HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Miscellaneous Bail Application No. 15508/2023

Subhash @ Kalu S/o Shri Leelu Ram, Aged About 35 Years, R/o Jorawapura, P.s. Hanumangarh Town, Dist. Hanumangarh,raj. (Appclinat Is Lodged In Dist. Jail, Hanumangarh)

----Petitioner

Versus

1. State Of Rajasthan, Through PP
2. Rohitash Kumar S/o Bhup Singh, B/c Jat R/o Village Jorawapura P.s., Tat Dist. Hanumangarh

----Respondents

For Petitioner(s)	:	Mr. Sumer Singh Rathore.
For Respondent(s)	:	Mr. Mohd. Javed Gauri, P.P.

HON'BLE MR. JUSTICE KULDEEP MATHUR

Order

10/01/2024

This application for bail under Section 439 Cr.P.C. has been filed by the petitioner who has been arrested in connection with F.I.R. No.478/2021, registered at P.S. Hanumangarh Town, District Hanumangarh for offences under Sections 302, 364, 34 IPC.

Heard learned counsel for the petitioner and learned Public Prosecutor. Perused the material available on record.

Learned counsel for the petitioner submitted that the petitioner has not been named as suspect in the FIR. Learned counsel further submitted that there is no eye witness of the incident and entire prosecution story is based on circumstantial evidence and the statements of last seen witness. Drawing attention of the Court towards the statements of last seen witness namely Jaswant @ Sadam recorded before the competent criminal court as P.W.-1, learned counsel for the petitioner submitted that the star witness of the case has turned hostile and has not

supported the story of prosecution, therefore the prosecution is controverting itself on the circumstance of last seen.

Learned counsel for the petitioner submitted that co-accused namely Anil @ Sethi and Mukesh Kumar Tarad have already been enlarged on bail by this Court vide order dated 02.08.2023 in Criminal Misc. II Bail Application Nos.8195/2023 and 7532/2023. The order dated 02.08.2023 passed by this Court is reproduced hereinbelow:-

> *"The present second bail applications have been filed under Section 439 Cr.P.C. by the petitioners who have been arrested in connection with F.I.R. No.478/2021, registered at Police Station Hanumangarh Town, District Hanumangarh, for the offences punishable under Sections 302, 364 & 34 IPC.*
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> *The first bail applications of the petitioners was dismissed by a coordinate Bench of this Court vide order dated 14.07.2022.*
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> *The facts in a nutshell are that an FIR No.478/2021 was filed by the complainant (brother of the deceased) stating inter alia that his brother (deceased) Mukesh did not return home in the night of 07.09.2021. During the search made by family members of the deceased, his dead body was found near Suratgarh Branch Canal. During inspection of the body, it was found that one hand and one leg of the dead body was broken and injuries were also seen on the dead body. In the FIR, it was also stated that a cloth was found stuffed into the mouth of the deceased.*
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> *As per FIR, on viewing images of the footage of CCTV installed at the shop of one Madan Taran, the deceased was seen on the motorcycle of Jaswant alias Sadam son of Jagdish and one unidentified person. The complainant suspected that his brother had previous animosity with Ajay Meghwal, son of Raju , Anil Mirasi, son of Brijlal, Sheshkaran, son of Brahmdev, Mukesh Jhinja, Siddharth Jhinja and Surendra Jhinja and*

therefore, these persons might be involved in the killing of deceased- Mukesh.

The investigating agency during the course of investigation, arrested the present petitioners and other co-accused persons in connection with the murder of the deceased. As per prosecution story, deceased was having illicit relations with the daughter of co-accused Subhash alias Kalu. The deceased was also trying to develop friendship with the wife of petitioner- Anil alias Sethi. Owing to these facts, petitioner- Anil alias Sethi, co-accused Subhash alias Kalu, co-accused 'A' in a pre-planned manner took deceased- Mukesh to Suratgarh Branch Canal, where petitioner- Mukesh Tarad also joined them and the petitioners along with co-accused persons brutally assaulted and murdered deceased- Mukesh.

As per prosecution, Jaswant alias Sadam had seen deceased- Mukesh being taken away by petitioner-Anil alias Sethi, Subhash alias Kalu, co-accused 'A' and informed petitioner- Mukesh Tarad about the deceased being taken away by accused persons, upon which, Mukesh Tarad joined other accused persons. As per prosecution, Jaswant alias Sadam, though did not participate in the killing of deceased- Mukesh but had full information about the crime being committed by the accused persons, thus, he was arrayed as 'prosecution witness' by the prosecution.

Learned counsel for the petitioner submitted that the petitioners who are in custody since 29.09.2021 and 03.10.2021 have been falsely implicated in the present case. Learned counsel submitted that the petitioners have not been named as suspected persons in the FIR. Learned counsel submitted that the complainant in the FIR stated that in the CCTV camera installed at the shop of Madan Tarad, he had seen deceased going with petitioner- Anil alias Sethi and Jaswant alias Sadam and motorcycle was being driven by deceased Mukesh himself. According to learned counsel, Jaswant alias Sadam was not made an accused in the matter and he was made a prosecution witness.

Learned counsel submitted that the statements of the star prosecution witness Jaswant alias Sadam have been recorded before competent criminal court on 06.09.2022 as PW-1. Drawing attention of the Court towards the statement of Jaswant alias Sadam, learned counsel submitted that aforenamed witness has not supported the prosecution story and has turned hostile. Learned counsel submitted that there is no eye witness of the incident and the prosecution story is based on circumstantial evidence. Learned counsel submitted that to connect the dots, the prosecution has analysed the call details of accused persons and the deceased. Learned counsel submitted that it is not in dispute that the accused and deceased knew each other and therefore, telephonic conversation between them sans transcript is not a circumstance enough to implicate them in the present case.

Attention of the Court was also drawn towards post mortem report of the deceased prepared by Medical Jurist, MGM Hospital, Hanumangarh dated 08.09.2021 to state that the cause of death of the deceased has been mentioned as asphyxia due to throttling. Learned counsel submitted that though injuries have also been found on the body of the deceased but no weapon (blunt or sharp) has been recovered at the instance of the present petitioners. Learned counsel submitted that to show involvement of present petitioners in the commission of alleged crime, recovery of mobile phone of the deceased and recovery of the motorbike at the instance of petitioner- Anil @ Sethi and Mukesh Tarad have been shown by the investigating agency. Learned counsel submitted that there is no material available on record to indicate that the petitioner were involved in a conspiracy to kill the deceased or they actively participated in his murder.

On the strength of above submission, learned counsel for the petitioners prayed that the petitioners deserve to be enlarged on bail.

Learned Public Prosecutor opposed the bail application and submitted that there is sufficient evidence available on record with respect to motive of the petitioners to commit

crime as well as their involvement in the commission of crime. Learned Public Prosecutor submitted that recoveries of mobile and motorcycle have been made on the basis of the disclosure statements of the petitioner recorded under Section 27 of the Indian Evidence Act. Learned Public Prosecutor submitted that in the CCTV installed at the shop of one Madan Tarad, deceased had been last seen in the company of one petitioner- Anil @ Sethi and prosecution witness- Jaswant @ Sadam.

On the strength of above, learned Public Prosecutor implored the Court not to grant indulgence of bail to the present petitioners.

Heard learned counsel for the petitioner and learned Public Prosecutor. Perused the material available on record.

Having gone through the FIR, challan papers, this Court prima facie finds that complainant- Rohitash in the FIR, lodged by him did not suspect the present petitioner as accused persons. The complainant in the FIR, stated that the deceased had animosity with a large number of people. The prosecution has developed its case based on 'last seen evidence'. The analysis of CCTV cameras installed at shop of Madan Tarad, reveals that deceased- Mukesh was last seen in the company of Jaswant alias Sadam and petitioner- Anil alias Sethi. Jaswant alias Sadam has not been arrayed as an accused by the investigating agency whereas he has been made star prosecution witness to substantiate the prosecution story as delineated in the challan submitted before competent criminal court. The statements of Jaswant @ Sadam have been recorded before the competent criminal court as PW-1 and he has been declared hostile. The prosecution is therefore, controverting itself on the circumstance of last seen.

This Court also prima facie finds that recovery of mobile and motorcycle have not been made from the places, exclusively within the knowledge of accused-petitioners.

Hon'ble the Supreme Court of India in the case of ***Bharat Choudhary vs Union of India*** *reported in* ***2021 SCC Online SC 1235*** *and Hon'ble Gujarat High Court in the case of* ***Yash Jayeshbhai Champaklal Shah vs State of Gujarat*** *reported*

*in **2022 SCC Online Guj 271**, held that in the absence of recording conversations exchanged between the accused persons, the same cannot be treated as corroborative material sufficient to establish a live link between them. Thus, this Court prima facie does not find it safe to deny bail to the petitioners only on the basis of call details between them and the deceased, particularly when, it is not in dispute that they knew each other.*

Having regard to the totality of the facts and circumstances of the case, without expressing any opinion on the merits/ demerits of the case, this Court is inclined to enlarge the petitioner on bail.

*Accordingly, the second bail applications filed under Section 439 Cr.P.C. are allowed and it is directed that petitioners **Anil @ Sethi S/o Shri Brji Lal** and **Mukesh Kumar Tarad S/o Mamraj** shall be released on bail in connection with F.I.R. No.478/2021, registered at Police Station Hanumangarh Town, District Hanumangarh provided each of them executes a personal bond in a sum of Rs.50,000/- with two sound and solvent sureties of Rs.25,000/- each to the satisfaction of learned trial court for their appearance before that court on each and every date of hearing and whenever called upon to do so till the completion of the trial.*

It is however, made clear that findings recorded/observations made above are for limited purposes of adjudication of bail application. The trial court shall not get prejudiced by the same.

A copy of this order be placed in each file."

Learned counsel for the petitioner submitted that the case of present petitioner is not distinguishable from that of the above named co-accused persons. The petitioner is in judicial custody and the trial of the case will take sufficiently long time, therefore, the benefit of bail should be granted to the accused-petitioner.

Learned Public Prosecutor has vehemently opposed the bail application. However, he was not in position to refute the fact that the above named co-accused persons have already been enlarged on bail by this Court.

Heard, learned counsel for the parties and after perusing the statements of the star witness, this court *prima facie* finds that the star prosecution witness has not supported the prosecution story before the competent criminal court and has turned hostile. This Court also *prima facie* finds that the case of the petitioner is not worse than that of the above named co-accused persons who have already been enlarged on bail by this Court. Thus, without expressing any opinion on the merits/demerits of the case, this Court is inclined to enlarge the petitioner on bail.

Thus, without commenting upon the present petitioner bail may be granted.

Consequently, the bail application under Section 439 Cr.P.C. is allowed. It is ordered that the accused-petitioner **Subhash @ Kalu S/o Shri Leelu Ram** arrested in connection with F.I.R. No.478/2021, registered at P.S. Hanumangarh Town, District Hanumangarh, shall be released on bail, if not wanted in any other case, provided he furnishes a personal bond of Rs.50,000/- and two sureties of Rs.25,000/- each, to the satisfaction of learned trial court, for his appearance before that court on each & every date of hearing and whenever called upon to do so till completion of the trial.

(KULDEEP MATHUR),J

79-AbhishekK/-