RESERVED

AFR

Court No. - 74

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 48444 of 2020
Applicant :- Vinay Kumar Tiwari
Opposite Party :- State of UP
Counsel for Applicant :- Satyendra Singh
Counsel for Opposite Party :- GA

Connected With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 49354 of 2020
Applicant :- K. K. Sharma (Krishna Kumar Sharma)
Opposite Party :- State of U.P.
Counsel for Applicant :- Harshit Pathak, Anurag Pathak
Counsel for Opposite Party :- GA

Hon'ble Pradeep Kumar Srivastava,J.

1. Since both the bail applications are connected and arisen from same case crime number, therefore, both the bail applications are being disposed off by a common order.

2. Heard Shri V.P. Srivastava, learned Senior Counsel assisted by Shri Satyendra Singh, learned counsel for the applicant (Vinay Kumar Tiwari), Shri Shyam Narayan Verma, Shri Anurag Pathak and Shri Harshit Pathak, learned counsel for the applicant (K.K. Sharma) and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Rajesh Mishra, Shri R.P. Pandey, Shri Kaushalesh Prasad Tiwari and Shri Mayank Mishra, learned AGA, Shri Abhijeet Mukherjee, learned Brief Holder for the State and perused the record.

3. The present bail applications have been filed by the accused-applicants Vinay Kumar Tiwari and K.K. Sharma in Case Crime No. 0192 of 2020, under sections 147, 148, 149, 302, 307, 504, 506, 353, 332, 333, 396, 412, 120B, 34 IPC, section 7 of Criminal Law Amendment Act and section ¾ of Explosive Substances Act, P.S.-Chaubeypur, District – Kanpur Nagar.

4. In the year 1981, in **Prem Chand (Paniwala) vs Union Of India, AIR 1981 SC 613**, *Justice V. R. Krishna Iyer* opened the judgment with a question *"Who will police the police?"* About 40 years have passed, but, that question is still there with a bigger question mark. On the date of incident, the raid conducted by police force was countered by the gangster Vikas Dubey and member of his gang in a very planned way and 8 police personnels including Circle Officer of the area were brutally killed and several police personnels sustained serious firearms injuries. The accused persons were carrying sophisticated firearms and the accusation against the accused-applicants is that they were in collusion with the gangster and his associates. Under a conspiracy, they leaked information of police raid and gave them opportunity to remain in preparedness and did not render due support to police personnels nor informed the police force regarding their preparedness to effectively counter the raid and their being equipped with sophisticated firearms.

5. As per FIR version and police papers, the brief facts are that on 03.07.2020, at 1 AM in the midnight, the incident took place in respect of which on the same day in the early morning at 5:35 AM, the FIR was lodged in which 21 accused persons were named with 60 to 70 unnamed accused persons and the allegation was that an FIR was registered on 02.07.2020, Crime No. 191/20, under section 147, 148, 504, 323, 364, 342, 307 IPC and section 7 of Criminal Law Amendment Act, 1932 against Vikas Dubey, Sunil Kumar, Bal Govind, Shivam Dubey and Amar Dubey. In order to arrest the accused persons, with reference to GD No. 5 at 00:27 AM midnight, SO Vinay Kumar Tiwari with other SI and Constables keeping weapon and cartridges reached at Bela crossing, where, as planning CO Bilhaur Shri Devendra Kumar Mishra with other police officers along with Govt. Vehicle and Driver and SHO Bithoor, Shri Kaushalendra Pratap Singh with other police officers along with

Government Vehicle and Driver and also SHO Shivrajpur, Shri Mahesh Yadav with SI and Constables (all mentioned in the FIR by name), after due consideration, set out from the place in search and arrest of the accused persons. Between the police parties of three police stations mentioned above, in view of fencing around the house of accused which is surrounded by big walls of adequate heights with barbed wire fencing and huge iron gates in different directions, it was decided that on reaching on the main gate in the leadership of CO Bilhour, the police will be divided into three teams. The first police team was led by CO Bilhour, the second by SHO Bithoor and the third by SO Chaubepur. The police teams and police officers ensured that there was no illegal article with them. Thereafter, the police party departed from *Diwedi Atta Chakki* to Bikru village and the moment they reached 20 meters close to the house of accused Vikas Dubey (now dead), it was found that on the road, a JCB machine was standing horizontally in such manner that the road was almost blocked. The police party anyhow, from the remaining space, managed to reach to the *Tiraha* close to the house gate of accused Vikas Dubey. The first police party lead by CO Bilhour stopped at the gate and the second party led by SO, Bithoor proceeded towards left side in east direction, and from the right side towards south direction the third police group led by SO Chaubeypur was proceeding.

6. All the police personnels were in police uniform except one Guard who was in civil dress. There was sufficient light of electricity and dragon light. Suddenly, from the room situating on the first floor on the north east side from the roof of Vikas Dubey, accused Vikas Dubey and other co-accused persons with rifle, pistol and firearms in their hands, in a preplanned way, with intention to kill the police personnels, opened fire shouting loudly how the police personnels dared to raid and nobody would escape alive from this place. Side by side, from the roof of Raja Ram alias Prem Kumar Pandey, situating

in front of the house of accused Vikas Dubey, Prem Kumar Pandey and other accused persons Shyam Bajpai, Chhotu Shukla, Monu, Jahan Yadav and others, and from the roof of the house of Atul situating in the west of the house of accused Vikas Dubey, Atul Dubey, Dayashankar Agrahari, Shashikant Pandey, Shiv Tiwari, Vishnu Pal Yadav, Ram Singh, Ramu Bajpai and other co-accused persons opened firing in a planned way with intention to kill the members of the police party. Because of this sudden and indiscriminate firing, most of the policemen of the first group and second group were seriously injured. Some of the members of police party after positioning themselves proceeded towards the house of Rajaram Pandey and some proceeded towards the open land of Pappu Mishra. At the same time when the police party was so proceeding, the accused persons from the roof of their house came down and started firing on already injured police personnel. The police party led by SO Caubeypur, because of indiscriminate firing, did not proceed further. There was no place to shelter and there was regular firing by the main accused persons from the roof. They, therefore, covered the firing in order to reach at a safe place. The accused persons coming from all sides surrounded the police personnel, fired and killed SI Anoop Kumar Singh Chawki in-charge Mandhana, Constable Jitendra Pal, Constable Bablu Kumar, Constable Rahul Kumar and Constable Sultan Singh by causing gunshot injuries. In the varanda of the house of accused Rajaram Pandey, SO Shivrajpur, Shri Mahesh Yadav and SI Nimbu Lal were also killed by the accused persons. CO Bilhour was dragged inside the house of Prem Kumar Pandy by accused Vikas Dubey, Prem Kumar Pandey, and Amar Dubey, Prabhat Mishra, Gopal Saini, Heeru Dubey, Bauwan Shukla, Shivam Dubey, Balgovind, Bauwa Dubey, and other co-accused persons and was killed brutally by them by causing injuries by fire arms and sharp weapons.

7. Meanwhile, remaining members of first, second and third police party, in their self-defense, started firing and saved 7 police personnels including SO Bithour, Shri Kaushalendra Singh, SI Sudhakar Pandey, Constable Shiv Moorat Nishad, Home Guard Jai Narayan Katiyar, Constable Ajay Kumar Kashyap, Constable Ajay Singh Sengar and took them to safe place. During the incident the accused persons looted the Govt. pistol of injured SO Bithour, but because of cover firing caused by the police party, the accused persons could not succeed in causing death of SO Bithour, Kaushalendra Singh. The accused persons looted the Government arms form the police personnels and absconded away. The alive policemen, in the light of electricity and other light, recognized the accused persons. Injured policemen were admitted in the Regency Hospital for their treatment. Thereafter, the police reached at the place of occurrence and found the dead body of the policemen lying there. 9MM pistol with 10 cartridges of SO Mahesh Chandra Yadav, 9MM pistol with 10 cartridges of SI Anoop Kumar Singh, AK-47 with 30 cartridges of Constable Jitendra Kumar, insas rifle with 20 round cartridges magazine of Constable Sultan Singh were already looted by the accused persons during incident. Besides the named accused persons, there were 60 to 70 more armed accused persons who in a very planned way, initially hiding themselves at a high place, with intention to kill the policemen, caused fire and subsequently, they jumped down from the roof and from very close range they committed brutal murder of the policemen. The policemen also fired, but, because of this incident and indiscriminate and daring firing by the accused persons, a situation of lawlessness and sense of fear was created. The accused persons were led by accused Vikas Dubey was a known gangster and history sheeter of the area and there remained fear and terror of the gangster and his gang around the vicinity. Because of the criminal activities, the gang had gained a lot

of movable and immovable properties. The police inspected the place of occurrence where cartridges were scattered here and there and the sign of firing was also present on the walls around and other places. Human blood was also scattered all over the place. On this basis, the FIR was lodged by SO Vinay Kumar Tiwari, who is presently one of the accused applicants.

8. The statement of informant was recorded by the Investigating Officer. The dead bodies were also taken into possession, inquest report was prepared, dead bodies were sealed and were sent for postmortem. The statement of SI Azhar Ishrat was recorded on the same day who stated in accordance with the FIR version. Thereafter, the statement of SI Vishwanath Mishra, P.S. Chaubepur, was also recorded who also stated to the tune of FIR and had additionally stated that from the roof of the house of the Vikas Dubey some women were loudly shouting that no police personnel should escape today and they were instigating the accused persons to kill the policemen. These women were Smt. Chhama, Smt. Khushi, Smt. Rekha Agnihotri, a maid of accused Vikas Dubey who used to live in the house of accused Vikas Dubey and she was also involved in his criminal activities.

9. Thereafter, SO Vinay Kumar Tiwari was suspended by order dated 4th July, 2020 of SSP, Kanpur Nagar on account of his inaction, suspicious role and for not apprising the police force about the kind and quality of weapon accused Vikas Dubey and the members of his gang were keeping, nor he apprised about the way to get away from the place of occurrence. It was also found that when the firing started from the side of accused persons, the applicant did not lead his team and escaped from the place. Because the police personnels were not having any knowledge about the way to get away from the place, a number of them were killed and in a great number sustained injuries.

10. The IO recorded the statement of constable Rajeev Kumar who

stated to the tune of SI Vishwanath Mishra and further added that SI Krishna Kumar Sharma and SO Vinay Kumar Tiwari of the police station were closely related with accused Vikas Dubey and prior to the incident, SI Krishna Kumar Sharma talked with Vikas Dubey for 20 minutes on mobile. He has also stated that these police officers (accused-applicants) were conspired with accused Vikas Dubey to humiliate and give lesson to CO Bilhour out of jealous and bad relationship.

11. Statement of constable Abhishek Kumar was also recorded and he also stated that SI Krishna Kumar Sharma and SO Vinay Kumar Tiwari were closely related with accused Vikas Dubey. He has also supported the statement of Constable Rajeev Kumar on that point. Statement of co-accused Suresh Verma was also recorded and he also stated in similar fashion showing the closeness of these two with accused Vikas Dubey and the prior talk with SI Krishna Kumar Sharma with him just before 20 minutes from the time of incident.

12. SI Azhar Ishrat was again examined by the IO, and despite that he supported the FIR version, he also stated about the involvement of the women who instigated the accused persons for commission of the offence and said that he saw Sanjay Dubey @ Sanju who was firing on the police party who was known to him because he used to come to the police station regularly. Co-accused Suresh Verma was also instigating the other accused persons. On being asked by the IO, he stated that SI K.K. Sharma was not present there during the raid who was present in the police station but deliberately did not join the raid. He was asked to join but he avoided. He had already given information about the raid much before the time of incident to gangster Vikas Dubey with whom he was closely related. He has also stated that he knew the accused persons with name because he is posted in the police station from the last about 3 years and he had gone to the village of Vikas Dubey several times in respect of his

official duty and Vikas Dubey and his other associates were well known to him. He saw and recognized the accused persons in the solar light which is installed at the main gate of Vikas Dubey and also in the light on the roof of the house of Vikas Dubey, Prabhat Dubey, Gopal Ji Saini, Govind Saini, Raja Ram @ Prem Kumar Pandey. He identified the other accused persons going from the side of house of Agar Dubey to the house of Vikas Dubey. The witness has stated that he also fired 7 times but realizing that by firing his location will be exposed, he stopped firing and concealed himself in the veranda of the neighbour of the Prabhat Mishra. Constable Navneet also concealed himself there. Thereafter there was power cut and Prabhat Mishra who was firing from his roof came down with his rifle and seeing them, he fired on Constable Navneet but because the witness intervened by slapping on the *but* of rifle, constable Navneet escaped and thereafter he and constable Navneet, because they were fully acquainted with the geographical situation, through the field, came to the road. The JCB driver was Rahul Pal and not Monu as he had stated earlier. He has named the accused persons who fired on the members of the police party.

13. Subsequent statement of SI Vishwanath Mishra was recorded and he has given detailed statement and besides that he supported the FIR version, he has also stated that the accused persons were firing from the roof of Prabhat Mishra. He has stated that Vikas Dubey was a known criminal and, in the area, he used to possess and grab lands of others with the help of police. He used to create terror and organize gambling. SO Vinay Kumar Tiwari was in his contact through SI K.K. Sharma and they used to regularly associate with them. This came in the knowledge of CO Bilhour and he had submitted adverse report about them to the superior authority. On the date of incident, K.K. Sharma deliberately avoided in participating in the raid and during the period he was regularly in touch with the

accused persons. He and SO Vinay Kumar Tiwari just to lower down the image of CO Bilhour, conspired with the criminals and consequently 8 police persons were killed and 7 police persons sustained serious injuries.

14. SI Ajhar Ishrat was re-examined by IO and he also stated that the accused persons were well informed about the raid which is also clear from electronic surveillance and other evidence. The relationship between SO Chaubepur and Circle Officer was bad and the CO had sent adverse report regarding misconduct of SO Vinay Kumar Tiwari to superior officer. He stated that SI K.K. Sharma and SO Vinay Kumar Tiwari were in contact with accused Vikas Dubey and used to regularly associate with him and therefore, the accused persons succeeded in causing such a horrible incident only because SI K.K. Sharma and SO Vinay Kumar Tiwari leaked the information about raid to them. He has also stated that he recognized the accused persons in the road light and accused persons were also lighting torch from their roof and were shouting.

15. Certain call details have been also annexed at page 156 and onward showing that accused-applicant K.K. Sharma had talked with the gangster and his gangmen. The learned counsels for the applicants have contended that constable Rajeev Kumar was also in touch with Vikas Dubey. The audio conversation of Constable Rajeev Kumar with Vikas Dubey has also been annexed to show that he was in regular touch with Vikas Dubey and he has not been made accused. Constable Rajeev Kumar has been subsequently examined and he has stated that Vikas Dubey was having prior knowledge of the police raid and he rang him on mobile phone but, being occupied in work, he could not pick up the same and when he saw that there was miss call of Vikas Dubey, he dialed him and Vikas Dubey gave a lot of threatening and abuse and threatened that he will kill all the police personnels who will be found on the police jeep and he would

commit such a big offence which will be unprecedented. The witness has stated that he recorded the phone call and told about this threatening to Vinay Tiwari, SO, Chaubepur and also said that the gangster has prior information of police raid, but, SO Vinay Tiwari ignored and did not take him seriously. He was also accompanying SO Vinay Tiwari during the raid. He recognized most of the accused persons. He has stated that Chhama Dubey, Khushi Dubey and Shanti Devi from the roof of Atul Dubey were disclosing the location of police personnels to the accused persons and were instigating them to kill the policemen. The accused persons continued firing from 1 AM in the night for 30 to 35 minutes.

16. From the description above, it is clear that 8 police personnel including the Circle Officer were brutally murdered by the accused persons and 7 police personnel sustained serious injuries. The accused persons who were named in the FIR with 60-70 more accused persons constituted unlawful assembly with firearms and deadly weapons killed eight police personnels in a brutal way and injured the police personnel very badly by causing firearm injuries. Some of the police personnels were killed and part of their limbs was also separated from body. The police witnesses who were one time colleagues of the accused applicants have given statement that the accused applicants were very close to gangster Vikas Dubey and his gangmen and they leaked the information of raid which gave opportunity to the accused persons to prepare and plan the brutal murder of the police personnels.

17. Submission of the learned Senior counsel for accused applicant Vinay Tiwari is that there is no direct or indirect evidence against him. It was a police raid conducted by the police party which was countered by the main accused persons and in the incident 8 police persons were killed by gunshot injuries and 7 policemen also sustained gunshot injuries. The accused applicant was himself leading

one of the police party. He himself lodged the FIR against the main accused persons and he also lodged FIR on the basis of information given by Rahul Tiwari implicating them. Therefore, it has been submitted that there is no question of the accused-applicant being involved in the commission of the offence. He has no motive nor there was any reason for him to enter into so called conspiracy which resulted in such a heinous crime. Further submission is that the witnesses have changed their version when they were subsequently examined by IO and all of them in a tutored way have stated about the closeness of the accused-applicants with gangster Vikas Dubey and his gang. There is no substantial evidence and there is only some scattered evidence against the accused applicants which is insufficient for the accusation of criminal conspiracy. Nothing can be concluded against them on the basis of CDR, particularly against SO Vinay Tiwari who never made any communication on mobile with either Vikas Dubey or his gangmen. There is no such CDR collected by the Investigating Officer.

18. It has been further submitted that the applicants have been falsely implicated. Late CO Devendra Mishra was informed about the incident of Rahul Tiwari who directed him not to make entry in GD as the police is going to take stern action and this will alert gangster Vikas Dubey. The policemen including CO Devendra Kumar Mishra were posted there for much longer period and were well-versed with history sheeter Vikas Dubey. The accused-applicants had no cordial relation with them. The said viral letter of CO indicating close relation is forged and has been obtained from social media. No such letter was sent by CO Mishra to SP, Kanpur Nagar nor the applicant was put to any departmental proceeding nor any explanation was asked from him. It has also not been mentioned in his suspension order. The allegations regarding his conduct during raid are vague, imaginary and false and is not supported by any evidence.

19. On the contrary, the learned additional Advocate General Shri Manish Goyal has argued that it is not a case of simple crime and the crime has been committed because the police assisted the gangster and leaked the information with regard to raid and, because of the prior information about the raid, the gangster was in preparedness and he planned the murder of the policemen and it is why so many accused persons assembled with the main accused and were active at the time of raid. They were inhabitants of area falling within the same police station in which house of the gangster situated and where the incident took place. Being the member of police force and working at the local police station, the accused-applicants had enough information about the geographical situation and path ways around the vicinity. The police force reached to the place of gangster and could not get away from the place as the accused applicants did not render support nor cooperated and remained inactive. The role of SI K.K. Sharma is rather evident in view of the fact that he was regularly in touch with Vikas Dubey and his gang and through him SO Vinay Tiwari was also in his touch. Both the accused applicants certainly helped them and always closed their eyes towards the criminal activities of the gang. They, during the incident, maintained distance from the other police party and went away to save themselves. In case of such an organized crime where members of police force were assisting the gangster and his group, it is not possible to have a direct evidence. Moreover, in a case of conspiracy, there is no possibility of direct evidence. The evidence which can be available is only circumstantial in nature and may be in the form of inaction on the part of the accused applicants who, in their endeavor to assist the accused persons, kept themselves out from the picture. Therefore, the conclusion of conspiracy is to be drawn from the circumstances of the case and the situation that the applicants, being member of police force, were indulged in assisting gangster Vikas

Dubey and his gang, and all the paper work was done by them. It has been submitted that the IO examined several witnesses of police force who worked with the accused applicants and they have stated about conspiracy and their close links with the gangster and his gang.

20. Moreover, it has been also pointed out on behalf of the State that, on being arrested, gangster Vikas Dubey gave statement to the IO revealing that the accused applicants used to give prior information of police activities and on the date of incident also he was informed about the police raid. The gangster is dead and his statement given to police is legally admissible as the same is statement of a dead man. Therefore, it has been submitted that taking into consideration over all circumstances, the culpability is writ large and the accused applicants do not deserve to be released on bail.

21. This case raises certain serious questions which relate to administration of criminal justice system in the country with reference to organized crime and criminals and the role and efficiency of police force in combating the problem. The police force is one of the most important force with great potential, easily approachable to the people facing criminal wrong and law and order problem and the most visible component of the criminal justice system. Like other departments, there has been a general fall and deterioration in the standard of functioning of the police force also. With time, it has been seen that the police force, not as a whole, but in small groups, has gone through a phase of moral and professional deterioration. There are black sheep also in the police force and they reflect upon the whole department which has led to growing concern, and a number of attempts have been made to mend this situation. In this direction, the past few years have been particularly eventful, with a number of positive developments having taken place towards a solution of the problem and the state appears to have observed zero tolerance policy towards organized crime and criminals. Strict and rigorous steps have

been taken to break and demolish financial network of gangsters. In future, this shall certainly bring about more and more positive results towards restricting criminal activities and organized crime.

22. Organized crime is not confined to a single state, or any one country and has become an international problem in view of their wide spread network and sometimes they have been also found to be a natural ally of terrorist groups. Organized crime is an act of threat involving murder, kidnapping, gambling, arson, robbery, burglary, extortion or dealing in narcotics or dangerous drugs and other crime. The basic features of organized crime involves a group of individuals that is structured, sophisticated and widely spread across nations; it is a section of society that seeks to operate outside control of the people and government and it is a self-perpetuating, continuing criminal conspiracy for profit and power, using fear and corruption and seeking protection from law. The focus areas of organized crime are smuggling, drug trafficking, women and child trafficking, arms trade, *hawala*, circulation of fake currency, extortion and contract killing. With financial solidarity, these criminals have entered into business of film financing, hotel business, house building, government contracts and the like. The gangsters are divided into three categories, namely, sharp shooters, money collectors and liaison agents. The liaison agents deal with lawyers and law enforcement officials to resolve legal problems and to ensure easy bail to gangsters. (**For details see S M Sharma The Organized Crime in India, Tokyo: United Nations Asia and Far East Institute (UNAFEI), 1999, Vol. 54, pp 24,88**)

23. The police force faces some real difficulty in combating with organized crime and criminal activities. The police personnels are mostly not provided with that kind of sophisticated arms which are available in plenty to the gangsters and their gang members. The police stations are mostly under-manned and the strength of police

force is remarkably less in comparison to the population. The police has to act in accordance with legal norms and while acting so, they are required to avoid any excesses and human rights violation. They have to behave like a disciplined force actuated to uphold rule of law and motivated by sense of public security and service. The force also face the problem of some police personnels who may be close and in collusion with the local mafia. They can leak the confidential informations and strategy of police for taking action and conducting raid to arrest the gangsters. On the contrary, the organized criminals keep with them all kinds of sophisticated weapons, they use the same indiscriminately and they can cause any amount of damage to the human life and property. Where they are having support from some members of police force, their potential to execute criminal act is adequately enhanced.

24. The problems of police force has been time and again highlighted by several Law Commissions appointed for making recommendations for police reforms and needless to point out that several recommendations have been suggested from time to time. It is pertinent to mention that the Supreme Court has also issued directions in view of recommendations in some of the judgments such as **Vineet Narain v Union of India, AIR 1998 SC 889** and **Prakash Singh v Union of India, (2006) 8 SCC 1**. *Professor M P Singh*, in his book **Police Problems and Dilemmas in India 10 (1989)** has discussed the fundamental complexities of Indian police system and has remarked that the police in the country faces tremendous challenges and works under extreme pressure due to a number of reasons such as growing unemployment, deterioration in educational environments, conflicting claims of socio-economic components, fluctuations in political order, rampant corruption etc. Frequent transfers to unfavorable positions or locations have demoralizing effects on the police force and it becomes a survival technique for

police to have close relationship with one or other political person.

25. The purpose of the above discussion is to show the prevalent conditions in which the police has to perform the complicated and difficult job of ensuring law and order, maintaining security and peace, preventing crime and taking action against and causing arrest of offenders. These all require home work and team work and if any member of police force starts giving clues about and leak the police strategy, the strategies are bound to fail and shall certainly result sometimes, particularly when police is confronting against organized crime and criminals, in disastrous situation as has resulted in this case. In such situation, policing such police personnels is a big task and it requires early identification of such black sheep, monitoring of their conduct, isolating them and taking immediate strict disciplinary action against them.

26. Now coming to the facts of this case. The accusation against the accused-applicants is that they had close friendly relationship with the gangster Vikas Dubey who and the members of his gang were running organized criminal activities of all sorts and was residing and flourishing within the local jurisdiction of the police station in which both the applicants were posted. IO has examined several witnesses and they have stated about the close relationship of the applicants with the gangster Vikas Dubey and gang. Submission of the learned senior counsel and other counsel for the the applicants is that the witnesses have stated against the applicants only when they have been examined subsequently on second and third time and their subsequent statement is after thought to meet the case against the applicants. Otherwise, the witnesses had not stated anything against the applicants.

27. It is pertinent to mention that gangster Vikas Dubey was arrested in Ujjain and while he was being brought to Kanpur Nagar, the Investigating Officer took his statement. On the way, the police

vehicle suffered accident. Vikas Dubey snatched the pistol of IO and attempted to run away from the police custody. He opened fire on police personnels and by police firing in self-defense, he was shot dead. The IO got hospitalized and after being discharged, he wrote the said statement of Vikas Dubey in CD. Some of the part of his statement has been also quoted in the bail application. In brief, Vikash Dubey, giving detailed description of the incident, has stated to the IO that on 2/3.07.2020, he had prior information of police raid at about 04:00 PM and the information was given by SI K.K. Sharma. The JCB of Sultaan Ahmad was working there from the last one and half months and in the night at about 12:00 PM, he called upon driver Rahul Pal with JCB and he got obstructed the road by JCB so that the police suddenly might not come to his house. He further stated that one Rahul Tiwari was harassing him by giving false complaints against him and the police was also supporting him. Therefore, hatred was generated in him towards the police and he had decided that he might be killed but he will give lesson and kill as many as police personnels as he can. He called his associates Raja Ram @ Prem Kumar (maternal brother), Shashi Kant, Shyamu Vajpayee, Chotu Shukla, Jahaan Yadav, Atul Dubey, Daya Shanker Agnihotri, Shiv Tiwari, Vishnu Pal Yadav, Ram Singh, Ramu Vajpayee, Amar Dubey, Prabhat Mishra, Gopal Shaini, Govind Shaini, Dharmendra @ Jeeru Dwivedi, Manish @ Veeru Dwivedi, Dheeraj @ Dheeru Dwivedi, Vitul, Uma Kant @ Guddan @Bada Bauwan, Shivam Dubey, Bal Govind Dubey, Pauwa @ Pradhan Dubey, Shivam @ Dalal, Nandu Yadav and Balloo Musalmaan. Licence holders came with their arms and to the remaining persons, he provided guns, country made pistols and cartridges. CO, Bilhaur, Devendra Mishra was behind him and, therefore, he was brutally killed. He was having animosity with SO, Shivrajpur also as in February, 2020, in the election in Kota, his nephew Aman Tiwari was contesting election and SO Shivrajpur got

his man arrested with illegal pistol whereupon he felt very humiliated. His close companions were on the roof with arms and he had made planning on every pathway coming to his house to kill the police personnels. Fortunately, the police force came from the way on which J.C.B. was planted and it made the task very easy and they surrounded the police officials and killed them. When there was power cut, he used code words which was a signal to run away from the place. He had also intended to kill his distant associates in order to implicate the police force but this could not happen. The women of his family and close to him such as Rekha Agnihotri, Kshama, Khushi, Shanti Devi were told to cry seeing the police personnel as "*thief-thief*". Manu Pandey was also having the knowledge of planning. Thereafter, with the help of his close associates, he went to Ujjain Mahakal Temple.

28. Submission, in this respect, from the side of accused-applicants has been two fold- that the statement of Vikas Dubey is not relevant against accused-applicants as he was the prime accused in the FIR and secondly, he did not state any thing against SO Vinay Tiwari and has only taken the name of SI K K Sharma. From the side of State, it has been contended that the statement of Vikas Dubey is statement of a dead man and it has legal effect under section 32(3) of the Indian Evidence Act. Moreover, other witnesses have stated that SO Vinay Tiwari was very much close to Vikas Dubey through SI K K Sharma and therefore, the statement can be well considered against both the applicants. Section 32(3) provides as follows:

> "32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant. — Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves

> relevant facts in the following cases:—(3) or against interest of maker. —When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages."

29. It is clear from the reading of section 32(3) that statement of a dead man has been legally recognized and used in evidence even though the same does not relate to the cause of his death. Although, a final view is not required to be expressed at this stage as the same will be considered by the trial court, yet, this much is clear that the statement is of a dead man and the same has legal relevance in view of the provision of the Evidence Act.

30. CDR has been annexed with the bail application at page 156 to 163 to show the relationship of accused-applicants with the gangster. On the basis of study of CDR, the IO has noted that on the date of incident, prior to incident, the accused persons contacted each other and this call pattern is exceptional in the last one month as this type of communication between them is unique; the CDR of the mobile number of Vikas Dubey shows that his location was in Village Bikaru where the incident took place; between Vikas Dubey and co-accused persons of his gang, there is 15 calls by the gangster, again a unique pattern, by which he talked to the co-accused persons which indicates that he was preparing for the incident; Vikas Dubey talked with one police personnel Rajiv Kumar prior to incident which is full of abusive language and threatening to kill police personnels and of committing big criminal incident; it further indicates that he was having prior information of police raid and he was in full preparedness to commit the offence and kill police personnels as many as he can; and call details also show that between co-accused Ramsingh and applicant K.K. Sharma, there were two calls and the location was in Village Bikaru, and as such by the mobile of Ramsingh, Vikas Dubey was in contact before and during the

incident. The accusation is that the accused-applicants, particularly accused-applicant K.K. Sharma, were giving information to the gangster and were working as agent to the aid and assistance of the gangster and it is why accused K.K. Sharma kept himself in the police station deliberately and both the accused-applicants had conspired with Vikas Dubey and gang as it was not possible for the accused-applicant Vinay Kumar Tiwari to contact the gangster at the time or during the incident.

31. The learned Senior Counsel for the accused-applicant Vinay Kumar Tiwari has submitted that constable Rajiv himself had also contacted on mobile with Vikas Dubey and as such he should have been also made accused on the basis of the analogy put forward by the State. Moreover, there appears to be no such communication by applicant Vinay Kumar Tiwari with the gangster or his gang-men. The statement of constable Rajiv however shows that he found a miss call of Vikas Dubey and he called back to him. In respect of second argument, it has been submitted by State that applicant Vinay Tiwari used to be in contact with the gangster through K.K. Sharma. Whatever the truth may be, this much is clear that the accused-applicants who were posted in the same police station could not have any professional relationship with the gangster and his men and communication on mobile with him is certainly a relevant circumstance which can be considered during trial.

32. From the side of the State it has been also pointed out that the incident took place in the notified area under the UP Dacoity Affected Area Act and due attention is required to be given to the law provided under section 10 of the Act. The relevant part of Section 10 is as below:

> **“10. Special provisions regarding bail. -** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused or

> convicted of a scheduled offence shall, if in custody, be released on bail or on his own bond, unless-
>
> (a) the prosecution has been given an opportunity to oppose the application for bail, and
>
> (b) where the prosecution opposes the application for bail, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence:....."

Submission is that after investigation, finding sufficient evidence, charge-sheet has been already submitted by police and at this stage there is no reason to believe that the accused- applicants are innocent.

33. From the side of accused-applicants, it has been pointed out that the witnesses examined by the IO initially did not state any thing against the accused-applicants and only in their second and third statements, they have started making allegations against them. As such, their subsequent statement is nothing but an after thought in order to falsely implicate the accused-applicants. It has been specifically mentioned that the allegations have been made by the witnesses mostly in the last part of their statements and a reading thereof shows that the words and expressions used are same and similar which is not possible if statements have been given by the witnesses individually and separately. This contention appears to have no weight as it has been rightly pointed out on behalf of the State that all the statements are part of CD and a view at this stage has to be taken after due consideration to all the material on record.

34. The bail applications have been also opposed on behalf of State on the ground that applicants are police officers and they are in a position to influence the witnesses if they are released on bail. They hatched conspiracy with the gangster and deliberately acted in such a manner which helped the gang in the commission of this offence. It has been submitted that in the counter affidavit dated 25.1.2021, in

order to save skin, accused-applicant Vinay Tiwari set up a false case that while he was on patrolling duty on 2.7.2020, he saw Vikas Dubey and his gang-men beating one Rahul Tiwari and while he confronted him, Vikas Dubey pointed his rifle on him and to save himself, he came back and convinced Rahul Tiwari to lodge FIR against Vikas Dubey. The falsity of this version is clear from the two facts, one, this has not been mentioned by the accused-applicant in the relevant GD, and two, this fact has been nowhere mentioned in the FIR of Rahul Tiwari nor it has been mentioned therein that he saved the informant during the said incident. Further submission is that applicant Vinay Kumar Tiwari himself lodged FIR and all papers were either prepared by him or on his direction, and he made all efforts to save his skin and after the applicants were made accused in this case, during investigation, incriminatory things have been revealed against them.

35. Further submission is that the applicant as SHO of concerned police station was very much aware about the activities of Vikas Dubey and was having healthy relation with him. The then Circle officer Sri Devendra Mishra (deceased) had also made a complaint against the working of the applicant highlighting his close relationship with gangster Vikas Dubey. On the date of incident, the raid was planned which is clear from GD entry of 03.07.2020 of 12:27 AM in the mid night about movement of the police team. When the police team reached near the house of accused Vikas Dubey led by Circle Officer, Bilhaur, late Sri Devendra Mishra and SO Shivraj Pur, SHO Bithoor, the applicant requested to be the part of third team and convinced CO, Bilhaur to lead the main team and to enter from the main gate and while the team of CO proceeded towards the gate, they found that a JCB had blocked the main gate and a narrow passage was left there. Anyhow, when they reached close to the gate, suddenly from all the three sides, indiscriminate firing was started

from the side of the gangster and his associates. The accused-applicant as per plan had to conduct raid from the right side. But neither he proceeded towards the right side nor he provided any help to the other teams. As such, the conduct of the accused-applicant shows that he was having knowledge of the plan of Vikas Dubey and he was also aware about the topography of the place and he knowingly avoided to lead the team which raided from the main gate and on account of conspiracy, the accused-applicant did not provide necessary information.

36. All the aforesaid contentions relate to one or other circumstance and they will be examined during trial and, therefore, it is not desirable to express any final opinion. The fact is that in the incident, CO Devendra Mishra, SHO Mahesh Kumar Yadav, two Sub Inspectors Anoop Kumar Singh, Nebulal and four Constables Jitendra Kumar, Sultan Singh, Rahul Kumar and Babloo Kumar were brutally murdered and seven police personnels SI Kaushalendra Pratap Singh, SI Sudhakar Pandey, Home Guard Jairam Katiyar, constables Ajay Singh Sengar, Shiv Murat Nishad and Ajay Kumar Kashyap received gun shot injuries and one person also received injury. Perusal of injuries found on the dead bodies shows that several gunshot injuries were caused to them and it was ensured that they could not survive. The gunshot injuries of all the deceased police personnels affirm that injuries were caused from close range as blackening and charring has been found. This also shows intention and knowledge in causing death and extreme culpability on the part of the main accused persons.

37. At no point of time, applicant Vinay Tiwari along with the members of his team responded to provide any backup to the team. While the members of other two teams, late Sri Devendra Mishra, late Sri Mahesh Chandra Yadav and late Nabu Lal, Sub Inspector and from second team SHO Bithur Kaushlendra Singh sustained fire arm

injury and from his team five other police personnels including Sub Inspector Anoop Kumar were shot dead, only two persons from the team of accused-applicant sustained injuries who, as submitted, by default joined the first team at the time of firing. The accused-applicant did not receive any injury and this also shows that he avoided active participation in the raid. The accused-applicant deliberately concealed the availability of automatic weapons with gangster Vikas Dubey and also concealed the incident which took place at the time of alleged saving of Rahul Tiwari. For this lapse and misconduct, the accused-applicant was suspended.

38. During the course of investigation, several witnesses present at the time of incident have stated that the accused-applicants were having cordial relationship with accused Vikash Dubey. Constable Rajeev Kumar who was the fellow of applicant Vinay Tiwari has in his first statement stated that the applicant Vinay Tiwari, co-accused Sub Inspector K.K Sharma were having cordial relationship with gangster Vikash Dubey. Constable Abhishek Kumar and others have also stated the same facts. The call details show that Sub Inspector K.K. Sharma on 02.07.2020 made several calls to the gangster and informed them about the raid as he talked with the accused for more than 20 minutes in different calls. There is enough evidence on record to show that the accused-applicants were having very good relationship and soft corner towards Vikas Dubey. This fact has also been stated by accused Kshama and Rekha Agnihotri in their statements.

39. The witnesses have stated that Sub Inspector K.K. Sharma was regularly in touch with the main accused and was regularly informing him about the movement of police team. The call details of K.K. Sharma sufficiently demonstrate his involvement in the crime. Moreover, Applicant Vinay Kumar Tiwari was having jealous and bad relation with Circle Officer Devendra Mishra and it is why he

was convinced by accused-applicant to lead from the main gate as a result of which 8 police personnels were killed and 7 policemen received gunshot injuries. After investigation, sufficient credible evidence was found against the accused-applicants showing their involvement in the whole criminal conspiracy which led to the commission of such a horrendous crime. They conspired with gangster Vikas Dubey, leaked confidential information about the raid and facilitated the gangster and his gang to commit such a crime which resulted in death of 8 police officers. The enmity and bad relation of accused-applicant with Circle Officer Devendra Mishra is very much evident and the Investigating Officer has taken note of the viral letter in his CD in which Circle Officer Devendra Mishra had intimated to higher authorities that integrity of Vinay Tiwary was completely doubtful and he was regularly meeting with Vikas Dubey and was communicating with him. It was also complained that if Vinay Tiwari does not modify his conduct, any time some serious incident can take place. With the CD, the report of Sri Devendra Mishra, Circle Officer has been annexed by the accused-applicant in his rejoinder affidavit dated 22.02.2021. At this stage, it cannot be ruled that the said letter of Devendra Mishra is fake as contended on behalf of accused-applicants.

40. It has been also argued from the side of accused-applicants that investigation has been completed and charge-sheet has been already filed in this matter. The applicants are in jail from the last more than one year. Their pretrial detention for such a long period is resulting in deprivation of their right to liberty and freedom. The learned counsel for applicant K.K. Sharma, has relied on the judgments of **Dalvir Hussain v State of Gujarat, AIR 1991 SC 56, Pawan Kumar v State of UP, 2015(90) ACC 9 (SC), Mukesh Kumar Kashyap v State of Uttarakhand, 2015(89) ACC 903, State of UP v Rajju, 2005(53) ACC 343,** and **K R Purushothaman v State of Kerla, 2006(54) ACC**

255(SC). Therefore, it has been requested that, taking into consideration overall circumstances and the long period to which they are in jail, the court should take sympathetic view and the applicants should be released on bail.

41. This court is not oblivious about the fact that the release on bail is crucial to the accused as the consequences of pretrial detention are grave. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. But, if the accused is involved in a conspiracy for commission of a heinous offence by a hardened criminal, his release on bail will give him an opportunity to abscond or temper with witnesses. Against such crime, social reaction is also sharp. Therefore, a balance between the need for protection of individual liberty which is so important and the requirements of the society for being shielded from the hazards of being exposed to the misadventures of organized crime has to be maintained.

42. The criminal justice system is often criticized for its pro-active approach towards the accused. The rights of the accused are protected not only during trial but also during investigation and even after the delivery of judgment, more particularly when the case has resulted in conviction. The accused cannot be kept in police custody unless with the order of Magistrate and that too is possible only within first fifteen days of his arrest. The bail provisions are liberal and for arresting the accused there must be prima facie evidence collected by the Investigation Officer. He can also be released on anticipatory bail. The accused cannot be put to cruel or inhuman treatment at any stage.

There is a strong presumption of innocence in favor of accused and consequently, it creates a heavy burden on prosecution to establish the guilt beyond any shadow of reasonable doubt. The accused has been given constitutional protection against self incrimination and he has right to keep silence throughout and his silence will not be taken adversely against him. Moreover, he enjoys all the rights associated with his fair trial claim including free legal aid and impartial justice delivery. Thus, protection of rights of accused is natural feature of democracy which is accorded for the simple reason that the criminal law machinery is controlled by the State. Accused is given free food, free lodging, free clothes etc. and if he has been directed to undergo rigorous imprisonment, he will have to be paid by the state for the work he has rendered during jail life. But, the victim who is the most adversely affected person by the criminal incident has no such claim. The guilty man is lodged, fed, clothed, entertained and educated by the state at the expense of the public, but ironically, the victim is left to pay for even his medical expenses which may be the result of that criminal event. There is no free education, free housing, free clothing and free food for the victim. The injured party, in the criminal law, often takes a back seat and after being examined in court as witness, he stands aside waiting and watching the criminal justice in action satisfied by conviction and sentence. He is fortunate if he gets a little compensation or even expenses of the litigation. The administration of criminal justice inspired and dominated by human rights and humanitarian causes does every effort to reform, treat and rehabilitate the offender, but does not show equal concern for the poor victim who has suffered loss or injury. (**See for details Stephen Schafer, Restitution to victim of crime, Stevens & Sons Ltd., London (1960) p. VII as quoted by Bharat C. Das, Victims in the criminal justice system , 19 (New Delhi), APII Publishing Corporation, 1997, Proff. S.V. Joga Rao, Victim Restitution, the Lawyer, June 1990, p. 17 and**

Proff. A. Lakshminath & Dr. J. Krishnakumari, Criminal Trial and Justice, ALT publication (2003) p. 258)

43. Crime, corruption and population are three major problems the society is facing at present. While against crime and corruption, particularly when it is organized crime and corruption, strict state action and intervention is necessary to restrict and minimize the same to maximum extent, control over population growth requires legal steps and strategy inclusive of motivation, spread of education and awareness and some positive incentive to those who opt for family planning. Against crime and corruption, the State must continue with the policy of zero tolerance. The political parties should rise above board against crime and corruption without being influenced by consideration of “his man” and “our man” as this approach will not only undermine rule of law but will also damage the democratic set up of the nation.

44. This is not an unknown phenomenon that there are policemen, may be very few in numbers, who show their loyalty more to such gangster than to their department for the reasons best known to them. Such policemen tarnish the image, name and fame of police and it is necessary that suspicious police personnels should be taken to task and their conduct should be regularly monitored for which a mechanism should be evolved, and if it exists already, the same should be geared up at different levels. There is a concerning trend that one or other political party welcomes gangsters and criminals involved in organized crime in the party and try to back and protect them, painting and spreading an imaginary image of Robinhood. They are given tickets to contest elections and sometimes they win also. This trend needs to be stopped as soon as possible. All the political parties should sit and together a decision is required to be taken by them that gangsters and criminals will be discouraged in politics and no political party will give ticket to them in public

elections. The political parties should rise to the occasion and must guide themselves keeping in view that there cannot be a concept of *"my criminal"* and *"his criminal"* or *"my man"* and *"his man,"* as a gangster is gangster only and is required to be condemned from all corners and even people/voters should also take note of it while making their choice for a candidate in a general election. We must have the idea in mind that if we are entrusted with responsibility of nation building, our responsibility is to think about the future generation to whom we have to handover a legacy. We need to ponder what kind of nation and society we want to leave for our future generation. A sooner decision is necessary lest one day these gangsters and criminals will become *"Bhasmasur"* and will give such serious dent to the country and democratic set up which cannot be repaired.

45. The pursuit of life, liberty and peace includes freedom from crime. The State's foremost duty is to provide these basic rights to each citizen. The success of a Criminal Justice System can only be measured by how successful it is in ensuring these rights in word and spirit. The extent to which these rights are successfully protected, will be reflected in the confidence of the public in the system. The organized crime should be treated differently from traditional individual criminality. Conspiracy is an integral aspect of organized crime. There cannot be a direct evidence of conspiracy in such cases and the law has to deal with organized crime on a footing different from that of individual or conventional crime, as regards admissibility and appreciation of the evidence.

46. The discussion aforesaid certainly goes to show that the nature of offence and amount of culpability is serious, heinous, shocking and unprecedented. It is also evident that the main accused persons had prior information of the police raid and naturally, in the present set of facts, this information was revealed by police which not only

made the main accused persons alert but also provided them fullest opportunity to prepare for attack and commit such a horrendous crime in which 8 police personnels including the Circle Officer sustained gunshot injuries and died. The situation of crime was such and so sudden that the police force could not get opportunity to sustain and counter and could do nothing. The accusation against the accused-applicants is that they conspired with the main accused for the commission of the offence because of their good relationship and loyalty with main accused and also they wanted to score their personal grudge with the Circle Officer. It is not possible to give a final opinion at this stage. Certain witnesses who were part of the police raid have given evidence against the accused-applicants showing their closeness with the main accused persons which is supported by circumstances such as the magnitude of the crime and the preparedness on the part of gangster Vikas Dubey and his associates; the statement of Vikas Dubey given to the IO before his death that he had prior information about the raid; the conduct of the accused-applicants before and during incident; applicant Vinay Kumar Tiwari though leading one team but did not give any backup support nor sustained any injury and showed complete inaction; and applicant K K Sharma deliberately avoided in participating in raid and the accusation is that he stayed and was deliberately left on police station to pass information to the gangster.

47. In view of the above discussion, the serious and heinous nature of the offence, complicity of the accused-applicants in the conspiracy and taking into consideration overall circumstances of the case, I do not find any reason sufficient to allow the bail applications. Hence, the bail applications of accused-applicants **Vinay Kumar Tiwari** and **K. K. Sharma** are **rejected**.

48. The learned trial court to expedite the trial. If the case is not disposed nor a substantial development is found towards progress of

trial in one year, the accused-applicants will be at liberty to move fresh bail application.

49. It is also made clear that no observation of this Court in this order will have any binding effect on the trial court and the case shall be decided on the basis of evidence adduced during trial.

Order date- 21.9.2021

Bhanu

(Justice Pradeep Kumar Srivastava)