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

+ **BAIL APPL.1327/2020**

AMIT KUMAR Applicant

Through: Mr. Ashok Chhikara, Advocate.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Ms. Neelam Sharma, APP for the
State with SI Naveen Kumar.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

% **10.09.2020**

The applicant, who is an undertrial in case FIR No. 479/2019 dated 29.12.2019 registered under sections 409/411 IPC at PS: Keshav Puram, seeks regular bail.

2. Notice in the application was issued on 19.06.2020 ; whereupon status reports dated 08.07.2020, 20.07.2020, 12.08.2020 and 25.08.2020 alongwith several documents have been filed by the State.

3. Nominal rolls dated 07.07.2020 and 20.07.2020 have been received from the Jail Superintendent.

4. Charge-sheet dated 08.04.2020 and supplementary charge-sheet dated 24.08.2020 are stated to have been filed in the matter; and copies have been placed on record.

5. The applicant's case is that he was working as a constable with the Delhi Home Guards and was deputed to serve at PS: Keshav Puram ; during the course of which duty, at some point of time, he was assigned to help the Moharrar Head Constable Malkhana (MHCM) at the police station, in producing case property from the *malkhana* before the concerned courts.

6. The allegation is that the case property stored in the *malkhana* *vidé* D.D. Nos. 2718/2017 dated 26.05.2017, 2722/17 dated 28.05.2017 and 2544/19 dated 01.04.2019, which were supposed to be lying in a plastic container in the *malkhana* were found missing when checked on 25.12.2019.

7. The applicant says that one Head Constable Kamlesh was posted at MHCM since January 2019; and that the applicant, who was a constable with the Delhi Home Guards was also only attached with the MHCM for about one-and-a-half years to assist him.

8. The essential allegation against the applicant is that he was *also in-charge* of the *malkhana*; and that while he was so posted, the said case properties went missing; and that subsequently, when the MHCM tried to get in touch with the applicant over the mobile phone and thereafter at his house, the applicant's wife informed the MHCM that the applicant had not returned home. It is thereby alleged that the applicant had stolen and misappropriated case property; and had absconded when they attempted to contact him.

9. In these circumstances, the FIR came to be registered under sections 409/411 IPC upon a complaint made by the Additional SHO, PS: Keshav Puram.

10. It is the applicant's case that being a constable with the Delhi Home Guards and being drafted-in *only to assist* the MHCM, the applicant was never *entrusted* with the keys of the *malkhana* which is evidenced by the fact that there is no DD entry to the effect that keys were entrusted/handed-over to the applicant at any stage, at any time.

11. Mr. Ashok Chhikara, learned counsel appearing for the applicant further contends that as per Rule 22.15 of the Punjab Police Rules 1934 as applicable to Delhi under section 149 of the Delhi Police Act 1978, it is obligatory upon the SHO to examine the case property lying in the *malkhana* at least twice a month and to make a report in the daily diary of having done so. Rule 22.15 reads as under:

"22.15. Public property. - Subject to the orders and responsibility of the officer in charge of the police station, the station clerk shall be considered to be in charge of all public property including money and case property in his station house. Every officer in charge of the station shall examine the property at least twice a month and shall report in the following Monday's diary that he has done so. If property is found to be incomplete or to be in any way damaged he shall add to his report the names of the persons responsible for the loss or damage.

He shall also see that the property in connection with a case is expeditiously disposed of according to magisterial orders on the conclusion of the case.

All property shall be examined by officers in charge of police stations on receiving and handing over charge and by station clerks

on relief. All damages and shortages must then be carefully noted and reported to the Superintendent of Police.”

(emphasis supplied)

12. Counsel further contends that, as seen from a perusal of the aforesaid rule, if any property is found to be missing or damaged, it is obligatory upon the SHO to record this in his report along with the names of the persons responsible for such loss or damage. He further points-out that it is also the obligation of the SHO/station clerk to examine all case property on receiving and handing over charge; and to note and report all damage and shortages to senior police officers. He contends that there is no such record in the daily diary nor any report of any case property being missing from the *malkhana*.

13. Furthermore, Mr. Chhikara submits that since the ‘station clerk’ is considered to be in-charge of all case property in a given police station, the keys to the *malkhana* are kept only with the MHCM of the police station or, in the absence of the MHCM, they are with the SHO. On point of fact it is contended that such keys were never handed-over to the applicant, who worked only as an assisting constable from the Delhi Home Guards, and is/was not even a government servant and rendered services purely as a person deputed as additional help, getting daily wages and nothing more.

14. Attention is also drawn to the provision of section 409 IPC which reads as under:

“Section 409. Criminal breach of trust by public servant, or by banker, merchant or agent. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public

servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

(emphasis supplied)

15. It is submitted that accordingly, the applicant was neither a public servant nor had he ever been entrusted with the *malkhana* keys. It is contended that the applicant therefore never had dominion over the case property which is alleged to have gone missing. It is also submitted that it is not even known as to *when* the case property went missing. It is pointed-out that 02 of the articles are stated to have been kept in the *malkhana* sometime in the year 2017, when the applicant was not even posted at the *malkhana* to assist the MHCM.

16. It is further argued that if, according to the prosecution, the applicant is a public servant, then prior sanction is required under section 197 Cr.P.C. to prosecute him; absent which no court can take cognizance of the offence alleged. In the present case, it is contended that, admittedly charge-sheet has been filed without sanction from the competent authority.

17. Counsel for the applicant submits that the applicant is being framed only to protect other police officials who may have been involved in the offence; and yet the applicant's regular bail application was dismissed by the learned Sessions Court on 09.06.2020, without considering the foregoing factors. It is further submitted that since the FIR was registered on 29.12.2019 whereas

charge-sheet has been filed on 08.04.2020, the applicant is also entitled to default or statutory bail under section 167(2) Cr.P.C.

18. Counsel contends that in order to frame the applicant, cash amounting to Rs.14 lacs was planted on him from the *malkhana* itself; and to show recovery of gold, alleging it to be the case property that is missing, jewellery belonging to the applicant's brothers and family have been shown as articles recovered from and at the applicant's instance, which is an entirely concocted story.

19. It is also pointed-out that the co-accused being the applicant's wife was released on regular bail by the learned Metropolitan Magistrate, Delhi on 26.01.2020, that is on the very day she was produced before the court.

20. On the other hand, relying upon status report dated 20.07.2020, Ms. Neelam Sharma, learned APP submits that the applicant had absconded and changed his cell phone and number in order to evade arrest and was arrested on 18.01.2020 upon receiving secret information. It is further alleged that cash of Rs.9.6 lacs and 175 gms. of gold was recovered from the bag the applicant was carrying; and that he subsequently disclosed that he had misappropriated case property worth Rs. 45 lacs and 500 gms. of gold, apart from another case property worth about Rs. 5 lacs. It is further alleged that the applicant had disclosed that most of the misappropriated cash had been spent in gambling. It has also been alleged that Rs. 4.4 lacs cash and 82.7 gms. gold were also recovered, at the applicant's instance, from his house on 26.01.2020.

21. More specifically, Ms. Sharma contends that there is ‘evidence’ to show that the applicant has purchased 52.68 gms. of gold in the form of 02 bangles from one M/s Kalyan Jewellers India Ltd. *vidé* sale invoice dated 06.08.2019 in the name of his then deceased father Umed Singh for Rs.2,08,570/-; and that he has further sold 58.377 gms. of old gold *vidé* old gold purchase voucher dated 06.08.2019 to the same company, again in the name of his father Umed Singh, who was by then deceased. Furthermore, Ms. Sharma draws attention to a purchase invoice dated 28.05.2019 whereby the applicant has sold an old gold ring weighing 4.85 gms. to one Cash-for-Gold Pvt. Ltd and thereby received a sum of Rs. 9,100/-. Copies of documents to the said effect have been filed alongwith status report dated 20.07.2020.

22. Ms. Sharma contends that these documents evidence the sale of the gold which the applicant mis-appropriated from the case property lying in the *malkhana*.

23. It is further contended that there is documentary evidence to show that the applicant stayed at various hotels and guest houses while he was evading arrest; and that the applicant’s CDRs also reflect his location away from Delhi at the time the Investigating Officer was looking for him. This again, is an aspect that would be considered during trial.

24. The State has also relied upon the duty roster of the Delhi Home Guards relating to November and December 2019, to show the period during which the applicant was on duty alongwith the MHCM. Subsequently the State has also placed on record a copy of the Daily Diary maintained at the police station for the period 01.01.2019 to

31.12.2019, in an effort to show that the applicant's name is recorded in it on the days he reported for *malkhana* duty; and when he was tasked to carry case property to court for various hearings alongwith other police officers.

25. Ms. Sharma opposes grant of bail relying upon the aforesaid submissions and documents. She *inter alia* says that if the applicant is enlarged on bail, both he and his wife would flee the process of law.

26. Nominal roll dated 07.07.2020 and 20.07.2020 show that the applicant has been in judicial custody from 26.01.2020, having been arrested on 18.01.2020. Accordingly, the applicant has remained in judicial custody as an undertrial for almost 07 months. His jail conduct is stated to be 'satisfactory' and there is no other or previous involvement in any other criminal case.

27. Upon a conspectus of the foregoing facts and circumstances, what weighs with this court is :

- a. that, it is quite incredible that a constable of the Delhi Home Guards, who is evidently posted only to assist the MHCM would be entrusted with the keys and be afforded the kind of access that he may remove case property, which is stated to have been placed in the *malkhana* *vidé* specific DD Entries;
- b. that, on point of law, Rule 22.15 of Punjab Police Rules 1934 places an obligation on the SHO to inspect case property lying in the *malkhana* and to record a report in respect of any loss or damage to it, despite which it is

only the applicant and his wife who have been made accused in the FIR for alleged loss of the case property;

- c. that, under Rule 22.15 there is also an obligation on the SHO/station clerk to examine all case property *on receiving and handing-over charge*; and to note and report any damage and shortages;
- d. that, despite repeated directions to the State to place on record documents that would *co-relate and cross-reference* the articles allegedly recovered from, or at the instance of the applicant, with the articles/case property that are alleged to be missing from the *malkhana* against specific DD Entry Nos.2718/17, 2722/17 and 2544/19, no such co-relation or cross-referencing is discernible from the documents filed on record;
- e. that, copies of the duty roster of the Delhi Home Guards placed on record relate to the period from 01.11.2019 to 25.12.2019 whereas the documents from Kalyan Jewellers India Ltd. and Cash for Gold Pvt. Ltd. cited as evidence of the sale/purchase/exchange of the stolen articles relate to May and August 2019 i.e. of a time before the applicant was on duty at the *malkhana as per the duty roster* filed, thereby belying the allegation that the gold purchased/sold was the same as the one that is missing from the *malkhana*;
- f. that, a copy of the Daily Diary for the period between 01.01.2019 and 31.01.2019 placed on record appears to contain some entries which record that the applicant had

reported to the police station for *malkhana* duty ; or, in some cases, was sent to court alongwith other police officers, carrying case property to court proceedings. While the entries in the Daily Diary would at best show that the applicant was on duty at the *malkhana*, none of the entries evidence that the *keys to the malkhana were handed-over or entrusted to the applicant*;

- g. that, most importantly, the State is unable to even indicate as to when, or *during which period of time*, the case property disappeared from the *malkhana*; and therefore, at least at this stage, it would be presumptive to impute the alleged disappearance of the case property to the applicant;
- h. that, insofar as the contention that the sale invoice/ purchase voucher dated 06.08.2019 from M/s Kalyan Jewellers is concerned, while the name of applicant's father Umed Singh does appear on the face of such documents, it is not clear how the State alleges that these documents have been prepared/procured by the applicant. This remains to be proved during the course of trial;
- i. that, in the status reports the State has failed to give even a description of articles that were placed in the *malkhana* *vidé* DD Nos.2718/17, 2722/17 and 2544/19. The purported explanation given in status report dated 25.08.2020 is a tabular description of case property alleged to be 'seized' under various FIRs and DD Nos.

with certain dates ; but there is no co-relation or confirmation that the articles alleged to be seized were at all placed in the *malkhana* under the aforesaid 03 DD Nos.;

- j. that, the allegation that cash of about Rs.9.60 lacs and 175 gms. of gold was recovered from a bag that the applicant was carrying; and that he subsequently disclosed that he had misappropriated case property worth Rs.50 lacs and 500 gms. of gold, apart from another case property of Rs. 5 lacs; and further that another Rs.4.40 lacs in cash and 82.7 gms. of gold were also recovered from the applicant's house, again appear to be allegations that remain to be strictly proved during the course of trial. Suffice it to note at this stage, that the State does not say that anything further remains to be recovered from the applicant;
- k. that, charge-sheet dated 08.04.2020 and supplementary charge-sheet dated 24.08.2020 have already been filed in the matter;
- l. that lastly, it is also the admitted position that the applicant's wife, who is also co-accused in the matter, has already been admitted to regular bail *vidé* order dated 26.01.2020 by the learned Metropolitan Magistrate.

28. In above view of the matter, this court is persuaded to grant to the applicant *regular bail* upon the following conditions:

- a. The applicant shall furnish a personal bond in the sum of Rs.25,000/- with 01 surety in the like amount from a family member, to the satisfaction of the Trial Court ;
 - b. The applicant shall furnish to the Investigating Officer/ SHO a cell phone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
 - c. If the applicant has a passport, he shall surrender the same to the Trial Court; and
 - d. The applicant shall not contact, nor visit, nor offer any inducement, threat or promise to the first informant/ complainant or to any of the prosecution witnesses. The applicant shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending matter.
29. Nothing in this order shall be construed as an expression on the merits of the pending matter.
30. The bail application stands disposed of.
31. Other pending applications, if any, also stand disposed of.
32. A copy of this order be sent to the concerned Jail Superintendent.

ANUP JAIRAM BHAMBHANI, J

10th SEPTEMBER, 2020/Ne