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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: February 10, 2021

Pronounced on: February 19, 2021

+ **BAIL.APPLN.3163/2020**

JUNAID

..... Petitioner

Through: Mr. Salim Malik, Adv.

Versus

STATE

.....Respondent

Through: Mr. S.V. Raju, ASG with Mr. Amit Mahajan, SPP, Mr. Amit Prasad, SPP, Mr. Rajat Nair, SPP, Mr. Shantanu Sharma, Mr. Dhruv Pande, Ms. Sairica Raju, Mr. A. Venkatesh, Mr. Guntur Pramod Kumar, Mr. Shaurya R. Rai, Ms. Zeal Shah, Ms. Aarushi Singh, Ms. Manjit Kaur and Mr. Anshuman Singh, Advs.

+ **BAIL.APPLN.3862/2020**

CHAND MOHD.

..... Petitioner

Through: Mr. Salim Malik, Adv.

Versus

STATE

.....Respondent

Through: Mr. S.V. Raju, ASG with Mr. Amit Mahajan, SPP, Mr. Amit Prasad, SPP, Mr. Rajat Nair, SPP, Mr. Shantanu Sharma, Mr. Dhruv Pande, Ms. Sairica Raju, Mr. A. Venkatesh, Mr. Guntur Pramod Kumar, Mr. Shaurya

R. Rai, Ms. Zeal Shah, Ms. Aarushi Singh, Ms. Manjit Kaur and Mr. Anshuman Singh, Advs.

+ **BAIL.APPLN.52/2021**

IRSHAD

..... Petitioner

Through: Mr. Salim Malik, Adv.

Versus

STATE

.....Respondent

Through: Mr. S.V. Raju, ASG with Mr. Amit Mahajan, SPP, Mr. Amit Prasad, SPP, Mr. Rajat Nair, SPP, Mr. Shantanu Sharma, Mr. Dhruv Pande, Ms. Sairica Raju, Mr. A. Venkatesh, Mr. Guntur Pramod Kumar, Mr. Shaurya R. Rai, Ms. Zeal Shah, Ms. Aarushi Singh, Ms. Manjit Kaur and Mr. Anshuman Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

The hearing was conducted through video conferencing.

1. The above-captioned petitions have been filed by the petitioners under Section 439 Cr.P.C. read with Section 482 Cr.P.C. for grant of bail in case FIR No.84/2020, for the offences punishable under Sections

147/148/149/153-A/302/395/397/452/454/505/506/120-B IPC, registered at PS Dayal Pur, North East District, Delhi.

2. The above-captioned petitions have been filed of the same incident and FIR and the evidence on record are the same against all the accused/petitioners, therefore, these petitions being decided by this common order. However, since facts are also same of all the petitioners, therefore, facts narrated in Bail Appln.3163/2020 filed by accused Junaid are being discussed while passing order in these petitions.

3. Case of the prosecution is that in the North East area of Delhi at different places, incidents of stone pelting and rioting were reported. On 24.02.2020, at around 3:00 PM, Hindu mob which was pro CAA also entered the arena and they too started pelting stones etc. at the Muslim community, forcing them to retreat. Muslim rioters were concentrated towards the Muslim dominated Chandbagh area, while the Hindu rioters were towards the Yamuna Vihar area. Some of the rioters on both the sides also went to the roof tops of the buildings of their area over looking Mohan Nursing Home and adjoining buildings, while Muslim mob took position at the roof top of buildings like Saptarishi, Ispat and Alloy Private Limited etc. From the roof top of the building, there were firing and stone pelting

towards each other, from both sides of the road. In short time, it became a full-fledged Hindu-Muslim riot. In the process, one Shahid received a gunshot injury which led to his unfortunate death.

4. Learned counsel for the petitioner submitted that the evidence against the petitioner, as per the report u/s 173 Cr.P.C. are that in their statements recorded u/s 161 Cr.P.C., eye-witnesses Mukesh Kr. (Labour) who were present on the date and time of the incident as well as Ct. Amit and Ct. Azad who were present on duty near SOC deposed that petitioner herein was part of the unlawful mob which not only entered forcefully inside the Saptarishi building after breaking the iron gate but also illegally overtook the Saptarishi building after getting it evacuated forcefully from the actual inhabitants i.e, the labourers and their family members. He was actively pelting stones/bottles on the police party and other community persons. The owner of the building vide his statement deposed that the protestors looted the cash from the cash counter and broke the CCTV camera/DVR. The petitioner was using one mobile number and the CAF and CDR of the same were obtained from the concerned service provider. On scrutiny, it was revealed that said number was obtained by the petitioner on his name. On scrutiny of the CDR, it was also revealed that on the date and time of

incident, mobile phone of petitioner was active at the scene of crime. Accordingly, he was arrested in the present case after having sufficient evidence on file dated 01.04.2020. Copy of FIR alongwith its English translation is annexed as Annexure-A.

5. It is submitted that the petitioner is innocent and has been falsely implicated in the present case. There is no evidence whatsoever against petitioner. He was called on 01.04.2020 through notice under Section 160 Cr.P.C. that he was required for some normal inquiry and would be sent back after taking the statement. He was not arrested from his house and was taken to police station as cleared by police in charge-sheet. The notice of Section 160 Cr.P.C. is also provided in charge-sheet which shows the authenticity of the above submissions. After putting petitioner into custody an afterthought story was made by police to falsely implicate him in this case. There is no relevant statement provided from owner of building against petitioner. No call at 100 number was made by the owner even after getting information of problem at his godown or Saptarishi building as it was a serious situation on 24.02.2020. Moreover, there is no proof in charge-sheet even in the CDR as shown by police which may prove petitioner's involvement in the case. There is no CDR chart presented by police in

charge-sheet which proves that petitioner was present at the scene of crime as provided on page No.275 of the charge-sheet. The particular presence on the Saptarishi building cannot be established only on the ground that the mobile phone was found within the radius of the mobile tower. A mobile tower covers an area of up to 500 meters. So, it cannot be said that every person who is in the range of 500 meters was present on the scene of crime at Saptarishi building.

6. Further submitted that to prove the involvement of the petitioner, the prosecution has relied upon a video of an NDTV prime time show, about which, the prosecution themselves have admitted that it fails to establish the identity of any of the accused. Because, when they try to enlarge the picture, the photos break and the stills could not be obtained as provided on page No.38 of the charge-sheet. But when the said video was run during the course of argument, it was seen clearly that all the faces were visible and can be identified easily. None of the persons present was identified as Junaid. The reason is simple, because he was not present at the scene of crime. On perusal of that if we see the statements of the three prosecution witnesses Mukesh, Narayan and Arvind Kumar u/s 161 Cr.P.C., it's all copied and pasted and even in the said statements, there is no fact which shows the

presence of petitioner at the Saptarishi building or identifies him categorically. Out of these three witnesses Mukesh deposed in his statement on 08.03.2020 that on that day he did not state a single word against petitioner herein. Even the description of petitioner was not mentioned by Mukesh. Afterwards on 01.04.2020, when the petitioner was called by IO at Old Kotwali building, Darya Ganj, he was arrested and put into custody to fulfil the ingredient of Section 149 IPC. No witness was present at that particular time not even Mukesh. The “*statement under Section 161 Cr.PC is Inadmissible in Evidence and cannot be Relied Upon For Conviction*”, as reiterated by Hon’ble Supreme Court in the case ***Parvat Singh vs. State of Madhya Pradesh*** in Criminal Appeal No.374/2020. Although the defence is aware of this fact that they are not at the stage of trial and are not seeking discharge/acquittal rather petitioner is only seeking bail. The trial has not started yet and it will take a long time and it is only on the basis of the statement of Mukesh which is not corroborated by any independent evidence that the prosecution wants to keep the petitioner into custody. If the statement of Mukesh is removed from the charge-sheet, there is no evidence against petitioner and no offence is being made out. Thus, only on the basis of one statement that too a supplementary one which is an afterthought of

the police to rope in an easy target, the most important and fundamental right of the petitioner is being curtailed. Moreover, statements recorded under Section 161 Cr.P.C. statements of Ct. Amit and Ct. Azad, also do not establish the presence of the petitioner. Thus, there is no evidence with police, against the petitioner except his confessional statement in the police custody which is inadmissible in evidence. Neither the presence of the petitioner at the scene of crime has been established at all, nor identification through dossier and TIP were done. Thus, the prosecution has no cogent evidence against the petitioner to bring his guilt home. Thus, the petitioner deserves bail in the present case.

7. On the other hand, Mr. S.V. Raju, learned ASG has raised preliminary objection by submitting that the present case is squarely covered by the judgment 06.07.2020 rendered by this Court in Bail Appln.922/2020 titled as ***Raiees Khan vs State of NCT Delhi***, wherein this Court was pleased to dismiss the bail application of the co-accused in the present FIR whose case was also similarly situated as the petitioner's case. The relevant portion of the said judgment is quoted hereinbelow for ready reference:

“....7. It is further argued the statements of public witnesses Mukesh and Arvind Kumar, though recorded on 08.03.2020, never stated about his presence at the roof top of said Building or that anybody allegedly having

received gunshot injury at rooftop, but their statements were again recorded on 12.03.2020 wherein they alleged they had seen applicant, who was then sitting in the police station and had duly identified him as an active member of the group which went to the roof top of Saptrishi Building, who fired and pelted stones from the roof at police and public by breaking the boundary wall of roof by use of kicks and sticks etc.

8. The learned counsel for applicant further submits that in the status report the role assigned to the applicant is only of hurling stones and raising slogans and the order of the learned Chief Metropolitan Magistrate shows that there was no incriminating evidence against the applicant, except his disclosure statement and hence the supplementary statements of two public witnesses, recorded on 12.03.2020, only show they have been tutored to allege against this applicant to falsely implicate him in this case.

9. The learned SPP for the State, on the other hand, submitted the incident was of rooftop of Saptrishi Building and not of Chand Bagh, Peer Baba Mazar, Bhajanpura, Delhi as is evident from the footage of NDTV as also the photographs showing the dead body of Shaheed was brought down with the help of a ladder from the roof of Saptrishi Building. It is argued witnesses Mukesh and Arvind were residing in Saptrishi Building itself, which was taken over by the rioters, including this applicant and his associates and they went to the roof; they kept on throwing bricks and other material on the police officials and general public and some of its members even fired.

10. It is also submitted when the applicant was at the police station he was advised to keep his face muffled, but he deliberately unmuffled himself when the witnesses arrived to frustrate the TIP and it was only for this reason, the TIP was not conducted. It is argued even otherwise the prime objective of the TIP is to find out if the investigation is moving in right direction. It is stated

besides these two public witnesses, ASI Rajender Singh and HC Davender have also given statements under Section 161 Cr.P.C. against the applicant and have identified him.

11. No doubt there was a delay in registration of the FIR, but it was only because of the circumstances prevalent at that time. On the day of incident, I am told about 18689 PCR calls were received on a single day; 3450 calls were from the Dayalpur area itself and then it took time to register the FIRs; the last FIR being registered on 28.03.2020. Pandemic Covid-19 further delayed the investigation.

12. Saptrishi Building is opposite to the place where HC Rattanlal of the police team was shot at. Immediately thereafter, this incident happened. Shahid was allegedly one of the rioters and probably, during firing upon the police party and general public, a gunshot misfired and probably hit Shahid from short range as the injury is a short range injury, as verified. Now since delay and non-conducting of TIP being sufficiently explained, coupled with the fact the identity of the applicant stood established by at least four witnesses in this matter, it would not be appropriate for this Court to appreciate the evidence.

13. All these pleas the accused relies upon, can be taken while arguing on charge, but considering the gravity of offence; the statements implicating him; I am not inclined to admit the applicant to bail at this stage.....”

A copy of the judgment dated 06.07.2020 rendered by this Court in the aforesaid case is annexed hereto and marked as Annexure-A.

8. It is submitted that in the instant case also the accused/petitioner has been named by same public witness Mukesh who named accused Raiees Khan. In the present case also, the petitioner has been named by the same

two police personnel of PS Dayal Pur who had also named Raiees Khan. Similar objection pertaining to identification of the accused, as raised in the present petition, was also raised in the said petition which came to be rejected by this Court in the aforesaid judgment. The issue of delay of registration of FIR, the ground of false implication of the accused in the subject FIR, the NDTV video and the grounds pertaining to TIP etc., in the submission of the prosecution, were all raised in the aforesaid judgment and were rejected. In the present case also similar grounds have been raised.

9. Further, it is submitted that the veracity of the statement of public and police witnesses for the purpose of bail has already been examined by this Court in the above-quoted judgment and only after closely examining the said statements, this Court came to the finding that the present stage was not a fit stage for granting bail to the co-accused. The said circumstances are *mutatis mutandis* applicable in the present case also. Furthermore, the CDR analysis of the petitioner, respondent also establishes his presence at the scene of offence. It is submitted that the petitioner had been using, 4G mobile phone which gives the exact location to 20 mts. The said fact falsifies the petitioner's ground that CDR location of the petitioner cannot be relied upon as its range is 500 mts. Further, the scene of offence i.e.

Saptarishi building, is opposite to the place where HC Rattanlal of the police team was shot at. Immediately thereafter, this incident happened. The said fact has also been examined by this Court in the aforesaid judgment.

10. Learned ASG further submitted that during investigation eye witnesses, namely, Mukesh, Arvind and Narayan were traced (labourer) who were present in the building at the time when unruly mob had forcibly entered inside the building after breaking open the iron gates. On 08.03.2020, the witnesses were joined in the investigation and their statements u/s 161 Cr.P.C. were recorded. All eye-witnesses deposed that they can identify those rioters who had not covered their faces while they forcibly entered inside the Saptarishi building after breaking open the iron gates and taking active part in stone pelting on police party from roof top. Besides this, eyewitness Mukesh also identified the petitioner herein during investigation as an active member of the rioters. Besides this, police personnel of Police Station Dayal Pur who remained present on duty continuously at demonstration site also deposed in their statement that they are familiar with faces of number of persons who attended the demonstration time to time and took active part in riots on the date of incident i.e. 24.02.2020. Ct. Amit and Ct. Azad, members of crack team of ACP/Gokal

Puri also identified the petitioner as an active participant of unruly mob in riots.

11. Further submitted that during investigation, after analysis of video footage obtained from NDTV, it was established that deceased Shahid sustained the gunshot injury at the roof top of Saptarishi building. Petitioner was also present there as a member of unruly mob. The mob gathered on the rooftop of building is seen hurling stones at public as well as police party. However, the petitioner's name was first disclosed by the other co-accused Rais Khan arrested earlier in the present case in his disclosure statement. Thereafter, on the information of local informer his whereabouts were identified and a notice was served on him to join the investigation. During investigation, on the basis of identification and statement of eye witness Mukesh & two police personnel as well as on the basis of CDR/Dump Data analysis, the petitioner was arrested in the present case.

12. Learned ASG further submitted that statement of eye witness Mukesh and two police personnel present at the spot as well as CDR analysis of petitioner shows that the petitioner was present at the scene of crime. Therefore, considering the conduct of the petitioner, there is every possibility that if the petitioner released on bail, he may abscond.

Furthermore, the character, antecedents, behaviour, means, position and standing of the petitioner also do not entitle him to seek bail. Also there is possibility that he may indulge in such activities if enlarged on bail. It is also pertinent to mention here that the witnesses are working and residing in the vicinity and they belong to weaker section of the society being labourer, hence, there is apprehension that the petitioner may influence the witnesses. Further, all the aforesaid facts (grounds for denial of bail) have already been examined by this Court vide its orders dated 06.07.2020 & 16.10.2020 passed in the bail matter of Raiees Khan and have been held in favour of the prosecution and against the petitioner. Thus, the present petition deserves to be dismissed.

13. Heard learned counsel for the parties and carefully perused the material on record.

14. On perusal of the post-mortem report which is provided on page Nos.36 & 37 and also on page Nos.65 & 66 which examines the gunshot wound to Shahid, that led to his unfortunate death. The analysis says that, the gunshot injuries were received around 04:00 PM. On the above-mentioned submissions, it has been stated that the prosecution has failed to establish presence of petitioner at the scene of crime or in that area. Further,

there is no blackening, singeing or tattooing seen around the wound which established the fact that neither it was a contact wound, nor a short-distance wound. Rather it was a wound caused by the long distance firing which indicates towards the fact that, it is a distant shot fired from any building which is in front of Saptarishi building and is at a distance or it is fired from Mohan Nursing Home, because in the video relied by the prosecution, it has been categorically shown that how some anti-social elements were firing gunshots by using a rifle from the roof of the Mohan Nursing Home building towards Saptarishi building and at other places. And this fact has been further admitted by the prosecution when they use the word “*possibility*” provided on page No.37 of the charge-sheet. Because they are not sure that from where this gunshot injury came then how can they be sure that it is a close-range shot when they are already mentioning that this is a “*possibility*” but not a surety or certainty.

15. Moreover, the antemortem injury does not mention the shape of the wound and the colour of the initial part of the track which are essential to decide the range of the fire. The shape of the wound depends on the range and the weapon used. In this case, neither the shape has been mentioned nor the weapon has been discovered. So, the theory of close-range shot is just a

conjecture of the investigating agency and is not based on scientific fact. Simply because copper like pieces were found near the exit wound of the body, as per the post-mortem report, it would not signify a close-range shot. But it was only on this basis, the investigating agency concluded that the *“firing was possibly from close proximity”*, which is not scientifically possible.

16. It is pertinent to mention here that in the post-mortem report, the direction of the wound in which it has entered the body has been given to be from the left side which is going downwards and exiting from the right side. Which means that the injury was from a height and at a distant range, thus, establishes the possibility that the bullet came from Mohan Nursing home or any building which is on the left side of the Saptarishi building and is at height which is on the front and diagonally left to the Saptarishi building and is on more height than that of Saptarishi building. In case if it was fired from a close range, then the bullet would have gone straight, rather than entering the body from left side and exiting from right side and that too downwards. Further, in case of close range shot gunshot residues like lead, Carbon Mono Oxide, Carbon Dioxide are bound to be present at the entry of the wound, but, no such residue was mentioned to be available in the post-mortem report.

17. As submitted by learned counsel for petitioner that in the same video relied upon by police, at exact after running of video for 10 minutes, it is seen that Ravish Kumar, NDTV primetime anchor saying that a person is firing rifle from Mohan Nursing Home Hospital and is wearing helmet, there is another person who is covering the weapon with handkerchief and later on, they can be seen in the videos as well. But the investigating agency seems to have concentrated only on one side of the building, although it is an admitted case of prosecution that rioters from both the sides were pelting stones at each other and were firing. Further, in this video, the firing is seen to be done only from Mohan Nursing Home and not from Saptarishi building.

18. In view of the above submissions, it can be seen that there is no evidence whatsoever, either direct or circumstantial or forensic against the petitioners. Neither there was any motive whatsoever either for them or for any other person allegedly present on the roof of Saptarishi building, to commit the offence, nor has the prosecution alleged any motive in the entire case. Thus, it is hard to believe that a communal riot can be used by the petitioners to cause death of the person of their own community. Moreover, when it is an admitted case of the prosecution that the petitioners actually let

go off the witnesses of the different community and asked them to leave the scene of crime to save their lives, namely, Mukesh, Narayan, Arvind and their families, before climbing on the roof top of Saptarishi building. If, they were really involved in this communal riot and wanted to cause harm to the members of the other community/Hindu community, they would not have tried to save the lives of the above-named members of the other community.

19. In addition, the investigating agency itself has stated in their reply to the bail applications of the petitioners that the main assailant who has caused gunshot injury to deceased Shahid, is yet to be arrested. Admittedly, no recovery, either of firearm or of any other weapon was obtained from the petitioners.

20. This Court is conscious about the bail denied by Co-ordinate Bench of this Court to co-accused Raiees Khan vide order dated 06.07.2020 in Bail Appln. 922/2020. On perusal of the said order and considering the rival contentions of the parties, I have no hesitation to say that the facts brought in the present petitions were not brought to the notice of the Court while deciding the bail application of co-accused named above.

21. Therefore, considering the above facts and the fact that charges are yet to be framed and thereafter, trial shall take substantial time, I am of the

view that the petitioners deserve bail.

22. Accordingly, they shall be released on bail on their furnishing a personal bond in the sum of Rs.25,000/- each with one surety each in the like amount to the satisfaction of the Trial Court.

23. The petitions are, accordingly, allowed and disposed of.

24. I hereby make it clear that observations made by this Court are only to pass this order, thus, the Trial court shall not get influenced from the same.

25. Petitioners shall not influence the witnesses and temper with the evidence.

26. Copy of this order be transmitted to the Jail Superintendent concerned and Trial Court for necessary compliance.

27. The judgment be uploaded on the website of this Court forthwith.

(SURESH KUMAR KAIT)

JUDGE

FEBRUARY 19, 2021/rk