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

Date of decision: 01st FEBRUARY, 2022

IN THE MATTER OF:

\+ **BAIL APPLN. 2386/2021**

RAVI KUMAR @ AMIT ..... Petitioner

Through Mr. Sanjiv Dagar, Mr. Yogesh Verma, Advocates

versus

THE STATE (NCT) OF DELHI ..... Respondent

Through Mr. Amit Prasad, SPP for the State with Mr. Ayodhya Prasad, Advocate and SI Santosh Gupta, Crime Branch

**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, thereafter, 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. It is stated that 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. The investigation was undertaken by Insp. Pankaj Arora.

6. It is stated that the petitioner was arrested on 30.03.2020 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. 398/2020 before the Court of Sessions Judge which was dismissed vide order dated 06.08.2020. Thereafter, another bail application vide IA No. 05/2021 in SC No. 17/2021 was filed before the Court of Sessions Judge which was subsequently dismissed vide order dated 24.06.2021.

8. Mr. Sanjiv Dagar, 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 accused was not even called for investigation and was directly arrested. Further, the grounds of arrest were not explained to the accused during the time of arrest.

9. The learned counsel for the petitioner submitted that the time of the alleged incident is stated to be about 11:00AM on 25.02.2020, whereas, the PCR calls were made at 1:53PM and 3:29PM. Therefore, there has been a huge delay in reporting the incident to the police which in turn places the instant case under suspicion.

10. The learned counsel for the petitioner submitted that complainant was not present during the incident and was informed of the same on phone by his son. He submitted that the complainant did not mention the name of the petitioner herein vide his statement dated 08.03.2020.The statement dated 08.03.2020, of the complainant's wife, that is, Gulista Begum also did not mention the name of the petitioner anywhere. He further submitted that the

complainant and his son gave multiple statements on different dates, however, it is only on 28.03.2020, vide a supplementary statement, that the name of the petitioner herein was mentioned.

11. The learned counsel for the petitioner submitted that the statements of the daughters of the complainant, that is, Isha Salmani and Ayesha Salmani, dated 18.05.2020 should not be given any credence since they were recorded around three months after the date of the incident and were not reliable.

12. The learned counsel for the petitioner submitted that the video clips bearing numbers 3, 3A and 4 as produced on record do not pertain to the SOC and are of a different location, that is, 200 metres away from the SOC/complainant's house. He further submitted that as per the chargesheet, the video clippings were subjected to Facial Recognition Software (FRS), the result of which indicates that the face of the petitioner herein did not match with the face of the person shown in the video. Therefore, the present case is that of a mistaken identity.

13. Mr. Dagar contended that the accused was merely a curious onlooker and was not a part of the mob. He placed reliance on Bhagwan Singh v. State of Madhya Pradesh, **AIR 2002 SC 1621,** where the court held that a mere presence in an assembly of persons does not make a person a member of an unlawful assembly. He submitted that neither has accused been seen coming out of the said house in any of the video clippings nor has anything been recovered from the possession of the accused and, therefore, the offence of *dacoity* and rioting are not made out against him.

14. The learned counsel for the petitioner submitted that the conduct of the complainant's family was improper and provocative. He submitted that the statement dated 10.03.2020 of Asif Salmani categorically stated that the

family of the complainant pelted stones towards the crowd from their roof top.

15. The learned counsel for the petitioner submitted that the accused has been in custody since 30.03.2020. The investigation qua accused has been complete, the chargesheet has been filed and there have not been any new developments or further arrests since then. 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. He further submitted that the trial is not likely to be concluded any time soon. Therefore, continued incarceration will violate the petitioner's right to life and personal liberty under Article 21 of the Constitution of India.

16. The learned counsel for the petitioner submitted that the petitioner has no permanent employment and that the sister of the petitioner is specially challenged and needs extra care and attention during the period of pandemic. He placed reliance on P. Chidambaram v. Directorate of Enforcement, **2019 SCC Online SC 1549,** to highlight the triple test for grant of bail. He submitted the accused is a permanent resident of the locality in question and there is no possibility of his absconding in the matter. 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.

17. *Per Contra*, the learned SPP submitted that during investigation, the statements of the complainant and his son Mohd. Asif Salmani were recorded under Section 161 of the CrPC and both have categorically

mentioned the name of the petitioner as an active member of the riotous mob which had set the house of the complainant on fire.

18. The learned SPP submitted that several video clippings of the incident were found that have been taken on record. The mobile phones in which they were recorded have been seized and referred to forensic laboratory for retrieving of video clips and expert's analysis. He submitted that out of these, in a video clip of 36 seconds as provided by the complainant over Whatsapp and in a video clip of six minutes as shot by Mohd. Parvez on the date of the incident, the petitioner along with other rioters are seen as active members of the mob. The video captures the petitioner muffling his face with a white cloth.

19. The learned SPP submitted that the CAF and CDR of the mobile number of the petitioner reveals that it was activated on 05.03.2018 and since then the same has been in use. Further, on the date and time of incident, the mobile phone of accused was active in the area of scene of crime. He also submitted that the CDRs of the witnesses were also obtained from the concerned service providers and it was revealed that their respective mobile numbers were present/active on the date and time of incident.

20. The learned SPP submitted that after the arrest of the petitioner/accused, at his instance, one dark blue coloured pyjama having two printed white stripes was recovered from a bed installed in the ground floor of his residence. He submitted that the petitioner stated that on the date and time of the incident, he was wearing this pyjama. He also submitted that the petitioner disclosed that the T-Shirt he was wearing during the incident was subsequently torn off during the Holi festival celebrations.

21. The learned SPP submitted that the presence and involvement of petitioner here was also confirmed by co-accused Prakash Chand, during interrogation, who was arrested in the present case on 30.03.2020.

22. The learned SPP further submitted that subsequent to the main chargesheet, a supplementary chargesheet was filed before the Hon'ble Court on 05.08.2020 under Section 173(8) Code of Criminal Procedure, 1973, on 05.08.2020 along with the expert's opinion so received from the Forensic Science Laboratory.

23. The learned SPP submitted that the complainant is a well-to-do businessman and has been specifically targeted by the mob. He submitted that the complainant and 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.

24. 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 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.

25. 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 DayabhaiVala, **2021 SCC OnLine SC 493**.

26. 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**.

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

28. A perusal of the chargesheet indicates that the petitioner is a resident of Bhajanpura. 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 incident. The chargesheet mentions that the petitioner has been identified by the complainant and his son Mohd. Asif.

29. The chargesheet shows that during the course of investigation certain video clips were retrieved that were shot from the mobile phones of the individuals present at the scene of crime or downloaded online. However,

the video clips merely show the petitioner herein muffling his face with a white cloth. It is not evident as to whether the petitioner herein was actively participating in the mob that set the house of the complainant on fire or not.

30. 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)

31. 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.

32. 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."*

33. 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 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 supplied)

34. 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.

35. 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."*

36. 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.

37. The Petitioner was arrested on 30.03.2020 and has been in judicial custody since then. It has been 20 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.

38. 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."*

39. 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."*

40. 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.

41. As has been stated above, the petitioner herein has been in custody for 20 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 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 matter of trial and cannot be delved into, at this juncture. As noticed above, the video footage only shows the petitioner muffling his face. He is not seen actively participating with the mob. The petitioner only seems to be a curious onlooker. The above material against the petitioner does not justify the continued incarceration of the Petitioner. Considering the fact that the trial is likely to 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

42. 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.

43. 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. 53,Gali No. 1, 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.

44. 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.

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

**SUBRAMONIUM PRASAD, J.**

**FEBRUARY 01, 2022**
*Rahul*