

Court No. - 27

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 8619 of 2023

Applicant :- Hamid Ali

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko.

Counsel for Applicant :- Dilip Mishra,Jaikaran

Counsel for Opposite Party :- G.A.,Amar Nath Dubey,Ashok Kumar Singh,Rahul Kumar Singh

Hon'ble Brij Raj Singh,J.

1.Supplementary affidavit filed today on behalf of the applicant, is taken on record.

2. Heard Sri Jai Karan, learned counsel for the applicant, Sri Amar Nath Dubey as well as Sri Rahul Kumar Singh, learned counsel for complainant, Sri Rajesh Kumar Singh learned AGA-I for State and perused record.

3. This bail application has been filed by the applicant for bail in case crime No.153 of 2021 under Section 302, 323, 34 IPC, PS Jethwara, district Pratapgarh.

4. It has been submitted by the learned counsel for the applicant that the First Information Report was lodged by the brother of the deceased on 17.04.2021 in which the applicant and other co-accused have been named with the allegation that on 17.4.2021 at 06.00 a.m., the complainants' deceased brother Wahid was taken by the accused Vakil @ Munda, Basir, Hamid (present applicant), Sabir and Ayub for the purpose of canvassing and there was quarrel between the applicant's party and the Ainul Hasan for the reason of BDC Election. Both the party assaulted and fired each other. The general allegation of assault has been levelled and it has been mentioned in the FIR that complainant's deceased brother was done to death by the assault made by the accused persons. The deceased was taken to hospital where, he was declared dead. It has been submitted by the applicant that as per post mortem report, there is single shot caused on the shoulder area with pillets found on forehead and muscles were also found lacerated. The cause of death of deceased is haemorrhage and shock due to anti mortem firearm injury.

5. It has been submitted by the applicant that as soon as the information was received by the police, the police reached the place of occurrence and police constable Akhilesh Pandey recorded dying declaration of deceased. The said dying declaration is recorded in the video and is part of case diary. The deceased stated that gun shot was used by Naseem Khan and Ainul @ Alli. It has been further submitted by the applicant that the statement of the complainant Riyaj Khan was recorded under Section 161 CrPC and he has assigned role of exhortation to the applicant and other co-accused and role of firing has been

assigned to Munda @ Vakil and he has stated that Munda @ Vakil had shot fire due to which his brother received injury and later on, died while going to hospital. While dying declaration was recorded, deceased Wahid had stated that Naseem Khan and Ainul @ Alli fired gun shot along with him but at the same time informant and eyewitness Nasir Ali as well as wife of deceased Smt. Shahjahan stated that Vakil @ Munda, Bashir, Hamid (applicant) and Sabir assaulted Ainul and Nasim Khan and in order to file cross case, Vakil fired a gun shot on the deceased on the exhortation of the applicant and other co-accused.

6. It has been submitted by the learned counsel for the applicant that role of exhortation has been assigned to the applicant and other co-accused Sabir and Ayub Khan who have been granted bail by this Court in Crl. Misc. Bail Application No.4885 of 2022 on 7.7.2022 and in Crl. Misc. Bail Application No.1075 of 2022 on 30.5.2022 respectively. It has been further submitted by the learned counsel for the applicant that the case of the applicant is at par with the co-accused Sabir and Ayub Khan, therefore, he is entitled for bail. The bail order of co-accused Sabir Ali is quoted below:-

"Heard Shri Prabhat Kumar Mishra holding brief for Shri Dilip Mishra, learned counsel for the accused/applicant as well as learned A.G.A. for the State and perused the record.

This bail application has been moved by the accused/applicant-Sabir for grant of bail, in Case Crime No.153 of 2021, under Sections 302, 323, 34 IPC, Police Station Jethwara, District Pratapgarh, during trial.

Learned counsel for the accused-applicant while pressing the bail application submits that it is a case of false implication and the applicant has not committed any offence as claimed by the prosecution.

It is further submitted that first information report of the incident was lodged by the brother of the deceased, namely, Riyaz Khan on 1.4.2021 at Police Station Jethwara, District Pratapgarh against 5 named persons including the applicant stating therein that on 17.4.2021 at about 6.00 a.m. his brother deceased Waheed was taken by the accused Wakeel, Basheer, Hamid, applicant- Sabir and Ayyub for the purpose of convessing and some scuffle had taken place with Ainul Hasan who was himself contesting the BDC Election and both the parties started assaulting and firing towards each other and his brother has been done to death by consorted assault given by the named accused persons and he was immediately taken to the hospital where he was succumbed to the injuries. The postmortem report of the deceased would reveal that he had sustained one firearm injuries on his shoulder area with pellets found on forehead and muscles were also found lacerated. The cause of death of the deceased was ascertained as hemorrhage and shock due to ante-mortem firearm injuries.

Highlighting the above facts, it is vehemently submitted that though in the first information report general role of assault has been assigned to the applicant and other co-accused persons but the informant had not assigned any specific role to any accused person. However, during the course of investigation constable Akhilesh Pandey had claimed to have recorded dying declaration of deceased Waheed wherein he had taken the name of Naseem Khan and Ainul @ Alli who had fired gun shot upon him along with two other unknown persons while the informant and eye witness Nasir Ali as well as the wife of the deceased, namely, Smt. Shahjahan had claimed that Wakeel @ Munda, Basheer, Hamid and applicant- Sabir had assaulted Ainul and Naseem Khan brutally and in order to file a cross case Wakeel had fired a gun shot on the deceased on the exhortation of the applicant and other co-accused persons.

Highlighting the above fact it is vehemently submitted that there are two versions of the single incident while the constable Akhilesh Pandey is claiming to have filmed the dying declaration of the deceased wherein he had stated to have fired upon by the Ainul @ Alli and Naseem Khan the other witnesses including the informant and wife of the deceased had claimed that the deceased had been fired at by co-accused Wakeel on the exhortation of Hamid, Bahseer and applicant. Thus prosecution is itself not certain pertaining to the fact as to how the incident had happened and the role played by the accused persons.

It is further submitted that identically placed co-accused Ayub Khan has been granted bail by a Coordinate Bench of this Court, vide order dated 30.6.2022 passed in Criminal Misc. Bail Application No. 1075 of 2022.

It is next submitted that the applicant is in jail in this case since 7.2.2022. Charge sheet has already been filed and there is no apprehension that the accused-applicant after release on bail, may flee from the process of law or may otherwise misuse the liberty. The applicant is not carrying any criminal history.

Learned A.G.A., on the other hand submits that the applicant is accused of committing heinous offences and the role of exhortation assigned to him by the prosecution witnesses, thus he cannot escape the liability.

Having heard learned counsel for the parties and having perused the record, it is evident that though the applicant and another co-accused persons are named in the FIR but during the course of investigation a constable has claimed to have recorded dying declaration of the deceased wherein he has attributed the role of firing to Ainul and Naseem Khan, however, the wife of the deceased, namely, Smt. Shahjahan had claimed that the deceased who at that point of time

was injured had informed him that he had been injured by firing done by Wakeel Khan on the exhortation of other co-accused persons including the applicant. Informant and other eye witness Nasir Ali has also claimed that gun shot has been fired by Wakeel. In view of above the role of only exhortation has been assigned to the instant applicant. Identically placed co-accused person Ayub Khan has been granted bail by a Coordinate Bench of this Court. The applicant is not carrying any criminal history and he is in jail in this case since 7.2.2022. The presence of the applicant could be secured before the trial court by placing adequate conditions.

Keeping in view the nature of the offence, evidence, complicity of the accused, severity of punishment, submissions of the learned counsel for the parties and without expressing any opinion on the merits and demerits of the case, I am of the considered view that applicant has made out a case for bail. The bail application is allowed."

7. It has been further mentioned that it is a cross-case and FIR was lodged by Mohd. Sharif father of Ainul as case crime No.0160 of 2021 under Section 506, 504, 323, 307, 149, 148, 147 IPC and Section 7 Criminal Law Amendment Act, PS Jethwara, district Pratapgarh. Learned counsel for the applicant has further submitted that co-accused Ayub who has been granted bail by this Court, has criminal history of 13 cases to his credit whereas, the applicant has also got 13 cases to his credit. He has explained 5 cases criminal history of the applicant in para-13 of the bail application and 8 cases criminal history of the applicant in para-3, 4, 5, 6, 7 and 8 of the supplementary affidavit dated 10.7.2023 satisfactorily. He has further submitted that he has explained 13 cases of criminal history of the applicant satisfactorily. He has submitted that co-accused Ayub has also been shown criminal history of 13 cases to his credit and he has been granted bail after considering cases of criminal history to his credit.

8. Learned counsel for the applicant has relied upon the judgment of Supreme Court in the case of **Prabhakar Tewari. Vs. State of Uttar Pradesh and another 2020 (11) SCC 648** and has submitted that pendency of criminal case cannot be the basis for refusal of prayer for bail and if discretion is exercised properly, then the pendency of criminal case will not play any role while granting bail. He has submitted that the role of the applicant is that of exhortation and on this count, the pendency of criminal cases would not disentitle the applicant to claim bail. The applicant is already in Jail since 7.2.2022 and role of firing is assigned to other co-accused. There is also no allegation to the extent that he has hatched conspiracy in commission of crime and only role of exhortation is mentioned.

9. Learned counsel for the applicant has further submitted that Court has to see whether there is any prima facie or any ground to believe that the accused has committed offence, nature of gravity of the accusation.

10. Learned counsel for the applicant has filed supplementary affidavit today and he has submitted that inadvertently in para-9 and 10 of the bail application,

no criminal history/no previous conviction is wrongly typed and it was a typing mistake, the same is not deliberate. He has submitted that the 5 cases of criminal history has been explained in bail application and other 8 cases criminal history has been explained in the supplementary affidavit dated 10.7.2023.

11. Sri Rajesh Kumar Singh learned AGA-I for State has cited case of **Prashanta Kumar Sarkar. Vs. Ashis Chatterjee and another, (2010) 14 SCC 496; Harjit Singh. Vs. Inderpreet Singh alias Inder and another, AIR 2021 SC 4017**, and has submitted that the applicant has 13 cases to his credit and has submitted that Hon'ble Supreme Court has deprecated to the bail to a repeated offender. He has submitted that the applicant has been assigned role of exhortation and on his exhortation, the gun shot was fired, therefore, he is responsible for the commission of crime. Learned AGA-I could not dispute the fact that role assigned to the applicant is at par with co-accused Sabir who was granted bail on 7.7.2022.

12. Similarly, Sri Amar Nath Dubey and Sri Rahul Singh learned counsel for the complainant have also opposed the bail and relied upon the judgment of Hon'ble Supreme Court in the case of **Neeru Yadav. Vs. State of Uttar Pradesh and another, (2014) 16 SCC 508 and Deepak Yadav. Vs. State of Uttar Pradesh and another, (2022) 8 SCC 559**, and submitted that looking into the severity, nature of gravity, character, behaviour, the likelihood of the offence repeated, the applicant is not liable to get bail. It has been further pointed out by Sri Rahul Singh and Amar Nath Dubey that in the bail application, the applicant has explained 5 cases criminal history and other 8 cases were not explained, rather, the same were explained in supplementary affidavit dated 10.7.2023 and, therefore, the applicant is not entitled for bail.

13. Having heard the arguments of learned counsel for the parties, the fact has emerged that the applicant has been assigned role of exhortation and role of firing has been assigned to co-accused. The Hon'ble Supreme Court has observed in the case of *Prashanta Kumar Sarkar (supra)* that the offence alleged no doubt may be grave and serious and there are several criminal cases pending against the accused but these factors cannot be the basis for refusal of prayer for bail. The High Court exercises the jurisdiction to grant the bail by considering relevant material and in the present case, admittedly, the role of exhortation has been assigned to the applicant coupled with the fact that the same role of exhortation has been assigned to co-accused Sabir and Ayub Khan and they have been granted bail.

14. Considering the over all facts and circumstances of the case, the argument that identical role is assigned to the applicant as the co-accused Sabir and Ayub Khan who have been granted bail, the argument that role of exhortation has been assigned to applicant by deceased in his dying declaration and in the statement of Riyaj, the brother of deceased, it is a fit case for bail.

15. Let the applicant, Hamid Ali be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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 him in accordance with law.

16. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

Order Date :- 13.10.2023

Rajneesh JR-PS)