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

Reserved on: 01.04.2024

Delivered on: 08.04.2024

+ BAIL APPLN. 1725/2023

RAVI RAI

..... Petitioner

Through: Mr. Mohit Batra and Mr. Sukhwinder
Singh, Advs.

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Raghuvinder Verma, APP for
State with Insp. Manish Bhati, Police
Station Bhalswa Dairy.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under Section 439 Cr.P.C. seeking regular bail in connection with FIR No.817/2021 under Section 302 IPC registered at Police Station Bhalswa Dairy.
2. The case of the prosecution is that on 04.12.2021, the FIR was registered on the complaint of the wife of the petitioner/accused under Section 302 IPC. In the said FIR, it has been alleged that on 03.12.2021, in a drunken state complainant's husband i.e., the petitioner herein had a quarrel with the complainant over the issue as to who would look after the child and



then, he started giving beatings to the complainant and stated that he would eliminate the cause of quarrel and thereafter, he caught hold of the four month old baby and hit the head of the baby on the wall, who died on the spot.

3. The learned counsel for the petitioner submits that the complainant namely Nisha Rai, who was examined as PW-4 did not support the case of the prosecution. Inviting attention of the Court to the testimony of PW-4, he submits that the said witness turned hostile and was cross-examined by the learned APP for the State and in her cross-examination also, nothing came out in favour of the prosecution version.

4. He further submits that the prosecution has also examined the landlord of the premises where the petitioner was residing at the relevant time, as PW-2. Referring to the testimony of PW-2, the learned counsel submits that even the said witness has not supported the case of the prosecution and he also turned hostile. He, therefore, contends that there is no evidence on record to support the case of the prosecution.

5. He submits that the petitioner is in custody w.e.f 05.12.2021 and has spent almost 02 years, 04 months in custody and since the investigation is complete and the trial is underway, the custody of the petitioner is no more required.

6. He submits that the petitioner does not have any criminal record nor he is a flight risk. He further submits that the material witnesses have already been examined and there is no possibility of the petitioner influencing the witnesses in the event he is granted on bail. He, therefore, urges the Court to enlarge the petitioner on bail.



7. *Per contra*, the learned APP for the State has argued on the lines of the Status Report.
8. He submits that in the present case since the complainant, happens to be the wife of the petitioner, therefore, she has not supported the case of the prosecution. He further submits the story put forth by the complainant in her testimony is to the effect that some unknown persons barged into their house and gave beating to her husband and when she tried to save her husband, someone pushed her due to which her son fell down on the floor and her son received injuries and died.
9. He submits that in view of the provisions of Section 106 of the Evidence Act, 1872 the burden is on the petitioner to prove the fact of attack by unknown persons as the said fact is especially within his knowledge.
10. In rejoinder, the learned counsel for the petitioner submits that the Section 106 of the Evidence Act will not be attracted in the present case as the complainant herself did not support the case of the prosecution.
11. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.
12. It is not in dispute that the complainant was examined as PW-4 but she has not supported the case of the prosecution. The same is the position in case of another witness namely, Sanjay Gupta, the landlord of the petitioner who was examined as PW-2. Undisputedly, there is no other eye-witness.
13. The learned APP has invoked the provision of Section 106 of the Evidence act, 1872 in support of his submission, therefore, apt would it be to refer to the said Section which reads as under;-

“Section 106. Burden of proving fact especially within knowledge.



When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

14. The present is a case where the prosecution witnesses have not supported the case of the prosecution. It is trite law that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Evidence Act to establish that he was not guilty.

15. The Hon’ble Supreme Court in “**Sucha Singh vs. State of Punjab**”, (2001) 4 SCC 375 held as under:-

“19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.”

16. Likewise in “**Vikramjit Singh v. State of Punjab**,” (2006) 12 SCC 306, the Hon’ble Supreme Court observed as under:-

“14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute.”

17. The Hon’ble Supreme Court in **Balvir Singh vs. State of Uttarakhand**; 2023 SCC OnLine SC 1261, in the context of Section 106 of



the Evidence Act has observed that the said Section does not cast any burden upon the accused in a criminal trial, but where the accused throws no light at all on the facts which ought to be especially within his knowledge and which could support any theory of hypothesis compatible with his innocence, the Court can also consider his failure to adduce any explanation. The relevant part of the decision reads thus:-

“56. Even where there are facts especially within the knowledge of the accused, which could throw a light upon his guilt or innocence, as the case may be, the accused is not bound to allege them or to prove them. But it is not as if the section is automatically inapplicable to the criminal trials, for, if that had been the case, the Legislature would certainly have so enacted. We consider the true rule to be that Section 106 does not cast any burden upon an accused in a criminal trial, but that, where the accused throws no light at all upon the facts which ought to be especially within his knowledge, and which could support any theory of hypothesis compatible with his innocence, the Court can also consider his failure to adduce any explanation.....”

18. The legal position which thus, emerges is that in a criminal case the prosecution has to stand on its own legs and Section 106 of the Evidence Act will come into play to shift burden on the accused to explain the facts within his knowledge only when the prosecution has been able to discharge its burden of establishing the guilt of the accused beyond reasonable doubt. Therefore, the appropriate stage for assessing the applicability of Section 106 of the Evidence Act, 1872 will be during the trial. Likewise, the ultimate call on the probative or evidentiary value of the testimonies of PW-2 and PW-4 will be taken by the learned Trial Court during the trial.

19. However, at this stage the very fact that the prosecution witnesses have not supported the case of the prosecution tilts the balance in favour of



the petitioner for granting him bail.

20. The petitioner is in custody since 05.12.2021 and the prosecution is yet to examine 08 witnesses out of total 16 witnesses cited in the charge sheet, therefore, the conclusion of trial is nowhere in sight and in the facts and circumstances of the present case the petitioner cannot be kept in custody for an indefinite period to await the outcome of the trial.

21. It is not the case of the prosecution that the petitioner has any criminal record or there is any threat perception to the witnesses. It is also not the case of the prosecution that the petitioner is a flight risk.

22. Considering the aforesaid circumstances in entirety, this Court is of the view that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is enlarged on bail subject to his furnishing a Personal Bond in the sum of Rs. 25,000/- and one Surety Bond of the like amount to the satisfaction of the Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- a) Petitioner shall not leave the Delhi without prior permission of the Court.
- b) Petitioner shall appear before the Court as and when the matter is taken up for hearing.
- c) Petitioner shall provide mobile number to the IO concerned which shall be kept in working condition at all times and he shall not change the mobile number without prior intimation to the Investigating Officer concerned.
- d) Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with the witnesses.



23. The petition stands disposed of.
24. It is clarified that the observations made herein above are only for the limited purpose of deciding the present bail application and the same shall not be construed as an expression of opinion on the merits of the case.
25. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.
26. Order *dasti* under signatures of the Court Master.
27. Order be uploaded on the website of this Court.

APRIL 08, 2024/dss

VIKAS MAHAJAN, J