

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41835 of 2023

Applicant :- Mohd Shahnawaj

Opposite Party :- State of U.P.

Counsel for Applicant :- Sanjeev Kumar Yadav

Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39044 of 2023

Applicant :- Faisal

Opposite Party :- State of U.P.

Counsel for Applicant :- Abhishek Chauhan,Sumant Kumar Tiwari

Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38789 of 2023

Applicant :- Mohd Hashim

Opposite Party :- State of U.P.

Counsel for Applicant :- Tripurari Pal,Awadhesh Kumar Pandey,Kunal Shah

Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39649 of 2023

Applicant :- Mahtab Aalam

Opposite Party :- State of U.P.

Counsel for Applicant :- Ashwani Kumar Pathak

Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41181 of 2023

Applicant :- Shadab

Opposite Party :- State of U.P.

Counsel for Applicant :- Mohd. Shueb Khan

Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 39648 of 2023

Applicant :- Rafi

Opposite Party :- State of U.P.

Counsel for Applicant :- Ashwani Kumar Pathak
Counsel for Opposite Party :- G.A.,Narendra Kumar Chaturvedi

Hon'ble Rajeev Misra,J.

Heard Mr. Sanjeev Kumar Yadav, Mr. Abhishek Chauhan, Mr. Kunal Shah along with Mr. Tripurari Pal, Mr. Ashwani Kumar Pathak and Mr. Mohd. Shoeb Khan, the learned counsel for applicants, the learned A.G.A. for State and Mr. Narendra Chaturvedi, the learned counsel representing first informant.

These applications for bail have been filed by applicants Mohd Shahnawaj, Faisal, Mohd Hashim, Mahtab Aalam, Shadab and Rafi seeking their enlargement on bail in Case Crime No.186 of 2022, under Sections 147, 148, 302, 506, 34 IPC, police station Gorakhnath, district Gorakhpur, during the pendency of trial i.e. Sessions Trial No.1813 of 2022 (State Vs. Mohd. Shahid @ Raju and others) now pending in the court of Additional District & Sessions Judge, Court No.6, Gorakhpur.

At the very outset, the learned counsel for applicants jointly contend that three of the named accused, namely, Shafi, Mohd. Shahid alias Raju and Ashfaq Ahmad have already been enlarged on bail by this Court vide order dated 18.08.2023 passed in Criminal Misc. Bail Application Nos.30726 of 2023 (Shafi Vs. State of U.P.); 56280 of 2023 (Mohd. Shahid alias Raju Vs. State of U.P.); and 34660 of 2023 (Ashfaq Ahmad Vs. State of U.P.). For ready reference, the order dated 18.08.2023 is reproduced herein-under :-

"Ref: Amendment Application No.(1) of 2023 in Bail Application No. 30726 of 2023

Heard Mr. Khurshed Alam, the learned counsel for applicant- Rafi, the learned A.G.A. for State and the learned counsel for first informant.

Applicant has filed an amendment application seeking amendment in the cause title of bail application of applicant- Rafi.

Amendment prayed for is bonafide.

It is accordingly allowed.

Let necessary amendment in the cause title of bail application of applicant- Rafi be carried out during the course of the day.

Accordingly, the name of the applicant Rafi in cause title of bail application has been amended as Shafi.

Ref: On Application

Heard Mr. Khurshed Alam, the learned counsel for applicant- Shafi, Mr. Kunal Shah along with Mr. Suvansit Kumar Jaiswal, the learned counsel for applicant- Mohd. Shahid Alias Raju, Mr. Abhishek Chauhan, the learned counsel for applicant- Ashfaq Ahmad, the learned A.G.A. for State and and Mr. Mukesh

Kumar, the learned counsel for first informant.

Perused the record.

These applications for bail have been filed by applicants- Shafi, Mohd. Shahid Alias Raju, Ashfaq Ahmad seeking their enlargement on bail in Case Crime No. 186 of 2022, under Sections 147, 148, 506, 302, 34, IPC, Police Station- Goraknath, District-Gorakhpur during the pendency of trial.

Record shows that in respect of an incident which is alleged to have occurred on 25.7.2022, a promot F.I.R. dated 25.7.2022 was lodged by first informant-Minhajulhaq and was registered as Case Crime No. 186 of 2022, under Sections 147, 148, 506, 302, 34, IPC, Police Station- Goraknath, District-Gorakhpur. In the aforesaid F.I.R. six persons namely, Mohammad Shahid, Mohammad Hashim, Tausif Alam, Mehtab Alam, Azhar Kha, Shehnwaz, Shadab have been nominated as named accused.

The gravamen of the allegations made in the F.I.R. is to the effect that named accused who were armed with deadly weapons with a common intention assaulted Merajulhaq, brother of first informant. Accordingly, he sustained injuries. Ultimately, the injured succumbed to the injuries sustained by him.

After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms Chapter XII Cr.P.C. Inquest (Panchayatnama) of the body of deceased was conducted. In the opinion of witnesses of inquest (panch witness), the nature of death of deceased was characterized as homicidal. Thereafter, post mortem of body of deceased was conducted. The autopsy surgeon who conducted autopsy of the body of deceased found following ante-mortem injuries on the body of deceased:

- "(i) L.W. size 6 cm x 5 cm x one bone deep present on rt. side forehead.
- (ii) L.W. size 7 x 2 cm x deep bone present on rt. side parietal bone of skull.
- (iii) Contuse swelling size 10 cm x 5 cm on rt. side face.
- (iv) L.W. size 5 cm x 2 cm. x bone deep present upper back Rt. ear.
- (v) 10-12 piece of bone occur on rt. side of parietal and temporal bone region.
- (vi) skull bone . brain membrane haematoma present."

In the opinion of autopsy surgeon, the cause of death of deceased was opined as Coma as a result of ante-mortem head injury.

During course of investigation, Investigating Officer examined first informant and other witnesses. Witnesses so examined have supported the F.I.R. Investigating officer also recovered the CCTV Footage, on the basis of which complicity of the named accused is said to be established. On the basis of above, it was discovered that apart from the complicity of named accused and five more persons are involved in the crime in question. Ultimately, Investigating Officer submitted the charge sheet dated 22.9.2022, whereby and whereunder, 12 persons whose complicity emerged during course of investigation have been charge sheeted under sections 147, 148, 506, 302, 34, IPC.

At the very outset, learned counsel for applicants contend that one of the charge sheeted accused namely Imran has already been enlarged on bail vide order dated 17.7.2023, passed in Criminal Misc. Bail Application No. 31015 of

2023 (Imran Vs. State of U.P.). For ready reference the same is reproduced herein under:

""By means of the the bail application the applicant has prayed to be enlarged on bail in Session Trial No. 1813 of 2022 arising out of Case Crime No. 186 of 2022 at Police Station- Gorakhnath, District- Gorakhpur under Sections 147, 148, 302, 506, 34 IPC. The applicant is in jail since 09.09.2022.

The bail application of the applicant was rejected by the learned trial court on 22.03.2023.

The following arguments made by Shri Sanjeev Kumar Yadav, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Chandan Agarwal, learned AGA from the record, entitle the applicant for grant of bail:

1. The applicant was not named in the FIR.
2. The applicant was subsequently introduced as an after thought at the instigation of some interested parties.
3. The applicant was not identified in the CCTV footage of the incident.
4. Other co-accused were nominated on the basis of said identification and other evidences.
5. The case of the applicant is distinguishable from the aforesaid accused persons.
6. The applicant does not have any criminal history apart from this case.
7. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

Let the applicant- Imran be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

- (i) The applicant will not tamper with the evidence or influence any witness during the trial.
- (ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted. "

It is next contended that there are as many as 12 charge sheeted accused. The deceased has died on account of head injuries sustained by him. However, neither in the F.I.R. nor in the statement of witnesses, the author of the fatal injuries sustained by the deceased has been identified. As such, general role has been assigned to all the accused. It is thus urged that applicants are liable to be enlarged on bail.

According to Mr. Kunal Shah, though reliance is placed upon CCTV footage, same is not worthy of reliance. The place of occurrence is 1 km away from the place where the CCTV was installed. The place from where the CCTV footage

was recovered is not depicted by Investigating Officer in the site plan. The ocular version of the occurrence does not tally with the pictorial image of the CCTV footage.

Even otherwise, applicants are men of clean antecedents inasmuch as they have no criminal history to their credit except the present one. Applicants-Shafi and Ashfaq Ahmad are in jail since 9.9.2022. As such, they have undergone more than ten months of incarceration. Applicant-Mohd. Shahid Alias Raju is in jail since 30.7.2022. As such, he has undergone more than one year of incarceration. Police report in terms of Section 173 (2) Cr.P.C. i.e charge sheet has already been submitted against applicants, as such, the entire evidence sought to be relied upon by the prosecution against applicants stands crystalized, however, no such circumstance has emerged on the record necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged 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 trial.

Per contra, the learned A.G.A. for State, and Mr. Mukesh Kumar, the learned counsel for first informant have opposed the prayer for bail. They submit that since applicants are named as well as charge sheeted accused, therefore they do not deserve any indulgence by this Court. It is also urged by the learned counsel for first informant that bail applications of the two of the charge-sheeted accused namely Tausif Ali and Ashar Khan, have already been rejected by this Court. The details of the bail rejection orders are as under:

(i) Criminal Misc. Bail Application No. 13138 of 2023 (Tausif Ali Vs. State of U.P.), rejected on 3.5.2023

(ii) Criminal Misc. Bail Application No. 54251 of 2023 (Ashar Khan Vs. State of U.P.) rejected on 21.3.2023

On the above premise, he submits that since bail applications of similarly situate and similarly circumstanced co-accused have already been rejected, therefore, the present applications are also liable to be rejected. Learned counsel for first informant contends that there are as many as two eye witnesses of the occurrence, who have fully supported the F.I.R. As per statement of witnesses, the complicity of applicants is clearly established in the crime in question. Since criminality committed by charge sheeted accused is joint and common, therefore, same cannot be separated or segregated. As such, no indulgence be granted by this Court in favour of applicants. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicants, with reference to the record at this stage.

Having heard the learned counsel for applicants, the learned A.G.A. for State, the learned counsel for first informant upon perusal of material brought on record, evidence, nature and gravity of offence as well as complicity of applicants, accusation made coupled with the fact that in the F.I.R. only seven persons were nominated as named accused, during course of investigation complicity of five more persons have emerged, the charge sheet has been submitted against 12 accused. Out of the 12 charge sheeted accused, one of the charge sheeted accused has already been enlarged on bail, as per post mortem report of the deceased, the cause of death of the deceased is coma as a result of ante-mortem head injury sustained by deceased, However, neither in the F.I.R. nor in the statement of witnesses examined under section 161 Cr.P.C., the author of fatal injuries has been nominated or specified, the role assigned to each of the accused is general, clean antecedents of applicants, the period of incarceration undergone, police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicants, as such, the entire evidence sought to be relied upon by the prosecution against applicants stands crystalized, inspite of above, the learned A.G.A. nor the learned counsel for first informant could not point out any such circumstance from the record

necessitating custodial arrest of applicants during pendency of trial, the judgement of Supreme Court in *Sumit Subhaschandra Gangwal and another Vs. The State of Maharashtra and Another*, 2023 Live Law (SC) 373 (paragraph 5), the period of incarceration undergone by the applicants, the clean antecedents of applicant, co-accused Tausif Ali, Ashar Khan are distinguishable, but without making any comments on the merits of the case, applicants have made out a case for bail.

Accordingly, the bail applications are Allowed.

Let the applicants Shafi, Mohd. Shahid Alias Raju, and Ashfaq Ahmad, be released on bail in the aforesaid case crime number on 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.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her 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."

It is next contended that co-accused Imran has been enlarged on bail by this Court vide order dated 17.07.2023 passed in Criminal Misc. Bail Application No.31015 of 2023 (Imran Vs. State of U.P.). For ready reference, the order dated 17.07.2023 is reproduced herein-under :-

"By means of the the bail application the applicant has prayed to be enlarged on bail in Session Trial No. 1813 of 2022 arising out of Case Crime No. 186 of 2022 at Police Station- Gorakhnath, District- Gorakhpur under Sections 147, 148, 302, 506, 34 IPC. The applicant is in jail since 09.09.2022.

The bail application of the applicant was rejected by the learned trial court on 22.03.2023.

The following arguments made by Shri Sanjeev Kumar Yadav, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Chandan Agarwal, learned AGA from the record, entitle the applicant for grant of bail:

1. The applicant was not named in the FIR.
2. The applicant was subsequently introduced as an after thought at the instigation of some interested parties.
3. The applicant was not identified in the CCTV footage of the incident.
4. Other co-accused were nominated on the basis of said identification and other evidences.
5. The case of the applicant is distinguishable from the aforesaid accused persons.
6. The applicant does not have any criminal history apart from this case.
7. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

Let the applicant- Imran be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

- (i) The applicant will not tamper with the evidence or influence any witness during the trial.
- (ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted."

It is next contended by the learned counsel for applicants that the bail application of accused Ashahar Khan was rejected by this Court vide order dated 21.03.2023 passed in Criminal Misc. Bail Application No.54251 of 2022. However, co-accused Ashahar Khan approached the Apex Court by filing Criminal Appeal No.2979 of 2023 (arising out of SLP (Criminal) No.6247 of 2023). The same was allowed vide order dated 25.09.2023, which reads as under :-

"ORDER

1. Leave Granted.

2. Heard the learned counsel counsel for the appellant, as also the learned counsel for the respondent-State and perused the appeal papers.

3. The learned counsel for the respondent-State, with reference to the objection statement filed on their behalf, would contend that the prayer, as made in the instant appeal seeking interim bail is not justified. However, we take note that in the instant case, the co-accused have been released on bail and the charge-sheet has been filed as far back as on 22.09.2022. Further, the appellant herein, has been in custody since 28.07.2022.

4. Taking into consideration all these aspects of the matter, we deem it appropriate that the appellant herein, be enlarged on bail.

5. Hence, the appellant herein, is directed to be enlarged on bail subject to appropriate conditions being imposed by the Trial Court.

6. For the said purpose and for issue of released orders, the appellant shall forthwith be produced before the rial Court.

7. Ordered accordingly.

8. The appeal is accordingly, disposed of along with the pending application(s), if any."

It is lastly contended that the bail application of co-accused Tausif Ali was also rejected by this Court and he has also approached the Apex Court for seeking his enlargement on bail.

On the above premise, the learned counsel for applicants submit that the case of present applicants is similar and identical to aforementioned named/charge-sheeted co-accused who have already been enlarged on bail. There is no such distinguishing feature on the basis of which the case of the present applicants could be so distinguished from the aforementioned named/charge-sheeted but bailed out co-accused so as to deny bail to the applicants. It is thus urged that in view of above and for the facts and reasons recorded in bail orders of co-accused referred to above, the applicants are also liable to be enlarged on bail on the ground of parity.

Even otherwise, the applicants are men of clean antecedents having no criminal history to their credit except the present one. The applicants are in jail since 04.08.2022; 09.09.2022; 28.07.2022 and 01.08.2022. As such, they have undergone more than one year of incarceration. The police report under Section 173 (2) CrPC has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicants stands crystalized. Up to this stage, no such circumstance has emerged necessitating the custodial arrest of applicants during the pendency of trial. They, therefore, submit 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.

Per contra, the learned A.G.A. and the learned counsel representing first informant have opposed the prayer for bail. They submit that since applicants are named and charge-sheeted accused, therefore, they do not deserve any indulgence by this Court. Moreover, since the criminality committed by the named/charge-sheeted accused is joint and common therefore, the same is incapable of separation and segregation. As such, no exception can be carved out in the case of present applicants. They, therefore, contend that no sympathy be shown by this Court in favour of applicants. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

Having heard the learned counsel for applicants, the learned A.G.A. for State, the learned counsel representing first informant, upon perusal of material brought on record, nature and gravity of offence, evidence, complicity of the accused, accusation made and coupled with the fact that similarly situate and circumstanced named/charge-sheeted co-accused have already been enlarged on bail by this Court, learned A.G.A. or the learned counsel representing first informant could not point out any such distinguishing feature to distinguish the case of the present applicants with the case of the named/charge-sheeted but bailed out co-accused referred to above so as to deny bail to the present applicants, the police report under Section 173 (2) CrPC has already been submitted, therefore the entire evidence sought to be relied upon by the prosecution against applicants stands crystalized, yet the learned A.G.A. nor the learned counsel representing first informant could point out from the record any such circumstance necessitating the custodial arrest of the applicants during the pendency of trial, judgement of the Apex Court in the case of **Sumit Subhashchandra Gangwal and Another Vs. State of Maharashtra and Another 2023 LiveLaw (SC) 373 (paragraph 5)**, the clean antecedents of the applicants, the period of incarceration undergone, therefore irrespective of the objections raised by the learned A.G.A. and the learned counsel for first informant in opposition to the present application for bail but, without making any comments on the merits of the case, the applicants have made out a case for bail.

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

Let the applicants **Mohd Shahnawaj, Faisal, Mohd. Hashim, Mahtab Aalam, Shadab and Rafi**, be released on bail in the aforesaid case crime number on their furnishing personal bonds and two heavy 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 applicants shall file an undertaking to the effect that they 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 applicants shall remain present before the trial court on each date fixed, either personally or through their counsel. In case of their absence, without sufficient cause, the trial court may proceed against them under section 229-A I.P.C.

(iii) In case, the applicants misuse the liberty of bail during trial and in order to secure their presence proclamation under section 82 Cr.P.C., may be issued and if applicants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law, under section 174-A I.P.C.

(iv) The applicants 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 applicants 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 them 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 applicants.

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 :- 24.11.2023.

Rks.