

Reserved /AFR

In Chamber

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 34667 of 2020

Applicant :- Mohd. Sharib

Opposite Party :- State of U.P.

Counsel for Applicant :- Raghuvansh Misra

Counsel for Opposite Party :- GA, Amir Khan, Sadaful Islam Jafri

Hon'ble Pradeep Kumar Srivastava,J.

1. Heard Shri G.S. Chaturvedi, learned Senior Counsel assisted by Shri Raghuvansh Misra, learned counsel for the applicant and Shri N.I. Jafri, learned Senior Counsel assisted by Shri S.I. Jafri, learned counsel for the informant who are present virtually through video conferencing and learned AGA for the State who is present in the Court.

2. This bail application has been given by accused-applicant **Mohd. Sharib** in Case Crime No. 1369 of 2018, under Section 302/ 120B IPC, P.S.- Kotwali Nagar, District – Bulandshahar.

3. The FIR has been lodged by informant Mohd. Yunus on 13.10.2018 in respect of incident dated 9.10.2018/10.10.2018 in the night and the allegation is that the deceased was an Ex-MLA and was living in Bulandshahar. In the morning, till 11 AM, door of his bedroom did not open and therefore, after breaking the window, members of his family and others opened the door which was locked from inside. The deceased was found lying on the bed in bleeding condition and there was gun shot injury on his head. The informant suspected that some unknown person killed him and lodged FIR against unknown. On the basis of FIR, the investigation started, the inquest report was prepared and post-mortem of dead body was undertaken. Investigating Officer investigated the offence and finding no evidence submitted Final Report. Re-investigation was conducted by CBCID. Evidence was collected and charge-sheet was filed against the accused applicant and others under aforesaid sections.

4. Submission of the learned Senior counsel is that there is no reason for the accused applicant to commit murder of the deceased, he was not named

in the FIR and it was not even suspected in the FIR that he might have committed the murder of the deceased. There was no motive available to the applicant. In the initial statement recorded by IO, nothing was stated against him. Subsequently, in order to implicate the applicant, evidence was manipulated, false evidence was created and certain witnesses were re-examined who made improvement to implicate the accused applicant. There is no criminal history of the accused applicant. He was doing the work of guard and was for the protection of the deceased. There is no reliable evidence against him in support of the police version. It is further submitted that charge-sheet has already been filed after police investigation and applicant is prepared to furnish sureties and bonds, therefore, there is no possibility of his either fleeing away from the judicial process or tampering with the evidence. Applicant is languishing in jail since 19.03.2020 and undertakes that he will not misuse the liberty of bail, if granted and cooperate in trial.

5. Learned Senior counsel appearing for the informant and learned AGA for the State have strongly opposed the bail application and have submitted that the matter was investigated and after collecting enough evidence it was found that the accused applicant committed murder in a very planned way. It has been further submitted that there is extra judicial confession made to witness Mohd. Khalid who has stated to the IO that while he was on his saw applicant Sharib and servant Sajid came there and made a confessional statement that out of greed and on the saying of Anas, the son of deceased, they killed the deceased. Further submission is that there are other evidence on record which is in the nature of circumstances which conclusively indicated the involvement of the accused applicant in the commission of the offence.

6. Learned Senior Counsel for informant side has submitted that the deceased with the accused were going to Delhi from Aligarh and it was the accused applicant who insisted for stay in Bulandshahar. On his pursuance, the deceased agreed to stay in Bulandshahar where his wife resides. In the evidence it has come that the accused and the deceased both slept in the

same room and the key of the room was always with the accused applicant. After committing the murder the accused persons locked the door and it is why the door was found locked from inside but no key was recovered from the room. Submission is that the accused applicant has every opportunity as he was with the deceased at the relevant time and having the key of the bedroom. The murder was committed by the pistol which was in the name of the wife of the deceased and in the evidence it has come that pistol was always with the accused applicant. It has been also submitted that the murder was committed in such a planned way that it gave the impression that it was a case of suicide. The witnesses have stated to IO that the deceased was very happy that day and there was no question of his committing suicide. From the spot two used cartridges were recovered and were sent for chemical examination in the Forensic Laboratory. Submission is that a person committing suicide will not be able to cause two fire arm injuries on his head.

7. It has been also submitted by the learned senior counsel for the informant side that it has been stated by witness Usman on 31.08.2019 to the IO that accused applicant was sleeping in the room of the deceased in that night. Family members as per statement of witness Naieem Mansuri also suspected on the applicant. There was no reason with him that he could commit suicide. It has also come in the statement of Qaram Hussain alias Kalam driver that the deceased was inclined to go Delhi directly as he was of the view that on stay in Bulandshahar, delay occurs in starting from Bulandshahr in the morning. Even on phone to his wife Farrah, the deceased said that he was not willing to come there. The witness has stated that on reaching to Bulandshahar the deceased said that at 8 AM positively in the next day morning, they will leave for Delhi. Thereafter he went inside the room and behind him accused person also went inside the room. He slept in the hall till then accused person did not come in the hall. When the door was opened, the accused applicant was the first man to go inside and he started weeping and saying why he (deceased) committed suicide. He has also stated that accused applicant used to have the pistol of the wife of deceased as he was not on official duty with the deceased. He has stated that the

deceased was very happy as his son has become father recently. On that fateful night there was no other family member in the house and the deceased was alone. Similar kind of statement has been given by Sajid and he has stated that it was the accused applicant whom he left with the deceased before he went to sleep. Farrah has also stated that in the mid night of 09.10.2018 at 1 AM, she talked to deceased on mobile and that time deceased was going from Aligarh to Bulandshahr. She reached at about 1 PM in Bulandshahr and then she came to know about the death of her husband. Submission of the learned counsel is that all the witnesses have suspected that accused applicant was having all intimacy with the deceased and he had the opportunity to commit the murder and he committed murder of the deceased. The reference has been made to the statement of co-accused also and it has been argued that the statement of co-accused Sajid also goes to show that accused applicant committed murder of the deceased. In the forensic lab report it was found that the gun shot injury was caused by the same pistol what was provided to him. Submission of the learned counsel is that the accused applicant was having illicit relation with the wife of the deceased and because of that he planned the murder of the deceased and caused his death. Submission is that in such kind of case sympathetic view should not be taken and bail application is liable to be rejected.

8. Learned senior counsel for the accused applicant has submitted that there is no evidence against the accused applicant; there is serious contradiction in the statement of the witnesses and all the statements relied upon by the state was recorded after a long gap and subsequently by way of improvement for implicating the accused applicant and the witnesses have changed their version and have given false and concocted statement against him. Learned senior counsel has also referred to the forensic lab report in which a conclusion has been given that there was possibility that suicide might have been committed by the deceased.

9. Considered the rival contentions of both sides and perused the record.

10. It appears that a number of witnesses namely, Faizan, Sajid, Aqaram, Wahid, Amar Sharma, Smt. Kavita, Lalit Kumar Sharma, Aamir, Naieem,

Afaq, Raiees, Vinod, Khalid, Aasim, Anas (son), Dr. Kafil, Smt Qamarjahan (first wife), Smt. Faraha (another wife) and informant Younus (brother) have been examined by the I.O. initially. I find that the witnesses initially stated nothing against applicant. On 6.11.2018, Final Report was submitted by IO concluding that no evidence of murder was found and on 19.3.20019, the SHO made a written request for accepting the FR. Thus, it is clear that after the first round of investigation, nothing was found against the applicant.

11. Thereafter, from the reading of the record, it appears that CBCID was directed to reinvestigate vide letter dated 20.7.2019 as annexed at page 92 of the bail application. This time son Anas in his statement suspected that uncle Younus with the accused-applicant and servant Sajid committed murder of the deceased in a planned way. Again son Zaid and two wives of the deceased said nothing against applicant. One Usman was examined who stated that he was told by SAJID that the applicant slept with deceased in his room in the night. It means that Usman has not seen the accused-applicant sleeping inside the room of deceased. Witness Naieem stated similarly and expressed suspicion on the applicant. Witness Qaram Hussain alias Kalam said that the applicant on the way insisted to stay at Bulandshahar. Sajid stated that in his presence the deceased was asking the applicant to sleep in his room. The wife Smt. Faraha also expressed suspicion on the applicant. On 13.7.2020, statement of Khalid was recorded by IO who said that the accused applicant with Sajid came to him in the month of November and confessed that on instigation of Anas, they killed the deceased out of greed for money. Clearly, the witnesses have only expressed their suspicion and Anas and Sajid are co-accused persons against whom charge-sheet has been filed.

12. On 7.3.2020, record shows that the IO summarized the evidence collected by him and made observations to the effect that a conspiracy took place between Anas, Sajid and accused-applicant for the commission of the offence for which weapon was arranged by Anas, although, the same was not used in committing the offence as the same was committed by the pistol of Qamarjahan which was used to be with the accused-applicant; post

incident conversation between the three and Danish on mobile corroborates the fact of conspiracy; deceased was apprehensive that he might be killed by Anas; accused-applicant was sleeping with the deceased in his room in the night; Anas had criminal antecedent and was in jail in relation to murder of his step mother and after coming out from jail on bail when he was given by the deceased the responsibility of his factory, he misappropriated about 20 lacs of rupees for which he was scolded by the deceased; Anas was aggrieved as the deceased was inclined to give his property to his wife Faraha and her daughter and not to the mother of Anas and his other brothers and all these factors prompted him to plan for the murder and he executed the same through accused-applicant and Sajid. It has been submitted by AGA that charge-sheet has been filed, the copy of which is annexed with counter affidavit.

13. It is pertinent to mention that the observations aforesaid made by the IO are based on speculation and suspicion. Moreover, the case against the accused applicant is totally based on the circumstantial evidence that he was sleeping in the same room with the deceased. This fact does not appear to be supported by any believable evidence or eyewitness account. It is co-accused Sajid who said so but he is accused in this case and much reliance cannot be placed on his statement. This fact has been stated by Sajid only during reinvestigation after about 11 months from the date of incident. It is his second statement and nothing of this sort has come in his first statement. Then, it is not usual and natural why the deceased would ask the applicant to sleep in his room. It was not a guest house where accommodation may not be sufficient and the adjustment was to be made. It was a big house of the deceased, an ex MLA with huge property, and it appears highly improbable that he would ask the applicant, a guard of his own, to sleep in his room and that too without any reason.

14. In view of above discussion, it is clear that the accused applicant is not named in FIR; no motive was assigned to him for causing death of the deceased; there is no eyewitness account supporting the allegation against the applicant; even suspicion was not expressed against him in the FIR even

though FIR was lodged by the brother which was lodged on fifth day after the date of incident and there was sufficient time with the informant for making allegations, or at least expressing suspicion against the applicant. The case is totally based on circumstantial evidence and it is difficult at this stage to say that the circumstances alleged against the applicant, if taken together and linked, form a chain of circumstance conclusively leading to an inference that the accused-applicant must have committed the said offence. Apparently unrelated circumstances if joined together must form a chain of circumstances indicating the guilt. I find at this stage that such link is missing. Moreover, the witnesses relied upon by state, have not stated anything against the applicant when examined earlier and FR was submitted. Later on, after about 10 months and more, during reinvestigation, same witnesses started expressing suspicion and four witnesses including two co-accused persons started saying the fact of applicant sleeping in the room of the deceased for which there appears to be no reason nor it appears to be natural in view of the status of the deceased. One of such witness is Usman who was so said by co-accused Sajid and other is Kalam and it is doubtful that he himself had seen the applicant sleeping in the room. Moreover, they are all subsequent and belated statements. The change in the version of witnesses appears to be after thought and possibility of improvement in order to implicate the applicant can not be ruled out. Further, the theory of applicant sleeping with deceased is primarily based on the statement of Anas and Sajid and against both charge-sheet has been filed. This is again a fact the advantage of which certainly goes to the applicant. It appears strange that extra judicial confession was record by IO after more than 15 months and after recording his concluding remarks on 7.3.2020 and it also creates a doubt that it was so done in order to give weight to the theory of guilt. Again, in the forensic lab report, it has been mentioned that the possibility is there that suicide might have been committed by the deceased. The forensic report therefore also gives strength to the bail plea. The fact that the bail application of Anas has been rejected is of no avail while considering the bail application of the accused applicant. The applicant is in jail from the last more than 15 months which also needs to be taken into consideration in

favour of applicant particularly during pandemic period. The case is based on circumstantial evidence and the circumstances are yet to be established during trial.

15. Taking into consideration the entire facts and circumstances and the evidence available on record at this stage, the bail application deserves to be allowed.

16. The bail application is therefore allowed. Accused-applicant **Mohd. Sharib** be released on bail in Case Crime No. 1369 of 2018, under Section 302/ 120B IPC, P.S.- Kotwali Nagar, District – Bulandshahar on following conditions:

(i) The applicant will co-operate with the trial and remain present personally on each and every date fixed for framing of charge, recording of evidence as well as recording of statement under Section 313 Cr.P.C. or through counsel on other dates and in case of absence without sufficient cause, it will be deemed that she is abusing the liberty of bail enabling the court concerned to take necessary action in accordance with the provisions of Section 82 Cr.P.C. or Sections 174A and 229A I.P.C.

(ii) The applicant will not tamper with the prosecution evidence and will not delay the disposal of trial in any manner whatsoever.

(iii) The applicant will not indulge in any unlawful activities.

17. The identity, status and residential proof of sureties will be verified by court concerned and in case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

18. It is made clear that no observation made by this Court in the course of disposal of this bail application shall anyway influence the trial court

while deciding the case on merits and the trial court will arrive at its own conclusion strictly on the basis of evidence on record.

19. A computer generated copy may be produced before the court concerned for necessary compliance.

Order Date :- 9.7.2021

Bhanu

(Justice Pradeep Kumar Srivastava)