

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

Date of decision: 03rd September, 2021

IN THE MATTER OF:

+ BAIL APPLN. 2775/2021
TABASSUM

..... Petitioner

Through: Mr. Abdul Gaffar and Ms. Deeksha
Dewedi, Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. S. V. Raju, ASG with Mr. Amit
Prasad, SPP for the State along with
Mr. Anshuman Raghuvanshi and
Mr. Ayodhya Prasad, Advocates and
DCP Rajesh Deo, Legal and Crime
Branch and Insp. Gurmeet Singh,
Crime Branch

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The Petitioner herein has approached this Court for grant of regular bail in FIR No.60/2020 dated 25.02.2020 registered at PS Dayalpur for offences under Sections 186/353/332/323/147/148/149/336/427/302 of the Indian Penal Code, 1860 (hereinafter, “IPC”) and Sections 3/4 of the Prevention of Damage to Public Property Act, 1984 (hereinafter, “PDPP Act”).
2. The FIR relates to the violence that took place in the National Capital Territory of Delhi in the month of February 2020.
3. The brief facts leading to the instant Bail Application are that a protest against the Citizenship (Amendment) Act, 2019 (hereinafter, “CAA”) had been taking place for 1.5 months prior to the incident at Khajuri Square to

Loni Circle at Wazirabad Road, Chand Bagh near 25 Futa Service Road by the Muslim community.

4. It is stated in the instant FIR that the Complainant, i.e. Constable Sunil Kumar, was on duty with the deceased, HC Ratan Lal, and others, namely Giri Chand, Ct. Mahavir, Ct. Jitender, HC Narender, HC Brijesh, W/HC Savitri, as well as DCP Shahdara District Amit Kumar and his staff.

5. It is stated that on 24.02.2020, at about 01:00 PM, the protestors had mobilized near the Chand Bagh area and 25 Futa Road, and were moving towards the Main Wazirabad Road. When they assembled near Main Wazirabad Road, it is stated that the Complainant and other police officers present attempted to convince the protestors to not move towards the Main Wazirabad Road, however, it is stated that the protestors were carrying sticks, baseball sticks, iron rods and stones. It is stated that ACP Gokalpuri and DCP Shahdara warned the protestors via loudspeaker of a government vehicle that lack of adherence to legal warnings would necessitate strict action against the crowd. It is stated that some people amongst the crowd started pelting stones at the police officials, and beat them as well as other passersby with aforementioned weapons that had been hidden.

6. It is stated that the Complainant herein received an injury on his right elbow and right hand due to a huge stone. It is further stated that the crowd even snatched tear gas balls and *lathis* from the police, and started beating them with it. It is stated that ACP Gokalpuri, HC Ratan Lal and DCP Shahdara Amit Kumar were also beaten with sticks and stones, and as a result, they fell down and suffered grievous head injuries.

7. The FIR states that post the incident, the protestors fled away and the injured were sent to a hospital, with the Complainant receiving treatment at

Panchsheel Hospital, Yamuna Vihar, Delhi.

8. The Complainant then states that he was informed that HC Ratan Lal had succumbed to a bullet injury, and some other police officers as well as public persons had also suffered injuries. It is stated that the protestors had also set fire to the vehicle of DCP Shahdara and private vehicles of police officers, and also damaged public and private property.

9. It is stated that investigation is now completed and chargesheet has been filed against the Petitioner on 08.06.2020. The Petitioner herein has been formally added *vide* third supplementary chargesheet dated 17.11.2020. The chargesheet states that there is sufficient material to proceed against the Petitioner herein under Sections 186/353/332/323/109/144/147/148/149/153A/188/336/427/307/308/302/201/120-B/34 of the IPC, read with 3/4 of the PDPP Act. Thereafter, supplementary chargesheets have been filed on 30.06.2020, 20.08.2020, 17.11.2020 and 30.12.2020.

10. Mr. Abdul Gaffar, learned Counsel appearing for the Petitioner, has submitted that the Petitioner herein is a law-abiding citizen who has deep roots in society, and that she is a married woman with two minor children. Further, she has no criminal antecedents and has never taken part in any form of violence. He has submitted that the Petitioner is being falsely implicated in the matter herein as a result of her religious identity and for exercising her fundamental right to freedom of speech and expression.

11. Mr. Gaffar has submitted that the Petitioner has been undergoing judicial custody since 05.10.2020. He has stated that the Ld. ASJ, Karkardooma Court, Delhi, had dismissed two bail applications of the Petitioner herein *vide* Orders dated 08.01.2020 and 17.03.2021.

12. The learned Counsel for the Petitioner has submitted that the Petitioner is a local resident of the area and her house is situated within 300 metres of the Chand Bagh protest site, and that she would take part in the peaceful protests against the Citizenship (Amendment) Act, 2019. He has submitted that on the day of the alleged incident, i.e. 24.02.2020, the protest in Chand Bagh was disrupted after one Kapil Mishra and officials from Bhajanpura Police Station barged into the site and started threatening the protestors to vacate the site. Mr. Gaffar has submitted that subsequent to this, armed gangs of people provoked and attacked the protestors, which led to a clash that consequently led to the death of HC Ratan Lal.

13. Mr. Gaffar, the learned Counsel for the Petitioner, has gone through the statements of the witnesses that have been recorded to present to the Court that the violence that had allegedly taken place at 01:00 PM on 24.02.2020, had in fact started prior to 01:00 PM and that the police's version of the events was false. He has further submitted that the Petitioner herein has not been caught in any of the CCTV from in and around the SOC. Furthermore, it has been submitted that the reliance on CDR and Cell ID to establish that the Petitioner was present at the protest site on the day of the alleged incident is misplaced as the Petitioner is a resident of the Chand Bagh area.

14. It has been submitted by Mr. Gaffar that chargesheet was filed on 08.06.2020 wherein 17 individuals were formally added. However, it was only in the third supplementary chargesheet filed on 17.11.2020 that the Petitioner was formally added wherein it has been alleged by the investigating agency that the Petitioner is one of the main conspirators of the riots and the allegations are merely an attempt to conceal the main culprits

responsible for the death of HC Ratan Lal.

15. Mr. Gaffar has brought to the notice of this Court that a notice had been pasted outside the house of the Petitioner on 29.08.2020 by the investigating agency to appear before them. However, as the Petitioner had gone to her native village on account of the COVID-19 pandemic and the lockdown, she was unaware of the notice and failed to appear before them. Thereafter, on gaining knowledge of the same, the Petitioner filed an anticipatory bail application which was dismissed *vide* Order dated 26.09.2020.

16. The learned Counsel for the Petitioner has submitted that the allegations against the Petitioner are fabricated, and that there is no evidence which directly or indirectly links the Petitioner to the alleged incident, and that the material which has been placed on record at the most suggests that the Petitioner was present at the protest site in the capacity of a “volunteer”.

17. With regard to the statements of the witnesses recorded under Sections 161 and 164 Cr.P.C against the Petitioner, Mr. Gaffar has argued that the statements are inconsistent and contradict each other. He has submitted that the statement of Salman Khan @ Guddu refers to the Petitioner as a “responsible” person at the protest, and that the statement of Toukir Alam under Section 161 Cr.P.C. refers to the Petitioner as a “volunteer”, whereas his Section 164 Cr.P.C. statement conveys that the petitioner was responsible for looking after the stage. Taking the Court through various statements, the learned Counsel for the Petitioner submits that material does not support the contention of the prosecution that she was one of the main organisers and conspirators involved.

18. Mr. Gaffar also refutes the allegations that the Petitioner herein

delivered hate speeches at the Chand Bagh protest site and submits that there is no material on record that supports this contention, and that none of the witnesses have provided any details of the said hate speeches that have been allegedly delivered by the Petitioner. He has further submitted that the statements of public witnesses Salman, Toukir Alam and Nazamul Hassan in this regard contradict each other. He has further submitted that while the statements of Nazamul Hassan refers to meetings that took place a few days prior to the alleged incident, the statement of Toukir Alam refer to a “secret meeting” held on the night of 23.02.2020. Furthermore, even as people this meeting have been named, there is no reference made to the Petitioner herein.

19. Mr. Amit Prasad, learned SPP for the State, has supplemented the arguments of the learned ASG and has painstakingly taken this Court through the videos pertaining to the topography of the area where the riots happened and the preparatory work that allegedly took place prior to the incident. Mr. Prasad brought to the attention of the Court three videos that had been found during the course of investigation which depict the scene of crime - Vishal Chaudhry Video (1.48 minutes) shot from Gym Body Fit Garage, Skyride Video (1.37 minutes) and Yamuna Vihar Video (40 seconds), and has submitted that the three videos shed a light on how the assault on the police personnel was pre-meditated. The learned APP has further taken this Court through all the available CCTV footage displaying timestamps and respective *galis* (lanes) wherein the accused have been caught on camera. He has further pointed out the timestamps which showcase the dislocation and deactivation of the CCTV cameras and has submitted that the same has been done in a synchronised and planned

manner.

20. The learned ASG Shri SV Raju, opposing the Bail Application, has submitted that the instant case is regarding the brutal assault on police officials wherein HC Ratan Lal succumbed to his injuries, and DCP Shahdara Amit Sharma and ACP Gokalpuri suffered grievous injuries along with more than 50 police officials also getting injured.

21. It has been submitted that the death of HC Ratan Lal was the first death in the North-East Delhi riots, and that the Trial Court has been dealing with the riot cases since then. It has also been submitted that the Trial Court has been apprised of the matter and has already dismissed the bail application of the Petitioner herein, and that the order of rejection of bail does not contain any legal infirmities.

22. The learned ASG has iterated that on 23.02.2020, the protestors who were convened at Wazirabad Main Road, Chand Bagh, unauthorizedly came onto the road and blocked the same. He submitted that in response to the same, the local police had issued a proclamation under Section 144 of the Cr.P.C. in order to bring the law and order under control. He further submitted that the protestors held a meeting on the night of 23.02.2020 at Chand Bagh to finalise a plan for 24.02.2020 as the President of the United States, Donald Trump, was coming to New Delhi. This meeting subsequently attended by several of the accused persons.

23. The learned ASG has submitted that on the morning on 24.02.2020, CCTV cameras which had been installed by GNCTD for security in the area were systematically disconnected or damaged or dislocated right from 08:00:41 AM to 12:50:57 PM. He argued before the Court that the protest at Chand Bagh continued despite the proclamation of Section 144 Cr.P.C.

orders. As a consequence, police officials had been deployed for law and order arrangements. The learned ASG averred that between 12:30 PM and 1:00 PM, at the behest of the organisers of the protest, a crowd carrying various weapons such as *dandas*, *lathis*, baseball bats, iron rods, and stones convened at the main Wazirabad Road, and refused to pay heed to the orders of the senior officers and police force. The crowd soon got out of control and started pelting stones at the police officers and resultantly, more than fifty police personnel suffered injuries and HC Ratan Lal was shot dead. It was further submitted by the learned ASG that the protestors turned violent, burnt private and public vehicles, as well as other properties in the vicinity, including a petrol pump and a car showroom.

24. It was then submitted by the learned ASG that absence of an accused from a video does not translate into absence of the accused from the scene of crime. He has argued that the role of the accused can be discerned from the myriad statements that have been recorded under Section 161 and Section 164 of Cr.P.C. wherein the presence of the Petitioner at the Scene of Crime and her role as one of the main organisers has been identified as well as acknowledged. It has been submitted that the Petitioner was in constant touch with the main organiser-cum-conspirator, Suleiman Siddiqui and Ravish (declared PO), and that during the protests, she would deliver speeches to instigate the crowd to commit violence and that these speeches were circulated on social media. Furthermore, she would collect sticks, stones and rods in the tent with the other accused.

25. The learned ASG has submitted that the CDR reveals that the Petitioner was present at the SOC and was in contact with the other accused. Further, a number of ladies in burqas hitting the police officials with *dandas*

and stones had been captured in the video taken by Vishal Choudhary. He has pointed out to the Court that the Petitioner was evading arrest, and as a result of the same, from 28.08.2020 to 29.09.2020, a non-bailable warrant had been issued against the Petitioner, and from 30.09.2020 to 20.11.2020, a warrant had been issued under Section 82 Cr.P.C. Additionally, during police custody, she refused to cooperate with the investigation.

26. It has further been submitted by the learned ASG that the Petitioner was present at the meeting on the night of 23.02.2020 wherein the violence on 24.02.2020 was planned and that her presence had been confirmed by various independent public witnesses in their statements recorded under Section 164 Cr.P.C.

27. The learned ASG relied upon Masalti and Ors. v. State of Uttar Pradesh, (1964) 8 SCR 133, and submitted that by way of application of Section 149 IPC, the Petitioner herein would be deemed to be a member of the unlawful assembly and, therefore, would be equally and squarely liable for the crime committed.

28. The learned ASG has also contended that the addition of the offence under Section 302 IPC means that ordinarily bail should not be granted. He has argued that it was not a case of a simple offence; if it was a grievous offence which was specially punishable with death, then bail could not be granted. On the issue of the parameters of bail, the learned ASG has submitted that in Gurcharan Singh v. State (Delhi Administration), (1978) 1 SCC 118, the Supreme Court has reiterated that the principle underlying Section 437 is towards grant of bail *except* in cases where there appears to be reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life, and also when there are

other valid reasons to justify refusal of bail. He has argued that the overriding considerations in granting bail are, *inter alia*, the nature and gravity of the circumstances in which the offence is committed. The learned ASG has submitted that in P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791, the Supreme Court had held that in addition to the triple test or tripod test, gravity of the offence had to be considered while making a decision on grant of bail. Further, one of the circumstances to consider the gravity of offence would be the term of sentence that is prescribed for the offence which the accused is said to have committed. The learned ASG has argued that as the instant case pertains to the offence of the murder of a police officer and Section 302 IPC has been invoked, the matter lies within the four corners of the gravest of grave offences, and therefore, the accused cannot be entitled to bail.

29. Mr. Raju, the learned ASG, has then contended that conspiracy had been established on 23 February, 2020, and that the offence was pre-planned. He has submitted that meetings were held 1-2 days prior to the alleged incident wherein the protestors were motivated to gather at the site of the alleged incident on 24.02.2020 in order to instigate violence, and therefore, there was a meeting of minds due to which Section 149 and Section 120B of the IPC were made out. Furthermore, secret codes had been used, and the Petitioner herein was fully involved as a main conspirator in the case.

30. It was also submitted by the learned ASG that there was only a small contingent of police officers present, and they were trying to protect themselves from the frontal attack by the crowd as they were outnumbered. He argued that had it been a simple protest, the crowd would not have been

required to come with sticks, weapons etc. Furthermore, if sticks and other weapons were to be utilised for self-defence, then the damage and dislocation of CCTVs defeated the case because such an action would only lead to the inference that the accused wished to destroy the evidence or to ensure that the evidence did not surface.

31. The Court has heard the learned ASG SV Raju with Mr. Amit Prasad, learned SPP for the State, and Mr. Abdul Gaffar, learned Counsel for the Petitioner. The Court has also perused the material on record.

32. A perusal of the chargesheet reveals that the Petitioner herein is a resident of the Chand Bagh area, living in Gali No.1. It states that the Petitioner would share a stage with other protestors and instigate them to commit violence. Further, she was in constant touch with other main conspirators/co-accused, as well as the accused who have been arrested in FIR No. 59/2020 registered at PS Dayalpur. The chargesheet also indicates that the Petitioner also deliberately evaded the investigation, subsequent to which Non-Bailable Warrant was issued against her. Additionally, the Petitioner has been named in a myriad of statements of independent public witnesses and police witnesses recorded under Section 161 and Section 164 Cr.P.C.

33. In the instant case, the issue which arises for consideration is whether when an offence of murder is committed by an unlawful assembly, then whether each person in the unlawful assembly should be denied the benefit of bail regardless of his role in the unlawful assembly or the object of the unlawful assembly. In order to understand the contention of the learned ASG, it is useful to refer to Section 149 IPC which reads as follows:

“149. Every member of unlawful assembly guilty of

offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”
(emphasis supplied)

34. The Supreme Court has consistently held that in order to convict an accused with the aid of Section 149, a clear finding needs to be given by the Court regarding the nature of unlawful common object. Furthermore, if any such finding is absent or if there is no overt act on behalf of the accused, the mere fact that the accused was armed would not be sufficient to prove common object.

35. In Kuldip Yadav and Ors. v. State of Bihar, (2011) 5 SCC 324, the Supreme Court has categorically stated:

“39. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149.”
(emphasis supplied)

36. In Sherey and Ors. v. State of U.P., (1991) Supp (2) SCC 437,

the Supreme Court, while considering a matter on merits after the conclusion of the trial and deciding whether Section 149 of the IPC could be applied to hold an accused constructively liable on the basis of omnibus allegations made by witnesses and on the basis of their mere presence at the spot/scene of crime, had observed as follows:

“4. We have carefully gone through the evidence. We have no doubt that all the eye-witnesses were present. Nothing significant has been elicited in their cross-examination. However, the eye-witnesses simply named these appellants and identified them. So, the question is whether it is safe to convict all the appellants. In a case of this nature, the evidence of the witnesses has to be subjected to a close scrutiny in the light of their former statements. The earliest report namely the FIR has to be examined carefully. No doubt in their present deposition they have described the arms carried by the respective accused but we have to see the version given in the earliest report. In that report PW 1 after mentioning about the earlier proceedings has given a fairly detailed account of the present occurrence. He has mentioned the names of the witnesses and also the names of the three deceased persons. Then he proceeded to give a long list of names of the accused and it is generally stated that all of them were exhorting and surrounded the PWs and the other Hindus and attacked them. But to some extent specific overt acts are attributed to appellants 1, 4, 5, 7, 8, 10, 17, 22 and 25. It is mentioned therein that these nine accused were armed with deadly weapons and were seen assaulting the deceased Ram Narain and others. Now in the present deposition he improved his version and stated that in addition to these nine accused, five more persons also attacked the deceased and others. In view of this variation we think that it is safe to convict only such of the appellants who are consistently mentioned as having participated in the attack from the

stage of earliest report. With regards the rest PW 1 mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. Further, the medical evidence rules out any lathis having been used. The doctor found only incised injuries on the dead bodies and on the injured PWs. Therefore, it is difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they are charged. We feel it highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance...” (emphasis added)

37. It is, therefore, noted that the applicability of Section 149 IPC, specifically read with Section 302, cannot be done on the basis of vague evidence and general allegations. When there is a crowd involved, at the juncture of grant or denial of bail, the Court must hesitate before arriving at the conclusion that every member of the unlawful assembly inhabits a

common intention to accomplish the unlawful common object. There cannot be an umbrella assumption of guilt on behalf of every accused by the Court, and every decision must be taken based on a careful consideration of the facts and circumstances in the matter therein. This principle, therefore, gains utmost importance when the Court considers the question of grant or denial of bail.

38. With regard to the submission that if there appears to be reasonable grounds that the accused has committed an offence which is punishable with death or life imprisonment, then there is a bar imposed by Section 437(1) Cr.P.C on granting of bail, this Court states that the case of Gurcharan Singh (supra) also acknowledges that it is the Court which has the last say on whether there exists any reasonable grounds for believing that the accused is guilty of committing the said offence. Furthermore, there is no blanket bar as such which is imposed on the Court on granting of bail in such cases and that the Court can exercise discretion in releasing the accused, as long as reasons are recorded which clearly disclose how the discretion has been exercised. Additionally, in the case of the Prabhakar Tiwari v. State of U.P., (2020) SCCOnline 75, the Supreme Court has held that despite an alleged offence being grave and serious, and there being several criminal cases pending against the accused, these factors by themselves cannot not be the basis for the refusal of prayer for bail. In Gurcharan Singh (supra), the Supreme Court had held as follows:

“24. Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr.P.C. against granting of bail by the High

Court or the Court of Session to persons accused of an offence punishable with death or imprisonment of life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The overriding considerations in granting of bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.”

39. The Petitioner surrendered to the police on 03.10.2020 and has been in judicial custody since then. It has been 10 months since the arrest of the Petitioner. Bail jurisprudence attempts to bridge the gap between the personal liberty of an accused and ensuring social security remains intact. It is the intricate balance between the securing the personal liberty of an individual and ensuring that this liberty does not lead to an eventual disturbance of public order. It is egregious and against the principles enshrined in our Constitution to allow an accused to remain languishing

behind bars during the pendency of the trial. Therefore, the Court, while deciding an application for grant of bail, must traverse this intricate path very carefully and thus take multiple factors into consideration before arriving at a reasoned order whereby it grants or rejects bail.

40. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the Supreme Court laid down the parameters for granting or refusing the grant of bail which are as under:

- “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;*
- v. character, behavior, 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.”*

In Mahipal v. Rajesh Kumar, (2020) 2 SCC 118, the Supreme Court had observed as under:

- “12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No*

straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter of trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow and ought to be guided by the principles set out for the exercise of the power to set aside bail.”

41. It is the Constitutional duty of the Court to ensure that there is no arbitrary deprivation of personal liberty in the face of excess of State power. Bail is the rule and jail is the exception, and Courts must exercise their jurisdiction to uphold the tenets of personal liberty, subject to rightful regulation of the same by validly enacted legislation. The Supreme Court has time and again held that Courts need to be alive to both ends of the spectrum, i.e. the duty of the Courts to ensure proper enforcement of criminal law, and the duty of the Courts to ensure that the law does not become a tool for targeted harassment.

42. As has been stated above, the Petitioner herein has been in custody for 10 months and was formally added by way of the third supplementary chargesheet dated 17.11.2020. A perusal of the material on record has revealed to the Court that the Petitioner has not been caught on any video footage in the vicinity of the protest site, and the contention of the

prosecution that a few women wearing burqas have been caught assaulting police officials in the Vishal Chaudhary video does not have any weight at this juncture because the petitioner cannot be identified in the video. The CDR of the Petitioner which places her around the protest site and Scene of Crime is also inconclusive as the Petitioner is a resident of the local area, i.e. Gali No.1. Whether or not the statements of the independent public witnesses and the police officials recorded under Sections 161 and 164 Cr.P.C. are definitive, cannot be delved into by this Court and is a matter of trial. However, this Court is of the opinion that they are not sufficient to justify the continued incarceration of the Petitioner. Additionally, merely being one of the organisers of the protest as well as being in touch with others who participated in the protest is also not sufficient enough to justify the contention that the Petitioner was involved in the pre-planning of the alleged incident. It is to be noted that the right to protest and express dissent is a right which occupies a fundamental stature in a democratic polity, and therefore, the sole act of protesting should not be employed as a weapon to justify the incarceration of those who are exercising this right.

43. The fourth chargesheet has already been filed, and trial in the matter is likely to take a long time. This Court is of the opinion that it would not be prudent to keep the Petitioner, who has two minor children, behind bars for an undefined period of time at this stage. The Petitioner has roots in society, and, therefore, there is no danger of her absconding and fleeing. Furthermore, the two co-accused of the Petitioner have been enlarged on bail *vide* Bail Appln. 1360/2021 dated 24.05.2021, and Bail Appln. 3550/2021 dated 16.02.2021.

44. In view of the facts and circumstances of the cases, without

commenting on the merits of the matter, this Court is of the opinion that the Petitioner cannot be made to languish behind bars for a longer period of time, and that the veracity of the allegations levelled against him can be tested during trial.

45. Accordingly, this Court is inclined to grant bail to the Petitioner in FIR No. 60/2020 dated 25.02.2020 registered at PS Dayalpur for offences u/s 186/353/332/323/109/144/147/148/149/153A/188/333/336/427/307/308/302/201/120-B/34 of the IPC, read with 3/4 of the PDPP Act on the following conditions:

- a) The Petitioner shall furnish a personal bond in the sum of ₹35,000/- with one surety of the like amount to the satisfaction of the Trial Court/Duty Magistrate.
- b) The Petitioner shall not leave NCT of Delhi without prior permission of this Court.
- c) The Petitioner shall report to the concerned Police Station every Tuesday and Thursday at 10:30 AM and should be released after completing the formalities within half an hour.
- d) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- e) The present address which has been given by the Petitioner is House No. D-51, Gali No. 1, Chand Bagh, Delhi. The Petitioner is directed to continue to reside at the same address. In case there is any change in the address, the Petitioner is directed to intimate the same to the IO.
- f) The Petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses.

g) Violation of any of these conditions will result in the cancellation of the bail given to the Petitioner.

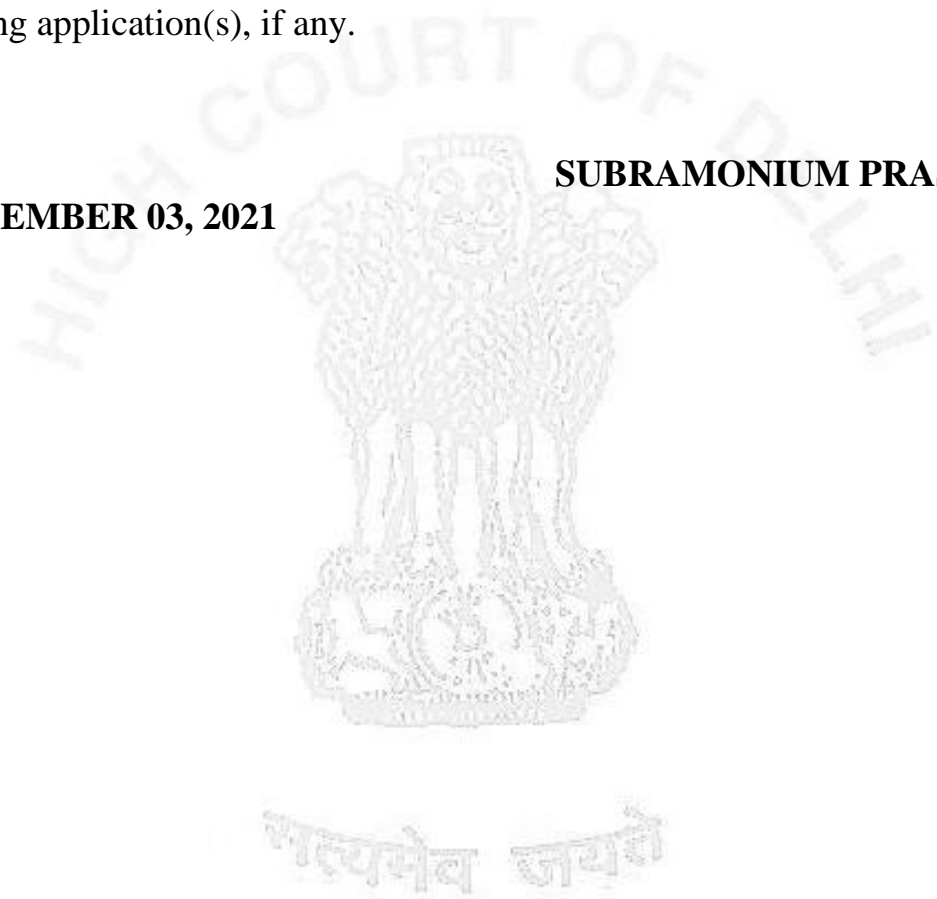
29. It is made clear that the observations made in this Order are only for the purpose of grant of bail and cannot be taken into consideration during the trial.

46. Accordingly, the bail application is disposed of along with the pending application(s), if any.

SUBRAMONIUM PRASAD, J.

SEPTEMBER 03, 2021

Rahul



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

Date of decision: 03rd September, 2021

IN THE MATTER OF:

+ BAIL APPLN. 1882/2021

SHADAB AHMAD

..... Petitioner

Through: Ms. Rebecca John, Senior Advocate
with Mr. Shivam Sharma, Mr. Kartik
Murukutla and Ms. Praavita Kashyap,
Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. S. V. Raju, ASG with Mr. Amit
Prasad, SPP for the State along with
Mr. Anshuman Raghuvanshi and
Mr. Ayodhya Prasad, Advocates and
DCP Rajesh Deo, Legal and Crime
Branch and Insp. Gurmeet Singh,
Crime Branch

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The Petitioner seeks bail in FIR No.60/2020 dated 25.02.2020 registered at PS Dayalpur for offences under Sections 186/353/332/323/147/148/149/336/427/302 of the Indian Penal Code, 1860 (hereinafter, "IPC") and Sections 3/4 of the Prevention of Damage to Public Property Act, 1984 (hereinafter, "PDPP Act").
2. The FIR relates to the violence that took place in the National Capital Territory of Delhi in the month of February 2020.
3. The brief facts leading to the instant Bail Application are that a protest against the Citizenship (Amendment) Act, 2019 (hereinafter, "CAA") had

been taking place for 1.5 months prior to the incident at Khajuri Square to Loni Circle at Wazirabad Road, Chand Bagh near 25 Futa Service Road by the Muslim community.

4. It is stated in the instant FIR that the Complainant, i.e. Constable Sunil Kumar, was on duty with the deceased, HC Ratan Lal, and others, namely Giri Chand, Ct. Mahavir, Ct. Jitender, HC Narender, HC Brijesh, W/HC Savitri, as well as DCP Shahdara District Amit Kumar and his staff.

5. It is stated that on 24.02.2020, at about 01:00 PM the protestors had mobilized near the Chand Bagh area and 25 Futa Road, and were moving towards the Main Wazirabad Road. When they assembled near Main Wazirabad Road, it is stated that the Complainant and other police officers present attempted to convince the protestors to not move towards the Main Wazirabad Road, however, it is stated that the protestors were carrying sticks, baseball sticks, iron rods and stones. It is stated that ACP Gokalpuri and DCP Shahdara warned the protestors via loudspeaker of a government vehicle that lack of adherence to legal warnings would necessitate strict action against the crowd. It is stated that some people amongst the crowd started pelting stones at the police officials, and beat them as well as other passersby with aforementioned weapons that had been hidden.

6. It is stated that the Complainant herein received an injury on his right elbow and right hand due to a huge stone. It is further stated that the crowd even snatched tear gas balls and lathis from the police, and started beating them with it. It is stated that ACP Gokalpuri, HC Ratan Lal and DCP Shahdara Amit Kumar were also beaten with sticks and stones, and as a result, they fell down and suffered grievous head injuries.

7. The FIR states that post the incident, the protestors fled away and the

injured were sent to a hospital, with the Complainant receiving treatment at Panchsheel Hospital, Yamuna Vihar, Delhi.

8. The Complainant then states that he was informed that HC Ratan Lal had succumbed to a bullet injury, and some other police officers as well as public persons had also suffered injuries. It is stated that the protestors had also set fire to the vehicle of DCP Shahdara and private vehicles of police officers, and also damaged public and private property.

9. It is stated that investigation is now completed and chargesheet has been filed against the Petitioner on 08.06.2020 wherein the Petitioner has been formally added. The chargesheet states that there is sufficient material to proceed against the Petitioner herein under Sections 186/353/332/323/109/144/147/148/149/153A/188/333/336/427/307/308/302/201/120-B/34 of the IPC, read with 3/4 of the PDPP Act. Thereafter, supplementary chargesheets have been filed on 30.06.2020, 20.08.2020, 17.11.2020 and 30.12.2020.

10. Ms. Rebecca John, learned Senior Counsel appearing for the Petitioner, has informed the Court the Petitioner was arrested on 06.04.2020 in connection to the instant FIR No. 60/2020 at PS Dayalpur. After the Petitioner filed his first bail application in the case pertaining to FIR No. 60/2020, he was arrested on 20.05.2020 in the matter related to FIR No. 59/2020. Further, on 07.11.2020, the Petitioner was arrested in FIR No. 136/2020 wherein he was granted bail *vide* Order dated 21.12.2020.

11. Ms. John has submitted that the Petitioner has been falsely implicated in the case and has not indulged in any violence or been a part of an unlawful assembly or instigated any violence either before or on 24.02.2020 or thereafter. She has submitted that the Petitioner is a 27-year-old graduate

in Computer Science hailing from Bijnor in Uttar Pradesh, and has been living and working in Jagatpuri, Delhi, for the last four years as a supervisor at NDS Enterprises. She has submitted that the Petitioner is a conscientious worker who is working towards earning a living for himself and his family, and that he has merely been falsely implicated for taking part in peaceful protests against the Citizenship (Amendment) Act, 2019, and volunteering at the protest site in Chand Bagh after his work hours.

12. Ms. John, learned Senior Counsel, has informed the Court that the Petitioner has cooperated with the investigation from the beginning, and that during his interrogation, he had been threatened with arrest by the Investigating Officer (IO). However, despite this, Ms. John submits that the Petitioner made himself available and was consequently arrested on 06.04.2020 without being given substantial reasons for the same. It has further been submitted that the Petitioner had been forced to sign a blank paper while he was in custody, and that his phone had been seized by the police, but not sealed.

13. Submitting that the evidence will not be sustained in trial, Ms. John has stated that the continued arrest of the Petitioner is inimical to his right to life and personal liberty, and that there is material contradiction in the statements of the witnesses. She has submitted that the dates in the statements rendered by the witnesses under Section 161 and Section 164 of Cr.P.C. are all over the place. Furthermore, she has raised the point that in such cases, the interpretation of every word must be construed definitively and that it is not the duty of the Court to fill the lacunae as it is the Petitioner who ends up paying the price for the same.

14. The learned Senior Counsel appearing for the Petitioner has submitted

that the Petitioner, as well as other accused, were not named in the FIR despite it being registered after a period of 24 hours after the alleged incident of HC Ratan Lal's death. She has submitted that the police officials were aware of the organisers of the protests as the same had been taking place for a month prior to the alleged incident, and that by not naming anyone in the FIR, it casts aspersions as to whether it was done to enable the police to falsely implicate individuals for protesting against the CAA.

15. Ms. John has submitted to the Court that the Petitioner herein arrived in the vicinity of the area only after the alleged incident had taken place, and that there is no CCTV or video footage on record which features the Petitioner. Furthermore, it has been submitted that the Petitioner's Call Detail Record (CDR) portrays that the Petitioner was not present at the Scene of Crime during the commission of the offence. Ms. John has taken the Court through the chart of the Cell ID location of the Petitioner and submitted that as per the chart, the Petitioner was present in Jagatpuri on 24.02.2020 from 11:31:40 AM to 12:41:10 PM. She has stated that the Cell ID location shows that the Petitioner was travelling from Jagatpuri and had only reached near the vicinity of the alleged incident at 13:13:16 PM, i.e. after the alleged incident took place. On the basis of this, Ms. John has argued that the Petitioner could not have been a part of the mob that assaulted the police officials as he was travelling and had only arrived near the spot/Scene of Crime afterwards.

16. The learned Senior Counsel for the Petitioner has vehemently argued that the statements under Section 161 Cr.P.C made by police witnesses are blatantly false as they claim to have seen the Petitioner at the protest site on the day of the incident which is contradictory to the CDR which has been

placed on record by the prosecution itself. Ms. John has submitted that HC Sunil, Ct. Gyan and Ct. Sunil have named 7-8 protestors who were allegedly present at the service road of Chand Bagh and were instigating the crowd on 24.02.2020. Furthermore, HC Sunil was made to identify the protestors, including the Petitioner herein, after they were arrested and it is stated by Ms. John that he falsely identified the Petitioner in order to maliciously implicate him in the case. Ms. John has argued that as per the cell ID location of the Petitioner, he was present at Gokulpuri metro station at 1 PM which is at least 2 kilometres away from the protest site, and therefore, the police eyewitnesses could not have seen him participating in the events leading up to the alleged incident.

17. Ms. John has further drawn the attention of the Court to the statements of HC Sunil, Ct. Gyan and Ct. Sunil, and has submitted that they fall in the category of “interested witnesses” and their statements are cut-copy-paste versions of each other, and therefore, they cannot be relied upon in order to identify the Petitioner. Ms. John has also assailed the statements of eight other police personnel who were said to be injured during the alleged attack, and has submitted that their statements are general, non-specific and almost verbatim of each other’s. Furthermore, the learned Senior Counsel has submitted that the statements were recorded three months after the alleged incident, without any explanation being given for the delay, and immediately after the Petitioner filed his first bail application.

18. It has also been submitted by the learned Senior Counsel that the statements of the three public witnesses recorded under Section 164 Cr.PC are also highly suspect as they were also recorded after a delay of three months and soon after the first bail application of the Petitioner was filed. In

wake of this, Ms. John has submitted that the statements must be viewed with caution as there exists a high possibility of coercion and of the statements being procured in exchange of promises to not be implicated and arrested in the matter. Furthermore, it is only Salman @ Guddu who has named Petitioner, plus no Test Identification Parade was carried out, and therefore his statement cannot be relied upon.

19. Ms. John, learned Senior Counsel for the Petitioner, has submitted that the allegations regarding inflammatory speeches being delivered by the Petitioner have not been substantiated by the Prosecution as no video, audio recording or transcripts were placed on record by the Investigating Agency, and no speech can be linked or sourced to the Petitioner. She has argued that the protest in Chand Bagh had been going for a month and more prior to the alleged incident, and that the Petitioner was merely exercising his constitutional right to protest by volunteering at the protest site in his spare time. Additionally, with regard to the allegations pertaining to planned conspiracy, the same has not been backed by cogent proof, and that the statements of the two witnesses, i.e. Nazamul Hasan and Toukir Alam, regarding secret meetings contradict each other. Ms. John has submitted that the Petitioner cannot be made a part of the conspiracy for the sole reason that he had spoken on the phone with other people protest against the CAA on the date of the alleged incident.

20. Ms. John has informed this Court that the Petitioner is not a flight risk and has deep roots in society as his parents are permanent residents of Bijnor in Uttar Pradesh. Furthermore, she has submitted that the Petitioner has cooperated with the investigation from the beginning, and as chargesheet has been filed and no further evidence is required from the Petitioner, there

exists no prolong his stay in custody. She has stated that the trial will take a considerable time and it is unlikely that the charges will be framed anytime soon.

21. It has been argued by Ms. John that the Petitioner herein satisfies the triple test or the tripod test as has been laid down by the Supreme Court in P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791, and that the gravity of the offence cannot be the sole criteria that is taken into consideration at the juncture of granting of bail. To buttress this submission, the learned Senior Counsel has relied upon the judgement of the Supreme Court in Prabhakar Tewari v. State of U.P., 2020 SCCOnline 75.

22. Mr. Amit Prasad, learned SPP for the State, supplemented the arguments of the learned ASG and has painstakingly taken this Court through the videos pertaining to the topography of the area where the riots happened and the preparatory work that allegedly took place prior to the incident. He has submitted that the presence of the Petitioner at the protest site on the day of the alleged incident is not natural as the Petitioner is a resident of Jagatpuri which is situated 10 kilometres away. Mr. Prasad brought to the attention of the Court three videos that had been found during the course of investigation which depict the scene of crime - Vishal Chaudhry Video (1.48 minutes) shot from Gym Body Fit Garage, Skyride Video (1.37 minutes) and Yamuna Vihar Video (40 seconds), and has submitted that the three videos shed a light on how the assault on the police personnel was pre-meditated. The learned APP has further taken this Court through all the available CCTV footage displaying timestamps and respective *galis* (lanes) wherein the accused have been caught on camera. He has further pointed out the timestamps which showcase the dislocation

and deactivation of the CCTV cameras and has submitted that the same has been done in a synchronised and planned manner.

23. The learned ASG, Mr. SV Raju, opposing the Bail Application herein, has submitted that the instant case is regarding the brutal assault on police officials wherein HC Ratan Lal succumbed to his injuries, and DCP Shahdara Amit Sharma and ACP Gokalpuri suffered grievous injuries along with more than 50 police officials also getting injured.

24. It has been submitted that the death of HC Ratan Lal was the first death in the North-East Delhi riots, and that the Trial Court has been dealing with the riot cases since then. It has also been submitted that the Trial Court has been apprised of the matter and has already dismissed the bail application of the Petitioner herein, and that the order of rejection of bail does not contain any legal infirmities.

25. The learned ASG has iterated that on 23.02.2020, the protestors who were convened at Wazirabad Main Road, Chand Bagh, unauthorizedly came onto the road and blocked the same. He submitted that in response to the same, the local police had issued a proclamation under Section 144 of the Cr.P.C. in order to bring the law and order under control. He further submitted that the protestors held a meeting on the night of 23.02.2020 at Chand Bagh to finalise a plan for 24.02.2020 as the President of the United States, Donald Trump, was coming to New Delhi. This meeting subsequently attended by several of the accused persons.

26. The learned ASG has submitted that on the morning on 24.02.2020, CCTV cameras which had been installed by GNCTD for security in the area were systematically disconnected or damaged or dislocated right from 08:00:41 AM to 12:50:57 PM. He argued before the Court that the protest at

Chand Bagh continued despite the proclamation of Section 144 Cr.P.C. orders. As a consequence, police officials had been deployed for law and order arrangements. The learned ASG averred that between 12:30 PM and 1:00 PM, at the behest of the organisers of the protest, a crowd carrying various weapons such as *dandas*, *lathis*, baseball bats, iron rods, and stones convened at the main Wazirabad Road, and refused to pay heed to the orders of the senior officers and police force. The crowd soon got out of control and started pelting stones at the police officers and resultantly, more than fifty police personnel suffered injuries and HC Ratan Lal was shot dead. It was further submitted by the learned ASG that the protestors turned violent, burnt private and public vehicles, as well as other properties in the vicinity, including a petrol pump and a car showroom.

27. It was then submitted by the learned ASG that absence of an accused from a video does not translate into absence of the accused from the scene of crime. He has argued that the role of the accused could be discerned from the statements of the police officers under Section 161 Cr.P.C. as well as the public witnesses who had identified the Petitioner as a main organiser of the protests and had stated that he would deliver hate speeches. Further, it is submitted that the Petitioner was a part of the meeting which was held on the night of 23.02.2020 wherein the planning for the violence that took place on 24.02.2020 was finalised. Additionally, he relied upon Masalti and Ors. v. State of Uttar Pradesh, (1964) 8 SCR 133, and submitted that by way of application of Section 149 IPC, the Petitioner herein would be deemed to be a member of the unlawful assembly and, therefore, would be equally and squarely liable for the crime committed.

28. The learned ASG has also contended that the addition of the offence

under Section 302 IPC means that ordinarily bail should not be granted. He has argued that it was not a case of a simple offence; if it was a grievous offence which was specially punishable with death, then bail could not be granted. On the issue of the parameters of bail, the learned ASG has submitted that in Gurcharan Singh v. State (Delhi Administration), (1978) 1 SCC 118, the Supreme Court has reiterated that the principle underlying Section 437 is towards grant of bail *except* in cases where there appears to be reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life, and also when there are other valid reasons to justify refusal of bail. He has argued that the overriding considerations in granting bail are, *inter alia*, the nature and gravity of the circumstances in which the offence is committed. The learned ASG has submitted that in P. Chidambaram v. Directorate of Enforcement(supra), the Supreme Court had held that in addition to the triple test or tripod test, gravity of the offence had to be considered while making a decision on grant of bail. Further, one of the circumstances to consider the gravity of offence would be the term of sentence that is prescribed for the offence which the accused is said to have committed. The learned ASG has argued that as the instant case pertains to the offence of the murder of a police officer and Section 302 IPC has been invoked, the matter lies within the four corners of the gravest of grave offences, and therefore, the accused cannot be entitled to bail.

29. Mr. Raju, the learned ASG, has then contended that conspiracy had been established on 23 February, 2020, and that the offence was pre-planned. He has submitted that meetings were held 1-2 days prior to the alleged incident wherein the protestors were motivated to gather at the site

of the alleged incident on 24.02.2020 in order to instigate violence, and therefore, there was a meeting of minds due to which Section 149 and Section 120B of the IPC were made out. Furthermore, secret codes had been used, and the Petitioner herein was fully involved as the CDR of the Petitioner revealed that he had been in touch with the other accused on the day of the alleged incident and that this had also been stated by the Petitioner in his disclosure statement. Mr. Raju has submitted that the Petitioner was also in touch with the accused persons in the FIR No. 59/2020 which pertains to the larger conspiracy of planning and executing riots, and has been arrested in the same. He has stated that the mobile phone of the accused was recovered, however the data on the same pertaining to 23.02.2020 and 24.02.2020 had been deleted.

30. It was also submitted by the learned ASG that there was only a small contingent of police officers present, and they were trying to protect themselves from the frontal attack by the crowd as they were outnumbered. He argued that had it been a simple protest, the crowd would not have been required to come with sticks, weapons etc. Furthermore, if sticks and other weapons were to be utilised for self-defence, then the damage and dislocation of CCTVs defeated the case because such an action would only lead to the inference that the accused wished to destroy the evidence or to ensure that the evidence did not surface.

31. The Court has heard the learned ASG Shri SV Raju with Mr. Amit Prasad, learned SPP for the State, and Ms. Rebecca John, learned Senior Counsel for the Petitioner. The Court has also perused the material on record.

32. In rejoinder, the learned Senior Counsel appearing for the petitioner

has stated that had the petitioner been an organiser of mob, he would have not been at his residence till 12:40 PM. It has been stated by the learned Senior Counsel that the normal course of conduct for the petitioner would have been to be a part of the mobilising crowd, as has been alleged by the prosecution. She further states that apart from the statements of certain witnesses that a secret meeting took place on 23.02.2020, there is nothing on record to show as to what was the nature of the meeting and what was discussed and an omnibus allegation that a secret meeting did took place and people were encouraged to protest on 24.02.2020 i.e. the date on which the President of the U.S.A was to come to India, is not sufficient to keep the petitioner in prison. The learned Senior Counsel has taken this Court through the statements under 164 Cr.P.C and 161 Cr.P.C to contend that the prosecution has gone extra mile to cover up the gaps in the earlier statements by procuring subsequent statements under Section 161 Cr.P.C. This Court is not inclined to comment on this at this juncture as it is not relevant for considering grant or denial of bail.

33. A perusal of the charge-sheet shows that the Petitioner is one of the main conspirators and has played a vital role in instigating the protestors at Chand Bagh. The chargesheet states that the Petitioner was entrusted with the job of maintaining the tent and the stage at the protest site, and that he would, along with the other accused, deliver hate speeches and instigate the public to be violent. It further states that the mobile phone of the Petitioner was recovered, however, the data pertaining to 23.02.2020 and 24.02.2020 had been deleted.

34. In the instant case, the issue which arises for consideration is whether when an offence of murder is committed by an unlawful assembly, then

whether each person in the unlawful assembly should be denied the benefit of bail, regardless of his role in the unlawful assembly or the object of the unlawful assembly. In order to understand the contention of the learned ASG, it is useful to refer to Section 149 IPC which reads as follows:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”
(emphasis supplied)

35. The Supreme Court has consistently held that in order to convict an accused with the aid of Section 149, a clear finding needs to be given by the Court regarding the nature of unlawful common object. Furthermore, if any such finding is absent or if there is no overt act on behalf of the accused, the mere fact that the accused was armed would not be sufficient to prove common object.

36. In Kuldip Yadav and Ors. v. State of Bihar, (2011) 5 SCC 324, the Supreme Court has categorically stated:

“39. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

If the members of the assembly knew or were of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149.”

(emphasis supplied)

37. In Sherey and Ors. v. State of U.P., (1991) Supp (2) SCC 437, the Supreme Court, while considering a matter on merits after the conclusion of the trial and deciding whether Section 149 of the IPC could be applied to hold an accused constructively liable on the basis of omnibus allegations made by witnesses and on the basis of their mere presence at the spot/scene of crime, had observed as follows:

“4. We have carefully gone through the evidence. We have no doubt that all the eye-witnesses were present. Nothing significant has been elicited in their cross-examination. However, the eye-witnesses simply named these appellants and identified them. So, the question is whether it is safe to convict all the appellants. In a case of this nature, the evidence of the witnesses has to be subjected to a close scrutiny in the light of their former statements. The earliest report namely the FIR has to be examined carefully. No doubt in their present deposition they have described the arms carried by the respective accused but we have to see the version given in the earliest report. In that report PW 1 after mentioning about the earlier proceedings has given a fairly detailed account of the present occurrence. He has mentioned the names of the witnesses and also the names of the three deceased persons. Then he proceeded to give a long list of names of the accused and it is generally stated that all of them were exhorting and surrounded the PWs and the other Hindus and attacked them. But to some extent specific overt acts are attributed to appellants 1, 4, 5, 7, 8, 10, 17, 22 and 25. It is mentioned therein that these nine

*accused were armed with deadly weapons and were seen assaulting the deceased Ram Narain and others. Now in the present deposition he improved his version and stated that in addition to these nine accused, five more persons also attacked the deceased and others. In view of this variation we think that it is safe to convict only such of the appellants who are consistently mentioned as having participated in the attack from the stage of earliest report. With regards the rest PW 1 mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. Further, the medical evidence rules out any lathis having been used. The doctor found only incised injuries on the dead bodies and on the injured PWs. Therefore, it is difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they are charged. **We feel it highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance...*** (emphasis added)

38. It is, therefore, noted that the applicability of Section 149 IPC, specifically read with Section 302, cannot be done on the basis of vague evidence and general allegations. When there is a crowd involved, at the juncture of grant or denial of bail, the Court must hesitate before arriving at the conclusion that every member of the unlawful assembly inhabits a common intention to accomplish the unlawful common object. There cannot be an umbrella assumption of guilt on behalf of every accused by the Court, and every decision must be taken based on a careful consideration of the facts and circumstances in the matter therein. This principle, therefore, gains utmost importance when the Court considers the question of grant or denial of bail.

39. With regard to the submission that if there appears to be reasonable grounds that the accused has committed an offence which is punishable with death or life imprisonment, then there is a bar imposed by Section 437(1) Cr.P.C on granting of bail, this Court states that the case of Gurcharan Singh (supra) also acknowledges that it is the Court which has the last say on whether there exists any reasonable grounds for believing that the accused is guilty of committing the said offence. Furthermore, there is no blanket bar as such which is imposed on the Court on granting of bail in such cases and that the Court can exercise discretion in releasing the accused, as long as reasons are recorded which clearly disclose how the discretion has been exercised. Additionally, in the case of the Prabhakar Tiwari (supra), the Supreme Court has held that despite the alleged offence being grave and serious, and there being several criminal cases pending against the accused, these factors by themselves cannot be the basis for the

refusal of prayer for bail. In Gurcharan Singh (supra), the Supreme Court had held as follows:

“24. Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr.P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment of life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The overriding considerations in granting of bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.”

40. The Petitioner was arrested on 06.04.2020 and has been in judicial custody since then. It has been 16 months since the arrest of the Petitioner. Bail jurisprudence attempts to bridge the gap between the personal liberty of

an accused and ensuring social security remains intact. It is the intricate balance between the securing the personal liberty of an individual and ensuring that this liberty does not lead to an eventual disturbance of public order. It is egregious and against the principles enshrined in our Constitution to allow an accused to remain languishing behind bars during the pendency of the trial. Therefore, the Court, while deciding an application for grant of bail, must traverse this intricate path very carefully and thus take multiple factors into consideration before arriving at a reasoned order whereby it grants or rejects bail.

41. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the Supreme Court laid down the parameters for granting or refusing the grant of bail which are as under:

- “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;*
- v. character, behavior, 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.”*

In Mahipal v. Rajesh Kumar, (2020) 2 SCC 118, the Supreme Court had observed as under:

- “12. The determination of whether a case is fit for the*

grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter of trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow and ought to be guided by the principles set out for the exercise of the power to set aside bail.”

42. It is the Constitutional duty of the Court to ensure that there is no arbitrary deprivation of personal liberty in the face of excess of State power. Bail is the rule and jail is the exception, and Courts must exercise their jurisdiction to uphold the tenets of personal liberty, subject to rightful regulation of the same by validly enacted legislation. The Supreme Court has time and again held that Courts need to be alive to both ends of the spectrum, i.e. the duty of the Courts to ensure proper enforcement of criminal law, and the duty of the Courts to ensure that the law does not become a tool for targeted harassment.

43. As has been stated above, the Petitioner herein has been in custody for 17 months and was formally added by way of chargesheet dated 08.06.2020. A perusal of the material on record has revealed to the Court that the

Petitioner has not been caught on any video footage in the vicinity of the protest site. Furthermore, the CDR and the Cell ID details which have been placed on record by way of the chargesheet and the supplementary showcase that the Petitioner had arrived within the vicinity of the site of the alleged incident post the commission of the alleged offence. There is some weight in the contention of the learned Senior Counsel appearing for the petitioner that if the petitioner was involved in mobilising the mob he would have been at his residence till 12:10 PM when, according to the prosecution, the preparation started at 11-12 PM itself when the CCTV cameras were systematically dislocated. Further, the Call Detail Records of the petitioner shows that the petitioner was on the move. The fact that the petitioner's location is recorded through a mobile tower which is near the Scene of Crime cannot, at this moment, lead to a definitive conclusion that the petitioner was there at the Scene of Crime, and therefore, should be denied bail. At this juncture, it appears that the statements of the police officers that have been recorded are wholly contradictory to the CDR and Cell ID details that are on record.

44. While the definitiveness and the veracity of the statements of the public witnesses and police officials is not to be delved into at this juncture and is a matter of trial, this Court is of the opinion that the same is not sufficient to justify the continued incarceration of the Petitioner herein. Additionally, merely being one of the organisers of the protest as well as being in touch with others who participated in the protest is also not sufficient enough to justify the contention that the Petitioner was involved in the pre-planning of the alleged incident. It is to be noted that the right to protest and express dissent is a right which occupies a fundamental stature in

a democratic polity, and therefore, the sole act of protesting should not be employed as a weapon to justify the incarceration of those who are exercising this right.

45. The fourth chargesheet has already been filed, and trial in the matter is likely to take a long time. This Court is of the opinion that it would not be prudent to keep the Petitioner behind bars for an undefined period of time at this stage. The Petitioner has roots in society, and, therefore, there is no danger of him absconding and fleeing. Furthermore, the two co-accused of the Petitioner have been enlarged on bail *vide* Bail Appln. 1360/2021 dated 24.05.2021, and Bail Appln. 3550/2021 dated 16.02.2021.

46. In view of the facts and circumstances of the cases, without commenting on the merits of the matter, this Court is of the opinion that the Petitioner cannot be made to languish behind bars for a longer period of time, and that the veracity of the allegations levelled against him can be tested during trial.

47. Accordingly, this Court is inclined to grant bail to the Petitioner in FIR No. 60/2020 dated 25.02.2020 registered at PS Dayalpur for offences u/s 186/353/332/323/109/144/147/148/149/153A/188/333/336/427/307/308/302/201/120-B/34 of the IPC, read with 3/4 of the PDPP Act on the following conditions:

- a) The Petitioner shall furnish a personal bond in the sum of ₹35,000/- with one surety of the like amount to the satisfaction of the Trial Court/Duty Magistrate.
- b) The Petitioner shall not leave NCT of Delhi without prior permission of this Court.

- c) The Petitioner shall report to the concerned Police Station every Tuesday and Thursday at 10:30 AM and should be released after completing the formalities within half an hour.
- d) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- e) The present address which has been given by the Petitioner is F-46, Gali No. 7, Jagatpuri, Delhi. Before the acceptance of the surety, the Trial Court/Duty Magistrate is required to confirm the same. The Petitioner is directed to continue to reside at the same address. In case there is any change in the address, the petitioner is directed to intimate the same to the IO.
- f) The Petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses.
- g) Violation of any of these conditions will result in the cancellation of the bail given to the Petitioner.

29. It is made clear that the observations made in this Order are only for the purpose of grant of bail and cannot be taken into consideration during the trial.

48. Accordingly, the bail application is disposed of along with the pending application(s), if any.

SUBRAMONIUM PRASAD, J.

SEPTEMBER 03, 2021

Rahul