

(2013) 04 AHC CK 0134

Allahabad High Court

Case No: Criminal Miscellaneous Bail Application No. 100 of 2011

Arshad

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: April 26, 2013

Hon'ble Judges: Ravindra Singh, J

Final Decision: Dismissed

Judgement

Ravindra Singh, J.

Heard Sri V.P. Srivastava, Senior Advocate assisted by Sri I.M. Khan and Sri Sikandar B. Kochar, learned counsel for the applicant, learned A.G.A. for the State of U.P. and Sri Rajiv Lochan Shukla, learned counsel for the complainant.

This bail application has been moved by the applicant Arshad with a prayer that the applicant may be released on bail in case crime No. 474 of 2009 under sections 302/34, 201 IPC, and Section 19/20 Arms Act, P.S. Dhoomanganj, District Allahabad.

The facts in brief of this case are that the FIR has been lodged by Julfekar Ahmad on 6.8.2009 at 9.30 P.M. in respect of the incident allegedly occurred on 6.8.2009 at about 8.00 P.M. The alleged occurrence had taken place in front the house of Basi Ahmad in village Kasari Masari, the FIR has been lodged against four persons namely Ishlam, Imran, Arshad and Mohd. Jaid alleging therein that the first informant Julfekar Ahmad along with his father Ansar Ahmad (deceased), cousin of the Gulam Nabi, Mashroor Ahmad and Ilfaas Ahmad after offering the prayer from the graveyard at about 8.00 P.M. on 6.8.2009 when they reached near the house of Vasi Ahmad, the accused Islam, Imran, Arshad and Mohd. Jaid came from the house of Vasi House, they were armed with rifles, they came in front the vehicle of first informant and others. The first informant and his father were pushed down by them and they discharged the shots the deceased. The first informant came in fear, he shouted and escaped from the place of the incident. His brother also came their, who witnessed the alleged incident. On account of a festival there was sufficient

light in the village and road side. On shouting made by the first informant many persons gathered at the place of the incident, thereafter accused persons fled away in the west side. The deceased has sustained injuries, he was taken to the medical collage with the help of the police where he was declared dead. The first informant went to police station and lodged the FIR. His motorcycle U.P. X3892 was lying at the place of the incident. The post mortem examination report shows that the deceased has sustained 10 ante mortem injuries in which injury No. 1,2,5,6, and 7 are gun shot wounds of entry, injury No. 3,4 and 8 are fire arm wounds of exit. Injury No. 9 is contusion and injury No. 10 is multiple contusion on left foot. The fire arms wounds of entry i.e. injury No. 1,2,5,6, and 7 were having the blackening. From the alleged place of the incident five empty cartridges of 315 bore, one empty cartridge of 12 bore and one metallic bullet were recovered on 6.8.2009. The applicant applied for bail before Sessions Court, the same has been rejected.

It is contended by learned counsel for the applicant that the alleged occurrence has taken place in the dark hours of the evening on 6.8.2009. In sight plan the source of light has not been disclosed. In recovery memo prepared by the I.O. at the place of the incident the source of light has not been disclosed. The deceased Ansar Ahmad was a hardened criminal, he was challaned in many criminal cases. He was history sheeter of police station, Dhoomanganj, District Allahabad. He was having multi corner enmity. According to the FIR all the accused persons were armed with rifles but the first informant himself changed the weapons shown in the hands of the applicant in his statement recorded under section 161 Cr.P.C. by alleging that the applicant was armed with DBBL gun. The source of light has been added subsequently. After commission of the alleged incident the I.O. came at the place of the incident prepared the spot inspect note, on the next day of the alleged incident i.e. 7.8.2009 the I.O. recorded the statements of the witnesses Mashroor Ahmad and Gulam Nabi, they also changed the FIR version on the factum of weapon. There was a cross version of the alleged incident. The cross FIR was registered at another police station i.e. P.S. Khuldabad on 6.8.2009 P.M in respect of the alleged incident occurred on 6.8.2009 at 9.30 PM. In respect of the incident allegedly occurred on 6.8.2009 at about 8.00 P.M. at the house of Smt. Tahira, wife of Mohd. Akram, resident of Kasari Masari, house No. 89/92 P.S. Dhoomanganj, Allahabad under sections 452, 307 IPC. According to the defence the first informant Julfekar Ahmad along with the Rasul Ahmad, Ikrar and other entered into house of Smt. Tahira wife of Akram (real brother of the applicant) and started firing as a result of which Smt. Baby Fatima had sustained gun shot injury. The first informant who got injury to the Baby Fatima is aggressor, he has been released on bail by the learned Sessions Judge on 15.10.2009. The deceased Ansar Ahmad was a sharp shooter, he was facing trial of the criminal cases. The applicant being first informant and eye witness of a murder case in case crime No. 377 of 2008 is pending against the deceased and coaccused Atiq Ahmad, due to this he has been falsely implicated. The coaccused Israr and Mohd. Jaid whose cases based on the same footing with the case of the

applicant have been released on bail by the another bench of this court on 28.10.2010 in Crl. Misc. Bail Application No. 31592 of 2010, therefore, the applicant is also entitled to get the benefit of the parity with above mentioned coaccused for releasing him on bail. The trial of the applicant is pending but no witness has been examined and the applicant is in jail since 10.8.2009 and it is further submitted that Mohd. Jaid who has been released on bail has been subsequently killed in an accident in which one person of other side was also killed. The prosecution has not come with clean hand and has not expressed the nexus with Baby Fatime. The applicant is not previous convict, he may be released on bail.

In reply of the above contention, it is submitted by learned A.G.A. and learned counsel for the complainant that it is a case in which the allegation of causing the gun shot injury is against the applicant and three other coaccused. The injuries have been caused from the closed range. According to the post mortem examination report the deceased had sustained five fire arm wound of entry and all entry wounds were having the blackening. The deceased in an injured condition was taken to the hospital immediately where he was declared dead. The FIR has been promptly lodged. There is eye witness account of the first informant. His brother cousin Gulam Nabi, Mashroor Ahmad and Ilfas Ahmad whose names are mentioned in the FIR as eye witnesses. Both the parties are committed the offence as of gangwar. The I.O. recorded the statement of the first informant Julfekar Ahmad, Mashroor Ahmad and Gulam Nabi. According to the statement of the first informant the applicant Arshad was armed with rifle and Mohd. Jaid was armed with country made pistol, all four accused persons discharged the shots causing the injuries to the deceased by using the rifle, gun and country made pistol. The witness Mashroor Ahmad stated that the accused Arshad was armed with record 315 bore, the accused Islam was armed with rifle and accused Mohd. Jaid was armed with country made pistol. The witness Gulam Nabi stated that accused Arshad and Israr were armed with rifles, the accused Islam was armed with DBBL gun and accused Mohd. Jaid was armed with country made pistol. The allegation of causing the injuries is against all the accused persons. There is no cross version of the alleged incident. No cross FIR has been lodged at the police station, Dhoomanganj, District Allahabad. Even according to the FIR lodged by Smt. Tahira wife of Mohd. Akram the incident occurred at her house whereas the incident of the present case has not occurred at the house of Smt. Tahira, it has occurred in front of the house of Vasi Ahmad. The place of the incident in both the cases is different. Even in FIR lodged by Smt. Tahira the presence of the deceased has not been shown. In any case it can not be said to be a cross case. The coaccused Imran has been released on bail manly on the ground that from the side of the accused person Smt. Tahira wife of Mohd. Akram lodged the FIR at P.S. Khuldabad under section 452, 307 IPC in which Fatima became injured, She sustained fire arm injury, in which Julfekar Ahmad @ Tota and Rasul Ahmad have been released on bail. It has been treated as cross case by mentioning that the day and time of the incident in both the FIRs are same and on the basis of

the parity with Mohd. Jaid the coaccused Imran has has been released on bail, whereas there in cross case. The place of the incident in both the cases is different even in so called cross case the presence of the deceased in any capacity has not been shown. According to the FIR lodged by Smt. Tahira herself, the alleged incident had taken place in side her house whereas in the present case the incident has taken place in front the house of Vasi Ahmad. The place of the incident in both the cases is different. The coaccused Jaid after releasing on ail has died in cross FIR, in that incident one person from another side has also died. The applicant is a man of criminal antecedent, in case he is released on bail he may temper with the incident and the fair trial will not be done because in the present case till today no witness can be examined. The fear and terror of the accused person may not be ignored. IN such circumstances, the applicant may not be released on bail.

Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A., counsel for the complainant and from the perusal of the record it appears that it is a case in which the applicant and three other coaccused persons are named. The role of firing is assigned to them. The deceased had sustained five fire are wounds of entry. All the wounds of entry were having the blackening. According to the prosecution version also the injuries were caused from a closed range. The FIR has been promptly lodged. There is no eye witness account, sufficient source of light has been shown at the place of the incident. So far as the plea of the cross case is concerned no cross FIR has been lodged at the police station Dhoomanganj. The FIR of so called cross case has been lodged at police station Khuldabad. In that FIR the place of the incident is house of Smt. Tahira wife of Mohd. Akram. IN that FIR the presence of the deceased (of the present case) has not been shown in any capacity. According to the FIR of the present case the incident has been occurred in front the house of Vasi Ahmad, it has not occurred at the house of Smt. Tahira wife of Akram. In such a situation, it is very difficult to establish that in exercise of right of private defence the injuries were caused to the deceased and the prosecution was not under obligation to explain the injuries of Baby Fatima who had received injuries in some other incident. Though I have the deepest respect to the orders dated 28.10.2010 and 12.11.2011 passed by Hon. Single Judge of this court granting bail the coaccused Imran and Mohd. Jaid. I do not agree to extend the benefit of right of private defence to the accused because in both the incidents the place of incident not same and so called cross case the persons of the deceased in any capacity has not been shown. The coaccused Mohd. Jaid who was released on bail in pursuance of the order dated 12.11.2010 passed by the another bench of this court has been subsequently released in cross firing, in that firing one person from the other side had lost his life. There is a criminal background of both the parties. Both the parties are involved in committing the offence and the sessions trial is still pending in which no witness has been examined. In case the applicant is released on bail the fair trial may not be ensured. For ensuring the fair trial the applicant is not entitled for bail. The prayer for bail is

refused.

However, considering the submission made by learned counsel for the applicant that accused is in jail since 10.8.2009. The proceedings of the trial pending against the accused and applicant in S.T. No. 189 of 2010 are expedited. The trial court is directed to ensure the presence of the witnesses by adopting the appropriate procedure as prescribed by the Criminal Procedure Code, The same may be commenced on day today basis.

With this direction, this application is disposed of.