

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

Date of decision: 18th JANUARY, 2022

IN THE MATTER OF:

+ **BAIL APPLN. 2359/2021**

MOHD. SHOAIB @ CHUTWA

..... Petitioner

Through

Mr. Salim Malik, Mr. Abdul Kadir,
Ms. Shavana, Mr. Sharukh and Mr.
Shamsad Khan, Mr. Bhim Kishore,
Advocates.

versus

STATE

..... Respondent

Through

Mr. Amit Mahajan, SPP with Mr.
Rajat Nair, SPP with Mr. Dhruv
Pande and Mr. Shantnu Sharma,
Advocates with SI Surender Kumar,
PS Crime Branch.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The Petitioner seeks bail in FIR No.39/2020 dated 28.02.2020 registered at P.S. Gokul Puri for offences under Sections 147/148/149/302/436/427 of the Indian Penal Code, 1860 (*hereinafter*, "IPC").
2. The FIR relates to the violence that took place in the National Capital Territory of Delhi in the month of February 2020.
3. The brief facts leading to the instant Bail Application are that a protest against the Citizenship (Amendment) Act, 2019 (*hereinafter*, "CAA") had been taking place, and in relation to this, the Complainant (ASI Gajraj

Singh) received a PCR call *vide* DD No. 17A on 26.02.2020 that some rioters were pelting stones on Street No.1, near Kabir Builder, Bhagirathi Vihar. As per the FIR, the Complainant rushed to Bhagirathi Vihar where he was informed by a Beat Constable who in turn was informed by some people that the house of owner of Anil Sweets, which was located in Chaman Park, Main Brijpuri Road, had been set ablaze by rioters.

4. The FIR states that when the Complainant and the Beat Constable reached the said house, they found the door to be broken and house to be completely burnt. On inspecting the second floor, the Complainant noticed a semi-burnt body lying in the corner. The FIR further states that the deceased seemed to be about 20 years old, and that both the arms and legs of the body were chopped off. It is stated that the chopped limbs could not be found, and that on inquiry, it was found that the burnt body belonged to a person named Dilbar who was a waiter at the sweet house. The body was then sent to GTB Hospital and then to the GTB Hospital mortuary. The FIR states that it appears that unknown persons belonging to one of the parties opposing and supporting the CAA killed the deceased with a deadly weapon and then set the house ablaze with the intent to destroy the evidence of the crime.

5. It is stated that investigation is now complete and chargesheet has been filed against the Petitioner on 04.06.2020 wherein the Petitioner has been added. The chargesheet states that there is sufficient material to proceed against the Petitioner herein under Sections 144/147/148/149/188/153A/302/201/427/436/120-B/34 of the IPC. A supplementary chargesheet has also been filed on 07.07.2020.

6. Mr. Salim Malik, learned Counsel for the Petitioner, has submitted that the investigation is tainted and the Petitioner is an innocent person who

has been falsely implicated in the matter herein. He has submitted that DD No. 17A was not included anywhere in the chargesheet.

7. Mr. Malik has submitted that there is no clinching evidence against the Petitioner and that even the initial statement of the eyewitness Himanshu did not factor in the presence of the Petitioner herein. The learned Counsel for the Petitioner has submitted that merely the statement of the eyewitness cannot be relied upon to prolong the incarceration of the Petitioner. He has further argued that the CDR which allegedly places the Petitioner in the vicinity of the SOC is not conclusive as the Petitioner stays in that locality and, therefore, it is inevitable that all the accused persons would be caught by the same mobile tower.

8. Mr. Malik has submitted the entire case of the prosecution is based on CCTV footage. He has stated that the CCTV footage allegedly places the Petitioner near the SOC around 4 PM, but the alleged incident occurred after 9 PM. He has, therefore, submitted that it cannot be ascertained if the Petitioner was at the SOC when the alleged incident had occurred. The learned Counsel for the Petitioner has also submitted that co-accused Rashid@Monu has been granted bail by this Court and, thus, the Petitioner also deserves to be enlarged on bail on the ground of parity.

9. The learned Counsel for the Petitioner has concluded his submissions by stating that the Petitioner has already spent almost two years in jail and that this is a violation of his right to personal liberty under Article 21 of the Constitution of India. He has submitted that trial is likely to take a long while and that the Petitioner is a poor boy who is the sole breadwinner of his family. He, therefore, has submitted that the Petitioner should be granted bail.

10. *Per contra*, Mr. Amit Mahajan, learned APP for the State, has submitted that the Petitioner had actively participated in the deadly riots on 24.02.2020 wherein the deceased Dilbar Negi was burnt alive. He has submitted that the present case emerges from a deep-rooted conspiracy which was hatched under the garb of democratically opposing CAA.

11. Mr. Mahajan has submitted that the Petitioner was identified in the CCTV footage retrieved from Rajdhani Public School where he could be seen instigating others. Pointing at the CCTV footage (CP IP Cam), the learned APP has indicated that the Petitioner has been identified at 3:37:04 PM in a black hoodie and that the posture of the Petitioner is not that of a curious onlooker. He has submitted that the Petitioner can be seen wielding an iron rod. The learned APP has submitted that the Petitioner was arrested on the basis of the statement of the eyewitness Himanshu who saw the Petitioner play an active role in the riots and has identified the Petitioner in the CCTV footage. He has submitted another statement of Himanshu dated 19.06.2020 confirmed the identification of the Petitioner.

12. The learned APP has brought the attention of the Court to the gravity of the offences that have been invoked against the Petitioner and has stated that he is relying upon the heinousness of the crime while opposing the instant bail application. He has submitted that the object of Section 149 IPC is different as it is impossible to identify everyone and that it is enough if one can show that the accused is a part of the riotous mob which led to the death of the victim. He has submitted that it is of no consequence that no specific conduct can be attributed to the Petitioner and that having participated in the riotous mob, the Petitioner is responsible for not only his own actions, but also the actions of the others.

13. The learned APP has relied on the judgment of this Court where by co-accused Ashraf Ali was denied bail *vide* Order dated 14.10.2020 in BAIL APPLN. 2614/2020 wherein this Court had observed that there was a *prima facie* finding that the Petitioner therein was a part of the unlawful assembly which was responsible for setting fire to the godown in which the deceased Dilbar Negi was found burnt alive. This Court had further observed that the offence committed was serious and heinous enough to not enlarge the Petitioner therein. He has also argued that the Petitioner is not entitled to seek parity with co-accused Rashid @ Monu, given the nature and quality of evidence against the Petitioner.

14. Mr. Mahajan has further argued that that Ld. Trial Court *vide* Orders dated 03.09.2020 and 09.06.2021 had also dismissed the Petitioner's bail applications on the ground of heinousness of the offence. He has, therefore, submitted before this Court that there has been no change of circumstances and that period of incarceration undergone by the accused is not relevant while considering grant of bail. He has submitted that Section 436A of the Code of Criminal Procedure specifically provides for the maximum period for which an accused can be in custody while the trial is underway, and therefore, it should not be a relevant factor for grant of bail. Furthermore, Mr. Mahajan has submitted that the eyewitnesses reside in the same area as the Petitioner and may be susceptible to being influenced or threatened if the Petitioner is enlarged on bail.

15. The Court has heard Mr. Salim Malik, learned Counsel for the Petitioner, and Mr. Amit Mahajan, learned APP, with Mr. Dhruv Pande. The Court has also perused the material on record.

16. A perusal of the chargesheet indicates that during the course of

investigation in FIR No. 134/2020 registered at P.S. Dayalpur, two CCTV footages were retrieved from Rajdhani Public School – one on the corner wall of the school covering the sweet shop between Rajdhani Public School and Anil Pastry Shop, and another inside Rajdhani School near the main entry gate covering main Brijpuri Road, A-29, Chaman Park and some part of gate and railings of Rajdhani Public School. It is stated that in the chargesheet that though the case was registered on 28.02.2020, the incident was of 24.02.2020. The chargesheet, however, notes that the incident of the murder of Dilbar Negi was well-planned and was committed with the intention to disrupt law and order, and disturb communal harmony.

17. It is further stated in the chargesheet that during investigation, it had been found *vide* the CDR of the deceased that two calls at 08:18 P.M. and 09:07 P.M. had been made to Mahesh Yadav, a co-worker of the deceased on the night of 24.02.2020 and that the same had been confirmed by Mahesh who informed the IO that the deceased told him that he was hiding in the building. The chargesheet states that the statement of Mahesh Yadav is yet to be recorded as he is not in Delhi. It is pertinent to note that a perusal of the CDR reveals a call was received at around 8 PM and the duration of the call was one minute.

18. The chargesheet additionally states that the statement dated 11.03.2020 of eyewitness Himanshu under Section 161 Cr.P.C. ascertains that the Petitioner was in front of Rajdhani Public School, involved in the riots, arson, provoking the crowd and raising communal slogans. It states that the Petitioner was involved in pelting stones and setting fire to the shops. This statement has been supported by the statement of a secret informer dated 18.03.2020 who has also identified the Petitioner in the

CCTV footage. A perusal of the video footage shows that the Petitioner was seen on the CCTV camera of CP IP Cam at 03:37:04 PM which shows him before Rajdhani Public School on the day of the incident. It indicates the Petitioner herein was wearing a black hoodie and black jeans, and was holding a rod.

19. In the instant case, the issue which arises for consideration is that when an offence of murder is committed by an unlawful assembly, then whether each person in the unlawful assembly should be denied the benefit of bail, regardless of his role in the unlawful assembly or the object of the unlawful assembly. In order to understand this, it is useful to refer to Section 149 IPC which reads as follows:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”
(emphasis supplied)

20. The Supreme Court has consistently held that in order to convict an accused with the aid of Section 149, a clear finding needs to be given by the Court regarding the nature of unlawful common object. Furthermore, if any such finding is absent or if there is no overt act on behalf of the accused, the mere fact that the accused was present or armed would not be sufficient to prove common object.

21. In Kuldip Yadav and Ors. v. State of Bihar, (2011) 5 SCC 324, the

Supreme Court has categorically stated:

“39. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149.”

22. In Sherey and Ors. v. State of U.P., (1991) Supp (2) SCC 437, the Supreme Court considered as to whether Section 149 of the IPC could be applied to hold an accused constructively liable on the basis of omnibus allegations made by witnesses and on the basis of their mere presence at the spot/scene of crime.

“4. We have carefully gone through the evidence. We have no doubt that all the eye-witnesses were present. Nothing significant has been elicited in their cross-examination. However, the eye-witnesses simply named these appellants and identified them. So, the question is whether it is safe to convict all the appellants. In a case of this nature, the evidence of the witnesses has to be subjected to a close scrutiny in the light of their former statements. The earliest report namely the FIR has to be examined carefully. No doubt in their present deposition they have described the arms carried by the respective accused but we have to see the version given in the earliest report. In that report PW 1 after mentioning about the earlier proceedings has given a

*fairly detailed account of the present occurrence. He has mentioned the names of the witnesses and also the names of the three deceased persons. Then he proceeded to give a long list of names of the accused and it is generally stated that all of them were exhorting and surrounded the PWs and the other Hindus and attacked them. But to some extent specific overt acts are attributed to appellants 1, 4, 5, 7, 8, 10, 17, 22 and 25. It is mentioned therein that these nine accused were armed with deadly weapons and were seen assaulting the deceased Ram Narain and others. Now in the present deposition he improved his version and stated that in addition to these nine accused, five more persons also attacked the deceased and others. In view of this variation we think that it is safe to convict only such of the appellants who are consistently mentioned as having participated in the attack from the stage of earliest report. With regards the rest PW 1 mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. Further, the medical evidence rules out any lathis having been used. The doctor found only incised injuries on the dead bodies and on the injured PWs. Therefore, it is difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they are charged. **We feel it highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they***

were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance...” (emphasis supplied)

23. It is, therefore, noted that the applicability of Section 149 IPC, specifically read with Section 302, cannot be done on the basis of vague evidence and general allegations. When there is a crowd involved, at the juncture of grant or denial of bail, the Court must hesitate before arriving at the conclusion that every member of the unlawful assembly inhabits a common intention to accomplish the unlawful common object. There cannot be an umbrella assumption of guilt on behalf of every accused by the Court, and every decision must be taken based on a careful consideration of the facts and circumstances in the matter therein. This principle, therefore, gains utmost importance when the Court considers the question of grant or denial of bail. The submission of the learned APP in this regard, thus, does not hold water.

24. With regard to the submission that if there appears to be reasonable grounds that the accused has committed an offence which is punishable with death or life imprisonment, then there is a bar imposed by Section 437(1) Cr.P.C on granting of bail, this Court states that the case of Gurcharan Singh(supra) also acknowledges that it is the Court which has the last say on whether there exists any reasonable grounds for believing that the accused is guilty of committing the said offence. Furthermore, there is no blanket bar

as such which is imposed on the Court on granting of bail in such cases and that the Court can exercise discretion in releasing the accused, as long as reasons are recorded which clearly disclose how the discretion has been exercised. Additionally, in the case of the Prabhakar Tiwari v. State of U.P., (2020) SCCOnline 75, the Supreme Court has held that despite the alleged offence being grave and serious, and there being several criminal cases pending against the accused, these factors by themselves cannot be the basis for the refusal of prayer for bail.

25. In the case of Gurcharan Singh (supra), the Supreme Court had held as follows:

“24. Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr.P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment of life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The overriding considerations in granting of bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the

accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.”

26. The Petitioner was arrested on 18.03.2020 and has been in judicial custody since then. It has been 22 months since the arrest of the Petitioner. Bail jurisprudence attempts to bridge the gap between the personal liberty of an accused and ensuring social security remains intact. It is the intricate balance between securing the personal liberty of an individual and ensuring that this liberty does not lead to an eventual disturbance of public order. It is egregious and against the principles enshrined in our Constitution to allow an accused to remain languishing behind bars during the pendency of the trial. Therefore, the Court, while deciding an application for grant of bail, must traverse this intricate path very carefully and thus take multiple factors into consideration before arriving at a reasoned order whereby it grants or rejects bail.

27. In this context, the submissions of the learned APP that co-accused Ashraf Ali was denied bail by way of an Order of this Court dated 14.10.2020 and that the duration of incarceration is not relevant while considering an application for grant of bail cannot be countenanced. In the case of Union of India v. K.A. Najeeb, (**Criminal Appeal No. 98 of 2021**), the Supreme Court had upheld an Order granting bail to a person accused of offences under the Unlawful Activities (Prevention) Act, 1967, on the ground that though charges levelled against the accused were grave and

serious, however, the length of the period spent in custody and the unlikelihood of the trial concluding soon outweighed the seriousness of the charges. Relevant portion of the Order in Union of India v. K.A. Najeeb(supra)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."
(emphasis supplied)

28. In Union of India v. K.A. Najeeb (supra), the Supreme Court had further observed that once it was made obvious that a timely trial would not be possible and that the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail. Similar stands have been taken by the Supreme Court in Sagar Tatyaram Gorkhe v. State of Maharashtra, [SLP (Crl.) No. 6888/2015] and Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, (1994) 6 SCC 73) wherein the Supreme Court has emphasised the importance of the principle of personal liberty enshrined under Article 21 of

the Constitution of India and noted that no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter.

29. In the aforementioned judgements, bail was granted to the accused therein on the ground that the accused had been in custody for a prolonged duration of time. It was done despite the stringency of the provisions pertaining to grant of bail in the statutes which had been invoked in those matters.

30. The Order of this Court rejecting bail to co-accused Ashraf Ali in BAIL APPLN. 2614/2020 was pronounced on 04.10.2020 when the matter was at its initial stages. More than a year has passed since then and trial in the matter is yet to commence. It can, therefore, be said that the Petitioner herein has suffered incarceration for a significant period of time and that the precedential value of the Order dated 04.10.2020 will not apply in the case herein. With these facts and circumstances, the judgement in Union of India v. K.A. Najeeb (supra) applies to the instant case.

31. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the 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.”*

32. In Mahipal v. Rajesh Kumar, (2020) 2 SCC 118, the Supreme Court had observed as under:

“12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter of trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow and ought to be guided by the principles set out for the exercise of the power to set aside bail.”

33. It is the Constitutional duty of the Court to ensure that there is no arbitrary deprivation of personal liberty in the face of excess of State power. Bail is the rule and jail is the exception, and Courts must exercise their jurisdiction to uphold the tenets of personal liberty, subject to rightful regulation of the same by validly enacted legislation. The Supreme Court

has time and again held that Courts need to be alive to both ends of the spectrum, i.e. the duty of the Courts to ensure proper enforcement of criminal law, and the duty of the Courts to ensure that the law does not become a tool for targeted harassment.

34. As has been stated above, the Petitioner herein has been in custody for 22 months and was formally added by way of chargesheet dated 04.06.2020. A perusal of the material on record has revealed to the Court that the sole evidence that is available at this juncture against the Petitioner is his presence in the CCTV footage, the statement dated 11.03.2020 under Section 161 Cr.P.C. of eyewitness Himanshu, and the statement dated 18.03.2020 of a secret informer. However, the authenticity of all of these materials are to be tested during the course of trial and cannot form the basis for the prolonged incarceration of the Petitioner.

35. The material on record discloses that the deceased received a phone call after 8:00 PM and the call detail record indicates that the phone call had been picked up and lasted for a minute. This Court, therefore, can infer that the deceased was probably alive at that point of time. Further, the CCTV footage places the petitioner at the scene of crime only around 4:00 PM. Taking this into account, this Court is of the opinion that it would be too much of a stretch to state that the petitioner was present at the SoC when the alleged murder was committed after a gap of almost six hours between the petitioner's presence at the SoC and the deceased's alleged time of death. Therefore, the petitioner's presence at the SoC is inconclusive at this juncture and can only be confirmed during the course of trial and cannot justify the prolonged incarceration of the petitioner at this point of time.

36. The chargesheet and the supplementary chargesheet have already

been filed. The chargesheet indicates that there are currently 72 witnesses who need to be examined and, therefore, trial in the matter is likely to take a long time. This Court is of the opinion that it would not be prudent to keep the Petitioner behind bars for an undefined period of time at this stage. The Petitioner has roots in society, and, therefore, there is no danger of him absconding and fleeing.

37. In view of the facts and circumstances of the cases, without commenting on the merits of the matter, this Court is of the opinion that the Petitioner cannot be made to languish behind bars for a longer period of time, and that the veracity of the allegations levelled against him can be tested during trial.

38. Accordingly, this Court is inclined to grant bail to the Petitioner in FIR No. 39/2020 dated 28.02.2020 registered at P.S. Gokalpuri for offences under Sections 144/147/148/149/188/153A/302/201/427/436/120-B/34 of the IPC on the following conditions:

- a) The Petitioner shall furnish a personal bond in the sum of ₹35,000/- with one surety of the like amount to the satisfaction of the Trial Court/Duty Magistrate.
- b) The Petitioner shall not leave NCT of Delhi without prior permission of this Court.
- c) The petitioner is directed to attend all the proceedings before the Trial Court.
- d) The Petitioner shall report to the concerned Police Station every Tuesday, Thursday and Saturday at 10:30 AM and should be released after completing the formalities within an hour.

- e) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- f) The Petitioner has given his address in the memo of parties as House No. 93, Gali No. 5/2, Behind Rajdhani Public School, Babu Nagar, Delhi. The Petitioner is directed to continue to reside at the same address. In case there is any change in the address, the Petitioner is directed to intimate the same to the IO.
- g) The Petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses.
- h) Violation of any of these conditions will result in the cancellation of the bail given to the petitioner.

39. It is made clear that the observations made in this Order are only for the purpose of grant of bail and cannot be taken into consideration during the trial.

40. Accordingly, the bail application is disposed of along with the pending applications, if any.

SUBRAMONIUM PRASAD, J.

JANUARY 18, 2022

Rahul