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

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Judgment delivered on: 11.07.2023

+ **BAIL APPLN. 630/2022**

VIJAY

..... Petitioner

Through: Mr. Sandeep Sharma, Ms. Kanchan Semwal, Mr. P.K. Ray, Adv.

versus

STATE (THROUGH NCT OF DELHI) Respondents

Through: Mr. Ajay Vikram Singh, APP with Insp. Subhash Yadav, P.S. Ghazipur. Ms. Kinnoori Ghosh, Adv. for complainant in person.

CORAM:**HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J. (ORAL)**

1. This is a petition filed by the petitioner under Section 439 Cr.P.C. seeking regular bail in FIR No. 0074/2020 under Sections 302/120-B/34 IPC registered at P.S. Ghazipur.
2. Vide order dated 22.02.2022, notice was issued in the bail application of the petitioner and the State was directed to file a Status Report.
3. The State has filed the Status Report dated 18.04.2022 which is on record.
4. The case of the prosecution is that deceased Raj Kumar was



providing home tuitions to one woman named Jyoti. The husband of Jyoti namely Sachin had seen Raj Kumar with Jyoti and thereafter he picked a quarrel with the deceased many times. On 09.03.2020, the deceased was called by Jyoti to Flat No. 313 Ashirwad Apartment, where the petitioner herein was also present inside the flat. When the deceased entered the flat, the husband of Jyoti i.e. Sachin along with petitioner's friend Akash also reached there and they all brutally beat up the deceased. They also made videos from their mobile phones. After the beating, they took the deceased Raj Kumar in Sachin's car and dumped him on the other side of the main gate of Ashirwad Apartment from where witness Deepak took him to the hospital.

5. On the basis of a complaint made by the brother of the deceased, the FIR was registered and accused persons namely Jyoti, her husband Sachin, the present petitioner and Akash were arrested.

6. The learned counsel appearing on behalf of the petitioner submits that the petitioner was arrested on 10.03.2020 by the police and since then he is in judicial custody. He submits that mobile phones of accused Jyoti, Sachin, deceased Raj Kumar as well as that of the present petitioner were seized and sent to FSL for examination.

7. Inviting attention of the court to the Status Report, he contends that the data which was recovered from the mobile phone of the accused persons was examined by FSL and the report reveals that 02 videos of beating of deceased Raj Kumar could be retrieved from the mobile of accused Sachin. In the said video clippings, only the deceased is seen and the face of no other accused is visible. However, some voices could also be heard.



8. He submits that in order to identify the voices in the clipping, voice samples of accused persons namely, Sachin, Vijay, Akash and Jyoti were taken at FSL, Rohini with prior permission of the Court and the same were compared with the voices heard in the video clipping.

9. After comparison of voice samples, the expert has opined that the voice sample of accused Sachin and Jyoti matched with the voice in the video recording. However, with regard to the present petitioner and Akash, no definite opinion was expressed by the expert. He only opined - 'the possible voice same person'. The learned counsel submits that in the absence of a definite opinion of the expert, the FSL report cannot be relied upon.

10. He further submits that no ocular evidence is available in the case. The other incriminating material / circumstances alleged against the petitioner is that - (i) co-accused Sachin stated in his disclosure statement that the petitioner was also present there, and (ii) the mobile location / CDR shows that the petitioner was either at Ashirwad Apartment or in its vicinity.

11. The learned counsel relies on the decision of this court in ***Rajesh Sharma Vs. Directorate of Revenue Intelligence, 2018 SCC Online Delhi 12372***, to contend that the statement of co-accused can only be used for the purpose of corroboration and conviction cannot be based solely on the statement of co-accused. He further contends that in the absence of substantive evidence, the statement of co-accused Sachin does not serve any purpose and the same cannot be relied upon.

12. In so far as the location of the petitioner's mobile is concerned,



he submits that the distance between the place of incident i.e. Ashirwad Apartment and the residence of the petitioner is 100 Meters, therefore, it is not unusual for location of the petitioner being traced to the service provider's tower in the vicinity of Ashirwad Apartments.

13. He relies upon the decision of this court in ***Sushil & Ors. Vs. State [Crl. A. 875, 1590/2014 and 590/2015] (DB) decided on 03.11.2015***, wherein considering the fact that the place of incident and the residence of the accused was within the vicinity of the same tower of the service provider, it was observed that the CDR and cell tower charts would not indicate and reflect as affirmative evidence in ascertaining the involvement of the appellant therein and such evidence was treated as weak and feeble in nature.

14. *Per contra*, the learned counsel appearing on behalf of the complainant, referring to the chargesheet submits that mobile phone (make Vivo black colour) was seized by the police from the petitioner as well and the said mobile also contains the video of beatings being given to deceased Raj Kumar.

15. She further submits that the offence is of serious nature, therefore, the petitioner should not be admitted to bail.

16. The learned APP also submits that the offence alleged is of serious nature and prays for rejection of petitioner's bail application.

17. I have heard the learned counsel for the petitioner, learned APP for the State as well as learned counsel for the complainant.

18. At the outset, it is to be noted that the petitioner is not seen in the video clipping examined by the FSL. On a query put by the Court, the learned APP, on instructions from the IO, submits that during



investigation only two video clippings became available and the same were retrieved from the mobile of Sachin and no video clipping was found in the mobile phone of the petitioner.

19. Further, no definite opinion has been expressed by the expert as regard the voice sample of the petitioner matching with the voice in the video clipping.

20. Again, on a query put by court, the learned APP, on instructions from IO, affirms that petitioner's residence is at 100 meters (approx) from Ashirwad Apartment. In this view of the matter, this court finds substance in the submission of the learned counsel for the petitioner that there is nothing unusual if the service provider's tower / CDRs shows the location of the petitioner at the time of incident in the vicinity of Ashirwad Apartment and the location of the petitioner otherwise, cannot be treated as an affirmative evidence at this stage in light of the law laid down in **Sushil & Ors.** (*supra*).

21. The only remaining piece of incriminating material is the statement of co-accused Sachin recorded by Police which is inadmissible in evidence. Reference in this regard can be made to the observations of a co-ordinate bench of this Court in **Amit Pratap & Anr. v. State**, 2011 SCC OnLine Del 5062, which reads as under:-

"6. Merely on the basis of disclosure statements of the co-accused and the Petitioners before the police which are inadmissible in evidence, I find that no charge under Section 364A/120B IPC is made out against the Petitioner. The law is well settled that the confession of an accused before the police officer or in police custody is inadmissible as held in Aghnoo



Nagesia v. State of Bihar, AIR 1966 SC 199 and Khatri Hemraj Amulakh v. State of Gujarat, AIR 1972 SC 922."

22. Further, at this stage, apart from the complicity of the petitioner, the other parameters for granting of bail are also required to be considered. A co-ordinate bench of this Court in *State (NCT of Delhi) v. Sanjeev Kumar Chawla, 2020 SCC OnLine Del 1970* after considering various judgments of the Hon'ble Supreme Court has summed up the principles governing grant of bail. The relevant paragraph of the judgment reads as under:-

"33. The principles governing grant of bail which the courts have to consider can be enumerated, though not exhaustively, as under:—

- a) The gravity and severity of the offence and the nature of accusation;*
- b) Severity of punishment;*
- c) The position and status of the accused vis-à-vis the victim and the opportunity to approach the victims/witnesses;*
- d) The likelihood of the accused fleeing from justice;*
- e) The possibility of tampering with the evidence and/or the witnesses;*
- f) Obstructing the course of justice or attempting to do so;*
- g) The possibility of repetition of the offence;*
- h) The prima facie satisfaction of the court in support of the charge including frivolity of the charge;*
- i) The peculiar facts of each case and nature of supporting evidence."*



23. The petitioner is in judicial custody since 10.03.2020. There are total of 27 witnesses which have been cited by prosecution. The chargesheet was filed on 05.06.2020 and since then only 03 witnesses have been examined. The conclusion of trial is likely to take long time.

24. The Status Report reveals that there is no other case registered against the petitioner and his antecedents are clean.

25. The learned counsel for the petitioner also handed over in Court a certificate issued by the office Inspector (Jail) Central Jail, No. 12 Mandoli, Delhi-110093, which indicates that the petitioner has been honoured on 26th January, 2021 by the jail authorities on account of his good work. The certificate be taken on record.

26. Having regard to the clean antecedents and conduct of the petitioner in jail, it appears that there is no likelihood of the petitioner fleeing from justice or attempting to obstruct the course of justice.

27. The object of judicial custody is not punitive but to secure the presence of the accused during the trial. The following observations of the Hon'ble Supreme Court in ***Vinod Bhandari v. State of Madhya Pradesh***, (2015) 11 SCC 502 could advantageously be referred to:

“12. It is well settled that at pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within



reasonable time. Reference may be made to decisions of this Court in Kalyan Chandra Sarkar v. Rajesh Ranjan [Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 2 SCC 42 : 2005 SCC (Cri) 489] , State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] , State of Kerala v. Raneef [State of Kerala v. Raneef, (2011) 1 SCC 784 : (2011) 1 SCC (Cri) 409] and Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397].”

28. Further, the presence of the petitioner during trial can be secured by putting appropriate conditions.

29. Considering the circumstances in entirety, I am of the view that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to regular bail subject to his furnishing personal bond in the sum of Rs. 20,000/- and a surety bond of the like amount from the family member, subject to the satisfaction of the learned Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- (a) Petitioner/applicant will not leave the city without prior permission of the Court.
- (b) Petitioner/applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- (c) Petitioner/applicant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the Investigating Officer concerned. The mobile location be kept on at all times.



(d) Petitioner/applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with the, witnesses or any family members of the witnesses.

30. It is made clear that the observations made herein above are only for the purpose of considering the bail application and the same shall not be deemed to be an expression of opinion on the merits of the case.

31. The petition stands disposed of.

32. Copy of the order be forwarded to the concerned Jail Superintendent for information and necessary compliance.

33. Order *dasti* under signatures of the Court Master.

JULY 11, 2023
N.S. ASWAL

VIKAS MAHAJAN, J

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