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

Judgment delivered on: 03.01.2024

+ **BAIL APPLN. 1433/2023**

RAMESH KAKKAR

..... Petitioner

Through: Mr. D.P.Singh with Mr. Nipun Katyal, Ms. Anam Siddiqui, Mr. Naved Ahmed, Mr. Surya Pratap Singh Rana & Ms. Kismat Chauhan, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Aashneet Singh, APP for State with Insp. Subhash Chand, PS Jamia Nagar.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under Section 439 of the Code of Criminal Procedure, 1973 seeking regular bail in FIR No. 445/2016 under Sections 302/120B/34 IPC registered at PS Jamia Nagar.
2. *Vide* order dated 02.05.2023, notice was issued in the bail application of the petitioner and the State was directed to file a status report. The State has filed a status report dated 23.05.2023, the same on record.
3. The case of the prosecution as borne out from the status report is that on 16.05.2016, a PCR call *vide* DD No. 74-B regarding bullet fire was received in PS Jamia Nagar, which was marked to SI Pankaj Gulia, who proceeded to the spot. On reaching the spot i.e. Noor Nagar Extn. Johri

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BAIL APPLN. 1433/2023

Page 1 of 16



Farm, SI Pankaj Gulia noticed pieces of glasses on the road and came to know that the injured had already been shifted to Holy Family Hospital.

4. On reaching the hospital, SI found injured Mohd. Moin Khan S/o Mohd Naaem Khan aged about 58 years was admitted *vide* MLC No. C-16/015226. The doctor mentioned alleged history as “*while he was parking his car today at around 7:40 P.M. h/o sustained 2 suspected gunshot injury to (R) upper Anterior Chest and he became unconscious immediately first attended by his wife Nishant (all history given by his wife and daughter)*”. On examination “*Unconscious L/E (R) upper Anv near II Inter coastal space just lateral to mild caluicle line wound 1X1 cm nearly triangle shape irregular margins inverted wound.*” Thereafter, the SI tried to trace the eyewitnesses of the incident but in vain. In the meantime, at about 09:10 P.M. the doctor declared the patient as “*dead*”. It is in this backdrop, that the present FIR came to be registered.

5. During investigation, the petitioner and other co-accused namely, Ram Phool, Israil, Saleem, Amir and Anwar Omaish were arrested on 18.05.216 and co-accused Bilal was arrested on 19.05.2016. During further investigation, it transpired that the deceased was an Assistant Law Officer / Estate Officer with the New Delhi Municipal Corporation and the recovery suit of license fee in respect of petitioner’s Hotel namely, ‘*The Connaught*’ was pending in the office of the deceased. It also came to light that the petitioner tried to win over the deceased by offering him hefty bribe running into crores, but the same was refused by the deceased and he had decided to proceed against the petitioner as per law.

6. It is thus, the case of the prosecution that the matter between the petitioner and the NDMC was listed on 17.05.2016 for the parties to file



written arguments and seeing no other option left, the petitioner entered into a criminal conspiracy to eliminate the petitioner and for this purpose he took the help of hired killers, which was provided by the co-accused Ram Phool, PSO of the petitioner. Ram Phool (PSO) in turn gave the contract to his colleague Israel, who further passed this contract to Saleem and Aamir. Aamir then arranged the meeting of Anwar Omaish and Bilal with Israel. Anwar Omaish shot the deceased on 16.05.2016, while he was riding the pillion and Bilal was driving the motorcycle.

7. Thereafter, during investigation, weapon of offence i.e. one pistol bearing no. RP 11671 along with one live cartridge was recovered at the instance of accused Bilal from his house, as the pistol was given by Anwar Omaish to Bilal to keep.

8. Mr. D.P. Singh, learned counsel for the petitioner at the outset submits that the petitioner has been incarcerated since 18.05.2016 and has spent more than 5½ years in custody. He further submits that the prosecution has sought to examine 61 witnesses out of which till date only 31 witnesses have been examined, therefore, keeping the petitioner in custody till the conclusion of trial, which is not likely to be concluded anytime soon, will not be in the interest of justice.

9. On merits, he contends that the prosecution has relied upon the testimony of PW-1 i.e. the daughter of the deceased and PW-3 i.e. the wife of the deceased to make out a case that while the deceased was being transported to the hospital by a car in an injured condition, the deceased disclosed to PW-1 and PW-3, who were sitting on the back seat, that the assailants were acting at the behest of the petitioner. According to Mr. Singh, the version of said witnesses is not corroborated by PW-8, who was



driving the said car, which makes the statement of PW-1 & PW-3, who the interested witnesses, unreliable.

10. He submits that the testimonies of PW-1 and PW-3 is contrary to the history given by PW-1 and PW-3 and recorded on the MLC No. C-16/015226, wherein it is mentioned that after sustaining two gunshot injuries, the deceased had become unconscious, which creates doubt about the so-called oral dying declaration made by the deceased to PW-1 and PW-3, when he was being taken to the hospital in the car by them.

11. He also submits that it is the case of the prosecution in the chargesheet that the SI, who proceeded to the spot of the incident found broken pieces of glass on the road. This according to Mr. Singh, makes it luminous that the window pane of the car was closed when the alleged incident took place and the petitioner could not have heard any alleged utterance made by the assailants showing the complicity of the accused in the crime.

12. Further, the attention of the Court was drawn to the testimony of R. Venkatesh, who was the CEO of Hotel Connaught and was examined as PW-11 to contend that no motive for committing the offence can be attributed to the petitioner as the petitioner had no grievance against the deceased. Further, it is submitted that the matter was listed for 17.05.2016 and the said date was fixed for the purpose of filing written submissions and not for pronouncement of order.

13. In respect of the CDR's which are sought to be relied upon by the prosecution, it is the contention of Mr. Singh that no reliance can be placed upon the CDRs of the petitioner to make out the case that he was telephonically in touch with co-accused Ram Phool, as it is the prosecution's



own case that co-accused Ram Phool was the PSO of the petitioner. Further, he also submits that the CDRs between co-accused Ram Phool and Israel cannot be safely relied upon as Israel had worked for Ram Phool previously.

14. He submits that the investigation in the present matter is complete and no further recovery is to be made from the petitioner, in as much as, the main chargesheet along with supplementary chargesheets dated 10.08.2016, 18.08.2016, 21.09.2016 and 08.12.2016 stand filed.

15. It was also contended by Mr. Singh that the petitioner is suffering from various medical ailments which are well documented in the form of a medical report of the Jail Superintendent and this shall inure to the benefit of the petitioner.

16. Placing reliance on the decision of the Hon'ble Supreme Court in *Akhtari Bi (Smt) v. State of M.P., (2001) 4 SCC 355*, Mr. Singh contends that the view has been taken by the Supreme Court that even post-conviction for the offence under section 302 IPC, the court should consider suspending sentence of the convict after the convict has undergone sentence of five years.

17. He submits that the petitioner was enlarged on interim bail on four occasions and that it is not the case of the prosecution that the petitioner has misused the liberty granted to him and he has always surrendered on time.

18. It is in this backdrop, it is urged by Mr. D.P. Singh, learned counsel for the petitioner that he may be enlarged on regular bail.

19. *Per Contra*, the learned APP appearing on behalf of the State has argued on the lines of the Status Report. He submits that the petitioner has been accused of a grave and serious offence, therefore, he may not be enlarged on bail.



20. He submits that as per FSL report No. FSL 2016/F-5137 dt. 20.04.2017, the bullet (projectile) recovered from the body of the deceased was fired from the pistol which was recovered at the instance of co-accused Bilal.

21. He further submits that the CDRs and tower location of the mobile numbers of all the accused persons was analyzed, which establishes their involvement. The attention of the Court was also drawn to the following previous involvements of the petitioner:

- a) FIR No. 445/2016, Dt. 16.05.2016, U/s. 302/120B/201/411/34 IPC and 25/27 Arms Act, P.S. Jamia Nagar.
- b) FIR No. 463/2002 U/s. 285/304A IPC, PS: Mandir Marg, New Delhi.
- c) DA1-1998-A-0025 Dt. 15.04.1998 U/s. 120B/406/420/468/471/511 IPC & Sections 13(2)/13(1)(d) of PC Act registered by the ACB/CBI.

22. Lastly, it is submitted by the learned APP that the petitioner is a man of means and he can tamper with the evidence and influence material witnesses to depose in his favour and might also flee from the course of justice to avoid punishment.

23. I have heard the learned counsel for the petitioner, as well as, the learned APP and have also perused the record.

24. At the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, however, 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 nonapplication of mind.¹

25. Accordingly, the evidence which has come on record is being examined only for the limited purpose of indicating the reasons for arriving at the conclusion as to whether the petitioner deserves to be enlarged on bail or not.

26. The motive attributed to the petitioner is that the deceased was acting as an Estate Officer in a case pending against the hotel of the petitioner and the deceased was set to decide the matter against the petitioner.

27. Apart from the circumstantial evidence, the prosecution is relying upon the testimonies of the daughter (PW-1), wife (PW-3) and Mujibul @ Bul (PW-8), the person who drove the car in which the deceased was taken to the hospital.

28. The daughter of the deceased (PW-1) stated in her examination-in-chief that when she saw her father in an injured condition and he was not speaking but he was alive. However, when she enquired from her father, he stated that two persons had come on bike and the pillion rider shot him and before that he said that “*saale tujhe Connaught Hotel ke malik Kakkar ke paise toh pasand nahi aaye, ab goli pasand aayegi*” It is also in the testimony of PW-1 that after making oral dying declaration, the deceased closed his eyes and died at Holy Family hospital while being treated. The relevant part of the examination-in-chief of the daughter of the deceased (PW-1) recorded on 07.07.2017 reads as under:-

“On 16.05.2016, at around 05:30 PM, I came home from my

¹ Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528



college and at that point of time my mother and two younger sisters were present at home. Our house is at First Floor, at around 07:30 PM, Mubijul @ Bul, who stayed at our house and help us in our household work and used to call my father uncle and my mother aunty and he came to our home in nervous condition and informed us that “uncle ko goli maardi hai”. I along with my mother came running downstairs and saw that in the lane in front of D-10, my father was sitting on driver seat in injured condition in our car Swift Dezire bearing No. DL-2CAP-4026. **He was bleeding from wound on the right side of his chest. At that point of time, he was not speaking, but was alive.** Thereafter, with the help of neighbours, we shifted at him at the back seat of the car and rushed towards Holy Family Hospital. Inside the car, I was sitting on the left side and my mother was sitting on the right side with my father sitting between us and we were holding his body. Mujibul @ Bul was driving the car.

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On his way to Hospital, upon my inquiry, my father told me that two boys had come on a bike and the pillion rider had shot him with a bullet and before that he said “saale tujhe Connaught Hotel ke malik Kakkar ke paise toh pasand nahi aaye, ab goli pasand aayegi”. We tried to ask him more, but he kept quiet and closed his eyes. We took him to Holy Family Hospital for treatment, where he expired during his treatment.”

(emphasis supplied)

29. To the same effect is the statement of PW-3. The relevant part of the examination-in-chief of PW-3 recorded on 07.10.2017 reads as under:

“When we reached near Ilka store, my husband opened his eyes and told us that two boys had come on a bike and the pillion rider had shot him. Before Shooting he had also utter the following words to my late husband : - “Saale tujhe Cannought Hotel ke Malik Kakkar ke paise to pasand nahi

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aaye, ab goli pasand aayegi". We reached at Holy family hospital with my injured husband where he had succumbed to his injuries during treatment."

30. The relevant part of the examination-in-chief of independent witness Mujibul @ Bul (PW-8) recorded on 12.07.2018 reads as under:-

"I sat on driving seat whereas aunty and Ikra were on the right and left side of the deceased. Shakib uncle met us on the way. Shakib uncle cleared the way by giving signal of hand. There is on Ilka Store. Uncle uttered some words as aunty was asking what has happened but I could not hear the same as my attention was to drive the vehicle."

(emphasis supplied)

31. Undoubtedly, PW-1 and PW-3 are the daughter and wife, respectively of the deceased, therefore, being close relatives of the deceased, they are the witnesses who might have an interest in the success of the prosecution's case. A collective reading of the testimony of PW-1, PW-3 and PW-8 reveals that the statement of PW-1 and PW-3 to the effect that the assailants were acting at the behest of the petitioner has remained uncorroborated by the testimony of PW-8, who failed to hear the alleged utterance or the so-called dying declaration made by the deceased, despite being in close proximity.

32. The testimonies of PW-1 and PW-3 is contrary to the history given by them and recorded on the MLC No. C-16/015226, wherein it is mentioned after sustaining two gunshot injuries, the deceased had become unconscious. Even PW-1 at one stage of her examination-in-chief stated that the deceased was not speaking though he was alive. Further, it appears that the deceased when he was examined in the hospital, he was still unconscious. This creates doubt as to whether the deceased regained consciousness in the car while



being taken to the hospital and whether he was in the fit state to make so-called oral dying declaration as stated by the PW-1 and PW-3. However, this aspect will be considered by the Trial Court in depth at an appropriate stage with reference to the MLC, medical record and other evidence that may be proved on record, in light of the fact that the oral dying declaration herein has not been made before the Doctor, Executive Magistrate or Police Official, but to the family members of the deceased.

33. In so far as the oral dying declaration is concerned, it is trite law that such a dying declaration has to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. Reliance in this regard is placed on *Arun Bhanudas Pawar vs State of Maharashtra (2008) 11 Supreme Court Cases 232*, wherein it was held as under:

“25. It is well-settled law that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother who, as stated above, arrived at the hospital only on the following day at about 3.30 p.m. when Dr. Nitin had already operated Raju for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased Raju to his mother PW Sundarbai relied upon by the prosecution and accepted by the trial court and the High Court, in our view, was not cogent, satisfactory and convincing to hold that deceased Raju before his death was in a fit condition to



make oral declaration to his mother.”

(emphasis supplied)

34. It has also come in the evidence of PW-8 and PW-13, namely, Abdul Bari, that the window pane of the car (in which the deceased was shot), was broken. This would necessarily imply that the window panes of the car, in which the deceased was shot, were closed at the time of the incident. In such a situation whether the deceased could hear the utterance of the assailant that *“saale tujhe Connaught Hotel ke malik Kakkar ke paise toh pasand nahi aaye, ab goli pasand aayegi”* is also shrouded in doubt.

35. As noted above, the prosecution has attributed motive to petitioner for carrying out the present offence as the deceased, being an Estate officer, was to pronounce an order against the petitioner. However, the testimony of R. Venkatesh (PW-11) reveals that Prominent Hotels Ltd., (a company running the Connaught Hotel at the relevant time) of which the petitioner was a director, had given a no objection for appointing the deceased as the Estate Officer in the case of the petitioner. The relevant part of the cross examination of PW-11 reads as under:

“XXXXXX by Sh. S.P. Kausal, Ld. Counsel for the accused Ramesh Kakkar.

It is correct that I alongwith Sh. Rajiv Sharma, Advocate used to appear before Estate Officer and we used to brief MS about the court proceedings. Deceased M.M. Khan was probably law officer prior to the Estate Officer. I have been appearing in every Court in the proceedings of the Hotel Connaught. It is a matter of record the Prominent Hotels Ltd. has given no objection for appointing decease as Estate Officer in this case. I have not recommended appeal against any order passed in the case of Hotel Connaught. We had no grievance against any order/proceedings passed by deceased Sh. M. M. Khan as Estate Officer in the case of Hotel Connaught till the



matter was before him. On 13.05.2016, the liberty was given to file the written synopsis if any by 17.05.2016 though no date was fixed for the pronouncement of order.”

(emphasis supplied)

36. As far as the CDR's of the petitioner are concerned, it is relevant to note that it is not the case of the prosecution in the status report that the petitioner has been in contact with any other co-accused barring Ram Phool, who was the PSO of the petitioner. Since the petitioner and Ram Phool were in a close professional relationship, there was bound to be CDR connectivity between them. However, the evidentiary value of the same shall be seen by the Trial Court. Further, there is nothing unusual about the CDRs showing connectivity between the petitioner and co-accused Ram Phool and Israel, as it is the prosecution's own case that Israel has worked for Ramphool previously.

37. In any case, the CDR's of the petitioner can only be used as supporting or corroborative piece of evidence and cannot form the sole basis of conviction. Reference in this regard may be had to a decision of a co-ordinate bench of this Court in *Azad v. State of GNCT of Delhi*², wherein it has been held that “*CDR data can only be taken as supporting or corroborative piece of evidence and conviction cannot be made solely on basis of CDR data*”. Likewise, the evidentiary value of the CDRs can be seen only at the time of trial and not at the stage of considering the bail application. Reference may advantageously be had to the decision of the

² 2023 SCC OnLine Del 1769



Supreme Court in *State (By NCB) Bengaluru v. Pallulabid Ahmad Arimutta*³, the relevant paragraph of which reads as under:-

“12. ...The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage trial.”

38. Though the ultimate call on probative value of the evidence, the credibility and reliability of the testimonies of the witnesses, will be taken by the learned Trial Court at the stage of trial but for the purpose of considering bail application, this Court cannot be unmindful of the gaps that have come to the fore in the version of the prosecution, which coupled with the long incarceration of approximately six years (*as per nominal roll dated 12.06.2023, the custody period is 5 years 5 months and 15 days*) furnishes the justification for grant of bail to the petitioner.

39. That apart, the prosecution has cited as many as 61 witnesses, out of which only 31 witnesses have been examined. Therefore, there is no possibility of the trial being concluded any time soon.

40. The apprehension of the learned APP for the State that the petitioner being a man of means can win over witnesses in order to make them depose them in their favour cannot be sustained, in as much, as the petitioner has been enlarged on interim bail a number of times and the said concession has not been misused by the petitioner. Further, all public witnesses have already been examined. Nonetheless, the apprehension expressed by the learned APP can be allayed by putting appropriate conditions.

³ (2022) 12 SCC 633



41. It is well settled that at the pre-conviction stage, there is a 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 awarded to him. The circumstances discussed above, do not warrant keeping the petitioner in custody for an indefinite period to await the conclusion of trial. An ultimate acquittal with continued custody would rather, be a case of grave injustice.

42. In respect of the antecedents of the petitioner, to be noted that the petitioner has been acquitted in DA1-1998-A-0025 *vide* judgment dated 28.05.2022, which has been annexed as Annexure D to the written synopsis filed by the petitioner. Whereas, the other case stated to be pending against the petitioner *vide* FIR No. 463/2002 u/s 285/304A IPC registered at PS Mandir Marg, New Delhi relates to the year 2002 i.e. more than 20 years ago and it is also not the case of the prosecution that the petitioner has been recently involved in any other offence.

43. The Supreme Court in ***Prabhakar Tewari v. State of Uttar Pradesh***⁴, has held that the fact that multiple criminal charges are still pending against the accused by itself cannot be a ground to deny bail. The relevant paragraph of the aforesaid judgment reads as under:

“73.The offence alleged no doubt is grave and serious and there are several criminal cases pending against the accused. These factors by themselves cannot be the basis for refusal of prayer for bail. The High Court has exercised its discretion in granting bail to the accused Vikram Singh upon considering relevant materials. No ex facie error in the order has been shown by the appellant which would establish

⁴ (2020) 11 SCC 648



exercise of such discretion to be improper. We accordingly sustain the order [Vikram Singh v. State of U.P., 2019 SCC OnLine All 5566] of the High Court granting bail. This appeal is dismissed.”

(Emphasis supplied)

44. Considering the above discussed circumstances in entirety, I am of the view that the petitioner is entitled to grant of regular bail pending trial. Accordingly, the petitioner is admitted to bail subject to his furnishing a personal bond in the sum of Rs. 50,000/- with two sureties of like amount, one of which should be of the family member, subject to the satisfaction of the Trial Court/Duty Magistrate/CMM, further subject to the following conditions.

- a) The petitioner shall not leave the NCR without permission of this Court and shall ordinarily reside at the address as per prison records/as mentioned in the petition;
- b) Petitioner shall surrender his Passport, if any, before the Trial Court at the time furnishing bail bond/surety bond.
- c) Petitioner shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- d) The petitioner shall furnish to the IO/S.H.O P.S: Jamia Nagar, a cell-phone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- e) The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to the complainant or any of the prosecution witnesses or other persons acquainted with the facts of the case. The petitioner shall not tamper with evidence nor otherwise



indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.

45. It is made clear that the observations made herein 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.

46. The petition stands disposed of.

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

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

49. Order be uploaded on the website of the Court.

VIKAS MAHAJAN, J.

JANUARY 03, 2024
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