

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

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Reserved on: 19th December, 2018

Decided on: 21st December, 2018

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BAIL APPLN. 2760/2018

DEVESH KUMAR

..... Petitioner

Represented by: Mr. R.K. Wadhwa, Mr. Vishesh
Wadhwa, Ms. Meenal Duggal, Adv.

versus

STATE

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP for
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. FIR No. 556/2018 was registered at PS Rajouri Garden on 9th September, 2018 on the complaint of Ram Singh who stated that he was working at Monu Tea Shop near ESI Hospital,. On 9th September, 2018 at around 4.30 AM in the morning he was sitting on the footpath having a cigarette/ bidi at Ring Road towards ESI Hospital side, Bali Nagar Cut. On the same footpath Shukla, Manoj and Noora were sleeping. In the meantime a white colour car came at a high speed from Punjabi Bagh side. The driver of the said car was drunk and rammed the car over the footpath. The said car after hitting tree turned upside down due to which all four of them got injured. The complainant took help of people around and turned the car when he saw Shukla and Noora were not having any movement in their body. The driver of the said car was drunk and the people around him questioned him as to how he was driving the car in such a manner, to which

he answered that these dirty people sleep on the footpaths to be killed, and he would clear the same. The name of the driver of the car was revealed as Devesh Kumar S/o R.L. Kumar who did not possess a driving license. An ambulance took all four of them to ESI Hospital where Noora and Shukla were declared brought dead by the doctors and complainant and Manoj were given treatment. He stated that the driver of the car had knowingly after being drunk drove the car in a wrong manner killing two people and injuring two other people thus action be taken against him.

2. The petitioner who was driving the said vehicle without the driving license was arrested on the same day i.e. 9th September, 2018 and is in custody since then. Petitioner filed an application seeking bail before the learned Trial Court on 30th October, 2018 on merits which was posted for hearing on 13th November, 2018, when besides the merit the petitioner urged the additional ground that the petitioner is entitled to default bail as charge-sheet had not been filed in the case. Learned Trial Court dismissed the application both on merits and also on the additional grounds holding that at this stage the Court cannot form any opinion whether the petitioner will be convicted for offence punishable under Section 304-I or Section 304-II or any lesser offence. Offence under Section 304-I being punishable up to life imprisonment and 90 days from the date of arrest having not elapsed, the petitioner was not entitled to default bail. Hence the present petition.

3. Learned counsel for the petitioner submits that on the face of allegations in the FIR it cannot be held that the petitioner committed the offence with any intention and at best knowledge can be attributed to him. Thus, the offence allegedly committed by the petitioner would fall under Section 304-II which is punishable up to 10 years rigorous imprisonment.

Hence, in view of the decision of the Supreme Court reported as 2017 (15) SCC 67 Rakesh Kumar Paul Vs. State of Assam the petitioner would be entitled to default bail. He also relies upon the decisions reported as 2012 (2) SCC 648 Alister Anthony Pareira Vs. State of Maharashtra; 2012 (8) SCC 450 State Vs. Sanjeev Nanda and (2002) 4GLR 3344 Girishbhai Arunbhai Desai Vs. State of Gujarat to contend that on the face of it only an offence punishable under Section 304-II is made out and as charge-sheet was not filed within the period of 60 days, he is entitled to bail.

4. Learned APP for the State on the other hand has taken this Court not only through the FIR but also the manner in which the petitioner was driving the vehicle as is evident from the skid marks, photographs whereof have been placed on record, also the manner in which the car rammed into the footpath and hit the tree resulting in injuries to the complainant and three other persons, two of whom succumbed to injuries. Relying upon the decision reported as 2008 CrI.LJ 1521 Lakhan Tomar S/o Shri Manbir Vs. State of U.P. learned APP contends that without the evidence being recorded this Court cannot form any opinion that the ingredients of offence would fall under Section 304-II IPC or 304-I IPC. She further relies upon the decision of the Supreme Court in AIR 2001 SC 1910 Uday Mohanlal Acharya Vs. State of Maharashtra to contend that if a charge-sheet is filed subsequently the accused would not be entitled to default bail.

5. Section 304 IPC reads as under:

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which

the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

6. It is thus evident that part II of Section 304 IPC provides that if an act is done with the knowledge that it is likely to cause death but without an intention to cause death, then the maximum punishment that can be awarded would be for a term which may extend to 10 years or with fine or with both. Thus, the maximum sentence that can be awarded is 10 years imprisonment. Supreme Court in the majority view expressed in Rakesh Kumar Paul (supra) clarified that use of the words “imprisonment for not less than 10 years or more in Section 167(2) Cr.P.C. give a clear indication that the period of 90 days was relatable to an offence punishable with a minimum imprisonment for a period of not less than 10 years if not more”. Thus if the investigation is relatable to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years, the period for filing the charge-sheet is extended to 90 days, otherwise in respect of all other offences the period of 60 days remains unchanged.

7. Supreme Court reiterated the view expressed in the decision reported as 2001 (5) SCC 34 Rajeev Chaudhary Vs. State (NCT) of Delhi and held that the interpretation of words “60 days or 90 days” has to be given looking from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by learned counsel for the State. Supreme Court

also clarified that once indefeasible right of default bail accrues to the petitioner when the period of 60 days for completing the investigation and filing the charge-sheet comes to an end by subsequent filing of the said charge-sheet, the said indefeasible right is not taken away and in case the petitioner/accused even orally prays for a default bail he would be entitled to the same. On the facts of the said case Supreme Court noted as under:

“45. On 11-1-2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of “default bail” since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24-1-2017) and the petitioner had orally applied for “default bail”. Under these circumstances, the only course open to the High Court on 11-1-2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him “default bail” on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to “default bail” but must apply for regular bail — the “default bail” chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of “default bail”. It would have been another matter altogether if the petitioner had not applied for “default bail” for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge-sheet or challan has been filed, claim a resuscitation of the indefeasible right.

But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for “default bail” during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017. On the contrary, he had availed of his right to “default bail” which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirements of obtaining “default bail” which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.”

8. In the present case as noted above the petitioner was arrested on 9th September, 2018. He filed a bail application on 30th October, 2018 on merits when 60 days from the date of first remand had not expired and charge-sheet had not been filed. When the application for bail on merits came up for hearing on 13th November, 2018 admittedly 60 days from the date of first remand had passed and no charge-sheet had been filed. The petitioner at that stage orally took the additional ground of default bail which was rejected by the learned Trial Court. Hence the petitioner in the present case has complied with all the requirements as noted by the Supreme Court in Rakesh Kumar Paul (supra).

9. The issue which now arises for consideration is that whether at this stage from the FIR itself the Court can form an opinion and/or is required to form an opinion whether a case is made out for offence punishable under Section 304-I or 304-II. In a given case on the facts it may be difficult to

ascertain whether the act which resulted in the death was caused with the intention or knowledge, in which case the Court would not be required to form an opinion whether the offence would fall under Section 304-I or 304-II. If the offence fall under Part-I, then the sentence being punishable up to life imprisonment the investigating agency would have time of 90 days for filing the charge-sheet whereas if the offence falls within Section 304-II, then the charge-sheet is required to be filed within 60 days.

10. As noted above taking the allegations as stated in the present FIR as it is the appellant cannot be said to have possessed an intention to do an act so as to cause the death of the two of the victims and at best what is attributable to the petitioner is the knowledge that his act was likely to cause the death of people sleeping in the footpath, in which case offence punishable under Section 304-II was clearly made out. When the facts speak for themselves and clarify that offence made out is punishable under 304-II, the investigating agency would be ordained to file the charge-sheet within 60 days.

11. Learned APP for the State has relied upon the decision of the Allahabad Court in Lakhan Tomar Vs. State of U.P. wherein it was held that whether the conviction would be under Section 304-II or otherwise can only be ascertained after conclusion of evidence during the course of trial and the High Court cannot preempt the decision of the Trial Court before the evidence is recorded. The said finding may be true when there is any doubt in the facts, in the ingredients of offence or during the course of investigation further material comes to show that offence would fall under Section 304-I, however when on the face of the FIR and investigation carried out ingredients of offence punishable under Section 304-II are made

out the investigating agency would be ordained to file the charge-sheet within 60 days.

12. Consequently, this Court is of the considered opinion that from the FIR and statements of witnesses an offence under Section 304-II IPC having been made out, the investigating agency was required to file the charge-sheet within 60 days and having not filed the same and the petitioner having exercised his right to default bail by an oral prayer of additional grounds on 13th November, 2018 before the learned Trial Court, the petitioner was entitled to default bail. Consequently, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of ₹50,000/- with two surety bonds of the like amount to the satisfaction of the learned Trial Court, further subject to the condition that the petitioner will not leave the country without the prior permission of the Court concerned and in case of change of residential address the same will be intimated to the Court concerned by way of an affidavit.

13. Petition is disposed of. Order dasti.

(MUKTA GUPTA)
JUDGE

DECEMBER 21, 2018
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