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

+ **Date of Decision: 10.03.2015**

% **BAIL APPLN. 463/2015 and Crl. M.A. No. 3519/2015**

BHURA

..... Petitioner

Through: Mr. M.M. Ansari, Advocate.

versus

THE STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. Lovkesh Sawhney, APP along
with SI Sahib Singh, PS – Khajoori
Khas.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

VIPIN SANGHI, J. (OPEN COURT)

1. This is the second bail application preferred by the petitioner – the first one having been dismissed as withdrawn on 24.02.2015 by this Court being Bail Application No.368/2015. On being asked as to what is the changed circumstance for moving the present application, learned counsel for the petitioner has no explanation to offer. He has, however, made his submissions on merits to press the present bail application.

2. I have heard learned counsel for the petitioner as well as the learned APP.

3. The submission of learned counsel for the petitioner is that the

petitioner is in Judicial Custody (JC) for the last 43 days. He submits that a complaint was filed by the complainant, on which the First Information Report (FIR) has been registered, was lodged after over 20 hours of the incident. Even though the complainant was in a position to make his statement in the hospital, where he received treatment after the injuries suffered by him, the complainant did not give his statement in the hospital to the Police, and stated that he would give the same to the Police Station later on. Learned counsel submits that the complaint is, therefore, an afterthought and has been made only to rope in the petitioner and others.

4. Learned counsel further submits that the injury suffered by the complainant has been found to be simple – though inflicted on the head. He submits that, according to the FIR and the MLC of the complainant, only one blow is stated to have been given on the head with an iron-rod. He submits that, in these circumstances, Section 308 I.P.C. cannot be invoked and it cannot be said that the petitioner had either the intention, or the knowledge that the alleged act could cause death, and if death had resulted, it would tantamount to culpable homicide not amounting to murder.

5. In this regard, he placed reliance on two decisions, namely ***P.K. Ghosh Vs. State & Another***, 2008 (2) JCC 834; and ***Bishan Singh & Another Vs. The State***, 2007 (4) Crimes 177 (SC). He submits that in both the cases the injuries inflicted on the head were found to be simple, and on that account, the Court held that the offence under Section 308 I.P.C. could not be made out.

6. Learned counsel further submits that there is no purpose of keeping

the petitioner in JC any longer. He submits that the petitioner had himself surrendered before the Court. He submits that the petitioner had been arrested to make recoveries. However, no recovery has been made at the instance of the petitioner. The investigation is complete qua the petitioner. In support of his submission that further detention of the petitioner is not necessary, he placed reliance on the judgment of the Supreme Court in *Arnesh Kumar Vs. State of Bihar & Another*, 2014 VII AD (S.C.) 697.

7. On the other hand, Mr. Sawhney, the learned APP submits that the nature of the injury suffered by the injured takes back seat. An attempt of the nature dealt by Section 308 I.P.C. may actually not result in hurt or injury. It is the attempt to commit culpable homicide, which is punishable under Section 308 I.P.C. He places reliance on the judgment of the Supreme Court in *Sunil Kumar Vs. N.C.T. of Delhi and Others*, (1998) 8 SCC 557, in this regard. He submits that in this case the High Court, by placing reliance on the nature of the injury, had concluded that the offence under Section 308 I.P.C. had not been made out. However, the Supreme Court reversed that decision.

8. Mr. Sawhney further submits that since there is no change in the circumstances, the present bail application is not maintainable. In the first application, this Court was not inclined to grant relief to the petitioner. He, therefore, withdrew the same. He further submits that the other two accused are on the run and they have not been arrested till date. He further submits that the injured, the petitioner, and the co-accused live in the close vicinity and there is grave apprehension that the petitioner and the other accused may harm, or threaten, or influence the injured/ complainant, if the petitioner is

released on bail.

9. Having considered the rival submissions, I am not inclined to grant bail to the petitioner at this stage. The investigation is still in progress; the final report has not yet been filed since the other two accused are on the run. The role played by the petitioner, according to the FIR is that it is he who had attacked the complainant with an iron-rod on his head, which erupted and the complainant fell down. After some time, he regained consciousness and dialed '100'. Merely because the complainant did not give his statement to the Police in the hospital itself, and later on, recorded his statement in the Police Station does not necessarily lead to the conclusion of false implication of the petitioner in the offence. Pertinently, the Police Control Room (PCR) Van had removed the complainant from the spot, i.e. the place of the petitioner and the other co-accused, to the hospital for treatment.

10. A perusal of the judgments relied upon by the petitioner in the case of **P.K. Ghosh** (supra) and **Bishan Singh** (supra) would show that they turn on their respective facts and they do not lay down, as a general principle of law, that if the nature of injury suffered on the vital part of the body is simple, a case under Section 308 I.P.C. would not be made out.

11. In **P.K. Ghosh** (supra), the initial medical report showed a simple blunt injury and there was nothing on record to show that the accused had any intention, or knowledge that by such act he could commit culpable homicide not amounting to murder, if succeeded. However, in the present case, the complainant has narrated that Shakeel @ Pappu asked his brother Bhura and his son Fahin to kill the complainant to finish the episode once

and for all of the complainant demanding money again & again, whereafter the petitioner inflicted a blow on the head of the complainant with an iron-rod.

12. In **Bishan Singh** (supra), the Supreme Court was dealing with a criminal appeal arising after complete trial. The Court relied on the deposition of PW-5, wherein he did not make a statement to the effect that the accused had attacked him with intention to kill him. The Supreme Court observed that the Trial Court had relied slightly upon the allegations made in the FIR to hold that a case under Section 308 I.P.C. was made out. The Supreme Court also took note of the fact that six persons had allegedly accosted the injured who harboured a previous enmity with the injured. Although the overt act had been attributed to each of the accused, who were having *lathis*, only seven injuries have been caused and out of them, only one of them was grievous, being a fracture on the arm, which was not a vital part of the body. In these circumstances, the Court formed the opinion that accused had not committed the offence under Section 308 I.P.C. and that the case fell under Section 323/ 325 I.P.C.

13. In **Sunil Kumar** (supra), the Supreme Court observed as follows:

“4. The view taken by the High Court is obviously erroneous because offence punishable under Section 308 IPC postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not. It is the attempt to commit culpable homicide which is punishable under Section 308 IPC whereas punishment for simple hurts can be meted out under Sections 323 and 324 and

for grievous hurts under Sections 325 and 326 IPC. Qualitatively, these offences are different. The High Court was thus not well advised to take the view as afore-extracted to bring down the offence to be under Sections 323/34 IPC and then in turn to hold that since that offence was investigated by the police without permission of the magistrate, the proceedings under that provision be quashed. For the view afore-taken as to the commission of the offence under Sections 308/34 IPC, it is not necessary to dwell on the correctness of the second part of the order relating to quashing of proceedings under Sections 323/34 IPC. Thus, the entire order of the High Court deserves to be and is hereby quashed, restoring the status quo ante of the trial remaining with the Additional Sessions Judge to proceed in accordance with law.”

14. Thus, the submission of learned counsel for the petitioner that the injury suffered by the complainant being simple, the offence under Section 308 I.P.C. cannot be made out, has no merit. The facts & circumstances of each case have to be examined to come to any such conclusion.

15. Reliance placed on **Arnesh Kumar** (supra) is also of no avail. The supreme Court held in this case that before arrest, the Police officer should be satisfied that such arrest is necessary “*to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured.*”.

16. As noticed above, the two other accused are still at large, and there is

a real possibility that the petitioner may commit another offence in relation to the complainant. There is also a possibility that the petitioner may cause the evidence of the offence to disappear, or tamper with the evidence and prevent the complainant, or other witnesses from prosecuting the complaint by resort to inducement, threat, or coercion. There is no change of circumstances between the dismissal of the earlier bail application on 24.02.2015; though as withdrawn, and the present application.

17. For the reasons aforesaid, the present application is dismissed. However, it shall be open to the petitioner to again apply for bail before the Trial Court, in the first instance, in the event of their being a change of material facts & circumstances in the case.

18. Dasti.

VIPIN SANGHI, J

MARCH 10, 2015

B.S. Rohella