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

% Judgment delivered on: 04.10.2023

+ **BAIL APPLN. 1537/2023**

TEK RAJ SAUD

..... Petitioner

Through: Mr. Ravi Sharma, Mr. Anjani
Kumar Rai, Mr. Vikas Rai, Mr.
Sachin Dubey, Mr. Vasoodev
Sharma and Ms. Anadi Mishra,
Advs.

versus

THE STATE, GOVT. OF NCT OF DELHI Respondent

Through: Mr. Aashneet Singh, APP with
Insp. Ichha Ram, Police Station
Daryaganj.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under Section 439 r/w Section 482 CrPC seeking grant of regular bail to the petitioner in FIR No. 224/2019 under Sections 302 IPC registered at P.S. Daryaganj.

2. The case of the prosecution as borne out from the charge-sheet is that on 29.10.2019 information was received that one boy was lying unconscious near Tiwari Tea Stall, Subzi Mandi, Daryaganj. When the police party reached Tiwari Tea Stall, Footpath 7B, N.S. Marg, Darya Ganj, Capital Surgical, Opp. Honda Showroom, Delhi, whereupon the



injured was found and blood was present on the face of the injured along with injury on his upper lips as well as marks of scratches and bruises on his neck. The injured was identified as Dadhi Bahadur, aged about 50 years R/o Nepal, by an individual namely, Bhawani Pher Tiwari who is the owner of Tiwari tea stall. The injured was rushed to LNJP hospital, where he was declared brought dead *vide* MLC No. 113513482 and the following injuries were reported (i) Bruise on front of neck either sides of adams apple, (2) Multiple nail scratches mark present over neck, (3) L.W. on upper lip Rt. Side 1 x 0.5 cm (4) linear abrasion on left cheek about 2 x 0.1 cm. It was opined by the doctor that there was internal wound on the neck and around the neck of the deceased, the neck of the deceased had been pressed with pressure due to which unnatural death has occurred. On these facts, the aforesaid FIR was registered. The post-mortem report no. 780/2019 dated 28.10.2019 was obtained, according to which *“Death in this case occurred due asphyxia as a result of manual strangulation....”*. It is mentioned in the status report dated 01.08.2023 that *“Ethyl alcohol has also been detected in the blood sample of deceased Dadhi Bahadur as 408.7 mg/100 ml.”*

3. During investigation, it was revealed by Bhawani Pher Tiwari in his statement under Section 161 Cr.P.C. recorded on 29.10.2019, that on 28.10.2019 at about 6:30/7:00 p.m. in the evening, he saw the deceased along with Tek Raj Saud (the present petitioner) sitting on the footpath situated behind his shop. He further stated that the deceased as well as the petitioner were habitual consumers of liquor. He revealed that the deceased Dadhi Bahadur used to abuse the people



and did not have good relations with anyone. He further revealed that the deceased was doing petty works in his shop since the last 15 years and that he also knew the petitioner, who was working as a security guard in Darya Ganj. It was further stated by him that the deceased was appearing restless since the past few days as the deceased had disclosed that he had borrowed Rs. 15,000/- from the petitioner and he was unable to repay the same due to which petitioner was threatening to kill him. The witness further revealed that the petitioner had also confirmed the factum of the deceased borrowing money from him and the petitioner also used to say by laughing that '*someday I will kill Dadhi Bahadur*'.

4. Thereafter, during the course of investigation, the IO obtained the CCTV footage from Smooth Honda Showroom, 6-A, Netaji Subhash Marg, Darya Ganj in which the footage of entire incident was recorded. The said camera was installed in the South-East corner of the showroom, which covers parking service road, south of Smooth Honda showroom. From the footage it was revealed that on 28.10.2019 at about 6:30 p.m. in the evening, two persons appeared from the side of Shroff hospital by walking on service road. One of the persons was wearing a cap and after some time, one person who was wearing the cap appeared to assault the other person with kicks and fists. Thereafter, the person wearing the cap left from the spot, only to return after some time to assault the injured again.

5. The said video footage retrieved from Honda showroom was shown to Bhawani Pher Tiwari and his supplementary statement under Section 161 CrPC was recorded on 29.10.2019. The said witness



identified the two individuals as the petitioner and the deceased. He also identified the person wearing the cap to be the petitioner. He further stated that the petitioner was the person who is seen in the video footage to be assaulting the deceased. It is in this backdrop that the petitioner was arrested on 30.10.2019 and one red color cap, one pair of sports shoes of grey and blue color which were stained with blood, one green color jacket, one black shirt and one black T-shirt, three blue color jeans pant, one white vest, one blue underwear, one towel, one black color belt and one black color bag were seized *vide* seizure memo.

6. Mr. Ravi Sharma, the learned counsel appearing on behalf of the petitioner submits that the petitioner has not been named in the FIR and he was not present on the spot. He further submits that the version of the prosecution hinges on the statement of Bhawani Pher Tiwari, who stated that he had seen the petitioner with the deceased on the date of the incident but no evidence has been placed on record for the said purpose.

7. He submits that the '*Last seen*' theory would not be applicable in the present case as the version of Bhawani Pher Tiwari has not been corroborated by any other person and the chain remains inconclusive. He submits that there is no direct evidence available on record to show the involvement of the petitioner in the said offence.

8. He contends that taking the incriminating material on its face value the present case against the petitioner is not one of commission of an offence under Section 302 IPC but only attracts Section 304 part II of the IPC, as the case of the prosecution is that – (i) no weapon of



any sort was used in the fight that ensued between the Petitioner and the deceased, (ii) both the Petitioner and the deceased were drinking liquor together in full public glare, on the road outside Tiwari tea stall, Darya Ganj, and (iii) the fight between them erupted spontaneously while drinking leading to the death of the deceased.

9. He also contends that charge-sheet in the present case has been filed and investigation *qua* the petitioner is complete. Further, no recovery is to be effected from the petitioner and no useful purpose would be served in keeping the petitioner behind bars. That apart, a total of 31 witnesses have been cited by the petitioner, therefore, the trial is going to take considerable time.

10. Referring to the nominal roll dated 27.07.2023, he urges that as on 26.07.2023, the petitioner has been incarcerated for a period of 3 years 8 months and 27 days and keeping in view the circumstances in totality, the petitioner may not be kept behind the bars till the conclusion of trial, which is not likely to be concluded within reasonable time.

11. Lastly, it is submitted that the petitioner has clean antecedents and no other case is pending against him.

12. *Per contra* Mr. Ashneet Singh, the learned APP appearing on behalf of the State has argued on the lines of the Status report. He submits that the offence alleged against the petitioner is of serious nature and since the petitioner is not an Indian citizen, there is a possibility that the petitioner may flee from the course the justice.

13. Further referring to the following relevant part of the post mortem report, the learned APP contended that the injuries caused on



the body of the deceased were sufficient to cause death in the ordinary course of nature.

"Death in this case occurred due to asphyxia as a result of manual strangulation. The injuries to the left kidney can also cause death of the person individually and collectively. Both injuries sufficient to cause death in ordinary course of nature. All injuries were antemortem in nature, fresh in duration and are caused by blunt force impact. Manner of death Homicidal. However, viscera has been preserved for chemical analysis. "

14. Mr. Singh submits that the petitioner is guilty of committing the offence as the entire incident has been captured in the CCTV camera which was installed in the Honda Showroom which was installed near the spot. He further submits that as per the FSL report, the CCTV footage which has been retrieved from the Honda Showroom was found to be genuine.

15. He submits that the clothes which were seized from the petitioner at the time of his arrest were sent to the FSL and the report in respect of the same manifests that the DNA profile of the blood found on the shoes of the petitioner and the DNA profile of the deceased have matched.

16. I have heard the learned counsel for the petitioner, the learned APP and perused the material on record.

17. Before weighing the rival stands of the parties, it is imperative to refer to the factors which are to be considered at the time of considering a bail application. Reference in this regard may be had to the decision of the Supreme Court in *State of UP v. Amarmani*



Tripathi, (2005) 8 SCC 21, the relevant paragraph of which reads as under:-

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the



case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)"

18. Reference may also be had to the decision of the Supreme Court in *Satish Jaggi v. State of Chhattisgarh*, (2007) 11 SCC 195, wherein the Supreme Court has held in cases of non-bailable offences, the primary factors to be taken into account while considering a bail application is the nature and the gravity of the offence. The observations read as under:

"12. Normally if the offence is non-bailable also, bail can be granted if the facts and circumstances so demand. We have



already observed that in granting bail in non-bailable offence, the primary consideration is the gravity and the nature of the offence. A reading of the order of the learned Chief Justice shows that the nature and the gravity of the offence and its impact on the democratic fabric of the society was not at all considered. We are more concerned with the observations and findings recorded by the learned Chief Justice on the credibility and the evidential value of the witnesses at the stage of granting bail. By making such observations and findings, the learned Chief Justice has virtually acquitted the accused of all the criminal charges levelled against him even before the trial. The trial is in progress and if such findings are allowed to stand it would seriously prejudice the prosecution case. At the stage of granting of bail, the court can only go into the question of the prima facie case established for granting bail. It cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial."

(emphasis supplied)

19. It is the case of the prosecution that both, the petitioner as well as deceased, were addicted to liquor and were abusive and quarrelsome in their behaviour. It is the case of the prosecution that witness Bhawani Pher Tiwari in his statement under Section 161 Cr.P.C. has stated that he had seen the deceased and the accused on 28.10.2019 at about 06.30 P.M. – 07.00 P.M. sitting on the footpath situated behind his shop.

20. The disclosure statement of the petitioner / accused recorded by the police records that the petitioner and deceased Dadhi Bahadur had



together consumed liquor at about 06.30 P.M. on 28.10.2019. It is also in the status report filed by the State that Ethyl Alcohol has been detected in the blood sample of deceased Dadhi Bahadur, which is to the extent of 408.7 mg/ 100 ml.

21. It is not the case of the prosecution that the petitioner / accused was carrying or used any dangerous or deadly weapon during the fight with the deceased Dadhi Bahadur. On the contrary, the case of the prosecution is that a beating was given by the petitioner to the deceased with kicks and fists.

22. From the above narration of facts it *prima facie* appears that the petitioner and deceased were known to each other being Nepalis. They had consumed liquor together and a scuffle seems to have taken place on the spur of the moment and thereafter, a sudden fight ensued in the heat of passion. The fight does not appear to be pre-planned or pre-mediated and it seems the same occurred under the influence of liquor. Thus, *prima facie* there does not seem to be an intention on the part of the petitioner to either cause, death or cause such bodily injury as is likely to cause death. Further, having regard to the nature and manner of the incident, *prima facie* it cannot be said that the act of the appellant was extremely cruel.

23. Therefore the possibility of alteration of charge from 302 IPC to Section 304 Part II during the course of trial cannot be completely negated at this stage. However, it is for the learned Trial Court to form an opinion after the prosecution evidence is recorded as to whether there was absence of any intention on the part of the petitioner to cause murder or bodily injury as was likely to cause the death of the



deceased and further whether the act of the petitioner was barbaric, torturous, brutal so as to deny the benefit of exception 4 of Section 300 IPC to the petitioner.

24. Notably, an offence under Section 304 Part II is punishable with maximum imprisonment of 10 years and there is no minimum punishment prescribed for the same. It would indeed be a travesty of justice to keep a person in jail for an indefinite period for an offence which is ultimately found not to have been committed by him or for which the Trial Court may propose to award punishment with imprisonment which is lesser than the period for which he has already been incarcerated.

25. It is also 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 time¹.

26. In the chargesheet, the prosecution has cited as many as 31 witnesses. It is not in dispute that not a single witness has yet been examined. The delay in the commencement of trial in the present case cannot at all be attributed to the petitioner since he is in continuous

¹ *Vinod Bhandari v. State of Madhya Pradesh*, (2015) 11 SCC 502



incarceration since his arrest on 30.10.2019. Further, considering the number of witnesses cited, trial is not likely to be concluded any time soon.

27. The petitioner will be completing 04 years of his incarceration on 29.10.2023. The investigation being complete, in the facts and circumstances of the present case, no useful purpose will be served in keeping the petitioner in judicial custody.

28. It is not the case of the prosecution in the status report that the petitioner has a criminal record. Given petitioner's status as small time labourer, there is hardly any possibility of he influencing the witnesses. In so far as the apprehension expressed by the Learned APP that the petitioner is a Nepali citizen and he may flee from justice, the same can be allayed by imposing appropriate conditions.

29. Considering the above factors in entirety, this Court is of the view that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to bail subject to his furnishing a Personal Bond in the sum of Rs.25,000/- and one Surety Bond of the like amount subject to the satisfaction of the Trial Court / Jail Superintendent/Duty Magistrate, further subject to the following conditions:-

- a) Petitioner will not leave the city without prior permission of the Court.
- b) Petitioner shall appear before the Court as and when the matter is taken up for hearing.



- c) Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and he shall not change the mobile number without prior intimation to the Investigating Officer concerned.
- d) Petitioner 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. The petition is disposed of.
31. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.
32. Order *dasti* under signatures of the Court Master.

VIKAS MAHAJAN, J

OCTOBER 04, 2023
N.S. ASWAL