



2024:DHC:4086



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:20.05.2024

+ **BAIL APPLN. 937/2023**

ASHOK KUMAR @ VINEY

..... Applicant

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Dharam Raj Ohlan, Adv.

For the Respondent : Mr. Utkarsh, APP for the State with
Insp. Mohinder Singh and SI Gaurav
Tyagi (P.S. Begam Pur).

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under section 439 of the Code of Criminal Procedure, 1973 (**Cr.P.C**), for grant of regular bail in FIR No. 102/2016 dated 29.01.2016 for offences under Sections 302/34 of the Indian Penal Code 1860 and Sections 25/27 of the Arms Act 1959, registered Police Station Begampur.

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2. The FIR was registered on a complainant given by the father of the deceased, alleging that his son was murdered by the applicant and the co-accused persons.

3. It is alleged that on 29.01.2016 at around 10:00 a.m., the complainant was sitting with his wife and two neighbors namely Rakesh and Pankaj in his balcony. The deceased was coming back home and four persons came from behind on two motor cycles and opened fire on him. The deceased crawled towards his father / complainant, and told him that he has been shot. It is alleged that meanwhile the four accused persons followed the deceased, to which the complainant along with the neighbors started pelting bricks on the alleged shooters.

4. It is alleged that due to bricks being pelted the applicant's helmet broke and therefore the complainant was able to recognize him. It is alleged that the applicant came close to the deceased and shot him in his head and even fired at the complainant and neighbors.

5. It is alleged that after shooting the deceased the applicant called one of the co-accused with the name 'Ajay'. The complainant stated that the deceased and Ajay used to work together in the cable TV business, and certain minor altercations used to take place between them but the same were resolved with the intervention of family and respectable members of the society.

6. It is stated that a bike was left behind bearing no. HR-05Y-3091, and the all the four accused persons ran away on one bike. The bike of the deceased as well as the bike of the accused persons was

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taken into possession by the police. It is stated that a helmet, a gun (pistol), one loaded magazine, one live cartridge and seven empty cartridges along with blood at the alleged place of incident was recovered.

7. Thereafter, the deceased was taken to the Braham Shakti Hospital by the PCR where MLC No. 13823/2016, was recorded that there was a gunshot injury, entry wound present on the left side of the chest, and the deceased was declared dead.

8. The learned Counsel for the applicant submitted that the applicant has been falsely implicated and there is no evidence on record to prove the motive to murder the deceased at the part of applicant. He submitted that the applicant had never been in the business of cable TV in Begumpur, Delhi.

9. He submitted the applicant is in custody since 13.06.2016, that is, for a period of more than seven years and the trial is yet not concluded. He submits that the two alleged eye- witnesses being, PW-19 (Pankaj Sharma) and PW-20 (Rakesh Kumar) have not identified the applicant. PW-19 stated that there were four assailants whereas PW-20 stated that there were three, but both stated that when the bricks / stones were pelted on the assailants, the helmet of the one of them was broken. PW-20 also stated that the assailant's whose helmet was broken was wearing a monkey cap inside the helmet hence he couldn't recognize him.

10. The learned Counsel for the applicant submitted that the applicant is not required to be kept in further incarceration since not



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only the Chargesheet but the Supplementary Chargesheet has already been filed. He submitted that all the public witnesses have been examined and there is no threat of the witnesses being tampered since the applicant was also released on interim bail twice and had never misused the said liberty.

11. He submitted that as per the allegations, the applicant shot on the head of the deceased from point blank range whereas as per the post mortem report, there is no entry wound on the head of the deceased.

12. He submitted that the applicant and his brother both are in judicial custody and there is no one to take care of their old and ailing parents. Also the applicant is married and has a minor daughter to look after as well.

13. The learned Additional Public Prosecutor for the State had opposed the grant of present bail application. He submitted that the allegations are serious in nature, and the role alleged to the applicant is that he had shot the deceased and committed the murder of the deceased alongwith his three other associates.

14. He submitted that the applicant does not have clean antecedents and there are multiple cases of similar nature pending against him and he is already convicted in one of the FIRs.

15. He submitted that even though the two public witnesses (PW19 and PW-20) have failed to identify the applicant, the case of the prosecution has been supported by PW-17 Azad Kaur and PW- 18



Mahabir Singh who are respectively the mother and father of the deceased.

Analysis

16. In ***Prasanta Kumar Sarkar v. Ashis Chatterjee : (2010) 14 SCC 496***, the Hon'ble Supreme Court laid down the parameters for granting or refusing the grant of bail which are as under:

"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, behavior, 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."

17. As per the FIR, the applicant was wearing a helmet and the helmet had fallen due to the bricks being pelted by the complainant and their neighbours, after which the complainant was able to identify the applicant, The alleged eye witnesses being PW-19 and PW-20 in their examination stated that the assailants ran away from the alleged place of incident and they also failed to identify the present applicant.



18. Clearly, the eye witnesses have turned hostile. It is settled law that the statement of a witness is only a piece of evidence, and for the purpose of conviction, the corroborated part of the evidence of a hostile witness regarding the commission of the offence can be treated as admissible. [Ref. *Mrinal Das v. State of Tripura* : (2011) 9 SCC 479]. The learned Trial Court while deciding the case has to consider the entire material on record, and can definitely look into the circumstances and other evidence put forth by the prosecution while passing the judgment. However, at the stage of considering the bail application, the same cannot be ignored especially when the applicant is in custody for more than seven and a half years.

19. As per the prosecution, there were four eye witness to the incident. As noted above, two eye witnesses have failed to identify the applicant. *Prima facie* a perusal of the material on record reveals that the sole evidence that is available at this juncture against the applicant is the statement of the father and mother of the deceased. It is not in dispute that complainant and the applicant are known to each other and the complainant also knew about the sour relations between the applicant and his son (deceased), due to the dispute in their cable business. The presence of mother of the victim at the place of incident is also denied by other witnesses.

20. The applicant is also alleged to have shot the deceased in his head, whereas in the post mortem report, no gun-shot injury in the head is noted.



21. The Hon'ble Supreme Court in the case of ***Union of India v. K.A. Najeeb : Criminal Appeal No. 98 of 2021***, upheld the grant of bail to the accused for offences under Unlawful Activities (Prevention) Act, 1967 on the ground that although the charges against the accused were grave and severe, however the length of the period spent in custody and the unlikelihood of the trial concluding soon outweighed the seriousness of the charges. The relevant portion reads as under:

“19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.”

22. There is no recovery of the alleged arms from the present applicant whereas the same was recovered from the co-accused. Since the alleged arms have already been recovered no further recovery is allegedly left to be made at the instance of the applicant

23. As noted above, the applicant, though, was found to be involved in other cases, it is stated that in the two out of the four FIRs the



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applicant is acquitted / compounded whereas the trial is pending in the other two FIRs.

24. The Hon'ble Supreme Court in the case of ***Prabhakar Tewari v. State of U.P*** : (2020) 11 SCC 648, had observed that mere pendency of several criminal cases against the accused cannot itself be the basis for refusal of bail. The same can be a factor, however, cannot be a sole basis for refusal of prayer of bail.

25. The charge sheet has already been filed in the present case and all the public witnesses have already been examined, it is also not alleged that the applicant misused the liberty while on interim bail, nor there is any complaint or report of witness(es) being tampered during that time. Therefore, this Court is of the opinion that it would not be prudent to keep the applicant in further incarceration at this stage.

26. The Court cannot lose sight of the fact that, the object of jail is to secure the appearance of the accused during the trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment. The applicant was arrested in the present case on 13.06.2016 and cannot be made to spend the entire period of trial in custody specially when the trial is likely to take considerable time.

27. It is not denied that the father of the applicant is suffering from cancer. The applicant also has an eleven-year-old daughter to take care of.



28. Without commenting further on the merits of the present case and keeping in mind the facts and circumstances of the case, I am satisfied that the applicant has made out a case for grant of regular bail. The applicant is, therefore, directed to be released on bail in FIR no 102/2016 on furnishing a personal bond for a sum of ₹25,000 with two sureties of the like amount, subject to the satisfaction of the learned Trial Court/ Duty Metropolitan Magistrate, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the country without the permission of the learned Trial Court;
- c. He shall appear before the learned Trial Court on every date of hearing;
- d. He shall, upon his release, provide his address details where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. He shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

29. In the event of there being any FIR/DD entry/complaint lodged against the applicant, it would be open to the State to seek redressal by filing an appropriate application for cancellation of bail.



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30. The applicant would be at liberty to pursue his rights and remedies in the proceedings with respect to the other FIRs which have been or which may be registered against him, and in that event, nothing contained in this judgment shall amount to an expression of opinion on the merits of such proceedings.

31. The present application is allowed in the aforesaid terms.

AMIT MAHAJAN, J

May 20, 2024

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