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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 10.11.2022

Judgment pronounced on: 17.02.2023

+ BAIL APPLN. 2825/2022

ASIF@SAMMI

..... Petitioner

Through: Mr. Anurag Jain, Mr. Bhanu Malhotra,
Mr. Ujwal Ghai, Mr. Shubham Arora,
Advts.

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Ms. Manjeet Arya, APP for State with
SI Giriraj, PS Kamla Market

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH (J)**

1. This is an application seeking bail in FIR No. 244/2020, dated 08.10.2020 under section 302/147/149/34 IPC, registered at PS- Kamla Market.

2. Brief facts of the case are:-

The FIR was registered upon the statement of Vakil Mehto, who was a taxi driver. He would visit New Delhi Railway Station for picking up customers. For this reason, he was having enmity with one Munna @ Aaltay, who runs a travel agency. On 7.10.2020 at around 5pm, the deceased was on his way home when his vehicle was stopped near Minto Road, CNG pump and he was attacked by Aaltay and Sammi

with *lathis* and *dandas*. While he was trying to save himself, three other people, namely Sammi(applicant herein), Aria and Bikki Sardar got off one White Scorpio, joined the attack and mercilessly beat the deceased Vakil Mehto with *dandas* as a result of which the deceased fell unconscious and the assailants fled from that spot in the white Scorpio. Pursuant to this incident, the son of the deceased Saheb Kumar reached the spot and rushed his father to RML hospital in an Auto. This resulted in filing of the FIR under section 307/34 IPC. However, this incident resulted in the death of the deceased on 13.10.2020 and subsequently, sections 302/147/149/34 IPC were added in the FIR.

3. The allegation against the applicant is that he was one of the assailants who had hit the deceased with *dandas* resulting in his death.
4. The status report has been filed indicating-
 - a. **MLC of the deceased-** The MLC dated 07.10.2020 states that“*alleged history of physical assault on 07.10.2020 open fracture over right and left both bone left and both bone forearm left and blunt trauma over chest and abdomen.*”
 - b. **Statement of the deceased-** The I.O. tried to record the statement of the deceased but due to severe pain, he was unable to give his statement. However, on 08.10.2020, SI Jyotirmoy Pandey along with ASI Ganesh reached the RML Hospital when the doctor informed them that the injured is fit for statement. The statement of Vakil Mehto reads as “*On 07.10.20 at about 05:00 PM while he was coming back to his house from Himmatgarh and reached near CNG Petrol Pump, Near Minto Road, New Delhi five people namely Munna, Shammi, Tammi, Arif and Vicky Sardar came in a white scorpio and came out of the car with bamboo sticks / Lathis*

and beaten him severely with intention to kill him. Thereafter, those person fled from the spot in that white scorpio.”

- c. Recovery of dandas(weapon of offence)-** Three accused persons namely Afjal @ Tammi, Arif and Asif (applicant herein) were arrested on 09.10.2020 and as per their disclosure, the blood stained broken bamboo sticks were recovered on the instance of the above said accused persons.
- d. Rivalry between the accused and the deceased-** The deceased was the leader of Auto Rickshaws and Taxi drivers at New Delhi Railway Station and even the accused persons in the present case have their travel agency at the New Delhi Railway Station. Due to this business rivalry, the accused persons and the deceased frequently indulged in quarrels and the same was ongoing between them from two months before the date of incident.
- e. FSL Result-** The FSL result of the exhibits were received with remarks that “DNA profile generated from the source of exhibit ‘2’ (blood stained cloth piece of deceased) is similar with the DNA profile generated from the source of exhibit ‘1’ (piece of wooden danda)”

5. Mr. Jain, learned counsel for the applicant states that the statement of the deceased cannot be treated as an FIR as he cannot be in the witness box for his cross examination. In case the statement of the deceased is taken as a dying declaration, then he submits:-

- (i) The deceased himself gave contrary versions in his two statements and changed the name of the assailants in his supplementary statement.
- (ii) Gurdev Singh @ Vicky Sardar was specifically named as an assailant in the statement/dying declaration of the deceased,

however, the police neither charge sheeted him nor was he summoned by the Trial Court as it was found that Gurdev Singh @ Vicky Sardar was not present at the spot at the alleged date and time of the incident.

6. The learned counsel for the applicant submits that the aforesaid contradictions and in view of the investigation conducted by the police, the dying declaration of the deceased becomes doubtful and cannot be relied upon. He further submits that it is a well settled position of law that a dying declaration cannot be read in part and in case it suspicious and/or suffers from infirmity and/or where the prosecution version differs from the version given in the dying declaration, then the same should not be accepted. To support his argument, Mr. Jain has placed reliance on a judgement of this Court titled as “***Geeta and Anr vs. State***” [163 (2009) Delhi Law Times 268 (DB)], decided on 13.08.2009, and more particularly paras 24 and 25 which read as under:-

“24...Thus, while there is no rule of law which suggests that a conviction cannot be based solely upon a dying declaration, the courts, as a rule of prudence, look for other corroborative material. If the dying declaration is of such a stellar and unimpeachable quality that it fully inspires confidence of the Court, there is nothing to prevent the Court from relying solely on such a dying declaration and on basing a conviction thereupon. But, the emphasis must be on the quality of the dying declaration. If the dying declaration is suspicious or suffers from some infirmity, then it should not be acted upon without any corroborative evidence.

25. In *Khushal Rao v. State of Bombay*: AIR 1958 SC 22, the Supreme Court summarized the principles with regard to dying declarations as under:-

“16...(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the

time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

7. He has further relied on a judgement titled as “***Latoor Singh vs. State of NCT of Delhi***” [2015 III AD (Delhi) 659] which states that-

“18. In, Smt. Paniben vs. State of Gujarat, AIR 1992 SC 1817, the Supreme Court has summarised the principles governing the dying declaration.

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja and Anr. v. The State of Madhya Pradesh (1976) 2 SCR 764)]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. (AIR 1985 SC 416) and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)].

(iv) *Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC 264)]*

(v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]*

(vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v. State of U.P. (1981 (2) SCC 654)]*

(vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]*

(viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505)]*

(ix) *Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration can look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)]*

(x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration*

cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)]

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839)]”

8. Mr. Jain also states that the star witness PW-1 (Saheb Kumar) has clearly stated in his examination that his father was not in a position to utter any word till his death after sustaining injuries. In addition, he states that PW-1 and PW-2 (Parmo Mehto) have not supported the case of the prosecution and have turned hostile. There is nothing incriminating against the applicant in their testimonies.
9. It is submitted by learned counsel for the applicant that the alleged dying declaration recorded by the police was not attested by any doctor or any other witness and it is also doubtful that the deceased was in a fit medical condition to make the dying declaration. He further submits that there is no mention of the name of the assailants in the MLC and also no statement of the deceased was recorded on the day of the incident, i.e, on 07.10.2020.
10. The Counsel further states that the alleged recovery made on 09.10.2020, of seven *dandas* were recovered at the instance of Afjal @ Tammi, Asif @ Sammi (applicant herein) and Arif at the back side of shop No. E-13, Tagore Road, Near New Delhi Railway Station is a joint recovery made from an open place accessible to all and is hence, not admissible in law. He also states that as per the seizure memo,

many *dandas* don't even have the blood stains on them. Reliance is placed on "***Kavinder v. State (NCT of Delhi)***" [2004 SCC OnLine Del 1058], wherein it was opined that-

"16... The question whether a joint recovery can be made and if so, whether the same is admissible in law was examined by their lordships in Chander Pal v. State, 1998 II AD (Cr.) Delhi 753. Rejecting the contention that such a recovery can also be used as an incriminating evidence against the accused persons the court observed:—

"Perusal of Ex.PW-4/G suggests that Chander Pal son of Janki Prashad and accused Kishan Lal son of Shanker Lal under police custody, voluntarily went ahead and after removing the earth from a pit by their own hands, took out and produced the clothes i.e. pant and bushirt of white colour stated to be that of deceased Nand Kishore. It is clearly suggested that both the accused persons voluntarily went ahead, removed the earth from a pit by their own hands took out and produced the clothes. (xxx xxx). There is no manner of doubt that Ex. PW4/G clearly indicates that both accused together reached the place, removed the earth from the pit jointly by their own hands and both took out and produced the clothes. It is as clear as anything from memos Ex.PW/4D and Ex.PW-4/G that the recovery of piece of muffler and the clothes are nothing but by both the accused jointly and from this it can not be said as to which of the accused produced which article and, therefore, the recoveries of muffler and clothes vide either of these memos cannot be regarded legal and admissible in law, as contemplated under Section 27 of the Indian Evidence Act.

17. In the present case, the recovery marked Ex.PW4/L relating to the alleged weapons of offence, the axe and pipe, is said to have been made at the instance of all the five accused persons together. Such a recovery is, in the light of the above pronouncement of the Supreme Court, worthless in the eye of law and hence can not be pressed into service against the accused leave alone made a basis for finding them guilty of a capital offence. This is true even about the alleged recovery of the clothes of the deceased in terms of Ex.PW4/M, which recovery is also made at the instance of all the accused persons jointly.”

11. Learned counsel for the applicant states that in all the earlier alleged cross cases/ FIRs mentioned in the status report, the applicant herein is neither an accused nor the complainant and therefore, no previous animosity or enmity can be attributed to the applicant. He also states that no CCTV camera was found to cover the alleged incident and neither did the police make any effort to examine nearby CCTVs to ascertain the truth.
12. Lastly, Mr. Jain states that the applicant is in Judicial Custody since 09.10.2020 and out of 32 prosecution witnesses, only 5 witnesses have been examined till date and as such the trial is likely to take a long time. He further states that the investigation is complete and there is also no apprehension of tampering with the evidence.
13. Per contra, Ms Arya, learned APP for the State submits that in the present case, the name of the applicant is mentioned in the statement of the deceased. She further submits that there is sufficient incriminating material against the applicant and he can also influence, threaten or pressurize the witnesses or tamper with the evidence of the case.

14. Ms. Arya has placed reliance on the judgement of Supreme Court titled as “**Virupakshappa Gouda v. State of Karnataka**”[(2017) 5 SCC 406], more particularly paras 15 and 16 which read as under-

“15. The court has to keep in mind what has been stated in Chaman Lal v. State of U.P. The requisite factors are : (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (iii) prima facie satisfaction of the court in support of the charge. In Prasanta Kumar Sarkar v. Ashis Chatterjee , it has been opined that while exercising the power for grant of bail, the court has to keep in mind certain circumstances and factors. We may usefully reproduce the said passage :

“9. ... among other circumstances, the factors which are to be borne in mind while considering 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 accusation;*
- (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 influenced; and*

(viii) danger, of course, of justice being thwarted by grant of bail.”

16. In *CBI v. V. Vijay Sai Reddy*, the Court had reiterated the principle by observing thus :

“34. While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”

15. She has further relied on “***Kalyan Chandra Sarkar v. Rajesh Ranjan***” [(2004) 7 SCC 528], wherein the Supreme Court observed-

“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] .

14. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.

20. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.”

16. It is stated by learned counsel for the State that all the accused persons, in furtherance of their common intention, had committed the murder of Vakil Mehto. She further states that the present case is at the stage of prosecution evidence, other public/ material witnesses are yet to be examined and the allegations against the accused are serious in nature.
17. I have heard learned counsel for the parties.
18. As regards the first contention of learned counsel for the applicant that the statement of the deceased cannot be relied upon for the reason that deceased himself gave contrary versions in his two statements and changed the name of the assailants in his supplementary statement, cannot be given weightage since this discrepancy is not in relation to the applicant and therefore, this does not call into question the veracity of the prosecution's story. The deceased's stand with regard to the applicant has always remained the same. In addition, this dying declaration of the deceased is supported by credible corroborative material.
19. In the present case, it is stated by learned counsel for the applicant that the deceased was not in a fit condition to make the statement.

Undoubtedly, when a dying declaration is recorded, the individual who records a dying declaration must ensure that the person giving the statement is aware and mentally fit, able to speak coherently, and comprehends the significance of the words being used while making the statement. In ***“Lallubhai Devchand Shah v. State of Gujarat”*** [(1971) 3 SCC 767], the Supreme Court laid special stress on the fact that one of the important tests of the reliability of a dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind and observed as follows:

"9.. The court, therefore, blamed Dr Pant for not questioning Trilok Singh with a view to test whether Trilok Singh was in a "fit state of mind" to make the statement. The "fit state of mind" referred to is in relation to the statement that the dying man was making. In other words, what the case suggests is that the person who records a dying declaration must be satisfied that the dying man was making a conscious and voluntary statement with normal understanding, and the responsibility of the court is greater in holding that it was so made when in fact it is found that the man dies a few minutes afterwards."

20. It is clearly noted in the Status report that the statement of the deceased could not be recorded on the date of incident, i.e on 07.10.2020 because the deceased was suffering from extreme pain. Rather, the statement of the deceased was recorded on the next day, i.e on 08.10.2020 when the doctor stated "the injured is fit for statement." Hence, the contention that the deceased was not in a fit condition to make the statement is misconceived.
21. It has been argued that PW-1, i.e the son of the deceased has not supported the case of the prosecution and has turned hostile, however,

the statement of the deceased is still reliable. In the present case, admittedly, the deceased Vakil Mehto has died of the injuries sustained by him. The deceased in his statement recorded on 08.10.2020 has clearly named the applicant.

22. It is argued by learned counsel for the State that there was previous animosity between the deceased and applicant. I am *prima facie* of the view that there seems to be no reason for the deceased to have named the applicant in his dying declaration purely due to the fact that there was some previous animosity between them. As already stated by learned counsel for the applicant, that the applicant was never named in the alleged cross cases/ FIRs, then the chances of falsely implicating the applicant even when there was no previous animosity, becomes even more slim. There seems to be no reason as to why the deceased would falsely implicate the applicant.
23. In addition, the blood stained *dandas* have been recovered at the instance of the applicant. Even the FSL Result which mentions that the DNA profile generated from the source of exhibit '2' (blood stained cloth piece of deceased) is similar with the DNA profile generated from the source of exhibit '1' (piece of wooden *danda*) proves the guilt of the applicant in commission of the offence.
24. Hence, all the above facts when read in conjunction with each other, lends credence to the dying declaration of the deceased.
25. The judgments relied upon by learned counsel for the applicant are not of much help to the applicant as in those judgments, there were isolated instances which led the Courts to entertain the bail application.
 - a. In *Geeta and Anr vs. State* (supra) it was held that the Courts should not merely rely solely on a dying declaration, if it is suspicious or suffers from infirmity. In the present case, the dying

declaration of the deceased does not suffer from any suspiciousness or infirmity as the deceased's stand that the applicant was hitting him with the intention to kill him, is very clear.

- b. In ***Khushal Rao v. State of Bombay*** (supra) it was held that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction, unless it is corroborated. In the present case, in addition to the dying declaration, the applicant along with other accused persons led to the recovery of the *dandas* which is the weapon of offence. Hence, there is adequate corroboration to the dying declaration.
- c. In ***Latoor Singh vs. State of NCT of Delhi*** (supra) it was held that where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. In the present case, the doctor opined the deceased to be "fit for statement" when the same was recorded. Therefore, the statement of the deceased can be relied upon.
- d. In ***Kavinder v. State (NCT of Delhi)*** (supra) this Court stated that it was only a mere disclosure statement and joint recovery which was being relied upon to convict the applicant and this joint recovery is worthless in the eyes of law. However, as already stated, in the case at hand, it is not merely the joint recovery of disclosure statement, but it is also joint recovery coupled with disclosure statement and dying declaration of the deceased.

26. Furthermore, the Addl. Sessions Judge has already rejected the bail application of the applicant vide order dated 29.08.2022. In cases where earlier bail applications have been rejected, there is a further onus on the court to consider the subsequent application for grant of bail by taking into consideration as to on what grounds the earlier bail

application was rejected. The earlier bail application of the applicant was rejected on the grounds of severity of the offence. I find support in the judgement of the Supreme Court titled as *Virupakshappa Gouda* (supra) as well as “*Ram Govind Upadhyay v. Sudarshan Singh*”[(2002) 3 SCC 598] which clearly states that the nature and gravity of the accusation as well as severity of the punishment are grounds which need to be considered at the time of granting bail.

27. In the present case, there are *prima facie* reasonable grounds to believe that the accused has committed the offence. The nature and gravity of the accusation are very serious in nature as the applicant is accused of offences under section 302 coupled with sections 147/149/34 of IPC.
28. For the aforesaid reasons, I am not inclined to entertain the present bail application. Hence, the BAIL APPLN. 2825/2022 seeking regular bail in FIR No. 244/2020, dated 08.10.2020 under section 302/147/149/34 IPC, registered at PS- Kamla Market is hereby dismissed.
29. However, the observations made hereinabove are only for the purpose of deciding this bail application and will have no bearing on the final adjudication of the case.

JASMEET SINGH, J

FEBRUARY 17th, 2023/ (MS)/ (ST)

Click here to check corrigendum, if any