

A.F.R.

Reserved on 11.08.2021

Delivered on 25.08.2021

Court No. - 52

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 28763 of 2021

Applicant :- Sher Ali

Opposite Party :- State of U.P.

Counsel for Applicant :- Zia Uddin Ahmad, Tanisha Jahangir Monir

Counsel for Opposite Party :- G.A.

Hon'ble Samit Gopal, J.

1. Heard Sri Zia Uddin Ahmad, learned counsel for the applicant and Sri Sanjay Kumar Singh, learned AGA for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant Sher Ali, seeking enlargement on bail during trial in connection with Case Crime No. C-37 of 1997, under Sections 364, 304, 506 IPC, registered at Police Station Phoolpur, District Varanasi.

3. The prosecution case as per the First Information Report registered by Sanjay Kumar Gupta the son of the deceased Gokrakhnath @ Om Prakash Gupta against Shankhdhar Dwivedi Sub-Inspector, Sher Ali, Digvijay Pandey, Jagat Singh, R. Rajan, Suresh Prasad Agarwal, Mahesh Chandra Agarwal and one unknown person of Kumar Guest House, Lanka, Varanasi and some other persons on 28.02.1997 at about 04:00 AM is as follows:-

(i) On 27.02.1997 at about 07:00 PM, one person whose name is not known but can be identified by the first informant and lives in Kumar Guest House, Lanka, Varanasi who if appears can be identified along with Mahesh Chandra Agarwal the brother of a transporter Suresh Prasad Agarwal of Shahdol, Madhya Pradesh came to the house of the first informant and inquired about his father to which he stated that his father will come in the night. On asking about the work the said person replied that he has to place an order for bricks.

(ii) On 28.02.1997 at about 04:00 AM, the same person of Kumar Guest House came along with Shankhdhar Dwivedi Sub-Inspector, Police Station Kotwali, District Shahdol, Madhya Pradesh and the police personnels of the said Police Station namely Sher Ali (the present applicant), Digvijay Pandey, Jagat Singh along with the transporter of Shahdol Suresh Prasad Agarwal and Mahesh Chandra Agarwal and some unknown persons in three vehicles being a Maruti Van No. M.P. 20A 9700, a Commander Jeep No. M.P.18 2399 and one Trax Jeep having a closed body of white colour to the house of the first informant and shouted Om Prakash Gupta the name of the father of the first informant, called him, on which, father of the first informant came out and then the said persons forcibly caught hold of his father, and while assaulting took him inside the Commander Jeep. The first informant, his brothers Ajay, Vijay, Arvind and his mother Smt. Nirmala Devi inquired about the reason for the same, to which, the persons did not tell them anything and kidnapped his father and also the cleaner of Truck No. URH 8449 Kariya Yadav and also took away the truck.

(iii) The first informant then went to Police Station Phoolpur and to different Police Stations in District Varanasi to know the whereabouts of his father and even at the district court and other places but could not know anything and then in the afternoon informed the S.S.P., Varanasi through a telegram. On an inquiry from Kumar Guest House, Lanka he came to know that the police of District Shahdol have taken away his father. The said unknown persons who had come to his house were also not available at the Guest House. On 01.03.1997 he sent a telegram to the S.S.P., Varanasi and S.P. Shahdol.

(iv) He kept on inquiring about his father and subsequently on 02.03.1997 at about 08:00 AM, a police constable from Police Station Phoolpur came and told him that a wireless message was received from Shahdol that his father has died due to heart attack. On getting the said information, the first informant along with his relatives Umashankar

Jaiswal, Rajendra Prasad Jaiswal, Pratap Narayan Kanaujia, Om Prakash Gupta and Arvind Kumar Singh went to Shahdol on a Jeep and reached there in the morning of 03.03.1997. From the newspaper in Shahdol, he came to know that the dead body of his father is lying in the District Hospital and the postmortem examination has been conducted. He came to know in Shahdol that his father have brought from Varanasi to Police Station Kotwali, District Shahdol by the District Inspector, Kotwali Incharge R. Rajan, Sub-Inspector Shankhdhar Dwivedi, police personnels, Sher Ali, Digvijay Pandey, Jagat Singh and others and they mercilessly and inhumanly assaulted his father due to which his father died in the Police Station itself on 01.03.1997 at about 08:00 PM and the police in order to conceal the factum of murder in conspiracy with the doctors of District Hospital, Shahdol have shown the admission of his father in the hospital one hour prior to his death and have shown the death in the hospital whereas his father had died at Police Station Kotwali itself. The cleaner Kariya was illegally detained by the police on the said day. The police did not let them see the dead body till 04:00 PM.

(v) On the said day at about 02:00 PM, the first informant gave a tehreer to the Inspector In-charge Police Station Kotwali, District Shahdol about the kidnapping and murder of his father but no First Information Report was registered.

(vi) On 03.03.1997 at about 04:00 PM after great persuasion and hectic efforts, the first informant and his companions were allowed to see the dead body of his father. The dead body was in a swollen condition and foul smell was coming from it and there were injury marks at various places. The first informant and his companions wanted to bring the dead body to Varanasi but the Inspector In-charge Kotwali R. Rajan and other police personnels threatened them that they will also meet the same fate as there father are else, they should cremate the body in Shahdol only. R. Rajan and other police personnels under their supervision got the dead body shifted to

near a river near Akasvani Shahdol and they themselves arranged for the wood and got the body cremated and threatened the first informant and other persons that they should not be seen now otherwise they will also be killed.

(vii) On 04.03.1997 the first informant reached Varanasi and they went to Police Station Phoolpur and told them the entire incident and give the information who assured that they will look into the matter and he may go and do the remaining last rites ceremonies of his father. The first informant then did the 13th day ceremony of his father and then on 16.03.1997 went to Police Station Phoolpur to inquire about the developments to which he was told that no further information has been received from Shahdol and he may inquire about it after a week. On 25.03.1997 he again went to the Police Station Phoolpur where the constable police told him to give an application to the S.S.P. otherwise no action would be taken in the matter.

(viii) In the various newspapers in Shahdol, the news about the custodial death of his father was printed and various political leaders of different parties had moved applications against the In-charge Sub-Inspector Kotwali and other police personnels for getting a case registered for murder against them and a high level inquiry be set up and an immediate action was demanded for which even agitations were being done. The information was given by the said persons to the first informant and even the copies of the said newspapers were made available to him. Later on, the newspapers of Shahdol published a news item that inquiry is being demanded in the matter. The first informant then sent an application about the incident to the S.S.P. Varanasi by registered post but no action was taken on it.

(ix) The said persons had kidnapped his father and have murdered him and as such a case be registered and investigation be done in the interest of justice.

4. The First Information Report was registered on the basis of an application dated 21.04.1997 moved by Sanjay Kumar Gupta, the first informant under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Varanasi with the prayer that appropriate orders be passed for registration of the case and investigation therein.

5. The postmortem examination of the deceased Gorakhnath @ Om Prakash Gupta was conducted on 02.03.1997 at 12:45 PM by a team of three doctors of District Shahdol. The doctors found two injuries on the body of the deceased which are as follows:-

(i) Contusion, margins reddish blue. Centre pale of 6cm x 2cm transversely placed over the lateral aspect of lower part of left thigh.

(ii) Contusion, margins reddish blue. Centre pale of 5cm x 2cm was present just above the injury no.1.

For the noted injuries, the doctors opined as follows:-

“Injury No. 1 and 2 mentioned on page No. 3 are antemortem in nature and caused by hard and blunt object.”

In so far as the cause of death is concerned, the team of doctors was of the following opinion:-

“No definite opinion can be given. Facts and findings have been described in detail. The viscera was preserved for chemical and histopathological examination. The time since death was within 24 hours.”

6. After registration of the First Information Report, the matter was under investigation by the local police, but vide order dated 09.10.1997 of the S.P. (Rural), Varanasi, the same was transferred to S.I.S. Branch, Varanasi for investigation. The S.I.S. concluded the investigation and submitted a Final Report No. 18 of 1998 dated 23.10.1998.

7. Against the final report as submitted by the S.I.S., Varanasi on 23.10.1998, the first informant filed a protest petition dated 31.01.2001

along with his affidavit. The Court of the Chief Judicial Magistrate, Varanasi vide order dated 05.06.2007 accepted the said protest petition and rejected the final report as submitted by the police and summoned the accused persons for offences under Sections 364, 304, 506 IPC. Non bailable warrants were also issued simultaneously and the case was ordered to be registered as a State case. The said order is annexed as annexure 26 to the affidavit.

8. Against the order dated 05.06.2007, an application under Section 482 Cr.P.C. was filed by R.Rajan before this Court which was numbered as Criminal Misc. Application (U/s 482 Cr.P.C.) No. 22539 of 2007 (R. Rajan Vs. State of U.P. and another) in which vide order dated 13th September, 2007 the further proceedings of the said case were stayed. The said matter was heard finally on 27.08.2012 and the judgment was reserved. The judgment could not be delivered and the matter was directed to be listed for rehearing before the appropriate Bench vide order dated 14.02.2013. The interim order passed therein was directed to continue till the next date fixed.

9. The first informant Sanjay Kumar Gupta then filed a Writ Petition (Criminal) No. 8 of 2018 before the Apex Court titled as “Sanjay Kumar Gupta Vs. State of U.P. and another” in which vide order dated 23.09.2020, the Apex Court vacated the order dated 13.09.2007 passed in the said 482 Cr.P.C. petition and directed the Chief Judicial Magistrate, Varanasi to proceed with the matter in accordance with law. The writ petition was allowed. The order passed by the Apex Court is extracted herein-below:-

“The office report is that respondent No.2 has refused to accept notice and thus, is deemed to have been served.

The facts of the case make a shocking reading as the allegation is of custodial death of the father of the petitioner - Late O.P. Gupta which, as per the medical report, occurred on 01.03.1997 after his arrest from Varanasi on 28.02.1997. The case was sought to be made out as one of heart attack, but the petitioner

relies upon the medical report of his father dated 21.02.1997 which shows that he had a normal cardiac condition. This also did not substantiate the fact that there were ante mortem injuries on the body. On the petitioner moving an application under Section 156(3) of the Cr.P.C., the SHO, Phoolpur, Varanasi (U.P.) was directed to register an FIR and investigate the matter.

Case Crime No.C-37/97 was lodged under Sections 364, 304 and 506 of the IPC against respondent No.2 and other police personnel. The investigation was transferred to the SIS Branch, Varanasi and the final report dated 23.10.1998 was filed by the I.O., against which the petitioner filed a protest petition, pursuant where to the Chief Judicial Magistrate, Varanasi rejected the closure report, accepted the protest petition and consequently issued summoning orders under Sections 364, 304 and 506 IPC and non-bailable warrants against the accused persons in terms of an order dated 05.06.2007. The order records that the investigation revealed that Late O.P.Gupta has picked up from his residence by the M.P.Police without authority of law on 28.02.1997.

The aforesaid summoning order was challenged by respondent No.2 before the Allahabad High Court in Criminal Miscellaneous Application No.22539 of 2007 for stay of proceedings of the case being Case No.6497 of 2007 in which notice was issued and an interim stay order was granted on 13.09.2007. The matter has continued in that position since then for the last 13 years with the criminal proceedings stayed. In fact, at one stage, orders were reserved on the proceedings on 14.02.2013, but were again listed for rehearing on 06.03.2013, which till date has not produced results.

The issue has also arisen as respondent No.2 was then in services of the State of Madhya Pradesh. The counter affidavit of respondent No.1, State of Uttar Pradesh practically supports the stand of the petitioner.

We thus, vacate the order dated 13.09.2007 passed in Criminal Miscellaneous Application No.22539 of 2007 by the Allahabad High Court and direct the Chief Judicial Magistrate, Varanasi to proceed with the matter in accordance with law.

We consider appropriate also to direct that this order be placed before the Chief Justice of the Allahabad High Court for administrative action as to why such a situation came to pass and why the trial Court order remained stayed for 13 years by an ad interim order in case of a custodial death. The Chief Justice may call upon the Registrar of the High Court to look into the matter and thereafter a report be submitted on the Administrative Side before this Court.

The writ petition is allowed in the above terms leaving parties to bear their own costs.

Needless to say, in view of this long passage of time of 13 years, the trial court will proceed with the trial almost on a day to day basis as far as possible in the given circumstances and endeavour to conclude the trial within a period of one year from its commencement.

Pending application(s) stand(s) disposed of.”

10. The said 482 petition being Criminal Misc. Application (U/s 482 Cr.P.C.) No. 22539 of 2007 (R. Rajan Vs. State of U.P. and another) was connected with two other petitions being Criminal Misc. Application (U/s 482 Cr.P.C.) Nos. 24013 of 2007 (Shankhdhar Dwivedi and others Vs. State of U.P. and others) and 24145 of 2007 (Suresh Chandra Agrawal Vs. State of U.P. and another) which were disposed of vide order dated 08.10.2020 of this Court in view of the order dated 23.09.2020 of the Apex Court in Writ Petition (Crl.) No. 8 of 2018.

11. The order dated 08.10.2020 of this Court was then challenged before the Apex Court in Special Leave to Appeal (Crl.) No. 5499 of 2020 (R.Rajan Vs. State of U.P. and another) which was dismissed vide order dated 19.11.2020. The said order is extracted herein-below:-

“Despite the best persuasion of learned counsel for the petitioner, who argued at some length, we are unable to persuade ourselves to interfere with the impugned order under Article 136 of the Constitution of India in the given facts of the case.

The special leave petition is accordingly dismissed.

Pending applications shall also stand disposed of.”

12. Subsequently, co-accused Jagat Singh and the present applicant Sher Ali preferred a Crl. Misc. Anticipatory Bail Application No. 7440 of 2021 (Jagat Singh and another Vs. State of U.P.) which vide order dated 06.04.2021 was allowed and it was ordered that in the event of arrest of the applicants therein they shall be released on anticipatory till the conclusion of trial subject to the conditions in the said order. The said order is extracted herein-below:-

“1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. This anticipatory bail application has been filed on behalf of the applicants - Jagat Singh and Sher Ali, seeking anticipatory bail in Case Crime No. C-37 of 1997, under Sections - 364, 304 and 506 I.P.C., Police Station - Phoolpur, District - Varanasi, during pendency of trial.

3. At the outset, it is stated that in exact similar circumstance Shankhdhar Dwivedi, the co-accused who was Sub-Inspector at the relevant time has already been granted anticipatory bail in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1195 of 2021, vide order dated 03.02.2021. The other co-accused R. Rajan is also stated to have similarly enlarged on anticipatory bail in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 9211 of 2020, vide order dated 03.02.2021. For the reasons contained in those orders, the present applicants against whom similar allegations have been made are also entitled to similar protection.

4. In view of the above, no useful purpose would be served in keeping the present application pending or calling for counter affidavit at this stage. Without expressing any opinion on the merits of the case, the applicant is entitled to anticipatory bail in this case, at this stage.

5. In the event of arrest of the applicants - Jagat Singh and Sher Ali, involved in the aforesaid case crime, they shall be released on anticipatory bail till conclusion of the trial, on their furnishing a personal bond of Rs. 50,000/- each with two sureties of the like amount to the satisfaction of the Station House Officer of the police station concerned on the following conditions:

(i) The applicants shall make themselves available for interrogation by a police officer as and when required.

(ii) The applicants shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court or to any police officer or tamper with the evidence.

(iii) The applicants shall not leave India without the previous permission of the court.

(iv) In default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicants.

6. Present application stands disposed of.”

13. Co-accused R.Rajan had also filed CrI. Misc. Anticipatory Bail Application No. 9211 of 2020 (R. Rajan Vs. State of U.P.) and vide order dated 03.02.2021 he was also granted anticipatory bail. The said order was challenged before the Apex Court in SLP (CrI.) Nos. 1928-1929 of 2021 (Sanjay Kumar Gupta Vs. State of U.P. and another) and also the order dated 06.04.2021 passed in CrI. Misc Anticipatory Bail Application No. 7440 of 2021 was also under challenge before the Apex Court in SLP (CrI.) No. 3496 of 2021. Both the SLPs were connected together and were disposed of vide order dated 25th May, 2021. The said order is extracted herein-below:-

“SLP(CrI.)Nos. 1928-1929 of 2021

Leave granted.

In these appeals, the informant of Case Crime No. C-37 of 1997, under Sections 364, 304 and 506 IPC, Police Station – Phoolpur, District – Varanasi, has challenged the order dated 03.02.2021 passed by the High Court of Judicature at Allahabad in Criminal Miscellaneous Anticipatory Bail Application No. 1195 of 2021, granting anticipatory bail to the respondent No. 2-Shankhdhar Dwivedi in SLP(CrI.) No. 1928 of 2021; and another order of even date by the High Court in Criminal Signature Not Verified Miscellaneous Anticipatory Bail Application No. 9211 of 2020, granting anticipatory bail to the respondent No. 2-R. Rajan in SLP(CrI.) No. 1929 of 2021.

The allegations in this matter are of custodial death of the father of the appellant on 01.03.1997, after his arrest from Varanasi on 28.02.1997. After having gone through the routes of the application under Section 156(3) of the Criminal Procedure Code, 1973; filing of negative final report dated 23.10.1998; filing of protest petition by the appellant; acceptance of the protest petition; and certain miscellaneous applications in the High Court for stay of proceedings, ultimately, the matter was taken up by this Court in Writ Petition (CrI.) No. 8 of 2018.

The said writ petition was decided by the order dated 23.09.2020 by a 3-Judge Bench of this Court to which, one of us (Aniruddha Bose, J.) was a party. Therein, after taking note of the relevant background aspects and while expressing dissatisfaction that the criminal proceedings relating to the allegations of custodial death had remained stayed for 13

years, this Court effaced the order/s which were hindering the progress of the matter; and directed expeditious proceedings in the trial. This Court also directed that the Trial Court shall proceed with the trial almost on day-to-day basis and make an endeavour to conclude the same within a period of one year from the date of its commencement.

We are not recounting several other proceedings in the matter at different stages, for being not relevant for the present purpose. The relevant part of the matter is that pertaining to the applications seeking anticipatory bail by the respondents.

Though in the impugned order dated 03.02.2021 in Criminal Miscellaneous Anticipatory Bail Application No. 1195 of 2021, the High Court noticed the aforesaid order of this Court dated 23.09.2020 but, proceeded to grant anticipatory bail to the respondent No. 2-Shankhdhar Dwivedi with the observations and consideration which read as under:-

“7. After considering the rival submissions this court finds that there is a case registered against the applicant. It cannot be definitely said when the police may apprehend him. After the lodging of FIR the arrest can be made by the police at will. There is no definite period fixed for the police to arrest an accused against whom an FIR has been lodged. The courts have repeatedly held that arrest should be the last option for the police and it should be restricted to those exception cases where arresting the accused is imperative or his custodial interrogation is required. Irrational and indiscriminate arrests are gross violation of human rights. In the case of Joginder Kumar v. State of Uttar Pradesh AIR 1994 SC 1349 the Apex Court has referred to the third report of National Police Commission wherein it is mentioned that arrests by the police in India is one of the chief source of corruption in the police. The report suggested that, by and large, nearly 60 percent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 percent of expenditure of the jails. Personal liberty is a very precious fundamental rights and it should be curtailed only when it becomes imperative. According to the peculiar facts and circumstances of the peculiar case the arrest of an accused should be made.

8. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and antecedents of applicant, he is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of

Sushila Aggarwal vs. State (NCT of Delhi)-2020 SCC Online SC 98. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.”

After granting anticipatory bail to the respondent-Shankhdhar Dwivedi, the High Court, by a separate order of even date in Criminal Miscellaneous Anticipatory Bail Application No. 9211 of 2020, extended the same benefit of anticipatory bail to the other respondent-R. Rajan, while observing that his case was on identical footing.

The petitions seeking leave to appeal by the informant against the aforesaid orders of the High Court were taken up for consideration on 25.02.2021 by another 3-Judge Bench of this Court wherein too, one of us (Dinesh Maheshwari, J.) was a party. After granting permission to file the petition, and while issuing notices, this Court specifically stayed the operation of impugned order granting anticipatory bail.

It was later on brought to the notice of this Court that the learned Chief Judicial Magistrate, Varanasi declined to take the requisite steps against the accused persons, even though the order of the High Court granting anticipatory bail stood in abeyance because of the stay order of this Court. In the order dated 07.04.2021, this Court found that the order passed by the Chief Judicial Magistrate was not in sync with the stay order dated 25.02.2021. This Court expressed clear views that the respondents ought to be taken into custody; and also observed that the Court would be inclined to hear them only thereafter on the issue as to whether the anticipatory bail granted by the High Court was sustainable or not. Having said so, this Court accepted the submissions at that stage by the learned senior counsel for the respondents that they will surrender within one week.

Thereafter, it was reported before the Court on 06.05.2021 that the respondents had since surrendered and the matter was ordered to be listed before the vacation Bench while giving liberty to the respondents to file counter affidavit. The respondents, as per the submissions made, had surrendered on 14.04.2021 and 15.04.2021 respectively.

The respondents have filed a detailed counter affidavit seeking to support the orders granting anticipatory bail with reference to the factual aspects of the case as also with reference to the decision of this Court in Sushila Aggarwal vs. State (NCT of Delhi): 2020 SCC Online SC 98. Further, the plea for setting aside the order granting anticipatory bail is opposed with

reference to the decision of this Court in *Dolat Ram v. State of Haryana*: (1995) 1 SCC 349.

The submissions have been opposed on behalf of the appellant with reference to the gravity of offences as also the observations and directions of this Court in the aforesaid order dated 23.09.2020, as passed in Writ Petition (Crl.) No. 8 of 2018. The submissions of the appellant have been duly supported on behalf of the State.

Having examined the matter in its totality, we do not find it necessary to dilate on the submissions pertaining to merits of the case, lest any prejudice is caused to any of the parties in relation to the pending trial. Suffice it to observe for the present purpose that, *prima facie*, we have not been able to persuade ourselves to endorse the approach of the High Court in granting anticipatory bail with the observations in the above-quoted paragraphs 7 and 8 of the order impugned. It needs hardly any elaboration that the bail plea in a particular case cannot be considered and decided merely with generalised observations about the processes of law, or the fundamental rights, or any particular study report.

Be that as it may, even while expressing disagreement with the approach of the High Court, we would prefer not to make any further comment in the matter because of the other relevant factors that: (a) the Trial Court is bound to proceed expeditiously as already directed by this Court in the order dated 23.09.2020; and (b) the respondents have indeed surrendered and are in custody.

As indicated hereinabove, it is difficult to endorse the order impugned, whereby anticipatory bail came to be granted, essentially with generalised observations and without adverting to the relevant considerations and material circumstances of the case. In any case, now when the respondents have surrendered and taken into custody, all the aspects related with the prayer of grant of anticipatory bail are practically rendered redundant.

However, after the respondents have surrendered and have been taken into custody, their right to seek regular bail during the pendency of the trial is not taken away. Of course, such a plea ought to be initially considered by the Court concerned upon making of a proper application in that regard and subject to the submissions of the relevant parties.

In view of the above, even while we are inclined to allow these appeals and to set aside the impugned orders while rejecting the applications made by the respondents for anticipatory bail, we would leave it open for them to apply for regular bail. If any such prayer is made by them, the same may be considered by the Court concerned in accordance with law,

uninfluenced by any observations occurring in this matter in any of the orders pertaining to the plea for anticipatory bail and irrespective of any observation made in these appeals.

In the interest of justice, we also deem it appropriate to observe that if the respondents apply for regular bail, their prayer be given due consideration expeditiously by the Court concerned.

The appeals are disposed of in the above terms.

All pending applications also stand disposed of.

SLP(Crl.) No. 3496 of 2021.

Leave granted.

This appeal is directed against another order dated 06.04.2021 relating to the same Case Crime No. C-37 of 1997, by the High Court of Judicature at Allahabad in Criminal Miscellaneous Anticipatory Bail Application No. 7440 of 2021, whereby the High Court granted anticipatory bail to other two co-accused persons, respondent Nos. 2- Jagat Singh and 3-Sher Ali on the basis of the aforesaid orders dated 03.02.2021.

So far as the impugned order dated 06.04.2021 is concerned, the same is in the teeth of the stay order dated 25.02.2021 passed by this Court in SLP(Crl.) Nos. 1928-29 of 2021, whereby operation of the relied upon order was stayed by this Court. It appears that the said stay order of this Court was not brought to the notice of the High Court because, the High Court could not have passed the order dated 06.04.2021 with reference to an order which was not in operation in view of the stay order of this Court.

Thus, the order so passed by the High Court on 06.04.2021 cannot be approved for the reasons and observations in the preceding part of this order; and additionally for the reason that the impugned order dated 06.04.2021 stands in conflict with the stay order passed by this Court on 25.02.2021.

In this matter, by an order passed by this Court on 28.04.2021, operation of the impugned order dated 06.04.2021 was stayed with directions to the respondent Nos. 2 and 3 to surrender. It has been submitted by the learned counsel for these respondents that they have surrendered on 19.05.2021.

Taking note of the submissions so made and for the reasons foregoing, this appeal is also allowed and while setting aside the impugned order and rejecting the application made by the respondents for anticipatory bail, we would extend the same liberty and observations for these respondents that it would be open for them to apply for regular bail and if any such prayer is made by them, the same may be considered expeditiously

by the Court concerned in accordance with law, uninfluenced by any observations occurring in this matter in any of the orders pertaining to the plea for anticipatory bail and irrespective of any observation made in this appeal.

The appeal stands disposed of in the above terms.

All pending applications also stand disposed of.”

14. The Apex Court had set aside the orders of anticipatory bail granted in the petition of the applicant and co-accused persons and had rejected the said applications and directed them to apply for regular bail and directed that if any such prayer is made by them, the same be considered expeditiously in accordance with law.

15. The applicant surrendered on 19.05.2021 before the court below at Varanasi and filed application for bail which was rejected vide order dated 30.06.2021 passed by the Additional Sessions Judge, Court No. 1 Varanasi and as such the present bail application has been filed before this Court.

16. The series of prolonged litigation ends here with the applicant surrendering and before the court concerned and then resorting to filing bail application under Section 439 Cr.P.C.

17. Learned counsel for the applicant argued that:-

(i) The applicant has been falsely implicated in the present case.

(ii) The deceased Gorakhnath @ Om Prakash Gupta was involved in Case Crime No. 103 of 1997 under Section 420, 406 IPC, Police Station Kotwali, District Shahdol in which he was arrested and subsequently a charge sheet was also submitted against him and Kariya @ Chandrabali on 25.07.1997. Shiv Shankar Gupta to whom the paper loaded in the said truck was sold is also an accused in the said charge sheet but as an absconder.

(iii) The deceased while being in custody at Police Station Kotwali, District Shahdol complained about chest pain and wanted to ease himself

after which he was taken to the toilet by the applicant who was present there but he fell on the stairs due to severe heart attack.

(iv) The deceased was taken to the hospital and was admitted there who died later on, for which the doctors after the postmortem could not give any definite opinion about the cause of death and preserved the viscera which was examined by the Forensic Science Lab and the report thereof does not mention of any poison being found in the body of the deceased. The death of the deceased was a natural death.

(v) After lodging of the First Information Report on the basis of an application under Section 156(3) Cr.P.C., the matter was being investigated by the local police but vide order dated 09.10.1997 passed by the S.P. (Rural) Varanasi, the investigation was transferred to S.I.S. Branch, Varanasi.

(vi) The investigation concluded by way of submission of a final report in the Court on 23.10.1998 after which a protest petition was filed on 31.01.2001 which was allowed and the final report was rejected and the applicant and other accused persons being a total of six accused named in the First Information Report were summoned to face trial.

(vii) The First Information Report is based on totally false and frivolous allegations. There is no corroboration of the version of the prosecution that the deceased died a custodial death. The death was a natural death. The applicant is a retired government servant and his implication therein is false.

(viii) The applicant is having no criminal history as stated in para 84 of the affidavit and is in jail since 19.05.2021.

18. Per contra, learned AGA for the State opposed the prayer for bail and argued that:-

(i) The deceased was taken away from his house by the applicant and co-accused persons which is not disputed.

- (ii) The deceased was under police custody at Police Station Kotwali, District Shahdol on the date of his death.
- (iii) The death has occurred while the deceased was under police custody.
- (iv) The order summoning the accused while allowing the protest petition and rejecting the final report is a well considered.
- (v) The beating of the deceased while being in police custody is evident from the fact that he has received two contusions on his body and the site of the injuries are fleshy part of the body which can be received only after being assaulted.
- (vi) On the own showing of the applicant as per the argument and while referring to the pleading of para 23, it was the applicant who was present when the deceased felt unwell.
- (vii) The present case is a case of custodial death in which the deceased has received injuries on his body as is evident from the postmortem report itself.
- (viii) The postmortem report and the opinion of the doctors therein is not suggestive of any heart attack or heart problem.
- (ix) The release of the applicant at the stage when the trial has been expedited by the Apex Court vide order dated 23.09.2020 may have an adverse affect therein as he is a resident of a different State being Madhya Pradesh.
- (x) The matter is serious in nature as it concerns custodial death.
- (xi) The prayer for bail of the applicant be rejected.

19. After having heard learned counsels for the parties and having gone through the records, it is evident that the applicant is named in the First Information Report. The case of the prosecution that the deceased was taken away to Police Station Kotwali, District Shahdol is not under

dispute. The applicant is named specifically and has been assigned the role of taking away the deceased from Varanasi to Shahdol along with other co-accused persons. The presence of the applicant even at the Police Station and he being there has been argued and pleaded in para 23 of the bail application and even it is pleaded that when the deceased feel ill the applicant was present there. The deceased as per the postmortem report has received injuries on his body which are suggestive of assault on him by hard and blunt object. There is no finding in the postmortem examination report which would be suggestive of any heart problem or cardiac arrest/heart attack. There is nothing to show that the death was natural. The present case is a case of custodial torture and death. The Apex Court vide order dated 23.09.2020 passed in Writ Petition (Crl.) No. 8 of 2018 has directed the trial court to proceed with the trial on a day today basis and make an endeavour to conclude it within a period of one year. The applicant is a resident of a different State. He has been in the police force which is a disciplined force and enshrined with the pious duty of maintaining law and order and protecting citizens. His release may have an adverse effect in the trial.

20. Custodial violence, custodial torture and custodial deaths have always been a concern for civilized society. Times and again the judicial verdicts of the Apex Court and other Courts have shown their concern and anguish in such matters.

21. In the celebrated case of **D.K. Basu Vs. State of West Bengal : (1997) 1 SCC 416** the Apex Court while expressing its anguish in cases of custodial deaths has observed as follows:

"22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed

contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic “No”. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In *Neelabati Bahera v. State of Orissa*, (1993) 2 SCC 746 (to which Anand, J. was a party) this Court pointed out that prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed: (SCC p. 767, para 31)

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort

is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. *State of Madhya Pradesh v. Shyamsunder Trivedi & Ors.*, (1995) 4 SCC 262 is an apt case illustrative of the observations made by us above.”

22. Further in the case of **Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and another: (2003) 7 SCC 749** the Apex Court has again shown its anguish in the matters of custodial violence, torture and abuse of police powers. It has been observed as follows:

"If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time", said Abraham Lincoln. This Court in *Ragbir Singh v. State of Haryana* (1980 (3) SCC 70), took note of these immortal observations (SCC p. 72, para 4) while deprecating custodial torture by the police.

2. Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Despite this pious declaration, the crime continues unabated, though every

civilized nation shows its concern and makes efforts for its eradication.

3. If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of people's rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

4. Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short "the Constitution") and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short "the Code") deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20 (3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. Justice Brandies' observation which have become classic are in following immortal words:

Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself. (In *Olmstead v. United States*, 277 US 438, US at p. 485, quoted in *Mapp v. Ohio*, 367 US 643, US at p. 659)

5. The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives

and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghbir Singh case (1980 (3) SCC 70) more than two decades back seems to have fallen to leaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma v. State of U. P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @ Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U. P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995 (3) SCC 702), State of M. P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262) and by now celebrated decision in D. K. Basu v. State of West Bengal (1997 (1) SCC 416) seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

6. Rarely, in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter.

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact-situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lockup because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule

of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under-trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if it happen will be a sad day, for anyone to reckon with."

23. Considering the totality of the case in particular, nature of evidence available on record, I am not inclined to release the applicant on bail.
24. The bail application is, accordingly, **rejected**.
25. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.
26. The computer generated copy of such order shall be self attested by the counsel of the party concerned.
27. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

Order Date :- 25.08.2021
M. ARIF

(Samit Gopal, J.)