



2024:DHC:5389



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Pronounced on: 22.07.2024*+ **BAIL APPLN. 1535/2024**

ANWAR OMAISH

..... Petitioner

Through: Mr Anil Basoya, Mr Akash and Mr
Rohit Lohia, Advocates.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Mr Rajesh Kumar, SPP, Mr
Raghvinder Varma, APP for the State
and Ms Mansi Rajesh Kumar,
Advocate with Insp. Sudhir Kumar,
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/201/411/34 IPC and Sections 25/27 of the Arms Act registered at PS Jamia Nagar.
2. *Vide* order dated 29.05.2024, 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 30.05.2024, the same is 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 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, who was admitted vide MLC No. C16/015226. 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 accused Ramesh Kakkar, Ram Phool, Israil, Saleem, Amir and Anwar Omaish (petitioner herein) were arrested on 18.05.2016 and accused/petitioner Bilal was arrested on 19.05.2016. As per prosecution version, 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 co-accused 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 co-accused namely, Ramesh Kakkar and NDMC was listed on 17.05.2016 for the parties to file written arguments and seeing no other option left, Ramesh Kakkar entered into a criminal conspiracy to eliminate the deceased and for this purpose he took the help of hired killers, which was provided by the co-accused Ram Phool, PSO of Ramesh Kakkar. Ram Phool (PSO) in turn gave the contract to his colleague Israil, who further passed this contract to Saleem and Aamir. Aamir then arranged the meeting of Anwar Omaish (petitioner herein) and Bilal with Israil. 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 co-accused Bilal from his house, as the pistol was given to him by Anwar Omaish (petitioner herein) to keep the same. The motorcycle bearing no.DL 3SBJ 0929 was recovered at the instance of the petitioner.

8. He submits that there is no evidence to show as to how the police officials came to know that the motorcycle recovered at the instance of petitioner was used in commission of alleged crime.

9. Mr. Anil Basoya, learned counsel for the petitioner at the outset submits that the petitioner was arrested on 18.05.2016 on the basis of disclosure statement of co-accused and he has spent 08 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 during the pendency of trial, which is not likely to be concluded anytime soon, will not be in the interest of justice.

10. He submits that it is settled law that accused cannot be convicted solely on the basis as disclosure statement without any independent corroboration.

11. He further submits that the main accused in the matter, namely, Ramesh Kakkar and co-accused Israil, have been enlarged on regular bail by this Court. Likewise, Mohd. Bilal who has been ascribed role similar to the petitioner and at whose instance alleged offence weapon was recovered, has also been granted bail. He also submits that co-accused Ram Phool has also been granted regular bail vide order dated 29.01.2024 passed by learned ASJ(FTC)-02, Saket Courts.

12. 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 charge sheet along with supplementary charge sheets dated 10.08.2016, 18.08.2016, 21.09.2016 and 08.12.2016 stand filed and the trial is underway.

13. It is in this backdrop that Mr. Basoya urges that the petitioner may be enlarged on regular bail.

14. *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.

15. He submits that as per FSL report No. 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 whereas the motorcycle used in the commission of offence was recovered at the instance of the petitioner.

16. He submits that the petitioner is found involved in other cases as enumerated in the status report.

17. I have heard the learned counsel for the petitioner, as well as, the learned APP and have also perused the record. An incriminating circumstance pressed into service by the prosecution against the petitioner is the recovery of motorcycle allegedly used in the commission of offence was recovered at the instance of the petitioner. It is trite that recovery is not a substantive piece of evidence and it is to be used only for corroboration. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in *Suryavir v. State of Haryana*, (2022) 3 SCC 260, wherein it was observed as under:

18. That leaves us with subsidiary evidence regarding recovery, which in the absence of substantive evidence, by itself would not be sufficient. In the circumstances, in our considered view, the prosecution failed to establish its case beyond reasonable doubt. The appellant would, therefore, be entitled to acquittal. The instant appeal is thus allowed acquitting him of the charges levelled against him.

(Emphasis Supplied)

18. There also seems to be some substance in the contention of the learned counsel for the petitioner that there is no evidence to show as to how the police officials came to know that the motorcycle recovered at the instance of petitioner was used in commission of alleged crime.



19. Further, no conviction can be based solely on the disclosure statement of co-accused.

20. Incidentally, Ramesh Kakkar, who is stated to be the main accused in the present matter, has been enlarged on regular bail by this Court vide order dated 03.01.2024 passed in Bail Application 1433/2023. The order granting bail to Ramesh Kakkar was challenged by the next of kin before the Hon'ble Supreme Court in the SLP titled as *Nishat Khan v. State of NCT of Delhi*,¹ which was not interfered by the Apex Court. The order of the Supreme Court dated 22.01.2024 reads thus:

“Though we do not find any reason to interfere with the impugned order, we make it clear that the observations made thereunder are prima facie in nature and, therefore, shall not have any bearing on the trial. We find force in the alternative submission made by learned Senior Counsel for the petitioner that the trial is pending for more than 6 years on the file of Ld. ASJ (FTC), Saket Courts, New Delhi bearing SC No.2783/2016 titled, ‘State vs. Ramesh Kakkar &Ors.’.

The same is directed to be disposed of within a period of one year from today.

The Special Leave Petition is disposed of accordingly.

Pending application(s), if any, shall stand disposed of.”

21. The defence in the bail application of Ramesh Kakkar had pointed out certain inherent inconsistencies in the statements of the wife and daughter of the deceased, who have already been examined as witness by the prosecution to prove the motive against main accused Ramesh Kakkar, as

¹ SLP (CRL) Diary No. 1779/2024.



well as, the oral dying declaration of the deceased, but the probative value of their evidence and their credibility will be seen by the learned Trial Court during Trial.

22. However, it cannot be overlooked that the order granting regular bail to Ramesh Kakkar, who is alleged to be the mastermind of the conspiracy, has attained finality, whereas it is the prosecution's own case that the petitioner was hired assailant stated to have ridden as pillion on a motorcycle which was being driven by co-accused Mohd. Bilal. There is no direct evidence against the petitioner. Undoubtedly, the role ascribed to the petitioner is subsidiary to the role attributed to Ramesh Kakkar. The other co-accused namely, Israil, Ram Phool, Salim and Mohd. Bilal have also been enlarged on bail. Therefore, the petitioner is entitled to the benefit of parity.

23. Insofar as other cases pending against the petitioner are concerned, the learned counsel for the petitioner has stated that in three FIRs i.e. FIR No.1224/2015, FIR No.1364/2015 and FIR No.1398/2015 pertaining to PS Jamia Nagar, untraced report has been filed by the police. In case FIR No.304/2021, the learned counsel submits that all public witnesses have turned hostile and petitioner is likely to be acquitted. Even otherwise involvement in other criminal cases cannot be the sole ground for rejecting the bail, as held by the Hon'ble Supreme Court in ***Prabhakar Tiwari vs. State of Uttar Pradesh, (2020) 11 SCC 648.***

24. The testimonies of public witnesses have been recorded, thus, there is no possibility of witnesses being influenced by the petitioner in the even he is enlarged on bail.



25. Furthermore, the prosecution has cited as many as 61 witnesses and till date only about 31 witnesses have been examined. Evidently, the conclusion of trial is likely to take some time and in the given facts and circumstances of the case, the petitioner, who is incarcerated since 18.05.2016, cannot be kept in custody for an indefinite period to await the conclusion of trial.

26. The aforesaid factors coupled with the long incarceration of more than five years furnish a reason for grant of bail to the petitioner.

27. Considering the above discussed circumstances in entirety, this Court is 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, subject to the satisfaction of the Trial Court/Duty Magistrate/CMM, further subject to the following conditions:

- a. The petitioner 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



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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.

28. 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.

29. The petition stands disposed of.

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

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

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

VIKAS MAHAJAN, J.

JULY 22, 2024
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