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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 20.05.2021

Pronounced on: 25.05.2021

(i) + BAIL APPLN. 1413/2021

SUNNY alias LALLAPetitioner
Through: Mr. Sanjiv Dagar, Mr. Yogesh Verma,
Mr. Gaurav Arora & Mr. Sumit
Sehrawat, Advocates

Versus

THE STATE (NCT) OF DELHIRespondent
Through: Mr. Rajat Nair & Mr. Amit Mahajan,
Special Public Prosecutors with
Mr. Shantnu Sharma & Mr. Dhruv
Pande, Advocates

(ii) + BAIL APPLN. 1432/2021

BRIJ MOHAN SHARMA alias GABBARPetitioner
Through: Mr. Pradeep Shukla, Advocate

Versus

THE STATE OF NCT OF DELHIRespondent
Through: Mr. Rajat Nair & Mr. Amit Mahajan,
Special Public Prosecutors with
Mr. Shantnu Sharma & Mr. Dhruv
Pande, Advocates

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The petitioners in above captioned two petitions are seeking regular

bail in FIR No. 95/2020, registered at police station New Usmanpur, Delhi. The FIR in question has been registered for the offences under Sections 302/308/201/147/148/149/174A/188 IPC against petitioner-*Sunny @ Lalla* and petitioner- *Brij Mohan Sharma @ Gabbar*, for the offences under Sections 149/308/302/201/188 IPC.

2. Since these petitions pertain to common FIR, therefore, with the consent of counsel for the parties, these petitions were heard together and are being disposed of by this common judgment.

3. The case of the prosecution is that on 26.02.2020, DD No. 167A was received at police station Usmanpur, Delhi that the caller has stated that in Gali No. 2, *pushta* Kartar Nagar, the rioters having lathis in hands are breaking the gates of houses of persons of other community and trying to enter in their houses. Another DD entry vide DD No. 164-A was also received from Jag Pravesh Chandra Hospital regarding an injured person, namely, Irfan, aged around 25 years being admitted in the hospital. Both the calls were assigned to ASI Naushad, who reached the hospital and collected the MLC, wherein the doctor had written that “*the patient brought to casualty with alleged history of physical assault, riot and patient unfit for statement.*” On the basis of DD No. 167 A, the FIR in question was

registered. Later, the injured-Irfan succumbed to the injuries sustained.

4. In the post mortem report, the reason of death is opined as “*shock as a result of ante mortem injury to head produced by blunt force impact. Injury No. 9 to 14 is sufficient to cause death independently and collectively. All injuries were ante mortem in nature and produced blunt force impact*”.

5. During investigation, statement of mother of deceased, Kuresha, who is allegedly the only eye witness to the incident, was recorded under Section 161 Cr.P.C. wherein she stated that on 26.02.2020 at about 07:30 PM, she along with her son, deceased Irfan, was going to fetch milk, and when they reached Gali No.2, 8 or 10 persons of their locality were standing and they attacked Irfan with iron rod, bat and iron pipes. She named four attackers as Gabbar, Lalla, Pankaj and subzi wala, whom she could identify being resident of the same locality. Her statement under Section 164 Cr.P.C. was also recorded before the learned Metropolitan Magistrate wherein she named Gabbar, Lalla, Pankaj and Rohit as the persons who attacked his son.

6. In view of statement of this eye witness, the petitioners herein were arrested on 28.03.3020 and in their disclosure statements they admitted having been involved in the alleged incident with other co-accused. However, they refused to undergo Test Identification Parade (TIP

proceedings). Further investigation was carried out and exhibits were sent to FSL for opinion. After completion of investigation, charge sheet in this case was filed before the trial court on 23.06.2020 and supplementary charge sheet was also filed on 31.12.2020.

7. Bail application of petitioner- *Sunny @ Lalla* was dismissed by the trial court on 19.05.2020 and 15.03.2021 and that of petitioner- *Brij Mohan Sharma* was dismissed on 24.11.2000 and 05.03.2021. Thus, the petitioners are before this Court.

8. At the hearing, Mr. Sanjiv Dagar, learned counsel representing petitioner *Sunny @ Lalla* [in BAIL APPLN. 1413/2021] submitted that name of petitioner was not mentioned in the FIR in question and he has been arrested on 28.03.2020 without substantial material evidence against him in this case.

9. Learned counsel submitted that the prosecution has relied upon the testimony of sole eye witness, *Kuresha*, mother of deceased who in her statement under Section 161 Cr.P.C. has stated that she along with deceased was going to fetch milk just before the alleged incident and when her son was attacked by a group of rioters and he got injured, she ran home and informed her brother in law's son- Nafees about the incident, who along

with few of his friends reached the spot and took the deceased to the hospital. She has further alleged that accused were carrying iron rods, iron pipes and bats in their hands, whereas Nafees in his information to the hospital has stated that the deceased was attacked with stones. Next submitted that mother on deceased in her statement recorded under Section 164 Cr.P.C. before the learned Metropolitan Magistrate has stated that sword was used to cause injury upon the deceased.

10. Further submitted that there is no CCTV footage or any other electronic mode to establish petitioner's involvement in the crime in question and since petitioner is resident of the same area, his location as per call detail record has to be of the place of alleged incident.

11. Learned counsel empathically submitted that statements of eye witness *Kuresha* recorded under Section 161 Cr.P.C. and 164 Cr.P.C. are contradictory not only with regard to the aspect whether she was walking with the deceased or the deceased was ahead of her but also use of weapon of offence. Moreover, the wife of deceased before the media persons stated that she and her mother-in-law *Kuresha* were at home at the time of alleged incident therefore, the accused could not be seen, as they all had run away leaving her husband in injured condition.

12. Also submitted that as per statement of eye witness *Kuresha*, recorded under Section 161 Cr.P.C., the alleged incident had taken place in Gali No.2, whereas in her statement under Section 164 Cr.P.C. she stated that the alleged incident took place in her gali i.e. where she lived (Gali No.1). Learned counsel submitted that these are material contradictions and, therefore, the statement of this witness cannot be relied upon.

13. It was further submitted by learned counsel representing petitioner *Sunny @ Lalla*, that during a media interview, son of brother-in-law of *Kuresha*, stated that at the time of alleged incident they both (he and mother of deceased) were at home and since they could not see anyone, so they cannot identify anyone.

14. Further, attention of this Court is drawn to the fact that one another witness namely, Pramod, who is resident of Gali No.1, in his statement recorded under Section 161 Cr.P.C. on 17.04.2020 has stated that he had seen a person lying in injured condition beside a wall in his *gali* from the terrace of his house. Learned counsel submitted that the foundation of this FIR case against the petitioner is the statement of eye witness, mother of deceased-*Kuresha* whose presence at the spot of crime is doubtful and another witness- Nafees, who is also a hear say witness, was not present at

the time of alleged incident.

15. Learned counsel placed reliance upon decision of this Court in BAIL APPLN. 3896/2020, titled as *Uttam Tyagi vs. The State (NCT) of Delhi*, decided on 18.12.2020 to submit that in somewhat similar circumstances, in view of contradictory statement of father, whose son was killed and who was the only eye witness of the incident, the accused was released on bail and similar are the facts and circumstances of the present case. Further submitted that since the prosecution case is based upon frivolous and baseless allegations so, this petition also deserves to be allowed.

16. Similarly, Mr. Pradeep Shukla, learned counsel for petitioner- *Brij Mohan Sharma @ Gabbar* submitted that petitioner is innocent and has been falsely implicated in this case and has nothing to do with animosity between two communities and was arrested on 28.03.2020 without any basis.

17. Learned counsel next submitted that in addition to what has been submitted by counsel for petitioner- *Sunny @ Lalla*, there are major discrepancies in the statement of ASI Naushad, who was the first Investigating Officer of this case with regard DD No. 167-A, wherein he stated that complainant Mehtab had told him that 8-10 persons were rioting

and had severely assaulted a person. However, the complainant-Mehtab in his statement under Section 161 Cr.P.C. has not mentioned about assault on any person and even DD No. 167-A is silent on this aspect.

18. Next submitted that the only eye witness in her statement recorded under Section 161 Cr.P.C. has mentioned one of the accused as “sabzi wala” but in her statement recorded under Section 164 Cr.P.C., she has not named any sabzi wala and rather named one Rohit as co-accused. Further in her statement recorded under Section 164 Cr.P.C., she has used the word “talwar” as weapon of offence, which she did not say in her statement under Section 161 Cr.P.C. Further stated that under MLC No. 692/20, the cause of injury has been mentioned to be by stones and not by sword.

19. Learned counsel next submitted that as per the statement of Pramod Kumar, when he heard shouting at 19:30 hours on 26.02.2020 and went to his terrace, he saw one person lying beside a wall on the road, however, no other person was seen there and thereafter, he immediately called PCR informing the police about the incident. This makes Pramod Kumar the first informant of the case, whereas the fact remains that neither the complaint by Mr. Pramod Kumar nor the action taken on his information has been adduced in the charge sheet. This further brings the investigation under

serious doubt.

20. Lastly, it was submitted that there is no technical evidence on record and in view of contradictory statements of these witnesses, the present petition deserves to be allowed and petitioner may be released on bail.

21. On the other hand, learned Special Public Prosecutor submitted that petitioner- *Sunny @ Lalla* and petitioner- *Brij Mohan Sharma*, both were front line active attackers/ rioters and they with their other two accomplice had beaten Irfan to death. Next submitted that the eye witness, mother of deceased, has specifically named them amongst the other accused who had attacked her son on the day of alleged incident and when they refused to participate in TIP proceedings, they were correctly identified by her during police remand. Further submitted that in their disclosure, the present petitioners have admitted having been involved in the killing of Irfan. The call detail records of petitioners also show their presence at the place of occurrence where Irfan was beaten to death.

22. Lastly, submitted that the nature of offence committed by these petitioners disentitle them from bail in the present FIR case and two other co-accused are yet to be arrested and there is every possibility of their absconding or remain unavailable for trial if released on bail. Thus, it is

urged on behalf of respondent/State that these petitions deserve to be dismissed.

23. The rival submissions made by counsel representing both the sides were heard at length and the material placed on record has been carefully considered.

24. Though at the stage of consideration of bail, this Court is not required minutely analyse the statement of witnesses, however, on this aspect the pertinent observations of the Hon'ble Supreme Court in ***Mahipal Vs. Rajesh Kumar (2020) 2 SCC 118*** are as under:-

“25. Merely recording “having perused the record” and “on the facts and circumstances of the case” does not subserve the purpose of a reasoned judicial order. It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the Judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of Judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty-bound to explain the basis on which they have arrived at a conclusion.”

25. In view of dictum of Hon'ble Supreme Court in *Mahipal (Supra)*, this court has gone through the statement of *Kuresha* alleged eye witness recorded under Section 161 Cr.P.C. by the police and also under Section 164 Cr.P.C. recorded before the learned Metropolitan Magistrate. In her statement recorded under Section 161 Cr.P.C. eye witness *Kuresha* has categorically stated that she had accompanied her son to fetch milk and when they reached Gali No.2, eight or ten boys were standing there, out of which four persons were holding iron rod, iron pipe, bat and a *danda* in their hands and whom she recognized as they lived in the same area. They hit her son on his head, he fell down and they all started beating him mercilessly. Due to the fear she ran towards her home, where *Nafees*, son of her brother-in-law, with his few friends, who lived in the same gali, reached at the crime spot and found her son lying on the road. Blood was oozing from his head and they all took him to the hospital. On the other hand, this witness in her statement recorded under Section 164 Cr.P.C. has stated that she had accompanied her son as she had to fetch medicine from the shop and that she walked slowly while her son walked much ahead of her. She further stated that all of a sudden a few boys came out of their houses, who were

carrying iron rod and sword in their hands and they hit her son on his head. She further stated that her injured son was brought to the hospital by son of her brother-in-law and his friends.

26. The aforesaid two statements *prima facie* seem to be contradictory on the point of weapon of offence as well as her exact position at the spot of crime. Moreover, in her statement under Section 164 Cr.P.C., this witness is silent on the aspect as to who had informed son of her brother-in-law about the alleged incident and his friends, who reached the spot and took the deceased to the hospital and also she has specifically named four accused persons instead of one “sabziwala”.

27. Further, learned counsel for petitioner has played before this Court a media video clipping available at The Live TV wherein the wife of deceased had specifically told the media correspondent that she and her mother-in-law were at home at the time of alleged incident and so, the accused could not be seen as they all had run away leaving her husband in injured condition. Pertinently, wife of deceased has not been made a prosecution witness in this case and so, her statement before the media is of no help to the case of petitioners.

28. This Court has also gone through the statement of Pradeep Kumar

recorded under Section 161 Cr.P.C. in this case. He has categorically stated that after hearing loud voices of people, he went on the roof of his house and saw a man lying in the *gali* beside the wall in an injured condition. However, it would be too soon to analyse as to whether any one was present with the deceased when he was being hit by rioters or not or by the time this witness reached at his roof, the others had left. But this Court does not find any discrepancy in the number of *gali* mentioned by these two witnesses, as according to eye witness *Kuresha*, the alleged incident occurred when they had reached Gali No.2 and Pradeep Kumar also is a resident of Gali No.2.

29. Next plea of petitioners is that *Nafees* in his information given to the hospital has stated that the deceased was attacked with stones, whereas in his statement under Section 161 Cr.P.C. stated that mother of deceased, *Kuresha*, had come home crying that her son had been attacked with iron rods and *dandas*. Moreover, the post mortem report of the deceased also records that “*the deceased was brought by relative Nafees due to injury by stones*”. The worthiness of statement of this witness shall be tested at trial but the fact remains that there is no recovery of weapon of offence from both the petitioners.

30. Further, this Court finds that there is no CCTV footage or any other

electronic evidence available on record except the call detail record, which establishes the presence of petitioners in the area in question but again it cannot be lost sight of the fact that these petitioners are residing in the same area so, their location has to be in the same area. As far as their involvement in the alleged incident is concerned, how their call details connect them to the offence in question, is subject to trial.

31. This Court is informed that charge in this case has already been framed and the matter is now fixed for recording of prosecution evidence before the trial court. In the considered opinion of this Court, trial shall take substantial time and petitioners cannot be made to stay behind bars till conclusion of trial.

32. In view of the above, however, without commenting on the merits of the prosecution case, the petitioners are directed to be released on bail forthwith upon their furnishing personal bond in the sum of Rs.20,000/- each with one surety each in the like amount, to the satisfaction of the Trial Court/ Duty Magistrate.

33. This Court hereby makes it clear that the trial court shall not get influenced by any observation made by this Court while deciding the present petitions.

34. The petitioners shall not directly or indirectly influence any witness and shall appear before the trial court as and when directed.

35. A copy of this order be transmitted to the Trial Court and Jail Superintendent concerned for information and compliance.

(SURESH KUMAR KAIT)
JUDGE

MAY 25, 2021

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