

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

% *Judgment pronounced on: 3rd June, 2015*

+ **BAIL APPLN. 907/2015**

SAHIL DAHIYA Petitioner
Through Mr.Sunil K. Mittal, Adv. with
Mr.Vipin K. Mittal and Mr.Anshul
Mittal, Adv.

versus

STATE Respondent
Through Mr.M.P.Singh, APP for the State
along with Insp. Ghanshyam, P.S.
North Rohini.
Mr.Sanjay Jain, Adv. for
complainant.

AND

BAIL APPLN. 957/2015

VAIBHAV DHAWAN Petitioner
Through Mr.Sunil K. Mittal, Adv. with
Mr.Ravi Drall, Adv.

versus

THE STATE (GOVT OF NCT, DELHI) Respondent
Through Mr.M.P.Singh, APP for the State
Mr.Sanjay Jain, Adv. for
complainant.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order I propose to decide the abovementioned two bail applications filed under Section 439 read with Section 482 of Cr.P.C., 1973.
2. Both the petitioners are in judicial custody since 29th October, 2014 for the offences originally registration of FIR No.816/2014 under Section 302/34 IPC at North Rohini, Outer District Delhi.
3. The order on charge was passed on 24th April, 2015 whereby the trial court held that prima facie Section 304 of IPC and 34 IPC are attracted in the matter against all three accused.
4. I have been informed that against said order, the petition is pending before this Court for quashing of the said order dated 24th April, 2015.
5. As already recorded by the trial court, the case of prosecution is based upon ocular testimony of Vinay Srivastav, who claims to be an eye witness of the incident. Perusal of statement of Vinay Srivastav reveals that on 27th October, 2014 at 11.15 P.M he was present at his house when Aruna Gupta, mother of his friend Amit, came to his house and told that accused Vaibhav along with other two associates were abusing Amit outside the house of Amit. At that time, Amit was not in his house. Vinay accompanied Aruna to her house. Outside the house of Aruna and Amit, all the three accused Vaibhav, Love and Sahil were found standing at that time. Immediately thereafter Love went away in his vehicle. Vinay

questioned accused Sahil and Vaibhav as to why they were abusing Amit, upon which Sahil and Vaibhav purportedly informed Vinay that Amit was to be set right as it appeared that Amit was not in his proper senses. When Vinay Srivastav enquired with Sahil and Vaibhav, they too left. Thereafter, Amit returned to his house and he was told about the incident. Upon it, Amit said that he would go and talk to the accused persons and asked his mother to go inside the house. Mother of Amit went in the house. Amit and Vinay went to nearby located market complex. When they reached near complex, accused Sahil and Vaibhav also reached there on a scooty. It was Amit who signaled the scooty to stop. Vaibhav and Sahil stopped their scooty. Thereafter, Amit questioned them and objected to abusing in front of his house. Upon it, Vaibhav and Sahil both' got enraged and purportedly exhorted saying that they would teach Amit a lesson. Thereafter, Sahil assaulted Amit with his belt, whereas accused Vaibhav gave leg and fist blows to Amit. It is claimed that in this process the ignition key of the scooty of the accused came in the hand of Amit and in the consequent grappling the key struck cheeks of Vaibhav. The eye witness intervened in the fight. Meanwhile, accused Sahil and Vaibhav called Love, telephonically. Love also came to the spot. On reaching the spot. Love also started assaulting Amit. All the three accused pounced upon Amit and during that process, Vaibhav and Love were exhorting to finish Amit. All three accused threw Amit on the ground as a result of which Amit's head struck the footpath. All the three accused continuously gave leg and fist blows upon Amit. Eye witness Vinay called PCR from his mobile.

In the meanwhile Ct. Jogender from local police reached spot while patrolling and took the injured to hospital. The accused had fled by that time. Injured Amit was taken to BSA Hospital where his MLC was prepared. Thereafter, not being satisfied with the quality of treatment, injured was taken to Saroj Hospital and from there to Jaipur Golden Hospital, where the injured expired.

6. MLC of deceased would reveal that he reached BSA Hospital on 28th October, 2014 at 12.47 AM and he was brought by Ct. Jogender. There were three injuries on Amit, i.e.,

- a. Swelling and bruises under left eye;
- b. Abrasion over right side of occipital region and;
- c. Abrasion over inner aspect of upper lip.

7. His body was subjected to post mortem on 28th October, 2014 between 11.30 AM to 1.15 PM. Following two external injuries were noticed by the doctor who conducted post mortem;

- a. Contused laceration over the middle part of inner aspect upper lip. With a laceration in the middle of the contusion;
- b. Contused laceration over the middle part of inner aspect upper lip with a laceration in the middle of contusion.

8. No other external injuries were noticed on the body of deceased. Thus contusions were present over upper and lower lips. However, in the internal examination of reflection of the scalp, extravagation of blood was present in the occipital region. The skull was however intact. Parietal region contained 2300 cc of fluid and

clotted blood. Abdominal viscera were blood stained, pale and showed clear lustre.

9. The opinion as to cause of death was given as, 'due to combined effect of hemorrhagic shock and cerebral damage consequent to blunt force injury to abdomen and head'. The injuries were ante mortem, fresh before death and opined to be caused by blunt force. The injury to the abdomen and head were opined to be sufficient to cause death in the ordinary course of nature.

10. Earlier the application filed by Sahil Dahiya for the grant of bail being Bail Application No. 262/2015 was filed before this Court which was listed. It was brought to the notice of this court that the next date before the Trial Court is now fixed for framing of charges. The said application was accordingly withdrawn with the liberty to raise all the pleas before the Trial Court at the time of framing of charges and the bail application was dismissed as withdrawn.

11. The reasons for converting the offence under Section 302 IPC are given by the trial court as under :

“In the present case also, after the three accused left from outside the house of deceased, it was the deceased who wanted to confront them and went to the marketing complex. It is nobody's case that the accused had asked the deceased or the eye witness to come to that marketing complex. It is also nobody's case that the accused were waiting for the deceased to come to the marketing complex. The deceased himself went there. As per statement of eye witness, which even if remains unrebutted, it was the deceased who signalled accused Vaibhav and Sahil, who were passing on a scooty, to stop the scooty. On the signal of the deceased, the scooty was stopped. It was the deceased who took out the

key from the scooty. Although eye witness claims that during the grappling the key came in the hand of the deceased, but that does not at all appeal to common sense as in the incident of grappling, key of a scooty cannot come in the hand of a person from ignition key hole. Key therefore, appears to have been taken out of the ignition hole deliberately by the deceased.

Thus, the incident of this case occurred suddenly when the accused were confronted by the deceased near market complex. At that time, accused Love was not even present at the spot.

Admittedly none of the three accused were armed with any kind of weapon whatsoever, what to talk of a deadly weapon. Sahil and Vaibhav were travelling on a scooty when intercepted by the deceased. Love came there subsequently. Even he was also unarmed. Thus, it cannot be claimed that the incident in question was pre meditated.

It is mentioned in the statement of eye witness itself that the accused persons used fist and leg blows in giving beatings to the deceased. Accused Sahil also at one place is alleged to have used belt in beating the deceased. It is also mentioned in the statement of eye witness that when the deceased was thrown to the ground in the process of beating, his head struck the foot path.

The number and the nature of injuries and also the fact as to the body part where the injuries occurred on the body of the deceased, as reflected in the MLC and the post mortem report and as mentioned above, does not support the claim that the deceased was intended to be killed by the accused. At the most, the accused wanted to beat the deceased severely, for some reason. At the most accused wanted to teach the deceased a lesson.

There is no external bodily injury except on the lips of the deceased, as mentioned in the post mortem report. Some abrasions are mentioned in MLC. Perusal of the photographs of the deceased taken prior; to his post mortem would reveal absence of any noticeable injury besides injuries mentioned above. It was held in the case of Surender Kumar (Supra) that the number of wounds caused during occurrence was not the sole criteria in determining the question whether exception 4 to Sec. 300 applies or not. The offence appears to have occurred in a sudden fight with no pre meditation and done in the heat of passion without the accused taking any undue advantage and they did not act in cruel manner. The cause of quarrel is not relevant nor is it relevant as to who offered provocation or supported the assault.

In the case of Suraj Dev (Supra) even there was an exhortation by one of the accused and even when the wooden log was hit on the head, the said case was found U/s 304 and not U/s 302 of IPC. Similarly in the case of Randhir Singh (Supra) despite exhortation to kill, it was held that it would be Sec. 304 of IPC which applies and not Sec. 302 of IPC.

Keeping in view the above mentioned facts & circumstances in the present matter also, even if statement of eye witness is taken as unrebutted, still prima facie Sec. 304 of IRC gets only attracted and not Sec. 302 of IPG. Therefore, let charges be framed U/s 304 of IPC r/w 34 against all the three accused.”

12. After framing of charge, Sahil Dahiya moved fresh application seeking regular bail before the trial court on account of the change in circumstances. The said application was dismissed by the Trial Judge by order dated 8th May, 2015.

13. Mr. Sunil K. Mittal, Adv. appearing on behalf of both petitioners argues that there was no intention to kill on the part of the accused,

at best offence punishable under Section 304 Part II, IPC is attracted and in view of these changed circumstances, the petitioner is seeking his release on bail in the present case. It is an undisputed position that none of the accused had the intention to cause death of the deceased. Admittedly, none of the accused persons were carrying any weapon, stick or any other thing which could show their intent to commit any offence, much short of the offences alleged. It is argued by Mr. Mittal that it was the deceased himself who was the aggressor and picked up the alleged fight while he was in an inebriated condition.

14. It is submitted by Mr. Mittal that the deceased himself was under the influence of alcohol' and the alleged head injury, if any, could have been caused by his falling down accidentally. The same could not be attributed to the petitioners in any manner. The FIR in question would show that the complainant has stated that all the accused allegedly gave blows to the deceased without explaining any particular role of any of the accused person. Therefore, on this aspect the petitioners are entitled for bail. He referred the decision of Supreme Court in the case of ***Pandurang Ors. v. State of Hyderabad***, 1955 Cri LJ 572, has held that :

"People do not ordinarily act in unison like a Greek chorus and, quite apart from dishonesty, this is a favourite device with witnesses who are either not mentally alert or are mentally lazy and are given to loose thinking. They are often apt to say all even when they only saw some because they are too lazy, mentally to differentiate. Unless Therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at

their face value. We are unable to reduce any prior arrangement to murder from these facts."

15. Mr. Mittal has also relied upon the following cases :

- a) In the case of ***Randhir Singh & Ors. vs. State*** decided by Division Bench of High Court on 12th July, 2013 in CrI. Appeal No. 403/1997. In that case, on the issue of demand of some money a quarrel took place suddenly in which one accused picked up a brick lying nearby and hit the witness and then brought a danda from nearby. Meanwhile, other two accused also came armed with lathies and they hit the complainant with lathi on his head. One lathi blow was given on the head and one on the shoulder. During the incident, one of the accused also exhorted and shouted to kill the victim. Thereafter, the accused took out a knife and stabbed the victim on left side of his chest as a result of which injured fell down and the assailants fled from the spot, it was held by High Court that the incident occurred at the spur of moment in a sudden fight without pre meditation and infact at the beginning of the fight, neither the deceased nor two of the accused were present. It was held by High court that there was no previous enmity between the parties to carry out the assassination of the deceased and that other accused were not aware that one was carrying knife in his pocket. Mere exhortation on the part of the accused was hold not to mean necessarily that he wanted the accused armed with knife to kill the deceased. In the facts & circumstances, the conviction of the accused was converted to under Section 304 part-I of IPC.

- b) In ***Surinder Kumar vs. UT, Chandigarh***, [(1989) 2 SCC 217 : 1989 SCC (Cri) 348] Supreme Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the exception provided he has not acted cruelly Supreme Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor what was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger it was held that :

"...The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue Advantage or acted in a cruel manner".

- c) In ***Ghapoo Yadav v. State of M.P.***, [(2003) 3 SCC 528 : 2003 SCC (Cri) 765] Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC.

d) In ***Pulicheria Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh***, (2006) 11 SCC 444, the Court has observed that:

"18. ... the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a

single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

- e) In ***Uday Singh v. State of U.P.***, (2002) 7 SCC 79 the fight between the two parties started all of a sudden as a result of obstruction caused in digging of the foundation and there was no evidence to show that the accused attacked the deceased with deadly or dangerous arms (or weapons). It was only in a fight, hand to fist, that both the accused had held the neck of the deceased, with such force as to ultimately result in strangulation and his death. It was held that It would be reasonable to hold that the injuries were caused by the appellant on the deceased in a sudden fight where no arms (or weapons) were used and that fight took place in the heat of passion and no common intention to kill the deceased could be inferred.

16. In the present case, MLC indicates that the deceased at the time of incident was under the influence of alcohol and he himself had gone towards complex near market where the accused reached on a scooty and ultimately unfortunately a tragic incident happened and life has lost.

Mr. Mittal has relied upon a case of ***Suraj Dev Vs. State***, 118 (2005) DLT 507 (DB) where it was found that the deceased went to the place of occurrence of his own accord and without any intimation to the accused persons the quarrel started all of a sudden which was

preceded with exchange of hot words and in the incident of assault, in which weapons used were blunt, but the blows were not repeated and no deadly weapon was used, Sec. 304 of IPC was held to be attracted.

His further submission is that the petitioners could not be connected with commission of any offence as no incriminating material against the petitioner to show any involvement of the petitioner in the present case and the personal liberty of any individual is his fundamental right and it cannot be curtailed lightly. The presumption of innocence is the strongest factor in the criminal jurisprudence and no one can be presumed as culprit unless it is so established beyond all reasonable doubts by the prosecution during the trial of the case.

17. It is a settled law that the grant of bail ought not to be denied only on the perceived apprehension by the Court that the petitioner, if restored to liberty, will tamper with the evidence. There must be some prima facie evidence on record or reasonable and justifiable grounds to believe that in case the benefit of bail is extended to an accused, he is going to misuse his liberty or he would create conditions which are not conducive to hold a fair trial. The Supreme Court in various judgments has confirmed that "Bail is the rule and jail is an exception. The object of bail is neither punitive nor preventive but is meant to secure presence of the accused during the trial.

18. It has been time and again held by the Supreme Court that a procedure which keeps large number of people behind bars without trial, for long, cannot be regarded as "reasonable, just, fair" so as to

be in conformity with the provisions of Article 21 of the Constitution of India. Detaining the under-trial prisoners in custody for an indefinite period is a gross violation of Article 21 of the Constitution. The trial of the petitioner is not likely to be concluded in near future and keeping the petitioner in custody indefinitely till the completion of trial could be a cause of great hardship and violation of personal liberty of the petitioner.

19. The Supreme Court in the case of ***Sanjay Chandra v. Central Bureau of Investigation***, (2012) 1 Supreme Court Cases 40 in paras 21, 22, 23, 24, 40, 45, 46 after recording the facts and law has held as under:-

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon

which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

24. In the instant case, we have already noticed that the “pointing finger of accusation” against the appellants is “the seriousness of the charge”. The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather “recalibrating the scales of justice”.

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40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the

community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

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45. In *Bihar Fodder Scam (Laloo Prasad v. State of Jharkhand, (2002) 9 SCC 372)* this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period of more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pretrial prisoners would not serve any purpose.

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to allay the apprehension expressed by CBI.”

20. The petitioners undertake not to attempt to influence any witness in the present case or to attempt to tamper any evidence that may be relevant for the present case and to face the complete trial

and not flee from justice. They deep roots in the society and is not likely to flee. Both are young boys and pursuing their studies.

21. There is no other eye witness to the incident of murder. No weapon of offence was used. Therefore, there is no question of recovery of any weapon of offence. The petitioners have no previous enmity with the deceased.

22. Considering the overall facts and circumstances and without expressing any opinion on merit, the petitioners are granted regular bail. It is directed that the petitioners shall be released on bail in FIR No.816/2014 subject to their furnishing a personal bond in the sum of Rs.50,000/- with one surety each of the like amount to the satisfaction of the trial Court and further subject to the following conditions:-

- (i) that the petitioners will furnish to the trial Court their current address and will not shift from the said addresses without prior permission of the trial Court;
- (ii) the petitioners will appear on every date before the trial Court;
- (iii) the petitioners will not interfere with the fair progress of the trial and will also not approach the witnesses.

23. *Dasti, under the signatures of Court Master.*

(MANMOHAN SINGH)
JUDGE

JUNE 03, 2015