

Court No. - 71

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37471 of 2022

Applicant :- Rizwan @ Guddu

Opposite Party :- State of U.P.

Counsel for Applicant :- Raghuvarsh Misra, Ashvani Tripathi

Counsel for Opposite Party :- G.A., Vinod Singh

Hon'ble Manish Mathur, J.

1. Counter affidavit on behalf of informant and rejoinder affidavit thereto filed today are taken on record.

1A. Heard learned counsel for applicant, learned Additional Government Advocate appearing on behalf of State, learned counsel for informant and perused the record.

2. This first bail application has been filed with regard to Case Crime No.132 of 2019 under Sections 147, 148, 149, 452, 302, 307, 504, 34 I.P.C., P.S. Swar, District Rampur.

3. As per contents of first information report, the incident is said to have taken place on 17.02.2019 at about 9.30 a.m. when the applicant along with co-accused who are nominated in the F.I.R. barged into house of deceased Mohd. Hanif armed with various fire arms and opened indiscriminate fire due to which the said Mohd. Hanif sustained grievous injuries and subsequently passed away. It is stated that when Firoz Alam, son of the deceased came to the rescue of his father, he was also fired upon with intent to kill due to which he also sustained various injuries.

4. Learned counsel for applicant submits that applicant has been falsely implicated in the allegations levelled against him only on account of previous enmity pertaining to murder of his father for which purpose an F.I.R. was also lodged on 14.07.2018 in which the son of deceased has been indicated as an accused. Learned counsel has drawn attention to various documents on record to submit that F.I.R. in fact is ante-timed. It is submitted that F.I.R. itself was lodged after the inquest and postmortem had already been performed which clearly indicates deliberations in the lodging of F.I.R. Attention has been drawn to the G.D. entry pertaining to information being given to the police by one Parvinder Singh as early as 9.45 A.M. although F.I.R. itself has been lodged at 5.06 P.M. Learned counsel has also drawn attention to the fact that although in the F.I.R., Section 452 I.P.C. has been imputed indicating that the accused had barged into the house of the deceased but as per inquest and affidavit of informant treated as a statement under Sections 161 Cr.P.C., the place of incident has been changed as outside the house. Attention has been drawn to the deposition of injured witness as P.W. 3, Firoz Alam to substantiate the same and as such it is submitted that it casts a reasonable doubt on the prosecution story since the place of incident itself has been changed. It is also submitted that in the subsequent affidavit treated as statement under Section 161 Cr.P.C., five more persons have been introduced in having participated in the crime. Learned counsel has also drawn attention to the discharge summary of injured Firoz Alam dated 25.03.2019 in which he has given a statement to the Doctor that while he was standing on the roof top, some persons came to the house and started firing on his family members and him. It is, thus, submitted that reasonable doubt is cast on the prosecution version due to the aforesaid facts, which have not been

considered by coordinate Benches of this Court while rejecting bail applications of co-accused Gulsher @ Sappu and Farman Ali in Bail Applications numbered 43995 of 2019 and 28962 of 2021 respectively. Learned counsel has placed reliance on Division Bench judgment of this Court in **Nanha v. State of Uttar Pradesh**, reported in 1993 CriLJ 938 to submit that rejection of bail application of co-accused cannot preclude the Court from granting bail to another accused whose case has not been considered at the earlier occasion and as such the earlier rejection cannot prejudice the bail application of another accused who had no opportunity of being heard or placing material at the time when bail application of another accused was heard and rejected. It is further submitted that applicant is in jail since 09.05.2019 and as yet 3 prosecution witnesses have been examined while as per charge sheet there are a total of 19 prosecution witnesses. It is thus submitted that there is no hope of early conclusion of trial, although coordinate Benches of this Court while rejecting the bail applications of co-accused has directed expeditious disposal of trial on priority basis, preferably within a period of one and half years from the date of production of a certified copy of the order.

5. Learned Additional Government Advocate appearing on behalf of State as well as learned counsel for informant have opposed the bail application with submission that the submission pertaining to ante-timing of F.I.R. is a subject matter of trial and cannot be examined at the time of bail application itself. It is submitted that there is no serious or material contradiction in the F.I.R. and statements of informant and injured witness in their affidavits treated as statements under Section 161 Cr.P.C. or even in the deposition of injured witness as P.W. 3. It is submitted that it is settled law that minor discrepancies in the prosecution version are to be ignored. It is submitted that the incident pertains to a heinous crime which took place during broad day light with a number of eye witness accounts in which applicant has been clearly identified as being one of the perpetrators of the crime. Attention has also been drawn to postmortem report indicating as many as 11 injuries on the body of the deceased with six fire arm entry wounds and 3 exit wounds. Injury report of the injured witness has also been relied upon to indicate the heinousness of the crime.

6. Hon'ble the Supreme Court in **Sanjay Chandra v. Central Bureau of Investigation**, reported in (2012) 1 SCC 40 has specifically held that bail is to be a norm and an under-trial is not required to be in jail for ever pending trial. Relevant paragraphs of the judgment are as under :-

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty."

"27. This Court, time and again, has stated that bail is the rule and committal to jail an exception. It has also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution."

7. Considering the submissions advanced by learned counsel for the parties and upon perusal of the material on record, prima facie, and subject to further evidence being led in trial, it appears that at the time of lodging of F.I.R., Section 452 I.P.C. has also been imputed against applicant with a clear assertion in the F.I.R. that the applicant along with co-accused had barged into house of the deceased and fired indiscriminately upon him and

his family members due to which he sustained injuries which were the cause of his death. It appears that in the subsequent affidavit filed by the informant which was treated as a statement under Sections 161 Cr.P.C. and forms part of the case diary, it has been stated that the incident had taken place outside the house. Two site plans have also been made by the police during investigation with the incident being shown as having taken place in different places. The aspect of F.I.R. being ante-timed or not is a matter to be dealt with by trial court with corroboration by evidence and, at this stage it would not be appropriate to make any comments upon the same. It appears that there were recovery of empty shells from the site of the incident and a fire arm at the instance of applicant but without any independent witness of the same, however, ballistic report is not on record. The applicant is in jail since 09.05.2019 with only 3 prosecution witnesses having been examined although as per charge sheet, there are a total of 19 prosecution witnesses and as such there does not appear to be any hope of early conclusion of trial despite directions of this Court to that effect. It also appears that the orders of coordinate Benches of this Court pertaining to rejection of bail of co-accused do not mention any aspect with regard to change in the location of incident. As such, without expressing any opinion on the merits of case, this Court finds, the applicant is entitled to be released on bail in this case.

8. Accordingly bail application is allowed.

9. Let applicant Rizwan @ Guddu, involved in the aforesaid case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court, absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

Order Date :- 30.11.2022

kvg/-