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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ BAIL APPLN. 2393/2018
CORNEL MIREA

..... Petitioner

Through: Romy Chacko, Mr. Varun Mudgal, Mr.
Ajay Singh and Mr. Prashant Sharma, Advs.

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for State with SI
Abhishek from Cyber Cell.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% 04.12.2018

The petitioner seeks bail. On the last date of hearing, the following order was passed:

“The learned counsel for the petitioner submits that the petitioner was not carrying any plastic gift card (ATM type card), which had a chip embedded in it. Therefore, it could not have been misused for the alleged offence of fraudulent withdrawal of monies from any ATM. He submits that he was at quite a distance from the site of the alleged crime. Therefore, he cannot be treated equally with those, who were allegedly involved in the crime of withdrawal of monies from ATMs.

The learned counsel for the State submits that gift cards found on the person of the petitioner had a magnetic/ plastic strip along the body of the cards. This strip could store information which could be used to defraud the banking system and carry out the

offence. Additionally, there was a PIN number mentioned on the reverse of the card, which in turn, could be used for verification and to use the cards fraudulently.

Issue notice. Mr. Amit Chadha, the learned Additional Public Prosecutor for the State accepts notice. Status Report, if any, be filed before the next date.

List on 04.12.2018.”

It is the petitioner's contention that he was not found at the site of the alleged offence for which he has been charged; the only ground on which he has been sought to be brought within the ambit of the crime is under section 34 IPC, but he was not at the site of the crime; that he was neither on the road outside the place of the alleged crime nor across the ATM kiosk, from where the main accused was apprehended. Instead he was at quite a distance from the site of the alleged crime. He relies upon the dicta of the Supreme Court in ***Shreekantiah Ramayya Munipalli v. State of Bombay*** AIR 1955 SC 287 which held *inter alia* that section 34 IPC envisages the presence of the accused at the site of the crime or when he/she would stand by a gate or in a car outside/near the road, to guard his companion or to facilitate his escape; such accused person may be present at the site of the crime in furtherance of the common intention. It further held:

“..... 23. The section was expounded at length in paragraphs 15 and 16 of the charge and though some of the illustrations given are on the right lines, there is much there that is wrong and which, if acted on, would cause a miscarriage of justice. The essence of the misdirection consists in his direction to the jury that even though a person "may not be present when the offence is actually committed" and even if he remains "behind the screen" he can be convicted under Section 34 provided it is proved that

the offence was committed in furtherance of the common intention. This is wrong, for it is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by Section 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter. It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.

24. *The emphasis in Section 34 is on the word "done": "When a criminal act is done by several persons....." It is essential that they join in the actual doing of the act and not merely in planning its perpetration. The section has been elaborately explained by Lord Sumner in *Brendra Kumar Ghosh v The King-Emperor* At page 52, he explains that "participation in action" is the leading feature of section 34 and at page 53 in explaining Section 114 of the Indian Penal Code, he says-*

"Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that

actual presence plus prior abetment can mean nothing else, but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34".

At page 55 he says about Section 34 that-

"participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts"...."

Therefore, the learned counsel for the petitioner contends that the petitioner, not being at the site of the crime, cannot be stated to be having in any way, common intention with the main accused.

The said contention are refuted by the learned counsel for the State. He submits that in the first instance, 34 plastic gift cards were recovered from the petitioner. These cards had magnetic chips/ strips. The cards had been sent for forensic examination. The FSL Report concludes that the magnetic portions contained information pertaining to Indian bank accounts, which possibly could be used for illegally withdrawing monies from ATM kiosks. Pursuant to the said Report, the Investigating Agency has sought further details from various banks to ascertain whether the cards were used at any stage, to electronically withdraw monies from ATMs. He further submits that the afore-cited judgment would not be applicable in the facts of the case because the petitioner was apprehended from some distance from the ATM kiosk at 4 am in the morning with a two wheeler motor vehicle; that there would be no reason for a foreign national to stand at M.G. Road in South Delhi at wee hours in the morning, without any reason except to facilitate his co-accused to get away after having committed or attempted the crime; and as aforesaid, about 34 plastic cards were recovered from the

petitioner when the police had been informed by his co accused that the petitioner was standing outside the ATM.

At this stage, the learned counsel for the petitioner states that he would like to withdraw the petition. Accordingly, it is dismissed as not pressed, with liberty to pursue appropriate applications in changed circumstances.

NAJMI WAZIRI, J

DECEMBER 04, 2018/acm