

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPL.1447/2019**

Judgment reserved on : 26.08.2019

Date of decision :23.10.2019

ABHIJEET GHOSH

..... Appellate

Through: Mr.Amit Khemka, Mr.
Bhupender Singh, Mr. Kartikey
Yadav, Advocates

versus

STATE Of NCT DELHI

..... Respondent

Through: Ms. Geeta Luthra, Sr. Adv. with
Mr. Nitin Saluja, Ms. Shivani
Luthra, Advs. For complainant,
Mr. Kewal Singh Ahuja, APP
for State with Insp.
Rambishan, AATS Dwarka.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The applicant who is in custody since 31.01.2018 in FIR No.717/2017, PS Dabri for the alleged commission of offences punishable under Section 302 r/w Section 34 of the Indian Penal Code, 1860 and Section 25 r/w Section 27 of the Arms Act, 1959 seeks the grant of regular bail vide the present bail application no.1447/2019.

2. The status report submitted by the State by Inspector Ram Kishan AATS Dwarka District has stated the facts of the case to the effect that on the intervening night of 15/16.11.2017 one Manmohan

@ Don was shot dead at H-2/36 1st floor Bengali Colony Mahavir Enclave New Delhi and that the above said case was registered at Police Station Dabri on the complaint of Vikas Chander Kundu (resident of the same building) stating therein that at about 11.20 PM on his having heard the noise of a fight coming from the residence of the accused persons, he went to intervene, however the accused Sujeet Ghosh (i.e. the father of the appellant herein) seeing him shut the door of the flat and that he i.e. Vikas Chander Kundu had recognized the voice of Manmohan Singh and told their neighbour regarding the quarrel and when the police came he saw Manmohan lying on the floor in a pool of blood and that he suspected that Manmohan had been shot by Sujeet Ghosh and his sons and was shifted to the Maharaja Agarsen Hospital and was declared brought dead.

3. It was further submitted through the status report that on investigation it was found that the deceased Manmohan was a well known businessman, builder and contractor of the area and he had constructed the house of the accused persons about 10 years ago and since then he was having business relations with the accused persons and that earlier they were running a non-veg shop in the name of Bengal Fish Hub in partnership at the Mahavir Nagar Bangali Colony area; the father (Sujeet Ghosh @ Bhola) of the present applicant being of Bengali origin had knowledge of fishes hence he used to purchase fish, make them ready for sale and give directions to the workers before going to his office; that during the day time, the mother of the applicant accused i.e. Ms. Shashi Ghosh used to run the shop and that the locality being dominated by Bengali people, their business

flourished and was established and that they were earning a handsome profit in the business; but suddenly the deceased Manmohan dissolved the partnership of the shop and removed the Ghosh family (accused persons) from the shop blaming that the accused persons had embezzled the money and that a flat was given to the accused persons in place of the partnership share in the shop; that the cost of the flat was kept Rs.5 lakhs higher than the partnership share, hence the accused persons had to pay Rs. 5 Lakhs to the deceased and that in addition to this the deceased had also provided a loan of Rs. 20 Lacs to one Sonu Gupta on the pursuance and assurance of Sujit Ghosh (father of the present applicant).

4. It is also stated through the status report that the deceased was demanding this amount of Rs. 40 lakhs for this loan including interest from the accused Sujeet Ghosh (father of the applicant) as Sonu Gupta had run away without paying the loan and that the deceased Manmohan was a well known builder, constructor of the area and belonged to a political family of the area and his sister in law was a two time MCD councilor of the area and that the accused persons had grudges against the deceased for annulling their partnership in the shop which deprived them from a handsome regular income; that the accused Sujeet Ghosh being a member of the RWA, Durga Pooja Committee, Mandir Committee had a good reputation in the area and that during the last MCD election he used his local connections/voters and convinced them to vote against the sister-in-law of the deceased.

5. It is also stated on behalf of the State that Sujeet Ghosh supported and facilitated meetings for the other candidate Rajkumar @

Raju (BJP) who ultimately won the election and that due to losing the election the deceased was very annoyed with the accused and started pressurizing the accused persons for making the payments; that on 15.11.2017 before going to the house of the accused persons the deceased told Anil Kumar and Ravi Kumar that he was going to the house of the accused as Sujeet Ghosh, the father of the applicant herein had called him for making payments and at the house of accused persons some altercation arose, hearing the noises, the complainant Vikas Chander Kundu came down to the door of the accused persons and seeing Vikas Chander Kundu, the father of the present applicant Sujeet Ghosh @ Bhola closed the door and that another witness Mala Banerjee, who was the tenant of the accused persons at H-2/36 top floor came to the door and called at the door, the door was opened by the accused Abhisek Ghosh (younger brother of the applicant) and when she peeped inside, she saw that the deceased was half standing on the sofa (one knee on the sofa) facing the applicant accused Shashi Ghosh and the applicant accused Shashi Ghosh had caught/grabbed the hand of the deceased and Abhijeet Ghosh @ Aman present applicant and his father Sujeet Ghosh were standing behind the deceased and the deceased Manmohan asked her to leave and just after a few seconds when Mala left, the gun was fired and Manmohan was shot dead.

6. It is further stated through the status report that before the firing took place, hearing the altercations the neighbours Ajit and Himanshu went upto the stairs of the house of the accused persons where they had met the present applicant accused Abhijeet Ghosh @ Aman and

enquired whether there was any problem, despite that the present applicant replied that there was no problem so they had gone back and that the accused persons neither informed the neighbours who came on hearing the voices of the quarrel nor called the police and that the call to the police was made only after the commission of crime and at first the accused persons started saying that the deceased shot himself but when the arrests were made the mother of the applicant Shashi claimed that she had shot the deceased and took the blame on herself to save the other family members. The State has also submitted that it was found that the bullet was fired by the accused i.e. the appellant herein Abhijeet Ghosh and that the present applicant had caught the deceased and the opinion was obtained from the doctor who conducted the post mortem that whether the injury could be caused during the scuffle and whether it could be self inflicted and the report declined the possibility of these two.

7. The State has also submitted through the status report that two pistols were recovered from the place of the incident and one was found to be the licensed pistol of the deceased, in the chamber of which two live rounds were found got stuck and another country made pistol was also recovered from the crime scene; as per the report of the FSL the bullet which caused the death of Manmohan was fired from the country made pistol found on the scene of the crime and that as per the report of the Biology division of the FSL, blood of the deceased was found on the T shirt of the accused Sujeet Ghosh (father of the applicant herein) and clothes of the present applicant accused Abhijeet Ghosh @Aman. Some of the voices of the quarrel which

were got recorded in a nearby camera were taken and got enhanced at the FSL and that the transcription of the audio recordings were prepared and was got analyzed at the Truth Lab, however the voices are not clear but it can be made out that the present applicant accused was very angry.

8. It is also submitted through the status report of the State that after the incident when the accused persons were detained at the police station the applicant accused's mother Shashi Ghosh made a call on the phone of Ms. Mala (i.e. the witness who had peeped inside the house of the accused persons just before the bullet was fired) which was picked up by her brother Mr. Ankur Banerjee and she asked him to tell Ms. Mala to make a statement in their favour and they will take care of Ms. Mala (who was an unmarried old woman and a tenant of the accused family) for her whole life and that the statements of Ms. Mala and her brother Ankur Banerjee were got recorded u/s 164 Cr.P.C. and Mala stated in her statement that when the gun shot was fired she had gone down 7-8 stairs and soon after the gun shot she heard "*Aman ye tune kya kiya. Aman tu bhag ja*"; that the father of the present applicant accused called the deceased to his house on the pretext of making payments and the present applicant accused shot at Manmohan which resulted in his death and that the parents of the applicant have been granted regular bail by this Court and the charge sheet had been filed and charges under Sections 302/34 of the Indian Penal Code, 1860 and Sections 25/27 of the Arms Act, 1959 had been framed against the accused person/applicant herein.

9. *Inter alia* it had been submitted on behalf of the State that the applicant /accused had fired the gun shot and committed the murder in a very pre planned manner; that the tenant of the accused persons was a prime witness and had categorically stated that the act was committed by the applicant and that the other witness i.e. the brother of Ms. Mala had also supported the prosecution version; that the opinion of the Autopsy Surgon had ruled out the theory of self infliction of gunshot injury and of the injury due to a scuffle. *Inter alia* it was submitted on behalf of the State that the independent prosecution witnesses were yet to depose before the trial Court and in order to avoid any atmosphere of threat, influence, and tampering of evidence, regular bail ought not to be granted to the applicant.

10. It has been submitted by the applicant through the submissions in the application and written submissions submitted on behalf of the applicant that he has been falsely implicated in the instant case;

- that he has deep roots in society; that he has never been charged with any untoward incident much less with any criminal activity;
- that he belongs to a respected family of the locality;
- that he has been living there for decades; that he has cordial relationship with neighbours;
- that there is no evidence of any kind that is available with the prosecution to bring forth the allegations levelled against the applicant;
- that the police had asked for a voice sample and lie detector test of the petitioner and his parents and his brother, which the petitioner and his family members had undergone readily;

- that the said lie detector test indicated the innocence of the petitioner and his family and brought forth that there was nothing that he wanted to conceal from the investigation;
- that the prosecution having resorted to the lie detector test cannot now disbelieve the report of the test, which was sufficient to prove the innocence of the applicant; that the handwash of the petitioner and his parents was taken and on being tested by the FSL, there was no explosive residue which was found which also supported the innocence of the applicant;
- that the police had not taken any fingerprints of the petitioner and had not got the alleged weapon of offence examined by the fingerprint expert, which would have shown the innocence of the petitioner; that at the place of the occurrence, a licensed pistol of the deceased Manmohan @ Don was recovered in which there were two bullets found stuck in the chamber and it was thus apparent that Manmohan @ Don had shot at the family of the petitioner but that the said bullets had got stuck twice;
- that the investigation had been conducted and the charge sheet and the supplementary charge sheet, investigation filed indicated that it was Manmohan @ Don who was the aggressor and had come to the house of the petitioner with two fire arms at late night with the clear intention that if the things did not go in his way regarding the financial dispute and his claim of Rs.5 lakh from Sujeet Ghosh i.e. the father of the petitioner herein, he would use the fire arms to murder Sujeet Ghosh (father of the applicant) and his family members and thus the applicant submits

that in these circumstances, if in the ensuing scuffle the aggressor suffered a bullet injury then by no stretch of imagination can it be concluded that the petitioner was guilty of committing murder;

- that it was the petitioner's brother named Abhishek Ghosh who had made the call to the PCR (Number 100) from his mobile informing the police at 11:23 pm that his family was under attack from Manmohan @Don at their House no. H-2/36 Mahavir Enclave, Sector-1 Dwarka, pursuant to which, DD No. 62A was registered by the Dabri Police Station and the first information about the firing of bullet was received by the PCR at 11:32 pm in response to which DD. No. 66A was registered.

11. The petitioner thus submitted that this indicated clearly that the petitioner and his family was desperately trying to save themselves from the aggression of Manmohan @ Don; the petitioner has further submitted that the prosecution had sought to rely upon an alleged audio recording taken out on the pen drive from the CCTV of a neighbour's house, which CCTV footage had not been seized and that the micro-phone through which the audio recording was made was also not seized/ found by the investigating agency and no picture captured in the CCTV was seized. *Inter alia* the petitioner submitted that it was impossible that the said audio recording would be recorded by the CCTV installed in the house of the neighbour i.e. Mr. Ashwni, whose house is three houses away from the house of the petitioner; that the place of incident was the drawing room of the house of the petitioner which was in the middle of the first floor flat of the petitioner and that there are two bed rooms on the front side of the flat

of the petitioner and that it was impossible for the voice taking place in a closed drawing room to go out through the front bedroom and then cross the 20 ft. wide road and then travel for another 60-80 ft. and then get recorded by the alleged CCTV camera installed in the house of Sh. Ashwini. It was further submitted on behalf of the petitioner that as per the FSL report dated 3rd July 2018 sign of distortions in the magnetic material distribution were found which suggested possible signs of tampering and that the Investigating Agency had not taken the Call Details Records (CDR) of the family including the petitioner and of the deceased person, which would have clarified a lot of issues.

12. The petitioner further submits that there is undue influence that has been played upon on the police by the family of the deceased in as much as a country-made pistol (from which bullets were fired) was recovered from the nephew of the deceased named Vishal and that the police had not chosen to investigate about the possession of the said weapon by Vishal; that the country-made weapon recovered from Vishal by the police dishonestly had been placed later on at the scene of crime and pictures had been taken and that the petitioner has further submitted that there is no eye witness to the incident and that the deceased had himself told Mala, one of the witnesses, to go out which indicated that the petitioner was a victim of circumstances, despite the fact that the deceased was admittedly the aggressor and that it was the aggressor who had gone to the house of the petitioner with two pistols and tried to fire at the father of petitioner and also hit him with the butt of the pistol.

13. The petitioner has further submitted that the deceased did not have any wound on his body which showed that he was the only aggressor; it was also contended on behalf of the petitioner that he was a classic victim of crime and had been falsely implicated in the instant case as per the whims and fancies of the family of the deceased by the Investigating Agency; that the case had been transferred to DIU, Dwarka from the Police Station Dabri but directions of transfer were not found in the charge sheet and that the entire investigation was done by the second Investigating Officer. The petitioner thus contended that there was no connection of the petitioner with the alleged weapon and that the prosecution had failed to establish the source of the alleged weapon and that there was no reason on the record to explain as to why the alleged audio recording had been sent from the FSL, Rohini to a private laboratory Truth Lab for the purpose of matching voices and that even the report of the Truth Lab had opined that even after the enhancement, 85% of the alleged audio clip was discernible and only 15-20 % is audible. The petitioner has reiterated that the statement of Ms. Mala recorded under Section 161 of the Cr.PC, 1973 was recorded under the influence of the family of the deceased. The petitioner further contended that the statement of Ms. Mala, the neighbour had been manipulated by the Investigating Agency in as much as Ms. Mala had in her first statement stated that '*Bhai ye tune kiya kya*' and then it was changed to '*Aman ye tune kiya kya*'. The petitioner has further submitted that during the entire period prior to his arrest, there was not a whisper of any allegation against the petitioner regarding his influencing the witnesses or tampering with

the evidence and that the parents of the petitioner were granted bail on 12.12.2018 by this Court and that there is no allegation of their influencing the witnesses or tampering with the evidence in any manner.

14. On behalf of the State, the certified copies of the statements recorded under Section 164 of the Cr.PC during investigation of Shri Ankur Banerjee and of Ms. Mala, the resident of H. No.2/36, Top Floor, Bengali Colony Enclave, New Delhi were submitted. The statement dated 25.11.2017 of Shri Ankur Banerjee, aged 59 years, a Government servant is to the effect that on the night intervening 15/16.11.2017, he had taken his sister Mala Banerjee to his house as she could not sleep that night as a surprising incident had taken place and the next morning, he received a call on his sister's mobile and Shashi was on the other side i.e. the mother of the petitioner who requested Shri Ankur Banerjee to ask Ms. Mala to give an **appropriate** statement and stated that "*Mala ko bola k bayan tik tak dena mere bachho ke career ka sawal hai*" and then Ms. Mala would have no worries as they would arrange all for her for her entire life and that she repeatedly stated all these things one after another and he, Ankur Banerjee asked her whether it was a monetary transaction, to which she replied that it was some other aspect, whereafter, he Ankur Banerjee had disconnected the call from his sister's mobile phone.

15. The other statement that the State relied upon was the statement dated 24.11.2017 of Ms. Mala in which she stated *inter alia* to the effect that on 15.11.2017, she was watching television and had gone to cook at about 11 pm after the serial she heard a sound of a quarrel

taking place in the house of Shashi i.e. the mother of the petitioner herein and when the quarrel increased, she, who lived on the top floor as a tenant, went down to the house of the petitioners and his family who was the owner of the building and in which she lived on rent on the top floor and she reached the first floor and called out to Shashi as '*Shashi, Shashi*' as a consequence thereof, there was pin drop silence suddenly and the younger son opened the door and when the door opened, she peeped in and saw that Mr. Manmohan Dass was standing half on the sofa (one feet folded on the sofa and the other feet was on the floor) and Shashi was standing in front of him and caught hold of her left wrist and Manmohan was at the corner of the sofa and Abhishek, the younger son of Shashi was at the door and in front of him diagonally on the left side, his father Sujeet Ghosh @ Bhola was standing and behind Mr. Bhola, the present applicant Abhijeet was standing. She stated further through her statement under Section 164 of the Cr.PC that she thought that it was a business matter and that she should go away and in the meantime Mr. Manmohan also saw her and acknowledged and said Namastey to her and asked her '*ki beheneji bahar jaie*' and the she came out but as she was tierd to climb the stairs again in as much as she was physically tierd, she went down so that she could relax a little on the road and as she was getting down, she heard a noise from inside and heard a sound like shot of a cracker and at that time itself, she heard the noise from room '*Aman ye tune kiya kya*' '*Aman tu bhag ja*' and in the meantime, she had reached half down and during this somebody opened the door with big noise and ran very fast after pushing her on her side but that she did not know

who that was and where he went because it was dark in the parking and that with fast steps, she started going outside, then from the back, she heard the sound of '*dhad dhad*' and also heard shouting to the effect that '*mar diya mar diya.....*' and then '*Aman ruk ja*', '*are ye kia ho gya*' and '*kand kar diya*' but that she could not understand who said these things by then she had gone down the parking and on going down, she called her brother Ankur Banerjee and in the meantime Bhola i.e. Sujeet Ghosh, the father of the applicant herein asked her to telephone the police and so she telephoned the police and then telephoned her brother and asked him to take her away from there as she was not feeling well and by the time, her brother came, she noticed that there was a large crowd collected and Manmohan Dass was not amongst them and that what she had thought was a cracker was in fact a gun shot because of which, she became more sick and that when she was telephoning whilst standing on the road, a Bullet bike went up at a very fast speed and that she did not know who stopped that bike but stated that Abhijeet i.e. the applicant herein normally used to drive a bike.

16. Submissions were also made on behalf of the relative of the deceased, which was allowed to be taken on record in the interest of justice, vide which it was submitted that the incident admittedly had occurred within the closed room of the petitioner's house where the only persons present were the accused persons including the petitioner and the deceased and these circumstances which led to the death of the deceased were within their special knowledge and the onus was on them under Sections 103/105/106 of the Indian Evidence Act, 1872 to

disprove their involvement / complicity in the crime. It was *inter alia* contended that the primary role in the commission of the crime of the person who fired the gun shot at the deceased was that of the petitioner and that the accused persons had attempted to tamper with the investigation by approaching a main witness to give a statement in their favour. *Inter alia* it was submitted that the petitioner and the other co-accused had been charged under Sections 302/34 of the Indian Penal Code, 1860 which is punishable with death or life imprisonment and the petitioner has been further charged under Sections 25/27 of the Arms Act, 1959 and keeping in mind the nature of the accusation, gravity of the offence and past attempts to approach the witnesses in the instant case, no exceptional case had been made out by the petitioner for grant of bail and that the petitioner had in fact actively participated in the incident in as much as it was he who had fired a gun shot at the deceased causing his death, which was also disclosed by his father, the co-accused when he was confronted with the bullet marks on the wall. *Inter alia* it was submitted on behalf of the relative of the deceased that the forensic evidence was also against the petitioner and that the FSL report dated 26.03.2018 indicated that the blood was detected on the clothes of the petitioner worn by him on the day of the incident and the DNA profile generated from the blood found on the jean pants of the petitioner matched the DNA profile of the deceased's blood, thus clearly establishing the petitioner's primary role in the incident and that as per the opinion of the Department of Forensic Medicine, DDU Hospital dated 05.04.2018, the possibility of

the injury causing the death of the deceased being inflicted during a scuffle or it being self inflicted has been ruled out.

17. It was also submitted on behalf of the relative of the deceased that on a combined reading of the statements of Ravi Kumar and Anil Kumar under Section 161 of the Cr.PC, 1973, it was evident that on the date of the incident, the deceased had gone to the petitioner's house after his father had called him to discuss and settle the account between them and that on a combined reading of the statement of Mala Banerjee under Section 161 and 164 of the Cr.P.C., 1973, Ajit Kumar Mishra and Murlidhar under Section 161 of the Cr.P.C., the active role of the petitioner in the incident was clearly established and there was a strong indication of his guilt and that the petitioner was standing behind his father when Mala came to his house and that the petitioner went out in the balcony to call someone when his father said '*Don't call anyone. We will see him ourselves. Let's kill him*' and that the petitioner did not seek help despite having an opportunity to do so. It was also submitted on behalf of the relative of the deceased that in his statement under Section 161 and 164 of the Cr.P.C., Ankur Banerjee had categorically stated that the petitioner's mother called his sister i.e. Mala and when he answered the call, the petitioner's mother requested him to ask Mala to depose in her favour as her children's career, including that of the petitioner was at risk and it was contended that there was a high probability that the petitioner, if released on bail, may tamper with the evidence and / or influence material witnesses.

18. *Inter alia* it was submitted on behalf of the relative of the deceased that the accused persons had continuously changed their

stance in order to derail the investigation and that in the first disclosure statement of the petitioner's father and mother, recorded on 16.11.2017 and 17.11.2017 respectively, after the recovery of the weapon, both the said accused stated that the petitioner's mother had shot the deceased and thereafter, when confronted with the said statements and the bullet mark on the wall, the petitioner's parents changed their versions in their second disclosure statements recorded on 29.11.2017, wherein they both stated that the petitioner had shot the deceased and that the petitioner had snatched the gun from the deceased when he tried to fire on them for the first time and kept the same next to the inverter downstairs but during the investigation, the said gun was found on the rack inside the room. It has been submitted on behalf of the relative of the deceased that there was no infirmity in the order dated 07.05.2019 of the learned trial Court rejecting the grant of bail and that the same ought not to be interfered with.

19. *Inter alia* it was submitted on behalf of the relative of the deceased that the contentions raised on behalf of the petitioner in relation to the lie detector test, hand wash by FSL (no explosive residue found), the lack of fingerprints of the petitioner having been taken, the non-examination of the weapon, the first PCR call, the factum of the audio recording of the CCTV of the neighbour's house having been taken from a pen drive but that the CCTV footage was not seized and the CDR had not been taken to refer to the merits of the case and cannot be gauged presently without trial.

20. Reliance was thus placed on behalf of the wife of the deceased on the verdict of the Hon'ble Supreme Court in *State of Maharashtra*

vs. Ritesh (2001) 4 SCC 224 and *Anil Kumar Yadav vs. State (2018) 12 SCC 129*) to contend to the effect that the admissibility and effect of evidence cannot be tested at the stage of granting bail with further reliance placed on the verdict of the Hon'ble Supreme Court in *Kalyan Chand Sarkar vs. Rajesh Ranjarv (2004) 7 SCC 528*). It has thus been submitted on behalf of the wife of the deceased that while considering the grant of bail, a detailed examination of the evidence and elaborate documentation of the merits of the case is not to be undertaken and that the parameters laid down for the grant of bail in serious offences relate to the aspect of nature of accusation, such as:

- “a) Nature of accusation and the severity of punishment in case of conviction and the nature of the supporting evidence.*
- b) Reasonable apprehension of tampering with the witness or apprehension of threat to the Complainant.*
- c) Prima facie satisfaction of the Court in support of the charge.”*

21. It was further submitted on behalf of the relative of the deceased that the petitioner's reliance on the Lie Detector Test is misplaced in as much as just as an inculpatory statement of the petitioner cannot be made the basis for his conviction, in the same manner an exculpatory statement of the Petitioner cannot be made the basis of his acquittal. Reliance was placed on behalf of the wife of the deceased on the verdict of the Hon'ble High Court of Bombay in *Yogesh @ Charu Ananda Chandane vs. The State of Maharashtra*, in CrI W.P. No. 2420 of 2016 and the verdict of this Court in *Sidhu Yadav vs. State of NCT of Delhi* in CrI M.C. No. 1150 of 2017, which has been upheld

by the Hon'ble Supreme Court in *Sidhu Yadav vs. State of NCT of Delhi, 2017 SCC Online SC 1645*.

22. It was further submitted on behalf of the relative of the deceased that the audio from the CCTV footage was enhanced by the FSL, Rohini and voice sample of the accused persons was obtained at the FSL, Rohini with their consent and the voice samples and the enhanced audio (along with the transcript) was sent to Truth Labs to compare the two and authenticate the transcript and the same had been duly explained by the Investigating Officer in the supplementary charge sheet and the statements of the eye-witnesses, the forensic evidence and the disclosure statements of the petitioner's parents clearly established the primary involvement of the petitioner in the incident and that the statement of Ms. Mala also brought forth the position of the petitioner in as much as the accused persons are right-handed and the entry wound was on the left side of the temporal region and the exit wound was on the right side of the temporal region and that the mark of the bullet on the wall also corroborates the said version.

23. *Inter alia* it has been submitted on behalf of the relative of the deceased that there is nothing which cast a doubt on the presence of the petitioner in his house at the time of the incident and there is no prima facie ground to dispel the allegation that it was the petitioner who fired the gun and that the prosecution had cited 52 witnesses, out of which 17 witnesses were from Mahavir Enclave, where the brutal incident occurred i.e. the locality where the petitioner's house is situated and there are total six material witnesses whose statements are

covered under Section 6 of the Indian Evidence Act, 1872 and that it was apprehended that the petitioner if released on bail, would tamper with the evidence and influence the witnesses / material witnesses and taking into account the nature of accusation, gravity of the offence and the severity of the punishment for the same along with factors such as previous attempts to influence a material witness, bail ought not to be granted.

24. On a consideration of the entire available record and rival submissions made on behalf of either side, without any observations on the merits or demerits of the case, taking into account the gravity of the offence, the framing of charges against the applicant qua the alleged commission of offences punishable under Sections 302/34 of the Indian Penal Code, 1860 and Section 25 r/w Section 27 of the Arms Act, 1959 by the learned trial Court, the prima facie incriminating circumstances against the applicant brought forth through the statement under Section 164 of the Cr.PC, 1973 of Ms. Mala, a tenant of the petitioner's family and the statement under Section 164 of the Cr.PC, 1973 of Mr. Ankur Banerjee, brother of Ms. Mala to contend to the effect that the mother of the applicant had telephoned by her mobile no. 7042584977 to Ms. Mala on her mobile no. 9873595103 which was picked up by her brother Mr. Ankur Banerjee and she asked him to tell Ms. Mala to make a statement appropriately as her children's career including that of the **petitioner** herein was at risk, as a consequence of which, they would look after her always, coupled with the factum that the demise of the deceased as indicated prima facie through the opinion of the doctor who conducted

the post mortem showing the cause of death was a head injury, the description of which as per the Post Mortem report No.1928/2017 dated 16.11.2017 was as under

“EXTERNAL EXAMINATION: External Injuries:-

One oval shaped firearm entry wound was present on the left temporal region, with dimension of 0.8cm x 0.60111 in diameter with inverted margins and abraded-collar was present all around the wound, 6cm above left mastoid process. Blackening around the wound was present. The oozing of blood present from the wound. Track of the projectile: The bullet traversed through scalp, left temporal bone, dura matter, sub archnoid membrane, cortex of brain, subcortex (left cerebrum), subcortex of right brain, cortex right brain, dura matter, right temporal bone and scalp. Massive extravasation of blood was present in the entire track. Firearm ammunition exit wound in the form of a laceration measuring 1.5cm x 1cm, with everted margins; located on the right temporal region, 8cm above the right mastoid process, The track of the projectile is directed upwards, backwards and towards right.”

which injury was opined by the specialized doctor of the Department of Forensic Medicine, DDU Hospital, Hari Nagar to be sufficient to cause death in the ordinary course of nature with it having also been opined that the doctor conducting the Post Mortem opined that the said injury was caused by a firearm weapon and was antemortem in nature and fresh in duration and that the possibility of homicide could not be ruled out and that the time since death was about 12 hours to 1 day prior to post mortem examination with the incident having taken place on 15.11.2017 at about 11:20 pm in relation to which, as per the supplementary charge sheet dated 16.07.2018, a further clarification

was given by the doctor who conducted the post mortem report that the injuries caused to the deceased could not be during the scuffle and the injury did not appear to have been caused due to self-infliction coupled with the conversation heard by Ms. Mala wherein she heard the noise from the room after she heard the sound of a shot of a cracker and at that time, she heard the noise from the room '*Aman ye tune kya kiya. Aman tu bhag ja*' and that she heard also the sound of '*dhad dhad*' and heard shouting to the effect "*mar diya mar diya.....*" and then '*Aman ruk ja*', '*are ye kia ho gya*' and '*kand kar diya*' and Abhishek @ Aman being the applicant herein and coupled with the detection of blood on the clothes of the petitioner worn by him on the date of incident with the DNA profile found from the jean pants of the petitioner having matched the DNA profile of the deceased's blood, coupled with the factum that the deceased was shot by the country-made pistol found at the scene of crime i.e. drawing room of the house of the petitioner, which was found on the rack inside the room during the course of investigation but had allegedly been disclosed by the petitioner to having been kept next to the inverter downstairs, - are all factors which presently negate the grant of bail to the applicant until the testimonies of the material prosecution witnesses are recorded.

25. It was contended on behalf of the applicant that the lie detector/polygraph test which had been conducted at the behest of the Investigating Agency, in which the applicant had readily participated indicated that the applicant had told no lie and that in as much as the questions put forth, which were to the effect:

“Whether it is correct that there was scuffle between his father and the deceased

Manmohan in the night of 15/11/2017? Ans. -Yes.

(ii) Whether he shot at Manmohan? Ans. - No.

(iii) Whether it is correct that he shot at himself ? Ans. - Yes.

(iv) Whether it is correct that the pistol pertained to them from which Manmohan was shot dead? Ans. - No. Opinion
"

On the basis of Polygraph examination and analysis of polygraph the following opinion has been formulated in respect of Abhijeet Ghosh- The analysis and evaluation of polygrams do not reveal deceptive responses on the issues no (i) to (iv). According to polygraph examination and analysis of polygrams Abhijeet Ghosh is truthful in his answers on the issues no. (i) to (iv).”

do not incriminate the applicant and that likewise the polygraph test of his brother Abhishek Ghosh was similar as under:

“Whether it is correct that there was scuffle between his father and the deceased Manmohan in the night of 15/11/2017? Ans. -Yes.

(ii) Whether he shot at Manmohan? Ans. - No.

(iii) Whether his brother Aman shot at Manmohan? Ans. -No.

(iv) Whether it is correct that the pistol pertained to them from which Manmohan was shot dead? Ans. -No. Opinion

On the basis of Polygraph examination and analysis of polygrams the following opinion has been formulated in respect of Abhishek Ghosh- The analysis and evaluation of polygrams do not reveal deceptive responses on the issues no (i) to (iv). According to polygraph examination and

analysis of polygrams Abhishek Ghosh is truthful in his answers on the issues no. (i) to (iv). ”

and that the same sufficed to bring forth the innocence of the applicant

26. In relation to this contention, it is essential to observe that though as laid down by the Hon'ble Supreme Court in ***Smt. Selvi & Others Vs. State of Karnataka*** in CrI. Appeal No.1267/2004 that no individual should be forcibly subjected to any of the techniques of narco analysis or brain mapping, which would violate the right against self-incrimination and would amount to an unwarranted intrusion into personal liberty, it was nevertheless laid down by the Hon'ble Supreme Court by the same verdict that even though there was room for voluntarily administration of the said technique in the context of criminal justice, the same was provided that certain safeguards were in place. The observations of the Hon'ble Supreme Court vide para 223 of the said verdict are to the effect:

“223. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary

administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer."

and thus observed thereby that even if the subject had given consent to undergo any of these tests, **the test results by themselves cannot be admitted as evidence because the subject did not exercise conscious control over the responses during the administration of the test** and it cannot be overlooked as adverted to elsewhere hereinabove as laid down by this Court in *Sidhu Yadav @ Siddharth vs. State of NCT of Delhi* **242 (2017) DLT 537** in CrI.M.C.1150/2017 that just as an inculpatory statement made by an accused collected during a narco analysis test cannot be made the basis for conviction in the same manner an exculpatory statement cannot be made the basis for an acquittal and it would be a futile exercise to permit the accused to undergo such test if sought by him, which verdict of this Court has been upheld by the Hon'ble Supreme Court by dismissal of SLP No.24422/2017 filed against the said verdict of this Court. Further, as laid down by this Court in *Deepika Sharma vs. The State Govt. of NCT of Delhi & Ors.* **2018 IX AD (Delhi) 244** that even there is a polygraph test in favour of an accused, the same does not suffice to overlook the other specific evidence that has been collected by the Investigating Agency, which observations essentially apply in the present circumstances at the time of consideration of the grant or non-grant of bail.

27. The BAIL APPL.1447/2019 is thus declined.

ANU MALHOTRA, J.

OCTOBER 23rd, 2019/vm