

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42786 of 2023

Applicant :- Mahesh Kumar

Opposite Party :- State of U.P.

Counsel for Applicant :- Pankaj Kumar Tyagi

Counsel for Opposite Party :- G.A.,Amrish Sahai

and

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 32285 of 2023

Applicant :- Santosh Kumar @ Sonu

Opposite Party :- State of U.P.

Counsel for Applicant :- Mandeep Singh,Pankaj Kumar Tyagi

Counsel for Opposite Party :- G.A.,Amrish Sahai

Hon'ble Rajeev Misra,J.

1. Supplementary affidavit filed by learned counsel for applicant in Criminal Misc. Bail Application No. 42786 of 2023 (Mahesh Kumar Vs. State of U.P.) in Court today is taken on record.
2. Heard Mr. Pankaj Kumar Tyagi, the learned counsel for applicants, the learned A.G.A. for State and Mr. Amrish Sahai, the learned counsel representing first informant.
3. Perused the record.
4. These applications for bail have been filed by applicants- Mahesh Kumar and Santosh Kumar @ Sonu seeking their enlargement on bail in Case Crime No. 113 of 2023 under Sections 323, 304 I.P.C., Police Station-Dibai, District-Bulandshahr, during the pendency of trial.
5. Record shows that in respect of an incident, which is alleged to

have occurred 28.03.2023, a prompt F.I.R. dated 28.03.2023 was lodged by first informant-Bhojraj Singh (father of the deceased) and was registered as Case Crime No. 113 of 2023 under Sections 323, 304 I.P.C., Police Station-Dibai, District-Bulandshahr. In the aforesaid F.I.R., three persons namely Mahesh Kumar, Sonu and Raju have been nominated as named accused.

6. The gravamen of the allegations made in the F.I.R is to the effect that Kishan @ Kalu, son of the first informant aged about 23 years was having love affair with the daughter of applicant Mahesh Kumar. It was in the light of above that the son of first informant namely Kishan @ Kalu went to meet the daughter of applicant Mahesh Kumar in his house where he was assaulted by named accused with Danda and Belt. Thereafter, a call was given by accused to first informant to take his son. Ultimately, the son of first informant died on the same day at 6.30 PM.

7. It is apposite to mention here that after the occurrence had occurred, the information regarding aforesaid occurrence was received by the Police. On the said information, inquest (Panchayatnama) of the body of deceased was conducted on 21.06.2023. In the opinion of the witnesses of inquest (panch witnesses), the nature of death of deceased was categorised as homicidal and cause of death of the deceased was specified as injuries sustained by the deceased on his person.

8. After the proceedings of inquest had been undertaken, the aforementioned F.I.R. came to be lodged.

9. After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. Subsequent to above, 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 haemorrhage as a result of ante-mortem injuries. The Autopsy Surgeon found following ante-mortem injuries on the body of deceased:-

"i Traumatic swelling of size 4 x 3 cm Rt side back of head, on explanation hematoma present on Rt. occipital region underneath about 80 ml of blood is present in cervical cavity.

ii. Blackening @ T.S. present on left eye in size 5 x 2.5 cm.

iii. Abrasion of size 2 x 1 cm on chin.

iv. Abrasion 5 x 1 cm on left clavicle.

v. Abrasion 4 x 1 cm left side chest present, 4 cm above from left nipple.

vi. Contusion swelling over entire length over lower of side of left upper limb.

vii. Contusion @ T.S. of size 7 x 4 cm present of Rt. forearm below elbow.

viii. Abrasion 2 x 1 cm on back of Rt. arm.

ix. Multiple contusion @ abrasion on the whole area of back of chest, B/L lumbar region & B/L pale of region, on explanation of abdominal cavity liner found lacerated & about 700 ml. of blood is present on abdominal cavity."

10. During course of investigation, Investigating Officer examined first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have supported the F.I.R. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of all the named accused is fully established in the crime in question. However, named accused Raju is found to be juvenile.

Therefore his case was segregated. Accordingly, Investigating Officer submitted the charge sheet dated 09.05.2023 whereby applicants have been charge sheeted under Sections 323 and 304 I.P.C..

11. Learned counsel for applicants contend that though the applicants are named and charge-sheeted accused yet they are liable to be enlarged on bail. As per prosecution story as unfolded in the F.I.R. he submits that present case is a case of circumstantial evidence. As such, there is no eye-witness of the occurrence. Complicity of an accused in a case based upon circumstantial evidence has to be inferred in accordance with the parameters laid down by Apex Court in **Sharad Birdhi Chand Sarda vs State Of Maharashtra reported AIR 1984 SC 1622**. However, upto this stage, none of the parameters laid down in aforesaid judgement are satisfied against present applicants. There is no evidence of last seen against applicants. The first informant is not an eye witness of the occurrence, therefore his testimony is only based upon suspicion. It is by now well settled that suspicion howsoever strong cannot take the place of proof. Upto this stage, no strong motive has emerged against applicants to commit the crime either. The complicity of the applicants in the crime in question is sought to be alleged on the following incriminating circumstance that have emerged against applicants during course of investigation:

i. Recovery of Danda on the pointing of Mahesh Kumar (applicant herein) from his house. However, the same do not having blood stains.

ii. With regard to motive attached to the applicants for committing the crime in question it is alleged that son of first informant was having love affair with the daughter of applicant Mahesh Kumar.

It is on account of above that the son of first informant came to the house of the accused to meet the daughter of accused, where the occurrence is alleged to have occurred.

12. Placing reliance upon the judgement of Apex Court in **Nandu Singh Vs. State of M.P. Criminal Appeal No. 285 of 2022 decided on Feb.25 2022** they submit that motive plays an important link in the chain of circumstances in a case based on circumstantial evidence. However, no strong motive has emerged against applicants to commit the crime in question. In the submission of the learned counsel for applicants, both the incriminating circumstance that have emerged against applicants are neither singularly nor cumulatively sufficient enough to infer the guilt of applicants in the crime in question. No animus has emerged against applicants for committing the crime in question either. There is no evidence of last seen. It is on the information of applicant Mahesh Kumar that father of the deceased came to the house of applicants and retrieved his injured son. Attention of the court was then invited to the post mortem report of the deceased and on the basis of above, learned counsel for applicant submits that allegations made in the F.I.R. cannot be taken as *ifso-facto* as there is no evidence on record to show that he victim was assaulted by applicants. The deceased has not sustained any grievous or fatal injury on his person nor any firearm or sharp edged weapon was used to cause injury to the deceased.

13. Even otherwise applicants are of clean antecedents inasmuch they have no criminal history to their credit except the present one. Applicants are in custody since 29.03.2023. As such, they have under-gone more than eight months of incarceration. Police report (charge-sheet) 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 applicant stands crystallised. Upto this stage, no such circumstance has emerged on record necessitating the custodial arrest of applicant during the pendency of trial. In support of above reliance is placed upon the judgement of Supreme Court in **Sumit Subhashchandra Gangwal Vs. State of Maharashtra, 2023 LiveLaw (SC) 373** (Paragraph 5).. On the above premise, the learned counsel for applicant 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.

14. Per contra, the learned A.G.A. for State and the learned counsel for first informant have vehemently opposed the prayer for bail. They submit that since applicants are named as well as charge-sheeted accused therefore they do deserve any indulgence by this Court. They submit that occurrence has taken place in the house of applicant. The weapon of assault has been recovered on the pointing of applicant Mahesh Kumar from his house. Injuries sustained by deceased could have been caused by weapon so recovered. There is strong motive against applicants to commit the crime in question. As such, 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 applicants with reference to the record at this stage.

15. Having heard the learned counsel for applicants, the learned A.G.A. for State, the learned counsel representing first informant, upon consideration of material on record, evidence, nature and gravity of offence, accusations made as well as complicity of applicants coupled with the fact that as per post mortem of the deceased, the deceased has not sustained any grievous or fatal injury on his person, no sharp edged weapon or firearm was used

by applicants in the commission of the crime in question, present case is a case of circumstantial evidence, therefore there is no eye witness of the occurrence, the complicity of an accused in a case based upon circumstantial evidence has to be judged in the light of parameters laid down by Apex Court in **Sharad Birdhi Chand Sarda (supra)**, up to this stage, none of the parameters laid down by Apex Court in aforementioned judgement are satisfied against applicants, no strong motive has emerged against applicants for committing the crime in question, motive plays an important role in a case based on circumstantial evidence as it is an important link in the chain of circumstances vide **Nandu Singh (supra)**, upto this stage the two incriminating circumstances that have emerged against applicants as detailed above are by themselves not sufficient enough to infer the guilt of present applicants in the crime in question, confession by an accused is by itself not sufficient to award conviction, in this case there is no corroboration of the same with the material on record, the clean antecedents of applicants, the period of incarceration undergone by applicants, police report (charge-sheet) under 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 crystalized, yet in spite of above, the learned A.G.A. and the learned counsel for first informant could not point out any such circumstance from the record necessitating the custodial arrest of applicants during the pendency of trial, the judgment of Apex Court in **Sumit Subhash Chandra Gangawal and another Vs. State¹¹³ of Maharashtra and another 2023 Live Law SC 373,** the clean antecedents of the applicants, the period of incarceration undergone, therefore irrespective of the objections raised by the learned A.G.A. in opposition to the present applications for bail

but without expressing any opinion on the merits of the case, applicants have made out a case for bail.

16. Accordingly, present applications for bail are **allowed**.

17. Let the applicants-**Mahesh Kumar and Santosh Kumar @ Sonu** involved in aforesaid case crime number be released on bail 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) Applicants will not tamper with prosecution evidence.

(ii) Applicants will abide the orders of court, will attend the court on every date and will not delay the disposal of trial in any manner whatsoever.

(iii) Applicants will not indulge in any unlawful activities.

(iv) Applicants will not misuse the liberty of bail in any manner whatsoever.

18. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail of applicant and send them to prison

Order Date :- 6.12.2023

YK