpose. Be that as it may, the fact remains that the petitioner is in custody from the past one and a half year without any justifiable reason and as such the petitioner is constrained to approach this court through the medium of instant petition. It is further submitted that though the petitioner immediately after his arrest on surrender had preferred bail application before the learned Trail court and the same was pending before the learned trial court, at the time when the matter was referred to Hon'ble High Court by virtue of order dated 31.12.2015. However, having regard to the fact that the petitioner is unable to prosecute his case at Srinagar in the light of threat perception, he seeks to withdraw the bail application originally field before the learned trial court and seeks the consideration of instant application by this Hon'ble court at Jammu wing.

xiv) *That the petitioner has already preferred a transfer application seeking transfer of criminal matter referred by learned Pr. Sessions judge, Srinagar by virtue of order dated 31.12.20154 and the said transfer application is pending before Jammu Wing of this Hon'ble court which is registered as CRTA 31 of 2016. Therefore, in this view of the matter also the petitioner seeks the adjudication of his bail application at Jammu.*

xv) *That the petitioner has been falsely implicated in the commission of the offence at the instance of complainant and he is made a scapegoat for discharging his duties totally hostile and adverse atmosphere. The petitioner has not committed any offence and there is no likelihood of petitioner fleeing the course of justice.*

It is required to be noted that accused No. 2 in complaint namely Mohammad Akram has not filed any motion before the Hon'ble High Court for admission to bail but has been arrayed as respondent No. 5 in the instant bail application.

The grounds which has been raised by the learned PP with regard to the rejection of the application are as:

1. *That the allegations against the petitioner/accused are serious and grave in nature. The accused is alleged to have committed non-bailable and heinous offence which carries severe punishment.*

2. *That the accused is alleged to have killed a young and school going boy who was reading in 7th class on the date of occurrence.*

3. *That the accused cannot claim bail as a matter of right in view of facts and circumstances of case.*

4. *That while deciding the bail application, the court has to consider public and social interests as in the present case public interest is involved. The people at large condemned the brutal act of accused and made protests against the killing of innocent victim.*

5. *That the applicant has not been able to make out a case for grant of bail. The application is not maintainable which deserves dismissal.*

6. *That in view of facts of the case, the court cannot exercise discretionary powers for grant of bail.*

7. *That there is no material for grant of bail. It may hamper the proceedings in case the accused is enlarged on bail.*

The complainant who has been arrayed as respondent No. 1 in the instant bail application has filed his objection wherein he has taken the following pleas:-

1. *That the bail application is not maintainable in view of the fact that the petitioner seeks the consideration of the instant bail application by the Hon'ble High Court at Jammu but not by the court at Srinagar in terms ofpart para 15 of his bail application at page No. 12. In this view of the matter bail application deserves to be rejected outrightly.*

2. *That the petitioner discloses his inability not plead the same here at Srinagar and as such, sought the permission of the court to withdraw the first bail application already filed before the learned trial court at Srinagar but he has not been allowed to withdraw the already filed bail application at Srinagar, meaning thereby that the said bail application is still pending disposal, hence subsequently filed application addressed to Jammu court is not maintainable in view of the already filed bail application at Srinagar, therefore, the same needs and deserves to be rejected forthwith and even this court has to exhaust the permissible remedy under law, as such, lacks jurisdiction to entertain and hear the second bail application, therefore, this court has to decide which bail application it is going decide,* ***(a)*** *one already pending disposal before the learned trial court at Srinagar and* ***(b)*** *or subsequently field bail application filed at Jammu wing of the Hon'ble High Court, and if the law of the land allows the first one, then the respondent No. 1 has every right to file objections int hat application for disposal under law, hence subsequently filed bail application deserves dismissal on this count alone.*

3. *That the bail application is also not maintainable under law at this stage as only cognizance in the complaints case has been taken by the learned trial court under section 304 Part II RPC (Culpable Homicide not amounting to murder) but this does not mean that the petitioner*

has been finally charged under this provision of RPC, as the charge in the said complaints case is yet to be framed and that can only be done lawfully after hearing both the sides on facts and points of law governing the subject and in case if charge is being framed under section 302 RPC then in that eventuality there is a different set of procedure for bail, the list of witnesses is to be exhausted first and if afterwards any ground is made out for bail, then and only then the petitioner can be released on bail otherwise not, as the petitioner and one constable Akram have filled a 7th Class student just 11 years old in a broad day light by tear gas shell fired at a distance of 10 feet on a very vital part i.e, posterior part of deceased's head, which resulted into Wamiq Farooq's instant death as the doctors declared him as brought dead. Therefore, in this view of the matter, the petitioner cannot be released on bail before framing of charge in a heinous offence, hence this bail application is liable to be dismissed on this count as well, as in case charge is framed under section 302 RPC, the bail cannot be granted in terms f general exception and bar falling under section 497 Cr.P.C.

4. *That bail application is not maintainable in view of the misleading and distorting facts reflected in the application that already FIR came to be registered by the police viz-a-viz the death of the deceased Wamiq Farooq. The fact of the matter is that the police registered an FIR No. 12/2010 under section 307,148,149,353,336 RPC in P/S Nowhatta about alleged stone pelting episode and even against the deceased after his death, but no FIR had been registered viz-a-viz his death despite the court of Principal District & Sessions Judge's Order dated 02-05-2011. the agony is that even charge sheet has been produced before the court about the stone pelting offences falsely shown to have been committed, even against the deceased, but no charge sheet has been filed till now viz-a-viz the death of the deceased and against the accused (petitioner & constable Akram. Meaning thereby that the accused have every right to kill innocents like Wamiq Farooq including their right to be exonerated from the charges and right to be bailed out but on the contrary the deceased's father (Farooq Ahmad Wani) has no right to oppose the bail application of the accused/ petitioner as his loss of 11 year old son could be repaired while as a few months detention of the accused in the murder of the deceased could not be tolerated. Hence a serious and lawful view is to be taken while considering the second bail application which is otherwise not maintainable. On this count as well the bail application of the petitioner deserves to be rejected outrightly.*

5. *That the petitioner admits to have appeared before the court on 01-12-2015, depicts his delaying tactics to appear despite various court orders from courts below to Hon'ble High Court and Hon'ble Supreme Court of India since the institution of the complaints case in the year 2010. Even from the date of his appearance i.e 01-12-2015, the*

petitioner and one constable Akram again adopted other tricks to delay the matter and trial of the complaints case, resorted to file various, more than one transfer applications at Jammu High Court for the transfer of the complaints case and bail application already pending disposal before Ld Trail Court and its disposal therein and till now no proceeding took place or has been allowed to be initiated by the trial court for the trial of the complaints case which not only hampered the process of law and justice but also made deliberately and intentionally the respondent No. 1 to suffer monetarily, as such serious prejudice, mental shock, agony has been caused to him which cannot be compensated by any means whatsoever. Therefore, it is vehemently denied that at the outset the petitioner caused his appearance before the court as is clear form the records that the accused/petitioner absconded incessantly for more than 05 long years to evade their arrest and to hamper the process of law. Therefore incorrect facts have been pleaded that the petitioner himself and by his own appeared before the court on 01-12-2015, he in fact had been brought ultimately by the orders of Forest Magistrate, Srinagar. Moreso, it is only cognizance taken u/s 304 II RPC but not the charge framed finally, hence the bail of the petitioner cannot be weighed/ considered on the basis of cognizance taken initially but is to be considered only after framing the charge, viewed thus, mere imprisonment of 10 years for the offence u/s 304 II RPC could be enhanced upto life imprisonment or death penalty. In this view of the matter, the bail application of the petitioner is liable to be dismissed forthwith.

6. *That the second bail application is also not maintainable in view of the admission of the petitioner that the bail application which he pleads before this court at Srinagar, has infact been filed at Jammu Wing of Hon'ble High Court cannot lay its hands for the consideration of the said bail application as it lacks the jurisdiction in the matter. The second bail application categorically demands and claims his inability wherein he sought consideration of the second bail application by the Hon'ble High Court and not by this court and further admits the institution of the first bail application originally filed before the Ld Trial Court at Srinagar, but that had neither been withdrawn by the petitioner till date nor was that application allowed to be withdrawn by the court, as no order in this behalf came to be passed, therefore, the first bail application filed at Srinagar court is still existing/ subsisting and on record at Srinagar wing of Hon'ble High Court. As such, the remedy which is to be exhausted first is the consideration on the first bail application not the instant one and for that matter, the entire court record is to be called from the Hon'ble High Court Srinagar which otherwise has been ordered by virtue of order dated 28-07-2017 by the Hon'ble Lord Chief Justice of J&K High Court which reads as under:*

"the entire proceedings shall now be placed before the Principal District & Sessions Judge Srinagar, for consideration of the bail application and other allied issues". The same be placed before the Principal District & Sessions Judge Srinagar on 02-08-2017. The criminal transfer application No. 01/16 stands disposed of for the time being".

Therefore keeping in view th aforesaid facts, the 2nd bail application deserves to be dismissed outrightly.

7. There was no law and order situation in the area, as the stand of the respondent No. 1 has even been ascertained and enquired by the Inquiry Magistrate in terms of her inquiry report.

8. That on 31-01-2010 Sunday at about 4.45 pm, the deceased 7th class student just 11 years old minor, was playing carom board with his friends and others were busy in playing cricket at Gani Memorial Stadium Rajouri kadal, Srinagar, the atmosphere was just cool i.e it was a normal day, there was no stone pelting or taking out of processions, abruptly a white coloured Gypsy from Police Station Nowhatta appeared on spot where from the ASI Ab Khaliq petitioner/ accused and another accused constable Akram along with other police personnels alighted from the vehicle in question, who started harassing the children playing therein, the children ran away helter skelter in fear psychosis, all of a sudden, tear smoke shells were fired by the petitioner and constable Akram. One of it hit the posterior part of the head of deceased Wamiq farooq from a distance of 10 feets, resulted in instant death as doctors at SKIMS declared him brought dead as his brain was oozing out from his skull according to them as earlier discussed. The respondent No.1 when came to know about the death of his son Wamiq farooq at SKIMS, went to P/S Nowhatta for registration of an FIR against the petitioner/ accused and one constable Akram, who were seen firing tear smoke shells on the deceased's head by the eye witnesses and respondent No. 1 himself on spot, as the petitioner had been in the first instance recognized by the people/ witness, as he has worn name tag on his uniform, besides this he had been suspended from his services alongwith constable Akram by the orders of the then DGP police and this caught the headlines of the newspapers. The police refused to register the FIR against their own men in uniform viz-a-viz the death of the deceased u/s 302 RPC but subsequently filed an FIR No. 12/2010 under stone pelting offence as earlier discussed even against the deceased as well after his death, interestingly charge sheet came to be presented in this behalf by P/S Nowhatta in the court of law even against the deceased as police wanted to hush up the matter of murder of Wamiq. It is unfortunate on polices part that they nowhere showed Wamiq, the deceased as a stone pelter, nevertheless the petitioner deprived the deceased from his life and personal liberty once for all which is against the basic structure enshrined/embodied under Article 21 of the constitution of India. There was no stone pelting going on that time, hence there was no law and order problem, as per enquiry report of inquiry Magistrate.

The petitioner himself was part of the police party, had to take resource to firing of tear smoke shells which hit the deceased Wamiq Farooq's head who succumbed to injuries, but suppressed the status of already filed FIR No. 12/2010. therefore it was a cold blooded murder with the intention to kill Wamiq in a broad day light, as the tear smoke shell was fired on a very vital part i.e posterior part of his head that too from a very close distance i.e 10 feet's as per the statements of eye witnesses in Magisterial enquiry, hence the petitioner/accused cannot be released on bail in the offence of a murder as charge is yet to be framed, only cognizance u/s 304 Part II RPC has been initially, this does not mean that the petitioner shall be tried u/s 304 Part II RPC which carries 10 years imprisonment on the basis of taking cognizance in this offence. Therefore the bail application of the petitioner is liable to be dismissed forthwith.

9. *That the petitioner as already submitted had been absconding since 2010 till 31.12.2015 ultimately he was brought in terms of non-bailable warrants issued by Forest Magistrate vide order dated 19.11.2015, hence its is absolutely wrong that the petitioner surrendered before the court on 31.12.2015.. Again distorted facts being furnished viz-a-viz the surrender by the petitioner and one constable Akram, as stated herein above, but simultaneously again admission by the petitioner that he has already filed bail application before the trial court at Srinagar which is still subjudice. As a matter of fact, the petitioner sought the bail in a case of murder of the deceased Wamiq Farooq and expected support and cooperation from the respondent No. 1 which was dead impossible, as such, the complainant/ respondent No. 1 had no option but to oppose the bail application tooth and nail. It is not the respondent No. 1 but the petitioner who himself delayed the matter by filing transfer application as well and then another transfer application at Jammu High Court, the respondent No. 1 filed objections in both the applications. In first transfer application, the petitioner levelled false and vexatious allegations against the complainant/respondent No. 1 and his counsel that they threatened the Presiding Officer and besides this he alleged that no lawyer dares to appear in petitioner's case and in second transfer application, the petitioner directly attacked and maligned the lower court Judges and Hon'ble High Court Judge at Srinagar that state exchequer is incurring huge expenses for the protection of the Judges and their security, but the Judges managed to allow the petitioner to remain in Jail. It is nothing but ,using of contemptuous words against the Hon'ble Judges who are meant for dispensation of justice. More so, the petitioner here at Srinagar was at liberty to engage a lawyer of his own choice, which he did as this court could find on record the Vakalatnama of various top most lawyers. Therefore, this contention is based on false grounds and that is the reason the Hon'ble Lord Chief Justice of J&K High Court by virtue of his order dated 28.07.2017 when found no merit in transfer application, ordered Criminal Transfer Application No. 01/2016 stood disposed of and as such, entire proceedings including the consideration of the bail*

application have been directed to be placed before this court, even he could not pas any order viz bail on the ground that he was intimated by the counsel for respondent No. 1 that already first bail application is pending disposal before learned trial court at Srinagar. Therefore, it was not respondent No. 1 or his counsel who prolonged the custody of the petitioner but the petitioner himself besides this vehemently denied that the complainant/ respondent No. 1 or his counsel threatened the Presiding Officer and otherwise it is not clear from the contents of bail application as to how and what threat had been hurled against the Presiding Officer. Infact the Presiding Officer wanted to grant bail and as per his version liberty of the accused had been curtailed which was opposed by the respondent No. 1 in terms of the following words:

"That in case the Presiding Officer grants bail to the accused at initial stage in a death case of Wamiq Farooq that too before arguments of framing charge, his order of bail shall be challenged either in High Court or before Lords Chief Justice of India."

Whether this amounts to threat, is to be looked into its legal perspective. Hence there was no hostile atmosphere even for the petitioner or his counsel, hence allegations of threat perception being hurled by the complainant and other persons is nothing but camouflage, and a premeditation in order to get the matter transferred to Jammu court and to make out a ground for bail, but the petitioner miserably failed in his ill and nefarious designs. Therefore, in this view of the matter bail application deserves to be rejected outrightly.

10. That the credibility of the Pr. District & sessions judge has been challenged by the petitioner that he has not taken corrective steps in the matter and instead submitted the record to Registrar High Court Srinagar, it seems that the petitioner wants to run the affairs of the courts as per his will and wish by brushing aside the set procedure of law. Moreso, he as an accused has got cheeks to use the contemptuous and derogatory words against the courts even, may it be District Court Srinagar or High Court Srinagar, that the atmosphere therein is much hostile. what it connotes, can be seen through the judicial wisdom by court. On one hand the petitioner claims that the entire case record along with the first bail application is pending disposal before this court as the case has been referred to Hon'ble High Court at Srinagar for solicitation of orders in terms of reference under No. 01/2016 by this court, but on the other hand, 2nd bail application is being filed at Jammu High Court by the petitioner for his bail. Then the procedure under law is to wait for the orders from the Hon'ble High Court Srinagar in reference, may it be the trial of the complaints case or first bail application, as has been rightly directed by the Hon'ble Lord Chief Justice og J&K high Court, otherwise the entire process of law shall be vitiated and a serious legal flaw /infirmity shall come into the existence which shall cause the failure of justice, as the status of the first bail application and position of law thereof, has to be considered.

11. *That the petitioner is without trial for last 1 ½ years for his own follies and delaying tactics as already stated. It is just cognizance taken u/s 304 II RPC but charge is yet to be framed, then how come shall petitioner be granted bail before framing of charge. in case he i being charged u/s 302 RPC, the procedure for bail is different in the given circumstances and facts of the case, it shall be premature to grant bail in a killing case where even the petitioner is avoiding/ refusing the trial in the complaints case since 2010. Moreso there is no procedure under law to challenge the criminal reference already pending before Hon'ble High Court Srinagar, in the courts below. The petitioner needs to approach Hon'ble High Court in this behalf.*

12. *That it was under the orders of courts & only after Magisterial inquiry, the accused/ petitioner has been ordered to be kept in jail but not at the instance of the complainant. Does it mean that the petitioner is again making aspersions/ allegations against the court of law, thereby challenging the credibility and majesty of law. No attempt shall be tolerated to fiddle with the sanctity of law which protects us all, prevents the commission of offence/s and governs us. The killing of Wamiq farooq does not fall within the ambit of official duty but it is the dereliction of duty by the men in uniform. The petitioner was entrusted the highest seat in police who was meant for the implementation of law and who is expected to protect the life and liberty of the individuals, but if he deprives somebody from his life and liberty once for all, could he be protected by law. The responsible person like him is not allowed to ignore the law, as the legal maxim rightly says "ignorance of fact is excusable but the ignorance of law is not excusable"*

13. *That the accused/ petitioner after killing the deceased cannot say and claim his innocence when the entire record is against him, viz orders of courts including magisterial inquiry etc. Therefore he has not been made a scapegoat but he made the deceased Wamiq Farooq scapegoat in turn for which the trial u/s 302 RPC for the offence of murder is required to be initiated/ conducted against him and another constable Akram. Therefore he is involved in the heinous offence, he shall easily flee from the course of justice as had been his routine keeping his past record into account as he fled from facing the trial/ course of justice since 2010 and it was ultimately through non-bailable warrants executed by SSP Srinagar, he was forced and brought before the court, as such, there is every possibility that he shall criminally intimidate the prosecution witnesses for saving his skin from facing the trail u/s 302 RPC. He shall hamper/tamper the prosecution witnesses which shall amount thwarting the course of justice.*

Lastly he has prayed for rejection of the instant petition.

It is required to be noted that earlier a bail application has been presented on 02.12.2015 on behalf of the accused/petitioner Abdul Khaliq and Mohammad Akram Dar (arrayed as respondent No. 5 in the instant petition) which has been transferred to the court of 1st Addl. Sessions Judge, Srinagar where from same had been transferred to the court of learned 2nd Addl. Sessions Judge Srinagar who (Mr. Sham Lal Lalhal) passed the order on 29.12.2015, reference of which is made herein after. The following pleas have been raised on behalf of the petitioners for admission to bail in the said application.

1. *That the petitioners have been arrested by the respondent on the directions of the learned Forest Magistrate Srinagar by virtue of order dated 01.12.2015 passed in a complaint filed by Farooq Ahmad Wani in the year 2010.Prior to this order one order was passed by the same court on 19.11.2015 pursuant to which non-bailable warrants of arrest against accused persons came to be issued and Sr. Superintendent of Police Srinagar was directed toe execute the non-bailable warrants of arrest and the matter was directed to be listed on 1st December 2015.*

2. *That the petitioner No. 1 approached before this court seeking bail in anticipation as there was every likelihood that the petitioner No. 1 would have been arrested. However, this court in bail application passed an order observing that the petitioner present in person who undertakes to appear before the court below on 1st December 2015 and pursuant to the undertaking and in the light of the order dated 27.11.2015 passed by this court appeared before the court on the due date i.e 1st December 2015. The petitioner was having every belief that he will be allowed to furnish bail bond in order to cooperate with the trial of the case to which petitioners otherwise were ready to submit, however, the court below instead of allowing the petitioner to submit the bail bonds passed passed an order committing the case for trial before the court of learned Pr. Sessions Judge for further orders. However, the petitioners were sent to judicial custody at Srinagar Central Jail till 03.12.2015. The petitioners were all along ready to cooperate with the investigation of the case. Therefore, by virtue of arrest no purpose could have been secured as the petitioners were not required for any custodial interrogation as it is a private complaint though petitioners have been alleged to have committed an offence during the course of discharging their duties. The petitioners have so many safeguards available in terms of criminal procedure code itself which the petitioners could have taken recourse to at the time of framing of charge even as before prosecuting the petitioners the sanction in terms of section 197 of Cr.P.C was pre-requisite but the court below has send the petitioners in judicial custody. By virtue of which neither any purported could be served nor the same will be in the interests of justice, the petitioners were all along ready to face the*

trial, however, the matter landed in Supreme Court. As such, there was no fault on the part of the petitioners. Nor the petitioners at any point of time have willfully chosen to remain absent from the court which could have warranted the coercive methods to be adopted by the subordinate court in order to secure the presence of the petitioners.

3. *That the petitioner No. 1 has 38 years of unblemished service record and petitioner No. 1 has never committed anything wrong and is innocent but virtue of their custody in police the innocence of the petitioner has been shaken. The petitioner is father of 4 unmarried daughters though by virtue of arrest nothing may be at stake but the social stigma that is got affixed to the career of the petitioner which will have every potential to speak upon the marriage of his unmarried daughters that too for an act which is alleged to have been committed while discharging sovereign functions of the state, the complaint simplistor with no concrete evidence against the petitioner No. 1 nor against the petitioner No. 2. The allegations levelled against the petitioners are baseless and false and they even does not possess a shade of criminal behaviour on their past.*

4. *That the petitioners will not violate the concession of bail granted and will abide by all the terms and conditions which may be imposed on them in letter and spirit.*

In order to appreciate the background on which the petitioner seek admission to bail is as:-

A complaint came to be presented by respondent No. 1 on 27th March, 2010 wherein it was alleged that on 31st of January, 2010 a tear gas shell was fired by the police party in the head of the victim, the son of the complainant namely Wamiq Farooq, at the distance of 30 feet near a Mosque adjacent to Gani Memorial Sports Stadium, Rajouri Kadal, resulting in his death on spot. It has been further alleged that the complainant as well as his other relatives approached the Police Stations Rainawari and Nowhatta for registration of case against the delinquent police officials but all in vain. Reluctance and inaction of Police to take any action, forced him to approach the court of Chief Judicial Magistrate Srinagar on 11.2.2010 for registration of FIR against the delinquent police officials who fired the tear gas shell on the head of the deceased, Wamiq Farooq and the court of Chief Judicial Magistrate Srinagar vide order dated 11th February, 2010, directed the police concerned to submit a detailed report

and in response to which SSP Srinagar submitted a detailed report vide communication No. LGL/CM/2010/625 dated 19.2.2010 which has been alleged to be concocted.

It is further alleged in the complaint that actually the matter of fact is that the deceased Wamiq Farooq along with some other teenager boys/friends was playing carom near the mosque and in the meantime a police Gypsy bearing registration No. JK02P/59132 of Police Station, Nowhatta came in the area and at that relevant time there was not any sort of violence or agitation going on in the area, yet one of the police officials came down from the said vehicle and without any cause, any challenge or justification fired a tear gas shell from a short distance of 30 feet from the victim, which hit the head of the victim and thereby, causing his death. The killing of victim was admitted by the government and the delinquent police official identified as ASI Abdul Khaliq has been put under suspension on the ground of misconduct.

The court of learned Chief Judicial Magistrate after considering the complaint, statements of witnesses and the police report received in this behalf, ordered for Magisterial enquiry vide order dated 11.5.2010 and the inquiry was initially entrusted to Judge Small Causes/JMIC Srinagar under Section 202 Cr.P.C for ascertaining the truth or falsehood of the allegations. But as the Ld. Judge Small Causes Court/JMIC Srinagar expressed his inability to conduct the inquiry thereafter by virtue of order dated 31.5.2010 the matter was transferred to the court of Passenger Tax Special Judge/JMIC Srinagar for conducting inquiry and accordingly inquiry was conducted, concluded and report submitted thereof.

The court of Ld. CJM Vide its order dated 05.02.2011 ordered IGP Kashmir to constitute a Special Investigating Team (shortly SIT) of at least three officers of known professional competence, integrity headed by the officer of the rank of S.P and accordingly, the SIT was constituted.

State has filed a revision against the order dated 05.02.2011 of learned CJM before the Court of Pr. Sessions Judge, Srinagar and the court of Pr. Sessions Judge Srinagar vide order dated 02.05.2011 dismissed the said revision petition with the observation that SIT ordered to be constituted shall be in place within one week relieving the investigating Officer of his duties and the investigation shall be concluded within two months without fail. SIT shall be at liberty to register a fresh FIR in regard to death of deceased caused by a tear smoke shell fired by police party.

A petition under section 561-A Cr.P.C was filed before Hon'ble High Court seeking quashment of the order of learned Chief Judicial Magistrate Srinagar dated 5th February 2011 and also the order of Revisional Court dated 2nd May 2011. The Hon'ble High Court vide order dated 09.08.2011 observed that the learned Chief Judicial Magistrate has exercised discretion in accordance with law and same is true about the order of the Revisional Court. No case has been made out which would warrant indulgence under section 561-A Cr.P.C, resultantly the petition was dismissed. The orders impugned in the petition be acted upon forthwith without any delay so that the Special Investigation team is in a position to dig out the actual facts and place its report before learned chief Judicial Magistrate, Srinagar with due dispatch.

Thereafter State has also preferred an SLP before the Hon'ble Supreme Court against the order of the Hon'ble High Court dated 09.08.21011. However, the Hon'ble Apex Court while disposing of the SLP No. 2245/2012 observed that *conclusions recorded by the four member SIT reveals that the police has been found to be innocent with reference to the death of the boy named, Wamiq Farooq and in the above view of the matter, the need to record a second First Information Report, by the impugned order passed by the High Court on 09.08.2011 (affirming the determination rendered by the Principal Sessions Judge, Srinagar vide his order dated 2.5.2011) stands frustrated*

and accordingly, the order was set aside. Their lordships, however, observed *that opinion expressed in the report submitted by the SIT would not influence the determination of the on going complaint case.*

The investigation was conducted by the SIT and the report was accordingly filed. After considering all the material available before it, order dated 22.8.2013 came to be passed by learned CJM, Srinagar who has taken the cognizance of the offences of culpable Homicide not amounting to murder as defined under section 299 RPC punishable under section 304 (Part II) of RPC and the said order dated 22.08.2013 has been challenged in the revision. The court of Ld. 2nd Additional Sessions Judge, Srinagar who heard the revision petition, disallowed same. Some questions were framed for determination and the observations as are reproduced herein below have been made.

Questions.

"……

i) Whether the order passed by the Ld. CJM is an interlocutory order in nature and as such the revision will not lie.

ii) Whether the sanction as envisaged under Seciton 132 Cr.P.C for launching of the prosecution was necessary or not;

iii) Whether learned CJM has fallen in error in entertaining the complaint after the first complaint was forwarded to police under Section 156(3) Cr.P.C;

iv) Whether the Ld. CJM should not have taken the cognizance in the matter without sanction as envisaged under Section 197 Cr.P.C;

v) Whether there was no material available before the Ld. CJM on the basis of which he could have taken the cognizance and could have issued the process against the petitioners."

Observations:

In so far as the 1st question relating to the fact, as to whether the impugned order is interlocutory in nature or not, it has been submitted by the counsel for the respondent/complainant that the order of Ld. CJM in issuing process and taking cognizance is an interlocutory in nature as was such, the revision is not maintainable, whereas on the other hand, it has been contended by the petitioners

the order of Ld. CJM in issuing the process against the petitioners and taking the cognizance is not interlocutory in nature as such, the revision is maintainable.

In case where question arises as to whether an order is interlocutory in nature or not as such revision will lie or not the safe test is that if the contention of the petitioner who moves the superior Court in revision, as against the order under challenge, is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not an interlocutory order in spite of the fact that it was passed during any interlocutory stage. In the present case, if the contention of the present petitioners in respect of the order taking cognizance and issuing process is upheld the proceedings in this instant case would come to an end, then the order issuing process cannot be said to be an interlocutory order even though it may have been passed at an interlocutory stage.

In order to support my contention I have laid my hands on the judgment cited as Bhaskar Industries Ltd. v Bhiwani Denim & Apparels Ltd. reported in (2002) Mh.L.J 81, wherein, reference has been made to various judgments passed by the Hon'ble Supreme Court in a number of case, the relevant Paras i.e. Para Nos. 11, 12, 13, 14, 15, 16, 17, 19, 21, 22, 23 and 24. For resolving the controversy with regard to the question regarding maintainability of this instant revision petition are extracted and reproduced here under

In the case of Bhaskar Industries Ltd. v. Bhiwani Denim and Apparels Ltd. and Anr.reported in 2002 (1) Mh.L.J. 81, in relation to the powers of revision, the Supreme Court has observed that the interdict contained in Section 397(2) of the Code of Criminal Procedure is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at an interlocutory stage. The Supreme Court laid down that the safe test is that if the contention of the petitioner who moves the superior Court in revision, as against the order under challenge, is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not an interlocutory order in spite of the fact that it was passed during any interlocutory stage. In the present case, if the contention of the present applicants in respect of the order issuing process is upheld the proceedings in the said case would come to an end, hence, in the light of the above decision, the order issuing process cannot be said to be an interlocutory order even though it may have been passed at an interlocutory stage.

Useful reference may also be made to the decision of the Supreme Court in the case of K.K. Patel and Anr. v. State of Gujarat and Anr. . In the said case, a private complaint was filed against the appellants before the Court of Metropolitan Magistrate. The learned Magistrate issued process against the appellants. The appellants filed an application for discharge. The objection which was raised before the learned Magistrate was that no sanction was obtained to prosecute the accused. The said application came to be dismissed. Thereafter, the appellants filed revision before the Sessions Court wherein two grounds were raised, the first was that no sanction was obtained to prosecute the accused persons and the second objection was that no complaint could be filed after one year from the date of the act complained of. The learned Sessions Judge upheld the objections of the appellants

i.e. accused persons and the process issued by the trial Court was quashed by the Sessions Court. The said order was challenged before the High Court and the High Court set aside the judgment of the Sessions Court mainly on the ground that the Sessions Court should not have entertained the revision at all as the order challenged before it was only an interlocutory order. The Supreme Court has held in para No. 10 that the appellants were not estopped from canvassing on that additional ground also before the Sessions Court in revision as they were challenging therein the very order of issuance of process against them.

In para 11 the Supreme Court held that the view of the learned Single Judge of the High Court that no revision was maintainable on account of the bar contained in Section 397(2) of the Code, is clearly erroneous.

It is further observed that in deciding whether an order challenged is interlocutory or not, the sole test is not whether such order was passed during the interim stage but the feasible test is whether by upholding the objection raised by a party, it would result in culminating the proceedings. It is further observed in the said para that: "In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

In the case of Amarnath v. State of Haryana and Anr. , it has been held that the order of Magistrate issuing summons to the accused is not an interlocutory order. In respect of the Magistrate issuing process, the Supreme Court in para 10 has observed thus:

> *"So long as the Judicial Magistrate had not passed this order, no proceedings were started against the appellants, nor were any such proceedings pending against them. It was only with the passing of the impugned order that the proceedings started and the question of the appellants being put up for trial arose for the first time. This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that the appellants were not at all prejudiced, or that any right of their's was not involved by the impugned order. It is difficult to hold that the impugned order summoning the appellants straightaway was merely an interlocutory order which could not be revised."*

The question as to what is an interlocutory order came up for consideration before the Supreme Court in the case of ***Madhu Limaye v. State of Maharashtra****. In the said case, the complaint was filed before the Court of Sessions. Cognizance of the offence was taken by the Court of Sessions. Being aggrieved thereby, the appellants preferred a revision before the High Court. The High Court rejected that said revision application on the sole ground that it was not maintainable in view of the provisions contained in Sub-section (2) of Section 397 of the Code of Criminal Procedure. In the case of Madhu Limaye the decision in the case of Amarnath (supra), was considered and the three-Judge Bench of the Apex Court in the case of Madhu Limaye in para 7 has re-affirmed the decision in the case of Amarnath on the point that the impugned order of the Magistrate was not an*

interlocutory order. Hence, the order of the High Court was set aside and the matter was remitted back for disposal on merits.

At this stage, the learned counsel for the applicants cited two more decisions in respect of his contention that the order of the Magistrate issuing process is an interlocutory order and hence, revision in respect of the same would not be maintainable. The said decisions are in the case of Poonam Chand Jain and Anr. v. Fazru and the decision of the Federal Court in the case of S. Kuppuswami v. The King . As far as the case of Poonam Chand is concerned, the main question which arose for consideration was whether a second complaint could be filed. After holding that a second complaint could be filed in exceptional circumstances in Paras 9, 10 and 11 the decisions in the case of Adalat Prasad and Subramanium Sethuraman have been discussed. In these paras the powers of the "Magistrate" in respect of reviewing his own order issuing process have been discussed and not the powers of the Sessions Court to entertain a revision against the order of the Magistrate issuing process. It is true that the words "interlocutory order" has been used but applying the principles in the case of Commissioner of Income Tax v. Sun Engineering Works referred to in para 9 above, it cannot be said that paras 9 to 11 of the judgment in the case of Poonamchand lay down the ratio that a revision against an order issuing process is not maintainable.

Thereafter, in Para 12 of the decision in the case of Poonamchand, various decisions of the Supreme Court have been referred to on the point whether the order issuing process is an interlocutory order and hence a revision against the same was maintainable or not before the Sessions Court. Reference has been made to Rajendra Kumar Sitaram Pande v. Uttam and Anr. and K.K. Patel and Anr. (Supra) wherein it is held that such an order is not interlocutory and hence a revision in respect of the same is maintainable. It is pertinent to note that nowhere in the case of Poonamchand has it been observed that the law laid down in these two decisions is erroneous or incorrect or requires reconsideration.

It may be stated here that from the observations of the Apex Court in paras 10 and 13 in the case of Madhu Limaye, it is clear that the revisional power was being considered in respect of the High Court as well as the Sessions Court. Thus, from the decision in the case of Madhu Limaye, it is clear that an order issuing process is not an interlocutory order and hence, revision would be maintainable against the same. As far as the case of Poonamchand is concerned, the learned counsel for the applicants was unable to point out any para or sentence therein, wherein it has been specifically held or observed that no revision is maintainable in respect of an order of the Magistrate issuing process. On the other hand in the case of Madhu Limaye it has been held that such an order is not an interlocutory order and revision in respect of the same would be maintainable. In any event, the decision in the case of Madhu Limaye having been rendered by a larger Bench than the one in the case of Poonamchand, the said decision would obviously prevail.

Going Back to the issue as to whether an order is an interlocutory order or not, in a majority decision by a Bench of five Judges of the Supreme Court in the case of Mohan Lal Magan Led Thacker v. State of Gujarat , four tests were culled out in respect of whether a judgment or order can be said to be final or interlocutory. One of the tests is that "if the order in question is reversed would the action have to

go on?" If due to the order being reversed, the action does not go on it would be an interlocutory order. The Apex Court in the case of Madhu Limaye has observed that applying the test in the case of Mohan Lal to the facts of the instant case, it would be noticed that if the plea of the appellant succeeds and the order of the Sessions Judge is reversed, the criminal proceeding as initiated and instituted against them cannot go on. Thus, an order issuing process would not be 'an interlocutory order. After considering the decision in the case of Kuppuswami, Their Lordships in the case of Madhu Limaye have referred to the earlier decision of the Constitution Bench of the Supreme Court in the case of Ramesh and Anr. v. Seth Gendalal M. Patni and Ors., AIR 1996 SC 1445 wherein in relation to what is the final order, it is observed as under:

> *"The finality of that order was not to be judged by co-relating that order with the controversy in the complaint, viz. whether the appellant had committed the offence charged against him therein. The fact that that controversy still remained alive is irrelevant."*

As observed earlier, after considering the case of Kuppuswami and various other decisions of the Supreme Court, it has been held in the case of Madhu Limaye that an order issuing process or summons is not an interlocutory order.

In addition to the decisions discussed above, useful reference may also be made to the case of Rajendra Kumar Sitaram Pande and Ors. v. Uttam and Anr. the main question before the Supreme Court was whether the order of Magistrate directing the issuance of process is an interlocutory order or not. The said question was directly in issue in the said case. The said issue was decided giving detailed reasons. The Supreme Court held after giving detailed reasoning that the order of Magistrate directing issuance of process is not an interlocutory order and the revisional jurisdiction under Section 397 could be exercised against the same. In view of the above observations, it is clear that an aggrieved person against whom process has been issued, can prefer a revision against the order of the Magistrate issuing process. Thus, it is clear that the applicants have an efficacious remedy of preferring a revision against the order of the Magistrate issuing process.

From various decisions of the Supreme Court discussed above it is quite clear that an order issuing process is not an interlocutory order and hence a revision can be preferred against such an order. In these decisions the said issue was specifically considered and the said issue was decided giving detailed reasoning. Thus, it is clear that there is a specific provision in the Code in Section 397 for redressal of the grievance of the accused against whom process has been issued.

In the authorities cited supra, it has been held by the Hon'ble Supreme Court that the order of Magistrate taking cognizance or issuing process is not an interlocutory order, as such, the revision is maintainable. So in view of the law laid down by the Supreme Court in the number of cases cited hereinabove, it is manifestly clear that the order whereby the Magistrate takes cognizance and issues process is not interlocutory order in nature as such, the revision is maintainable. So in view of the observations and the law laid down by Hon'ble S.C. the plea raised by the counsel for the respondent/complainant that present revision is not maintainable is not sustainable so as such, his plea is rejected.

In so far as the 2nd question which relates to the sanction under Section 132 Cr.P.C required for launching the prosecution against the petitioner is concerned, it has been contended by the counsel for the petitioners that since the petitioner were discharging their duties and were dispersing the rioters who had assembled to threaten the security of the State and damage the public property so sanction was required before launching prosecution against them.

It has been contended by the counsel for the respondent that on the fateful day when the small boy was killed there was no rioting going on and the deceased was playing carom board along with other boys but the petitioners suddenly appeared on the scene and without any provocation fired a teargas smoke shell whereby, the small boy got ultimately killed.

As far as the provisions of Sections 127 to 132, which fall under the Chapter-IX are concerned, the section 127 relates to the powers of Magistrate to command police to disperse the members of unlawful assembly who are likely to cause disturbance to the public peace and section 128 pertains to the use of force to disperse the unlawful assembly, which provides that if any unlawful assembly upon being so commanded, does not disperse, and conducts itself in such a manner as to show a determination not to disperse, the executive magistrate or the officer-in-charge of police station may proceed ahead to disperse such unlawful assembly by force and if necessary for dispersing such assembly may arrest or confine the persons who are found part of the unlawful assembly.

Section 129 deals with the use of military force and it provides that if any assembly cannot be otherwise, dispersed, and if it is necessary for the public security that it should be dispersed, the executive magistrate may cause it to be dispersed by military force provided that the sanction of the Govt. shall be obtained within the reasonable time for that purpose when practicable.

Section 130 deals with the duty of officer commanding troops required by Magistrate to disperse assembly. It provides that when the Executive Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in the army to disperse such assembly by military force and to arrest and confine such person forming part of it. It further provides that every such officer shall obey such requisition in such a manner as he thinks fit.

Section 131 deals with the power of commissioned military officer to disperse assembly and it provides that when the public security is manifestly endangered by any such assembly, and when no executive magistrate can be communicated with, any commissioned officer of the army may disperse such assembly by military force and may arrest and confine any persons forming part of it.

Then Sec. 132 deals with the protection against prosecution for act done under this Chapter (IX) it further provides that no prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Govt.

As far as the provisions of Chapter IX are concerned, the conjoint reading provides that any unlawful assembly can be dispersed by using the force to the

extent of arresting and confining the persons who form part of such unlawful assembly. It further provides that in order to disperse the unlawful assembly the orders are necessarily to be given by the executive magistrate or by the Officer-in-charge of the Police Station concerned. But in so far as the facts of the present case are concerned the allegation against the petitioners is that while the deceased along with other boys was playing Carom board, there was no rioting going on and the deceased was not the member of any unlawful assembly, the petitioners appeared on the scene and fired teargas smoke shell without any provocation and without any legal justification with the result the deceased was killed. Though it has been contended by the petitioners that the petitioners were discharging their official duties and dispersing the mob of rioters who had endangered the public property and caused threat to the security of the State, but the petitioners have failed to show or prove that any authority or any sanction was given by the executive magistrate or by the officer-in-charge of the police station to use the force which has been used by them in firing of teargas smoke shell whereby the boy got killed.

The provisions of Chapter IX no where provide that police personnel can use any weapon which has the effect of taking the precious live of any one. The chapter IX only provides for using the force to the extent of arresting and confining the persons forming part of the unlawful assembly but not using fire arms to disperse or kill. It further provides that any police personnel can use the force but that too with the sanction and authority of the magistrate or the officer-in-charge of the Police Station concerned. In so far as the facts of the present case are concerned it has no where been shown or established either from the magisterial enquiry or by the SIT that before using the fire arms the sanction/permission was given by the executive magistrate or the officer-in-charge of the police station to use the fire arms or fire the tear smoke shell. If the tear smoke shell was fired by the petitioners without any authority of law then their act of firing tear smoke shall does not fall within the ambit of discharge of their official duty. More so when it is revealed clearly from the magisterial enquiry and to some extent from the report of SIT that on the eventful day no rioting was going on at the time the fire smoke shell was fired by the petitioners. Further more, the protection under Section 132 can be only claimed, if the act was done in the discharge of the official duty but as far as the enquiry conducted by the Magistrate is concerned, it is clearly revealed that there was no rioting at the time the fire smoke shell was fired and as the petitioner were suspended for their misconduct, this fact lends further credence to the fact that petitioners misused not only their position but also exceeded their powers and in a state of frenzy fired tear smoke shell only to take a precious life of teen aged small boy of class 9th standard, so as such, the petitioners cannot claim protection as envisaged under Section 132 Cr.P.C.

Further more, it has been contended by the petitioners that under the "Jammu and Kashmir Disturbed Areas Act, 1997" the entire Valley has been declared as disturbed area and once the entire Valley has been declared as disturbed area, the powers have been conferred upon the police to fire upon the persons contravening certain orders, but as far as the ***section 4 of the Disturbed Areas Act*** *is concerned, it provides that under the disturbed area any Magistrate or* ***Police Officer not below the rank of Inspector or sub-Inspector*** *in case of the Armed*

Branch of the police, may, if he is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warning, as he may consider necessary, fire upon, or otherwise use force even to the causing of death, against any person who is indulging in any act which may result in serious breach of public order or is acting in contravention of any law or order for the time being in force, prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substance.

The language of Section 4 gives powers to the Magistrate and the Police officers not below the rank of Inspector or Sub Inspector to use force or authorize them to fire upon or use powers even to the causing of death. The powers are given to the Magistrate and the Police officers not below the rank of Inspector or Sub Inspector to use force or authorize them to fire upon or use powers even to the cause death. But this protection cannot be availed by the petitioners because one of the petitioners is only ASI in rank while as, the other petitioner is a constable so even if it is presumed that entire Valley has been declared as disturbed area and powers have been conferred upon the police personnel to use force, but as far as the language of Section 4_of the Act is concerned, the force and power even to the extent of firing upon the person to the causing of death can be availed only by the Magistrate or the police officer not below the rank of Inspect and Sub Inspector. Since the petitioners are ASI and Constable so the protection given under Section 4 of the Act cannot be availed by the petitioners.

Further more the allegations against the petitioner is that on the fateful day i.e. on 31.10.2010 the petitioners without any provocation fired a teargas smoke shell whereby, the deceased was killed. The act of the petitioners in killing the deceased was not even owned by the Govt. or high ups of petitioners. Their act of firing a tear smoke shell which killed a small boy was even condemned by their high ups as well. Their act of firing a tear smoke shell was even termed and regarded as misconduct by authorities in police department, which forced the police authorities to suspension them from their services. By passing the order of suspension against the petitioners on the grounds of misconduct during the law and order problem establishes the fact that the petitioners fired tear smoke shell with out any cause, provocation and as such the illegal act done by the petitioners in firing a teargas smoke shell was not done by them under the colour of their official duty. In case the accused/petitioners had acted under the colour of their official duty and had they fired the teargas smoke shell in the discharge of their duty then they should not have been suspended. By suspending the petitioners a strong and un-rebutted presumption can be raised that the petitioners had acted in breach of their authority and that is the reason that they were suspended.

From the record it is manifestly clear that the initially the complaint was lodged by the complainant before the Ld. CJM on 15.02.2010 which was forwarded by the Ld. CJM to the police for initiation of action under Section 156(3) Cr.P.C. thereafter, the 2nd complaint was filed by the petitioners before the Ld. CJM on 27.03.2010. On the date the complaint was lodged, the petitioners were already suspended from their services and as the petitioners were suspended from their services on the ground that they had exceeded their powers and had committed

misconduct in the discharge of their official duties, which had established the fact they had misused their power and position and had acted in breach of their official duty, so the protection under Section 132 Cr.P.C was not available to them and could not have been extended to them. As the petitioners had not acted in accordance with the law and as the action taken by them was not done under the colour of their official duty or in the discharge of their official duty, so no sanction was required at the time prosecution was launched against them, so in view of the attending facts and circumstances and discussion made hereinabove, the plea raised by the petitioners that that no prosecution could have been launched against without obtaining sanction under Section 132 Cr.P.C is not sustainable.

So far as the 3rd question relating to the matter that the Ld. CJM had earlier forwarded the complaint to the police under Section 156(3) Cr.P.C, on which action was taken by the police, so the 2nd complaint as such was not maintainable. In so far this question is concerned, it is to be borne in mind that investigation contemplated in Chaper XII of the Code can be commenced by the police even without the order from the Magistrate. It does not mean that when the Magistrate orders investigation under section 156(3), it would be a different kind of investigation. Such investigation in all cases has to end up only with the report contemplated in Section 173 of the Code. But in cases where a Magistrate is not inclined to make any such order where he intends to or propose to take cognizance of the offence himself for the purposes of ascertaining as to whether he should proceed in the matter or not, the enquiry is ordered and if the report of enquiry prima facie makes out a case then discretion/ powers lie with the Magistrate to proceed in the matter and take cognizance under the relevant provisions of the Code. For the purposes of conducting investigation under section 202 Cr.P.C, a Magistrate is not required to direct only a police officer or police Station to conduct the investigation. Such an investigation can be made by any other person who may not be holding any post or who may not be a police officer. The purpose of holding such enquiry is to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words of Section 202(1) Cr.P.C i.e. "or direct the investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding". Section 156 Cr.P.C falling within Chapter XII deals with powers of police officer to investigate cognizable offences, whereas, investigation envisaged under section 202 Cr.P.C contained in Chapter XV is different from the investigation contemplated under section 156 of the Code. Chapter XII contains the provisions relating to information to the police and their powers to investigate. Whereas, Chapter XV which contains Section 202 Cr.P.C deals with the provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of an offence on a complaint. Provisions of above two Chapters deal with two different facets all together. Though there could be a common factor i.e. complaint filed by a person. Section 156 deals with the powers of the police officer to investigate cognizable offences. Whereas, section 202 Cr.P.C refers to the powers of Magistrate to direct investigation by a police officer or any other person. But the investigation envisaged under Section 202 Cr.P.C is different from the investigation contemplated under section 156 of the Code. The purpose of conducting investigation under section 202 Cr.P.C is to remove the doubt which a

Magistrate may have in his mind while deciding as to whether or not process should be issued or cognizance taken, after the report of investigation is filed, the powers lie with the Magistrate to decide as to whether process should be issued or not.

Now coming to the facts of present case where the ld. CJM decided to direct magistrate to make the investigation under section 202 Cr.P.C. no illegality appears to have been committed by the ld. CJM. As the Magistrate was directed to make the investigation under section 202 Cr.P.C, so the magistrate was only required to make the investigation under section 202 Cr.P.C and submit the report. After the filling of the report the powers to proceed any further in the matter lies with the court only and if on the basis of report court is satisfied that any offence has been committed by the accused the process could be issued against him under section 204 Cr.P.C after taking the cognizance but if on the basis of report it is found by the court that no case is made out against the accused then court has powers to dismiss the complaint under section 203 Cr.P.C.

From the language of the above quoted chapters it is manifestly clear that once the complaint has been filed before a Magistrate, he has the powers either to conduct the enquiry by himself or direct the enquiry to be conducted by any officer either the police officer or any other person. As the Ld. CJM directed the enquiry to be conducted by the Magistrate so there was no illegality committed by the Ld. CJM in directing the enquiry to be conducted by the Magistrate. After the report was submitted by the Magistrate, it was observed by the Ld. CJM that the enquiry conducted by the Magistrate is not clear on certain points and accordingly the I.G Police was directed to constitute a Special Investigating team (shortly SIT) to get certain matters investigated.

In his order dated 5.2.2011 it has been observed by the Ld. CJM that the investigation in the matter has not been properly conducted and some factual aspects are required to be investigated scientifically and objectively before issuing the process. In order to ascertain some of the facets scientifically and objectively, the I.G police was directed to constitute a team of Professional competent Police Officers headed by an officer of the rank of S.P to get some matters investigated, such as 1) To examine the witnesses. 2) to draw the possible route of the shell, 3) to study the actual range, 4) to arrest and interrogate the accused and 5) to investigate any other aspect of the matter.

Accordingly, in pursuance to the directions passed by the Ld. CJM the SIT was constituted and the SIT accordingly conducted the investigation/enquiry. By constituting the SIT no illegality appears to have been committed by the ld. CJM. The Ld. CJM wanted to clear some points scientifically and objectively which could not have been cleared by the Magistrate and such points could be cleared by the experts only and accordingly the SIT conducted the enquiry and examined experts and also examined the eye witnesses and other persons acquainted with the facts and circumstances of the case and the report was accordingly submitted. After considering the report filed by the Magistrate as well as the SIT, the Ld. CJM framed his opinion that there is sufficient material on the file, which leads to the presumption that the petitioners have committed the offence and accordingly the process has been issued against them. By ordering the magisterial enquiry or

enquiry by the SIT, no illegality has been committed by the court below, so as such, the plea raised by the petitioners that an irregularity has been committed by the court below by directing the enquiry through Magistrate or SIT, is not sustainable.

In so far the 4th question regarding the sanction under Section 197 is concerned, it has been contended by the counsel for the petitioners that the court below had no authority or competence to issue the process against the petitioners because the petitioners are the public servants and are not removable from their services without the sanction of the Govt. so before process could have been issued against them, the sanction was necessarily to be obtained from the Govt. It has been contended by the counsel for the petitioners that the sanction to take cognizance is not only required at the post cognizance stage but the sanction is required even at the pre cognizance stage. It has been contended that once the complaint was filed against the petitioners, the court below was required to ascertain as to whether the sanction has been obtained or not, but as sanction had not been obtained by the complaint, at the time complaint was filed before the Ld. CJM, the Ld. CJM should not have entertained the complaint but should have directed the complaint to first obtain the sanction from the Govt. and then only file the complaint, but as the Ld. CJM has not only entertained the complaint without sanction, but issued the process and taken cognizance without obtaining sanction from the competent authority, so the order passed by the Ld. CJM as such, is to be declared as null and void and non-est in the eyes of law.

In so far the question of sanction as provided under Section 197 Cr.P.C is concerned it provides that protection given under Section 197 Cr.P.C is to protect responsible public servants against the possible vexatious criminal proceedings for offences alleged to have been committed by them while acting or purporting to act as public servants. The policy of legislature in enacting this section is to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without any reasonable cause. This protection has certain limits and is available only when the alleged act is done by the public servants in the discharge of his official duty and is not merely a cloak for doing the objectionable act. The use of expression "official duty" implies the act or omission must have been done by the public servants in the course of his service and that it should be done in the discharge of his duty. This section does not extend its protective cover to every act or omission committed by the public servants in service but restrict its scope and operation to only those acts or omissions which are done by the public servants in the discharge of his official duty. There must be a reasonable connection between the alleged act and the discharge of official duty and then only his act can come under the protective cover of Section 197 Cr.P.C .

The question to examine as to whether the sanction is required or not under the statute has to be considered at the time of taking cognizance of the offence and not during the enquiry or investigation. The performance of the public duty under the colour of duty cannot be a camouflage to commit a crime. The public duty may provide a public servant an opportunity to commit crime and such issue is required to be examined by the sanctioning authority or by the court. The official capacity may enable the public servants to fabricate the record or misuse his powers; such

activities cannot be integrally connected or interlinked with the crime committed in the course of discharge of official duty. The acts as done by the public servant or the act purporting to have been done by the public servant in discharge of his official duty, cannot as a matter of course be brought under the protective umbrella or requirement of sanction, same has been held in the authorities cited as AIR 1968 S.C 1232, (2009) 3, SCC 398, AIR 1997 S.C 2120. It has further been held that the protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralizes the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may provide such a public servant an opportunity to commit crime and such issue is required to be examined by the sanctioning authority or by the court. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. As has been held in the authorities cited as AIR 1968 SC 1323; AIR 1978 SC 1568; (1993) 3 SCC 339; AIR 1996 SC 204; AIR 1997 SC 2102; , AIR 2009 SC 1404).

In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. Hon'ble Supreme Court in a case cited as State of Orissa & Ors. v. Ganesh Chandra Jew, AIR 2004 SC 2179, while dealing with the issue held as under:-

> *"….. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty*

and there was every connection with the act complained of and the official duty of the public servant."

It has been contended by the complainant/respondent that the accused despite being government official are not entitled for protection under Sec 197 Cr.P.C whereas on the other hand it has been contended that their act of firing a tear smoke shell is covered by the protective layer provided under Sec. 197 Cr.P.C, so the question which crops up for consideration is whether the alleged act committed by them was within the colour of their official duty as would call for sanction before prosecuting them or the act was not under the colour of their official duty and would not attract provisions of 197 Cr.P.C.

So far public servants are concerned the taking of cognizance of any offence, by any Court, as observed by Hon'ble SC in a case cited as 2004 STPL(LE) 33191 SC, for prosecution against public servants is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied.

The pivotal issue i.e. applicability of Section 197 of the Code needs careful consideration. In Bakhshish Singh Brar v. Smt. Gurmej Kaur and another (AIR 1988 SC 257), Hon'ble Supreme Court while emphasizing on the balance between protection to the officers and the protection to the citizens observed as follows:-

> *"It is necessary to protect the public servants in the discharge of their duties. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported to discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 197 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasized that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."*

The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably

connected with the discharge of his official duty and is not merely a cloak for doing the objection-able act. If in doing his official duty, he acted in excess of his duty, but there is a reason-able connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

Reference in this regard can be made with advantage to the case cited as to P. Arulswami v. State of Madras (AIR 1967 SC 776), wherein Hon'ble Supreme Court held as under:

> *"….It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code, nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable."*

Prior to examining the merits of the case it may not be out of place to

examine the nature of power which can be exercised by the Court under Section 197 of the Code and the extent of protection it affords to public servant, who apart, from various hazards in discharge of their duties, in absence of a provision like the one may be exposed to vexatious prosecutions. Section 197(1) and (2) of the Code reads as under:

> *"197. Prosecution of Judges and public servants.--(1) When any person who is Judge within the meaning of Section 19 of the Ranbir Penal Code or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the State Government or the Government of India, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, no Court shall take cognizance of such offence except with the previous sanction--*
>
> *(a) in the case of persons employed in connection with the affairs of the Union, of the Government of India; and*
>
> *(b) in the case of persons employed in connection with the affairs of the State, of the Government.*
>
> *(2) No Court shall take cognizance of any offence alleged to have been committed by the Ruler of a former India State except with the previous sanction of the Government of India."*

The section falls in the chapter dealing with conditions requisite for initiation of proceedings i.e. if the conditions mentioned are not made out or are absent then no prosecution can, be set in motion. So far public servants are concerned the cognizance of any offence, by any Court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, "no Court shall take cognizance of such offence except with the previous sanction". Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the Court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance it means taking notice of. A Court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

Such being the nature of the provision the question is how should the expression, "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", be understood? What does it mean? "Official" according to dictionary, means pertaining to an office, and official

act or official duty means an act or duty done by an officer in his official capacity. In B. Saha and others v. M. S. Kochar (1979(4)SCC 177), it was held: (SCC PP. 184-85, para 17):

> *"The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an Act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision."*

Use of the expression, "official duty" implies that the act or omission must have been done by the public in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determined its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty and without any justification therefore then

the bar under Section 197 of the Code is not attracted.

To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official has been explained by Hon'ble Supreme Court in Matajog Dobey v. H. C. Bhari (AIR 1956 SC 44) as:

> *"The offence alleged to have been committed (by the accused) must have some-thing to do, or must be related in some manner with the discharge of official duty. . . . there must be a reasonable connection between the act and the discharge of official duty; the act must bear, such relation to the duty that the accused could lay a reason-able (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."*

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held official to which applicability of Section 197 of the Code cannot be disputed.

From the discussion made hereinabove, it is manifestly clear that the protection under Section 197 Cr.P.C can be extended to only those public servants who are not removable from the Services except with the sanction of the Govt. and the act purported to have been done by them must have been done in the discharge of their official duty. But in so far as the facts of the present case are concerned, it is alleged that on the fateful day the deceased was playing Carom board along with other boys and petitioners appeared on the scene of occurrence and without any provocation fired tear smoke shells whereby, the boy got ultimately killed. Apparently, it appears that the petitioners have exceeded their powers and their act of firing of teargas shells does not come under the purview of their official duties and even if it is presumed that the rioting was going on and the mob had gathered on spot to threaten the public security still then the petitioners were not required to open fire arms and fire teargas smoke shells that too without the permission of Executive Magistrate or the Incharge Police Station concerned. Their act of firing smoke shells without any authority of law does not come within the purview of discharge of their official duty, as such, the protective layer under Section 197 Cr.P.C cannot be extended to the petitioners even if it is presumed that they are the public servants not removable from the services without the sanction of the government.

Though it has been contended by the counsel for the petitioners that the petitioners are public servants as such, not removable from the services without the sanction of the Govt. whereas on the other hand, it has been contended by the counsel for the respondent that the petitioners being the police officers of inferior rank do not come within the definition of public servants as such, the protective cover under Section 197 cannot be extended to them. From the record it is manifestly clear that the petitioner Abdul Khaliq is of the rank of ASI whereas the other petitioner Mohd Akram is a constable and in so far the police rules are concerned , Section 335 provides that the ASI can be appointed or removed from the services by the DIG of Police whereas, the constable can be removed from the services by the S.P. as the police rules provide that the ASI and the constable can be

removed from the services not by the Govt, but by the DIG Police and also by the S.S.P, so their services are not covered under Article 311 of the Constitution which provides that the public servant cannot be removed from the services unless sanction is obtained from the Govt., and as the petitioners are removable from the services by the DIG Police or SP police so the protection given under Section 197 Cr.P.C cannot be extended to the petitioners. Further more, as has been held in the authorities cited as 2003 Crl. L.J 2949 Punjab and Haryana, KLJ 1997 J&K page 220 and 2002 Crl. L.J3715 Delhi that the competent authority to remove the Sub Inspector and Assistant Sub Inspector from services is the Superintendent of Police who is their appointing authority, therefore, they are not entitled to the protection under Section 197 Cr.P.C.

As the petitioners can be removed from their services not by the Govt. but can be removed from their services by the DIG Police or S.S.P concerned so, the protection given under Section 197 Cr.P.C cannot be extended to them and even if complaint has had been filed without seeking sanction under Section 197 Cr.P.C and even if the Ld. CJM has issued the process and taken the cognizance against the petitioners without sanction, his act of issuing process and taking cognizance as such, does not suffer from any illegality. No irregularity or impropriety has been committed by ld. CJM but impugned order has been order in inconformity with the provisions of law so the plea raised by the petitioners that the complaint is liable to be dismissed for want of sanction, is not sustainable.

Lastly, the 5th contention which has been raised by the petitioners that the Ld. CJM has acted illegally and has passed the impugned order in a mechanical manner because there was no material available on the file before the Ld. CJM, on the basis of which, he could have framed the opinion and taken the cognizance in the matter and issued process against the petitioners, so the impugned order is liable to be set aside.

Before adverting upon this issue it is to be analyzed as to what are the duties imposed on a magistrate by law when a complaint is filed and what material is to be considered by him and whether he is required to pass a detailed order when taking cognizance and issuing process against the accused is concerned.

Ordinarily when a complaint is filed before a Magistrate he has to ensure that no person is compelled to answer a criminal charge unless the court is satisfied that there is prima facie case for proceeding against the accused. The responsibility imposed and confidence reposed by the legislature on and in Magistrate as to exercise of his discretion in dismissing the complaint or issuing process against the accused is very onerous and pious. He is to exercise this responsibility and confidence judicially and not arbitrarily keeping in view the object of administration of criminal justice viz. to save innocent persons from the clutches of unscrupulous complainants and put to trial real offenders to whom it is not easy to bring to book due to their unholy league with the police.

In S.Nihal Singh V.Arjan Das, 1983 Criminal Law Journal 777, it was observed that in deciding whether or not there is sufficient ground for proceeding against the accused or dismissing the complaint, the discretion vested in the Magistrate has to be exercised judicially. He is neither expected to play into the hands of the

complainant and chew meekly what he is fed by the complainant nor is he expected to hold a brief for the accused and summon witnesses with a view to find out the defence of the accused, if any. He is neither a post office, nor automation and he is to exercise his jurisdiction as to the exigency of the situation demands, the only limitation being that he cannot convert the enquiry into a full scale trial. The Magistrate must apply his judicial mind to the materials on which he has to form his judgment.

In A. S. Nayal V. Khem Chand 1983 ALL. C.C 264 explaining the duties of the Magistrates as to dismissal of complaint or issue of process against the accused it was observed that there is growing tendency on the part of mischievous litigants to file vexatious and frivolous complaints. Complaints for criminal misappropriation are filed against outstation accused. Complaints for defamation are filed. Complaints of civil nature are filed. Some of the complaints are filed solely for harassment. The purpose of a mischievous litigant is achieved when the accused are summoned. Some Magistrates act in a mechanical manner. It is time to sound a note of caution and apprise the Magistrates of their responsibility under the law. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding.

The legal position is that a Magistrate has to act like a reasonable and prudent person for satisfying himself prima facie if there is sufficient ground for proceeding. Where the Magistrate acts arbitrarily or ignores apparent absurdities and improbabilities of the version or acts upon intrinsically, untrustworthy self-contradictory evidence or acts in the absence of any legal evidence courts on a complaint filed illegally or vexatiously or without jurisdiction or without proper sanction or acts even when the complaint does not disclose any offence, there is no exercise of judicial discretion. For determining the question whether courts should proceed with the trial or not, the courts must be satisfied that there is sufficient ground for proceeding. The courts have to be on their guard to see that their process should not be abused for putting pressure on parties with a view of obtaining settlements of disputed questions.

He has to exercise this responsibility and confidence judicially and not arbitrarily keeping in view the object of administration of criminal justice viz. to save innocent while the law imposes duty on the magistrate to act reasonably and not arbitrarily and satisfy himself that there is sufficient material/record on the file which necessitates the issuance of process and taking of cognizance. But while taking cognizance and issuing process, the magistrate is not required to write a detailed and speaking order but what is required is that there must be a satisfaction based on the material which was collected during the enquiry or trial or presented before the magistrate by the complainant.

After considering the material if magistrate is satisfied that there is sufficient material collected before him which connects the accused with the commission of the offences, the magistrate may issue the process and take cognizance but in no case he is required to write a speaking and the lengthy order. My view is supported by the judgment passed by the Hon'ble Supreme Court in case cited as AIR 2012 S.C 1921.

The relevant Paras wherein, it has been held that the magistrate is not required to write the speaking and lengthy orders are extracted and reproduced here under:

9. Undoubtedly, merely for taking cognizance and/or for issuing process, reasons may not be recorded. In U.P. Pollution Control Board vs. M/s. Mohan Meakins Ltd. and others, (2000) 3 SCC 745, the issue whether it was necessary for the trial court to record reasons while issuing process came to be examined again, and this Court held as under:-

> *"**2**. Though the trial court issued process against the accused at the first instance, they desired the trial court to discharge them without even making their first appearance in the court. When the attempt made for that purpose failed they moved for exemption from appearance in the court. In the meanwhile the Sessions Judge, Lucknow (Shri Prahlad Narain) entertained a revision moved by the accused against the order issuing process to them and, quashed it on the erroneous ground that the magistrate did not pass a speaking order for issuing such summons.*
>
> ***3**. The Chief Judicial Magistrate, (before whom the complaint was filed) thereafter passed a detailed order on 25.4.1984 and again issued process to the accused. That order was again challenged by the accused in revision before the Sessions Court and the same Sessions Judge (Shri Prahlad Narain) again quashed it by order dated 25.6.1984.*
>
> ***5**. We may point out at the very outset that the Sessions Judge was in error for quashing the process at the first round merely on the ground that the Chief Judicial Magistrate had not passed a speaking order. In fact it was contended before the Sessions judge, on behalf of the Board, that there is no legal requirement in Section 204 of the Code of Criminal Procedure (For short the 'Code') to record reasons for issuing process. But the said contention was spurned down in the following words: My attention has been drawn to Section 204 of the Code of Criminal Procedure and it has been argued that no reasons for summoning an accused person need be given. I feel that under Section 204 aforesaid, a Magistrate has to form an opinion that there was sufficient ground for proceeding and, if an opinion had to be formed judicially, the only mode of doing so is to find out express reasons for coming to the conclusions. In the impugned order, the learned Magistrate has neither specified any reasons nor has he even formed an opinion much less about there being sufficient ground for not proceeding with the case.*
>
> ***6**. In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record*

reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons vide Kanti Bhadra Shah v. State of W.B., (2000) 1 SCC 722. The following passage will be apposite in this context:

*"**12**. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."*

Whether an order passed by a Magistrate issuing process required reasons to be recorded, came to be examined by this Court again, in Dy. Chief Controller of Imports and Exports vs. Roshanlal Agarwal & Ors., (2003) 4 SCC 139, wherein this Court concluded as below:-

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not 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. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in U.P. Pollution Control Board v. M/s. Mohan Meakins Ltd. & Ors., (2000) 3 SCC 745, and after noticing the law laid down in Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722, it was held as follows:

> *The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order.*

Recently, in Bhushan Kumar and another vs. State (NCT of Delhi) and another (Criminal Appeal no. 612 of 2012, decided on 4.4.2012) the issue in hand

was again considered. The observations of this Court recorded therein, are being placed below:-

> *"**9**. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished Under Section 174 Indian Penal Code. It is a ground for contempt of Court.*
>
> ***10**. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.*
>
> ***D.** Time and again it has been stated by this Court that the summoning order Under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith."*
>
> *33. this Court has held in Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors. [(1976) 3 SCC 736] that whether the reasons given by the Magistrate issuing process under Section 202 or 204 Cr.P.C. were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Section 397/401 Cr.P.C when the order issuing process under Section 204 Cr.P.C. was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 Cr.P.C.*

As is quite evident and manifest from the law laid down in the judgments cited supra that In determining the question whether any process is to be issued or not, the Magistrate has to be satisfied that there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. At the stage of issuing the

process to the accused, the Magistrate is not required to record reasons and it is not be seen whether the reasons given by the Magistrate issuing process under Section 202 or 204 Cr.P.C. were good or bad, sufficient or insufficient, cannot be examined in the revision. However, the revisional courts can do while exercising its powers of revision, when the order issuing process under Section 204 Cr.P.C. is under challenge is to examine whether there was material before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes has been issued under Section 204 Cr.P.C.

In so far as this question of taking cognizance and issuing process is concerned, it is to be remembered that after the complaint was filed before the Ld. CJM, the Ld. CJM had postponed the issuance of process and taking cognizance in the matter and enquiry was directed to be made by the Ld. CJM and accordingly, the enquiry was conducted by the Magistrate and, thereafter, as it was observed by the Ld. CJM that some clarification regarding the scientific and objective points was required, so the SIT was constituted and was directed to conduct further investigation. Both the Magistrate and the SIT filed their respective reports. Ld. Magistrate in his report has found petitioners involved in the commission of offences on the basis of evidence recorded during investigation. ld. enquiry Magistrate has examined number of witnesses such as Javid Ahmad, Mst Shamima, Farooq Ahmad, Ghulam Mohd, Tasaduq Ahmad, Mst Aisha, Abdul Majeed, Gh Nabi and Abdul Majeed who all have stated that on the particular day when the occurrence took place the situation was normal and everybody was involved in the daily activities and a shopkeeper situated near the place of occurrence was also open. But at about 4-5 P.M a white Gypsy from Police Station, Nowhatta came on spot carrying some police personnel, on the link road, near the Gani Memorial Stadium and one of the police personnel came down from the Gypsy and without any provocation fired a teargas shell at the distance of 30 ft on a boy who was walking on the link road, after playing carom board with other boys. Some of the witnesses have stated that the shell was fired by Abdul Khaliq Sofi who belongs to Police Staton Nowhatta, wearing his name plate on his clothes. The witnesses who have been examined by the Ld. Magistrate have clearly stated that there was no stone pelting on the particular day, it was calm prevailing around, but the police personnel without any provocation fired a teargas shell which hit the boy on head, which ultimately caused his death.

The SIT conducted investigation and also examined some points scientifically and also examined witnesses. The SIT has recorded the statements of civilian witnesses namely Mushtaq Ahmad Bhat, Bilal Ahmad Sheikh, Sanaullaha Sheikh, Irfan Ahmad Khan, Bilal Ahmad Bhat, Javid Ahmad Chaloo, Ghulam Mohammad Bhat, Munis-ul-islam, Shabir Ahmad Khan, and the Police personnel namely Constable Firdous Ahmad No. 2598/S, Constable Showkat Ahmad No. 3341/S, Dvr. HC Nisar Ahmad No. 1401/S, Constable Nazir Ahmad No. 742/S, Abdul Majid Bhat No. 48/3rd Sec, HC Mohammad Sultan No. 732/S and SPO Mohammad Akram No. 920/SPO. That apart the SIT has conducted the exercise of test firing of tear smoke shells with the help of Ballistics Expert from Forensic Science Laboratory, obtained the medical opinion from the Doctors pertaining to the death of Wamiq Farooq (as reported In the Post-mortem Report), analyzed the ground situation, prepared the

site map and also noticed the surrounding circumstances pertaining to the occurrence. The SIT has given its conclusion in paragraph (K) as under:

"From all the relevant facts in statements of witnesses it can be concluded that on the day of incident there was no stone pelting going on in the area and police party entered the area surrounding Gani Memorial Stadium to control the situation. The gypsy in which nafri was boarded was stopped near the masjid and the police party disembarked in order to chase the stone pelters and fired tear smoke shell. At the same time the death of the boy named Wamiq Farooq was reported which may have been due to fall from the surrounding wall of Gani Stadium, or the death could have caused by tear smoke shell itself. However the police action was done in due course and as per the situation on the ground. But in its report the SIT did not rule out the possible cause of death of boy Wamiq Farooq could not have been caused by the firing of tear smoke shell, apart from the other reason being fall from the Stadium Wall. However, on the close analyses of evidence collected by the SIT as referred to in paragraph (j) it has pointed out to the fact, that an injury of the nature could have been caused by the striking of tear smoke shell. There is sufficient material to draw the conclusion that most likely the cause of injury on the head of deceased was hitting of tear smoke shell.

Another important aspect of crucial significance, investigated by the SIT, pertaining to test firing of tear smoke shells, as discussed in paragraphs (c), (H) and (I) of the report, also indicates towards the possibility of the tear smoke shell to have been the cause of injury received on the head of deceased. The firing of tear smoke shells was examined by the ballistic experts. The opinion expressed by the ballistic experts indicated that it is highly likely that the tear smoke shell can cause injury to any human target, intentionally or unintentionally throughout its extreme range of 135+10 mtrs. It also has been expressed by ballistic expert that the shell projected from the tear gas gun can hit the human body accurately up to the distance of 12 feet which may prove fatal.

The civilian witnesses number 1, 2, 3, 4, 5 and police witnesses number 1, 2, 3, 4, 5, and 6 examined by SIT highlight that there was an incident of heavy stone pelting by the miscreants which had compelled the police party to resort to firing of tear smoke shell to disperse the mob. Other witnesses being civilian witnesses number 7, 8 and 9 have disclosed that there was no stone pelting at the time when the police party arrived on the scene and police officials fired tear smoke shell aimed at the boy who suffered injuries and later on expired. Apparent analysis of the account of the occurrence as given in the statements of eyewitnesses points out to the probability of there being stone pelting by the mob. The circumstances of stone pelting before and after the occurrence, as collected and placed on record by the SIT do indicate to the probability of there being the episode of stone pelting at the time of alleged occurrence and the incident involving the firing of tear smoke shell.

All the witnesses examines by Magistrate and some of the witnesses examined by SIT in their statements have indicted ASI Abdul Khaliq Sofi to be the person responsible for firing of tear smoke shell with his Tear Gun. The witnesses point out that Tear Gun was aimed at the boy who had received injury from the tear smoke shell so fired. Another account given by police personnel point out to firing of

tear smoke shell by SPO Mohammad Akram with his Tear Gun. Although the evidence does not conclusively determine as to who had actually fired the tear smoke shell, nonetheless the said two persons are suspected of firing of tear smoke shell, and strong circumstances exist to suggest that one of them had fired tear smoke shell.

The test firing of tear smoke shells, coupled with the statements of eyewitnesses as recorded by the SIT, does not rule out the possibility of the tear smoke shell to have been recklessly fired by the said two persons, aiming at the persons running helter-skelter after pelting stones. Even the evidence collected by the SIT indicates that the stone pelters were chased by the police party and tear smoke shell was fired to disperse them.

The petitioners having the weapons in their hands were expected to use them with proper care and caution while maintaining law and order duty. They were required to use only that much of force which was required to disperse the unruly mob. The tear smoke shell should have been fired with intent to disperse the mob and maintain the calm but not fired recklessly to take a precious life. Any police personnel using the Tear Gun is required to handle it properly. It is not a weapon of offence but only intended to disarm the miscreants. If it is recklessly used and recklessly fired at the human target intentionally or unintentionally, it is likely to cause serious injuries to the human targets and can result in the death as has happened in the present case.

Similar situation appears to have resulted in this case also because of a reckless use of Tear Gun and its reckless use by the petitioners. The circumstances as are available in the record of investigation conducted by the SIT, do indicate that this was an episode of reckless firing of tear smoke shell by the police personnel, while they had tried to disperse the stone pelters. The person of ordinary prudence, the police personnel using the Tear Gun also being so, are in normal course expected to know the consequences of reckless firing of tear smoke shells on the mob. This has the potential of causing such injuries which in the ordinary course would be sufficient to cause death of a person who is hit by such tear smoke shells.

The mandate of the Court at the stage of issuing process and taking cognizance is not to sift the evidence meticulously so as to hold that accused will be convicted on the basis of material collected during the course of investigation. The Record which was available before Ld CJM leads to the presumption that the petitioners fired a teargas smoke shell without any provocation and some of the witnesses examined by the SIT have stated that on the day of occurrence the rioting was going on and in order to quell the rioting the teargas smoke shell was fired so as to disperse the rioters, which hit the deceased. This fact has been established by the enquiry conducted by the Magistrate as well as by the SIT that the deceased was hit by a fire smoke shell which was fired by one of the petitioners.

Perusal of the trial court record reveals that there was sufficient material before the ld. CJM to frame an opinion about the involvement of the petitioners with the commission of the offences. The report filed by the Ld. Enquiry Magistrate establishes the fact that the petitioners have used fire arms without any provocation and without there being any need or occasion for them to use the fire arms because

it has been stated by all the witnesses examined by the Magistrate that on the particular day no rioting was going on and the people were involved in their daily activities. Since the report of enquiry filed by the Magistrate and also filed by the SIT prima facie make out a case against the petitioners that the tear smoke shell was recklessly fired by them which killed the boy so apparently there was sufficient material before the Ld. CJM to proceed ahead in the matter and issue process and take cognizance in the matter. The act of issuing process and taking cognizance does not suffer from any irregularity or illegality, as such; the order passed by the ld. CJM cannot be reversed or set aside. In the circumstances, the case is not one which needs any interference under section 435 Cr.P.C.

I have heard the learned counsel for the petitioner as well as the learned counsel for the complainant and also the learned PP.

The contentions raised on behalf of the learned counsel for the petitioner are:-

That earlier proceedings clearly depict that because of the conduct of the learned Advocate of the complainant and the respondent No. 1 (complainant) the petitioners have not been able to get effective legal representation. He has referred to page 10 and 11 of the order passed by learned CJM on 22.07.2013 and contended that the petitioners have been found prima-facie guilty of commission of offence under section 304 part II RPC and so ban/rider under section 497 Cr.P.C would not be applicable for grant of bail. The detention of the petitioner for last 20 months in jail tantamounts to pre-trial conviction according to him. It is also his contention that the police has registered an FIR No. 12 of 2010 and the final report vis-a-vis same has been submitted before the concerned court wherein the deceased figures as an accused in stone pelting. He has frankly conceded that there is no mention of the same in the bail application. He has also given reference of the order passed by Hon'ble Apex Court on 07.04.2015 in SLP No. 2247/12 wherein the pertinent observations are as :

> *A perusal of the conclusions recorded by the four member SIT reveals that the police has been found to be innocent,with reference to the death of the boy named, Wamiq Farooq. In the above view of the matter, the need to record a second First Information Report, by the impugned order passed by the High Court on 09.08.2011 (affirming the determination rendered by the Principal Sessions Judge, Srinagar vide his order dated 2.5.2011) stands*

frustrated. Accordingly, the direction issued by the Sessions Judge, Srinagar, which came to be affirmed by the High Court, to register a fresh FIR in connection with death of the aforementioned boy named Wamiq Farooq, deserves to be set aside. The same is accordingly set aside.

We have been informed that a trial is being proceeded with, on the basis of a private complaint on the same set of allegations, which were subject mater of consideration in the First information Report under reference. Needless to mention, that the observations recorded by the courts below, as also the opinion expressed in the Report submitted by the SIT, would not influence the determination of the on going complaint case."

Reference is also made of the order of the learned 2nd Additional Sessions Judge dated 29.12.2015 by Mr. Sharma. The plea regarding right to assist the PP by the complainant is sought to be buttressed in the light of section **492 Cr.P.C.** To substantiate his arguments further reliance is also placed on ***2 G Spectrum case*** (Sanjay Chandera v CBI).

The petitioner through his son namely Sajad Ahmad has also brought on record the following pleas:

1. That case FIR No. 12/2010 of Police Station Nowhatta has been registered against accused persons (stone throwing by miscreants) including deceased Wamiq Farooq, which is pending trial before the court of 1st Addl. Sessions Judge, Srinagar in which deceased Wamiq Farooq is one of the accused is one of the accused in the case and non-applicant (Farooq Ahmad Wani) has not challanged registration of FIR or trial against deceased Wamiq Farooq. Thus they have admitted that he is one of the accused in case FIR No. 12/2010 of Police Station Nowhatta having caused law and order problem.

2. That offence for which accused is facing trial has maximum punishment of 10 years. Thus rider of section 497 RPC will not apply for grant of bail.

3. It has been observed by Hon'ble Supreme Court vide order dated 07.04.2015 in case State of J&K and another Vs Farooq Ahmad Wani (SPLP (Cri) 2245/2012 that SIT has concluded that police (accused) are innocent with reference to death of Wamiq Farooq.

4. That accused are in judicial custody for last 02 years without any trial and suffering in the jail. Thus a strong case for bail.

5. *That learned Chief Judicial Magistrate Srinagar after submission of report to the court of PT&E Srinagar did not took the cognizance of the matter but again referred the matter to constitution of SIT by police for enquiry. Thus Chief Judicial Magistrate Srinagar was not*

satisfied with the report of PT&E Srinagar, on which latter on Chief Judicial Magistrate Srinagar took cognizance.

6. That it has been observed by the learned Chief Judicial Magistrate Srinagar at page 10 of the order that there was an incident of heavy stone pelting by miscreants which has compelled the police party to fire tear smoke to disperse the mob and has further stated at line 12 of page 10 that "at ,this stage there is nothing which would conclusively establish that there was no stone pelting at the time of alleged occurrence, thus in the order dated 22.08.2013 learned CJM Srinagar while taking cognizance has concluded that there was an incident of stone pelting on the day of occurrence. Thus accused have discharged their lawful duties as per law.

7. That at para 2 line No. 9 of page 10 of order of cognizance dated 22.08.2013 the court has concluded, although the evidence does not conclusively determine as to who had actually fired the tear smoke shell, nonetheless the said two persons are suspected of firing the tear smoke. Thus there is no conclusive evidence on record that accused caused the death of deceased.

8. That at page 11 para 3 of order of cognizance of CJM Srinagar dated 22.08.2013 it has been mentioned that there may be number of contradictions and varying accounts of the occurrence, available in the evidence collected by learned Magistrate. Thus the court of CJM Srinagar has in haste manner taken the cognizance when the fact of the matter is that there is no evidence available against accused persons.

9. That at line 9 page 12 of order dated 22.08.2013 passed by learned CJM Srinagar it has been mentioned that material available is not sufficient to prove guilty of accused persons. However, the court found it sufficient to proceed against accused persons.

10. That statement of Aishya recorded by learned Magistrate has contradiction with regard to identification of accused ,ans statement of Ghulam Nabi shows that Akram has fired the shell while as Aishya says Khaliq has fired shell. Thus there is contradiction who actually fired the shell, even other witnesses recorded by learned Magistrate (PT&E, Sgr) have lot of contradictions regarding the occurrence.

On the other hand learned counsel for the complainant has raised the following pleas:-

That the relief claimed in the bail application can not be granted by this court. He has in particular referred to para 15 of the petition wherein it is stated that bail application be considered by the Jammu wing of the Hon'ble High Court. It is also his argument that in the criminal transfer application presented before the Hon'ble High Court Jammu uncalled and derogative remarks have been made against the Hon'ble High Court and the Judiciary as:

> "that the huge amount is being spend by the state for the security and safety of the Hon'ble Judges and they have taken oath of the office and promised to do justice to the litigants and will not succumb before any pressure, threat etc but in the present case both the courts have not performed part of their duty with the result the petitioner is suffering in the jail from last one year for the fault of his none but for performing his duty and for upholding the dignity of law that too under hostile circumstances. The Hon'ble Sessions Court as well as the Hon'ble High Court has failed in awarding justices to a honest and dedicated police officer who performed part of his duty and took the risk of his life to uphold the dignity of law but the Hon'ble Judges who enjoy security failed to perform their part of duty and preferred their safety and let the petitioner suffer on the mercy of god."

The allegations according to the learned counsel prima-facie suggest the commission of offence under section 302 RPC and the opinion tendered by learned CJM regarding the commission of offence under section 304 part II RPC would not furnish a base to admit the accused to bail according to him. The court is required first to consider the aspect of the framing of the charge against the accused and thereafter to see whether any ground is made out for grant of prayer as made out in terms of instant petition. Further more it is being contended that even under Armed Forces Special Powers Act Officer of the rank of ASI and SPO are not authorized to use fire arm on an unlawful assembly in a Disturbed Area. The petitioner cannot claim protection under section 197 of Cr.P.C or any other statute as also held by learned Additional Sessions Judge, Srinagar while disposing of revision petition and the said order has been confirmed by Hon'ble High Court and Hon'ble Apex court. The case which has been

presented before the learned CJM regarding the occurrence on the version as narrated by the police, does not reflect the victim as an assailant, is being also contended. The documents on record including postmortem report sufficiently suggest the averments made in the complaint are well founded and the accused/petitioner having regard to the position they hold, seriousness of the offences and the manner the same has been committed, do not warrant concession to be granted in their favour. It would not be only a case to which mischief of section 487 Cr.P.C is applicable where the bail can be rejected but also other offences where same are non-bailable and the interests of the society at large necessitate the individual liberty to give weigh in the societal interests. It is also being contended that the matter was heard by various Hon'ble Judges of the High Court but the petitioners were not able to satisfy the Hon'ble court the case is made out for petitioners to bail. The court should also not be insensitive of the fact that the death of the victim had been the cause to an agitation which continued for more than 06 months in which the lives of more than 100 minors were lost.

One more point raised is that the accused being men of influence are likely to tamper with the prosecution evidence and so their being basis to deduce the course of justice would stand thwarted, the petition is liable to dismissal. The petitioners had been absconding for a pretty long time after the cognizance was taken cannot be lost sight by the court is also contended. The witnesses examined have also sounded that a tear gas shell was used by accused 2 and accused No. 1 was present on the spot. The roll of accused No. 1 is stated of being Incharge of Police party and so vicariously responsible for the consequence which ensued on spot according to him.

I have given my thoughtful consideration to the material available before me.

The fact remains that the cognizance has been taken in the matter after an inquiry was initiated by the learned Chief Judicial

Magistrate, Srinagar and the Officer who conducted the inquiry examined number of witnesses i.e Javaid Ahmad Chaloo, Shameema, Farooq Ahmad Sofi, Ghulam Mohammad Bhat, Tasaduq Ahmad Kharadi, Nissar Ahmad Malik, Ghulam Nabi Bhat, Mst. Aisha and Abdul Mjeed Bhat. The witnesses Ghulam Mohammad Bhat, and Ghulam Nabi Bhat who have been examined during the inquiry conducted by the Magistrate have stated that the tear smoke shell was fired by both the accused i.e Abdul Khaliq and Mohammad Akram while witness Mst. Aisha and Ab. Majed Bhat have stated that they do not know the police personnel who fired the tear smoke shell but the people present on the spot were saying that the name of the policemen who fired the tear smoke shell is Ab. Khaliq and Mohammad Akram. The witness Javaid Ahmad Chaloo who is stated to be a shopkeeper in the area stated that he had not seen any policemen coming in the area. Witness Mst. Shameema stated that she has not seen any one firing tear smoke shell but the people were saying that the death of Wamiq Farooq had been caused due to the tear smoke shell fired by some policemen. Witness Farooq Ahmad Sofi stated that on the day of occurrence at about 3 to 4.30 PM he was playing carom and besides him Wamiq Farooq and some other boys were also playing carom. In the meanwhile a white coloured gypsy appeared and from the said gypsy about 4/5 policemen came down and two policemen reached to the house of Abdul Aziz Sofi and the name of one policeman was written on the name plate of Abdul Khaliq, however, he cannot identify the said policeman. Witnesses Tassaduq Ahmad Kharadi and Nissar Ahmad Malik stated that Abdul Khaliq had fired tear smoke shell on the head of Wamiq Farooq. At the time the process was issued by the learned CJM on 22.08.2013, reference has been made of the material available before him for holding the accused/petitioners as guilty prima-facie.

In the inquiry report the learned Judicial Magistrate (PT&E) made the observations in the light of evidence collected as:

"the situation in the area on the day of occurrence was normal and every body was involved in the daily activities as s a shopkeeper ,situated near the place of occurrence was also open. At 4 to 5 PM a white gypsy from Police Station Nowhatta has come on spot carrying some police personnel on the link road near Gani Memorial Stadium. One of the police personnel without any provocation fired a tear smoke shell at the range of thirty feet on the Wamiq Farooq who was walking on the link road after playing carom with other boys. Some of the witnesses have stated that the shell was fired by Ab. Khaliq who belongs to police station Nowhatta having name plate on his uniform. Hence prima-facie the accused ***Ab. Khaliq*** *has committed the offence which is punishable under Ranbir Penal Code.*

This court is not at this stage to return the finding of the guilt or innocence of the accused. Considerations in grant of bail are common both in the case of Section 497 and 498 of J&K Cr.P.C. Same as laid down by the Hon'ble Apex Court in case ***Gurcharan Singh vs State (Delhi Administration)*** are:

(i) the nature and gravity of the circumstances in which the offence is committed;

(ii) the position and the status of the accused with reference to the victim and the witnesses;

(iii) the likelihood of the accused fleeing from justice;

(iv) of repeating the offence;

(v) of jeopardizing his own life being faced with a grim prospect of possible conviction in the case;

(vi) of tampering with witnesses;]

(vii) the history of the case as well as of its investigation; **and**

(viii) other relevant grounds which in view of so many variable factors, cannot be exhaustively set out.

In the case of ***Niranjan Singh & Anr vs Prabhakar Rajaram Kharote & Ors reported in AIR 1980 SC 785*** the Hon'ble Supreme Court has considered the entitlement of the accused to bail in circumstances somewhat similar to the present petition. The facts and observations have been outlined by their lordships as:

> *"the accused were 2 Sub- Inspectors and 8 Constables attached to the City Police Station, Ahmednagar. The charges against them, as disclosed in the private complaint, were of murder and allied offences under ss. 302, 341, 395, 404 read with ss. 34 and 120B of the Penal Code. The blood-curdling plot disclosed in the complaint was that pursuant to a conspiracy, the brother of the complainant was way laid by the police party on August 27, 1978 as he was proceeding to Shirdi. He had with him some gold ornaments and cash. He was caught and removed from the truck in which he was travelling, tied with a rope to a neem tree nearby, thus rendering him a motionless target to a macabre shooting. One of the Sub-Inspectors fired two shots from his revolver on the chest of the deceased at close range and killed him instantaneously. The policemen, having perpetrated this villainy, vanished from the scene. No action was taken by the State against them.*
>
> ***Their lordships have further observed*** *that how could they, when the preservers of the peace and investigators of crime themselves become planned executors of murders. The victim's brother was an advocate and he filed a private complaint. The learned magistrate ordered an inquiry under s. 202 Cr. P.C, took oral evidence of witnesses and cognizance was taken under sections 302, 323, 342 read with section 34 I.P.C. The accused moved the sessions court for bail and, in an elaborate order the sessions court granted bail*

subject to certain directions and conditions. The High Court, which was moved by the complainant for reversal of the order enlarging the accused on bail, declined to interfere in revision but added additional conditions to ensure that the bail was not abused and the course of justice was not thwarted.

The Hon'ble Apex court further observed *that the case in the complaint, verified under s. 202 Cr. P.C. to have some veracity, does not make us* ***leap to a conclusion of guilt or refusal of bail****. On the contrary, the accused policemen have a version that the victim was himself a criminal and was sought to be arrested. An encounter ensued, both sides sustained injuries and the deceased succumbed to a firearm shot even as some of the police party sustained revolver wounds but survived. Maybe, the defence case, if reasonably true, may absolve them of the crime, although the story of encounters during arrest and unwitting injuries resulting in casualties, sometimes become a mask to hide easy liquidation of human life by heartless policemen when some one allergic to Authority resists their vices.*

Their lordships have also observed *that the police have the advantage that they prepared the preliminary record which may 'kill' the case against them.This disquieting syndrome of policemen committing crimes of killing and making up perfect paperwork cases of innocent discharge of duty should not be ruled out when courts examine rival versions.*

Their lordships cautioned that detailed examination of the evidence and elaborate documentation of the merits should be avoided

while passing orders on bail applications. No party should have the impression that his case has been prejudiced. The note of caution was also added that Grant of bail is within the jurisdiction of the Sessions Judge but the court must not, in grave cases, gullibly dismiss the possibility of police-accused intimidating the witnesses with cavalier ease. While concluding their lordships added note of anguish that the complainant has been protesting against the State's bias and police threats. We must remember that a democratic state is the custodian of people's interests and not only police interests. Then how come this that the team of ten policemen against whom a magistrate after due enquiry found a case to be proceeded with and grave charges including for murder were framed continue on duty without so much as being suspended from service until disposal of the pending sessions trial? On whose side is the State? The rule of law is not a one-way traffic and the authority of the State is not for the police and against the people. A responsible Government responsive to appearances of justice, would have placed police officers against whom serious charges had been framed by a criminal court under suspension unless exceptional circumstances suggesting a contrary course exist. After all a gesture of justice to courts of justice is the least that a government owes to the governed. We are confident that this inadvertence will be made good and the State of Maharashtra will disprove by deeds Henry Clay's famous censure :

"The arts of power and its minions are the same in all countries and in all ages. It marks its victim denounces it; and excites the public odium and the

public hatred to conceal its own abuses and encroachments."

The observations that we have made in the concluding portion of the order are of such moment, not merely to the State of Maharashtra but also to the other States in the country and to the Union of India, that we deem it necessary to direct that a copy of this judgment be sent to the Home Ministry in the Government of India for suitable sensitized measures to pre-empt recurrence of the error we have highlighted.

Their lordships have have also observed as:

"….No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is a part of the Universal Declaration of Human Rights. The content of Art. 21 of our Constitution, read in the light of Art. 19, is similarly elevating. But romance about human rights and rhetoric about constitutional mandates lose credibility if, in practice, the protectors of law and minions of the State become engines of terror and panic people into fear. We are constrained to make these observations as our conscience is in consternation when we read the facts of the case which have given rise to the order challenged before us in this petition for special leave."

The order for grant of bail by court of Sessions and confirmed by High Court with some conditions was stated, need not to be upset in exercise of powers under Article 136 of Constitution with observations as:

"Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it,

exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but sitting under Art. 136 do not feel that we should interfere with a discretionexercised by the two courts below."

The accusations levelled against the petitioner and co-accused in the instant case too are serious in nature but as observed by their lordships in Niranjan Singh's case they have version of their own about the incident. The learned Magistrate has tested the veracity of accusations prima-facie and found ground to proceed in the matter. Cognizance has been taken in pursuance of the order dated 22.07.2013 against the accused of being involved in the commission of offence under section 304 Part II RPC accordingly .

It is on record that the petitioner herein had been a police Officer at the relevant time when the incident forming the subject matter of proceedings is said to have taken place. The offence punishable under section 304 Part II RPC of which the accused is held prima-facie guilty does not entail the death or imprisonment of life, as a punishment. The court of Sessions on receipt of the committal proceedings has to examine whether there is a ground for presuming the accused to have committed the offence or not. Further course of action is to be taken as provided under Chapter XXXIII of the Cr.P.C. Merely because at the time the parties would be heard in terms of Chapter XXXIII, the court may come to the conclusion that offence committed by the petitioner does not fall under section 304 Part II RPC but is

an offence of Culpable Homicide amounting to murder, as suggested by the counsel for the complainant, does not warrant under law the petition to be rejected. The charge against the petitioner nonetheless being heinous, the prayer made by him, still is required to be examined on the touch stone of law laid in number of cases by the Hon'ble Apex Court and the Hon'ble High Courts. The contention raised that earlier bail application has not been disposed of and so the proprietary does not warrant the second application be entertained, too in my opinion is not sufficient to turn down the prayer made on behalf of the petitioner, for being admitted to bail.

Similarly the plea raised on behalf of respondent No. 1 that as the averment have been made in the bail application seeking consideration of bail application by Jammu wing of the Hon'ble High Court cannot be granted by this court as the entitlement is to be considered by the Hon'ble High Court, is also without force

Their lordships of the Hon'ble Apex Court while commenting upon the scope for grant of bail in ***Sanjay Chandra's*** case enunciated as:

> *"…..that from the earliest times the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty."*
>
> *".....it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test.In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not*

been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances."

".....In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice".

".....both the Courts have refused the request for grant of bail on two grounds:- The primary ground is that offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. ***Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration."***

".....The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he

will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

Having in view the various judgments on the subject it can be safely said that the society has a vital interest for grant or refusal of bail. The endeavour of the court while dealing with an application for grant of bail has been to maintain perfect balance between the sanctity of individual liberty and interests of society. Emphasis have been laid in the judgments that courts should pay more than verbal respect to the principle that punishment begins after conviction and and that every man is believed to be innocent until duly tried and found guilty.

Viewing the case on the touch stone of above referred legal principles I am of the opinion that it would be expedient in the ends of justice to admit the petitioner to interim bail subject to orders likely to be passed hereinafter. Accordingly, the petitioner is ordered to be ***admitted to interim bail upto 24th October 2017*** provided bail in the amount of Rs two lac each is furnished by two sureties on the conditions as:-

1. that the hat the accused/petitioner shall not leave the territorial limits of Kashmir valley without prior permission of this court.
2. that the accused shall not directly or indirectly make any inducement, threat or promises to any person/s acquainted with the facts of the case;

A personal bond be elicited from the accused for compliance of the stipulations.

Taking note of the concern of the complaint that having regard to the status of accused there is likelihood the accused may tamper with the evidence which has been collected against them, it is deemed expedient to direct IGP, Kashmir to closely monitor the conduct of accused and submit the report by or before next date as to how the petitioner has faired during the period for which he is ordered to be kept at large on bail. The complainant is kept at liberty to bring to the notice of the court

any fact by or before next date which may necessitate the recalling of the order passed herein

Put up on 24.10.2017

Announced: Pr. Sessions Judge
16.10.2017 Srinagar.