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

Date of decision: 01st FEBRUARY, 2022

IN THE MATTER OF:

\+   **BAIL APPLN. 2312/2021**

SHRI ARUN KUMAR @ ARUN KUMAR MALIK ..... Petitioner

Through Mr. Ashwin Vaish, Advocate

versus

STATE ..... Respondent

Through Mr. Amit Prasad, SPP for the State with Mr. Ayodhya Prasad, Advocate and SI Santosh Gupta, Crime Branch
Mr. Mehmood Pracha , Advocate with Mr.Sanawar Choudhary and Mr. Jatin Bhatt, Advocates for the complainant.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner seeks bail in FIR No. 70/2020 dated 27.02.2020 registered at PS Bhajanpura for offences under Sections 147, 148, 149, 302, 307, 396, 436, 455, 201, 188, 34 of the Indian Penal Code, 1860 *(hereinafter, "IPC").*

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 on 25.02.2020, around 11:00 AM., the complainant had gone to purchase milk from a nearby shop when he received a call from his son Asif informing him that a huge crowd of around 100 people had gathered near their house in

support of NRC and CAA. The crowd was chanting slogans of "*Jai Shree Ram*". The crowd later entered their house after breaking open the locks, and set it on fire. It is stated that the complainant's family members and employees rushed to the top floor of the house. The complainant's family members and workers were safely rescued from the roof of his residence, which was made possible by the rescue operation launched by the police in support with the locals of the vicinity.

4. It is stated that the complainant's mother, Smt. Akbari, who was 85 years old could not reach the rooftop due to her age. After extinguishing the fire, her body was found lying on a folding bed and was recovered from the second floor. She was taken to Guru Teg Bahadur Hospital, where she was declared brought dead vide MLC No. D-45. A Post Mortem was conducted at GTB Hospital itself and vide PM Report No. 345/2020 dated 28.02.2020, the cause of death was opined as *Asphyxia as a result of an ante-mortem inhalation of smoke.* It is further stated that the crowd looted Rs. 8,00,000 in cash and a box containing gold and silver jewellery and other valuable articles from their residence

5. The investigation of the said case was transferred from North East to Special Investigation Team-II, Crime Branch, Delhi and subsequently to Special Investigation Unit-I, Crime Branch, Delhi vide order No. 8266-74/AC-III/C&T/PHQ dated 27.02.2020 and No. 216/S)/DCP/Crime (SIU & ISC) dated 04.03.2020.Theinvestigation was undertaken by Insp. Pankaj Arora.

6. The petitioner was arrested on 11.03.2020 and has been in custody since then. The chargesheet was filed on 07.06.2020 and on 06.04.2021, the charges were framed by the Trial Court.

7. The petitioner had filed Bail Application No. 399/2020 before the Court of Sessions Judge which was dismissed vide order dated 06.08.2020. Thereafter, another bail application vide IA No. 04/2021 in SC No. 17/2021 was filed before the Court of Sessions Judge which was subsequently dismissed vide order dated 29.04.2021.

8. Mr. Ashwin Vaish, the learned counsel for the petitioner contended that the accused has been falsely implicated in the present matter and that there exists no evidence which can prove the connection of the Petitioner to the incident beyond reasonable doubt. He submitted that the FIR was registered on 27.02.2020, that is, two days after the incident occurred and the name of the accused is nowhere mentioned therein. He further submitted that the statements of the eye witnesses under Section 161 CrPC were recorded on multiple occasions. He submitted that particularly, the complainant, Mohd. Salmani, gave his statements on 07.03.2020, 08.03.2020 and 10.03.2020. It is only at a later date, that is around two weeks after the incident, that statement dated 09.03.2020 by Mohd. Aziz Hasan and statement dated 15.03 2020 by Mohd. Saeed Salmani was recorded and the name of the accused surfaced for the first time. He also submitted that the statements given by the daughters of the complainant, that is, Isha Salmani and Ayesha Salmani, who claimed that the accused was a part of the mob that lit the house on fire, were recorded on 18.05.2020, that is, two months after the incident. He submitted that despite the petitioner herein being the neighbour of the complainant's family, his name surfaced much later and, therefore, cannot be trusted.

9. The learned counsel for the petitioner contended that the mobile phones that contained the video clippings were not seized in accordance

with Section 102 of the CrPC by the investigating officer. The phones were kept in personal possession of the investigation officer till 16.03.2020 before it was handed over to HC Balraj No. 120/Crime who deposited the same in the *Malkhana* of PS Bhajanpura. Therefore, it cannot be ruled out that the video clippings could have been tampered.

10. The learned counsel for the petitioner contended that the accused was merely a curious onlooker and was not a part of the mob. He submitted that the accused has not been seen coming out of the said house in any of the video clippings. He submitted that in the video clip of 1.04 minutes that was shot by Mohd. Irshad, at the 0.30 second frame, it is the accused Varun Kumar (brother of the petitioner herein) who is seen coming out of the complainant's house, while the house was on fire and not the accused herein. The same has been categorically mentioned in the chargesheet. He further submitted that nothing has been recovered from the possession of the accused and offences of *dacoity* and rioting are not made out against the petitioner herein. The learned counsel also submitted that as per the photographs placed on record, as well as the statement of PW Satish Kumar, the accused was seen rescuing the victims of the incident. He, therefore, argued that subsequent conduct of the petitioner is clearly contradictory to the allegations that have been levelled against him. He submitted that the entire approach of the investigative agency towards the matter has been a prosecutorial approach.

11. The learned counsel for the petitioner submitted that the accused has been in custody since 11.03.2020. The investigation qua accused has been complete, the chargesheet has been filed and there haven't been any new developments or further arrests since then. He submitted that there are over

53 prosecution witnesses and more than 75 documents to be examined and the trial is not likely to be concluded any time soon. He further submitted that the supplementary chargesheet has not been supplied and the FSL report has not been placed on record yet, even though two years have passed. Therefore, continued incarceration will violate the petitioner's right to life and personal liberty under Article 21 of the Constitution of India.

12. The learned counsel for the petitioner submitted that the offence under Section 146/148/149 of the IPC are bailable. He submitted that the petitioner has no permanent employment. He submitted that the accused immediately joined investigation 08.03.2020 and has made no attempts to abscond since then. The accused has deep roots in the society and there are no apprehensions against him for attempting to delay the trial/tamper with evidence. He further submitted that the petitioner has undertaken to abide by the conditions that this Hon'ble Court deems fit.

13. *Per Contra,* Mr. Prasad, learned SPP submitted that during investigation, the statements of the complainant, his family members and other independent witnesses namely Mohd. Ayaz Hasan, Shakeel and Salam were recorded under Section 161 of the CrPC and all have categorically mentioned the name of the petitioner as an active member of the riotous mob that had set the house of the complainant on fire.

14. The learned SPP submitted that the independent witness Shakeel vide statement dated 23.04.2020 specifically stated that on the date of the incident, he saw the accused along with the co-accused Varun holding a match box in their hand and entering the scene of crime. The witness further stated that he saw them bringing the match box from their house, which is located on the same street as that of the victim.

15. The learned SPP submitted that several video clippings of the incident were found that have been taken on record and the mobile phones in which they were recorded have been seized and referred to forensic laboratory for retrieving the video clips and expert's analysis. He submitted that out of these, in a video clip of 124 seconds shot by Mehraj Ansari, the presence of the petitioner herein is seen on the basis of which, he was identified by the complainant, his son Mohd. Asif Salmani, daughters Isha Salmani and Ayesha Salmani and Salam.

16. The learned SPP submitted that the complainant is a well-to-do businessman and has been specifically targeted by the mob. He submitted that he along with his family have been receiving threats from and at the instance of the family members and the associates of the accused persons, who live in their street itself. Due to this, the complainant and his family are in an extremely precarious situation. Therefore, in such circumstances, especially when all the statements of public witnesses have not yet been recorded and when the investigation has not been conducted in a proper manner, grant of bail would be prejudicial to the trial.

17. Mr. Pracha, the learned counsel for the complainant contended that the above incident was a pre-mediated crime. He submitted that the house of the complainant was situated inside the *gali* and not at the outskirts. Further, through video clippings, he highlighted the fact that the area is so compact that that there is virtually no room for any escape. He further submitted that the ground floor was on set fire and, therefore, the residents were unable to come out of the house. This forced the residents to rush to the top floor in order to save themselves. The mob of which the petitioner was a part, had the knowledge that in all probability, the fire would result in the death of

residents. He submitted that this attracts the offence of Section 302, IPC and considering the gravity of the offence, the accused should not be released on bail.

18. Mr. Pracha, the learned counsel for the complainant further contended that ocular evidence is considered to be the best evidence unless there are grave reasons to question its credibility. Where there is substantial evidence present, the absence of an FSL report is considered as irrelevant. For this purpose, he placed reliance on the judgement of Pruthiviraj Jayantibhai Vanol v. Dinesh Dayabhai Vala, **2021 SCC OnLine SC 493**.

19. Mr. Pracha, learned counsel for the complainant submitted that the investigation has been conducted in a shoddy manner which is against the principles of fair trial under Article 21 of the Constitution of India. He further submitted that neutrality of the police and the investigating agency is an important factor to conduct the investigation in a proper manner. For this purpose, he placed reliance on Pooja Pal v. Union of India and Others, **(2016) 2 SCC 135**.

20. The court has heard both the parties and perused the material on record.

21. The petitioner is a resident of Bhajanpura and works as a photographer. The chargesheet states that an analysis of the Petitioner's mobile number has revealed that he was present at the Scene of Crime during the time of the alleged incident. The chargesheet further mentions that the petitioner has been identified by the complainant, his son Mohd. Asif Salmani, his daughters Isha Salmani and Ayesha Salmani, and other independent witnesses.

22. A perusal of the charge sheet and the video footages indicate that the accused was seen in only one video clip which was of 124 seconds that was shot by Mehraj Ansari. He was seen carrying a *lathi* in his hand, however, that in itself is not sufficient to make him an active member of the mob that set the house on fire. Further, nothing was recovered from the petitioner herein to indicate that he was an active member of the said unlawful assembly and had the common intention to commit any act in furtherance of the common object.

23. In the instant case, the issue which arises for consideration is whether when an offence of murder is committed by an unlawful assembly, then should each person in the unlawful assembly be denied the benefit of bail, regardless of their role in the unlawful assembly or the object of the unlawful assembly. In order to understand the same, 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)

24. 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.

25. 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."*

26. In Sherey and Ors. v. State of U.P., **(1991) Supp (2) SCC 437**, the Supreme Court considered as to 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.

> *"**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 crossexamination. 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 supplied)

27. 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. It cannot be assumed that every member of the unlawful assembly could be found guilty of the offence of Section 302 of the IPC and, therefore, every decision on an application of bail must be based on a careful consideration of the facts and circumstances in the matter therein.

28. In relation to the bar imposed by Section 437(1) CrPC on granting of bail, the Supreme Court in Gurcharan Singh v. State (Delhi Administration), **(1978) 1 SCC 118,** holds 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. The relevant extract is 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 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 43791) 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."*

29. It must also be kept in mind that gravity of the offence cannot be the sole basis for grant of bail. In the case of the Prabhakar Tiwari v. State of U.P., **(2020) SCCOnline SC 75**, 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.

30. The Petitioner was arrested on 11.03.2020 and has been in judicial custody since then. It has been almost 21 months since the arrest of the Petitioner. Bail jurisprudence attempts to bridge the gap between the personal liberty of an accused and ensuring that 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

31. 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 fleeting, 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."

32. 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."*

33. 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.

34. As has been stated above, the petitioner herein has been in custody for almost 21 months. The chargesheet has been filed and the investigation qua the petitioner herein has been completed and no incriminating evidence has been recovered from the petitioner. Further, the Trial court has taken cognizance of the matter and the charges have also been framed. Whether the identification of the petitioner as per the witness statements under Section 161 CrPC and the presence of the petitioner in the video footage with a *lathi* in his hand is enough to determine the petitioner as an active member of the unlawful assembly with the common intention to commit the offence of Section 302, in furtherance of the common object, is a matter of trial and cannot be delved into, at this juncture.

35. Even though the petitioner was spotted with a lathi, he has not been seen attacking any person with the lathi. The atmosphere where incident took place was charged and considering that the petitioner herein is the neighbour of the complainant, it cannot be said with certainty that the presence of the accused at that time with the *lathi* alone is sufficient to

conclude that he was an active member of the unlawful assembly that set the house of the complainant on fire. Therefore, the above material against the petitioner does not justify the continued incarceration of the Petitioner.

36. There are around 53 prosecution witnesses and more than 75 documents in the present matter and, the trial will continue for a long period of 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

37. 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.

38. Accordingly, this Court is inclined to grant bail to the Petitioner in FIR No. 70/2020 dated 27.02.2020 registered at PS Bhajanpur for offences under Sections Bhajanpura for offences under Sections 147, 148, 149, 302, 307, 396, 436, 455, 201, 188, 34 of the IPC 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 Petitioner has given his address in the memo of parties as House No. A-195, Gali No. 3, Village Gamri, Bhajanpura, Delhi 110053. 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.

39. 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.

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

SUBRAMONIUM PRASAD, J.

FEBRUARY 01, 2022
Rahul