

Bail Application No.1810/2020

State V/s Aarif @ Mota

FIR No.158/2020

U/s: 144/147/148/149/188/302/120-B/34 IPC

PS: Dayalpur (Crime Branch)

11.12.2020

THROUGH WEBEX VIDEO CONFERENCING

Present: Shri Manoj Chaudhary, Ld. Special PP for the State alongwith IO, Inspector Videsh Singhal.

Shri Abdul Gaffar, Ld. Counsel for accused Aarif @ Mota/applicant.

ORDER

I have heard arguments advanced at bar by both the sides on this bail application and perused the report filed in the matter as well as the chargesheet.

2. Before advertng to the application in question, it would be appropriate to have a brief overview qua the facts of the case. The FIR in the matter was registered on 21.03.2020 in respect of death of one young boy namely Zakir. Initially, FIR No.77/2020, U/s 147/148/149/302/120-B/34 IPC, PS Dayalpur was registered, in which total four persons were found dead during the communal riots which took place on 25.02.2020, however, during the course of investigation it was noticed that all the four dead bodies were found at four different places and as such, four different cases were registered.

3. The learned counsel for the applicant has very vehemently argued that the applicant has been falsely implicated in the matter. He has been in judicial custody since 16.04.2020. There is an “*unexplained delay*” of about 24 (twenty four) days in registration of

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FIR in as much as the alleged incident took place on 25.02.2020; whereas, the case FIR in the matter was registered on 21.03.2020. No recovery of any sort has been effected from him. The police never sought his custody remand in the matter. It is argued that admittedly a muslim boy had lost his life in the matter and all the persons implicated in the matter are Hindus and it is quite appalling that a muslim boy (i.e the applicant herein) shall become part of the “**riotous mob**” which mainly consisted of persons belonging to Hindu community. The eye witnesses in the matter namely Shashi Kant Kashyap, Ashok Solanki and Surender Sharma are “*planted witnesses*”. Even aforesaid PWs have merely identified the applicant being part/member of the “*riotous mob*” and did not utter a single word against the applicant of carrying any sharp edged weapon on the date of alleged incident and attacking the deceased. There is no evidence on record except for his disclosure statement about he having attacked the deceased. It is claimed that the applicant was a “*bonafide bystander*” and he cannot be fastened with liability of riots with the aid of Section 149 IPC. In this regard, the learned counsel for the applicant has relied upon the case of “*Musa Khan & Ors. V/s State of Maharashtra*”, (1977) 1 SCC 733. Para 5 of the said judgment is reproduced as under:

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“5.Thus, a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it any stage during its activities is in law guilty of every act committed by it from the beginning to the end or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge.”

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4. It is next argued that the applicant has not been subjected to judicial “*Test Identification Parade*” (TIP). In this regard, reliance has been placed by the learned counsel upon the judgment of “*Usmangani @ Bhura Abdul Gaffar & Anr. V/s State of Gujarat*”, decided on 09.08.2018 by Hon’ble Supreme Court in *Crl.Appeal No.1041/2061* to emphasize that *identification of a few select persons in a large mob by a witness, in the absence of TIP cannot inspire the confidence of Court*. It is further argued that “*pre-trial detention has been deprecated by the Courts*” and “*bail is the rule and jail is an exception.*” It is further argued that the applicant is the permanent resident of the locality in question and as such, there is no possibility of his absconding. In the end, it is argued that the investigation in the matter is complete; chargesheet has already been filed; applicant is no more required for any custodial interrogation and no useful purpose would be served by keeping him behind bars, as the trial in the matter is likely to take long time.

5. Per contra, learned Special PP for the State has very vehemently argued that the applicant is an accused in the matter, wherein murder of a young boy namely Zakir S/o Shri Shabbir Ahmed had taken place during the course of communal riots. It is argued that deceased Zakir was brutally attacked and stabbed by the riotous mob on 25.02.2020 near Gali No.10, main Brijpuri Road, Delhi and he had sustained 22 injuries (including seven such injuries which in itself were sufficient to independently cause the death of any person in ordinary course of nature).

6. It is next contended that initially FIR No.77/2020, U/s 147/148/149/302/120-B/34 IPC, PS Dayalpur was registered, in which

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total four persons were found dead during the communal riots which took place on 25.02.2020, however, during the course of investigation it was noticed that all the four dead bodies were found at four different places and as such, four different cases were registered. The instant case FIR was registered on 21.03.2020 in respect of death of deceased Zakir and subsequently the investigation of the case was taken over by Crime Branch SIT.

7. The other three cases are:

- (i) *FIR No.159/2020, PS Dayalpur with regard to the murder of Shri Ashfaaq;*
- (ii) *FIR No.163/2020, PS Gokulpuri in respect of murder of Shri Mehtaab and;*
- (iii) *FIR No.160/2020, PS Gokulpuri in respect of murder of Shri Jameel.*

8. It is further contended that during the course of investigation, it was revealed that on the fateful day of 25.02.2020, communal riot took place on main Brijpuri Road, Delhi wherein the “riotous mob” pelted stones, ransacked and torched many shops and killed several persons. During the analysis of CCTV footages of nearby Chawla Kiryana Store, it was found that the riotous mob had caught and severely beaten three “muslim boys”; wherein applicant was found pelting stones while co-accused persons namely Shubham was found carrying a stick (palta) in his hand; Ajay @ Monu was found carrying a sword and Ashok was found carrying scissors tied in a stick and as such the riotous mob was armed with “*deadly weapons*”. It is further contended that the applicant was part of the unlawful assembly/riotous mob that had inflicted severe injuries upon deceased Zakir, which ultimately resulted in his death.

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9. It is further argued that eye witness(es) namely Shri Shashi Kant Kashyap, Ashok Solanki and Surender Sharma have duly identified the applicant indulging in rioting and torching the shops on 25.02.2020 and furthermore the CDR location of his mobile phone bearing SIM number 9899133757 has also been found to be at the spot on the day of incident. It is further argued that on the basis of aforesaid evidence available against the applicant, he was arrested in the matter on 16.04.2020.

10. It is further argued that regular bail applications of several co-accused persons namely Ajay @ Monu, Ashok Kumar, Shubham and Jitender have already been dismissed by this Court vide various orders and as such, the instant bail application is also liable to be dismissed. In the end, it is submitted that the investigation of the case is still in progress to identify the remaining persons from the riotous mob; three more innocent persons were brutally murdered in the vicinity of the place of incident and the witnesses in the present matter are residents of the same locality and if released on bail at this stage, the applicant may threaten the witnesses and tamper with the evidence.

11. I have given my thoughtful consideration to the arguments advanced at bar.

12. The “**unlawful assembly**” is defined under Section 141 IPC. Admittedly, majority of the accused persons which formed the “**unlawful assembly**” in the matter on the date of incident are Hindus, whereas the applicant is a muslim by religion. The allegations against the applicant are that he was part/member of the “**unlawful assembly**”, the common object whereof was to cause maximum damage to the

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property, life and limb(s) of the members of other community. It is very obfusatory that a muslim boy would become part of an “**unlawful assembly**” which mostly consisted of members of Hindu community, the common object whereof was to cause maximum damage to the property, life and limb(s) of the other community. So, *prima facie*, the applicant cannot be said to be part of “**unlawful assembly**” or share “**common object**” with them on the date of incident. As such, once the provisions of Section 141 IPC are not attracted in case of applicant, then he will also go out of the ambit of Section 149 IPC. Even the eye witnesses namely Shri Shashi Kant Kashyap, Ashok Solanki and Surender Sharma have not specifically spelt out the role of applicant in the matter and their statements *prima facie* appears to general one. The applicant is not visible in any CCTV/video footage. As regards the CDR location, it is relevant to mention here that applicant is resident of the same locality/area and as such, at this stage his CDR location being found at or around the spot is also not of much consequence to the prosecution. Furthermore, once the applicant is out of the ambit of Section 149 IPC, then he cannot be fastened with the liability under Section 302 IPC. As regards applicant indulging in rioting/torching shops, admittedly Section 436 IPC has been not been invoked by the investigating agency in the case in hand. Thus, now the primary material against the applicant remains his disclosure statement, which has got no meaning.

13. The case of applicant is totally on a different pedestal as compared with other co-accused persons namely Ajay @ Monu, Ashok Kumar, Shubham and Jitender whose bail applications have already been dismissed by this Court because it does not appeal to senses that applicant being a muslim would rub shoulder to shoulder in such a

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surcharged atmosphere with the members of “**unlawful assembly**”, which mainly consisted of the persons of Hindu community and would beat a muslim boy to death. The investigation in the matter is complete and chargesheet has already been filed; trial in the matter is likely to take long time; applicant cannot be made to incarcerate in jail for infinity merely on account of the fact that other persons who were part of the riotous mob have to be identified and arrested in the matter.

14. Considering the facts and circumstances of the case in totality, applicant Aarif @ Mota is admitted to bail on his furnishing a Personal Bond in the sum of Rs.20,000 (Rupees Twenty Thousand Only) with one surety in the like amount to the satisfaction of the Ld.CMM/Ld.Illaka MM/Ld.Duty MM, subject to the condition that he shall not tamper with the evidence or influence any witness in any manner, he shall maintain peace and harmony in the locality and that he shall appear before the Court on each and every date of hearing to attend the proceedings in accordance with the terms of Bail Bond, which would be executed by him; he shall furnish his mobile number to SHO, PS Dayalpur upon his release from the jail and will ensure the same to be in working condition and further he shall also get installed “*Arogya Setu App*” in his mobile phone.

15. Application stands disposed off.

16. It is hereby clarified that anything stated hereinabove shall not be construed as expressing any opinion on the merits of the case, as the case is at “*pre-cognizance/pre-committal stage*”.

17. A copy of this order be sent to the Superintendent Jail concerned as also to the learned counsel for the applicant through electronic mode.

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by VINOD YADAV
YADAV Date: 2020.12.11
17:39:01 +05'30'

(VINOD YADAV)

ASJ-03(NE)/ KKD COURTS/DELHI/11.12.2020