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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 27th May, 2021

Decided on: 4th June, 2021

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BAIL APPLN. 1423/2021

SHABIR ALI

..... Petitioner

Represented by:

Mr.Pritish Sabharwal, Advocate with
Mr.Sanjeet Kumar, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Represented by:

Mr.Rajat Nair and Mr.Amit Mahajan,
Spl. P.P. for State with Mr.Shantanu
Sharma and Mr.Dhruv Pande, Advocates
with Inspector Data Ram Yadav, Crime
Branch and Inspector Prem Chandra
Khanduri (Investigating Officer).

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BAIL APPLN. 1103/2021

MEHTAB @ FULLEY (IN JC)

..... Petitioner

Represented by:

Mr.Tanvir Ahmed Mir, Advocate with
Mr.Kartik Venu, Advocates.

versus

STATE OF NCT DELHI

..... Respondent

Represented by:

Mr.Rajat Nair and Mr.Amit Mahajan,
Spl. P.P. for State with Mr.Shantanu
Sharma and Mr.Dhruv Pande, Advocates
with Inspector Data Ram Yadav, Crime
Branch and Inspector Prem Chandra
Khanduri (Investigating Officer).

Reserved on: 31st May, 2021

Decided on: 4th June, 2021

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BAIL APPLN. 1475/2021

RAIS AHMED

..... Petitioner

Represented by:

Mr.Mir Akhtar Hussain, Advocate.

versus

STATE NCT OF DELHI

Represented by:

..... Respondent

Mr.Rajat Nair, Spl. P.P. for State with
Mr.Shantanu Sharma and Mr.Dhruv
Pande, Advocates with Inspector Data
Ram Yadav, Crime Branch and Inspector
Prem Chandra Khanduri, (I.O.)

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these petitions, petitioners seek regular bail in case FIR No.153/2020 under Sections 302/307/188/147/148/153/323/505/435/120B/34 IPC registered at PS Jafrabad, Delhi.
2. Learned counsels for the petitioners contend that the petitioners were not named in the main charge-sheet filed on 27th June, 2020 which was filed against Arshad @ Sonu, Aleem Saifi, Javed Khan and Naved Khan. Aleem Saifi has already been granted bail by the learned Additional Sessions Judge vide order dated 26th November, 2020. The entire case of the prosecution is based on the statements of two constables namely Constable Deepak and Constable Rajeev who were examined on 14th July, 2020 and 21st July, 2020 respectively, who identified the people who were seen in the footage of CCTV installed by the PWD at Gali No.1, Akhadewali Gali on 24th February, 2020. The alleged incident took place at around 10.30 PM in Gali No.1, Brahmpuri which is on the opposite side of the main road towards a distance and none of the accused was seen near Gali No.1, Brahmpuri at the relevant time. Merely because the petitioners along with the other people of the gali Akhadewali, in view of the informations which were pouring in, gathered at the corner of the gali at around 11.10 to 11.15 PM on 24th February, 2020 the same would not be attributed the common object of the mob which committed the murder of Vinod and caused injury to Nitin in

Gali No.1, Brahmpuri.

3. Learned counsel for Shabir Ali further states that even as per the prosecution, Shabir Ali is seen for just two seconds coming out of the gali wearing vest and is admittedly not armed with any weapon. Even the face of the person in vest is not clear to be that of the petitioner. Constable Rajeev who was examined on 21st July, 2020 in the absence of a clear picture of Shabir Ali strangely is in a position to give even the parental details of the petitioner. The CDRs of the petitioner have no relevance for the reason, the petitioner is a resident of the said gali and thus his location would be in the gali. No injured witness had stated that the petitioner was part of the mob which caused injuries to Nitin and Vinod Kumar resulting in death of Vinod Kumar at gali No.1 Brahmpuri.

4. Learned counsel for Mehtab @ Fulley states that the petitioner has been identified on the statement of Constable Deepak and is in custody since 16th July, 2020. Nitin in his statement has not stated anything about the petitioner. The only evidence against the petitioner is the CCTV footage at Gali No.1, Akhadewali Gali which is not the place of incident. As per the rough site plan the CCTV is shown next to point 'B' where motorcycle of Nitin is parked however, the charge-sheet is silent about the footage from the CCTV installed at point 'B' which has neither been relied upon nor given to the accused. Even according to Nitin, the mob came from No.2, Kalyanwali Gali which is opposite to Brahmpuri Gali and not from Gali Akhadewali. Mehtab who is seen at Gali Akhadewali is unarmed and does not appear to be going aggressively as a mob but a curious onlooker. In the scaled site plan, the camera adjacent to ICICI ATM shown in the rough site plan is missing. Further there were cameras installed even at Gali

Kalyanwali however, no footage from the said CCTV has been collected. Statement of Constable Deepak recorded after a period of four-five months of the incident cannot be relied upon. Reliance is placed on the decisions reported as 2014 SCC OnLine Del 2136 Rohit @ Nanhe vs. State and Noor Fatma vs. The State Govt of NCT of Delhi & Ors., Crl.Rev. P. 164/2015 decided on 20th October, 2016.

5. Learned counsel for Rais Ahmed states that from Annexures-P-7 to P-20 filed with the petition it is evident that the petitioner has been falsely implicated. The petitioner was rather helping the police at the relevant time to maintain peace and harmony when riots took place. Further two FIRs for the same offence have been registered, the earlier being FIR No.49/2020 which is impermissible in law. FIR No.49/2020 specifically relates to the death of Vinod Kumar and that is why Section 302 IPC was invoked therein besides Section 307 and 323 IPC. Statements of Nitin Kumar and other material witnesses in relation to the pelting of stones which took place in Gali No.1, 2 and 3, Brahmpuri gali were recorded therein. However, when no specific evidence was found against the petitioners in the said FIR, to implicate the petitioners a fresh FIR was registered being FIR No.153/2020 based on the CCTV footage of Gali Akhadewali at Chauhan Banger where the incident of rioting resulting in injuries to Nitin and death of Vinod Kumar did not took place. It is contended that for the same incident two FIRs cannot be registered, the same being contrary to the law laid down by the Hon'ble Supreme Court in the decision reported as 2001 (6) SCC 181 T.T. Antony vs. State of Kerala. Further the alleged incident at Gali No.1, Brahmpuri took placed at 10.30 PM and the petitioner was nowhere near the place of the incident at that time. In fact, the call records of the petitioner

show that he was at a distant location. Further the petitioner has not been seen in any of the video clips recovered from the mobile phones with regard to the incident which allegedly took place at Brahmpuri Gali No.1, where as per the prosecution Nitin Kumar and his father were attacked by stones.

6. Learned Spl.P.P. for State contends that during the riots in the North-East district area of Delhi on the intervening night of 23rd-24th February, 2020 mobs collected at various points and each one was acting in support and in tandem with the others. Gali No.1, Brahmpuri and Gali No.1, Akhadewali Gali are in the vicinity and hence people were travelling/walking down from one gali to another causing riots resulting in injuries and deaths of the victims. CCTV cameras installed in front of ATM of ICICI bank in Gali No.1, Brahmpuri as also in Gali Kalyanwali were not working and hence footages could not be collected. At this stage, this Court will not appreciate evidence to find out whether the members of the unlawful assembly were curious onlookers or were acting in concert pursuant to a common object.

7. Additional status report has been filed by the State in the bail application of Rais Ahmed in relation to the contentions raised from Annexures-P-7 to P-20 in the petition. As per the status report FIR No.49/2020 was a general FIR relating to the various MLCs collected including the MLC of Vinod Kumar however, later it was found that FIR No.49/2020 relates to three distinct incidents, thereafter with the permission of the Commissioner of Police, FIR No.153/2020 was separately registered and investigated. FIR No. 1530/2020 relates only the rioting and stone pelting that took place in gali No.1 Brahmpuri in which Nitin and his father Vinod Kumar were injured resulting in the death of Vinod Kumar. The

petitioner has not been arrested in FIR No.49/2020 for the alleged offence of rioting and being a member of the mob with the common object of injuring Nitin Kumar and causing death of his father Vinod Kumar. In any case the petitioner has already filed a petition seeking quashing of FIR No.153/2020 on the ground that for the same offence no second FIR can be registered being CrI.M.C. No.1330/2021 wherein notice has been issued and the issue whether the second FIR is maintainable or not will be decided in the said petition. Reliance is placed on the decisions of the Supreme Court reported as 2016 (3) SCC 8 Awadesh Kumar Jha vs. State of U.P. and 2019 (4) SCC 771 Pattu Rajan vs. State of Tamil Nadu. It is claimed that the victim/witnesses in FIR No.49/2020 and FIR No.153/2020 have stated about different places of occurrence, and offence under Section 302 IPC is not being investigated in FIR No.49/2020. Learned Spl. P.P. for the State further relies upon the decision reported as (2018) 10 SCC 516 State of Orissa vs. Mahimananda Mishra and (2018) 12 SCC 129 Anil Kumar Yadav vs. State (NCT of Delhi) to contend that there can be no appreciation of evidence at this stage as to whether the mob consisted of members who were curious onlookers or they were acting in concert with the common object. The petitioners are clearly visible in the CCTV footage which collected as a mob armed with dandas, lathis, stones, swords, gun, pistol etc. and hence all acts committed in furtherance of the common object will be attributable to the mob of which the three petitioners were a part of.

8. Notice in the Bail Appln.1423/2021 was issued on 28th April, 2021 returnable for 19th May, 2021. On 19th May, 2021 when the matter was heard, learned counsel for the petitioner stated that in the supplementary charge sheet as also in the status report it has been wrongly stated that the

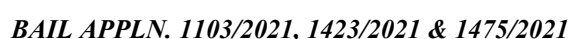
petitioner Shabir Ali was earlier involved in offences which fact was clarified by the learned Spl.P.P. on instructions that the factum of previous involvements of Shabir Ali has been wrongly mentioned in the status report as also in the supplementary charge sheet. Consequently, affidavits were filed by the Investigating Officer Inspector Prem Chandra Khanduri and Supervising Officer ACP Girish Kaushik stating that in the supplementary charge-sheet and the status report there is an error which has crept in stating that the petitioner Shabir Ali is earlier involved in offences. On the said date since footages of the CCTV installed at Akhadewali Gali were relied upon by learned Spl. P.P. which according to learned Spl.P.P. was a crucial evidence, this Court directed the learned Spl. P.P. to send the complete CCTV recording of the CCTV installed at Akhadewali Gali and if any, at Brahmpuri Gali. A pen drive containing CCTV footage from 9.59 PM to 11.12.46 PM of Gali No.1 Akhadewali Gali, Chauhan Banger and from 10.28 PM to 10.54 PM of Gali No.3 Brahmpuri Gali dated 24th February, 2020 was sent to this Court.

9. FIR No.153/2020 was registered at PS Jafrabad on the statement of Nitin son of Vinod Kumar on 28th March, 2020 wherein he stated that he was residing at House No.V-224, Khajur Wali Gali No.1, Arvind Nagar, Ghonda, was married, had studied upto 10th standard and was doing the work of D.J. On 24th February, 2020 he along with his father Vinod Kumar went out of their house to Kalyan Medicos, Brahmpuri main road on his motorcycle bearing No.DL 5SAL 3427 make Passion Pro which he was driving and his father was sitting as a pillion rider with medicines. At around 10.30 PM when they reached at Gali No.1, Brahmpuri main road near ICICI bank suddenly a stone hit on his head and his motorcycle fell on

the road. Both of them also fell on the road. He picked up his motorcycle and was returning back when around 100-200 people shouting 'Allah Hu Akbar' came from the right side of Kalyan Theka with dandas, iron rods, stones and other weapons in their hands and they assaulted him and his father with dandas and rods due to which both of them fell unconscious. After sometime he regained conscious and tried to pick up his father however, he could not get up though he was breathing. The mob burnt his motorcycle and an unknown person on his scooty took his father to Jag Pravesh Chandra Hospital where the doctor immediately on treatment declared his father dead and after getting his treatment he came back home. Thus he sought action against the persons involved in the incident and violence.

10. After investigation, charge sheet was filed in the Court on 27th June, 2020 and a supplementary charge sheet was filed on 11th October, 2020. In the charge sheet Arshad @ Sonu, Aleem Saifi, Javed Khan and Naved Khan were arrayed as the accused whereas by the supplementary charge sheet Imran, Gulzar, Mohd.Sageer, Mehtab @ Fulley, Rais Ahmed, Sabir Ali, Amiruddin Malik and Chand Babu were arrayed as accused. Statements of injured Nitin, Vikas Tomar, Rahul Tomar, Deepanshu Sharma and Rajesh Kumar were recorded. In his statement Nitin did not name any accused, nor did any other witness name the petitioners as the member of the mob that injured them at gali No.1 Brahmpuri. Learned Spl.P.P. for State fairly states that though the injured witnesses have not named or identified the assailants or the members of the mob however, from the CCTV footage of Gali No.1, Chauhan Banger (Akhadewali Gali) identification of the accused was done by Constable Deepak and Constable Rajeev whose statements were recorded

11. Since the identification of the petitioners is based on the footage of the CCTV camera installed at Gali No.1, Chauhan Banger (Akhadewali Gali) this Court saw the CCTV footages at the entrance of Gali No.1 Akhadewali Gali and Gali No.3, Brahmpuri. Before this Court notes the CCTV footages, it would be appropriate to note the rough site plan which has been filed by the Investigating Officer before the learned Trial Court along with the charge-sheet, which is as under:



12. A perusal of the rough site plan itself would show that Gali No.2, Kalyanwali from where it is alleged that the mob came is opposite Gali No.1, Brahmpuri and between the two galis is the main Brahmpuri road. The alleged incident, according to the prosecution, took place at point 'A' and the motorcycle of Nitin was found lying at point 'B' in front of the ATM of the ICICI bank. On a query raised by this Court as to whether the CCTV at ICICI bank ATM could reveal anything, learned Spl.P.P. stated that the same covered only the inside of the ATM, so there was no footage of the Gali and the CCTV installed near the point 'B' was not in working order however, footages of CCTV installed at gali No.3 Brahmpuri were collected during investigation. He further stated that gali Nos. 2 and 3 Brahmpuri were smaller lanes as compared to gali No.1 Brahmpuri which is a bigger lane.

13. A perusal of the footage of CCTV installed at gali No.3 Brahmpuri shows that in front of Gali No.3 Brahmpuri on the main road Brahmpuri from 10.28 P.M. till 10.35 PM people were moving around normally and at 10.35 P.M. some incident appears to have taken place and people on the main road stopped to watch the incident, whereafter pelting of stones took place on main road, Brahmpuri just beyond Gali No.3 towards Gali No.1. At 10.37.12 P.M. many people are seen coming out of Brahmpuri gali No.3, some of whom are armed with dandas and also start pelting stones. People are seen moving from Brahmpuri gali No.3 towards Gonda. This commotion at 10.35 P.M. at Brahmpuri gali and on main road corroborates the version of Nitin who stated that the incident took place at 10.30 P.M.

14. From the footage of the CCTV at the corner of Gali No.1 Akhadewali, the activity at the corner of gali Akhadewali was normal activity from 10.00

P.M. till 10.38 P.M. when two boys come out and curiously look towards the opposite side. After some time, 7 to 8 boys run towards Gali Kalyanwali. However, the reliance of the prosecution is on the mob which collects at the corner of Gali Akhadewali after 11.00 P.M wherein petitioners are stated to be present. Some of the boys are seen moving forward, some armed with dandas, pistol, sword etc. and some unarmed. Some of them who were unarmed, being curious onlookers only. Most of people who collected at the corner of the gali No.1 Akhadewali gali came from inside this gali and not from the main Brahmpuri road where the incidents of stone pelting took place at around 10.30 P.M. There is no material in the charge sheet or the supplementary charge sheet to show that the petitioners who were the part of the mob at gali No.1 Akhadewali gali after 11.00 P.M. were also the members of the mob at 10.30 P.M. at Brahmpuri gali No.1 which injured Nitain and his father. From this CCTV footage it is evident that the people who collected after 11.00 PM at the entrance of Gali Akhadewali may not have been the same persons who collected as the mob at Gali No.1, Brahmpuri main road for the reason most of these people and at least the petitioners came from inside Akhadewali gali and not from Brahmpuri gali or Brahmpuri Road.

15. Learned Spl. P.P. for the State relies upon the decisions reported as 2018 (10) SCC 516 State of Orissa vs. Mahimananda Mishra and 2018 (12) SCC 129 Anil Kumar Yadav vs. State to contend that at the stage of grant of bail the Court must not go deep into merits of the matter and all that needs to be established from the record is the existence of a prima facie case against the accused. Further the probability or improbability of the prosecution version has to be judged based on the materials available to the Court at the

time when bail is considered and not on the basis of discrepancies.

16. Undoubtedly, at this stage, this Court will not appreciate the evidence as witnesses are yet to be examined but this Court is definitely required to look into the existence of a prima facie case against the accused. Learned Spl. P.P. for State contends that from the perusal of the CCTV footages it is evident that the petitioners were part of the mob. This contention of the learned Spl.P.P. for State fails to note the fact that the petitioners are being prosecuted for being part of a mob with the common object of causing offences resulting in injuries to Nitin Kumar and death of Vinod Kumar, his father at Gali No.1, Brahmipuri and not for collecting as a mob subsequently at Gali No.1, Akhadewali, Chauhan Banger. There is no prima facie material available with the prosecution from the statements of the eye witnesses or the video clips of the mobile phones to show that the petitioners were part of the mob which caused unlawful activity at Gali No.1, Brahmipuri resulting in injuries to Nitin Kumar and death of his father. A subsequent collection of mob at another place may be for a different object and the petitioners may be prosecuted for the same and not for the common object of pelting stones and causing injuries to Nitin and his father.

17. As noted by the Hon'ble Supreme Court in Mahimananda Mishra (supra) even at the stage of grant or refusal of the bail, the prosecution needs to show from the material on record existence of a prima facie case. The petitioners in the present case are not being prosecuted merely for forming an unlawful assembly armed with weapons but for forming an unlawful assembly armed with weapons with the common object resulting in causing injuries to Nitin Kumar and his father Vinod Kumar.

18. Learned Spl. P.P. for the State also relies upon the decision reported

as 2017 (5) SCC 568 Kattukulangara Madhavan vs. Majeed to contend that when the prosecution establishes the presence of an accused as part of unlawful assembly then it is the conduct of the accused that would determine whether he continued to participate in the unlawful assembly with the intention to fulfill the object of the assembly or not. The issue in the present bail application is whether the petitioners were part of the unlawful assembly which in order to fulfill its object caused injuries to Nitin Kumar and death of Vinod Kumar. The subsequent forming of an unlawful assembly at a different place i.e. gali No.1 Akhadewali gali will not implicate the petitioners as members of an unlawful assembly for causing the offences at gali No.1 Brahmpuri gali.

19. Keeping in view the fact that the petitioners even though were present as members of a mob at gali No.1 Akhadewali gali after 11.00 PM when some members of this mob were armed with Sarias, dandas, stones, swords, knives etc., however there is no material even prima facie on record to show that the petitioners were members of mob that was present at Gali No.1 Brahmpuri at around 10.30 P.M. which mob indulged in pelting stones causing injuries to Nitin and death of Vinod Kumar, this Court deems it fit to grant bail to the petitioners.

20. It is therefore, directed that the petitioners be released on bail on their furnishing a personal bond in the sum of ₹25,000/- each with one surety bond of the like amount each subject to the satisfaction of the learned Trial Court/Duty Magistrate, further subject to the condition that the petitioners will not leave the country without prior permission of the learned Trial Court and in case of change of residential address and/or mobile phone the same will be intimated to the Court concerned by way of an affidavit.

21. Petitions are disposed of.
22. Judgment be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

JUNE 04, 2021/‘vn’

