

A.F.R.

Reserved on 21.09.2022.

Delivered on 17.10.2022

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 18458 of 2022

Applicant :- Sanjeev @ Kallu Sethiya

Opposite Party :- State of U.P.

Counsel for Applicant :- Shiv Shankar Gupta, Arun Kumar
Shukla, Prakash Chandra Srivastava, Ram Kishor Gupta

Counsel for Opposite Party :- G.A., Rajiv Lochan Shukla

Hon'ble Siddharth, J.

1. Heard Sri P. C. Srivastava, learned counsel for the applicant; Sri Rajiv Lochan Shukla, learned counsel for the informant; learned A.G.A. for the State and perused the material on record.

2. In the first information report eight persons, including the applicant, have been implicated for causing the offence of attempt to murder, rioting armed with deadly weapons and forming illegal assembly for prosecution of a common object of murder. There is allegation in the first information report that uncle of informant, Mukesh Agarwal, was sitting on pavement of his house and talking to one, Swadesh, when co-accused, Deepesh Sethiya, came on his Scorpio car and co-accused, Shubham Tamrakar, came out of the car and directed one car standing to be removed and he started abusing. Co-accused, Akhilesh Vishwakarma was also with him. The father of the informant on hearing the noise came out. At the same time other brothers of Deepesh Sethiya, namely, Rakesh Kumar, Vinod

Kumar, Manish Kumar, Manoj Sethiya, Kallu @ Sajiv Sethiya etc., came out. Deepesh Sethiya and Rakesh Kumar fired which did not hit any one and in the commotion which followed every one tried to protect themselves from Sethiya brothers. All the accused persons fired on the father of informant, Ashok Agarwal and uncle of the informant, Mukesh Agarwal. Ashok Agarwal, the father of the informant, suffered number of injuries and the uncle of the informant suffered injuries in his leg. Subsequently, father of the informant, Ashok Agarwal, died and implication of the accused persons was also made under Section 302 I.P.C in addition to earlier implication under Sections 147, 148, 149, 307, 302, 504 I.P.C, Section 7 Criminal Law Amendment Act.

3. Learned counsel for the applicant submitted that the father of the informant and his uncle both sustained injuries. On the body of the father of informant following injuries were found :-

(a) Septic shock with abdominal sepsis with acute kidney injury.

(b) Status post exploratory laparotomy.

(c) **Alleged history of firearm injury on abdomen and right thigh.**

(d) Hemoperitoneum with multiple jejunal perforation due to firearm injury.

4. In the statement of the informant, Aman Agarwal, recorded under Section 161 Cr.P.C., no specific role was assigned to the applicant. The role of firing was assigned to co-accused, Deepesh and Rakesh. In the statement of eye-witness, Amit Agarwal, also he

assigned general role to all the accused persons. The injured, Mukesh Agrawal, also did not assigned any specific role to the applicant in his statement recorded by Investigating Officer.

5. Learned counsel for the applicant submits that applicant has been falsely implicated in this case along with his co-accused brothers, including, Deepesh Sethiya and Rakesh Sethiya, who were assigned the role of firing but it did not hit any one. He has submitted that the entire family has been falsely implicated in this case for ulterior motives. Applicant is in jail since 15.06.2021 and has no criminal history to his credit.

6. Learned counsel for the applicant has relied upon the judgement of the Apex Court in the case of **Mariadasan and others Vs. State of Tamil Nadu, 1980 SCC (Crl.) 523** and has submitted that the Apex Court held in this case that where sudden heated altercation and fight between two parties occurred and deceased tried to intervene, was assaulted on the spur of moment, no unlawful assembly can be said to have been formed at any time with common object of assaulting and killing the deceased. He has further relied upon the judgement of Apex Court in the case of **Puran Vs. State of Rajasthan, 1975 SCC (Crl.) 750**, wherein the Apex Court held that in the case of sudden and free fight constructive liability cannot be imposed as per Section 149 I.P.C. Reliance has also been placed on the judgement of the Apex Court in the case of **Sherey and others Vs. State of U.P., 1991 SCC (Crl.) page 1059**, wherein the Apex Court held that where number of

accused armed with lethal weapons attacked the victim, it shows that they were members of unlawful assembly with common object of committing murder but the other accused mentioned in an omnibus way who were armed with lathis cannot be implicated without attributing any overt acts to anyone of them and medical evidence ruling out any injury by lathis such accused cannot be convicted. He has submitted that in the first information report two co-accused namely, Deepesh and Rakesh, are stated to have made firing and thereafter omnibus allegations have been made that all the eight accused fired on the deceased and injured his brother which will not make all of them liable for punishment under Section 149 I.P.C.

7. Learned for the informant has vehemently opposed the bail application. He has relied upon the judgement in the case of **Kumer Singh Vs. State of Rajasthan and another, 2021 (4) Crimes (SC) Mah 461** and has argued that in this case the Apex Court set aside the order passed by the High Court granting bail to the accused without considering the facts of the case, nature of allegation, gravity of offence and role attributed to the accused. The Apex Court held that High Court did not consider whether the accused is alleged to be part of unlawful assembly. Merely because he was armed with lathi cannot be a ground for release him on bail. Such an order passed by the High Court was set aside. He has relied upon the judgement of this court in the case

of **Mahfooj Alam Vs. State of U.P. , wherein the judgment of Kumer Singh (Supra)** was relied by this Court.

8. Learned AGA has opposed the prayer for bail but could not dispute the above submissions.

9. This court after hearing rival contentions finds that the facts of this court are not disputed. The only point requires to be decided is whether the applicant has been assigned any overt role in the incident and can be considered to be member of unlawful assembly formed for the purpose attaining the common object of committing the offence of murder and attempt to murder. Whether the constructive liability provided under Section 149 I.P.C can be considered to have been extended to them regarding the alleged crime.

10. At the stage of consideration of bail application the court is required to rely upon the material collected by the Investigating Officer during the course of his investigation. The investigation of criminal cases is rarely fair and the report of the investigation officer under Section 173(2) are mostly one-sided and against the procedure of fair investigation.

11. Before proceeding further to decide the issue in hand, the basis of charge-sheet and the manner of investigation by police in a case involving cognizable offences needs

consideration.

12. Investigation and charge-sheet form the genesis of the Criminal Trial. Charge-sheet is the outcome of investigation. Under Section 157 of the Code of Criminal Procedure, the procedure of investigation in criminal cases has been incorporated. It requires the intimation of information to the police officer on the commission of a crime. The investigation includes all the procedures which are done by the police officer under the Code for the collection of evidence. The police on registration of FIR shall upon perusal of the facts of the case decide the line of investigation i.e., whether there is circumstantial evidence or eyewitnesses. Circumstantial evidence is the something which is a chain of circumstances that lead to the crime for example previous animosity, threats, last seen theory. It is basically connection of various circumstances to the crime. On the other hand, eyewitnesses are those who have seen the incident take place.

13. The police officer who is pursuing the investigation is empowered to require the attendance of the witnesses. The witnesses shall be such who are acquainted with the facts and circumstances of the case. The powers have been conferred under Section 160 of the Code. The provisions of Section 160 of the

Code explicitly mention that no male below fifteen years or a woman shall be called to attend at any other place than the place where she resides.

14. The non-compliance of summons under Section 160 of the Code is punishable under Section 174 of the Code. The person who is required to appear when served summons does not do so shall be liable to simple imprisonment up to one month or with a fine up to INR 500 or both. The section only requires the attendance of the witnesses and furnishing of relevant information about them. The police officer cannot insist upon the witnesses for the production of documents before him. The order which requires the attendance of a person needs to be in written form.

15. The most crucial part of the investigation lies in the examination of witnesses. The statements made by them can hold a person guilty. The police officer who is investigating the case has been empowered to conduct witness examination. The witnesses are bound to answer the questions which are related to the case truly. Section 161 lays down the procedure for the examination of witnesses by the police.

16. The investigating officer shall examine the persons who are acquainted with the facts of the case. It is the duty of the

investigating officer to record the statements of the eyewitnesses without any delay. After examining the witnesses, it is required by the police officer to write down the statement made by the witness. There should be no delay on the part of the police officer investigating the case in examining the witnesses. In the event of a delay of the examination of the witness, the onus lies on the investigating officer for explaining the reasons for the delay.

17. When the delay has been properly explained, it does not have any adverse impact upon the probable value of a particular witness. The police officer while examining the witnesses is not bound to reduce the statements made into writing. It is preferred that the statements should be written or the substance of the whole examination should be written down at least. The recorded statements are required to be noted down in the case diary maintained under Section 172 of the Code.

18. A police officer or the investigating officer has been empowered under section 165 of the Code to search the premises whenever he feels necessary or has reasonable grounds to believe the same. The investigating officer or the officer-in-charge conducts the search when he believes that there are sufficient or reasonable grounds to pursue the same. The search is conducted

when there is an absolute necessity for the same. Section 93(1) of the Code of Criminal Procedure provides for the grounds under which a warrant for search shall be issued. Moreover, the search has to be recorded in the diary otherwise it becomes illegal.

19. The investigating officer would go to the locality where the offence was committed and get two people called the "Panchas". The evidence given by the Panchas is of paramount importance. They sign a document called the Panchnama which contains the evidence collected out of the search. It is signed by them which validates the search and the procedure adopted during the investigation.

20. Panchnama has not been defined anywhere in the law. However, it is a document which holds great value in criminal cases. The Panchnama states things which were found at a particular place and at a particular time. After this, a memorandum of the search is prepared by the investigating officer or the officer-in-charge. It needs to be submitted to the Magistrate. The police officer-in-charge or the investigating officer who has a valid warrant is to be allowed to conduct the search of a place. Force may be used if he is not allowed to do so. The search is not just only of the premises but also of a person. If it is a female, a female officer shall search her with utmost

decency. The search of the closed place or of a person has to be made before two respectable persons of the society. These respectable persons are known as the "Panchas". They need to sign the document validating the search. However, the Panchas need not necessarily be called as witnesses.

21. Under Section 47 of the Code, the search of a place can be conducted by the police when they have to arrest a person. The police can break in and enter if they are not being allowed in the place. There is also an allowance for no-knock break-in to take place: this is done to take the person by surprise. The basic objective of conducting a search is to find evidence which may help in solving the case.

22. Section 91 of the Code of Criminal Procedure states that whenever a Court or the officer-in-charge of a police station feels that a document or some other thing is necessary for the purpose of the investigation, such Court may issue summon or the officer may in writing, order the person in whose possession the document is to be produced. The document shall be produced at the date and time specified in the summons served to the person. This section does not apply to a person who is accused and on trial.

23. The Court cannot issue a summons for the production of a

document or a thing by the accused. This is because it will become self-incrimination under Article 20(3) of the Constitution of India.

24. Under section 92 of the Code, if a document or other thing or a parcel is in the custody of a postal or telegraph authority, and the Magistrate whether Judicial or Executive, any of the Courts wanted that that document for the purpose of investigation, such Magistrate or the Court may order the authority to produce the document before them.

25. Section 173 of the Code requires the investigating officer to file a report before the Magistrate after the collection of evidence and examination of witnesses are done with. This section requires that each and every investigation shall be completed without any unnecessary delay.

26. The report under Section 169 of the Code can be referred to as the Closure Report. Closure report is the one in which it is stated that there is not enough evidence to prove that the offence has been committed by the accused. Once the closure report is filed before the Magistrate, he may accept and the report the case as closed, direct a further investigation into the case, issue a notice to the first informant as he is the only person who can

challenge the report or he may directly reject the closure and take cognizance of the case.

27. A charge sheet is a final report prepared by the investigation or law enforcement agencies for proving the accusation of a crime in a criminal court of law. The report is basically submitted by the police officer in order to prove that the accused is connected with any offence or has committed any offence punishable under any penal statute having effect in India. The report entails and embodies all the stringent records right from the commencement of investigation procedure of lodging an FIR to till the completion of investigation and preparation of final report. Section 173 of the Code of Criminal Procedure, 1973 provides for report of the police officer. Filing of the Charge-Sheet indicates the end of investigation.

28. The purpose of a charge-sheet is to notify a person of criminal charges being issued against them. After the charge-sheet is filed, the person against whom the charge-sheet has been filed comes to be known as an accused. The filing of charge-sheet with the magistrate indicates commencement of criminal proceedings.

29. The U.P. Police Regulation 107 and 108 detail the procedure required to be followed by the Investigating Officer as follows:-

107. An Investigating Officer is not to regard himself as a mere clerk for the recording of statements. It is his duty to observe and to infer. In every case, he must use his own expert observations of the scene of the offence and of the general circumstances to check the evidence of witnesses, and in cases in which the culprits are unknown to determine the direction in which he shall look for them. He must study the methods of local offenders who are known to the police with a view to recognizing their handiwork, and he must be on his guard against accepting the suspicions of witness and complaints when they conflict with obvious inferences from facts. He must remember that it his duty to find out the truth and not merely to obtain convictions. He must not prematurely commit himself to any view of the facts for or against any person and though he need not go out of his way to hunt up evidence for the defence in a case in which he has satisfactory grounds for believing that an accused person is guilty, he must always give accused persons an opportunity of producing defence evidence before him, and must consider such evidence carefully if produced. Burglary investigations should be conducted in accordance with the special orders on the subject.

108. The first step of the Investigating Officer should be to note in the case diary prescribed by Section 172 of the Code of Criminal Procedure the time and place at which he has received the information on which he acts and to make in the diary a copy of the first information report. When beginning his investigation, he must note in the diary the time and place at which he begins. He should then inspect the scene of the alleged offence and question the complainant and any other person who may be able to throw light on the circumstances. At an early stage of the investigation,

he should consult the village crime note-book to learn of any matter recorded there which may have a bearing on the case.

30. A perusal of the aforesaid regulations shows that for the Investigating Officer, the accused and the complainant are equal at the time of conducting investigation. He has to consider the case of both the parties and thereafter, arrive at a fair conclusion regarding the investigation into the allegations made against the accused. He is not required to simply prove that the allegations in the F.I.R are correct and should necessarily collect evidence to implicate the accused, justifying his implication. This was done when the country was under colonial rule but it appears that even after independence the police investigation is still the same. Its aim is only to justify the implication. Rarely the statements of the accused side are recorded by the investigating officers of police.

31. What is fair investigation has been considered by the Hon'ble Supreme Court in number of judgements, considered hereinbelow:-

1) State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222, at page 258 :

48. From this perspective, the function of the judiciary in the course of investigation by the police should be complementary and full

freedom should be accorded to the investigator to collect the evidence connecting the chain of events leading to the discovery of the truth, viz., the proof of the commission of the crime,. Often individual liberty of a witness or an accused person are involved and inconvenience is inescapable and unavoidable. The investigating officer would conduct indepth investigation to discover truth while keeping in view the individual liberty with due observance of law. At the same time he has a duty to enforce criminal law as an integral process. No criminal justice system deserves respect if its wheels are turned by ignorance. It is never his business to fabricate the evidence to connect the suspect with the commission of the crime. Trustworthiness of the police is the primary insurance. Reputation for investigative competence and individual honesty of the investigator are necessary to enthuse public confidence. Total support of the public also is necessary.

2) Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 268 :

32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer "is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur Vs. State of Punjab

AIR 1960 SC 866; Jamuna Chaudhary & Ors. Vs. State of Bihar AIR 1974 SC 1822; and Mahmood Vs. State of U.P. AIR 1976 SC 69).

3) Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762, at page 792 :

48. What ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons.

4) Amitbhai Anilchandra Shah v. CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, at page 383 :

58.9. Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen

each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second F.I.R to meet the ends of justice.

58.10. The investigating officers are the kingpins in the criminal justice system. Their reliable investigation is the leading step towards affirming complete justice to the victims of the case. Hence they are bestowed with dual duties i.e. to investigate the matter exhaustively and subsequently collect reliable evidences to establish the same.

5) Manohar Lal Sharma v. Principal Secy., (2014) 2 SCC 532 : (2014) 4 SCC (Cri) 1, at page 553 :

26. One of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences is one of the important duties the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to book.

27. Section 2(h) of the Code of Criminal Procedure (for short "the Code") defines investigation to include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by the Magistrate in this behalf.

28. In H.N. Rishbud, this Court explained that the investigation generally consists of the following steps : (AIR p. 201, para 5)

- (1) Proceeding to the spot;
- (2) ascertainment of the facts and circumstances of the case;
- (3) discovery and arrest of the suspected offender;
- (4) collection of evidence relating to the commission of the offence which may consist of the examination of :

(a) various persons (including the accused) and the reduction of statement into writing, if the officer thinks fit;

(b) the search of places and seizure of things, considered necessary for the investigation and to be produced at the trial;

(5) formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial, if so, take the necessary steps for the same for filing necessary charge-sheet under Section 173 Cr.P.C.

6) Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384, at page 643 :

48. Undoubtedly, the essence of criminal justice system is to reach the truth. The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law. All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed under law. Fair, unbiased and transparent investigation is a sine quo non for protecting the accused. Being dissatisfied with the manner in which the investigation was being conducted, the father of the victim filed the petition seeking an impartial investigation.

7) Rajiv Singh v. State of Bihar, (2015) 16 SCC 369, at page 397 :-

79. The investigating agency as the empowered mechanism of the law enforcing institution of the State is entrusted with the solemn responsibility of securing the safety and security of the citizens and in the process, act as the protector of human rights. The police force with the power and resources at its disposal is a pivotal cog in the constitutional wheel of the democratic polity to guarantee the sustenance of an orderly society. It is usually the first refuge of one in distress and violated in his legal rights to seek redress. The police force, thus is bestowed with a sacrosanct duty and is undisputedly required to be impartial, committed and relentless in their operations to unravel the truth and in the case of a crime committed, make the offender subject to the process of law. The investigating agency, thus in the case of a probe into any offence has to maintain a delicate balance of the competing rights of the offenders and the victim as constitutionally ordained but by no means can be casual,

incautious, indiscreet in its approach and application. A devoted and resolved intervention of the police force is thus an assurance against increasingly pernicious trend of escalating crimes and outrages of law in the current actuality.

80. As a criminal offence is a crime against the society, the investigating agency has a sanctified, legal and social obligation to exhaust all its resources, experience and expertise to ferret out the truth and bring the culprit to book. The manifest defects in the investigation in the case demonstrate an inexcusable failure of the authorities concerned to abide by this paramount imperative.

81. This Court, amongst others, in *Amitbhai Anilchandra Shah vs. Central Bureau of Investigation* and another (2013) 6 SCC 348, while underlining the essentiality of a fair, in-depth and fructuous investigation had observed that investigating officers are the kingpins in the criminal justice system and reliable investigation is a leading step towards affirming complete justice to the victims of the case. It was ruled that administering criminal justice is a two-end process, where guarding the ensured rights of the accused under the Constitution is as imperative as ensuring justice to the victim. It was held that the daunting task, though a compelling responsibility, is vested on the court of law to protect and shield the rights of both. That a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the Court was emphatically underlined. We are left appalled by the incomprehensible omissions of the investigating agency in the instant case and we would expect and require that the authorities in-charge of ensuring fair, competent and effective investigation of criminal offences in particular would take note of this serious concern of the Court and unfailingly take necessary remedial steps so much so that these observations need not be reiterated in future entailing punitive consequences.

8) Suresh Chandra Jana v. State of W.B., (2017) 16 SCC 466, at page 480 :-

34. The last aspect is regarding the defective investigation and prosecution. If a negligent investigation or omissions or lapses, due to perfunctory investigation, are not effectively rectified, the faith and confidence of the people in the law enforcing agency would be shaken. Therefore the police have to demonstrate utmost diligence, seriousness and promptness. [refer Ram Bihari Yadav v. State of Bihar & Ors., (1998) 4 SCC 517].

35. The basic requirement that a trial must be fair is crucial for any civilized criminal justice system. It is essential in a Reportable society which recognizes human rights and is based on values such as freedoms, the rule of law, democracy and openness. The whole purpose of the trial is to convict the guilty and at the same time to protect the innocent. In this process courts should always be in search of the truth and should come to the conclusion, based on the facts and circumstances of each case, without defeating the very purpose of justice.

32. The Hon'ble Supreme Court has held in number of cases that fair investigation, which precedes filing of charge-sheet, is a fundamental right under Article 21 of the Constitution of India. Therefore, it must be fair, transparent and judicious. A tainted and biased investigation leads to filing of a charge-sheet which is infact based on no investigation and therefore, the charge-sheet filed in pursuance of such an investigation cannot be held to be legal and in accordance with law. Some of such observations are as follows :-

1) Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523, at page 455

:

28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other

agency including a central agency which has acquired specialization in such cases.

2) Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 272 :

45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation.

3) Azija Begum v. State of Maharashtra, (2012) 3 SCC 126, at page 128 :

12. In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her complaint properly investigated. The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution.

13. The issue is akin to ensuring an equal access to justice. A fair and proper investigation is always conducive to the ends of justice and for establishing rule of law and maintaining proper balance in law and order. These are very vital issues in a democratic set up which must be taken care of by the Courts.

33. This country has inherited the present police system from the British Government. The main objective of British rule was to maintain status quo by using the police force as effective weapon to

put down any challenge to its authority by iron hand. The police had to take repressive measures on account of the directions of the British Government. The investigation was accordingly carried out keeping in view the direction of the government and their object of ruling this country. Charge-sheets were submitted accordingly which were not the result of free and fair investigation. The fundamental rights of the people of the country were not in existence and the Criminal Procedure Code was designed in a manner which was not in accordance with the rights of the people of this country before independence. The code nowhere clearly provides that the investigating officer shall necessarily record the statements of witnesses of both the sides, viz., the accused and the informant / complainants, while conducting the investigation into an alleged offence.

34. After India became independent, it became a welfare state from the police state of the Britishers. The legislations which were framed after independence were in conformity with the fundamental rights of the people of this country. In the welfare state, the role of the police became more difficult in view of deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, increase in white-collar crimes, etc. The police force, in addition to the aforesaid new challenges, came under stress and strain. Long hours of duty in connection with law and order situation, V.I.P duty, etc., left

the police with lesser time to properly investigate the cases. Under the pressure of work, police started mechanical investigation of the crimes entrusted to it for free and fair investigation. The investigating officer is subjected to pressure by the influential persons of society to give report as per their command. The influence of money in conducting investigation is quite evident and it is a very big hurdle in the free and fair investigation of a crime and case. It was suggested by number of Law Commission Reports that the investigation wing of the police should be separated from the law and order wing but it has not materialized as yet. The separation of investigation wing from law and order wing has its hazards. If they are separated it would be difficult to control law and order situation time the mischief mongers and the criminals will not tear the law and order wing of the police, once it is clear to them but the investigation of the case after report is lodged will be done by different wing of police. This is the practical drawback in separation of the wings of police at local level. The investigating officer is also under pressure of Senior Officers, who do not favourable see any departure from established practice of justifying implication of an accused by collecting evidence in this regard. They feel it safe to justify implication of an accused by submitting investigation reports against the accused, except in few cases, where they or their political patron is interested otherwise.

35. Therefore, it is clear that the Court has to be cautious in

considering the bail applications filed by the accused before and after submission of charge-sheet. There are number of impediments in the way of Investigating Officer in submission of charge-sheet after free and fair investigation as considered hereinabove.

36. Right to liberty is sacrosanct and guaranteed under Article 21 of the Constitution of India. Under Article 14 of the Constitution of India, there is equal protection of law to everyone, informant/complainant and accused, alike. During investigation stage or during trial stage, "presumption of innocence of accused" is intact and it is so till he is convicted either under Section 255 Cr.P.C. (summons case), Section 248 Cr.P.C. (warrant case) or under Section 335 Cr.P.C. (sessions case). Only when he is convicted, presumption of innocence gets replaced by a judgement of conviction.

37. Section 149 I.P.C is one of the most misused, misinterpreted and misleading provision of the present times so far as the investigation by the Investigating Officers of police or any other investigating agency of crime is concerned. The edifice of Section 149 I.P.C stands on substratum of Sections 141 I.P.C, 142 I.P.C and 143 I.P.C. Chapter VIII of the IPC provides for offences against the public tranquillity. Section 141 I.P.C defines unlawful assembly to be an assembly of five or more persons. They must have a common object, amongst others, to commit any mischief or criminal trespass, or other offence. Section 142 I.P.C postulates that whoever being aware of facts which render any assembly an unlawful one, intentionally joins the same

would be a member of the same. Section 143 provides for punishment of being a member of unlawful assembly.

38. Section 149 I.P.C provides for constructive liability to every person of an unlawful assembly. If an offence is committed by any member thereof in prosecution of common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. Formation of unlawful assembly having its common object and knowledge of common object are matters of fact which are required to be proved by the prosecution beyond all reasonable doubt for securing conviction of an accused under Section 149 I.P.C. There cannot be any straight jacket formula to arrive at a finding as to who was the member of unlawful assembly and for which object the same was formed. It can be inferred and proved by the cogent evidence only.

39. Section 149 I.P.C has following three essentials (i) there must be unlawful assembly; (ii) commission of offence may be by any member of unlawful assembly; (iii) such offence must have been committed in prosecution of the common object of the assembly, or must be such as member of the assembly knew to be likely to be committed.

40. Only when these three elements are satisfied an implication /conviction under Section 149 I.P.C may be sustained and not otherwise. The law of vicarious liability under Section 149 I.P.C is crystal clear that even mere presence in unlawful assembly, but with an active mind, to achieve the common object, makes a person vicariously liable for the act of unlawful assembly as held by the Apex Court in the case of **Amerika Rai Vs. State of Bihar, 2011(4) SCC 677** and **Ramchandran Vs. State of Kerala, 2011(9) SCC 257**. Ramchandran (supra) in paragraph 25 to 27 relying upon earlier judgement held as follows :-.

25. Regarding the application of [Section 149](#), the following observations from **Charan Singh v. State of U.P., (2004) 4 SCC 205**, are very relevant:

"13. ... The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in [Section 141](#). ... The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in [Section 149](#) has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter...."

26. In [Bhanwar Singh v. State of Madhya Pradesh, \(2008\) 16 SCC 657](#), this Court held:

"Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in [Section 141](#) IPC. Secondly, such common object need not

be the product of prior concert but, as per established law, may form on the spur of the moment (see also [Sukha v. State of Rajasthan](#) AIR 1956 SC 513). Finally, the nature of this common object is a question of fact to be determined by considering nature of arms, nature of the assembly, behaviour of the members, etc. (see also [Rachamreddi Chenna Reddy v. State of A.P.](#) (1999) 3 SCC 97)".

27. Thus, this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of [Section 149](#) IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

41. The concept of constructive liability must not be so stretched as to lead to false implication of innocent person or if general allegations are made against large number of accused, the Court has to be cautious unless reasonable direct and indirect circumstances lend assurance to the prosecution case that all the accused shared common object of unlawful assembly and hence their implication / conviction not be justified, as held by the Apex Court in the case of **Subal Ghorai and others Vs. State of West Bengal, 2013(4) SCC 607**. Ready reference to paragraph 53 would be relevant :-

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend

assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of [Section 149](#) of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.”

42. Apex Court has also cautioned that when there is sudden action by one member in the assembly, all are not liable. In the case of **Roy Fernandes Vs. State of Goa, 2012(3) SCC 221**, it was held that a group attack on the victim is not the only decisive factor to infer common object of the unlawful assembly. It would be useful to refer to paragraph 27 to 33 in this context :-

27. This Court has in a long line of decisions examined the scope of [Section 149](#) of the Indian Penal Code. We remain content by referring to some only of those decisions to support our conclusion that the appellant could not in the facts and circumstances of the case at hand be convicted under [Section 302](#) read with [Section 149](#) of the IPC.

28. In **Chikkarange Gowda & Ors. Vs. State of Mysore [AIR 1956 SC 731]** this Court was dealing with a case where the common object of the unlawful assembly simply was to chastise the deceased. The deceased was, however, killed by a fatal injury caused by certain member of the unlawful assembly. The court below convicted the other member of the unlawful assembly under [Section 302](#) read with [Section 149](#) IPC. Reversing the conviction, this Court held:

"9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under [Section 302](#)

read with [Section 149](#) Indian Penal Code cannot be sustained. The first essential element of [Section 149](#) is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under [Section 302](#) read with [Section 149](#) Indian Penal Code was not justified in law."

29. In **Gajanand & Ors. Vs. State of Uttar Pradesh [AIR 1954 SC 695]**, this Court approved the following passage from the decision of the Patna High Court in *Ram Charan Rai Vs. Emperor* [AIR 1946 Pat 242]:

"Under [Section 149](#) the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

30. This Court then reiterated the legal position as under:

"9.....The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of [Section 149](#) IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

31. In **Mizaji and Anr. Vs. State of U.P. [AIR 1959 SC 572]** this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of

the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. [Section 149](#) of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified.

32. This Court analysed [Section 149](#) in the following words:

"6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under [section 149](#) if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of [section 149](#). Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

33. In *Shambhu Nath Singh and Ors. Vs. State of Bihar* [AIR 1960 SC 725], this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object.

As a consequence, the effect of [Section 149](#) of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court *Gangadhar - Behera and Others Vs. State of Orissa* [2002 (8) SCC 381] and *Bishna Alias Bhiswadeb Mahato and Others Vs. State of West Bengal* [2005 (12) SCC 657] similarly explain and reiterate the legal position on the subject.

43. Common object has to be ascertained from the membership, weapon used and the nature of injuries as well as other

circumstances as held by the Apex Court in the case of **Haramant Laxmappa Kukkadi Vs. State of Karnataka, 1994(1) SCC 736.**

44. In the present case this court finds that out of three ingredients discussed above, third ingredient for constituting offence under Section 149 I.P.C is not satisfied in this case. The allegations clearly prove that dispute took place all of a sudden regarding parking of car and from the allegations on record it does not appears that all the accused persons had common object of causing the murder of the deceased and attempt to murder of his brother and had formed unlawful assembly knowing that such offence is likely to be committed. The dispute took place all of a sudden wherein two co-accused were involved. The injuries do not prove that any indiscriminate firing was made by all the accused persons. The injury caused to the injured was on his leg and will not constitute offence under Section 307 I.P.C. In the first information report no weapon used in the alleged offence was assigned to the applicant but allegation of firing was made against to him along with co-accused. As per judgements of Apex Court in the case of **Ramchandran (supra) and Bhanwar Singh (Supra)**, nature of arm used is one of the necessary

ingredients for considering the common object of the accused who had formed unlawful assembly.

45. Keeping the above facts, this court at the time of consideration of the bail application of an accused implicated for committing offence under Section 149 I.P.C. must place reliance on the material collected by the investigating officer. The court has to consider the case on its merit and there cannot be any straight jacket formula for the same, as stated earlier formation of unlawful assembly having its common object and knowledge of any object are matters of fact and the court should apply its independent mind keeping in view the position of the criminal investigation and the rule of prudence and probability keeping in view the totality of facts and circumstances of the case.

46. This court has come across number of cases of bail where ingredients for constituting offence under Section 149 I.P.C were clearly made but accused was not implicated under Section 149 I.P.C. Conversely court has also come across cases where the allegation in the first information report and the statements of the witnesses clearly did not proved the presence of the necessary ingredients for constituting offence under Section 149 I.P.C but accused was implicated for the same. Court should be cautious of relying upon the Section 149 I.P.C while considering bail

application. The investigating officer apply mostly section 149 I.P.C as it suits them.

47. In view of the above factual position emerging from the record the applicant cannot be said to be rightly implicated under Section 149 I.P.C for the alleged offences. Two fire arm injuries were found on the body of the deceased, Once on abdomen and on on thigh of the deceased. The accused named are above five in numbers, therefore, only because they were more in numbers the offence alleged cannot be considered to be made out against them at this stage. It appears to be case of sudden provocation and all the members of the alleged unlawful assembly cannot be held liable for the offence committed by any one or two accused named in the first information report. More so because in this case also the investigating officer of police has not recorded the statement of a single witness from the accused side. All the statements recorded by the investigating officer are of the informant side for justifying the implication of all the accused. The version of accused side, as usual, is missing. Therefore, on the basis of one-sided and flawed investigation the implication of the applicant under Section 149 I.P.C cannot be justified. It could have been done after considering the versions of both sides by the investigating officer, which he was required to do as per law, but

he has again miserably failed in performance of his legal duty. The three ingredients for constituting the offence under Section 149 I.P.C discussed in paragraph 12 of this judgement could have been ascertained only after considering the evidence of both sides by the investigating officer and not on the basis of one sided evidence collected by way of illegal investigation. In short, after considering the evidence lead before the trial court only definite opinion can be formed regarding commission of offence under Section 149 I.P.C. At the time of consideration of bail application of an accused, it would be unsafe to deny bail to an accused, implicated for committing offence under Section 149 I.P.C considering the state of investigation of crime by investigating agency in the state.

48. Respectfully concurring with the ratio of cases cited at the bar but in the light of above consideration, keeping in view the nature of the offence, evidence, complicity of the accused, submissions of the learned counsel for the parties, larger mandate of the Article 21 of the Constitution of India, considering the dictum of Apex Court in the case of **Dataram Singh Vs. State of U.P. and another reported in (2018) 3 SCC 22** and recent judgment dated 11.07.2022 of the Apex Court in the case of **Satendra Kumar Antil vs. C.B.I., passed in S.L.P (Crl.) No.**

5191 of 2021 and considering 5-6 times overcrowding in jails over and above their capacity by the under trials in this State and without expressing any opinion on the merits of the case, which may interfere with the discretion of the trial court, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

49. Let the applicant, **Sanjeev @ Kallu Sethiya**, involved in Case Crime No.279 of 2021, under Sections 147, 148, 149, 307, 302, 504 I.P.C and Section 7 Criminal Law Amendment Act, Police Station Mauranipur, District- Jhansi be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified:-

(i) The applicant shall not tamper with the evidence or threaten the witnesses.

(ii) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in Court. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The applicant shall remain present before the Trial Court on each date fixed, either personally or as directed by the Court. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicants fail to appear before the Court on the date fixed in such proclamation then the Trial Court shall initiate proceedings against him in accordance with law under Section 174-A of the Indian Penal Code.

(v) The applicant shall remain present in person before the Trial Court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

50. In case of breach of any of the above conditions, the complainant is free to move an application for cancellation of bail before this court.

51. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

52. The trial court is directed to conclude the trial against the applicant as expeditiously as possible, preferable within a period of one year as per Section 309 Cr.P.C from the date of production of certified copy of this order.

53. Registrar (compliance) is directed to communicate this order to the court concerned within a week.

Order Date :- 17.10.2022

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