

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

Date of decision: 01st FEBRUARY, 2022

IN THE MATTER OF:

+ **BAIL APPLN. 4016/2021**

VISHAL SINGH @ PAWAN

..... Petitioner

Through: Mr. Pankaj Yadav, Advocate

versus

STATE (GOVT NCT)

..... Respondent

Through: Mr. Amit Prasad, SPP for the State
with Mr. Ayodhya Prasad, Advocate
and SI Santosh Gupta, Crime Branch
Mr. Mehmood Pracha , Advocate
with Mr. Sanawar Choudhary and Mr.
Jatin Bhatt, Advocates for the
complainant.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner seeks bail in FIR No. 70/2020 dated 27.02.2020 registered at PS Bhajanpura for offences under Sections 147, 148, 149, 302, 307, 396, 436, 455, 201, 188, 34 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 on 25.02.2020, at around 11:00 A.M., the complainant had gone to purchase milk from a nearby shop when he received a call from his son Asif informing him that a huge crowd of around 100 people had gathered near

their house in support of NRC and CAA. The crowd was chanting slogans of “*Jai Shree Ram*”. The crowd later entered their house after breaking open the locks, and set it on fire. It is stated that the complainant’s family members and employees rushed to the top floor of the house. The complainant’s family members and workers were safely rescued from the roof of his residence, which was made possible by the rescue operation launched by the police in support with the locals of the vicinity.

4. It is stated that the complainant’s mother, Smt. Akbari, who was 85 years old could not reach the rooftop due to her age. After extinguishing the fire, her body was found lying on a folding bed and was recovered from the second floor. She was taken to Guru Teg Bahadur Hospital, where she was declared brought dead vide MLC No. D-45. A Post Mortem was conducted at GTB Hospital itself and vide PM Report No. 345/2020 dated 28.02.2020, the cause of death was opined as *Asphyxia as a result of a ante-mortem inhalation of smoke*. It is further stated that the crowd looted Rs. 8,00,000/- in cash and a box containing gold and silver jewellery and other valuable articles from their residence

5. It is stated that the investigation of the said case was transferred from North East to Special Investigation Team-II, Crime Branch, Delhi and subsequently to Special Investigation Unit-I, Crime Branch, Delhi vide order No. 8266-74/AC-III/C&T/PHQ dated 27.02.2020 and No. 216/S)/DCP/Crime (SIU & ISC) dated 04.03.2020.

6. It is stated that the petitioner was arrested on 16.03.2020 and has been in custody since then. The chargesheet was filed on 07.06.2020 and on 06.04.2021 charges were framed by the Trial Court.

7. The petitioner had filed three bail applications before the Court of Sessions and subsequently vide orders dated 29.04.2020, 20.10.2020 and 02.11.2021 the same were dismissed by the Learned Judge of the Trial Court.

8. Mr. Pankaj Yadav, the learned counsel for the petitioner contended that the accused has been falsely implicated in the present matter and that there exists no evidence which can prove the connection of the Petitioner to the incident beyond reasonable doubt. He submitted that the FIR was registered on 27.02.2020, that is, two days after the incident occurred and the name of the accused is nowhere mentioned therein. He further submitted that the accused has no relation with any of the co-accused, the complainant and his family members and has no reason to cause them any harm.

9. The learned counsel for the petitioner submitted that the petitioner is not mentioned anywhere in the identification memo dated 10.03.2020. He submitted that Mohd. Asif also failed to mention the name of the petitioner in his statement under Section 161, Cr.P.C dated 10.03.2020, when he was shown the video clippings. He highlighted the fact that despite having enough opportunities to mention the petitioner before, the petitioner was named only on 15.03.2020 by Mohd. Saeed Salmani and his Mohd. Asif Salmani vide their witness statements.

10. Mr. Yadav further submitted that the witness statements were in contradiction to each other. For this, the learned counsel placed reliance on the statement of Mohd. Salmani dated 15.03.2020, who mentioned that the person wearing black clothes is the petitioner whereas the statement dated of Mohd. Asif dated 10.03.2020 mentions that the person wearing black clothes is Prince, who is not the petitioner herein.

11. The learned counsel for the petitioner contended that the mobile phones that contained the video clippings were not seized in accordance with Section 102 of the CrPC by the investigating officer. The phones were kept in personal possession of the investigation officer till 16.03.2020 before it was handed over to HC Balraj No. 120/Crime who deposited the same in the *Malkhana* of PS Bhajanpura. Therefore, it cannot be ruled out that the video clippings could have been tampered.

12. The learned counsel for the petitioner submitted that the arrest of the petitioner is solely based on certain video clippings that show him to be present in that area during the time of the incident, the credibility of which is yet to be determined. In this regard, he submitted that the FSL report pertaining to the said videos has not yet been placed on record, despite the fact that almost two years have passed since the alleged incident.

13. Mr. Yadav submitted that the petitioner was merely a curious onlooker and was not a member of the riotous mob. He submitted that the petitioner was not seen coming out of the said house in any of the video clippings. He further submitted that nothing has been recovered from the possession of the accused and the offence of *dacoity* and rioting are not made out against the petitioner herein.

14. The learned counsel for the petitioner submitted that the accused has been in custody since 16.03.2020. The investigation qua accused has been complete, the chargesheet has been filed and there have not been any new developments or further arrests since then. He submitted that the supplementary chargesheet has not been supplied and the FSL report has not been placed on record yet, even though two years have passed. He also submitted that the trial is not likely to be concluded anytime soon.

Therefore, continued incarceration will violate the petitioner's right to life and personal liberty under Article 21 of the Constitution of India.

15. The learned counsel for the petitioner submitted that the offence under Section 146/148/149 of the IPC are bailable. The petitioner has no criminal antecedents and has always been cooperative with the investigative agency. He further submitted that the accused immediately joined investigation as and when called upon to do so, that is, on 12.03.2020, 13.03.2020 and 14.03.2020 and has made no attempts to abscond since then. The accused has deep roots in the society and there are no apprehensions against him for attempting to delay the trial/tamper with evidence. He further submitted that the petitioner has undertaken to abide by the conditions that this Hon'ble Court deems fit.

16. *Per Contra*, Mr. Amit Prasad, the learned SPP for the state submitted that during investigation, the statements of the complainant, and his son Mohd. Asif have been recorded and both of them categorically mention the name of the accused herein.

17. The learned SPP submitted that several video clippings of the incident were found that have been taken on record and the mobile phones in which they were recorded have been seized and referred to forensic laboratory for retrieving of video clips and expert's analysis. He submitted that out of these, in a video clip of 124 seconds shot by Mehraj Ansari, the petitioner was seen as an active member of the riotous mob which set the house of the complainant on fire. He further submitted that apart from this, in a video clip of 0.52 seconds that is provided by the complainant and available on record, one person wearing black clothes was seen pelting stones. This person was identified as the petitioner herein by the complainant and his son Mohd. Asif

after watching the said video. He submitted that Mohd. Asif also informed that he saw the petitioner herein in his house along with the mob.

18. The learned SPP submitted that at the instance of the petitioner herein, one black coloured T-Shirt (Sweater) on which a sticker of “CAESARS CLASSIC-100” is affixed on the back side of neck and a pair of trousers were recovered. He further submitted that the presence and involvement of the accused has also been confirmed by his co-accused namely Ravi Kumar, Prakash Chand and Suraj Singh during their respective interrogation and through identification memos.

19. The learned SPP submitted that the complainant and his family have been receiving threats from and at the instance of the family members and the associates of the accused persons, who live in their street itself. Due to this, the complainant and his family are in an extremely precarious situation. Therefore, in such circumstances, especially when all the statements of public witnesses have not yet been recorded and when the investigation has not been conducted in a proper manner, grant of bail would be prejudicial to the trial.

20. Mr. Pracha, the learned counsel for the complainant contended that the above incident was a pre-mediated crime. He submitted that the house of the complainant was situated inside the *gali* and not at the outskirts. Further, through video clippings, he highlighted the fact that the area is so compact that that there is virtually no room for any escape. He further submitted that the ground floor was set fire and, therefore, the residents were unable to come out of the house. This forced the residents to rush to the top floor in order to save themselves. The mob of which the petitioner was a part, had the knowledge that in all probability, the fire would result in the death of

residents. He submitted that this attracts the offence of Section 302, IPC and considering the gravity of the offence, the accused should not be released on bail.

21. Mr. Pracha, the learned counsel for the complainant further contended that ocular evidence is considered to be the best evidence unless there are grave reasons to question its credibility. Where there is substantial evidence present, the absence of an FSL report is considered as irrelevant. For this purpose, he placed reliance on the judgement of Pruthiviraj Jayantibhai Vanol v. Dinesh Dayabhai Vala, **2021 SCC OnLine SC 493**.

22. Mr. Pracha, learned counsel for the complainant submitted that the investigation has been conducted in a shoddy manner which is against the principles of fair trial under Article 21 of the Constitution of India. He further submitted that neutrality of the police and the investigating agency is an important factor to conduct the investigation in a proper manner. For this purpose, he placed reliance on Pooja Pal v. Union of India and Others, **(2016) 2 SCC 135**.

23. The court has heard both the parties and perused the material on record.

24. A perusal of the chargesheet indicates that the petitioner is a resident of Bhajanpura. The chargesheet states that an analysis of the Petitioner's mobile number has revealed that he was present at the Scene of Crime during the time of the alleged incident. The chargesheet further mentions that the petitioner has been identified by the complainant and his son Mohd. Asif.

25. The chargesheet shows that during the course of investigation certain video clips were retrieved that were shot from the mobile phones of the

individuals present at the scene of crime or downloaded online. A perusal of the video footage indicates that the petitioner herein was an active member of the mob that set the house of the complainant on fire. The video clippings clearly show the petitioner herein dragging a scooty near the scene of crime and arson. The clippings further show the petitioner herein pelting stones towards the residence of the complainant.

26. In the instant case, the issue which arises for consideration is whether when an offence of murder is committed by an unlawful assembly, then should each person in the unlawful assembly be denied the benefit of bail, regardless of their role in the unlawful assembly or the object of the unlawful assembly. In order to understand the same, 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)

27. In Kattukulangara Madhavan v. Majeed &Ors, (2017) 5 SCC 568, the Supreme Court has categorically stated:

“23. In the first place, the presence of an accused as part of an unlawful assembly, when not as a curious onlooker or a bystander, suggests his participation in the object of the assembly. When the prosecution establishes such presence, then it is the conduct of the accused that would determine whether he continued

*to participate in the unlawful assembly with the intention to fulfil the object of the assembly, or not. It could well be that an accused had no intention to participate in the object of the assembly. For example, if the object of the assembly is to murder someone, it is possible that the accused as a particular member of the assembly had no knowledge of the intention of the other members whose object was to murder, unless of course the evidence to the contrary shows such knowledge. **But having participated and gone along with the others, an inference whether inculpatory or exculpatory can be drawn from the conduct of such an accused.** The following questions arise with regard to the conduct of such an accused:*

- 1. What was the point of time at which he discovered that the assembly intended to kill the victim?*
- 2. Having discovered that, did he make any attempt to stop the assembly from pursuing the object?*
- 3. If he did, and failed, did he dissociate himself from the assembly by getting away?*

*The answer to these questions would determine whether an accused shared the common object in the assembly. **Without evidence that the accused had no knowledge of the unlawful object of the assembly or without evidence that after having gained knowledge, he attempted to prevent the assembly from accomplishing the unlawful object, and without evidence that after having failed to do so, the accused disassociated himself from the assembly, the mere participation of an accused in such an assembly would be inculpatory.*** (emphasis supplied)

28. The Supreme Court has, therefore, held that the mere presence of an accused in an unlawful assembly, when not as a curious onlooker or

bystander, suggests that they were a part of the said assembly. When this presence is established by the prosecution, it is the conduct of the accused which must be examined in order to discern whether the accused continued to participate in the unlawful assembly for the achievement of the unlawful object, or not. Even in circumstances where the accused may not have the intention to participate in the object of the assembly, an inference whether exculpatory or inculpatory can be drawn from the conduct of the accused during their participation in that assembly. Furthermore, if there is no evidence which shows that the accused did not have knowledge of the unlawful object of the assembly, or that having gained knowledge of the same, he attempted to either prevent it or disassociate himself from the assembly, the mere participation of the accused in such an assembly would be deemed to be inculpatory.

29. In Lalji and Others v. State of U.P., (1989) 1 SCC 437, the Supreme Court had observed as follows:

“9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus, this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of the assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the

*defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. **When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principle for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicarious criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.***

(emphasis supplied)

30. It has, therefore, been held by the Supreme Court that once an individual is deemed to be a part of the unlawful assembly, it would not be open to the Courts to acquit some members on the ground that they themselves did not perform any violent act, or that there was no corroboration of their participation. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149 IPC. Furthermore, the common object of the unlawful assembly could be gathered from the nature of assembly, arms used by the members of the assembly, and the behaviour of the assembly at or before the scene of

occurrence. It is an inference that is to be deduced from the facts and circumstances of the case, as has been stated in *Lalji v. State of U.P.* (supra)

31. A perusal of the material on record has revealed to the Court that the petitioner herein was seen as an active member of the mob that set the house of the complainant on fire. The clinching evidence that tilts this Court to prolong the incarceration of the petitioner is his presence in the video clipping wherein he is clearly identified at the Scene of Crime, pelting stones and dragging a scooty near the Scene of Crime and pelting stones towards the residence of the complainant. The petitioner was not a mere curious onlooker and the mob, in which the petitioner was participating, set fire to the house of the complainant resulting in the death of an old lady. This Court is of the opinion that the above material reveals that the Petitioner is not merely a curious onlooker.

32. In *Ash Mohammad v. Shiv Raj Singh*, (2012) 9 SCC 446, while dealing with individual liberty and cry of the society for justice, the Supreme Court has observed as under:

*"18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilised milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. **Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organised society the concept of liberty basically requires citizens***

to be responsible and not to disturb the tranquillity and safety which every well-meaning person desires."

(emphasis supplied)

33. This Court is of the opinion that the footage of the Petitioner at the Scene of Crime is quite egregious, and is therefore sufficient to keep the Petitioner in custody. Furthermore, the Petitioner does not satisfy the ingredients to claim bail on ground of parity with the other co-accused of the Petitioner who have been enlarged on bail vide BAIL APPLN. 2312/2021 and BAIL APPLN. 2386/2021as, unlike the Petitioner herein, none of those co-accused, who have been granted bail were caught in an overt act which indicated their active participation in perpetrating the offences mentioned in FIR No. 70/2020.

34. 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 is not to be granted bail.

35. Accordingly, the bail application is dismissed along with the pending application(s), if any.

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

SUBRAMONIUM PRASAD, J.

FEBRUARY 01, 2022

Rahul