

IA No.02/2021 in SC No.137/2020
State V/s Ankit Chaudhary @ Fauzi
FIR No.103/2020
U/s 147/148/149/302/201/120-B IPC
PS Gokalpuri (**Aamin murder case**)

04.06.2021

THROUGH WEBEX VIDEO CONFERENCING

Present: Shri Rajeev Krishan Sharma, Ld. Special PP for the State alongwith IO, Inspector Kailash Chander.

Shri Pradeep Teotia and Shri Jitender Bakshi, Ld. Counsels for accused Ankit Chaudhary @ Fauzi/applicant.

ORDER

This is an application filed under Section 439 Cr.P.C, seeking regular bail on behalf of applicant. Detailed arguments were advanced by both the sides on the said application spreading across several sessions on various dates. I have perused the report filed in the matter as well as the chargesheet.

2. Before taking up the application under consideration, it would be appropriate to have a brief overview of the facts which led to registration of FIR in the matter. The case FIR in the matter was registered on 03.03.2020 on the basis of DD No.7A (dated 01.03.2020, PS Gokalpuri) which was regarding lying of an unknown dead body in “Bhagirathi Vihar Nala”. The said DD was marked to PSI Ashish Garg, who alongwith the Constable Rahul went to C-Block, Bhagirathi Vihar Nala and found one male dead body lying face down in a decomposed condition having several injury marks on the head. The deceased was found wearing yellow and black coloured check-shirt and blue coloured jeans pant. The dead body was removed to Ram Manohar Lohia Hospital (RML Hospital). During the course of investigation, said dead body was identified to be of one “**Aamin**” by his father namely Shahbuddin. On 06.03.2020, postmortem upon the dead body of deceased Aamin was got conducted vide Postmortem Report No.163/2020 and thereafter the dead body was handed over to the relatives. Considering the seriousness and gravity

of offence involved in the matter, on 28.03.2020 the investigation thereof was transferred to SIT-III/Crime Branch. During the course of further investigation, applicant was formally arrested in the matter on 04.04.2020, who made disclosure statement regarding commission of crime in the instant matter alongwith his other accomplices/co-accused persons.

3. The learned counsel for the applicant has very vehemently argued that applicant, who is a young person, aged about 24 years has been a victim of arbitrary and autocratic investigation which is apparent from the fact that besides the case in hand, he has been falsely implicated in eight other cases of murder. The applicant has been falsely implicated by the investigating agency merely to hide the **“administrative failure”** of the State in preventing/controlling the communal riots which took place in Delhi between 24.02.2020 to 26.02.2020. He has been in judicial custody since 04.04.2020. It is very vehemently argued that public witnesses cited in the matter namely (i) Narottam Singh; (ii) Mohit Sharma; (iii) Shivam Bhardwaj; (iv) Aman Saxena and (v) Nisar Ahmad are **“planted witnesses”** as their statements recorded under Section 161 Cr.P.C are whimsical, do not inspire confidence and same have been cooked up by the investigating agency to suit their ulterior motives. The reasons given in support of the said contention are as under:

- (a) The statements (recorded under Section 161 Cr.P.C) of all the aforesaid public witnesses are **“highly belated”** in as much as statement of PW Aman Saxena was recorded on 11.05.2020; statement of PW Narottam Singh was recorded on 14.05.2020; statement of PWs Mohit Sharma and Shivam Bhardwaj @ Raja were recorded on 09.06.2020; and statement of PW Nisar Ahmed was recorded on 17.06.2020, **without any cogent/plausible explanation for the said delay;**
- (b) PW Narottam Singh vide his statement dated 14.05.2020 has neither identified the incident forming subject matter of the case nor he has

claimed the presence of applicant at the spot/scene of crime (SOC) on the date of alleged incident. He even did not claim to have witnessed the alleged incident;

- (c) PWs Mohit Sharma and Shivam Bhardwaj were themselves the member(s) of alleged Whatsapp group “**Kattar Hindu Ekta**” and the applicant was never related to, directly or indirectly with any such Whatsapp group. As a sequel to the aforesaid contention, it is further argued that both the said PWs have neither identified the incident forming subject matter of the instant case nor they have claimed/identified the presence of applicant at the spot/SOC on the date and time of incident. The statements of both the aforesaid PWs were again recorded after a **humungous delay of 74 days**. It is further contended that their statements are hearsay and not even covered within the doctrine of “*res gestae*”;
- (d) The statement of PW Aman Saxena completely negates/demolishes the case propounded by the investigating agency in as much as the said witness vide his statement recorded under Section 161 Cr.P.C on 11.05.2020 (**recorded after delay of about 45 days**) categorically stated that the incident in question occurred on **25.02.2020 at around 9.30 AM**; whereas, as per the contents of chargesheet, deceased Aamin was allegedly killed by the riotous mob **at about 9.30 PM on 25.02.2020**;
- (e) As regards PW Nisar Ahmad, it is emphasized that his alleged statement was recorded on 29.05.2020, i.e after huge and unexplained delay of about 63 days and the prosecution never claimed that this witness had witnessed the alleged incident.

4. As regards the CDR location of the applicant, it is contended as under:
- (a) That the call details, CAF, location chart, cell ID qua mobile number 9871171934 (belonging to the applicant) was sought by the investigating agency from the Nodal Officer of M/s Bharti Airtel Limited on 14.05.2020 and the same was provided by the concerned telecom company vide its reply dated 26.05.2020; meaning thereby that the claims of investigating agency in absence of cell ID/location of the mobile phone of applicant, his presence at the spot/SOC cannot be ascertained;
 - (b) There is no connectivity of the applicant with other co-accused persons during the period of communal riots or otherwise. However, at the same time it is claimed that prior to his arrest in the matter, applicant had been in the business of property dealing and small time finance and on account of this reason, **if one off call or the interaction over phone, even if it occurred with co-accused persons is purely incidental and has nothing to do with the instant case;**
 - (c) That the alleged incident occurred on 09.30 PM on 25.02.2020; however, the mobile phone (number 9871171934) tower location of applicant is completely different from the mobile phone location of other co-accused persons, who are stated to be using "Airtel" services and this fact alone negates the entire prosecution story;
 - (d) That during the period of communal riots, i.e from 25.02.2020 – 26.02.2020, applicant was present at his house at G-14, Gali No.2, Ganga Vihar, Delhi and he alongwith his neighbours were keeping a watch to prevent any untoward incident as the situation in the area was very tense on account of eruption of communal riots.

5. As regards the Whatsapp group “**Kattar Hindu Ekta**”; it is emphasized by the learned counsel that:

- (a) The applicant was never related to/part of any Whatsapp group by the name of “**Kattar Hindu Ekta**” directly or indirectly;
- (b) It is further argued that even if the message of co-accused Lokesh Solanki @ Rajput, posted at 11:44 PM on 26.02.2020 from mobile number 7557497409 (on the said whatsapp group) is taken on its face value, then the prosecution's case/claim that said co-accused Lokesh Solanki @ Rajput and applicant were involved in nine murder cases (including the present one) falls flat on account of the simple reason that the alleged message was posted by said co-accused at 11:44 PM on 26.02.2020, i.e after happening of all nine murders; whereas, the said co-accused in the message in question claimed killing of two persons only, which in any case are not the subject matter of instant case, but are covered in case FIRs No.35/2020 and 37/2020, both pertaining to PS Gokalpuri).

6. It is further very strenuously argued that the findings of postmortem report are in “**complete contradiction**” to the theory propounded by the investigating agency in the matter in as much as per PM Report No.163/2020 (dated 06.03.2020) the age of deceased Amin has been ascertained to be about 25 years; whereas, as per the claim of prosecution, deceased was aged about 15-17 years and was uncircumscribed.

As a sequel to the said contention, it is further submitted that even the public witnesses cited in the matter claimed that the person killed by the mob at around 9.30 PM was wearing brown T-shirt and black coloured pant; however, as per the contents of FIR dead body had purple coloured T-shirt; whereas, as per postmortem report, deceased was found wearing black coloured T-shirt and blue coloured jeans.

7. It is further very vehemently contended that no recovery of any sort has been effected from the applicant. There is no electronic evidence in the form of CCTV footage/video-clip of the alleged incident available on record, which in turn strengthens the innocence of applicant and demolishes the case of prosecution. It is further contended that the disclosure statement of applicant and other co-accused persons, allegedly recorded by the investigating agency has no evidentiary value.

8. It is further very strenuously argued that besides the case in hand, applicant has been falsely implicated in either other cases of riots-cum-murder at the whims and caprices of the investigating agency. To cement the said contention, it is submitted that applicant is also an accused in case FIR No.126/2020, PS Gokalpuri, wherein the time and date of occurrence of the alleged incident has been shown as 10.00 PM on 25.02.2020 at B-145, Gokalpuri; whereas, the time and date of incident in the case in hand is also somewhat similar, i.e between 9.30 PM-10.00 PM on 25.02.2020 at C-Block, Bhagirathi Vihar Ganda Nala, Gokalpuri and the distance between said two places is about 1.5 KMs and as such, it is not possible for any person to be present at two different places at the same time.

9. The learned counsel for the applicant has referred to a few judgments to emphasize the point that “*pre-trial detention should be avoided*” and if the applicant satisfies the tripod test, bail should be granted to him. In this regard, the learned counsel(s) have referred to the case titled as, “*P. Chidambaram V/s Directorate of Enforcement*”, [2019 SCC Online SC 1549], wherein the Hon’ble Supreme Court has been pleased to re-emphasize that the primary conditions of bail are (i) *availability of accused for investigation, interrogation and facing trial*; (ii) *whether the accused is a flight risk and*; (iii) *likelihood of the petitioner to tamper with evidence and influence/intimidate witnesses (paras 10, 16-18, 23-24)*. On the strength of “*P. Chidambaram’s*” case (supra), it has been contended by the learned counsel(s) that the applicant in the present case satisfies the “*tripod test*” mentioned therein and as such, he is entitled for bail. Reference has further been made to the

order passed by Hon'ble High Court of Delhi on 29.05.2020 in *Bail Application No.945/2020*, titled as, "*Feroz Khan V/s State of NCT of Delhi*" to contend that "*bail is the rule and jail is an exception.*" The learned counsel further made a strong pitch that "*bail is not to be withheld as a punishment before the trial*" and "*presumption of innocence*" of the accused remains till the time he is pronounced guilty by the Court and mere filing of chargesheet does not prove the guilt of an accused. He has further argued that "*pre-trial detention has been deprecated by the Courts*" and "*bail is the rule and jail is an exception.*" It is next contended that applicant is permanent resident of the locality in question and as such, there is no possibility of his absconding in the matter. In the end, it is argued that the investigation in the matter is complete; chargesheet has already been filed; the applicant is no more required for custodial interrogation; and no useful purpose would be served by keeping him behind bars in the matter, as trial of the case is likely to take long time. It is claimed that the applicant has clean past antecedents

10. Per contra, learned Special PP has very vehemently argued that the communal riots in North-East Delhi were of a very high magnitude, wherein 53 innocent lives were lost and a lot of public and private property was damaged/vandalized and looted and several vehicles, houses and business establishments were set on fire. **As regards the case in hand**, it is argued that the same pertains to the murder of an innocent person namely **Aamin, S/o Shri Sahabuddin**, who was brutally murdered by the riotous mob merely on account of the fact that he belonged to a different (muslim) community. It is argued that **as per the CDR analysis of the mobile phone (9871171934) of applicant, his location was found/traced at the spot/SOC on the date of incident (i.e on 25.02.2020)**. It was further found that **he/applicant was in touch with other co-accused persons, including the members** of Whatsapp group "**Kattar Hindu Etkar**" (which as per CERT was created in the intervening night of 24/25.02.2020 by one Ritik Gupta using mobile phone number 9560860823, subscribed in the name of Smt.Babita, W/o Shri Jitender). It is argued that initially there were 125 members in the said whatsapp

group, out of which 47 had exited by 08.03.2020 and thereafter 78 members were found added. It is further argued that the language used while chatting/sending messages in the said whatsapp group is **highly communal in nature, clearly promoting disharmony, enmity and feelings of hatred towards the members of a particular community.** The learned Special PP has read over to me in detail the “chat(s)” dated 26.02.2020 amongst the members of said whatsapp group. It is further argued that on detailed analysis, it was further revealed that applicant was in touch with co-accused Lokesh Kumar on 12.02.2020 and 16.02.2020; with co-accused Jatin Sharma @ Rohit on 20.02.2020; with co-accused Prince on 20.02.2020 and with **co-accused Vivek Panchal @ Nandu on 15.02.2020 as also on the intervening night of 25/26.02.2020.** It is further argued that applicant was part/member of the riotous mob, who had conspired with his other associates and acted with a common object of committing the riots; actively participated in it and involved in rioting-cum-murder of nine (9) innocent muslim persons and thereafter throwing their dead bodies in the “nallah” to destroy the evidence.

11. It is further argued that besides aforesaid, the presence of applicant at the spot/SOC has also been confirmed by independent public witnesses namely Narottam Singh (statement dated 14.05.2020); Mohit Sharma and Shivam Bhardwaj (their statements dated 09.06.2020); and Nisar Ahmed (statement dated 17.06.2020). As regards the delay pointed out by defence in recording the statements of said witnesses, it is emphasized that firstly the said witnesses were not known to the IO/investigating agency, the investigating agency had to deploy its human intelligence which took considerable time and secondly there was curfew like atmosphere at or around the area at that time wherein everybody was reluctant to come out in the open and say a word about the incident and it is only after the humongous efforts put in by senior officers of Delhi Police by making continuous appeal(s) to the members of general public to come forward, that the witnesses/members of public in general gained confidence and thoroughly narrated about the incident in question, thereby categorically naming/ identifying the applicant

and his other associates who were part/member(s) of the riotous mob on the date and time of incident. As regards, the question about the identification of the deceased in the matter is concerned, it is argued that the deceased was identified by his father and brother which cannot be *prima facie* disputed at this stage. It is further argued that the dead body of deceased remained in nallah for fairly long time which resulted in slight change of colour of the clothes worn by deceased and his physical appearance, as the body got swollen and appeared to be of a person of the age about 25 years.

12. It is further argued that besides the case in hand, applicant is also involved in twelve (12) other cases of riots (which includes nine case of riots-cum-murder).

As a corollary to the said contention, it is submitted that based on somewhat similar material, the regular bail application of applicant already stood dismissed in connected case bearing FIR No.104/2020, PS Gokakpuri (**Bhure Ali @ Salman murder case**) by this Court vide detailed order dated 22.03.2021 and as such, it is submitted that instant bail application is also liable to be dismissed.

13. It is further argued that recently eight more accused persons have been arrested in the matter and supplementary chargesheet qua them has been filed. In the said supplementary chargesheet, it has been clarified that on account of typographical mistake 9.00 AM instead of 9.00 PM was recorded in the statement of PW Aman Saxena on 11.05.2020. In the end, it is argued that although the chargesheet in the matter has been filed, yet the investigation of the case is still in progress; the “*conspiracy angle*” behind such a large-scale riot needs to be unearthed; many accomplices of the applicant are still absconding and have not been arrested till date and there is every chance that if released on bail, the applicant being resident of the same area/locality may threaten the public witnesses/tamper with the evidence and as such, dismissal of the instant bail application has been strenuously prayed for.

14. I have given my thoughtful consideration to the arguments advanced at bar. Before proceeding to discuss the rival arguments, it is worthwhile to note that Section 149 IPC creates a specific and distinct offence. Its two ingredients are:

- (i) *Commission of an offence by any member of an unlawful assembly and;*
- (ii) *Such offence must have been committed in prosecution of the common object of that assembly or must be such as members of that assembly knew it be likely to be committed.*

15. Furthermore, in “*Masalati V/s State of UP*”, *AIR 1965 SC 202*, the Hon’ble Supreme Court has been pleased to lay down as under:

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17. xxxxx

What has to be proved against a person, who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entered alongwith the other members of the assembly. The common object is defined by Section 141 IPC. Section 142 provides as whoever being aware of the facts which run any assembly is unlawful assembly, intentionally joins that assembly or continues in it is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons, actuated by and entertaining one or more of the common objects specified by five clauses of Section 141 IPC is unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified by Section 141 IPC. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons, who were nearly passive witnesses and had joined the assembly as a matter of idle curiosity, without intending to entertain the common object of the assembly.”

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(emphasis supplied)

16. From the evidence of a number of public witnesses recorded in the matter, it is *prima facie* apparent that the “*riotous mob*” armed with “*lethal weapons*” had engaged in vandalism, looting and torching of public and private properties and their *main objective was to cause maximum damage to the lives and properties of other persons*. Therefore, at this stage it cannot be said with certainty that the applicant did not have a common object with the other persons of unlawful

assembly. The “*common object*” of this kind of riotous mob can be easily inferred therefrom. This Court is conscious that at this stage the trial is not being dealt with. We are at *pre-charge stage* and this Court has limitations in making in-depth analysis of the statements of witnesses, which are yet to be tested on the anvil of trial. Whether he can be convicted in the matter with the aid of Section 149 IPC is a preposterous conclusion at this stage, as the evidence is yet to be led in the matter. However, from the aforesaid behavior of “*riotous mob*”, the “*common object*” can be inferred at this stage.

17. Though, the applicant has not been named in the FIR and also no CCTV footage/video-clip of the incident in question is available on record, but this Court at this stage cannot lose sight of the fact that the CDR location qua the mobile phone **(9871171934) of applicant has been found/traced at the spot/SOC on the date of incident (i.e on 25.02.2020) and no cogent/plausible explanation in this regard has been accorded on behalf of applicant.** It is further noted that the applicant had been in touch with co-accused Lokesh Kumar on 12.02.2020 and 16.02.2020; with co-accused Jatin Sharma @ Rohit on 20.02.2020; with co-accused Prince on 20.02.2020 and with **co-accused Vivek Panchal @ Nandu on 15.02.2020 as also on the intervening night of 25/26.02.2020.** It is a matter of record that all the aforesaid co-accused persons were member(s) of the Whatsapp group “**Kattar Hindu Etk**” (which as per CERT was created in the intervening night of 24/25.02.2020 by one Ritik Gupta using mobile phone number 9560860823, subscribed in the name of Smt.Babita, W/o Shri Jitender). I have gone through the chat(s)/messages forwarded in the said Whatsapp Group and the language used therein appears to be highly communal in nature and clearly promoting disharmony, enmity and feelings of hatred towards the members of a particular community. At this stage, I am deliberately refraining myself from producing in verbatim the said chats/messages. Though, applicant may not be a member of the said Whatsapp group, however, it is noted that in paragraph 11 (iv), **it has been admitted on behalf of applicant that he had telephonic interaction(s) with co-accused persons; whether the said interaction**

over phone was incidental or otherwise cannot be decided at this stage. A perusal of the location of deceased prior to his death and the location of applicant at that time is found to be at the same spot.

18. Furthermore, at this stage, we have overwhelming evidence qua the identification of applicant being present at the spot/SOC on the date of incident by independent public witnesses namely Narottam Singh (statement dated 14.05.2020); Mohit Sharma and Shivam Bhardwaj (their statements dated 09.06.2020); and Nisar Ahmed (statement dated 17.06.2020). As regards the delay pointed out by defence in recording the statements of said witnesses, I find substance in the submissions of learned Special PP put forth in this regard that the said witnesses were not known to the IO/investigating agency and it took time for the investigating agency to identify and boost the confidence of said public witnesses to come forward and depose in the matter. I have taken pains to go through the statement of each of the said public witness(es) recorded by the police U/s 161 Cr.P.C to satisfy myself about the sufficiency or otherwise of the material collected during investigation by the police. I do not find any force in the arguments of learned counsel for the applicant that applicant has been falsely implicated in the present matter or that there is no legally sustainable evidence available against them. *In my considered opinion, the statements of witnesses can be said to be delayed when the witnesses are known to the police and yet police does not record their statements; whereas, in a case of rioting, police hardly has any idea as to who were the witnesses.* On the contrary, I find the “*ocular evidence*” of aforesaid independent witnesses to be credible at this *prima facie* stage, which gives the clear details of the individual role of applicant in the incident. Be that as it may, we are at “*pre-charge stage*” and the Court considering the bail matter has to consider the material collected by the investigating agency at its face value and at this stage, “*mini trial*” cannot take place.

19. As regards the other two contentions raised by learned counsel for the applicant, **firstly** that PW Aman Saxena vide his statement recorded under Section

161 Cr.P.C on 11.05.2020 stated that **on 25.02.2020 at around 9.30 AM** he saw one person, aged about 15-16 years, wearing yellow coloured check-shirt and trouser, coming from Brijpuri puliya towards Co-Block main nallah road, stopped and beaten by the riotous mob with sticks/stones and thereafter his body thrown in the nallah; whereas, the alleged incident in the instant case occurred at about 9.30 PM on 25.02.2020 and **secondly**, that the findings of postmortem report are in “**complete contradiction**” to the theory propounded by the investigating agency in the matter in as much as per PM Report No.163/2020 (dated 06.03.2020) the age of deceased Aamin has been ascertained to be about 25 years; whereas, as per the claim of prosecution, deceased was aged about 15-17 years, an explanation has been offered that because of long stagnation of the dead body of deceased in nallah, the clothes got slightly discoloured and even the body suffered swelling. At the cost of repetition, it is reiterated that this is not the appropriate stage to dwell upon such discrepancies as we are at “*pre-charge stage*” and the Court considering the bail matter has to consider the material collected by the investigating agency at its face value and at this stage, “*mini trial*” cannot take place.

20. It is relevant to note here that based on somewhat similar material, this Court vide detailed order dated 22.03.2021 has already dismissed the regular bail application of applicant in connected case being FIR No.104/2020, PS Gokalpuri (**Bhure Ali @ Salman murder case**). Furthermore, it is a matter of record that besides the case in hand, applicant is also an accused in twelve (12) cases of riots (which includes **nine case of riots-cum-murder**). Therefore, at this stage, I find that there is enough material on record to presume that the applicant was very well present at the spot/SOC and was exhorting the rioters of a particular community, who on his instigation could have killed anybody.

21. It is common knowledge that the dreary days of 25/26.02.2020 saw parts of North-East Delhi gripped by a communal frenzy, reminiscent of carnage during the days of partition. Soon, the riots spread like wildfire across the smoke-grey

skyline of Capital, engulfing new areas and snuffing out more and more innocent lives. *The Delhi riots 2020 are a gaping wound in the conscience of a nation aspiring to be a major global power. The allegations against the applicant are extremely grave in nature.*

22. Considering the facts and circumstances of the case in totality, gravity of offence, categorical identification of applicant by aforesaid independent public witnesses; CDR location of the applicant having been found at the spot/SOC on the date and time of incident; applicant himself having admitted to have interacted with the co-accused/members of Whatsapp group “**Kattar Hindu Ekta**” (as per averments made in para 11-(iv) of the bail application) and the fact that said witnesses are residents of same locality and if released on bail at this stage, he can threaten or intimidate the witnesses; the charge in the matter is yet to be framed. As such, I am not inclined to admit the applicant on bail at this stage. The application under consideration accordingly stands dismissed.

23. It is hereby clarified that anything stated hereinabove shall not be construed as expressing any opinion on the final merits of the case.

24. A copy of this order be sent to learned counsel(s) for the applicant through electronic mode.

(VINOD YADAV)
ASJ-03(NE)/KKD COURTS/DELHI/04.06.2021