

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 06.04.2010**
Judgment delivered on: 09.04.2010

+ **BAIL APPLN. NO.431/2010**

SUBHASH @ NATI Petitioner
Through: Mr. R.S. Malik, Advocate

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through: Mr. Manoj Ohri, APP for the State
with Insp. Rakesh, P.S. Darya Ganj.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

J U D G M E N T

VIPIN SANGHI, J.

1. The present application has been filed by the applicant under Section 439 of the Cr.P.C. to seek regular bail. The applicant has been in incarceration since 10.08.2004 in connection with the trial of case bearing FIR No.99/2004 registered under Section 302/120B IPC read with Sections 25/27/54/59 of the Arms Act, P.S. Darya Ganj, SC No.90/09, pending in the Court of Ms. Shailender Kaur, Additional

Sessions Judge-FTC (Central), Tis Hazari Courts, Delhi titled "State v. Mahender Kumar Nigam & Ors."

2. The case of the prosecution is that Mahender Nigam and deceased Yogesh Sharma were doing property construction business jointly. Mahender Nigam was allegedly owing about Rs.6 Crores to the deceased. It is alleged that in order to avoid making payment, accused Mahender Nigam hatched a conspiracy along with the applicant and other co accused to eliminate Yogesh Sharma, and in pursuance thereof one Javed and Abrar were hired to kill the deceased. The conspiracy was given effect to by Javed who shot at the deceased and at that time Abrar was accompanying him by driving the motorcycle on which Javed was sitting.

3. The police has filed a chargesheet against the accused persons including the applicant. The applicant and the other accused are being tried for offences punishable under Sections 302/120B IPC and under Sections 25/27/54/59 of the Arms Act. The applicant has stated that he was granted interim bail vide order dated 22.01.2005 passed by the then Sessions Judge, and after the expiry of the period of bail the applicant surrendered before the Court. He states that most of the prosecution witnesses have already been examined in the case. However, no evidence has come on record to connect him in the alleged conspiracy to murder Yogesh Sharma. He submits that another co accused Rakesh Kumar has been admitted to bail by this Court vide order dated 16.02.2010 passed in Bail Application

No.1777/2009. He further submits that the role assigned to the applicant is identical or lesser in extent to that of co accused Rakesh Kumar. For this purpose, he relies on the contents of the charge sheet. He further states that the mobile no. which is attributed to him is registered in the name of one Ramesh Gopal, who has not been examined. Learned counsel for the applicant has placed reliance on **Nanha s/o Nabhan Kha V. State of U.P.**, 1993 CRI.L. J.938 to submit that since the case of the applicant is similar, if not identical, to that of Rakesh, who has been bailed out, consistency should be maintained by the court and the applicant should be released on bail.

4. On the other hand, the learned APP has opposed by submitting that a specific role had been assigned to the applicant; that the case of the applicant is materially different from that of Rakesh who has been granted bail by this Court.

5. He submits that a recording of the conversation of the applicant with the accused Mahender Kumar Nigam, which is being duly made shows his involvement in the crime. He further argues that the applicant had even refused to give a sample of his voice which establishes his involvement in the crime.

6. The learned APP submits that considering the seriousness of the charge against the applicant, merely because he has been under incarceration since 10.8.2004, does not entitle him to seek bail. In support of his submission, the learned APP has placed reliance on the

judgment of the Supreme Court in ***Kalyan Chandra Sarkar V. Rajesh Ranjan Alias Pappu Yadav and Another***, (2004) 7 SCC 528.

The learned APP has also submitted that the trial is more or less over and most of the witnesses already stand examined. He submits that there are in all about 70 prosecution witnesses in the case. He further submits that the conduct of the applicant in the past has not been good. He was absconding and only after proceedings to declare him a proclaimed offender were undertaken, he surrendered before the Court.

7. In his rejoinder, learned counsel for the applicant has submitted that the prosecution has not examined the various persons whose names have cropped up in the alleged telephonic conversation recorded by the police between the applicant and Mahender Kumar Nigam. He further submits that the tape recording was not sealed immediately upon its being made. He therefore submits that the said tape recording of the alleged conversation is of no avail.

8. The case against the applicant is founded upon circumstantial evidence. The role assigned to him is that he has acted as the link between Mahender Kumar Nigam and one Nadeem, who had, in turn, facilitated the engagement of the alleged contract killers. The further role assigned to him is that he is said to have delivered the money for the killing and to have received the information about the killing and to have passed on the same to Mahender Kumar Nigam.

9. The role allegedly played by the applicant would have to be assessed on the basis of the evidence already led by the prosecution or that may be led hereinafter. At this stage, this Court is not required to assess, even prima facie, the guilt of the applicant. The veracity and the evidenciary value of the tape-recorded mobile phone conversation would also have to be assessed by the trial court. On a perusal of the charge-sheet it appears that the role assigned to the applicant is similar to that assigned to Rakesh who has since been released on bail.

10. Considering the fact that the prosecution has more or less completed the leading of its evidence, there is little or no possibility of the petitioner tampering with the evidence or influencing the trial. The judgment of Supreme Court in **Kalyan Chandra Sarkar** (supra) is not applicable in the facts of this case. Coupled with this is the fact that the petitioner has remained in incarceration since 10.08.2004. Therefore, in my view, the petitioner is entitled to grant of bail. That would also be in consonance with the view taken by the Allahabad High Court in **Nanha** (supra).

11. Accordingly the present application is allowed. The petitioner is admitted to bail on his furnishing a personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the trial Court, subject to the condition that the petitioner shall not leave the territorial jurisdiction of NCT of Delhi.

Petitioner will not contact the prosecution witnesses. He will make himself available during trial or as and when called by the trial Court.

The application stands disposed of.

(VIPIN SANGHI)
JUDGE

APRIL 09, 2010
as/rsk