

IN THE COURT OF VINOD YADAV: ADDL. SESSIONS JUDGE-03:
(NORTH-EAST): KARKARDOOMA DISTRICT COURTS: DELHI

Sessions Case No.44/2021	
State Vs	(i) Mohd. Shahnawaz @ Shanu @ Ansari , S/o Mohd. Rashid Aged about 27 years, R/o House No.A-528, Gali No.22, Phase-10, Shiv Vihar, Delhi. Profession: Paan shop and water supply business.
	(ii) Mohd. Shoaib @ Chhutwa , S/o Shri Shri Islam, Aged about 22 years, R/o House No.93, Gali No.5/2, Behind Rajdhani School, Babu Nagar, Delhi. Profession: Auto driver.
	(iii) Shahrukh , S/o Shri Salauddin, Aged about 24 years, R/o House No.B-262, Gali No.7, Babu Nagar, near Shiv Mandir, Delhi. Profession: Driver.
	(iv) Rashid @ Raja , S/o Shri Riyajuddin, Aged about 22 years, R/o House No.A-22, Gali No.1, Chaman Park, Shiv Vihar Tiraha, Delhi. Profession: Hardware shop.
	(v) Azad , S/o Shri Riyasat Ali, Aged about 24 years, R/o House No.C-824, Gali No.9, Old Mustafabad, Delhi. Profession: Milk Dairy.
	(vi) Ashraf Ali , S/o Shri Anisul Haq, Aged about 29 years, R/o House No.A-18, Chaman Park, Indira Vihar, Delhi. Profession: Cloth selling at Mangalore, Karnataka.

<p>(vii) Parvez, S/o Shri Riyajuddin, Aged about 34 years, R/o House No.A-30/6, Gali No.1, Mahalaxmi Enclave, Babu Nagar, Delhi. And Mohalla Patua, PS Chaudpur, District Bijnor, Uttar Pradesh. Profession: Motorcycle repairing.</p>
<p>(viii) Md. Faisal, S/o Shri Raisuddin, Aged about 20 years, R/o House No.F-14, Gali No.1, Babu Nagar, main Brijpuri Road, Delhi. Profession: Electricity shop.</p>
<p>(ix) Rashid @ Monu, S/o Shri Khalil, Aged about 20 years, R/o House No.259, Gali No.7, Shiv Mandir, Shakti Vihar, Delhi. Profession: Carpenter.</p>
<p>(x) Mohd. Tahir, S/o Mohd. Umar, Aged about 38 years, R/o House No.16, Gali No.6, Old Mustafabad, Delhi. Profession: Hardware Shop.</p>
FIR No.138/2020
PS Gokalpuri
U/s 147/148/149/436/454/392/452/188/153-A/427/506 IPC

22.09.2021

PHYSICAL HEARING

Present: Shri R.C.S Bhadoria, Ld. Special PP for the State alongwith IO, SI Satyadev.

Shri Salim Malik, Ld. Counsel for the accused persons namely Mohd. Shoaib @ Chhutwa, Shahrukh, Rashid @ Raja, Ashraf Ali and Mohd. Tahir.

Shri Dinesh Tiwari, Ld. Counsel for accused persons namely Mohd. Shahnawaz @ Shanu @ Ansari, Azad and Parvez.

Shri Abdul Gaffar, Ld. Counsel for accused persons namely Mohd.Faisal and Rashid @ Monu.

ORDER ON CHARGE

The matter is listed for consideration on charge today. I have heard arguments advanced at bar by both the sides and perused the entire material on record.

2. (i) The facts of the case in brief required for the present are that FIR in the matter was registered on 04.03.2020 on a written complaint dated 01.03.2020, made by Brijpal, S/o Shri Binda Prasad, wherein he stated that his rented shop by the name of “**Kapil Rickshaw Battery**”, bearing No.A-5 (adjacent to Priyanka Copy House), situated in Chaman Park, in front of DRP Public School, main Brijpuri Road, Delhi-110094 was looted by the riotous mob on **25.02.2020 at about 9.30 PM.**

(ii) Thereafter, during the course of investigation, on 05.04.2020, IO clubbed two more complaints (both dated 24.02.2020), made by Shri Diwan Singh, S/o Shri Dashrath Singh regarding breaking opening the shutters and loot at his two shops, i.e shop No.4 (**Shivam Cycle Store**) and shop No.5 (**Shivam General Store**), situated at main Brijpuri Road, Chaman Park by the riotous mob on **24.02.2020.**

3. The learned defence counsel(s) have made a strong pitch by submitting that there is no incriminating material available on record against the accused persons and as such they are entitled for discharge in the matter on

account of the following reasons:

(i) It is argued that the accused persons have been falsely implicated in the matter by the investigating agency, being resident(s) of the same area/locality. Their false implication is further evident from the fact that there is an “*unexplained delay*” of about eight (08) days in registration of FIR, as the alleged incident took place on 25.02.2020; whereas, the case FIR in the matter was registered on 04.03.2020.

(ii) Both the complainants have neither specifically named any of the accused persons in their respective written complaints nor any specific role has been assigned to them in the matter. Even complainant Brij Pal has not named the accused persons in his two supplementary statements dated 04.03.2020 and 09.04.2020 respectively. As a sequel thereto, it is contended that at the instance of investigating agency, complainant Diwan Singh had later on falsely implicated accused persons namely Mohd. Shahnawaz @ Shanu, Ashraf Ali, Rashid @ Raja and Mohd. Faisal vide his supplementary statement recorded under Section 161 Cr.P.C in the matter on 09.04.2020, which is neither here nor there. No recovery of any sort has been effected from any of the accused persons.

(iii) It is further argued that accused persons were initially arrested in case FIR No.39/2020, PS Gokalpuri (**Dilbar Negi murder case**) and thereafter merely on the basis of disclosure statement(s) made by them in the said case, their arrest has been formally effected in the instant matter.

(iv) It is contended that the police has wrongly clubbed two incidents of different dates in the matter, in as much as the alleged incident as per complaint(s) made by complainant Diwan Singh occurred on 24.02.2020;

whereas, as per complaint of Brijpal his shop was looted by the riotous mob on 25.02.2020. The FIR in the matter should have been registered on the complaint(s) dated 24.02.2020 of Diwan Singh and not on the complaint dated 01.03.2020, made by complainant Brij Pal.

(v) It is next contended that even the four public witnesses namely Pawan Singh, Sharad Singh, Vipin and Mahesh, all of whom had made call at number 100 on the date of incident(s) have not specifically named any of the accused persons vide their respective statement(s) recorded under Section 161 Cr.P.C on 09.07.2020.

(vi) It is next contended that Constable Sanjay, Constable Vipin and HC Hari Babu are “*planted witnesses*” because if they had witnessed the incident, then why they didn’t report the matter to the Police Station on 24.02.2020 itself and waited till the recording of their alleged statements under Section 161 Cr.P.C on 08.04.2020 by the IO. No cogent/plausible explanation for the delay in recording the statements of said police witnesses has come from the side of prosecution.

(vii) Lastly, it is very strenuously argued that there is no electronic evidence available against the accused persons in the form of CCTV footage/video-clip to nail their presence at the spot/SOC at the relevant time .

4. Per contra, the learned Special PP for the State has very vehemently argued that on 24.02.2020 some unscrupulous elements had hatched a large scale conspiracy and carried out riots in the area of North-East District of Delhi. The

communal riots continued for two days unabated, resulting in large number of deaths of innocent persons and loss of property worth crores of rupees. It is submitted that initially all the accused persons were arrested in case FIR No.39/2020, PS Gokalpuri and thereafter their formal arrest was effected in the instant matter.

5. The evidence available against the accused persons has been specified as under:

(a) Role of accused persons	They have been found to be “ active members of the riotous mob ” on the date and time of incident that took active participation in rioting, vandalizing and arson in the area/locality in question on the date(s) and time of incident.
(b) Ocular evidence	(i) Complainant Diwan Singh vide his supplementary statement dated 09.04.2020 had categorically named/identified four accused persons namely Mohd. Shahnawaz @ Shanu, Ashraf Ali, Rashid @ Raja and Mohd.Faisal in the matter. (ii) The accused persons have further been categorically named/identified by PW Shyam Sunder vide his statement recorded under Section 161 Cr.P.C on 10.04.2020. (iii) Furthermore, the presence of accused persons at the spot/SOC on the date(s) and time of incident(s) has also been confirmed by HC Hari Babu (No.1840/NE), Constable Sanjay (No.1988/NE) and Constable Vipin (No.1997/NE), vide their statements recorded under Section 161 Cr.P.C in the matter on

	87.04.2020. The said police witnesses were lying posted as “ Beat Officers ” in the area/locality in question at the relevant time.
(c) Technical Evidence	The CDR location qua the mobile phones of accused persons have been found near the spot/SOC at the relevant time.
(d) Involvement in other cases	Besides the case in hand, all the accused persons are involved in several other cases of rioting in the area, including case FIR No.39/2020, PS Gokalpuri (Dilbar Negi murder case).

6. (i) As regards the contention of the learned counsel(s) that there is a delay in recording of FIR in the matter, it is argued that the riots at or around the scene of crime were “*very fierce*” from 23.02.2020 till 26.02.2020. Several persons were injured; public and private property(ies) worth crores of rupees were vandalized, arsoned and torched. There was curfew like atmosphere at or around the area. The police officials of PS Gokalpuri remained busy in law and order duty and as such, delay in recording of FIRs took place.

(ii) As regards the complainants not specifically naming the accused persons in their respective written complaints, it is submitted that same is not of much significance as complainant Diwan Singh has categorically named four accused persons vide his supplementary statement dated 09.04.2020. Even PW Shyam Sunder has categorically identified the accused persons vide his statement dated 10.04.2020 and the same finds corroboration from the statements of police witnesses recorded in the matter, who were lying posted as ‘**Beat Officers**’ in the area/locality in question at the relevant time. As a sequel thereto, it is contended that the peculiarity of North-East Delhi communal riots is such that the “**atmosphere of terror**” remained for weeks together, people were highly scared and it may be possible that due to highly surcharged and tense atmosphere,

complainant(s) might have got scared and could not name the accused persons in their initial written complaints. At the same time, it is also contended that this is not the appropriate stage to dwell upon the said issue and the same would be taken care of during the course of trial.

7. Lastly, it is submitted that at the stage of consideration on charge, the court is not supposed to meticulously judge the evidence collected by the investigating agency and has to take *prima facie* view thereupon.

8. I have given thoughtful consideration to the arguments advanced at bar by both the sides. I have also carefully gone through the chargesheet filed in the matter.

9. The law with regard to framing of charge is fairly settled now. In the case of “**Kallu Mal Gupta V/s State**”, **2000 I AD Delhi 107**, it was held that while deciding the question of framing of charge in a criminal case, the Court is not to apply exactly the standard and test which it finally applied for determining the guilt or otherwise. This being the initial stage of the trial, the court is not supposed to decide whether the materials collected by the investigating agency provides sufficient ground for conviction of the accused or whether the trial is sure to culminate in his conviction. **What is required to be seen is whether there is strong suspicion which may lead to the court to think that there is ground for presuming that the accused has committed an offence.**

10. Furthermore, in case titled as, “**Umar Abdula Sakoar Sorathia V/s Intelligence Officer Narcotic Control Bureau**”, **JT 1999 (5) SC 394** it was held that, “it is well settled that at the stage of framing charge, the Court is not expected to go deep into the probative value of the materials on record. If on the

basis of materials on record, the court could come to the conclusion that the accused would have committed the offence, the court is obliged to frame the charge and proceed to the trial”.

11. It is well-settled law that at the time of framing of charge the FIR and the material collected by the investigating agency cannot be sieved through the cull ender of the finest gauzes to test its veracity. A roving inquiry into the pros and cons of the case by weighing the evidence is not expected or even warranted at the stage of framing of charge (reliance **Sapna Ahuja V/s State**”, **1999V AD Delhi p 407**).

12. Now, reverting back to the case in hand. A careful perusal of the chargesheet filed in the matter reveals that sections 147/148/149/436/454/392/452/188/153-A/427/506 IPC have been invoked therein. It is relevant to note that except for section 436 IPC, all the sections invoked in the matter are exclusively triable by learned Magistrate. Now, let us see whether ingredients of Section 436 IPC are made out in the matter or not. Before that, it would be appropriate to have the definition of Section 436 IPC, which for ready reference is re-produced as under:

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Section 436- Mischief by fire or explosive substance with intent to destroy house, etc.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any **building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property**, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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13. (i) The case FIR in the matter was registered on 04.03.2020, on the basis of a written complaint dated 01.03.2020, made by complainant Birjpal, S/o Shri Binda Prasad. I have carefully gone through the aforesaid written complaint. In his said complaint, he has merely stated that his rented shop by the name of “**Kapil Rickshaw Battery**”, bearing No.A-5 (adjacent to Priyanka Copy House), situated in Chaman Park, in front of DRP Public School, main Brijpuri Road, Delhi-110094 was looted by the riotous mob on 25.02.2020 at about 9.30 PM. It is relevant to note here that date (25.02.2020) and time (at about 9.30 PM) has been added/inserted later on by a different ink in the said complaint. Even no initials of complainant Brij Pal are there on the said addendum. **The said complainant has not stated a single word regarding committing mischief by fire or explosive substance by the riotous mob in his aforesaid shop on 25.02.2020, i.e on the date of incident. Even in his supplementary statement(s) dated 04.03.2020 and 09.04.2020, he has not stated a single word regarding putting on fire of his shop by the riotous mob.** As such, the ingredients of Section 436 IPC are not at all made out either from written complaint of aforesaid complainant or from his supplementary statement(s) recorded under Section 161 Cr.P.C.

(ii) Now, coming to the other two complaints, both dated 24.02.2020, made by another complainant Diwan Singh, S/o Dashrath Singh regarding breaking open the shutters and looting of his two shops, i.e shop No.4 (Shivam Cycle Store) and shop No.5 (Shivam General Store), situated at main Brijpuri Road, Chaman Park by the riotous mob on **24.02.2020**. A careful reading of both his aforesaid complaints clearly and unerringly reveals that even he has not stated a single word therein which could attract the ingredients of Section 436 IPC. This is not be all and end all in the matter. A glaring fact which is worth

mentioning here is that in the body of said two complaints, complainant Diwan Singh has categorically mentioned that when he visited his aforesaid shops on 25.02.2020, he found the shutters thereof broken and articles looted by the riotous mob and few articles taken outside and put on fire in front of his Shivam General Store; whereas, in the heading/subject he mentions the date of incident as 24.02.2020. This Court is not able to comprehend as to how he could prefer the said complaint(s) to police on 24.02.2020 when he himself had visited his shops on 25.02.2020, meaning thereby that prior to his visit to the shops on 25.02.2020 he was not aware about the fate thereof. Secondly, when both the aforesaid complaints had reached to the police prior in time on 24.02.2020, then why FIR was not registered on these two complaints and instead the same was registered on the complaint of Brij Pal, dated 01.03.2020. No explanation in this regard has been provided by the investigating agency in the entire chargesheet. This Court is further not able to comprehend as to how an incident which took place on 24.02.2020 can be clubbed with the incident which occurred on 25.02.2020, unless and until there is clear evidence to the effect that same unlawful assembly of rioters was operating on both the aforesaid dates and there has to be specific witnesses in this regard. These are a few questions/queries which the investigating agency has to answer during the course of trial.

(iii) Be that as it may, as regards the complainant Diwan Singh naming accused persons in his supplementary statement and narrating the incident of putting on fire his Shivam General Store and first floor where spare-parts of bicycles were being kept, I am afraid that the investigating agency cannot cover up the said flaw by way of recording the supplementary statements of complainant(s), if the ingredients of Section 436 IPC were not there in their initial written complaints made to the police. This Court is conscious of the fact that cases of communal riots have to be considered with utmost sensitivity, but that does not mean that the common sense should be given go-by; mind has to be

applied even at this stage with regard to the material available on record. In case reported as, “**2004 SCC Online Del 961**”, titled as, “**Deepa Bajwa V/s State & Ors.**”, Hon’ble High Court of Delhi has been pleased to observe as under:

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6. After considering the submissions made by learned counsel for the parties, this Court is of the considered view that a complaint, on the basis of which the complainant seeks registration of an F.I.R., must disclose essential ingredients of the offence and in case a complaint lacks or is wanting in any of the essential ingredients, the lacuna or deficiency cannot be filled up by obtaining additional complaint or supplementary statement and thereafter proceed to register the F.I.R. If such a course is permitted, it would give undue latitude as well as opportunity to unscrupulous complainants to nail others by hook or by crook in spite of the fact that their initial complaint does not make out the offence complained of. Such a course would be utter abuse of the process of law. First version as disclosed in a complaint is always important for adjudicating as to whether an accused has committed or not an offence. In the complaint dated 19th April, 2001, the Complainant himself alleged that the Councillor Chhannu Mal was introducing him to the petitioner. If that was the case, how could he say later that on that day the petitioner knew that he was a Scheduled Caste. This statement, therefore, was a crude falsity introduced at the behest of the police to implicate the petitioner under Section 3 of the Act. This effort on the part of the police to supply the deficiency and cover up a lacuna in the complaint in view of legal opinion was totally unwarranted and an abuse of the process of law.

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(iv) In another case reported as, “**2008 (2) JCC 979**”, titled as, “**Rajender Singh Sachdeva V/s State (NCT) of Delhi**” has been pleased to observe as under:

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13. *If these and other surrounding circumstances are taken into consideration the complaint of the petitioner appears to be well founded. According to the complainant, the incident in which the petitioner was involved occurred some time in April-May 1988, i.e 16 years before the complaint. He was not named in the FIR. That incident is also absent in the first report documented during investigation, i.e a complaint to the Assistant Labour Commissioner. The allegations against the petitioner surfaced only during the statement under section 161. Interestingly, he was named in that. The third statement was recorded on 21.05.2004. In the meanwhile, the petitioner was arrested on 18.05.2004. One does not find any logic as to the recording of the second statement under Section 161 except as a explanation by the complainant regarding identity and knowledge of the petitioner's name. If this is seen in the background of absence of any mention of the petitioner in the FIR, the tenuousness of the link with allegations against him become apparent.*

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15. *Now, it is well established by series of judgments of the Supreme Court commencing from Union of India V/s Prafulla Kumar Samal, AIR 1979 SC 366 onwards that charges can be framed against an accused if the materials, i.e documentary and oral evidence show his prima facie involvemenet and existence of a grave suspicion in that regard. The materials sought to be pressed into service by the prosecution in this case for the charge under Section 120B do not inspire such confidence as to be termed as disclosing grave suspicion of his involvement. Another principle which has been recognized by the Courts is that if two views are possible, the one favouring the accused should be preferred at the charge framing stage. In this case, the entirety of evidence are the two Section 161 Cr.P.C statements of the complainant. There are no objective material or circumstantial evidence supporting the statements in the form of seizure of articles etc. In this background, it is clear that there are two views possible.*

*Therefore, applying the rule enunciated in “**Dilawar Balu Karane V/s State of Maharashtra**”, 2002 (2) SCC 135, the interpretation favouring the petitioner has to be accepted.*

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(v) Furthermore, in case reported as, “(2002) 2 SCC 135”, titled as, “**Dilawar Balu Kurane V/s State of Maharashtra**”, the Hon’ble Supreme Court has been pleased to lay down as under:

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*12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under [Section 227](#) of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under [Section 227](#) of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial [**Union of India versus Prafulla Kumar Samal & Another (1979 3 SCC 5)**].*

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(vi) Further, section 436 IPC cannot be invoked merely on the basis of statements (dated 08.04.2020) of police witnesses namely HC Hari Babu, Constable Sanjay and Constable Vipin, who were lying posted as “**Beat Officers**” in the area/locality in question on the date of incident(s), as when both the complainants aforesaid had stated nothing in this regard, then the statements of said police witnesses have no significance. There is also a considerable delay in recording of their statements.

14. In view of the aforesaid discussion, I am of the considered view that ingredients of Section 436 IPC are not at all made out from the material produced on record by the investigating agency. Except Section 436 IPC, all the offences invoked in the matter are exclusively triable by the court of learned Magistrate.

15. Accordingly, the case file be placed before learned Chief Metropolitan Magistrate (North-East), Karkardooma District Courts on 28.09.2021 at 2.00 p.m. with a request to either try the matter himself or assign it to some other competent Court/learned MM. Accused persons be produced physically before learned CMM (North-East) on the said date.

16. A copy of this order be sent to learned counsel(s) for the accused persons as well as to Superintendent Jail concerned.

(VINOD YADAV)
ASJ-03(NE)/KKD COURTS/22.09.2021