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IN THE HIGH COURT OF DELHI AT NEW DELHI

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BAIL APPLN. 157/2019

RAKESH KUMAR & ANR.

..... Petitioners

Through: Dr. A.P. Singh, Ms. Geeta
Chauhan, Mr. V.P. Singh, Ms.
Pratima Rani & Ms. Richa
Singh, Advocates

versus

STATE

..... Respondent

Through: Mr. Panna Lal Sharma, APP
with ASI Vijay Singh,
PS:Jafrabad, Delhi

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

ORDER

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05.04.2019

1. This is an anticipatory bail application filed on behalf of the petitioners under Section 438 of the Code of Criminal Procedure, 1973 (Cr. PC), read with Section 482 of the Cr. PC.
2. Status report has been filed.
3. The case of the prosecution, as noticed from the record, is that a call was received by PS:Jafrabad, Delhi regarding injury on the head of a boy. On reaching the spot, it was found that the injured had been taken to the hospital for treatment. The police reached the hospital and collected the MLC of the injured.
4. In his complaint, Faisal(complainant) alleged that, on 29.10.2018, at about 12:30 pm., when he was waiting for his

brother near his school, three boys, who were already there, asked him about a boy, named Aman and the complainant told them that he does not know any Aman. Suddenly, another three boys came on a motorcycle and asked about Aman from the three boys who were already at the spot. The boys standing there pointed towards Faisal and then the boys on the motorcycle started assaulting Faisal and also hit him with a brick on his head. When the neighbours of Faisal tried to save him, one of the assailants hit Shakib (one of the neighbours) on his head and also threatened to shoot him. That assailant then directed his associate, Rakesh, to further hit Faisal and his neighbours. One assailant, who was called by the name 'Lavee' started beating Faisal. After this, Faisal's father came to the spot and called the police.

5. Learned counsel for the petitioners submitted that the petitioners have been falsely implicated in the case. It is also submitted that the petitioner No.1, Rakesh Kumar, had a shop near the place of incident and he was merely standing at the spot. Even otherwise, no complaint was made immediately at the hospital and it is mentioned that all the assailants are unknown. However, subsequently, the name of the applicant was falsely mentioned.

6. *Per contra*, learned APP submitted that as per the opinion of the doctor, the injury caused was on the head of the victim and the weapon used was blunt and the nature of injury

is simple. Learned APP further submitted that vide order dated 2.11.2018, the anticipatory bail application of the petitioner No.1, Rakesh Kumar, was dismissed by the Sessions Court. Learned APP also submitted that the Trial Court, vide its order dated 27.3.2019, has held that the accused persons are evading the process of law and there is no prospect of arresting the accused persons. Hence, both Rakesh Kumar and Lavee Kumar were declared proclaimed offenders. Learned APP also submitted that the children are not going to school on account of threat and they have been threatened not to visit the school.

7. In *State of Madhya Pradesh v. Pradeep Sharma, 2014(1) Crimes 70*, the Supreme Court held as under:

“10) The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.

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12) Recently, in *Lavesh vs. State (NCT of Delhi)*, (2012) 8 SCC 730, this Court, (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis to a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under:

“12. From these materials and information, it is clear that the present

appellant was not available for interrogation and investigation and was declared as “absconder”. Normally, when the accused is “absconding” and declared as a “proclaimed offender”, there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.”

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In such serious offences, particularly, the respondents/accused being proclaimed offenders, we are unable to sustain the impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.

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13) In the light of what is stated above, the impugned orders of the High Court dated 10.01.2013 and 17.01.2013 in Misc. Criminal Case Nos. 9996 of 2012 and 15283 of 2012 respectively are set aside. Consequently, the subsequent order of the CJM dated 20.02.2013 in Crime No. 1034 of 2011 releasing the accused on bail after taking them into custody in compliance with the impugned order of the High Court is also set aside.

14) In view of the same, both the respondents/accused are directed to surrender before the court concerned within a period of two weeks failing which the trial Court is directed to take them into custody and send them to jail.”

8. Anticipatory bail may be granted when there is material on record to show that prosecution was inherently doubtful or where there is material on record to show that there is a possibility of false implication. However, when the element of criminality is involved and/or the custodial interrogation is required and/or the other aspects and facts are required to be unfolded in investigation, the applicant is not entitled for anticipatory bail.

9. It is also well-settled law that while considering the question of grant of anticipatory bail, the Court *prima facie* has also to look into the nature and gravity of the alleged offence and the role of the accused. The Court is also bound down and must look into, while exercising its power to grant bail, the antecedents of the applicant and also the possibility of the applicant fleeing from justice, apart from other factors and parameters in view of the facts of each and every case.

10. In the matter of Dr. Subhash Kashinath Mahajan v. State of Maharashtra & Anr., in Criminal Appeal No.416/2018, decided on 20.3.2018, it is held as under:

“112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of [Sections 34 and 149](#) of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck

between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

11. The complainant has specifically mentioned the names of the accused persons and their role in the FIR. The victim has sustained injuries on his head, i.e., vital part of the body. Even otherwise, the petitioners have been declared proclaimed offenders by the Trial Court. It has to be noted that the application of the petitioners for the grant of anticipatory bail was dismissed by the Sessions Court. The petitioners are also evading the process of law and there is no prospect of arrest of the accused persons, Rakesh Kumar and Lavee Kumar. Hence, they have been declared proclaimed offenders. It is well-established principle of law that a party who intend to have the protection of law, must submit to due process of law and here, petitioner Rakesh Kumar, at least after dismissal of the anticipatory bail application by the Sessions Court, ought to

have surrendered and followed the due process of law.

12. In this case, the material on record, *prima facie* does not, in any manner, reflect that the prosecution is inherently doubtful or there is a possibility of false implication. The element of criminality is allegedly involved and the threat against the complainant allegedly looms large even at present.

13. In view of the facts and circumstances of the case, this Court is not inclined to grant anticipatory bail to the petitioners. Accordingly, the anticipatory bail application is dismissed.

14. It is clarified that whatever is discussed or observed hereinabove is only a *prima facie* view of this Court and shall not tantamount to any expression or opinion on the merits of the case.

CHANDER SHEKHAR, J

APRIL 05, 2019

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