

In Chamber

A.F.R

Reserved on 23.6.2020

Delivered on 23.7.2020

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 2554 of 2019

Applicant :- Gajendra Singh

Opposite Party :- State of U.P.

Counsel for Applicant :- Manish Tiwary, Ajay Kumar Pathak, Ashwini Kumar Awasthi

Counsel for Opposite Party :- G.A., Anoop Trivedi, Kamendra Singh Jadaun

Hon'ble Ravi Nath Tilhari, J.

1. Sri Kamendra Singh Jadaun, learned counsel for the first informant filed an affidavit to which Sri Ajay Kumar Pathak, learned counsel for the applicant did not propose to file any reply.

2. Heard Sri Manish Tiwary, learned Senior Counsel assisted by Sri Ajay Kumar Pathak, learned counsel for the applicant, Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Kamendra Singh Jadaun, learned counsel for the informant and Sri R.K. Srivastava, learned Additional Government Advocate for the State.

3. This bail application has been filed by the applicant Gajendra Singh for releasing him on bail in Case Crime No.186 of 2018, under Sections 147, 148, 149, 302, 307, 504 and 34 I.P.C., P.S. Hathras Junction, district Hathras.

4. Sri Manish Tiwary, learned Senior Counsel submitted that the F.I.R. was lodged on 9.6.2018 at 21-45 hours in respect of the alleged incident of the same day at 20-00 hours. As per the F.I.R., on 9.6.2018 due to animosity out of the election of Pradhan of the Gram Panchayat, 11 accused persons, armed with firearms came to the house of the first informant Rajkumar, started abusing and on protest they opened fire upon the first informant and his brothers Netra Pal and Pratap, who received fire arm injuries and died on spot, whereas the first informant was injured. He submitted that the F.I.R. was lodged with delay, of which there was no plausible explanation. The Investigating Officer prepared spot inspection report/memo mentioning that the corpse of deceased persons were found lying on the road, outside the house of the first informant. Inquest was done on the next day, as for want of light it could not be done on the same day. Nobody had seen the incident so as to ascertain as to who opened fire upon the deceased and by which

weapon. The applicant has not been assigned any particular weapon. The F.I.R. was lodged against 11 persons but charge sheet was filed against only 4 persons, including the applicant. This belies the prosecution story. As per post mortem report cause of death is shock and hemorrhage, as a result of ante mortem firearm injuries, but he submitted that the injuries are of such a nature which could not be caused by a country-made pistol of 315 bore, recovered from the possession of the applicant as per the recovery memo. Such injuries could be caused by SBBL gun or 12 bore pistol, which were recovered from other accused, namely, Rajan Singh and Ajay Singh. The first and the second statements of the first informant, recorded under Section 161 Cr.P.C. although supported the F.I.R. but being false cannot be considered. The scribe of the F.I.R. Anurag Sisodiya, on being asked as to how the first informant recognized the accused persons, replied "by voice and light of inverter", whereas the inquest could not be done on the same day for want of light and therefore, the statement of the scribe under Section 161 Cr.P.C. was also not reliable. Other witnesses Devendra Singh, Hemlata and Himanshu are interested witnesses, being the family members of the first informant and as such their statements under Section 161 Cr.P.C. are also not reliable.

5. Learned Senior Counsel Sri Manish Tiwary has submitted that general allegations have been levelled against the applicant who has been falsely implicated. The coaccused Harendra from whose possession also recovery of country made pistol of 315 bore was made has been granted bail by this Court by order dated 13.12.2018 in Criminal Misc. Bail Application No.43858 of 2018. The applicant is involved in one other Case Crime No.205 of 2017, under Sections 323, 504, 506 I.P.C., P.S. Hathras Junction, district Hathras, in which he has been released on bail. The applicant is in jail since 10.6.2018. In case the applicant is granted bail he will not misuse the liberty of bail and will cooperate in the trial. He has also informed that the trial has commenced and one witness PW-1 has been examined.

6. Per contra Sri Anoop Trivedi, learned Senior Counsel submitted that it is a case of brutal murder in which two persons were killed and one was severally injured. The accused entered the house of the first informant and murdered his two brothers by firearms and also injured the informant. The

applicant is named in the F.I.R. The statements of witnesses under Section 161 Cr.P.C. fully support the prosecution story. The F.I.R. is prompt as the police station is at a distance of 16 km from the place of the incident. As per the post mortem report following, so many, ante mortem firearm injuries were found on the bodies of the deceased Netrapal and Pratap:-

“Ante Mortem Injuries on the body of Netrapal-

- i. Multiple gunshot entry wound, spread over left chest 5 in number one 5 cm above left nipple at 12 o' clock, one 4 cm medial to nipple at 9 o' clock, two over mediastinum over left side, margins inverted and blackening seen.*
- ii. Two entry wounds of gunshot with blackening and inverted margins at shoulder.*
- iii. Two entry gunshot wounds with inverted margins and blackening over left axilla.*
- iv. Two gunshot entry wound over right thigh at mid anteriorly, margins inverted blackening seen.*
- v. Two entry wound of firearm over left groin with blackening and inverted margins.*
- vi. Two entry wound of fire arm margin inverted over abdomen at 11 o' clock and 9 o' clock position with blackening seen.*

Ante Mortem Injuries on the body of Pratap-

i. Firearm entry wound with blackening seen -forehead at glabella, over left eyebrow, at left face 3 cm below left eye, at neck at level of thyroid over left side. Two at base of neck on Lt side 2 at base of neck on Rt side.

5 wound at Lt side of upper chest long with collar bone one at mid of collar one just above its mid Lt. Nipple two wound at 6 cm medial to left nipple at 7 o' clock, 3 cm below left nipple 5 o' clock position, 7 cm below left nipple at 5 o' clock position at arm 09 cm below shoulder joint at medial surface, at lateral surface of left arm 13 cm below shoulder joint, at area of epigastric, on over right side chest 4 cm below medial end of collar bone, at 6 cm below medial end of collar bone over right chest, 16 cm below medial end of collar bone, over right side of chest. Three wound along the parietal to collar bone of right side 8 cm below it a shoulder right side, one over right side of chest 4 cm below nipple at 5 o'clock, one 7 cm below nipple at 7 o'clock position over cubital fossa right arm at medial end of right wrist at right thigh at lateral surfaced. The wound left illaic create over, medical aspect of thigh(L) on would lateral aspect of left thigh.

Lacerated wound 3 cm x 0.5 cm at mid of right arm blackening present at mid lateral surface.

Lacerated wound over right chest 2 cm above nipple blackening seen.

Cause of death as a result of shock and hemorrhage due to ante mortem fire arm injuries.”

7. Sri Trivedi further submitted that the informant also received firearm injuries. As per x ray report metallic density shadow of pellet has been seen in different part of body of the first informant. Country made pistol of 315 bore was recovered from the applicant and it is a matter of trial that firearm injuries were caused by which firearm. The applicant has criminal history. He is involved in Case Crime No.205 of 2017 under Sections 323, 504, 506 I.P.C.P.S. Hathras Junction, district Hathras and the NCR dated 23.02.2019 is also lodged under Sections 504 and 506 I.P.C. against the applicant.

8. Sri Anoop Trivedi, learned Senior Counsel has submitted that on relevant considerations for granting bail, the applicant is not entitled for bail. So far as bail granted to coaccused Harendra by this Court is concerned, he submitted that the first informant has filed **Special Leave Petition (Criminal) Diary No.2551/2019 (Raj Kumar vs. Haredra and another)** in which Hon'ble Supreme Court has granted permission to file S.L.P., by order dated 1.2.2020, (Annexure-2 to the affidavit of informant). He has submitted that parity cannot be the sole ground for granting bail. Besides, distinguishing feature is also that the present applicant has criminal history and trial has also commenced.

9. He has placed reliance upon the judgment of Hon'ble Supreme Court in the case of **Union of India and others vs. West Coast Paper Mills Ltd., reported (2004) 2 SCC 747 , Mauji Ram vs. State of U.P. and another reported in (2019) 8 SCC 17, Rakesh Kumar Pandey vs. Munni Singh @ Mata Bux Singh & Anr., (SLP(Crl) No. 4059/2000 decided on 12.3.2001)** and in the case of **Ramesh and others vs.State of U.P. (Criminal Appeal No.528 of 1998 in Criminal Misc. Application No.4581 of 2005(B) of Vishram) decided on 1.1.2010** by the Division Bench of this Court.

10. In reply, Sri Manish Tiwary, learned Senior Counsel submitted that even if the matter of the coaccused Harendra is in jeopardy before the Hon'ble Supreme Court, the applicant is entitled for bail on parity. He has placed reliance upon the case of **Khoday Distilleries Limited (now known as Khoday India Limited) and others vs. Sri Mahadeshwara Sahakara**

Sakkare Karkhane Limited, Kollegal (under Liquidation) represented by the Liquidator, (2019)4 SCC 376.

11. Learned A.G.A. has adopted the arguments advanced by the learned Senior Counsel Sri Anoop Trivedi. He has opposed grant of bail to the applicant and submitted that considering the facts and circumstances of the case, the applicant is not entitled for grant of bail.

12. I have considered the submission advanced by the learned counsel for the parties and have perused the material on record.

13. In the case of **Rakesh Kumar Pandey** (supra) the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence. It is relevant to quote the following paragraphs from the judgment of Hon'ble Supreme Court in the case of **Rakesh Kumar Pandey**(supra):-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

.. ..
"Suffice it to say that for a serious charge where three murders have been committed in broad day light, the High Court has not applied its mind to the relevant materials, and merely because some of the co-accused, whom similar role has been ascribed, have been released on bail earlier, have granted bail to the present accused respondents. It is true that State normally should have moved this Court against the order in question, but at the same time the power of this Court cannot be fettered merely because the State has not moved, particularly in a case like this, where our conscience is totally shocked to see the manner in which the High Court has exercised its power for release on bail of the accused respondents. We are not expressing any opinion on the merits of the matter as it may prejudice the accused in trial. But we have no doubt in our mind that the impugned order passed by the High Court suffers from gross illegality and is an order on total non-application of mind and the judgement of this Court referred to earlier analysing the provisions of sub-section (2) of section 439 cannot be of any use as we are not exercising power under sub-section (2) of section 439 Cr.P.C."

14. In the case of **Ramesh and others**(supra), the Division Bench of this Court held that parity cannot be the sole ground for granting bail. It is relevant to reproduce relevant part of the case of **Ramesh and others**(supra), the Division Bench of this Court has held as under:-

"In para 17 in the case of **Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263)**, it was held that:-

"The grant of bail is not a mechanical act and principle of consistency cannot be extended to repeating a wrong order. If the order granting bail to an identically placed co-accused has been passed in flagrant violation of well settled principle, it will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency."

In Special Leave Petition No. 4059 of 2000: **Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another**, decided on 12.3.2001, the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court it observed that:-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

The **Apex Court** in the aforesaid case has further observed:-

"Suffice it to say that for a serious charge where three murders have been committed in broad day light, the High Court has not applied its mind to the relevant materials, and merely because some of the co-accused, whom similar role has been ascribed, have been released on bail earlier, have granted bail to the present accused respondents. It is true that State normally should have moved this Court against the order in question, but at the same time the power of this Court cannot be fettered merely because the State has not moved, particularly in a case like this, where our conscience is totally shocked to see the manner in which the High Court has exercised its power for release on bail of the accused respondents. We are not expressing any opinion on the merits of the matter as it may prejudice the accused in trial. But we have no doubt in our mind that the impugned order passed by the High Court suffers from gross illegality and is an order on total non-application of mind and the judgement of this Court referred to earlier analysing the provisions of sub-section (2) of section 439 cannot be of any use as we are not exercising power under sub-section (2) of section 439 Cr.P.C."

In the case of **Salim Vs. State of U.P. 2003 ALL. L. J. 625**, this Court has held that parity can not be the sole ground for bail.

Again in the case of **Zubair Vs. State of U.P. 2005(52) ACC 205**, this Court observed that there is no absolute hidebound rule that bail must necessarily be granted to the co-accused, where another co-accused has been granted bail. In view of the aforesaid discussion, we are of the considered opinion that parity cannot be the sole ground for granting bail."

15. In the case of **Mauji Ram** (supra) Hon'ble Supreme Court has held that it must appear from perusal of the order that the Court has applied its mind to the relevant facts in the light of material filed by the prosecution at the time of consideration of bail application. Paragraph 13 of the judgment in **Mauji Ram** (supra) is being reproduced as under:-

*"13. Time and again this Court has emphasized the need for assigning the reasons while granting bail (see **Ajay Kumar Sharma vs. State of U.P. & Ors.**, (2005) 7 SCC 507, **Lokesh Singh vs. State of U.P. & Anr.**, (2008) 16 SCC 753 & **Dataram Singh vs. State of U.P. & Anr.**, (2018) 3 SCC 22). Though it may not be necessary to give categorical finding while granting or rejecting the bail for want of full evidence adduced by the prosecution as also by the defence at that stage yet it must appear from a perusal of the order that the Court has applied its mind to the relevant facts in the light of the material filed by the prosecution at the time of consideration of bail application. It is unfortunate that neither the law laid down by this Court, nor the material filed by the prosecution was taken note of by the High Court while considering the grant of bail to the respondents.*

16. I, therefore, proceed to consider the bail application of the applicant on its own merits.

17. In the case of **Lt. Col. Prasad Shrikant Purohit vs. State of Maharashtra, (2018)11 SCC 458**, the Hon'ble Supreme Court has held that the law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary to consider the factors such as; a) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and c) prima facie satisfaction of the court in support of the charge.

18. In **Anil Kumar Yadav vs. State (NCT of Delhi), (2018)12 SCC 129**, the Hon'ble Supreme Court laid down the following relevant consideration while granting bail, in paragraph 17 which is being reproduced as under:-

“While granting bail, the relevant considerations are:- (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.”

19. In the present case, the offence committed is of serious nature. It is double murder, which would inflict severe punishment, in case of the applicant's conviction. There was indiscriminate firing and the fire arm injuries were sustained by the deceased Netrapal and Pratap on the vital parts of the body as per the post mortem report. The witnesses, including the informant-the injured witness, under Section 161 Cr.P.C. have named the applicant. There is recovery of fire arm of 315 bore from the possession of the applicant as per the recovery memo. There are prima facie and reasonable grounds to believe the complicity of the applicant in the commission of the offence. The applicant has criminal antecedent. The trial has also commenced in which PW-1 has been examined. Considering in totality the facts of this

case, but without commenting anything on the merits of the case, I do not find it a fit case for grant of bail to the applicant.

20. The case of **West Coast Paper Mills Ltd. and Anr.**(supra), upon which reliance has been placed by Sri Trivedi, learned Senior Advocate, to submit that once appeal is listed before the Hon'ble Supreme Court and the same is entertained, the judgment of the High court or the Tribunal is in jeopardy and the subject matter of the lis unless determined by the last Court cannot be said to have attained finality, is not on the point of grant of bail or on the point of parity, i.e. the coaccused can or cannot be granted bail on parity.

21. Similarly, the case of **Khoday Distilleries Limited (now known as Khoday India Limited) and others vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal (under Liquidation) represented by the Liquidator, (2019)4 SCC 376**, upon which reliance has been placed by Sri Manish Tiwary, learned Senior Advocate, to contend that in spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties, is also not on the point of grant of bail on the ground of parity. The principle as laid down in Khoday Distilleries case shall apply between the parties.

22. A perusal of the order granting bail to Harendra, the coaccused shows that the applicant therein had no criminal antecedent. The present applicant has criminal antecedent.

23. Thus considered, the bail application of the applicant Gajendra Singh is hereby **rejected**.

Order Date:23.7.2020

mt.