



2024:DHC:1691



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

% Judgment delivered on: 01.03.2024

+ **BAIL APPLN. 2958/2023**

HIMANSHU THAKUR

..... Petitioner

Through: Mr. Siddhant Sharma, Adv.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Saleem Ahmed, SPP with
Insp.Sunil, PS. Crime Branch.**CORAM:****HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed under Section 439 CrPC seeking regular bail in connection with FIR No. 156/2020 under Sections 147/148/149/201/302 IPC registered at Police Station Gokalpuri. The charges against the petitioner were framed under Sections 144/147/148/427/412/432/435/302/395 IPC r/w Section 149 IPC.
2. *Vide* order dated 04.09.2023, notice was issued in the bail application of the petitioner and the State was directed to file a Status Report, which is on record.
3. The case of the prosecution as borne out from the charge-sheet is that on 28.02.2020 at 10:13 AM, information was received by police through a

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PCR call regarding a dead body in the Nala near Johripur *Tiraha*, which was later identified as that of Mursaleen s/o Sh. Yamin. The information was recorded *vide* DD No. 28A and entrusted to SI L.N. Sharma for necessary action. The body was shifted to GTB Hospital, where it was declared brought dead *vide* MLC No. BD/766/03/2020.

4. The post-mortem of the dead body was conducted in the said hospital on 13.03.2020 by the Medical Board and as per the post mortem report, as many as five external injuries were found on the body of the deceased. Cause of death was opined as “drowning”. Subsequently, an opinion regarding the type of weapon used to cause injuries was taken from the doctor who has opined that the injuries have been caused by blunt weapon.

5. The cause of death in the case had been kept pending, therefore, initially FIR in the matter was not registered. Sh. Md. Mohsin, brother of deceased Mursaleen filed a writ petition *viz.*, W.P.(Crl) 732/2020 before this Court. *Vide* order dated 16.03.2020, the Court directed for the registration of FIR in the case on the same day.

6. In compliance with the aforesaid order, on 16.03.2020 the I.O. SI L.N. Sharma recorded statement of the complainant Ms. Nargis, wife of the deceased, who had earlier reported at Police Station Gokalpuri on 01.03.2020 that her husband was missing.

7. During the course of investigation, the statement of the complainant/ wife of the deceased was recorded wherein she stated that her husband Mursaleen was a scrap dealer by profession and on 25.02.2020 at about 12 noon, her husband left from their residence in Muradnagar to go to his workplace in Indra Vihar on his old scooter. Later in the evening at around 6 PM, she became aware of the riots in Delhi and tried to call her husband to



enquire about him but he could not be reached despite several attempts as the phone was switched off. She made all efforts to search for her husband but he could not be traced. Thereafter, on 01.03.2020 she lodged a missing report of her husband. On 12.03.2020, she went to the mortuary at GTB hospital and identified the dead body of her husband. She claimed that her husband/deceased was assaulted by the rioters on 25.02.2020 as a result of which he died and his body was thrown by them in the *Ganda Nala*.

8. During further course of investigation, the statements of eye-witnesses were recorded. One eye-witness namely, Divesh Rajpoot, in his statement stated that on 25.02.2020 at about 04-4:30 PM in the evening, while the eyewitness was present near the *pulia*, he saw a person wearing a blue colour jacket and blue jeans coming towards Bhagirathi Vihar side of the *pulia* from Ganga Vihar, on his cream colour scooter. He further added that this person was stopped by the mob near *nala* road and on being asked he disclosed his name as Mursaleen and took out a blue colour mobile phone to disclose his identity. After this, he was assaulted by the group of persons and was thrown in the sludgy water of the *nala*. Further, the group of persons set the scooter of the deceased on fire. The eye witness further added that the mobile phone was robbed and was retained by the present petitioner.

9. Sequel to the above, the present petitioner was arrested on 08.04.2020. It is pertinent to note that the present petitioner was also roped in other FIR's which were registered in February, 2020 in connection with the communal riots which took place during that time. The spot where rioting took place is Johripur *Tiraha Nala*, which is the same location wherefrom the deceased's body was found.



10. Mr. Siddhant Sharma, learned counsel appearing on behalf of the petitioner, at the outset, submits that the petitioner is in custody since 08.04.2020 and is languishing in jail only because of the present FIR as he has been enlarged on bail in different FIRs *vide* following orders:

- (i) *Vide* order dated 13.02.2023, granted bail in FIR no. 103/2020;
- (ii) *Vide* order dated 06.03.2023, granted bail in FIR no. 37/2020;
- (iii) *Vide* order dated 07.03.2023, granted bail in FIR no. 35/2020;
- (iv) *Vide* order dated 23.03.2023, granted bail in FIR no. 38/2020;
- (v) *Vide* order dated 28.03.2023, granted bail in FIR no. 36/2020;
- (vi) *Vide* order dated 01.04.2023, granted bail in FIR no. 102/2020;
- (vii) *Vide* order dated 5.4.2023, granted bail in FIR no. 104/2020; and
- (viii) *Vide* order dated 14.7.2023, granted bail in FIR no. 149/2020.

11. He further submits that the material eye-witnesses i.e. PW2 (Nasir Ahmed) and PW7 (Divesh Rajpoot) have not supported the case of the prosecution. PW-7 also turned hostile and PW-2 also resiled from his earlier statement on certain aspects. The other material witnesses have also been examined and discharged.

12. He invites the attention of the Court to the testimony of PW2 (Nasir Ahmed) to contend that the testimony of PW2 is contrary to the prosecution version. The said witness has been cited as eye witness. It is the case of the prosecution that the incident happened on 25.02.2020 between 04-4:30 PM whereas PW2 during his cross-examination recorded on 02.08.2022 stated that “*I had visited Eidgah camp on 25.02.2020 at about 2.30 / 3.00 pm and I*



stayed there for about 4 hours.” Further, during his testimony PW2 also wrongly identified accused Lokesh Solanki as Himanshu (petitioner).

13. Further, drawing attention of the Court to the testimony of Divesh Rajpoot, who was examined as PW7, the learned counsel submits that the said witness turned hostile and stated that he did not see any rioting act by the mob. He was cross-examined by the learned SPP and denied the suggestions put to him as regard the presence of the present petitioner and the overt act attributed to him.

14. He submits that the material witnesses have already been examined, therefore, there is no possibility of petitioner influencing any material witness in the event he is enlarged on bail. There is no basis for prosecution's contention that the petitioner if enlarged on bail will tamper with evidence.

15. He submits that co-accused Sahil Babu, Tinku, Sandeep @ Mogli, Vivek Panchal, Pankaj Sharma, Sumit Chaudhary, Prince and Ankit Chaudhary have been enlarged on bail *vide* order dated 03.04.2023.

16. He further submits that another co-accused Lokesh Solanki @ Rajput in the present FIR was enlarged on bail *vide* order dated 21.07.2023, and the role of the petitioner and the said co-accused is alleged to be similar.

17. He submits that the petitioner may be extended the benefit of parity and the gravity of the offence cannot be the sole ground to deny bail when all the other co-accused have been granted bail by the learned Trial Court.

18. Further, the attention of the Court was drawn to the fact that the Petitioner has also been granted bail by the Ld. Trial Court in remaining 8 FIRs on the ground that the material eye witnesses have been examined and no other eye witnesses remain to be examined.



19. The learned counsel for the petitioner adds that the petitioner is in custody since 08.04.2020 and the main purpose of detention is to ensure the availability of accused during the trial and if it can be ensured that the accused will be available for the trial, then detaining of accused person is not necessary.

20. He submits that the prosecution has cited as many as 92 witnesses in total and the trial is not likely to be concluded anytime soon, which itself furnishes a reason to enlarge the petitioner on bail in view of the decisions of the Hon'ble Supreme Court in *Union of India v. K.A. Najeeb, (2021) 3 SCC 713* and *Praveen Rathore v. State of Rajasthan, 2023 SCC OnLine SC 1268*.

21. In the backdrop of the aforesaid facts and circumstances, it has been urged by learned counsel that the petitioner be enlarged on bail.

22. *Per contra*, the learned APP appearing on behalf of the State has argued on the lines of the status report. He submits that the present petitioner has been accused of a grave and serious offence, therefore, he may not be enlarged on bail. He submits that the petitioner was identified by eye witness PW-7 namely Divesh Rajpoot in his statement u/s 161 Cr.P.C.

23. The learned APP submits that parity with other co-accused has not been established as the role of the present petitioner and evidence against him is different than the co-accused persons. He submits that there is additional evidence against the petitioner in the form of recovery of the mobile phone of the deceased Murasleen and there is material to show that the said mobile phone was being used by the family members of the petitioner. That apart, there is additional charge under section 412 IPC against the petitioner, punishable up to life imprisonment which cannot be treated as a lighter charge.



24. He submits “*wooden danda*” in the incident was also recovered at the instance of the petitioner and the subsequent opinion taken from the doctors who conducted the post-mortem, records that the injuries of the deceased could be caused by a wooden stick.

25. The learned SPP submits that the present petitioner is the resident of the same locality as the eye witnesses in the present case and connected cases, therefore, in case the petitioner is enlarged on bail, there are definite chances that the petitioner may threaten or tamper with evidence.

26. I have heard the learned counsel for the petitioner as well as the learned APP appearing on behalf of the State and perused the material on record.

27. A perusal of the testimony of eye witness namely Divesh Rajpoot, who was examined as PW-7, shows that the said witness did not support the case of the prosecution and turned hostile. He has stated that he did not witness any rioting act of the mob.

28. Similarly, the testimony of another eye witness namely Nasir Ahmed, who was examined as PW-2, is also contradictory to the prosecution version. It is the case of the prosecution that the incident happened 25.02.2020 between 04-4:30 PM, whereas PW-2 during his cross examination has stated that “*I had visited Eidgah Camp on 25.02.2020 at about 2.30/3.00 p.m. and stayed there about for 4 hours.*”

29. There is also substance in the submission of the learned counsel for the petitioner that during his testimony PW-2 has wrongly identified accused Lokesh Solanki as Himanshu.

30. Though the evidentiary value of the testimonies of the witnesses will be considered by the learned Trial Court during the course of trial. However, at the stage of considering the bail application, the aforesaid anomalies in the



statement of eye-witnesses cannot be overlooked which definitely enures to the benefit of the petitioner.

31. In so far as the recovery of the mobile phone at the instance of the petitioner and the CDR records with regard to the use of the said phone by the family of the petitioner by inserting other SIM cards is concerned, the ultimate call with regard to its probative value will also be taken by the learned Trial Court during the course of trial as the same are corroborative piece of evidence.

32. Apart from the seriousness of the offence, other factors also need to be taken into consideration while considering the bail application.

33. The prosecution has cited as many as 92 witnesses in the charge sheet and till date only 9-10 witnesses have been examined, therefore, inevitably the trial is going to be protracted one which coupled with the fact that the petitioner is in custody for almost 04 years, furnishes the justification for granting bail to him.

34. The Hon'ble Supreme Court in ***State of Rajasthan v. Balchand @ Balaiy***, (1977) 4 SCC 308, laid down as under:

“2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.”...

35. In ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India***, (1994) 6 SCC 731, it was held that under trials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a



neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

36. In **K.A. Najeeb** (supra) the Hon'ble Supreme Court considering the absence of possibility of timely trial and period of custody, granted bail to an accused under Unlawful Activities (Prevention) Act, 1967, observing as under:

“...18. 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.”....

37. Likewise, in **Praveen Rathore** (supra) the Hon'ble Supreme Court considering the long custody period of four and half years' and possibility of trial not being concluded within reasonable time, granted bail to an accused charged under section 302, 120-B IPC, observing as under:

“5. It is not in dispute that the petitioner, by now, has undergone more than four and a half years' of sentence. The prosecution intends to examine 76 witnesses, out of whom 53 have already deposed. All the crucial witnesses have already been examined. The instant case was adjourned on few occasions to enable the prosecution to examine Chauthmal Kashyap and Manohar Rathore,



who were stated to be the vital witnesses. Their deposition is also complete.

6. We have heard learned counsel for the parties and carefully perused the material placed on record.

7. Taking into consideration the period already spent by the petitioner in custody coupled with the fact that conclusion of trial will take some reasonable time however, without expressing any views on the merits of the case, we are inclined to release him on bail.”...

38. Insofar as the apprehension expressed in the status report that the petitioner may threaten the witnesses if enlarged on bail, the said apprehension could be allayed by imposing appropriate condition on the petitioner.

39. That apart all co-accused of the petitioner have been enlarged on bail. Even the petitioner is on bail in other case FIRs as stated by the learned counsel for the petitioner, which fact is not disputed by the learned SPP. All material witnesses have already been examined.

40. 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 to the satisfaction of the Trial Court/Jail Superintendent/Duty Magistrate, further subject to the following conditions:-

- a) Petitioner/accused shall not leave the country without express 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.

41. The petition is disposed of.
42. Nothing stated herein shall be deemed to be an expression on the merits of the case of the respective parties.
43. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.
44. Order *dasti* under the signatures of the Court Master.
45. Order be uploaded on the website of the Court forthwith.

VIKAS MAHAJAN, J.

MARCH 1, 2024
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