

(2023) 04 SHI CK 0052

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (Main) No. 706, 707 Of 2023

Balboo And Others

APPELLANT

Vs

State Of Himachal Pradesh

RESPONDENT

Date of Decision : 05-04-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 149, 302, 307

Citation : (2023) 04 SHI CK 0052

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Vivek Sharma, Abhinav Mehta, Anoop Rattan, Pushpinder Singh Jaswal, Tejasvi Sharma, Jitender Sharma, Gautam Sood, Noop Ram

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Since both the bail petitions arise out of same FIR, they were taken up together and are being disposed of vide this common order.

2. By way of present bail petitions, filed under S.439 CrPC, prayer has been made on behalf of the bail petitioners namely Babloo and Ashish Sharma, who are behind the bars since 13/14.10.2022, for grant of regular bail in FIR No. 82, dated 13.10.2022 under Ss. 302, 341, 323, 147, 148, 149, 506 and 120B IPC, registered at Police Station Jhakri, District Shimla, Himachal Pradesh. Respondent State has filed status report and investigating officer has come present with record. Record perused and returned.

3. Close scrutiny of status report/ record reveals that on 13.10.2022, complainant Sahil Negi lodged complaint at PS Jhakri, District Shimla, alleging therein that he alongwith his friends had gathered at Rampur for celebration of his birthday on 12.10.2022. He alleged that at around 11.00 PM, they all went to Mahesh Hotel, Jhakri for having dinner. However, when they reached Mahesh Hotel, security guard refused to give them entry. He alleged that owner of

Mahesh Hotel Rahul Dev Sharma and his nephew Ashish Sharma started hurling abuses and forcibly pulled the key of vehicle of Mahender. Complainant alleged that when they asked above named persons to return the key, owner of the Mahesh Hotel alongwith his staff, who were carrying dandas in their hands, gave them beatings. He alleged that all the persons, save and except Mahender, succeeded in fleeing from the spot, to whom subsequently owner of the Mahesh Hotel, Sh. Rahul Dev Sharma, and his nephew Ashish Sharma alongwith other staff members gave beatings. Complainant alleged that though they tried to make telephonic call to Mahender, but the same was unattended. Complainant alleged that he alongwith other friends came back on the spot to find out whereabouts of the Mahender, but by that time many people had gathered on the spot. He alleged that being afraid of the people gathered on the spot, they went to police Station, Jhakri and thereafter reached on the spot with the police. Complainant further alleged that accused, named hereinabove, gave merciless beatings to them, as a result of which they suffered grievous injuries. Police after having completed necessary codal formalities took complainant as well as other injured persons to the medical officer MGMHC, Khaneri, for medical examination. Since injured Mahender had suffered grievous injuries on his body, he was referred to IGMC but unfortunately, he died on his way to IGMC. In the aforesaid background, FIR was lodged against Rahul Dev Sharma, Ashish, Naresh Verma, Babloo, Ritik, Bhupesh and Amita Sharma, Rishi, Ankesh, Ashwani, Rakesh Kumar and Mohan Lal. All the persons save and except, bail petitioners already stand enlarged on bail. Since investigation in the case is complete and nothing remains to be recovered from the bail petitioners, they have approached this Court for grant of regular bail.

4. While fairly admitting the factum with regard to completion of investigation, learned Additional Advocate General submits that though nothing remains to be recovered from the bail petitioners, but keeping in view gravity of offence alleged to have been committed by the bail petitioners, they do not deserve any leniency and their prayer for grant of bail, deserves outright rejection. While making this Court peruse the statements of independent witnesses recorded under S.161 CrPC, learned Additional Advocate General contends that there is overwhelming evidence available on record suggestive of the fact that bail petitioners were part of the unlawful assembly and all in unison ran after Mahender, with the intention to kill him. Learned Additional Advocate General further states that it has come in evidence that the bail petitioner Ashish had given blow of Danda on the head of deceased Mahender, as such, it cannot be said that he has been falsely implicated. Learned Advocate General, further states that CCTV footage of the cameras installed in front of Mahesh Hotel and Police Station clearly suggests that accused named in the FIR including bail petitioners herein gave merciless beating to the deceased Mahender, while he was lying on the road in an unconscious condition, as such, it shall be too premature at this stage, to conclude that the bail petitioners did not give any beatings on the person of the deceased. Learned Additional Advocate General states that question with regard

to common object and intention to kill is not to be seen at this stage, rather is matter of trial and shall be determined in the totality of evidence collected on record by the investigating agency. He submits that in the event of petitioners being enlarged on bail, they may not only flee from justice but may also tamper with prosecution evidence, as such, prayer made by them for bail, may be rejected outrightly.

5. Mr. Vivek Sharma and Mr. Abhinav Mehta, Advocates appearing for the bail petitioners, state that no case, much less a case under S.302 IPC is made out against the bail petitioners, as such, they deserve to be enlarged on bail. While making this court peruse statements of independent witnesses recorded under S.161 CrPC, learned counsel for the petitioners state that the complainant alongwith his friends had gone to Mahesh Hotel in drunken condition and when they were asked to go back, they picked up quarrel with the hotel staff. Above named counsel further stated that though majority of persons fled from spot but since Mahender was caught by the staff and made to sit in the hotel, so that he could be handed over the police. He submits that it is own case of the prosecution that deceased Mahender succeeded in fleeing from the spot but he fell on ground after being hit by a vehicle. While referring to CCTV footage, learned counsel for the petitioner argued that none of the persons named in the FIR gave beatings to the deceased rather, deceased can be seen falling, after being hit by truck. Learned counsel for the petitioner states that there was no motive or intention to kill the deceased, rather all the accused came out of the hotel to protect their property from the complainant and his friends. Learned counsel for the petitioner further invited attention of this Court to the status report filed by the respondent State in CrMP(M) Nos. 275-277 of 2023 and stated that no blood of deceased can be seen on the alleged weapon of offence. As per aforesaid status report, DNA profile of the deceased did no match with the blood found on the Danda, allegedly used by the accused for giving beatings to the deceased. Lastly, he submits that since investigation is complete and nothing remains to be recovered from the bail petitioners, they may be enlarged on bail.

6. Having heard learned counsel for the parties and perused the material available on record, this Court finds that accused named in the FIR, save and except bail petitioners herein stand enlarged on bail. It is not in dispute that investigation is complete and nothing remains to be recovered from the bail petitioners. Since complainant and his friends tried to enter Mahesh Hotel, security guard stopped them but once they started creating ruckus, owner of hotel, Rahul Dev Sharma and Lal Chand, alongwith other family members came down and tried to persuade the complainant party to leave the spot, however, an altercation took place inter se parties and bail petitioners. Since complainant party tried to pull keys from Mahender, fight got intensified between the complainant party and the accused. All the persons alongwith complainant fled from spot except Mahender, who was caught by staff of hotel but before Mahender could be handed over to police, he also attempted to flee from the spot, and was hit by the vehicle as can be seen from CCTV footage. Allegedly,

while Mahender was in an unconscious condition on road, accused named in the FIR alongwith bail petitioners Ashish gave him beatings with Danda, as a result of which, he suffered multiple injuries.

7. Careful perusal of statements of independent witnesses namely Satish and Shubham clearly reveals that entire staff of Hotel had reached the spot but it is nowhere stated that except Ashish Sharma and Amita Sharma, anyone gave beatings to the deceased lying on the spot. Having taken note of the aforesaid statements of aforesaid independent witnesses, this court has already enlarged other co-accused on bail. Though, in the instant case, there is specific allegation against bail petitioner Ashish Sharma, that he had given blow of Danda on the head of deceased Mahender while he was lying unconscious on the road, but SFSL in its report has opined that that DNA profile of deceased did not match with the blood found on Danda allegedly used by the accused for giving beatings to the deceased. Aforesaid report if taken into consideration, creates serious doubt with regard to correctness of the story put forth by prosecution. At no point of time, allegation came to be made against bail petitioner Babloo, that he gave beatings to deceased, rather specific allegation with regard to infliction of injury on head of deceased with Danda is against Ashish. However, as has been taken note above, DNA profile of Mahender did not match with blood found on Danda allegedly used for giving beatings, as such, it would be too premature to conclude guilt, if any, of the bail petitioner in the case.

8. Though, aforesaid aspects of the matter are to be decided by the court below in totality of facts and circumstances as well as evidence collected on record by the prosecution, but definitely after having seen the CCTV footage coupled with the report of SFSL with regard to blood sample found on the weapon allegedly used by the accused named in the FIR, this Court is persuaded to agree with learned counsel appearing for the bail petitioners that petitioners never gave beatings, if of any kind to the deceased, who unfortunately lost his life in the alleged incident. Since, after having heard noises or ruckus being created by the complainant party, staff members came out from the hotel and they with a view to protect the property of the hotel may have shown some kind of fear to the complainant party but that may not be sufficient to conclude guilt, if any, of such persons much less under Section 302 of IPC.

9. Learned Additional Advocate General vehemently argued that gravity of offence alleged to have been committed by accused is required to be taken into consideration while considering their prayer for grant of bail, but now it is well settled that while deciding the question of grant of bail or refusal of bail, other factors such as the nature of evidence, the part played by the accused in the commission of offence and the likelihood of the accused absconding or tampering with the prosecution evidence are also required to be taken into account. No doubt, offence punishable under Section 302 of IPC is grave offence for which extreme penalty of death has been provided in law, however, mere gravity of offence and the severity of punishment is no ground for rejection of bail. In this

regard, reliance is placed upon the judgment passed by this Court in Jeet Ram v. State of H.P., Latest HLJ 2003(HP) 23, wherein it has been held as under:-

"7. As is the case of the prosecution, the only role attributed to the accused persons is that they caught hold of the deceased and their co-accused Savitri and Bimla pelted stones at him and thereafter Bhupender gave him the fatal blow with a 'Draft'. Prima facie it is difficult to believe that when a person is caught hold of by three persons two other persons are pelting stones at him, then such person and those persons who have caught hold of him will not sustain any injury. Therefore, the version regarding pelt ing of stones and holding of the deceased is prima facie clouded by suspicion as none of the accused persons who are alleged to have caught hold of the deceased while co-accused Savitri and Bimla were pelting stones at the deceased did not receive any injury whatsoever and no injury caused by the pelting of stones was found on the per son of the deceased. Mere catching hold of the deceased by the accused persons may not necessarily lead to the conclusion that they haw the common object of killing the deceased as the applicability of Section 149, IPC, In the facts of the ease, is a debatable question.

8. In Thakar Singh v. State of Punjab, 1969 Cur LJ 810 (relied upon by the learned Counsel for the accused persons to substantiate his contention) wherein the case of the prosecution was that accused Niranjn Singh 10 caught hold of the deceased and fell him down and accused Thakar Singh throttled his neck, the Punjab and Haryana High Court held as under :

"..... It is not a case in which it can be legitimately contended on behalf of the prosecution that there was any pre-planned common intention on the part of both Niranjn Singh and his father Thakar Singh in throttling the deceased. There could be no such intention on the part of Niranjn Singh even in executing his act of catching hold of the boy by the arms and throwing him down on the ground. The act of throttling by Thakar Singh followed per se and was independent of the act of throwing the boy down by Niranjn Singh. Thus, there is no community of intention in the act performed by Niranjn Singh and that executed by Thakar Singh. The two are distinct ones and one has nothing to do with the other. No intention on the part of Niranjn Singh from his act could be inferred in common with the intention of throttling by Thakar Singh, which followed later on. It is not a case in which it could be held that throwing down was committed by Niranjn Singh in furtherance of the common intention of throttling by Thakar Singh. Thus, the applicability of Section 34 of the Indian Penal Code is uncalled for. Niranjn Singh appellant could not be held vicariously liable by virtue of that Section. This is additional ground of his being entitled to acquittal."

9. In Jaspal Singh v. State of Haryana, 1986 (2) Recent CR 582 (2) wherein one of the accused caught hold of the deceased while armed with a stick but did not cause any injury to the deceased whereas his co- accused caused injuries to the deceased which resulted in his death, the Punjab and Haryana High Court

granted bail to the accused who had only caught hold of the deceased while on the following premise :

"Though the motive was with the petitioner and he caught hold of the deceased while armed with a stick, he did, not cause any injury to the deceased.

Rather his co-accused did cause injuries to the deceased which resulted in his death. In this situation, applicability of Section 34 Indian Penal Code is a moot point. It would thus be apt that the petitioner gets the concession of bail."

10. In *Kuldip Singh v. State of Punjab*, 1994 (3) Rec Cri R 137 : (1994 Cri LJ 2201) (SC) where one of the accused inflicted the injury on the head of the injured with sharp edged weapon and the second accused gave 'Lathi' blow on his shoulder causing simple injury allegedly with the common intention of accused in an attempt to commit the murder of the injured, the Hon'ble Supreme Court held that the injury on the head of the injured was serious one and proved to be grievous, therefore, the offence under Section 307, I.P.C. is made out against Kuldip Singh who caused 11 such injury but in so far as the other co-accused is concerned, he inflicted only one blow on the shoulder with the 'Lathi' causing swelling, therefore, it could not be said that he shared the common intention along with the Kuldip Singh in attempt to commit the murder of the injured."

"12. There is no doubt that offence punishable under Section 302, I.P.C. is a grave offence for which the extreme penalty of death has been provided in law. However, the mere gravity of the offence and the severity of punishment is no ground for rejection of bail, while deciding the question of grant or refusal of the bail, other factors such as the nature of evidence, the part played by the accused in the commission of the offence and the likelihood of the accused absconding or, tampering with prosecution evidence has also to be taken into account".

10. Though cases at hand are to be decided by the court below in the totality of evidence collected on record by the investigating agency, but having taken note of the aforesaid aspect of the matter, there appears to be no reason for this Court to let the bail petitioners incarcerate in jail for an indefinite period. Hon'ble Apex Court as well as this Court have held in catena of cases that one is deemed to be innocent till the time his/her guilt is not proved, in accordance with law and as such, this Court sees no reason to let bail petitioners incarcerate in jail for an indefinite period during trial.

11. Hon'ble Apex Court and this Court in a catena of judgments have held that one is deemed to be innocent, till the time, his/her guilt is proved in accordance with law. Since nothing remains to be recovered from the bail petitioners and they have already joined the investigation, this court sees no reason to curtail the freedom of the bail petitioners, for an indefinite period during trial. Apprehension expressed by learned Additional Advocate General that in the event of being enlarged on bail, bail petitioners may flee from justice or hamper the investigation, can be best met by putting the bail petitioners to stringent

conditions.

12. Hon'ble Apex Court in Criminal Appeal No. 227/2018, Dataram Singh vs. State of Uttar Pradesh & Anr decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved.

It has been further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty.

13. Hon'ble Apex Court in Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49 has held that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative.

14. In Manoranjana Singh alias Gupta versus CBI, (2017) 5 SCC 218, Hon'ble Apex Court has held that the object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

15. The Apex Court in Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496, has laid down various principles to be kept in mind, while deciding petition for bail viz. prima facie case, nature and gravity of accusation, punishment involved, apprehension of repetition of offence and witnesses being influenced.

16. In view of above, bail petitioners have carved out a case for themselves, as such, present petition is allowed. Petitioners are ordered to be enlarged on bail, subject to petitioner's furnishing bail bonds in the sum of Rs.2,00,000/- each, with two local sureties in the like amount, each to the satisfaction of the learned trial Court, besides the following conditions:

(a) They shall make themselves available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) They shall not make any inducement, threat or promises to any person

acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) They shall not leave the territory of India without the prior permission of the Court.

17. It is clarified that if the petitioners misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

18. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petitions alone. The petitions stand accordingly disposed of.

A downloaded copy of this order shall be accepted by the learned trial Court, while accepting the bail bonds from the petitioner and in case, said court intends to ascertain the veracity of the downloaded copy of order presented to it, same may be ascertained from the official website of this Court.