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

Judgment Delivered on: 13.09.2023

+ **BAIL APPLN. 1432/2023**

AKASH KUMAR

..... Petitioner

Through: Mr. Aditya Aggarwal, Mr. Ankit Mutreja, Mr. Naveen Panwar and Ms. Kirtika, Advs.

versus

STATE

..... Respondent

Through: Ms. Richa Dhawan, APP for State with Insp. Subhash Kumar, PS. Ghazipur.
Mr. Abhay Mani Tripathi, Ms. Kinnori Ghosh, Mr. Kumar Deep and Mr. Tushar Roy, Advs. for complainant.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. This is a petition filed by the petitioner under Section 439 CrPC seeking regular bail in FIR No. 0074/2020 under Sections 302/34 IPC registered at Police Station Ghazipur. Section 120B against the petitioner was later on added in the charge-sheet.
2. *Vide* order dated 02.05.2023, notice was issued in the bail application and the State was directed to file a Status Report.
3. The State has filed the Status Report dated 20.07.2023 which is on



record.

4. The case of the prosecution is that deceased Raj Kumar used to provide 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 co-accused Vijay was also present inside the flat. When the deceased entered the flat, the husband of Jyoti i.e. Sachin along with Akash (petitioner herein) 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 the co-accused namely Jyoti, her husband Sachin and Vijay were arrested and the charge sheet was filed against them under Sections 302/120B/34 IPC. Subsequently, the petitioner/Akash Kumar was arrested from his native place in District Farukkhabad (U.P) on 28.08.2020.

6. The learned counsel for the petitioner invites the attention of the Court to the disclosure statement of the main accused Sachin to contend that in his disclosure statement Sachin has stated that the petitioner/Akash left from the flat in Ashirwad Apartment i.e., the place of incident and even thereafter, Sachin and Vijay continued to beat the deceased Raj Kumar. He contends that as per the disclosure statement of Sachin, the deceased became unconscious around 10:00 p.m and the petitioner had left much prior to that.

7. Referring to the Status Report filed by the State, he submits that it is



the case of the prosecution that the petitioner was at Ashirwad Apartment till 20:29 hours and then he left for Anand Vihar to depart for his village to celebrate the Holi festival. He submits that the Status Report shows that Akash was earlier at Nehru Place and it is only between 18:27 and 20:29 hours that his location has been traced near Ashirwad Apartment, whereas, as per the disclosure statement of co-accused Sachin, he alongwith Vijay had given beating to deceased Raj Kumar till 10:00 p.m. Elaborating further, he submits that as per the version of prosecution, the petitioner had left at least 1 ½ hours prior to the deceased becoming unconscious on account of beatings given by co-accused Sachin and Vijay.

8. Drawing the attention of the Court to the Seizure Memo, as well as, to the Status Report, he contends that the key of the flat in question was seized by the police from co-accused Sachin Kumar which goes to show that the flat where the incident is alleged to have taken place was under the lock and key of co-accused Sachin Kumar. He submits that the case of the prosecution is that the petitioner was the tenant of the said flat and even if it is assumed that the petitioner was the tenant, the Seizure Memo and the Status Report shows that the petitioner had left for his native place at 20:29 hours and thereafter, the flat was in possession of the co-accused Sachin as key of the flat was seized from him.

9. He submits that no motive can be attributed to the present petitioner, in as much as, it was the wife of Sachin i.e., co-accused Jyoti who was provided home tuition by the deceased and it was her husband i.e. co-accused Sachin who was having an objection to the deceased calling and meeting his wife.

10. He submits that no recovery was made at the instance of the present



petitioner. He further submits that mobile numbers of co-accused Jyoti, Sachin, deceased Raj Kumar, as well as that of co-accused Vijay were seized and sent to FSL for examination. 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 be heard.

11. 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 recording. After comparison of voice samples, the expert has opined that the voice sample of accused Sachin and Jyoti matched with the voice in the recording. However, with regard to the present petitioner, no definite opinion was expressed by the expert. The expert 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.

12. He contends that the petitioner was arrested on 28.08.2020 and since then, he is in custody. He submits that investigation is complete, the charge sheet has been filed and the custody of the petitioner is no more required.

13. He also submits that the co-accused Vijay, who is similarly placed, has already been granted bail by this court, therefore, on the ground of parity, he urges the Court to enlarge the present petitioner also on bail.

14. *Per contra*, the learned APP for the State assisted by the learned



counsel for the complainant submits that the offence is of serious nature and the petitioner should not be admitted to bail.

15. She submits that the case of co-accused Vijay is on different footing, in as much as the flat in which the beatings were given to the deceased had been taken on rent by the present petitioner. She, therefore, contends that there is no parity between the case of Vijay and the present petitioner.

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

17. The learned APP, on instructions from the I.O, fairly conceded that during investigation two video clippings became available and the same were retrieved from the mobile of Sachin. Voice samples of all accused persons were taken at FSL, Rohini and the same have been compared with the voice recordings collected during investigation. After comparing the voice of the accused found in the recordings and his voice samples taken at FSL, expert opined that both the voices are of the same person i.e., accused Sachin. Same opinion has been given regarding accused Jyoti. However, with regard to the accused Vijay and the present petitioner i.e., Akash, the expert has opined, “the possible voice same person”.

18. Evidently, no definite opinion has been expressed by the expert as regard the voice sample of the petitioner matching with the voice recording during investigation.

19. Undisputedly, in the present case no ocular evidence is available. The incriminating material/circumstances alleged against the present petitioner are that (1) co-accused Sachin stated in his disclosure statement that the petitioner was also present there in the flat; (2) the mobile location/CDR shows that the petitioner was near Ashirwad Apartment between 18:27



hours and 18:29 hours and, (3) the petitioner was the tenant of the flat in question in Ashirwad Apartment where the beatings were allegedly given to the deceased person.

20. From the disclosure statement of the co-accused Sachin and the CDRs, as referred to in the Status Report, it is clear that the petitioner left Ashirwad Apartment for Anand Vihar to depart for his village to celebrate the Holi festival around 20:29 hours, whereas co-accused Vijay and Sachin were present at Ashirwad Apartment and continued to give beatings to the deceased till the time the deceased became unconscious at 10:00 PM. Evidently, the petitioner was not at Ashirwad Apartment when deceased became unconscious and even, thereafter, when the deceased was taken in a car of co-accused Sachin and thrown opposite the gate of Ashirwad Apartment.

21. From a perusal of disclosure statement of Sachin, as well as, from the Seizure Memo referred to by the learned counsel for the petitioner, it is evident that the key of Flat no.313, Ashirwad Apartment was seized from the co-accused Sachin which goes to show that the said flat was under the lock and key of co-accused Sachin when the incident took place.

22. Further, the disclosure statement of co-accused Sachin in which he has stated about the presence of the present petitioner at Ashirwad Apartment, 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."

23. A perusal of the CDR of petitioner's mobile number which has been filed along with the charge sheet shows that on the date of incident between 18:30 hours till 20:30 hours, the petitioner was continuously talking on phone to different mobile numbers which also creates doubt about the incident having taken place during that period or the petitioner being present at the place of incident during that period.

24. Seizure Memo dated 22.05.2020 filed with charge-sheet shows that two pen drives containing CCTV footage of the cameras installed inside and at the main gate of Ashirwad Apartment were seized, which were handed over by the cashier of the RWA of the said apartment. It is not the case of the prosecution that the petitioner has been seen entering or exiting the Ashirwad Apartment at the relevant time. The seizure memo only mentions about the entry and exit of the car of Sachin. Needless to reiterate that as per the prosecution's version accused had used the car for removing the injured victim after 10:00 p.m. and by that time the petitioner had already left for his native village.

25. 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."*

26. The petitioner is in judicial custody since 28.08.2020. There are total of 27 witnesses which have been cited by prosecution. The charge sheet 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.

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

28. The learned counsel for the petitioner also handed over in Court five appreciation certificates issued by the office Inspector (Jail) Central Jail, No. 11 Mandoli, Delhi-110093, which indicates that the petitioner has been



appreciated for cooperation and discipline on 26.01.2021, 15.08.2021, 26.01.2022, 15.08.2022 and 26.01.2023 by the jail authorities on account of his good work. The certificates are taken on record.

29. 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.

30. 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].”

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



32. 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.

33. 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.

34. The petition stands disposed of.

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



36. Order *dasti* under signatures of the Court Master.
37. Order be uploaded on the website of this Court.

VIKAS MAHAJAN, J

SEPTEMBER 13, 2023/dss