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

Dated : 29th May, 2020

+ BAIL APPL. 945/2020

FIROZ KHAN

..... Applicant

Through: Ms. Rebecca John, Sr. Adv. with
Mr. Bilal Anwar Khan, Adv.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Hirein Sharma, APP for the State.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J. (Oral) :

The applicant, who was taken into custody on 03.04.2020 in case FIR No. 105/2020 registered on 04.03.2020 under sections 147/148/149/427/436 IPC at PS : Dayalpur, seeks regular bail *inter-alia* on the grounds that he has neither been named in the FIR nor is there any allegation in the FIR nor any other material collected during investigation, that would identify the applicant as one of the perpetrators of the offences alleged.

2. Pursuant to order dated 26.05.2020 made in this matter, along with its additional status report dated 27.05.2020, the State has placed on

record supplementary statement dated 10.04.2020 of complainant/ Mohd. Shanawaj/Shanawaz recorded under section 161 of the Code of Criminal Procedure, 1973 ('Cr.P.C.', for short). The first statement of the complainant, on the basis of which the FIR was registered has not been filed on record. Ld. APP states however that the complainant's first statement is extracted *in-extenso* in the FIR itself.

3. Ms. Rebecca M. John, learned senior counsel appearing for the applicant states that *firstly*, the complainant Mohd. Shanawaz's supplementary statement, upon which the State seeks to rely, does not in any manner identify or connect the applicant to the offences alleged. *Secondly*, senior counsel contends that no test identification parade was conducted of the applicant to get the complainant to identify him, which ought to have been done in a case such as this, alleging arson by an unlawful assembly. *Thirdly*, Ms. John contends, that the applicant is a resident of Old Mustafabad which is nearly a 15-minute walk from Mahalaxmi Enclave, where the complainant is said to have run his confectionary shop; and therefore the applicant's presence in the vicinity of the shop cannot be assumed, unless there is evidence to that effect, which there isn't. She also contends that there is nothing on record to show that Ct. Vikas, who is alleged to have seen the applicant committing the offences, was posted and present at the place of the incident. It is further pointed-out that the complainant's shop, where the applicant is alleged to have been spotted and Rajdhani Public School, the CCTV footage whereof is stated to have captured the applicant's presence, are not in the vicinity of each other.

4. It is also argued that Mohd. Anwar, who is co-accused with the applicant in FIR No. 105/2020, has already been admitted to bail by the learned Additional Sessions Judge by order dated 13.05.2020 in connected FIR No. 111/2020 ; and by order dated 19.05.2020 in connected FIR No. 112/2020. It is stated that Mohd. Anwar is co-accused along with the applicant in 5 FIRs registered in connection with the riots that happened in Delhi in February 2020, as recorded in status report dated 23.05.2020. Ms. John also points-out that of the offences alleged, only one, namely the offence under section 436 IPC is a non-bailable offence.
5. Opposing the grant of bail, Mr. Hirein Sharma, learned APP for the State submits that the applicant has been identified by the complainant ; by Ct. Vikas ; as well as in the CCTV footage obtained from Rajdhani Public School ; and that is sufficient basis to hold him in judicial custody. On being queried, he states that overall there were around 250 to 300 rioters in the area at the relevant time.
6. Refreshing one's understanding of the concept and fundamentals of bail, reference may be made to the decision in ***Ash Mohammad vs. Shiv Raj Singh & Anr.***¹ in which the Supreme Court very lucidly explains thus :

“8. In Ram Govind Upadhyay v. Sudarshan Singh², it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution

¹ (2012) 9 SCC 446

² (2002) 3 SCC 598

and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said case the learned Judges referred to the decision in *Prahlad Singh Bhati v. NCT, Delhi*³ and stated as follows: (Ram Govind case, SCC p. 602, para 4)

“(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

9. In *Chaman Lal v. State of U.P.*⁴ this Court while dealing with an application for bail has stated that certain factors are to be considered for grant of bail, they are: (SCC p. 525)

“... (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witness or apprehension of threat

³ (2001) 4 SCC 280

⁴ (2004) 7 SCC 525

to the complainant, and (iii) prima facie satisfaction of the court in support of the charge.”

10. In *Masroor v. State of U.P.*⁵, while giving emphasis to ascribing reasons for granting of bail, however, brief it may be, a two-Judge Bench observed that: (SCC p. 290, para 15)

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case.”

11. In *Prasanta Kumar Sarkar v. Ashis Chatterjee*⁶ it has been observed that (SCC p. 499, para 9) normally this Court does not interfere with an order passed by the High Court granting or rejecting the bail of the accused, however, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point.

“9. ... among other circumstances, the factors [which are] to be borne in mind while considering an application for bail are:

(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;

⁵ (2009) 14 SCC 286

⁶ (2010) 14 SCC 496

- (v) character, behaviour, 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.”

* * * * *

“20. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury's Laws of England it has been stated thus:

“166. Effect of bail.—The effect of granting bail is not to set the defendant [(accused) at liberty], but to release him from the custody of the law and to entrust him to the custody of his sureties, who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law, and he will then be imprisoned....”

21. In *Sunil Fulchand Shah v. Union of India*⁷ Dr A.S. Anand, learned Chief Justice, in his concurring opinion, observed: (SCC pp. 429-30, para 24)

“24. ... Bail is well understood in criminal jurisprudence and Chapter 33 of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive con-

⁷ (2000) 3 SCC 409

trol over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety."

(Emphasis supplied)

7. Now, analysing the material based on which the applicant is being held in judicial custody, purely on a *prima-facie* basis, the following picture emerges.
8. In the complaint/statement made by the complainant on 03.03.2020 he said this :

दुकान का मूल्य 30,000 का रहा था। दुकान में बिल्व, पथरी का फ्लोर, LED, 4 कमर, 3 काउन्टर, और खाने पीने का सामान बहुत सारा था जिसकी कीमत 3.5 से 4 लाख रुपये थी ये सब मेरी आँखों के सामने 24/02/2020 4:15 बजे मेरी दुकान जला दी और मेने पुलिस को फोन भी किया पर पुलिस का फोन व्यस्त ना रहा या इसलिए मे वहा से अपनी जान बचा कर भाग गया। कृपा करके मेरी सहायता करे और सक्षम कार्यवाही करे धन्यवाद COMPLAINT NO. 918901 TIME -24/02/2020 6:34 pm Sd English प्रार्थी MOHD SHANAWAJ S/O MOHD RASHID Add- A-

(Relevant extract from record)

In supplementary statement dated 10.04.2020, made more than a month later, the complainant says the following:

बोतलें थी, और मेरी दुकान में घूस गई, मे जैसे तैसे करके दुकान से बाहर आ गया। दंगाइयो ने मेरी दुकान में तोड़फोड़ मचा दी। और दुकान में आग लगा दी। जो आज आप मेरी दुकान पर आय और आपने मुझे आपने फोन में विडियो और फोटो दिखाय, जो मेने दुकान में आग लगाने वाले दो व्यक्तियों को विडियो व फोटो में पहचान लिया है बाकि मौजूद व्यक्तियों को मैं सामने आने पर पहचान सकता हु। आपने मेरे से पूछ ताछ करके आज आपने मेरा बयान लिखा पढ़ सुन लिया जो ठीक है।

(Relevant extract from record)

It is seen that nowhere in the above statements does the complainant *name* or *otherwise identify* the applicant. In his supplementary statement the complainant only says, that in the video and photos shown to him in the police officer's cellphone, he has identified 2 per-

sons who set fire to his shop and, if confronted, he will be able to identify other persons who were present.

9. In first status report dated 23.05.2020, the State says this :

“6. That notice U/s 91 CrPC were given to the residents/ shopkeepers of the area to provide the CCTV Footage of the said incident, however, no footage is made available as most of the CCTV Camera's in the area were damaged and burnt by rioters. However, it has also come to light that some cameras are also installed by PWD in the various parts of the area, footage of these cameras is still awaited and on the basis of these footages, further Investigation will be carried out accordingly.”

(Emphasis supplied)

According to the State therefore, while *no footage is available of the incident*, footage from some cameras that are installed by the PWD in various parts of the area is still awaited, on the basis of which further investigation will be carried-out.

10. Besides the statement of complainant, the State has also placed reliance upon the statement of Ct. Vikas, who is stated to have been the Beat Constable of the area; was present on the spot at the relevant time ; and was also an eye-witness to the incident of 24.02.2020, in which the applicant is implicated in the present FIR No. 105/2020. In his statement dated 05.03.2020 recorded under section 161 Cr.P.C., Ct. Vikas has said the following :

। द्वा. शीत में शामिल कुछ लड़के थाने के पास थे और थे जिनमें दो लड़के मुस्तफाबाद के थे जिनका नाम विरोध खान S/O सुनान खान व Mohd अनवर S/O Mohd ज़ाहिद हुसैन थे और बाकि मौजूद लड़के को मैं समझे आने पर पहचान सकता हूँ जो हाथ में पेट्रोल से भरी बोतल लिए हुए थे और मोहलखी इंग्लैव में वनी दुकानों में तोड़ फोड़ करके शरर सामान बहार फेंक दिया व सामान में पैसा बिखर आग लगा दी थी और फिर वहां से भाग गए थे । और आज आपने मेरे से पूछा कि कबने आज आपने मेरा बयान लिखा पढ़ सुन लिया जो सच है ।

(Relevant extract from record)

The constable accordingly names 2 persons, including the applicant. It is extremely important to note however, that in the complainant's statement upon which the FIR was recorded, the complainant says that when the rioters vandalised his shop, *he telephoned the police but the police telephones were going busy* ; and that therefore he ran away to save his life. In the teeth of this statement of the complainant that there was no police help on hand, Ct. Vikas claims that he was present at the scene of the offence and *inter-alia* saw the applicant commit the offences. Even on first blush, it is not understood as to why the complainant would say that he *failed* to reach the police by telephone, if Ct. Vikas was *already present* there.

11. The State further says that in CCTV footage dated 24.02.2020 obtained from cameras installed at Rajdhani Public School, Mahalaxmi Enclave, which footage was seized in the connected case FIR No. 111/2020 registered at PS: Dayalpur, the applicant is clearly seen actively participating in and instigating others during the riots. A quick check of the walking distance between the complainant's shop at

property No. A-126A Mahalakshmi Enclave and Rajdhani Public School, Mahalakshmi Enclave on Google Maps, which identifies property No. A-126 (though not A-126A) and identifies the school, it is seen that the two places are at a distance of about 400 meters and a 5-minute walk *but on two different sides of a turn in the road*. It appears incredible therefore that camera/s installed in the school would be able to ‘see’ the complainant’s shop.

12. It is on the basis of the aforesaid statements and CCTV footage that, according to the State, the applicant has been identified as being one of the main persons involved in the offences alleged *inter-alia* under sections 147/148/149 IPC.
13. Upon being queried, Mr. Sharma confirms, on instructions of the Investigating Officer with whom he has spoken over the phone, that investigation in FIR No. 105/2020 is complete ; that a draft charge-sheet has been prepared and forwarded to the concerned ACP; and that to that extent, investigation in this matter is closed.
14. Mr. Sharma also confirms that there are only 2 accused persons in FIR No. 105/2020 as also in the charge-sheet, namely the applicant and Mohd Anwar. He further states, that there are only 2 main witnesses in the matter, the complainant Mohd. Shanawaz and Ct. Vikas ; and the other witnesses are only formal witnesses and *no public witness* is being cited by the State.
15. The APP also confirms that the 5 cases mentioned in the status report, all arising from the same or related incidents of riots in Delhi in February 2020, are the only cases in which the applicant is involved ; and that the applicant has no previous or other involvement or criminal

record. The APP however contends that two earlier bail applications filed by the applicant in FIR No. 105/2020 have been dismissed by orders dated 27.04.2020 and 11.05.2020 by the learned Sessions Court.

16. While in the additional status report the State says that

“.... Granting of bail at this early stage may send an adverse message in the society and such crimes should not be allowed to happen in the national capital.”.

(Emphasis supplied)

this court is of the view that that cannot be basis for denying bail, if the court is otherwise convinced that *no purpose in aid of investigation and prosecution* will be served by keeping the accused in judicial custody. Prison is primarily for punishing convicts ; not for detaining undertrials in order to send any ‘message’ to society. The remit of the court is to dispense justice in accordance with law, *not* to send messages to society. It is this sentiment, whereby the State demands that undertrials be kept in prison inordinately without any purpose, that leads to overcrowding of jails ; and leaves undertrials with the inevitable impression that they are being punished even before trial and therefore being treated unfairly by the system. If at the end of a protracted trial, the prosecution is unable to bring home guilt, the State cannot give back to the accused the years of valuable life lost in prison. On the other hand, an accused would of course be made to undergo his sentence after it has been awarded, after trial.

17. Besides this court also cannot but notice that the offences under section 147/148/149 IPC arise in the context of an ‘unlawful assembly’, which section 141 IPC defines as an assembly of 5 or more persons acting with unlawful purposes as defined in that provision ; while in the present case only 2 persons appear to have been charged. Also, the offences under sections 147/148/149/427 IPC are in any case bailable offences ; and only the offence under section 436 IPC is non-bailable ; and there is no material to support that offence that can be said to be clinching or unquestionable, to say the least.
18. Upon a conspectus of the foregoing facts and circumstances, including in particular that :
- (a) *firstly*, the supplementary statement of the complainant does not appear to identify the applicant;
 - (b) *secondly*, according to the State itself, no CCTV footage is available of the the incident itself;
 - (c) *thirdly*, Rajdhani Public School, the CCTV footage from which is relied upon by the State, appears to be located at a place from where the complainant’s shop seems unlikely to be visible ;
 - (d) *fourthly*, Ct. Vikas’s claim that he was present seems to be contradicted by the complainant’s statement as recorded in the FIR that the complainant was unable to contact the police and therefore, fled from the shop ;
 - (e) *fifthly*, co-accused Mohd. Anwar has already been admitted to bail in cases arising from the same incidents of rioting in the same area;

- (f) *sixthly*, investigation in the matter is complete and chargesheet has been drawn-up and sent for approval to higher police authorities; and
- (g) *lastly*, when offences are alleged to have been committed by an 'unlawful assembly', after concluding investigation, the State has been able to identify and name only 2 persons from amongst a crowd of some 250-300 persons;

this court is persuaded to admit the applicant to regular bail on the following conditions :

- (a) The applicant shall furnish a personal bond in the sum of Rs.50,000/- alongwith 02 sureties of the like amount from blood-relatives, to the satisfaction of the Trial Court/Duty Metropolitan Magistrate ;
- (b) The applicant shall not leave the National Capital Region (NCR) without permission of the court and shall *ordinarily* reside in his place of residence as per prison records;
- (c) The applicant shall present himself on every alternate Wednesday between 11 am and 11:30 am before the Investigating Officer, and in case the Investigating Officer is no longer in service or is otherwise unavailable, then to the SHO PS : Dayalpur, New Delhi for marking his presence. It is made clear that the applicant shall not be kept waiting for longer than an hour at the police station ;
- (d) The applicant shall furnish to the Investigating Officer/SHO a cellphone number on which the applicant may be contacted and shall ensure that the number is kept active and switched-on at all times ;
- (e) If the applicant has a passport, he shall surrender the same to the Trial Court/Duty Metropolitan Magistrate ;

- (f) The applicant shall not contact nor visit nor threaten nor offer any inducement to the first informant/complainant or any of the prosecution witnesses. The applicant shall not tamper with evidence nor otherwise indulge in any act or omission that would prejudice the proceedings in the matter ;
19. While ordinarily this court would not have entered upon any discussion on the evidence at the stage of considering bail, however here is a case where a purported unlawful assembly of some *250-300 persons* is alleged to have committed offences; of which the police have picked-up *only two*, one of them being the applicant. In this peculiar circumstance, this court was compelled to sift the evidence *only prima-facie and limited to cursorily assessing how the police have identified the applicant from that large assembly of persons*. This court is conscious that ‘judicial custody’ is the custody of the court ; and the court will be loathe to depriving a person of his liberty, in the court’s name, on the mere *ipse-dixit* of the State, when it finds no substantial basis or reason for doing so.
20. Let it be clear however, that nothing in this order shall be construed as an expression on the merits of the evidence to be adduced in the matter.
21. The application stands disposed of in the above terms.
22. Copy of this order be sent to the concerned Jail Superintendent.

ANUP JAIRAM BHAMBHANI, J.

MAY 29, 2020/uj