IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CURATIVE PETITION (CRIMINAL) NO. 39-42 OF 2010

IN

CRIMINAL APPEAL NO. 1672-75 OF 1996

IN THE MATTER OF:

CENTRAL BUREAU OF INVESTIGATION ... PETITIONER

VERSUS

KESHUB MAHINDRA & ORS. ...RESPONDENTS

AND IN THE MATTER OF:

1. BHOPAL GROUP FOR INFORMATION AND ACTION

2. CHILDREN AGAINST DOW-CARBIDE

3. BHOPAL GAS PEEDIT MAHILA STATIONERY KARAMCHARI SANGH

4. BHOPAL GAS PEEDIT NIRASHRIT PENSION BHOGI SANGHARSH MORCHA

5. BHOPAL GAS PEEDIT MAHILA PURUSH SANGARSH MORCHA

…APPLICANTS

VERSUS

KESHUB MAHINDRA & ORS.

...RESPONDENTS

APPLICATION FOR DIRECTIONS TO INSTITUTE CHARGES U/S 302 (FOR OFFENCE U/S 300 (4)) READ WITH S. 35 OF THE INDIAN PENAL CODE, 1860 AGAINST THE RESPONDENTS HEREIN, IN FIR NO. 3 OF 6TH DECEMBER, 1984

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SYNOPSIS

1. The instant application supports the Curative Petition against the impugned judgment of this Hon'ble Court in Cr. Appeal No. 1672 of 1996, reported in (**1996) 6 SCC 129**, but respectfully submits that on the face of the material available to the investigating agency, and brought to their notice by the Applicants herein, and the charges alleged in the charge sheet, this Hon'ble Court may institute charges u/s 302 of the Indian Penal Code, 1860, (hereinafter "IPC") as the case is fit for an offence u/s 300 (4) of the IPC, r/w 35 of the IPC, as the Accused, acting in concert, with full knowledge of the design defects and the purposeful degradation of safety precautions and maintenance, and admitted full knowledge of the uniquely extremely hazardous nature of Methyl Iso-Cyanate (hereinafter "MIC"), and the extremely stringent design, maintenance, and safety standards required to be employed to run such a plant. They knew that there was a high probability of death for thousands living around the compound. The MIC gas leak was a certainty.

2. The Applicants are victims and those who support them in their long and frustrating struggle for justice, which has been more often than not opposed rather than assisted by the Government of India, including Petitioner No.1. Thus, it is essential, and in the interests of justice, that they, and others similarly placed, be heard to ensure due process. It is pertinent that for instance, Applicant No.1 has both assisted the Prosecutor, Petitioner No.1, in the proceedings before the Learned CJM, Bhopal, and was one of the Petitioners in the Review Petition against the impugned judgement was this Hon'ble Court was pleased to dismiss through circulation.

3. The Accused, and others, had full knowledge that the MIC plant in Bhopal India was designed with fatal design flaws, including the complete lack of any emergency remediation facilities to counter a runaway reaction of the MIC stored. For instance, the VGS could barely handle a fraction of the MIC gas expected to leak in a runaway reaction. The technology was admittedly

and counter to the averments to the Government of India, unproven. Even the type of stainless steel used in the MIC storage tanks was sub standard. This was seemingly motivated by the desire to increase profits with reckless disregard to human life, and the need to ensure that Union Carbide retained control over UCIL even in the restrictive foreign climate existing in India at that point. Due to profitability issues, the design was further mitigated by allowing the tanks to store 80% MIC, rather than the prior 60%, as it was decided to manufacture in batch rather than continuous process.

4. The safety and maintenance of the MIC factory was, with full knowledge of the consequences, fatally disregarded. None of the safety features were working. The refrigeration unit had been shut off on the absurdly false premise that a stainless steel could maintain MIC gas at the recommended 0°C in the Bhopal climate without continuous refrigeration because they were stainless steel. The nitrogen pressurisation system had stopped working as of 22nd October, 1984. A jumper line had been installed as a workaround between the RVVH and PVH valves in the MIC unit increasing the chance of contamination. Cheaper materials were being used in pipes and other parts during maintenance. There wasn't even an evacuation plan. The siren was not working, and on the fateful night of 2nd December, 1984, no warnings to the population or the authorities was issued.

5. The Accused had ample notice of these problems through numerous safety incidents and recurring accidents, including one in which one worker died. Yet, instead of remedial action, they continued to further degrade safety standards through actions authorised by management, and continued to run the MIC factory in a populated urban centre. The MIC gas leak was a certainty.

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1. BHOPAL GROUP FOR INFORMATION AND ACTION
THROUGH SATINATH SARANGI, MEMBER
44, SANT KANWAR RAM NAGAR, BERASIA ROAD,
BHOPAL, MP 462001

2. CHILDREN AGAINST DOW-CARBIDE
THROUGH SAFREEN KHAN, FOUNDER MEMBER
HOUSE NO 93, GUPTA NAGAR, CHHOLA ROAD
BHOPAL, MP 462001

3. BHOPAL GAS PEEDIT MAHILA STATIONERY KARAMCHARI SANGH
THROUGH RASHIDA BEE, PRESIDENT
HOUSE NO 12, GALI NO 1, BAG UMRAO DULHA,
BHOPAL, MP 462001

4. BHOPAL GAS PEEDIT NIRASHRIT PENSION BHOGI SANGHARSH MORCHA
THROUGH BALKRISHNA NAMDEO, PRESIDENT
HOUSE NO A 542, HOUSING BOARD COLONY, AISHBAGH
BHOPAL, MP 462001

5. BHOPAL GAS PEEDIT MAHILA PURUSH SANGARSH MORCHA
THROUGH NAWAB KHAN, PRESIDENT
HOUSE NO 55, GONDIPURA, BYPASS ROAD
BHOPAL, MP 462001

…APPLICANTS

VERSUS

KESHUB MAHINDRA & ORS.

...RESPONDENTS

APPLICATION FOR DIRECTIONS TO INSTITUTE CHARGES U/S 302 (AS AN OFFENCE IS MADE OUT UNDER (300 (4) OF THE IPC) READ WITH SECTION 35 OF THE INDIAN PENAL CODE, 1860 AGAINST THE RESPONDENTS HEREIN, IN FIR NO. 3 OF 6TH DECEMBER, 1984

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT

The humble application of the applicant above-named

Most respectfully showeth that:

6. The Learned CJM Bhopal, in the 7th June 2010 Judgment held that:

> "The tragedy was caused by the synergy of the worst of American and Indian cultures." (Paragraph 216)

The applicants are organisations of victims, and those that support the victims, who have been providing succour to the victims since that fateful night of 2nd December 1984. On that night, Methyl Iso Cyanate (hereinafter "MIC") leaked from tank no. E610 in the Bhopal plant due to the accused, and others', deliberate actions such as shutting off the refrigeration unit, cutting corners on safety procedures, taking no action to address design defects and problems identified numerous times, which had caused death and injury in the past. When dawn broke over the city, thousands of bodies lay in heaps on the streets, leaving no one to identify them. According to the ICMR, over 22,000 people died in the accident, although the FIR registered the human deaths as only 2850 (3828 in the charges framed by the Learned Sessions Court in its order dated 8th April, 1993), and till date, the victims have struggled to secure justice and hold the accused and others, accountable for their actions, which made the accident inevitable, not just possible. The

victims', who the Applicants have as members and supporters, were never represented or heard by a two judge bench of this Hon'ble Court, which passed the Impugned Order and Judgment, passed by this Hon'ble Court in Criminal Appeal No. 1672-1675 of 1996, reported in (**1996) 6 SCC 129**, (hereinafter "1996 Impugned Judgment") which in relevant part, quashed charges u/s 304 Part II of the Indian Penal Code, 1860 (hereinafter "IPC"), and instead instituted charges u/s 304-A of the IPC, against the non-absconding accused in FIR No. 3 of 6th December, 1984, Respondents herein, filed by the Central Bureau of Investigation (hereinafter "CBI"), Petitioner No.1 herein. It is pertinent, however, that the Learned CJM, Bhopal was pleased to allow Applicants Nos.1 and 4 in his order dated 24th December, 1996, to appear before him, , and in the case of Applicant No.1, assisted the Prosecutor. Charges u/s 302 (300 (4)) IPC are warranted in the true facts and circumstances, and supported by the material adduced before the Learned Chief Judicial Magistrate, in Criminal Case No. 8460 of 1996 in themselves, and further corroborated by evidence recently brought to light in civil proceedings ongoing in the United States. The evidence demonstrates that from its inception, the design of the MIC plant, in storing large quantities of the uniquely highly hazardous, volatile and reactive MIC, particularly without appropriate safeguards such as electronic sensors, was flawed. Further, there was an increased need to store MIC in large quantities as the factory moved to a batch, rather than a continuous processing, in order to save approximately Rs. 70 lakhs. Thus, at the time of the MIC gas explosion, the tank contained 80% MIC, instead of the 60% previously recommended. Such flaws should have been known, and were specifically brought to the notice of the accused and others between 1973 and 1984, both by safety audits and as a result of relatively minor accidents. The design flaws were compounded by deliberate actions of the accused to cut costs, and subsequently safety procedures, through inexplicable actions, such as shutting down the refrigeration unit, recording the pressure in the MIC tanks

only at the end of each shift, and installing a jumper line between the two safety valves as a workaround. The evacuation MIC tank was not empty, and the tank 610 was more than half full. MIC was being stored at atmospheric temperature, far exceeding the range of 0° to 15° C admittedly required. No evacuation plan was prepared despite the location being in a densely populated residential area. No drills conducted despite the occurrence of less widespread leakage with alarming frequency prior to the accidents. Complaints by the workers of gas leaks were dismissed summarily. No medical information regarding responses to MIC was provided to the workers or the surrounding communities. On the night of the disaster, and prior, information regarding the MIC gas explosion and prior leaks was withheld and its ultra hazardous nature misrepresented to the workers of the factory and citizens of Bhopal including doctors treating the exposed people. Safety guidelines were ignored, or the goalposts arbitrarily shifted whenever convenient. This was a grotesque act for profit, entirely lacking in justification or excuse, in which the victims' certain likelihood of death was left to the mercy of god due to the actions outlined in this application and demonstrated by the evidence. Due to the deliberate actions of the accused, and others, with full knowledge of their consequences, the MIC gas leak, on the night of 2nd December, 1984 and the consequent deaths, were an inevitability.

7. The IPC, exhaustive as it is, does not contemplate the scale of murder and destruction possible through the manmade chemical MIC that was stored in large quantities in Bhopal by the accused, along with others, in the MIC plant with its known design defects and in which safety had been fatally compromised through deliberate actions to cut costs. According to the Government of India, 5295 people were killed in the accident (the original number of 2660 was revised upwards in approximately 1992). According to the Madhya Pradesh Government, it was 16,000. An ICMR study, conservatively extrapolated to 2009, places the number of dead at 22,917.

These numbers are far above the number of death registered in the FIR – 2850 (3828 in the charges framed by the Learned Sessions Court in its order dated 8th April, 1993). Thus, far from being accountable, the current charge sheet does not even account for those whose deaths are known, let alone those whose deaths have not been registered. Crimes of such magnitude have led to specialised administrative responses, such as the setting up of specialised tribunals, or in the case of this Hon'ble Court, the setting up of special investigation teams reporting directly to this Hon'ble Court. In this instance, the charges were reduced to those applied usually for death caused by reckless driving. Thus, it is respectfully submitted that the prosecutorial and judicial response has denied justice thus far to the victims of Bhopal, represented by the Applicants herein.

8. The procedural facts of this matter have been stated in the Curative Petition filed by Petitioner No.1, and are not repeated herein for the sake of brevity. Some further brief facts are set out below as they appear from various documents (although these are by no means exhaustive reviews of either the investigations or the evidence adduced before the Learned CJM, Bhopal):

a) On 2nd December, 1973, three documents were presented to the Management Committee of Union Carbide, absconding Accused No. 11, including Accused No.1, Mr. Warren Anderson, in the criminal proceedings, , that contained proposals for setting up of the plant. The documents included the Capital Budget Proposal 73-8. Despite the known hazards of MIC, the plan called for the use of 'unproven technology' in the extremely hazardous MIC unit. It was admitted that the technology had seen only a "limited trial run".

The sole objective of the plan was to enable Accused No.10 to gain control over the Bhopal MIC plant and other businesses in India. Accused No.10, absconding, was "not prepared to accept any situation" that would reduce its equity below 51%, as necessitated by

the Foreign Exchange Regulation Act, 1974 (hereinafter “FERA”). Accused Nos.11 and 12 and others including Accused Nos.2, 3 and 4 participated in and collaborated and aided Accused No.10 to execute this plan. Accused No.10 carefully calculated "under-investment" totalling US$ 8 million – over 25% of the projected cost - made substantial savings on the MIC-Sevin process. As a consequence, Accused No.10 would be able to retain its majority equity in Accused No.12. The company therefore deemed it “an acceptable business risk”. Accused No.2 had, at this time, had already been a decision making position for 9 years. Notably, a management committee that contained Accused No.1, who is absconding, ratified the plan.

A true fair typed copy and photocopy disclosed in U.S. court proceedings of the Capital Budget Proposal 73-8, dated 2nd December, 1973, sent on 2nd December, 1973, are annexed hereto and marked as **Annexure-I Colly** (pages __ to __)**.**

b) By 1977, the scramble to meet requirements stipulated by FERA had reached such a pitch of desperation that Accused Nos.10, 11 and 12 were prepared to make reckless compromises to their own critically essential stipulations regarding operating and safety procedures for the manufacture of MIC. Besides FERA, the drastic revisions proposed to the original Capital Budget Plan, itself the product of criminal compromises, were a response to “slower growth rates, higher prices, reduced market potential, greater competition, a construction overrun, diminished finished returns and necessity of loan and equity financing for UCIL”, a consequence of the fact that “UCIL’s cash flow throughout 1976 was critical and could not support the Project expenditure programme.”

The Accused Nos.10, 11 and 12, acting through their management, including the other accused at operative times, identified three choices to deal with the mass of problems ahead of the proposed MIC plant project. They were:

"1) abandonment of the total project

2) restriction of the investment of Phase 1 (production of Sevin from locally manufactured I-NOL and imported MIC)

3) completion of the original project …"

The completion of the original plan was recommended, because:

> "A decision to drop the project will materially affect UCIL's chances of retaining a UCC equity of 51% … UCIL has elected with the concurrence of UC Eastern to implement an equity reduction to 50.9% and focus its efforts on qualifying as a 50.9% FERA company under GOI guidelines."

Thus, without regard to safety, in order to pursue Union Carbide, Accused No.10's wider corporate policy "to secure and maintain effective management control of an Affiliate", with full knowledge of the Accused No.12, Union Carbide India Ltd (hereinafter UCIL), and its management arrayed as Accused herein, accepted and implemented a series of "Cost Reductions" to ensure control that grossly and fatally undermined the essential safety features of an already compromised and inherently uniquely hazardous factory. If the MIC factory not been completed, Union Carbide would have had to divest to meet India's then closed foreign exchange regulations pursuant to FERA.

The process of manufacturing SEVIN was changed - a "continuous process to batch process and eliminating pneumatic conveying systems proposed by UCC, to a system more compatible with Indian

conditions" realising a safety of approximately Rs. 60 lakhs or USD $793,000. This changeover led to a need to store far greater quantities of the material that served as the greatest risk, MIC, as it could not be continually processed.

There were also:

"Changes in operating criteria, material specifications, elimination of non-essential items, substitution of UCC standards with Indian standards on valve and piping specifications, without sacrificing safety or operating efficiency."

These cost-savings were particularly duplicitous as UCC has been granted an exemption to hold a stake exceeding 50% because of the need for high technology transfer related to the MIC plant. The technology, already materially deficient, was being further localised – safety features being done away with knowledge of the consequences on the health and lives of the workers and the population that lived around the factory site.

Examples of fatal safety compromises included:

-"use of carbon steel in place of stainless steel baffle plates";

-replacement of stainless steel safety valves with bronze safety valves;

-"costly" American Standard testing materials are replaced with "cheaper" butt welded pipes;

-galvanized pipes replace bronze ones;

-costly globe and gate valves for chlorine, another potentially deadly material are replaced with "cheaper plug valves"

-"non-essential instruments are "deleted" including "miscellaneous major and minor instruments in all work orders"

It seems that few safety critical materials and procedures are left unrevised.

A true copy of the Review of the Core Business Plan: 73-78 Methyl Isocyanate based Agricultural Chemicals project dated sometime in February, 1977, is annexed hereto and marked as **Annexure-II** (pages __ to __)**.**

c) Sometime in October, 1978, UCIL, Accused No.12, produced an Operating Manual Part-I, Methyl Isocyanine Unit, evidence before the trial court, and used for consideration. (**Reference: PW8, Exhibit 2587 before the Learned CJM, Bhopal**) stated that:

> "…[i]t must be foremost in everybody's mind that there is probability of injury or accident around the corner. But these can be avoided if all are safety conscious and follow safety procedures strictly. Safety is our primary need…There is a correct way of handling them and there is "No Short Cut". Any carelessness in operation will endanger you, your colleagues and everybody around you." (Page 122)
>
> "Stringent precaution must be observed to eliminate any possibility of human contact with methyl isocyanate". (page 26)

Thus, the knowledge that safety measures must be strictly followed and that there could be no short cuts was starkly apparent.

Further, the Operating Manual acknowledged the design defect in storing the MIC unit in large quantities, stating that:

> "With bulk systems, contamination is more likely than with tightly sealed drums and [they must be maintained at low temperature]….The low temperature in a bulk system will not

eliminate the possibility of a violent reaction, if contamination occurs. It will, however, increase the time available for detection of the reaction and safe disposal of the material before the reaction rate reached a dangerous speed." (page 9)

d) In 1979, according to Mr. D.R. Lahiri, Deputy Chief Consultant for UCIL in 1984 (**Reference:** PW128 before the Learned CJM, Bhopal), the specification of the material used for fabrication of MIC tanks was not as per specification. According to the MIC brochure, storage for MIC in underground tank must use stainless steel type 304 and 316a. The material should contain tax 2-3% MO but it contains only about 0.3%. The inner part of the sample examined by Dr. Lahri contained pitting/corrosion.

In 1979, the manual for "Start-Up Procedure" for MIC, was altered, as evidenced by the document obtained that shows the alterations by hand. For instance, instead of requiring circulation through the refrigeration system of the MIC to maintain temperate between 0° and 15°C, the manual changed the requirement to presume, without any evidence, and contrary to common sense, that the tanks "are supposed to maintain low temperature." The safety systems were thus systematically allowed to fall into disrepair. Between 1983 and 1984, the safety manuals were also rewritten to permit switching off the refrigeration unit and shutting down the vent gas scrubber when the plant was in operation.

e) In 1979 and 1980, there were two safety audits, conducted by Mr. Hull and Mr. Merryman, who travelled from the U.S. for this purpose. According to Mr. Raj Kumar Keshwani (**Reference:** PW 172 before the Learned CJM, Bhopal), writing in the Indian Express on 22nd November, 1985, the safety report recommended creation of

an evacuation plan due to serious concerns found in the safety audit. Mr. Keswani asserts that the recommendations were circulated among various managers of Accused Nos. 10, 11 and 12 for resolution. However, these facts were never formally disclosed to the government, and it was stated that "[u]nderstanding of the problem in the proper perspective is expected."

f) On 24th or 25th December, 1981, a leak of phosgene killed one worker, Ashraf Khan, at the plant and severely injured two others. It was reported to the management, including Accused Nos. 1 and 10. A report was drafted which included an action plan that called for, *inter alia,* certain design changes to be approved by the Institute of Central Engineering of the Union Carbide Corporation, Accused No.10. In accordance with the policy of the company, the accidents were reported immediately to the plant management and the Accused Nos. 2 to 4, who were in executive positions.

g) On 7th January, 1982, according to Mr. T.R. Raghuraman, Warren Woomer, who was on deputation from UCC, and was involved in operationalising the MIC plant in 1973, and was then works manager, had taken the decision to shut off the refrigeration system, in spite of the knowledge, known by the management, that temperatures below 15°C could not be maintained in the tanks given the climate in Bhopal. According to Mr. Raghuraman, this was evidenced from the Technical Instruction Note, dated 12th January, 1982, and exhibited as **Exhibit 46.** None of the accused including Mr. J. Mukund, Accused No. 5 did anything to reverse the decision, which was contrary to all safety guidelines, and left the MIC at atmospheric conditions, taking away any buffer with regard to the time to fix a problem before a volatile reaction according to the operator's own guidelines.

A true copy of Mr. T.R. Raghuraman, DW8 in the proceedings before the Learned CJM, Bhopal is annexed hereto and marked as **Annexure-III** (pages __ to __)**.**

h) On 9th January 1982, the pump seal failed and released a quantity of MIC and phosgene, as well as hydrochloric acid, as a result of which 25 employees of UCIL were sent to the local hospital. Some management members of UCC, Accused No.10, and UCE, Accused No.11 were in Bhopal at the time of the incident. On 9th February, 1982, M.L. Ranji, President of the Union Carbide Karamchari Sangh, the trade union recognised by UCIL handed over a letter to UCC, Accused No.10 management in India, Robert Oldford, protesting the hazards imposed on workers due to lack of proper maintenance checks and replacement of corroded equipment. The letter was responded to by Mr. D.N. Chakravarty, General Works Manager, UCIL who said that no additional steps were needed to be taken to improve the safety conditions at the plant, and blamed the accident on "unmindful" actions of Mr. Ashraf Mohd. Khan.

A true fair typed copy of the correspondence dated 9th February, 1982, and 24th March, 1982 are annexed hereto and marked as **Annexure-IV Colly** (pages __ to __)**.**

i) In May, 1982, an Operational Safety Survey was conducted by three technicians from UCC, Accused No. 10, who interviewed plant personnel, reviewed design documents, analysed safety procedures and conducted a "detailed physical inspection" of the facility. The team found a number of "major" concerns and possibilities for "serious personnel exposure", which it detailed in its report:

> "Potentials for release of toxic materials in the phosgene/MIC unit and storage areas, either due to equipment failure, operating problems, or maintenance problems. Deficiencies in

safety valve and instrument maintenance programs. Problems created by high personnel turnover at the plant, particularly in operations. Filter cleaning operations were performed without slipbinding process lines. Leaking valves could create serious exposures during this process."

"The plant relies heavily on manual inspection of the Bhopal control and checking of levels."

It warned unequivocally of the "potential for the release of toxic materials" and a consequent "runaway reaction" due to "equipment failure, operating problems, or maintenance problems". It warned of a "higher potential for a serious incident or more serious consequences if an accident should occur." The safety audit team also noted a total of 61 hazards, at least 30 of which were major and 11 of which were specifically identified as hazards in the MIC/phosgene unit. The said report was marked as **Affidavit D-205** before this Hon'ble Court in the 1996 Impugned Judgment**.** According to Mr. T.R. Raghuraman, DW8, in the said proceedings before the Learned CJM, Bhopal, the Operational Safety Survey inexplicably did not oppose shutting down the refrigeration unit. (**Annexure-III)**

The Operational Safety Survey noted and gave notice of numerous serious potential for sizeable release or toxic materials, which included, in relevant part:

"…

(b) Breakage of small lines or connections, either because of inadequate line strength, installation of long unsupported nipples or corrosion. Examples cited included quench pump drain and vent connections…"

It also recommended that numerous remedial steps be taken, none of which were put into place. For instance, it recommended that water sprays be installed, which was never done.

j) In April 1982, the workers at UCIL printed hundreds of pamphlets "WORKER'S PROTEST FOR BETTER SAFETY MECHANISMS", warning:

- "Beware of Fatal Accidents"
- "Lives of thousands of workers and citizens in danger because of poisonous gas"
- "Spurt of accidents in the factory, safety measures deficient."

(**Reference:** page 137 of the Impleadment Application, Annexure-I of the Review Petition)

k) Starting in 1982, a local journalist named Rajkumar Keswani, had written extensively on the dangers of the MIC plant. In September of 1982, he wrote an article titled "Please Save This City". Other articles, written later, bore grim testament to the disaster waiting to unfold. They were titled "Bhopal Sitting On Top of a Volcano" and "If You Do Not Understand This You Will Be Wiped Out". Just five months before the disaster, he wrote an article titled "Bhopal on the brink of a Disaster". His warnings were criminally ignored and met with evasion. On 24th April 1982, the Dainik Aalok published a news report outlining the utter lack of safety measures in the UCIL factory in Bhopal. (**Reference:** page 138 of the Impleadment Application, Annexure-II of the Review Petition). On 7th October, 1982, the Nav Bharat, Bhopal, published a news report about the gas leak in the factory. (**Reference:** page 139 of the Impleadment Application, Annexure-III of the Review Petition).

l) In August, 1982, an engineer received 30% burns on his body when he was splashed with liquid MIC.

m) On 20th October, 1982, a worker's message to the people was communicated, which stated that "[a]ccidents are common and frequent in the factory due to inadequate safety measures…" (**Reference:** page 140 of the Impleadment Application, Annexure-IV of the Review Petition).

n) On 4th March, 1983, a Bhopal based advocate, Mr. Shahnawaz Khan, sent a legal notice to the UCIL, Accused No.12, management by registered post complaining about the accidents that have occurred in the recent past as well as the accident in that month itself and pointed out that the population in the neighbouring colonies was being subjected to poisonous leaks and contamination. It was addressed to the General Manager, UCIL, Bhopal. (**Reference:** page 142 of the Impleadment Application, Annexure-V of the Review Petition).

o) On 29th April, 1983, Mr. J. Mukund, Accused No.5, replied to the legal notice dated 4th March, 1983, assuring Mr. Shahnawaz Khan that the plant had taken "proper precautions with a view to ensure that no pollution is caused by our Pesticide Complex". However, no specific allegations were addressed. (**Reference:** page 145 of the Impleadment Application, Annexure-VI of the Review Petition).

p) Opposition MLAs demanded. in the Madhya Pradesh Legislative Assembly, urging the state government to force Union Carbide/Dow to relocate the plant to a less populated area.

q) Instead of responding to these safety concerns, spelled out in detailed chapter and verse in not only external warnings, but warnings explicitly contained in their own operational safety survey and their own unmodified safety procedures and guidelines, Union Carbide/UCIL and its officials, including the accused herein,

undertook a major cost cutting effort, including a reduction of 333 men from the workforce, saving the company U.S. $ 1.25 million that year. The MIC plant maintenance crew was reduced to from 6 to 2 as a cost cutting measure. In the control room, there was only 1 operator to monitor 70+ panels. Safety training was cut from 6 months to 15 days.

A true copy of the letter from R. Natarajan, Union Carbide Eastern to J.B. Law his Chairman, dated 24th February, 1984 is annexed hereto and marked as **Annexure-V** (pages __ to __).

r) The cost cutting was confirmed by Girija Pandey, in his statement dated 7th January, 1985 (**Reference:** pages 282 to 284 of the Curative Petition, **Annexure P-8 Colly**). Mr. Pandey stated in his statement that during his time, positions were gradually phased out. The position of maintenance supervisor was abolished. According to PW60 and PW62, in proceedings before the Learned CJM, Bhopal, under training staff was asked to work in the MIC plant, and one of them was asked to do so by the Production Supervisor Mr. Satish Khanna.

s) At some point after 27th August, 1984, the safety auditor sent a telex to Mr. Mukund's letter dated 27th August, 1984, stating that the spiral gasket was too expensive, and thus Mr. Mukund's earlier decision in that regard needed to be revised. (**Reference:** PW172, Pt. 3, Exhibit 2609 in the Lower Court Record).

t) In 1984, the factory was running at a loss, and according to the Chargesheet dated 30th November 1987 (paragraph 8) was running at a loss of Rs. 5,03,39,000 for the first 10 months of 1984.

u) In May 1984, on the say-so of US engineers working with knowledge of the Indian management, on whose behalf Mr. S.P. Chaudhary, Accused No.7 made the fateful decision, the "jumper line"

modification was introduced, which was a low cost workaround to a maintenance problem, and connected a relief valve header to a pressure vent header and enabled water from a routine washing procedure to pass between the two, on through a pressure valve, and into MIC storage tank 610. Union Carbide/UCIL's initial investigation agreed that the pressure valve was leaking, but did not attribute it to the jumper line. The plant master card, recording procedural steps / decisions, mentions that on 25th November, 1984, the RVVH and PVH were connected through a jumper line. (**Reference: Exhibit 2589** in the Lower Court Record).

v) In June 1984, new safety guidelines and the start-up procedures, in which the safety norms had been drastically degraded in order to support cost cutting and the corporate objective of maintaining 51% control over UCC by keeping costs downs, were published. These incorporated many of the handwritten changes in the 1979 Start-Up Manual for the MIC Unit. For instance, the MIC storage norms were degraded to allow storage upto 80% (paragraph 4.10.1). Further, the imperative to keep the temperature of the MIC stored between 0° and 15° C was degraded through instructions to:

> "Circulate MIC through the refrigeration unit and maintain tank temperature around 0°C. Once tank contents are chilled and no more MIC is being made into this then the circulation can be stopped <u>as the tanks are supposed to maintain low temperature</u>." (paragraph 4.10.1 (iv))(<u>Emphasis added</u>)

Thus, the MIC tanks, containing a uniquely extreme hazardous material were maintained on the entirely false premise that stainless steel tanks in the climatic conditions of Bhopal would remain at 0°C once cooled, without any further refrigeration. Although it was clear that MIC runaway reaction could not be handled through the capacity

available in the VGS because of the volumes of MIC stored in the tanks, it was stipulated that, "[i]f need arises, MIC can be neutralised in the vent gas scrubber." (paragraph 4.10.1 (viii)) It is evident that the VGS was not designed for an emergency situation, and its stipulation for such a purpose was a deliberate act in complete reckless disregard for its consequences. With these stipulations, it was a certainty that the emergency procedures in case of a reaction would be entirely useless. An evacuation system was mooted as necessary to stop leaks, but none was ever put into place. (paragraph 5)

The Accused herein either worked on, approved, or had knowledge of the MIC Unit Operating Manual 1984, and knowledge of the consequences of the deliberate and criminal degradation of an already fatally defective MIC plant's safety procedures. The motives for such behaviour were the cold and calculated logic that sought both to maximise profit for Union Carbide, and control investment to ensure that UCC maintained control through a stake that exceeded 50% of the shareholdings of UCIL. The Accused herein implemented the global corporate strategic imperatives of UCC.

A true copy of the MIC Unit Operating Manual 1984 II dated 18th June, 1984, is annexed hereto and marked as **Annexure-VI** (pages __ to __)**.**

w) On 24th August, 1984, the General Secretary of the Worker's Union made a representation to the Works Manager at UCIL, Mr. J. Mukund, Accused No.5:

> "In the several meetings we discussed above subject matter and you told us that this is chemical plant and pollution is natural. Mainly in MIC plant, Sevin plant, Temik plant and

formulation (NGP, packing, R#, OGP, S-1-2-3) area pollution has been reached at uncontrollable situation."

(**Reference:** page 147 of the Impleadment Application, Annexure-VII of the Review Petition).

x) Mr. Mukund, Accused No.5, replied on the same day, wrote to the General Secretary of the worker's union, assuring them blithely without addressing any of the specific queries raised then. (**Reference:** page 149 of the Impleadment Application, Annexure-VIII of the Review Petition).

y) At some point in September 1984, an internal Union Carbide memo warned of a "runaway reaction that would cause a catastrophic failure of the storage tanks holding the poisonous [MIC] gas."

z) After 22nd October, 1984, the tank E610 could not be pressurised with nitrogen. The contents of tank E610 from that date providing opportunities for entry of contaminants.

aa) According to Mr. Tejeshwar Rao (PW45 before the Learned CJM, Bhopal), according to comments by Mr. Gauri Shankar in the logbook (**Reference:** Exhibit P811, p. 311, in the Lower Court Record):

> "MIC tank 611 is not getting pressurized, no makeup Nitrogen flow was coming. Nitrogen section isolation valve, nitrogen line cap close, strainer in Nitrogen line to be inspected, unable to transfer MIC to Sevin unit. MIC 610 at section isolation valve on RVVH downstream off blowdown DMV is cap close. Nitrogen is going into the tank but pressure is not building up. To be inspected."

bb) On 2nd December, 1984, none of the safety systems designed to prevent a leak – six in all – were operational, and the plant siren had

been turned off. Exposure to this water attributable to the jumper line led to an uncontrolled reaction; a deadly cloud of MIC, hydrogen cyanide, mono methyl amine and other toxic chemicals. The absence of a refrigeration system gave no buffer time to try and contain the MIC reaction. The MIC in the tank was not being maintained at the pressure of the order of 1 kg / ^{cm2} through the use of nitrogen pressure since 30th November, 1984. There was no remedial action to ensure positive pressure in Tank 610. The evacuation tank had MIC in it. Tank 610 was 80% full. (PW88, Pt.82 and PW62, Pt.16). The UCIL quality control analysis sheet shows that MIC quality was not analysed between 21st October 1984 and 2nd December 1084, contrary to the safety manual. As recorded by the Learned CJM on page 63 of the judgment dated 7th June 2010, PW53 states that the flare tower, 30 TR and VGS were not working, as although they were in operational condition, they were kept shut down. (**Reference:** Annexure P-7, pages 187-281 of the Curative Petition).

As averred in the abstract submitted by the Prosecutor to this Hon'ble Court in the 1996 impugned judgment, there was some repair work in progress that had resulted in the jumper line being opened. It is further averred that:

> "…it appears during the cleaning of choked filters with water in the Relief Valve Vent Header (RVVH), such water perhaps mixed with alkali from Vent Gas Scrubber Accumulator, could have entered the non pressurised tank and may have carried some metallic contaminants from the carbon steel portions of the header pipelines. The rapid rise in temperature necessitates onset of metal catalysed polymerization and could not result from water alone." (***Reference:*** page 77 of the Application for Impleadment)

The chloroform in the MIC, which was at 32 times more than normal levels, accelerated the chain reaction. Union Carbide's own manuals warn that chloroform can react with MIC as well as the stainless steel walls to produce a runaway reaction, and it reacted with the water introduced into the tank.

The first indication of any action in the tanks would have come through the pressure and temperature transmitting lines, but the latter had not been functioning for some time, and pressure was only being gauged at the end of every shift, and the last one had ended at 10:45 pm. (**Reference:** Paragraph 15 of the Charge sheet dated 30th November, 1987, pages 73 to 84 of the Curative Petition). At 10:45 pm, no deviation was noticed on the pressure of Tank 610.

As recited in the Charge sheet, in paragraph 14, the attempts to pressure tank 610 failed:

> "design of the plant ought not have allowed such a contingency to happen at all. The tank being under only atmospheric pressure, free passage was available for the entry of the back flow of the solution from the VGS into the tank. According to the Dr. Vardarajan Committee, about 500 kgs. water with contaminants could enter tank 610 through RVVH/PVH lines. The water that entered RVVH at the time of water flushing along with backed up alkali solution from the VGS already present could find its way into the tank 610 through the RVVH/PVH line via the blow down DMV or through the SRV and RD." (**Reference:** Paragraph 14 of the Charge sheet dated 30th November, 1987, pages 73 to 84 of the Curative Petition).

Some operators noticed leakage of water and gases from the MIC, and informed the Control Room. It was only then that the Control

room, due to a decrease in the frequency of measuring pressure, noticed that the pressure had gone up. Staff were dispatched to check, and the pressure was found to be out of control. Containment efforts could not be implemented. Tank E-619, to be reserved for emergency transfers, was not empty, but contained MIC, and "transfer was not possible".

The staff informed senior officials in Bhopal. There was, however, no warning to anyone with regard to the problem, and no emergency plan was put into place, as none existed, and the siren was not sounded. Instead, false information was released – that the leaked gas was only a potent form of tear gas. Death came unseen in the middle of the night, although the Accused herein, acting knowingly and deliberately with others, had ample notice of it. (**Reference:** Paragraph 17 of the Chargesheet dated 30th November, 1987, pages 73 to 84 of the Curative Petition).

Grounds

9. The Applicants approach this Hon'ble Court, aggrieved by the said orders, for directions on the following, among other grounds, which are without prejudice to one another:

A. The charge sheet and the Supporting Evidence are Sufficient Grounds for an offence u/s 300 (4), punishable u/s 302, read with S. 35 of the IPC against the Accused

A1. The charge sheet dated 30th November 1987 discloses an offence u/s 300 (4) of the IPC, punishable u/s 302 of the IPC. S. 299, in relevant part 4, of the IPC defines culpable homicide, *inter alia,* as the act of causing death with the knowledge that such death is likely to cause death. It is respectfully submitted that the Accused herein all acted deliberately, in concert, with the knowledge of facts that any reasonable person would realise would probably

cause the death of innumerable people. There is little dispute that the acts of the accused herein, cumulatively, resulted in the MIC leak, and the criminal conduct was continued when the population was not warned of their imminent death. The charge sheet in itself, and the supporting evidence adduced and available, clearly demonstrate that the appropriate section of the penal code is not 304-A, as was erroneously held in the impugned 1996 judgment of this Hon'ble Court, reported in **(1996) 6 SCC 129**, and also not S. 304 Part II, as originally articulated, contrary to the content of the charge sheet, and prayed for in the instant Curative Petition.

A2. Murder, the specie of the genus of culpable homicide, with regard to S. 300 (4) of the IPC, punishable u/s 302 of the IPC, is for those culpable homicides which are caused by acts which was with the knowledge that the act is so imminently dangerous that it must in all probability cause death. As articulated by Professor PSA Pillai in his treatise Criminal Law, 10th Edition (LexisNexis Butterworth) it is the "the recklessness and inexcusability of an act must be borne by the facts and circumstances of each case[,]" and "whether the act amounts to murder or culpable homicide depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probably result, it is murder." (Pages 799, 814). This Hon'ble Court has held in *Thangaiya v. State of Tamil Nadu,* **(2005) 9 SCC 650** that:

> "Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of

the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. (Emphasis added)

A3. It is respectfully submitted that the deliberate acts of the Accused, acting in concert, and in full knowledge of the others' actions, were analogous to Illustration 4 of s. 300 of the IPC, which places under s. 300 (4) of the IPC the act of firing "a loaded cannon into a crowd of persons and kill[ing] one of them." The deliberate design defects, whose consequences were known, and the complete flouting of safety guidelines which left the Bhopal MIC plant a land mine in the middle of a population centre, waiting for someone to step onto the landmine to set off the runaway reaction which resulted in the MIC gas leak.

A4. The Bhopal MIC Leak was a certainty due to the deliberate actions of the Accused and others, acting within the purview of their corporate responsibility, with subjective and objective knowledge of the probable consequences of their actions, purportedly advancing their corporate goals. The MIC gas leak was caused by deliberate actions taken despite accurate and credible notice, which should have been known regardless, of imminent danger in storing MIC in the way it was designed to be stored, the way it was maintained, and the way it was safeguarded. The MIC Gas Leak was caused by the gross disproportionally between each plant's production capacity and the safety systems implemented where the plant design and policies led to production and storage requirements that far exceeded the stated safety limits which were anyway only adequate for much smaller volumes of hazardous substances. Their actions were continued by management's systematic failure to inform the victims, or any competent authority, of the hazardous conditions to which they were exposed, and their failures to train the potential victims as to how to respond to and protect themselves from the dangers posed by the plant conditions.

A4.In a persuasive case in the U.S. in which the facts are analogous, where five were charged with the murder of an employee who had not been informed that he was working with substances containing cyanide and failed to advise him about it, train him to anticipate it, and provide adequate equipment to protect him from attendant dangers involved. *People v. O'Neill,* 194 Ill. App. 3d 79; N.E.2d 1092-92 (U.S.) Although the case was remanded to the lower court's on a collateral point to this issue here, the Sixth Circuit, commenting on the case, observed that:

> "An intentional tort is not …. . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. It does not matter whether the employer wishes the injury would not occur or does not care whether it occurs. If the injury is substantially certain to occur as a consequence of actions the employer intended, the employer is deemed to have intended the injuries as well." *Laundree v. AMCA Int'l*, 908 F.2d 43, 44 (6th Cir. 1990, U.S.).

A5. The Chargesheet details that MIC is a uniquely "reactive, toxic, volatile and flammable." According to Union Carbide's Literature:

> "[MIC is highly hazardous and lethal material by all means of contact and is a poison. Skin contact with MIC can cause severe burns. MIC can also seriously injure the eyes even in 1% concentration."

The 1996 Impugned Judgment held that the "counsel for the accused had conceded that the accused did have prior knowledge of the disastrous consequence of escape of MIC into the atmosphere. (***Reference:*** paragraph 16 of the Impugned Judgment, page 23 of the Curative Petition)

A6. As the chargesheet dated 30th November 1987 (***Reference:*** pages 73 to 84 of the Curative Petition) observes with regard to safety procedures that there was sufficient knowledge of the necessity of safety procedures that were

deliberately set aside for a chemical as uniquely and extremely hazardous as MIC:

a) MIC in the tank should not exceed 60% above the capacity of the tank; (Paragraph 20). However, at the time of the incident, the tank E610 was 80% full. The documents, described hereinabove, which detail the requirements of storing more MIC because of a shift to batch processing to save costs is relevant here.

b) For emergency situations, UCC/UCIL procedure calls for the existence of an emergency tank to transfer MIC. However, at the time of the incident, the emergency tank was unusable because it had MIC in it.

c) MIC had to be stored between 0° and 15°C. However, the refrigeration unit had been deliberately shut down in 1982, and there was no buffer time available as the MIC was being stored above 15° C at atmospheric temperatures on the known faulty assumption that the MIC tanks would keep cool even without refrigeration. The absence of MIC at lower temperature did not allow any time to try and contain the reactions of MIC with contaminants that had been introduced in Tank 610E.

d) The storage tank must be 100% free of contaminants, including water, as the pressure in the tank will rise rapidly if MIC is contaminated with water. The workaround jumper line installed in May 1984 resulted in water, entering the MIC storage tank.

e) “MIC is kept under pressure by nitrogen which is supplied by a carbon steel header common to all the storage tank. There is a strainer in the nitrogen line. Subsequent to the strainer the pipe is of carbon steel and leads to make up control valve (DMV) that also has a body of carbon steel. These carbon steel parts could get exposed to MIC vapours and get corroded, providing a source of contamination which

could enter the MIC storage tank and cause dangerous reactions with the MIC." (paragraph 12 of ?)

f) "With regard to back up safety procedures, MIC fumes and other gases that escape, pass through a Process Vent Header (PVH) pipeline of 2" diameter. The PVH line to a Vent Gas Scrubber (VGS) containing alkali solution that would neutralize the escaping gases and release them into the atmosphere carries the escaping gases.

Another escape line of such gases that was provided from the tanks was the Relief Valve Vent Header (RVVH) of 4" diameter. Normal pressure is shown by a pressure indicator, and when it exceeds 40 psig, rupture disc (RD) leading to a safety relief valve (SRV) has to break to allow the escaping gas to get to the VGS for neutralization." (Paragraph 12 of Chargesheet dated 30th November 1987)

However, as found in the judgment dated 7th June, 2010, besides the refrigeration system being shut down long before the incident and the VGS and other alarming system being out of order, "[t]he pipelines were choked and corroded. Valve was leaking and nobody was caring about and because of this on the intervening night of 2nd December, 3rd December 1984 the hazard of this Methyl Isocyanate had happened. (Paragraph 116, Learned CJM Judgment dated 7th June, 2010, page 243 of the Curative Petition)

g) Only stainless steel of type 304 and 306 should come into contact with MIC and used for storage and pipes for transportation, and at no stage should MIC be allowed to come into contact with any other metals. (Paragraph 10)

A7. Further, it is respectfully submitted that it is detailed in the charge sheet dated 30th November 1987 (pages 73 to 84 of the Curative Petition) that there were known inherent design defects in the system:

h) Storage of large quantities of MIC in big tanks is fraught with considerable risk and there was insufficient caution in design. (Exhibit D-146 in the record before this Hon'ble Court in the 1996 impugned judgment). There exist alternatives, safer methods of production, and that MIC should be stored in only small amounts because of safety considerations.

i) PHV and RVVH pipelines as well as valves were of carbon steel, and on account of design defect these lines also allowed back flow of the alkali solution from the VGS to travel upto the MIC tank. There was no adequate remedial action except for draining the alkali solution/water. (Paragraphs 13 and 21)

j) The VGS that had been provided in the design was capable of neutralizing only 13 tonnes of MIC per hour and proved totally inadequate., and tanks E610 and E611 were designed to store 90 tonnes, and tank E 610 was 80% full at the time of the MIC gas leak. (Paragraph 20)

A8. In addition, the Nitrogen Pressure System, which contained the MIC against any contaminants was not working at the time of the explosion, and no remedial action, including shutting down the processes and storing the MIC in drums had been taken. The temperature and pressure measurement systems were not working. However, it is also submitted that even if all the safety systems worked, they would have been unable to prevent the disaster because they wee not designed for the expected consequences of runaway reaction in the storage tank. There was no emergency gas scrubber as existed in the Institute plant in the U.S. The VGS, designed to chemically neutralize any escaping toxins with a caustic soda solution, could not process the MIC stored in the tanks. UCC/UCIL operating manual states that its normal feed rate is 190 pounds per hour at 35° C, and warns that "high pressure in the vent scrubber" is a process "upset" whose solution is to "check for the source

of the release and rectify". MIC at 80% capacity of tank 610 causes gas to escape at many magnitudes that rate in case of a runaway reaction. Similarly, the flare tower, even if it had been working that day, would have been useless to handle the magnitude of gas produced in a runaway reaction.

A9. It is respectfully submitted that at this stage of the proceeding, the charge sheet discloses a trial offence punishable u/s 302 of the IPC, u/s 300 (4) of the IPC and puts the accused on notice on the material allegations that they must answer in a criminal trial. The evidence should have been gone into further detail in the impugned 1996 judgment of this Hon'ble Court.

A10. For instance, it is amply evident that all the accused officials were fully aware of the disastrous consequences of the decision to shut down the refrigeration system in complete violation of stipulated safety norms, despite knowing fully well that these safety norms had to be observed "stringently". They had been warned about the refrigeration unit, and the previous leakage of phosgene gas. As found in the Varadarajan Report, the actual temperature was not known, and this was fatal, as "provision of 'rate of rise in temperature' alarm would have invited the operator's attention to the start of such a reaction." (***Reference:*** D-614 on the record before this Hon'ble Court in the 1996 Impugned Judgment). However, there was an extensive drive to reduce expenses, despite the safety measures required for the uniquely extremely hazardous MIC, and even when new pipes were required to be fitted;, it was compromised by welding old pipes. Even the operating manual established that for bulk systems, were there to be contamination, low temperature "increase the time for detection of the reaction and safe disposal of the material before the reaction rate reaches a dangerous speed." (***Reference:*** page 9, PW8, Exhibit 2587, Lower Court Record).

A11. It is respectfully submitted that the additional elements of S. 302 of the IPC, namely causation, are common knowledge, and entirely supported by the material on record. It is undisputed that the MIC gas leak killed at least

5,295, according to the Union of India revised figures, and 22, 917, according to a conservative extrapolation of the ICMR studies. It is respectfully submitted that the amended charge should account for each death that occurred due to the MIC gas leak, whether immediate or after a considerable passage of time.

A11. The depositions of Prosecution Witnesses PW-164, P-165, P-169 and P-172 i.e. Mr. Kamal Pareek, Mr. Hatim Jariwala, Mr. Shahnawaz Khan and Mr. Rajkumar Keshwani respectively, proved beyond a shadow of doubt that the accused officials of UCC and UCIL had prior knowledge of the disastrous consequences of their reckless and inexcusable violations of safety norms. (7th June, 2010 Judgment of the Learned CJM, Bhopal). The Judgment dated 7th June, 2010 held that:

> "[The accused persons] are also having good knowledge that if the shortcomings in the instruments is not rectified, such incident could happen any time. Knowing all the things, they omitted to do what they were entrusted to do." (***Reference:*** Paragraph 192 of 7th June 2010 Judgment of the Learned CJM, Bhopal, pages 270-271 of the Curative Petition)

It is respectfully submitted that the finding of knowledge of the accused persons of the terrible consequences of their actions warrants an offence u/s 300 (4), punishable u/s 302 of the IPC, and not a lesser charge because the weapon of choice was industrial rather than a rifle.

A11. The actions of the accused were deliberate and seem to have been motivated by cost saving, as outlined hereinabove. Although the manufacture of Sevin required use of extremely hazardous toxic chemicals, the respondents were obliged to install state of the art technology in Bhopal, but instead used admittedly inferior and unproven technology and employed lax operating procedures and maintenance and safety standards compared to those used in its U.S. "sister plant". The motive, it is respectfully submitted, was simply

profit and control. Increased investment would have reduced the share of Union Carbide, USA to less than 51%, and Union Carbide, USA was loath to give up control.

A12. The accused Mr. J. Mukund, Mr. S.P. Chaudhary, Mr. K.V. Shetty and Mr. S.I. Qureshi who were actively associated with the working of the plant had full knowledge of the deficiencies inherent and introduced into the functioning of the plant. Accused Mr. Keshub Mahindra, Mr. V.P. Gokhale, and Mr. Kishore Kamdar too had full knowledge of the defects in the centralised reporting structure of UCIL/UCC.

B. The Institution of Charges U/s 302, for an offence u/s 300 (4), of the IPC is not in Contravention of S. 300 (4) CrPC

B1. It is respectfully submitted that the proscription that a person not be tried again once convicted or acquitted for the same offence is not applicable, and S. 300(4) of the Code of Criminal Procedure (hereinafter "CrPC") is applicable here because the Learned CJM was not competent to try the accused u/s 300 (4) of the IPC, which is a charge triable by a Sessions Court only. The Learned CJM did not exercise his duty to modify the charge and transfer the case to a court of competent jurisdiction pursuant to S. 216 of the CrPC, which may be exercised anytime before judgment. Section 300 (4) CrPC states that:

> "(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

B2. In *Ramekbal Tiwari v. Madan Mohan Tiwary,* **1967 AIR 1156**, a five judge bench of this Hon'ble Court held that there can be fresh charge and trial u/s 307 of the IPC in spite of the acquittal of the appellant therein on charges

u/ss 326 and 338 of the IPC as the offence u/s 307 IPC could not have been charged or tried by a Magistrate and could only have been charged and tried by a Court of Sessions, falling within the scope of S. 300 (4) of the CrPC, where he was first tried was not competent to try the offence with which he is subsequently charged. Illustrations (e) and (f) of Section 300 of CrPC illustrate the significance of S. 300 (4) CrPC. In illustration (e), the offence of robbery is not triable by magistrate of the second class, and his prior conviction for theft is not a bar for the subsequent charge of robbery. It is triable only by a magistrate of the second class. In illustration (f), the offence of dacoity is not triable by a magistrate of the first class; it is triable only by a court of sessions, and thus the prior conviction by a magistrate of the first class is no bar to subsequent trial.

B3. Thus, there is no bar under the statutory implementation of the doctrine of double jeopardy. The accused were convicted by the Learned CJM, pursuant to S. 304-A of the IPC, triable by a Magistrate of First Class. The Learned CJM lacked jurisdiction to try the charge under S. 300 (4) of the IPC (or even 304 Part II of the IPC) regardless of the evidence placed before him. Perhaps due to the quashing of the charge under S. 304 Part II of the IPC by this Hon'ble Court in the 1996 impugned judgement, the Learned CJM rejected an application, pursuant to S. 216 of the CrPC, filed by the intervenors (not applicants here) Bhopal Gas Peedit Sangharsh Sahayog Samiti (BGPSSS) and the Bhopal Gas Peedit Mahila Udyog Sanghathan (BGPMUS) on 26th April, 2010, to frame charges in accordance with the evidence, and commit the case to a Sessions Court to try the offence u/s 304 Part II of the IPC. Although it is respectfully submitted that the appropriate charge was S. 300 (4) of the IPC, punishable u/s 302 of the IPC, the Learned CJM had the power to act, either through an application, or *suo motto*, and did not exercise his power. At this point, however, post judgement, there is no power available pursuant to S. 216 of the CrPC to institute a new charge sheet, and a rejection of this Curative Petition would render the victim's quest for

justice without remedy. Thus, the applications filed before the Learned Sessions Court, Bhopal, by the CBI and the Government of Madhya Pradesh to commit the case to a Court of Sessions pursuant to s. 216 of the CrPC are, it is respectfully submitted, not maintainable, and the instant Curative Petition is the only remedy available for the Applicants herein, and indeed all victims of Bhopal, to see the perpetrators of the crimes that killed at least 22,000 relatives and friends be bought to substantive justice and held accountable.

B4. It is pertinent to reiterate the submissions in the Application for Impleadment as Petitioners No. 2 to 6 (Impleadment Application) of the Applicants that the denial of fair trial, in accordance with the evidence, is also applicable to victims. In not trying the case under the appropriate charge in accordance with the evidence, the principle of fair trial was denied. As this Hon'ble Court held in *Zahira Sheikh v. State of Gujarat,* reported in **(2004) 4 SCC 158,** the operating principles of fair trial involve a "delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to weighted not losing sight of the public interest in the prosecution of persons who commit offences." The Learned CJM, must exercise his statutory powers, including those granted u/s 216 CrPC. The evidence before the Learned CJM warranted committing the case to a Sessions Court for trial u/s 302 (300(4)) of the IPC.

C. The Impugned Judgment and Order of This Hon'ble Court erred in not applying the appropriate standard u/s 482 CrPC and Article 136 of the Constitution of India

C1. It is respectfully submitted the limited nature of this Hon'ble Court's jurisdiction to interfere as that proceedings u/s 227 and 482 of the CrPC do not warrant an exhaustive appraisal of evidence. This Hon'ble Court need not function as the investigating agency and the magistrate committing the case.

It is the magistrate, pursuant to S. 227 of the CrPC who must examine at a preliminary stage whether sufficient ground exist for proceeding against the accused. S. 227 of the CrPC prescribes that, if, upon consideration of the record of the case, and after hearing the submission of the accused and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. Similarly, S. 228 allows the judge to frame charges is appropriate to do so. S. 482 of the CrPC and Article 136 of the Constitution of India must be exercised with due care to prevent the abuse of the judicial process or otherwise secure the interests of justice. There is no jurisdiction given to the higher courts to go into the merit of the allegations at that stage of proceedings as that is reserved for the trial stage.

C2. As delineated recently by this Hon'ble Court in *State of Maharashtra & Ors. v. Arun Gulab Gawali,* **Cr. App. No. 590 of 2007** (decided on 27th August, 2010, and relying in part on *State of Haryana & Ors. v. Ch. Bhajan Lal & Ors.,* **AIR 1992 SC 604**):

> "The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can "soft-pedal the course of justice" at a crucial stage of investigation / proceedings…The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure.

However, there are no limits to the power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers." (paragraph 12)

"The inherent power is to be exercised ex debito jutitiae…" (paragraph 16)

"It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with." (paragraph 17 *citing State of Orissa & Anr. v. Saroj Kumar Sahoo,* **(2005) 13 SCC 540**).

C3. In this instant, it is respectfully submitted, there was no overriding reason to override the discretion of the Learned Session Court to frame charges pursuant to order dated 8 April 1993. (pages 85 to 124 of the Curative Petition). The administration of justice and public interest mitigate against quashing of charges without a full elucidation of the evidence in a crime on the scale of the Bhopal MIC leak, where even counting the dead has been thus far impossible. There was no abuse of process against the accused as alleged. In fact, there is ample evidence, from interviews with the former officers of the investigating agencies, that there was tremendous pressure on them, often successful, to limit the investigation. This was not a thinly veiled civil suit, where the parties were resorting to the criminal justice system to secure private ends.

C4. In the impugned 1996 judgment, this Hon'ble Court relied on *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya,* reported at **(1990) 3 SCR 633** where though the limited nature of the jurisdiction of this Hon'ble Court was acknowledged, this Hon'ble Court held that its role entails examining the material on record to see if the facts emerging therefrom, if taken at face value, disclose the existence of all the ingredients of the alleged acts. However, this Hon'ble Court, in the 1996 impugned judgment, then states that even at this stage "…it cannot be expected … to accept all that the prosecution states as gospel truth…" However, in paragraph 20 of the

impugned 1996 judgment, this Hon'ble Court once again defined the standard of review as finding that "[t]he material on record must at least *prima facie* show that the accused is guilty of culpable homicide". It is respectfully submitted that the standards of review articulated by this Hon'ble Court were inherently contradictory, and it is respectfully submitted, erroneous. It varies between requiring grounds that indicate guilt, and material that indicates guilt, or facts *prima facie* disclosing all ingredients.

C5. It is respectfully submitted that *Niranjan Singh, supra,* in emphasis facts rather than material, is not a clear enunciation of the law on quashing criminal proceeding, as laid down in *Gawali, supra*. It states that the standard is to "evaluate the material to find out if the facts emerging therefrom". It is, however, erroneous for this Hon'ble Court, in the interpretation of this Hon'ble Court's 1996 Impugned Judgement to interpret *Niranjan Singh, supra,* as emphasising facts, since at this stage of criminal proceedings, "facts" mean alleged facts, i.e. the facts stated in the prosecution's case, not established or substantiated facts. However, the judgment of this Hon'ble Court relied on by *Niranjan Singh, supra, Union of India v. Prafulla Kumar Samal,* reported in **(1979) 2 SCR 229**, which effectively restricted the judge's perusal of the material to ascertaining if the material relates *prima facie* to the alleged facts, rather than examining the *prima facie* nature of the facts itself.

C6. It is respectfully submitted that the legal justification set forth by this Hon'ble Court in the impugned 1996 judgment was thus erroneous. It required the prosecution to demonstrate that the facts and/or material made out a case on the basis of the elements of the offence. However, as per the rules emerging from *Prafulla Kumar, supra,* the burden was on the defence to demonstrate that the material does not *prima facie* show or establish guilt. It is further demonstrated that nothing in the record, or the true facts and circumstances of this case, suggest that the accused warranted such flexibility. The question before this Hon'ble Court in the 1996 Impugned

Judgment was whether this case was likely to fall within the ambit of those "rarest of the rare" cases that call for quashing of the prosecution. Indeed, in the interests of justice, this Hon'ble Court must tilt towards interpreting provisions towards the benefit of deference towards the prosecution, and even requiring the investigating agency to conduct investigations diligently and competently, without any consideration of extraneous pressures.

C7. In the alternative, it is respectfully submitted that the charge sheet should have been considered in itself, and it disclosed at least an offence u/s 304 Part II of the IPC, and as demonstrated hereinabove, an offence more appropriately charged u/s 302 (300(4) IPC. The charge sheet pleads the elements of the offence u/s 302 of the IPC, as defined u/s 300(4) of the IPC. Charge sheets may only be quashed because the facts stated in them did not amount to an offence punishable by law.

C8. It is respectfully submitted that this Hon'ble Court, in its 1996 Impugned Judgment, should have directed the Respondents herein to lead their defence to the charges adduced. The 1996 Impugned Judgment itself acknowledges, in Paragraph 22, that the "question of proof of rashness and negligence will arise at the stage of trial after full evidence is led by the prosecution and even by the accused side if at all they choose to do so and in the light of the evidence the question would arise whether the charge as framed is made out by the prosecution against the accused concern."

D. This Hon'ble Court was Erroneous as Quashing was Premature on the Erroneous Finding that the Facts Did Not Make Out a Prima Facie Case Before Conclusion of Investigations

D1. It is respectfully submitted that there was no smoking gun in this case and an investigating agency with the requisite resources, competence, and independence of operation would struggle to collect and adduce the evidence. The Bhopal Gas Leak was unprecedented in scale, magnitude, and complexity. The charge sheet dated 30th November, 1987 (***Reference:*** Page

73 to 84 of the Curative Petition), in paragraph 25, acknowledged that further investigation was required due to the complicated nature of the investigation. In light of this averment in the charge sheet, it is respectfully submitted that this Hon'ble Court's 1996 impugned judgment was premature, particularly when it sought to examine the facts underlying the material on record to reach an erroneous finding. This Hon'ble Court held in *Dr. Monica Kumar & Anr. v. State of U.P. & Ors.,* reported in **(2008) 8 SCC 781** that "[t]he High Court being the highest court of a State should normally refrain from giving a *prima facie decision on a* case where the entire facts are incomplete and hazy, more so when the evidence has been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material." (Paragraph 30)

D2. The task of investigation was particularly difficult due to the fact that Accused Nos.1, 10 and 11 never cooperated with the investigating agencies, and were subsequently declared absconders, as was known in 1996. Most of the highly material evidence was in their possession, and has only recently been released not due to the diligence exercised in the use of the powers accorded by the CBI, but due to discovery in civil proceedings before the U.S. District Court for the Southern District of New York.

D3. It is pertinent that an inspection of the sister plant in West Virginia was never conducted, and it has been stated that the settlement between the Government of India and Union Carbide Corporation prevented the Central Bureau of Investigation from conducting the investigation. The Committee on Government Assurances (2003-2004), Thirteenth Lok Sabha, Twelfth Report On "Extradition of Former Chairman, Union Carbide Corporation", found that after numerous letter rogatories, and visits to the U.S.,

> "…the CBI visited the USA in the 3rd/4th week of November 1988 as per the Letter Rogatory dated July 6, 1988. The CBI team along

with the Counsellor (Pers), Embassy of India in the USA, had several meetings with the officials of the Justice Department of USA and clarified various matters of facts and laws. During the visit, Justice Department of USA intimated that the Letter Rogatory would be sent to the United States Attorney in West Virginia for filing an application for appointment of Commissioner by the District Attorney and service of subpoenas to the UCC Officials to execute the Letter Rogatory. It was decided that after the appointment of the Commissioner, the CBI team will be required to visit USA again for inspecting the plant in West Virginia for a comparative study with the Bhopal (India) Plant as well as to assist officials of Justice Department. However, it was at this stage that the Hon'ble Supreme Court of India passed Orders on February 14, 1989 and February 15, 1989 in various civil petitions by which it ordered the settlement of Civil Suits and UCC was directed to pay a sum of US $ 470 millions and all criminal and civil litigations were quashed. Therefore, the Counsellor (Pers.) Embassy of India, Washington was advised on February 22, 1989 to request the Department of Justice of the USA to keep the matter of conducting investigation in the USA as per the Letter Rogatory in question, in abeyance, till they heard from the CBI in future. However, the Hon'ble Supreme Court vide its Order dated October 03, 1991 in Review Petitions held that the quashing of the Criminal proceedings were not justified. The Criminal proceedings were, therefore, directed to be proceeded with. On receipt of the above Orders dated October 03, 1991 of the Supreme Court of India, the Counsellor (Pers), Embassy of India, Washington (USA) was requested vide D.O. letter dated December 24, 1991 to renew CBI's request to US authorities for taking up the matter relating to Letter Rogatory dated July 06, 1988. Thereafter, the Criminal proceedings were started in the Court of Chief Judicial Magistrate, Bhopal. But

> Accused No. 1 Mr. Warren Anderson failed to attend the Court in spite of service of summons. The trial court thereafter issued orders for proclamation and attachment of property. But since as per legal provisions in the USA, the attachment of property could not be made for compelling the attendance of the accused, which can only be done through extradition proceedings, the Chief Judicial Magistrate, Bhopal ordered for issue of non-bailable warrant for extradition proceedings which was issued on April 10, 1992." (Point 3.9)

A true copy of the first page and the pages with the relevant extract of the The Committee on Government Assurances (2003-2004), Thirteenth Lok Sabha, Twelfth Report On "Extradition of Former Chairman, Union Carbide Corporation" is annexed hereto and marked as **Annexure-VII** (pages __ to __).

D4. Since the charges were reinstituted, the CBI has not taken any further action to execute the aforementioned Letter Rogatory issued by the Learned CJM on 6th July, 1988.

E. This Hon'ble Court Erred in the 1996 Judgement by Relying on the Abstract and Selected Material on the Record

E1. It is respectfully submitted that this Hon'ble Court erred in the 1996 Judgment as it based its reasoning on the ground that the facts did not support a *prima facie* case u/s 304 Part II of the IPC, yet relied, at least in part on an abstract of the evidence provided by the Prosecutor. This Hon'ble Court could not have exercised due care in the exercise of its inherent power without consideration of all the material, although such an exercise was not appropriate, it is respectfully submitted, where the charge sheet made out the elements of the offence charged with material specificity not sure what it should be. Further, the material placed before the Hon'ble Supreme Court is inherently and specifically selective. The entire material available to the Prosecutor at that point of time was not placed before this Hon'ble Court in

1996. It could not have been so placed even if desired, as the investigation was not yet complete. As referenced hereinabove, for instance, there had been no inspection of the "sister" plant in West Virginia, U.S.A, despite the existence of a Letter Rogatory dated 6th July, 1988, which had been accepted by the U.S but kept in abeyance on the request of the Government of India.

G2. The abstract, which was selective, and not comprehensive, was nevertheless, it is respectfully submitted, sufficient to disclose an offence not only u/s 304 Part II of the IPC, but punishable u/s 302, as defined in S. 300 (4) of the IPC. As recited in the Review Petition dated 13th September, 1996, the detailed abstract was filed in which

> "[I]t was recited that in that plant there were no facilities for collecting MIC produced separately in each shift and the material is directly laid into the storage tanks without batch wise analysis. It was also found that there are no online analysers. Similarly, nitrogen from a neighbouring factory is fed directly into the storage tank, without full intermediate storage and quality determination. Carbon steel sections are used in the connectors to the storage tanks. Copper tubes are used is connecters to the level instruments of the tank. The system of instruments for alarm to indicate sudden increase in temperate are not suited to the conditions of operation. Only a single refrigeration system for cooling of MIC in two tanks was installed and it had not been operated for some considerable time. MIC had the combination of properties of very high reactivity with minimum contaminants, ready volatility to become gas and very high inhalation toxicity. The installed facilities provided for disposal of unstable liquid MIC. In alkali or for the neutralization of gaseous emissions from violent reaction. On examination are found to be not capable of meeting the objectives of such disposal in a very short time. The abstract also recited that the ingress of about 600 kg. of water alone, was not the

sole cause of the escape of a huge quantity of toxic gad." (***Reference:*** pages 74 to 75 of Annexure P-1 of the Curative Petition)

The averments in the abstract also stated that:

> "The presence of sodium at levels of 50 to 90 ppm in the samples from residues of tank 610 indicates ingress of some alkali, possibly derived from the vent Gas Scrubber Accumulator. It is known that the tank 610 could not be pressurised with nitrogen at any time after 22 October, 1984. The contents of tank 610 from that date providing opportunities for entry of metal contaminants."

G3. However, the reliance solely on the CBI's limited articulation of the case is illustrated by the averment in the abstract that "[t]he presence of chloroform has no influence whatsoever in initiating or accelerating the run-away reactions." (***Reference:*** page 77 of the Application for Impleadment). Chloroform, according the MIC Operating Manual, in 1984, states that if the chloroform exceeds specified limits, the MIC so diluted needs to be diverted to the dump tank, and the MIC only needs to be stored in the tank once it meets specification. (Page 34, MIC Operating Manual, 1984, **Annexure VII**)

F. The Decision of this Hon'ble Court To Quash Charges under Section 304 Part II of the IPC is Unsupported by its own Findings

F1. It is respectfully submitted that the 1996 Impugned Judgment is in itself contradictory with regard to the fact that accused possessed knowledge. Paragraph 22 of the Impugned Judgement states that "there were not only structural defects but even operational defects in the working of the Plant on the fateful night which resulted in the grim tragedy…" In Paragraph 23, the Impugned Judgment states that "[a] mere look at [section 35] shows that if the act alleged against these accused becomes criminal on account of their sharing common knowledge about the defective running of plant at Bhopal by the remaining accused who represented them on the spot and had to carry

out their directions from them and who were otherwise required to supervise their activity.

F2. It is further respectfully submitted that it is unclear how S. 35 of the IPC, which is charged as a form of liability with s. 304-A of the IPC by this Hon'ble Court in the exercise of its powers u/s 142 of the Constitution of India can be used with the aforementioned section 304-A of the IPC. S. 35 of the IPC is a form of liability for incurring vicarious liability for the actions of those with whom you share common intent or knowledge. Both knowledge and intent are necessarily absent from a charge of S. 304-A of the IPC, as they are required only for culpable homicide, and of course, murder. However, this Hon'ble Court, in the 1996 Impugned Judgment, held that a S. 35 of the IPC for vicarious liability is maintainable, yet quashes S. 304 Part II of the IPC because the element of knowledge is insufficiently demonstrated from the facts. The two are logically inconsistent, and illustrate the contradictions inherent in the 1996 Impugned Judgment.

G. This Hon'ble Court in the 1996 Impugned Judgment Erred in The Appreciation of Material Selectively Placed Before It

G1. It is respectfully submitted that this Hon'ble Court should not have considered individual instances of evidence, selectively placed before it, in consideration of an erroneous burden placed on the Prosecutor to establish that the facts demonstrated that there was a *prima facie* case made out for the offences charged. For instance, consideration of "D-205", the Operational Safety Support recited hereinabove, was erroneous as, contrary to the reliance placed on it, it demonstrates knowledge of all the accused, as the report was widely disseminated, and discussed, and detailed numerous critical safety problems and defects that made the MIC gas leak a certainty. (***Reference:*** Para 18, Page 27 of the Curative Petition). Further, "D-205" demonstrated that no remedial steps were taken by any of the Accused, who

had functional or supervisory authority over the plant, to remedy the problems despite such detailed and specific notice.

G2. The 1996 Impugned Judgment of this Hon'ble Court failed to consider and give appropriate weight, in the absence of any contrary evidence, or any averment that the conclusions therein were beyond common sense or nonsensical, that the MIC plant was defective because of:

> "a. Lack of reliable automatic back-up for cooling water on the CO converter shells.
>
> b. Possibilities of air entry into the flare head of the CO unit.
>
> c. Potentials for release of toxic materials in the phosgene/MIC unit and storage areas, either due to equipment failure, operating problems or maintenance problems.
>
> d. Lack of fixed water spray protection in several areas of the plant.
>
> e. Possibilities for dust explosion in the SEVIN area.
>
> f. Potentials for contamination, overpressure or overfilling of the Sevin MIC feed tank.
>
> g. Possibilities of nitrogen header contamination.
>
> h. Problems created by high personnel turnover at the plan, particularly in operations."

G3. This Hon'ble Court's conclusion in the 1996 Impugned Judgment that the charge of S. 304 Part II was not made out was not possible after the consideration of the Bhopal Gas Tragedy Expert Committee Report which is cited to "indicate [] the dismal situation that existed even in 1982 in M.4.2." This Hon'ble Court observed in the 1996 impugned judgment that:

> "At page 81 of the Report after listing various defects … instrumentation and control system (D-146) In para 5 of the Report, it is concluded, and this cannot be gone behind that at this stage of the proceedings that – 'The needless storage of large quantities of the material in very large-size containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident." (***Reference:*** Paragraph 17 of the Impugned Judgment, Page 151 of the Curative Petition)

The aforementioned report also mentioned the installation of the jumper line and the fact that no transfer of MIC to relief tank could take place. (Paragraph 17)

G4. It is also respectfully submitted that this Hon'ble Court's conclusions were not reasonable after its consideration of and purported reliance on the statements of Arjun Singh, Mohan Singh and Ram Lal and other statements of persons who were employed in the plant. The impugned judgement stated that the aforementioned proposed witnesses had recorded statements that:

> "all the accused had <u>criminal knowledge regarding the defective working of the plant at Bhopal and as the Plant was to be dismantled … were no longer interested in its safekeeping and by their illegal omissions to take appropriate steps for safe keeping of such dangerous material like MIC which they were handling at Bhopal, they were rightly charged for the offences concerned …</u>" (<u>emphasis added</u>)

The Learned Additional Solicitor General relied on Memorandum of Association and Articles of Association of UCIL, Accused No.12, to

demonstrate how Mr. Keshub Mahindra, Accused No.2/Respondent No.1 herein, Chairman, presided over meetings of the Board, and how Mr.V.P. Gokhale, Accused No.3/Respondent No.3 herein worked as a full time Director. (***Reference:*** D-517 before this Hon'ble Court in the Impugned Judgment). 3

G5. This Hon'ble Court's conclusion was also erroneous in its disregarding of a statement, explicitly considered, of Ram Lal, recorded u/s 161 of CrPC, that his superiors responded to his complaints of irritation in the eyes of people working that "such gas leaks keep on happening".

G6. This Hon'ble Court's conclusion was erroneous in its disregarding of important facts, without explanation or reasoning, of the Varadarajan Committee Report (***Reference:*** D-614 on the record before this Hon'ble Court in the 1996 Impugned Judgment) in the aftermath of the disaster, which highlighted several safety lapses that ought to have been known to the accused. For instance, in Paragraph 4.3 of the Report, it was observed that despite the knowledge that the pipes and storage tank for MIC must be made of stainless steel,

> "…the nitrogen was supplied by a common steel header common to all the storage tanks. There is a strainer in the nitrogen line. Subsequent to the strainer the pipe is of carbon steel and leads to make up DMV which also has a body of carbon steel. Similarly, the blow down DMV is also of carbon steel body. These carbon steel parts may be exposed to MIC vapours and get corroded, providing a source of contaminant which can enter the MIC storage tank."

In Paragraph 5 of the Report, it was concluded that:

> "In retrospect, it appears the facts that led to the toxic gas leakage and its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. The needless storage of large quantities of the material in very large size containers for

inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facility of quick effective disposal of material exhibiting instability, led to the accident. These factors contributed to guidelines and practices in operations and maintenance. Thus the combination of conditions for the accident were inherent and extent. A small input of integrated scientific analysis of the chemistry, design and controls relevant to the manufacture would have had an enormous beneficial influence in altering this combination of conflictions, and in avoiding or lessening considerably the extent of damages of December 1984 at Bhopal."

G6. Indeed, nowhere in its discussion on S. 299 of the IPC, punishable u/s 304 Part II of the IPC, does this Hon'ble Court in the 1996 Impugned Judgment examine the significance of the accused's awareness of safety deficiencies. The Prosecution had in fact raised this issue, but their contention was disregarded without explanation, that the accused had not only continued to run the plant knowing about the safety deficiencies, but also that they had not undertaken any measures to rectify them. (***Reference:*** Para 18 of the Impugned Judgment, Page 151 of the Curative Petition)

G7. In light of the instances of the prosecution evidence considered piecemeal and selectively by this Hon'ble Court in the 1996 Impugned Judgment, the conclusion reached in Paragraph 20 of the Impugned Judgment is entirely erroneous. This Hon'ble Court's disregarded the charge sheet and the Prosecutor's statements, and instead relied on its own interpretation of the charge sheet's material averments. The offences were never made out because of "the mere act of storing such a material by the accused in Tank No. 610 could not even *prima facie* suggest that the accused concerned thereby had knowledge that they were likely to cause death of human being."

This Hon'ble Court, in the 1996 Impugned Judgment, in effect, reduced the charges to simpliciter absolute liability, and then rejected the same. However, this was never the charge. This Hon'ble Court presumed the charge was related to (1) merely operating a plant, (2) storing hazardous material, (3) even assuming the plant was defective, knowledge could not be presumed, and (4) knowledge of the hazardous nature of MIC. The knowledge of the defects in design, and the complete and deliberate acts of the accused in shutting down safety systems, failing to take remedial actions or repairs and ignoring safety warnings, all of which made the MIC gas leak a certainty discussed even in the material perused by the Hon'ble Court, were not given due consideration. The Prosecution never suggested that the mere act of storing such a material, MIC, could cause, or the operation of the plant was per se warranting criminal liability. Nor was it the act of running the plant that was considered the actus reus of the murder. The actus reus was commission and omission in taking steps, such as the design and design changes of the plant, shutting down the refrigeration unit, storage of MIC till 80% capacity of tank 610, installation and use of the jumper line, use of the emergency tank to store MIC when it was meant to be empty, storing vast amounts of MIC to save costs, cutting corners of purchase and maintenance of parts, etc. The mens rea is the knowledge that such actions, when possessing knowledge of the uniquely extreme hazardous nature of MIC, would lead to certain death. The charge sheet and framing of charges by the Learned Sessions Court, and the material specificity of the Charge Sheet were not the basis of the quashing of the charge sheet by this Hon'ble Court.

G8. In fact, this Hon'ble Court, in the 1996 Impugned Judgment, records the submissions of the Additional Solicitor General, with regard to the charge of culpable homicide pursuant to S. 304 Part II, but then disregards the same without explanation:

> "…Additional Solicitor General Shri Altaf Ahmed submitted that there was ample material produced by the prosecution in support of

the charge-sheet which clearly indicated that all the concerned accused shared common criminal knowledge about the potential danger of escape of the lethal gas MIC both on account of defective plant which was operated under their control and supervision at Bhopal and also on account of the operational shortcomings…"[Emphasis added] "…. (c) Not maintaining the temperature of the MIC tanks at the preferred temperature of 0 degree Celsius but at ambient temperatures which were much higher…. (e) Not taking any immediate remedial action when tank No. 610 did not maintain pressure from 22nd October 1984 onwards. (f) When the gas escaped in such large quantities, not setting out an immediate alarm to warn the public and publicise the medical treatment that had to be given immediately." (***Reference,*** Para 13 of the Impugned Judgment at Pages 12-13 of Curative Petition)

G8. It is respectfully submitted that this Hon'ble Court erred in its 1996 Impugned Judgment in overlooking logical inconsistencies and inferences. It is indisputable that running a plant with the knowledge that it uses hazardous chemicals will not *per se* establish criminal liability. Neither will running a defective plant establish liability. But when one put the two together, it yields a scenario that entails the accused running the plant knowing it contains ultra hazardous chemicals and that it is seriously defective. In addition, to further make inevitable the release of the MIC gas, a uniquely hazardous chemical that made the consequent death of thousands a certainty, safety measures were removed, not maintained, or not followed. As Pratap Bhanu Mehta points out, "[T]he issue was not liability for an 'accident'; it was liability for knowingly not acting upon risks that were known to exist."

H. The Applicants Herein Were Unable to Approach This Hon'ble Court Before the Conclusion of the Proceedings Before the Learned CJM As The Investigations Were Never Completed, and Some of the Documents

Were Only Disclosed Within the Last Year Due to Related Litigation in the United States Compelling Union Carbide to Disclose Records that were Never Shared With the Investigating Agencies and Materially Relevant to the Prosecution

H1 It is respectfully submitted, as submitted in the Application for Intervention, that Petitioner No.2/Applicant No.1 was one of the Petitioners in the Review Petition filed before this Hon'ble Court (Review Petition (Crl.) No. D20073/97 in Crl.A.No. 1672-1675/96. This Hon'ble Court was pleased to dismiss the review petition on 10th March 1997 through circulation. The review petition had taken the grounds that the accused had knowledge that their acts were likely to cause death. (***Reference:*** Pages 23 to 151 of the aforementioned Applicants application for impleadment).

H2. The Petitioners/Applicants are in full knowledge of the events leading to the MIC Gas Leak, and some of these documents have only been disclosed by Dow / UCC in the last one year, which demonstrate without any doubt that the actions of the accused, acting in concert, were deliberate and with full knowledge of the terrible consequences, but nevertheless undertaken ostensibly only so that cost cutting could be maintained both for the profit motive and so that Accused No.10, absconding here, could maintain controlling stake in UCIL, above 50%, which was restricted to companies undertaking certain activities in accordance with the then requirements of the Foreign Exchange Regulation Act, 1974.

H3. For instance, the Capital Budget Plan, 1977 (**Annexure-II**) was disclosed by UCC, Accused No.12, absconding from Indian judicial proceedings, pursuant to discovery before the Court of the Hon'ble Mr. Justice Keenan, U.S. District Court for the Southern District of New York in 2010. These documents, as detailed, hereinabove, are highly material to the knowledge of the accused, and the rationales for their deliberate actions in cutting safety measures despite their own guidelines.

I. This Hon'ble Court Has The Power to Frame Charges U/s 302 (300(4)) of the IPC pursuant to Article 142 To Direct Framing of Charge Even Though It Was Not Found in the Chargesheet

I1. It is respectfully submitted that, in this instance, the interest of justice warrant that this Hon'ble Court exercise its powers under Article 142 of the Constitution of India. Such an exercise is warranted given the facts and circumstances of the crime alleged, and the facts already proven in criminal proceedings with regard to the case. There is sufficient evidence, and it is respectfully submitted, beyond a reasonable doubt that the Accused, acting in knowledge and/or concert, took deliberate actions, including not taking remedial action with regard to the safety violations disclosed and the defects in the design of the MIC plant, to not implement the safety guidelines and known requirements for storing the uniquely hazardous MIC. These actions were taken primarily for profit, and are thus without excuse. The fact that the weapon of choice for the accused was the pen that authorised the actions does not distract from the fact that there was knowledge that the consequence of those actions was certainly death.

J. For that the present Application is bona fide and made in the Interests of Justice

H. Any other Grounds that may be Argued during Oral Hearings

PRAYER

The Applicants, therefore, most respectfully pray that this Hon'ble Court may be pleased to:

(a) Allow this Application for Directions in the following terms:

i. Direct charges to be instituted u/s 302 for an offence u/s 300(4) of the read with s. 35 of the IPC;

ii. Direct that the charges account for all deaths that occurred due to the MIC Gas Leak, irrespective of the lapse of time;

ii. Direct the Petitioner No.1 to file a charge sheet within three months and to report to this Hon'ble Court;

iii. Direct the Sessions Court with Competent Jurisdiction to Hear the Matter on a Day-to-Day Basis.

(b) Call for the Lower Court Records from the Sessions Court, Bhopal, for appropriate review of the evidence adduced before the Learned CJM, Bhopal; and

(c) Direct the Respondents to pay criminal fines on account of the deliberate nature of the crime and the immensity of its consequences; and

(d) Pass such other and further orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

Drawn By:

Avi Singh
Karuna Nundy
Advocate

Filed by:

Aparna Bhat
Advocate for the Appellants

New Delhi
April, 2011