

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41456 of 2023

Applicant :- Arvind

Opposite Party :- State of U.P.

Counsel for Applicant :- Ajay Kumar Srivastava, Anees Ahmad

Counsel for Opposite Party :- G.A.

Connected with

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 29728 of 2023

Applicant :- Bobby @ Rahul

Opposite Party :- State of U.P.

Counsel for Applicant :- Ajay Kumar Srivastava, Nitin Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Ajay Kumar Srivastava, the learned counsel for applicants and the learned A.G.A. for State.

2. Perused the record.

3. These applications for bail have been filed by applicants-Arvind and Bobby @ Rahul, seeking their enlargement on bail in Case Crime No. 0441 of 2022, under Sections 147, 120-B, 302, 201 IPC, Police Station-Kotwali Fatehgarh, District-Fatehgarh (Farrukhabad) during the pendency of trial.

4. Record shows that in respect of an incident, which is alleged to have occurred on 30.09.2022, a prompt FIR dated 30.09.2022 was lodged by first informant-Smt. Poonam Devi (mother of the deceased) and was registered as Case Crime No. 0441 of 2022, under Sections 147, 120-B, 302, 201 IPC, Police Station-Kotwali Fatehgarh, District-Fatehgarh (Farrukhabad). In the aforesaid FIR, 5 persons namely (1) Arvind, (2) Umesh, (3) Bobby, (4) Roshan and (5) Shiva have been nominated as named accused whereas an unknown person has also been arraigned as accused.

5. The gravamen of the allegations made in the FIR is to the effect that Suraj Yadav (son of the first informant) aged about 20 years

was doing the job of labourer. About 12 days ago from the date of FIR, the son of the first informant had gone out for work. Unfortunately, his dead body was found near the railway track. His legs were amputated from the thigh and there were injuries on his head. The amputated portion of left leg was not near the dead body. The FIR further records that the son of first informant was having love affair with Shivani. The first informant has expressed his apprehension that named accused namely Arvind, Umesh, Bobby, Roshan and Shiva along with some other unknown persons have caused the murder of the son of first informant and thereafter, laid his dead body on the railway track. On account of love relationship aforementioned, named accused had come to the house of first informant 10 to 12 days ago and had broken household goods. The FIR ultimately records that the wives of named accused are also involved in the crime in question, however, subsequently, a compromise was arrived at between the parties.

6. After above-mentioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C.

7. It is apposite to mention here that after the occurrence had taken place, one Anuj Yadav, Gateman gave information to the police. On the aforesaid information, the inquest (*Panchayatnama*) of the body of deceased was conducted. In the opinion of the witnesses of inquest (*Panch witnesses*), the nature of the death of deceased was categorized as homicidal. According to the Panch Witnesses, the cause of death of deceased was injuries inflicted upon the body of deceased. Thereafter, the post mortem of the body of deceased was conducted. In the opinion of Autopsy Surgeon, who conducted autopsy of the body of deceased, the cause of death of deceased was shock and hemorrhage as a result of ante-mortem injuries. The Autopsy Surgeon found following ante-mortem injuries on the body of deceased:-

"1. Lacerated wound 1.6 cm x 3 cm over open of right side of forehead, 6 cm above medial aspect of Rt. eye brow.

2. Lacerated wound 6 cm x 3 cm, bone deep on Rt. Parietal region of Head, 2.8 cm right to midline.

3. Abraded contusion 5 cm x 4 cm on Rt. illiac crest.

4. Abraded contusion 10 cm x 5 cm on part lateral aspect of Rt. elbow.

5. Multiple Abrasion 8 cm x 2 cm to 2.2 cm x 0.3 cm on Anterior lateral aspect of Rt. Lower Arm, Elbow and upper forearm.

6. Abrasion 5 cm x 3 cm medial aspect of Rt. Ankle

7. Abraded contusion 7 cm x 4.5 cm and lateral aspect.

In the opinion of Autopsy Surgeon, the death of deceased had occurred 3 to 4 days ago. However, one leg of the dead body was found to be missing.

8. Subsequent to above, on 01.10.2022, an application was given by the brother of deceased namely Anil @ Banti to the police about the missing leg of deceased. Thereafter, the missing leg of deceased was recovered from a distant place. As a result, part inquest was conducted on 01.10.2022. As per the opinion of witnesses of inquest, the discovered leg (bones) belong to the deceased. However, the cause of separation could not be specified. Part post mortem of the amputated leg was conducted on 02.10.2022. According to the Autopsy Surgeon, no specific reason could be ascertained for separation of leg from the body.

9. During course of investigation, Investigating Officer recorded the statements of following witnesses under Sections 161 Cr.P.C.

(i). Shivani

(ii). Smt. Munni Devi

(iii). Prabhat

(iv). Subhash (neighbour)

(v). Vijay Yadav (Neighbour)

(vi). Shiv Ratan Yadav

(vii). Rajeev Srivastava

(viii). Kripal Singh,

(ix). Brajesh

(x). Shivram Yadav

(xi). Brijesh Kumar

(xii). Prashant Yadav (last seen)

(xiii). Pratap Yadav

(xiv). Ajay Yadav

(xv). Madan Mohan

(xvi). Sunil

10. The theory of last seen has emerged against applicants as per the statements of Prashant Yadav, Pratap Yadav, Ajay Yadav, Madan Mohan and Sunil. In the statements of Shivani, Smt. Munni Devi, Prabhat, it has come that the deceased was having affair with Shivani. The witnesses Subhasha and Vijay Yadav in their statements have stated enmity in between the deceased and the accused. The witnesses Shiv Ratan Yadav, Rajeev Srivastava, Kripal Singh and Shiv Ram Yadav in their statements have stated that the deceased having affair with Shivani. Another witness Brajesh in his first statement under Section 161 Cr.P.C. has alleged that the deceased was having affair with Shivani on account of above, relationship between the family of deceased and present applicant was not cordial. To the contrary, it was bitter. Subsequently, the repeat statements (Bayan Majeed) of aforesaid witnesses were recorded wherein they have not rejoined their previous statements under Section 161Cr.P.C. On the above conspectus, the learned counsel for applicants contends that prosecution witnesses are themselves not clear about the prosecution story which is set out to prove against applicants.

11. On the basis of above and other material collected by Investigating Officer, he came to the conclusion that complicity of applicants is fully established in the crime in question. He, accordingly, arrested the named accused Arvind on 31.03.2023, Umesh on 23.02.2023, Bobby on 01.04.2023 and Roshan on surrendered on 06.04.2023 before the C.J.M., Farrukhabad. Named accused Roshan in his confessional statement admitted his guilt. He also detailed the manner of occurrence regarding the death of deceased. On the basis of above and other material collected by Investigating Officer during the course of investigation, he opined to submit the charge sheet. Accordingly, Investigating Officer submitted the charge sheet dated 20.04.2023 whereby Arvind, Umesh, Bobby and Roshan have been charge sheeted under Sections 147, 120-B, 302, 201 IPC whereas one of the named accused Shiva has been exculpated.

12. Learned counsel for applicants contends that though applicants are named and charge sheeted accused, yet they are liable to be enlarged on bail. Present case is a case of circumstantial evidence and therefore, there is no eye witness of the occurrence. Applicants have been falsely implicated in the crime in question on the basis of suspicion. It is by now well settled that suspicion howsoever strong cannot take the place of proof. The complicity of an accused in a case based on circumstantial evidence can be inferred only in accordance with the parameters laid down by the Apex Court in ***Sharad Birdhichand Sarda Vs. State of Maharashtra AIR 1984 SC 1622 (Paragraph 152)***. However, up to this stage, none of the parameters laid down by the Apex Court in aforementioned judgment is satisfied against applicants. It is then contended that no recovery has been made from applicants. No animus can be attached to the applicants for committing the crime in question as there was no pre-existing enmity in between the applicants and the deceased. According to the learned counsel for applicants, the complicity of present applicants is sought to be alleged in the crime in question on the basis of the following incriminating circumstances;-

(A). There was love relationship in between the deceased and Shivani (daughter of Ram Niwas),

(B). The evidence of last seen which has emerged in the affidavit of Prashant Yadav and the statements of Pratap Yadav, Ajay Yadav and Madan Mohan which is on record at C.D. page No. 24 and 26.

(C). Motive

(D) The confessional statements of the accused.

13. According to the learned counsel for applicants, the aforesaid incriminating circumstances when considered singularly or cumulatively cannot lead to the conclusion regarding the guilt of applicants. The aforesaid incriminating circumstances by itself are not so sufficient enough so as to conclude the guilt of the applicants. So far as the relationship of deceased with Shivani is concerned the girl (Shivani) in her statement under Section 161 Cr.P.C. has admitted her relationship with the deceased. However, the nature of relationship has not been detailed. Therefore, the true nature of relationship can be unearthed only during the course of trial. Learned counsel for applicants contends that surprisingly the lady Shivani has not been charge sheeted. With regard to the second circumstance, the learned counsel for applicants contend that no conviction can be made simply on the basis of last seen

vide following two judgments of the Supreme Court (1) ***Jaswant Gir Vs. State of Punjab (2005) 12 SCC 438*** and (2) ***Jabir Vs. State of Uttarakhand, 2023 SCC OnLine SC 32***. Furthermore, the statement of the witnesses of last seen namely Prashant Yadav who gave affidavit and Pratap Yadav, Ajay Yadav and Madan Mohan were recorded after a great delay which itself is an adverse circumstance against the prosecution but remains unexplained up to this stage. No strong motive has emerged against the applicants to commit the crime in question even when motive plays an important link in the chain of circumstances in a case based on circumstantial evidence. It is further submitted that confession is a very weak type of evidence and can be relied upon only when there is corroboration of the same with the other material on record. According to the learned counsel for applicant, the alleged confession of the accused remains uncorroborated till date.

14. Even otherwise, applicants are men of clean antecedents inasmuch as, they have no criminal history to their credit except the present one. Applicant-Arvind is in jail since 31.03.2023 whereas applicant-Boby @ Rahul is in jail since 01.04.2023. As such, they have undergone more than 8 and 1/2 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicants stands crystallized. However, up to this stage, no such incriminating circumstance has emerged on record necessitating the custodial arrest of applicants during the pendency of trial. On the above premise, he submits that applicants are liable to be enlarged on bail. In case, the applicants are enlarged on bail, they shall not misuse the liberty of bail and shall co-operate with the trial.

15. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that applicants are named and charge sheeted accused, therefore, they do not deserve any indulgence by this Court. The complicity of applicants in the crime in question stands fully established, therefore, no sympathy be shown by this Court in favour of applicants. Learned A.G.A. has then referred to the bail rejection order and on basis thereof, he submits that as per the statements of the witnesses examined under Section 161 Cr.P.C., the complicity of applicants stands fully established in the crime in question. However, the learned A.G.A. could not dislodge the factual and legal submissions urged by the learned counsel for applicants in support of the present applications for bail with reference to the record at this stage.

16. Having heard, the learned counsel for applicants, the learned

A.G.A. for State, upon perusal of record, evidence, nature and gravity of offence, accusations made, complicity of accused and coupled with the fact that present case is a case of circumstantial evidence, therefore, there is no eye witness of the occurrence, the guilt of an accused in a case based on circumstantial evidence has to be inferred in accordance with the parameters laid down in the case of **Sharad Birdhichand Sarda (Supra)**, however, up to this stage, none of the parameters laid down by the Apex Court in aforementioned judgment are satisfied against applicants, no recovery has been made from the applicants, no animus can be attached to the applicants to commit the crime in question as there was no pre-existing enmity between the deceased and the applicants, however irrespective of above, the complicity of applicants in the crime in question is sought to be alleged on the strength of the incriminating circumstances that have emerged against the applicants and have already been referred to hereinabove, however, the relationship in between the deceased and the girl i.e. Shivani is not fully established from the record inasmuch as, except for the confessional statement of the girl, there is nothing else to support the same, the theory of last seen is by itself insufficient to infer the guilt of applicants in view of the law laid down by the Apex Court **Jaswant Gir (Supra)** and **Jabir (Supra)**, the motive that has emerged against the applicants for committing the crime in question is itself not so sufficient so as to infer the guilt of applicants, whereas motive plays an important link in the chain of circumstances in a case based on circumstantial evidence vide **Nandu Singh Vs. State of M.P., 2022 SCC OnLine SC 1454**, the confessional statements of accused cannot be relied upon to infer the guilt of applicants in the absence of corroboration of the same with the record, prima-facie, the confession made by the accused remains uncorroborated upto this stage, moreover, the confession made by co-accused cannot be read against another co-accused, the clean antecedents of applicants, the period of incarceration undergone, the police report in terms of Section 173(2) Cr.P.C. has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicants stands crystallized, yet in spite of above, the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicants during the pendency of trial, therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present applications for bail, but without making any comments on the merits of the case, applicants have made out a case for bail.

17. Accordingly, the bail applications are **allowed**.

18. Let the **applicants-Arvind and Bobby @ Rahul**, be released on bail in the aforesaid case crime number on their furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST THE HIM/HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

19. However, it is made clear that any wilful violation of above conditions by the applicants, shall have serious repercussion on their bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 5.12.2023/Vinay