

(2020) 10 DEL CK 0074

In the Delhi High Court

Case No : Bail Application No. 2614 Of 2020

Ashraf Ali

APPELLANT

Vs

State Of Nct Of Delhi

RESPONDENT

Date of Decision : 14-10-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 41A, 160, 161, 173(8), 439
Indian Penal Code, 1860 — Section 34, 120B, 147, 148, 149, 153A, 201, 302, 427, 436

Citation : (2020) 10 DEL CK 0074

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Shri Singh, Maneka Khanna, S.V. Raju, Rajat Nair, Amit Mahajan, Shantnu Sharma, Dhruv Pande, A. Venkatesh, Pramod Kumar, Sairica Raju, Manan Popli, Rajeev Ranjan, Shaurya Rai, Bhushan Oza

Final Decision : Dismissed

Judgement

Suresh Kumar Kait, J

1. Present petition has been filed under section 439 Cr.P.C. seeking grant of regular bail on behalf of petitioner in pursuance to FIR No.39/2020 registered at Police Station Gokulpuri for the offences punishable under sections 147/148/149/149/302/201/436/427/153A/120B/34 IPC.

2. Undisputed facts are that on 28.02.2020, FIR No. 39/20 registered at Police Station Gokulpuri for the offences punishable under Sections 147/148/149/302/201/436/427 IPC. On 05.03.2020, statement under Section 161 Cr.P.C. of witness Anil Pal was recorded whereby Khalnayak and Arshad s/o Anish are mentioned as separate persons. The witness does not identify the Petitioner. On 08.03.2020, notice under section 160 Cr.P.C. was issued to the petitioner by IO. On 11.03.2020, statement under Section 161 Cr.P.C. of witness Himanshu was recorded wherein the Petitioner is identified as one of the 250 persons involved in stone-pelting and raising anti-community slogans on

24.02.2020 around 2:30pm and petitioner has joined the investigation whereupon arrested for the offence punishable under sections 147/148/149/153-A IPC.

3. Case of the petitioner is that on 16.03.2020, statement under Section 161 Cr.P.C. of witness Ankit Pal was recorded wherein he did not identify the Petitioner. He mentioned Khalnayak and Mohd Arshad s/o Anish as separate persons. On 01.04.2020, statement under Section 161 Cr.P.C. of witness Amit Pal was recorded wherein he also did not identify the Petitioner. There is no mention of Arshad, only Khalnayak is mentioned. On 04.06.2020, the police filed final report against 12 accused persons before the Court of the Ld. MM, Karkardooma Courts and the petitioner was mentioned as accused No. 4 and no mention of alias Khalnayak. On 07.07.2020, IO filed a Supplementary Final Report under Section 173(8) Cr.P.C solely on the point of petitioner's identification and petitioner was mentioned as Ashraf Ali @ Khalnayak for the first time.

4. Learned counsel for the petitioner submitted that unlike other accused persons in the present case, there is no CCTV footage identifying the petitioner in any mob on 24.02.2020. Hence, the case of the Petitioner stands at a different footing from co-accused persons. The case against the petitioner relies on identification by a single witness, Himanshu, that too in the absence of a Test Identification Parade. Even as per Himanshu, the mob consisted of 200-250 persons wherein he identified only 5 persons. It is settled law that identification of a few select persons in a large mob, by a witness, in the absence of a TIP cannot inspire the confidence of the Court.

5. To strength his argument, learned counsel has placed reliance on the decision of Hon'ble Supreme Court in CrI. A. No. 1041/2016 on 09.08.2018 in the case of Usangani Alias Bhura Abdul Gafar and Anr. v. State of Gujarat.

6. He further submitted that the final report cites the statements of three witnesses-Anil Pal, Ankit Pal and Amit Pal as evidence against the Petitioner. However, these witnesses named one 'Arshad' and not the Petitioner (as per final report). The Petitioner is named for the first time by these witnesses in identical supplementary statements dated 22.06.2020, filed along with Supplementary Chargesheet, after a delay of three months, while Petitioner's bail application was pending before the Ld. Trial Court.

7. It was argued that evidently, the Supplementary Chargesheet was filed to cure the lacunae in the prosecution case, in response to the arguments on the petitioner's bail application before the Ld. Trial Court. However, the attempt of the prosecution to cure this lacuna by introducing an alias (Khalnayak) and a typographical error (Arshad is Ashraf) is inherently inconsistent and contradictory. The Petitioner has never been known as Khalnayak. Further, the investigation agency has provided no explanation as to why said 'clarifications' were not sought from Anil Pal in his additional statements dated 06.03.2020, 07.03.2020 or 19.03.2020, that too after the remand order dated 12.03.2020,

wherein the Ld. CMM clearly noted that the Petitioner has not been named by Sh. Anil Pal. While the 'lockdown' is given as the reason for belated recording of statements filed along with the Supplementary Chargesheet, a perusal of the main Chargesheet shows that the IO has conducted a detailed investigation during the lockdown, including of witnesses Amit Pal (statement dated 01.04.2020) and Ankit Pal (statements dated 13.04.2020 and 28.05.2020). When read along with the Chargesheet, the Supplementary Chargesheet creates further doubt and confusion regarding the Petitioner's identification. Hence, the Supplementary Chargesheet does not aid the case of the prosecution and the Petitioner's identification is suspected.

8. Further argued that apart from the witness statements, the only evidence against the Petitioner is his alleged CDR location. It is an admitted position that the address of the Petitioner's residence is A-18, Chaman Park while the address of the godown that was set on fire i.e. the place of incidence is A-29, Chaman Park. Hence, even assuming the admissibility/authenticity of the CDR records, the mere fact that the Petitioner's location corresponds with the place of incidence does not incriminate the Petitioner in any manner.

9. In addition to above, the only evidence against the Petitioner is the statement under Section 161 Cr.P.C. dated 11.03.2020 of witness Himanshu, who states that the Petitioner was involved in stone-pelting and raising anti-community slogans on 24.02.2020 at 2:30 pm. It appears that pursuant to this statement, the Petitioner was arrested on 11.03.2020 under Sections 147/148/149/153-A IPC. When the Petitioner was produced before the Court of the Ld. CMM on 12.03.2020, IO fairly conceded that there was no evidence till date against the Petitioner for commission of offences under Sections 302/201/436 IPC. Hence, the Petitioner was produced for the commission of offences under Sections 147/148/149/153-A IPC. The Court of the Ld. CMM further noted that that no incriminating material was mentioned in the remand application, and remanded the Petitioner to judicial custody. Despite conducting a detailed investigation from 12.03.2020 till 03.06.2020, the investigation agency did not produce any other incriminating material against the Petitioner in the Final Report, particularly any material implicating the Petitioner for commission of offences under Sections 302/201/436 IPC. Hence, these Sections are not made out against the Petitioner and the alleged role of the Petitioner is limited to commission of offences under Sections 147/148/149/153-A IPC.

10. Learned counsel for the petitioner submitted that the Final Report and Status Report make it abundantly clear that the Petitioner is being made liable under Section 302/436 IPC only by virtue of Section 149 IPC. The only ground raised to oppose the Petitioner's bail application was the gravity of these offences. Implication under Section 149 IPC would, at the very least, require the presence of the Petitioner in the mob that burnt the godown at A-29, Chaman Park as a result of which deceased Dilbar Negi died. Needless to say, the pre-requisite for establishing the presence of the Petitioner is establishing his identification.

However, in the absence of CCTV Footage, TIP and contradictory witness statements, even the identification of the Petitioner is suspect.

11. As per the Final Report, the godown was set ablaze around 9pm. The time of death of the deceased was around 9pm as CDR of the deceased shows the last call was at 9:07pm. In his statement dated 05.03.2020, Anil Pal states that one Chiddalal Tomar informed him about the burning of his godown at 9:45pm. (Statement @ Page 250 of Bail Application). Witness Chiddalal Tomar states that he saw some persons entering the place of incident with petrol bombs, and setting fire to the said godown at around 9pm. The Petitioner is not named or identified by witness Chiddalal Tomar (Statement @ Page 268 of Bail Application).

12. Hence, even assuming the Petitioner was part of the mob involved in stone pelting and chanting slogans from 2-2:30pm onwards, as stated by witness Himanshu, there is no allegation that the Petitioner was part of the mob that burnt the godown at around 9pm. It is for this reason that the Petitioner was not arrested under Sections 302/436 IPC.

13. The prosecution has now sought to implicate the Petitioner in a murder that took place in the vicinity of the place where he was allegedly shouting slogans, hours after he was allegedly seen there, merely by invoking Section 149 IPC. Such an approach is contrary to all settled principles of law under Section 149 IPC, which requires proof of participation at the relevant time, proof of common object and some overt act. There is no evidence or allegation that the Petitioner was connected to the act or series of acts leading upto the death of Dilbar Negi. Hence, even at a prima facie stage, Sections 302/436 IPC cannot be invoked to deny bail to the petitioner.

14. Further submitted that the Hon'ble Supreme Court in P. Chidambaram vs. ED: 2019 SCC Online SC 1549 has re-emphasized that the primary considerations for grant of bail are (i) availability of the accused for investigation, interrogation and facing trial; (ii) whether the accused is a flight risk and (iii) likelihood of the Petitioner to tamper with evidence and influence/intimidate witnesses. The said test has been recently applied by this Hon'ble Court while granting bail in an FIR registered inter alia under Section 302 IPC in Devangana Kalita vs. State of NCT Delhi [Judgment dated 01.09.2020 in Bail Application No. 2038/2020]. There is no apprehension of the Petitioner absconding or evading trial in any manner. The Petitioner is a permanent resident of Delhi. On being served notice under Section 160 Cr.P.C., the Petitioner joined investigation on 11.03.2020 in accordance with the notice. It may be noted as on 08.03.2020, the status of the Petitioner was that of a witness and not an accused, in so far as no Notice under Section 41-A Cr.P.C. was issued to the Petitioner.

15. Moreover, the investigation agency has completed its investigation qua the Petitioner and has filed a Final Report. A supplementary charge sheet has also been filed by the investigating agency on 06.07.2020. Insofar as the Petitioner is concerned, the material on record demonstrates that police investigation is

complete and final report has been filed. Accordingly, the Petitioner is no longer required for any investigative purpose and no useful purpose is being served by his continued incarceration. The further investigation mentioned in the Final Report does not relate to the Petitioner. There are no chances of the Petitioner tampering with the prosecution evidence or influencing prosecution witnesses. Most of the evidence in the present case is in the custody/possession of the prosecution and filed along with the Final Report and hence no person can tamper with such evidence, let alone the Petitioner. There is no allegation that the Petitioner tampered with any evidence or influenced any witness from the date of the registration of the FIR to the date of his arrest. Though, the status report has alleged that the Petitioner is a 'roughneck' of the locality who would 'terrorise' witnesses. However, there is no allegation that any witness from the locality were intimidated by the Petitioner prior to his arrest from 24.02.2020 to 11.03.2020. In *P. Chidambaram v. CBI* [2019 SCC Online SC 1380], the Hon'ble Supreme Court emphasized that bail cannot be denied on the basis of generalized and speculative apprehensions that the Applicant will influence witnesses or tamper with evidence, without any basis or material to support such apprehensions. The status report has further alleged that the Petitioner has a criminal bent of mind. However the prosecution has failed to show the involvement of the Petitioner in any other case prior to the registration of the present case.

16. To strengthen his arguments, learned counsel for the petitioner has cited the following judgments:

- i. *Devangana Kalita vs. State of NCT Delhi*: Bail Appln. No.2038/2020;
- ii. *P. Chidambaram vs. Enforcement Directorate*: 2019 SCC OnLine SC 1549;
- iii. *State of Maharashtra vs. National Punjabi Shah*: (1969) 3 SCC 904;
- iv. *P. Chidambaram vs. CBI*: 2019 SCC OnLine SC 1380;
- v. *Ashok Sagar vs. State (NCT of Delhi)*: 2018 SCC OnLine 9548;
- vi. *Firoz Khan vs. State of NCT of Delhi*: judgment dated 29.05.2020 in Bail Appln. No.945/2020;
- vii. *Musa Khan & Ors. vs. State of Maharashtra*: (1977) 1 SCC 733;
- viii. *Pandurang Chandrakant Mhatra vs. State of Maharashtra*: (2009) 10 SCC 773;
- ix. *Usmangani Alias Bhura Abdulgafar and Anr. vs. State of Gujarat*: 2018 SCC OnLine SC 3270.

17. On the other hand, Mr.S.V. Raju, learned ASG for State submitted that the present matter is commonly known as "Delhi Riot" Matter. The present offence pertains to a violent mob burning a building of Anil Sweet situated at A-29, Chaman Park, Main Brijpuri Road, Delhi. The violent mob had completely torched

the said building and had also burned alive one person whose limbs were found to be missing. The deceased was identified as Dilbar Singh Negi s/o Gopal Singh R/o Village-Shekhda Chakisen, Pauri Garwal, Uttarakhand who used to work as a waiter in Anil Sweet Corner.

18. During the course of investigation, the IO collected the CCTV footages of the area from the cameras installed at Rajdhani Public School, the focus whereof was towards the scene of crime. From the CCTV footages, it was revealed that a large number of rioters from one particular community had gathered at or around Rajdhani Public School. There was huge gathering at Main Brijpuri Road, and rooftops of building and people in mob were promoting enmity and disharmony by rioting, stone pelting and instigating others. Some of the persons in mob also killed the deceased Dilbar Singh Negi and burnt him along with the whole building. Petrol bottles and bag of kanche have also been seized from the roof of the building. The rioters had installed a big "catapult" in the building of Rajdhani Public School, from where "Molotov Cocktail" (petrol bombs) were being thrown at the houses of another community. It was also revealed through the CCTV footage that a number of rioters were active on the main road at or around Chaman Park on main Brijpuri Road, which goes from old Mustafabad to Shiv Vihar Tiraha.

19. Mr.Raju submitted that the present accused person Ashraf Ali was arrested on 11.03.2020 under section 147/148/149/153A of IPC on the basis of the statement of the eye witness Himanshu. The petitioner has been found to be promoting the enmity and disharmony by rioting, pelting stones and instigating others during the riots occurred on dated 24.02.2020. Therefore, on the basis of statements and CCTV footage, 12 (Twelve) accused persons have been arrested and other Co-accused persons are being searched.

20. Further, it is submitted that during the investigation, it has been established that the riotous mob of which, the accused was a part, has caused the death of victim Dilwar @ Dilber Negi. After this section 302 IPC was added in the present case. Hence, the present accused Ashraf Ali is also liable for the criminal acts committed by any member of that illegal mob gathered on 24.02.2020 at the spot where he set on fire the deceased Dilber Negi.

21. Learned ASG further submitted that the statement of Himanshu is categorical in naming all the accused persons, their presence on the spot till late night, their indulgence in acts of arson, stone pelting and other sort of violent activities. He is an eye witness, who has specifically named the present accused/applicant, by name, his role and his presence at the spot up to late hours. The dispute regarding identity of accused on behalf of accused Ashraf Ali also rests through this testimony, which establishes the clear cut identity as this witness has signed the arrest memo of this accused, which is categorically having details of the name/ parentage and address of accused/applicant Ashraf Ali leaving no room for any doubt in the identity of this accused. Even naming of Ashraf Ali with other name as Khalnayak by PWs namely Anil Pal, Ankit Pal and Amit Pal and their

further clarifications in the form of their supplementary statements establishing that Ashraf Ali and Khalnayak are the one and the same person removes any doubt about his identity. Even it is nowhere contended by the defence on behalf of the accused Ashraf Ali that he is never known by the name of Khalnayak.

22. Further argued that once the presence of the accused persons till late night is established through oral as well as corroboratory technical evidence then the consequences of the acts of rioting and arson cannot be separated as the same are the links of one chain of circumstances triggered by the acts of accused who was part of the unlawful assembly.

23. I have heard learned counsel for the parties and perused the material available on record.

24. As is on record, Anil Pal, Amit Pal and Ankit Pal though have described the accused as Khalnayak, however, they have clearly stated in their 161 Cr.P.C. statement dated 05.03.2020 and 01.04.2020 that they know him and identify him very well as he use to reside in the same area and use to roam around in the same area every day. The relevant portion of their statement is as under:

"These muslim people again and again by climbing on the roof of my godown and Rajdhani School were attacking on Hindus with stones and burnt petrol bottles and they were pelting stones on Hindus. In the evening at 4-5 Hrs. the persons Parvej neighbour of Shanu, Khalnayak, Aarif residing in Gali No. 4/5 B Block, Babu Nagar, Kasim son of owner of shop situated at A-28 adjacent to my godown, Faizan nephew of Hazi Khaleel, Dr. Sahil Chaman Park, Sonu Saifi who is doing the work of welding, Salman, Mohd. Arshad S/o Aneesh and Salmaan residing in the lane situated in front of DRP who was running Mobile Repairing shop which some months ago the shop was closed by him were involved in pelting stones, setting fire, raising slogans against Hindus and they were expressing abuses in filthy languages 253 towards us, to whom because of residing and seeing roaming in the area every day have been identified by me very well."

[Emphasis Supplied]

25. Moreover, witness Amit Pal & Ankit Pal also named the petitioner as "Khalnayak". The said witnesses in their further statements, which is part of the supplementary chargesheet have clearly stated that accused/applicant is Ashraf Ali alias Khalnayak. They have also stated that they have been personally knowing the accused Ashraf Ali as khalnayak as he was famous in the area with the said alias name. Thus from the aforesaid, it is clear that all the witnesses who had identified the applicant as Khalnayak clearly knew that Khalnayak was only Ashraf Ali.

26. The role assigned to present petitioner was involved in rioting, arson, raising anti Hindu Slogans and his CDR location was found at the incident spot. The Supplementary Report states that the Petitioner is also known as

"Khalnayak". It further stated that in the previous Charge Sheet, the name of the accused is Ashraf Ali, has been wrongly mentioned as Arshad due to typing error/mistake. In the supplementary charge-sheet, the eye witnesses, persons namely Amit Pal, Ankit Pal, Anil Pal and Rajkumar have clearly stated that they all know Ashraf Ali very well since long time, who lives in front of DRP Scholl in Gali No.1, Chaman Park and his father's name is Anisul Haq. His father Anis, Ashraf Ali and other members of his family often come to Anil's shop for buying sweets. The other natural eye witness i.e. Himanshu has stated that Ashraf Ali used to come at Pan, Cigarette shop of accused shanu, often. They also know Ashraf Ali @ Khalnayak for a long time.

27. The interesting fact is that Ashraf Ali is also known as Khalnayak in the area and the Ashraf Ali @ Khalnayak is the same person not a different person. Though, there was a typographical error in the charge sheet and not in the statement of any witness, where word Arshad was wrongly used in place of Ashraf. Thus the same cannot be treated as a case of disputed identity as no person by the name of Arshad is yet arrested, but one Arshad has been named as one of the suspects. Even word supplementary denotes further and vice versa. Moreover, even if the supplementary statements are ignored, which were filed under section 173 (8) Cr.P.C., the identity of Ashraf Ali stands established through statement dated 11.03.2020 of P.W Himanshu/arrest memo/personal search memo.

28. It is not in dispute that the term "Test identification parade" is used as a means to examine the truthfulness of the witness and his ability to identify unknown persons. The test is generally not necessary to identify the accused if the witness knows the accused and can recognise the accused in moonlight and lantern. Test identification parade is a useful tool in the investigation and with the right procedure it can be accepted as evidence in the court of law as corroborative. The purpose is primarily to test and strengthen the existing substantial evidence of the witness in court. If the witness cannot name the accused and can only identify him on the basis of his physical appearance then the Test cannot be taken into consideration. The corroborative value of test identification parade is absolute and its use of test of identification parade as substantial evidence is obsolete, the test identification has only corroborative value as evidence.

29. Considering the above facts and the evidence and circumstances of the case in totality as well as the gravity of offence in the matter coupled with the fact that the riots at the scene of crime were really horrific; wherein, loss of innocent life as well as damage to the property of general public was enormous. It is, however, prima facie clear that the applicant was part of unlawful assembly which was responsible for putting on fire the godown in which deceased Dilbar Negi was there and after that he was found dead (burnt alive). The accused were involved in the heinous crime/ offence where the deceased person died and when a person died then section 302 IPC automatically attract. So, the evidence for

the offence 302 IPC is considered that the almost admitted position for other offences committed by the accused/applicant are serious and heinous enough not to enlarge on bail.

30. In view of the facts and circumstances of the present case, the cases cited by the petitioner are of no help at this stage.

31. Finding no merit in the present petition, the same is, accordingly, dismissed with no order as to costs.

32. I hereby make it clear that the Trial Court shall not get influenced by the observations made by this Court while passing this order.

33. The order be uploaded on the website forthwith.