

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 354 OF 2023

Divya Ashok Pahuja ...Applicant
Versus
State Of Maharashtra ...Respondent

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Mrs. Sana Raees Khan a/w Mr. Aditya Parmar, Advocate for the Applicant.

Mr. Amin Solkar, Special P.P. a/w Mrs. Anamika Malhotra, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.
DATE : 20th JUNE, 2023.

PER COURT:

1. The Applicant is seeking bail in C.R. No. 92 of 2016 registered with M.I.D.C. Police Station, Mumbai, subsequently investigated by Crime Branch, SIT vide C.R. No.12 of 2016. The offences were registered under Sections 302, 193, 182, 201 r/w Section 34 of Indian Penal Code (for short 'IPC'). The Applicant was arrested on 14th July, 2016.

2. The prosecution case is that the Accused were involved in fake encounter of deceased Sandeep Gadoli. It is alleged that the Applicant was part of conspiracy and involved in providing information about the deceased. She was accompanying the deceased at the time of incident in question.

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3. The Applicant preferred an application for bail before this Court viz. Criminal Bail Application No. 1714 of 2018. The said application was rejected vide order dated 8th February, 2019.

4. The Applicant preferred another application for bail before this Court which was rejected vide order dated 24th February, 2021. However, considering the fact that the Applicant was in custody from 14th July, 2016, the trial Court was requested to give priority to this case and proceed with the trial expeditiously.

5. Learned Advocate for Applicant submit as under :

i. The Applicant is in custody for a period of about 6 years and 11 months. There is no progress in the trial. Long incarceration in custody affects the fundamental right of the Applicant under Article 21 of the Constitution of India. The Applicant has not delayed the trial.

ii. The Applicant was aged around 18 years at the time of incident. The Applicant is not having any criminal antecedents.

iii. Vide order dated 24th February, 2021 this Court had expedited the trial. However, inspite of directions to conclude the trial expeditiously, there is no progress in the trial.

iv. The prosecution has so far examined one witness. The list provided by the prosecution refers to 171 witnesses. It is not clear as to how much time it would take to conclude the trial. Reliance is placed on the Roznama of the trial Court proceedings and submitted that the Applicant has not protracted the trial.

v. The co-accused Jitendra Jaypal Yadav and Deepak Kakran were granted bail by this Court vide order dated 14th November, 2017.

vi. The co-accused Sonia Pahuja (mother of Applicant) was granted bail by this Court vide order dated 21st March, 2023.

6. Learned Advocate for the Applicant has relied upon the following decisions ;

i. Chintan Vidyasagar Upadhyay V/s. The State of Maharashtra in Special Leave to Appeal (Crl) No(s). 2543 of 2021 dated 17th September, 2021.

ii. Khushi Ajay Sahjwani V/s. The State of Maharashtra in Special Leave Petition (Criminal) Dairy No(s). 3679 of 2021 dated 2nd July, 2021.

- iii. Indrani Pratim Mukerjea V/s. Central Bureau of Investigation and Anr. in Special Leave to Appeal (Crl.) No(s). 1627 of 2022 dated 18th May, 2022.*
- iv. Paras Ram Vishnoi V/s. The Director, Central Bureau of Investigation in Criminal Appeal No. 693 of 2021 dated 27th July, 2021.*
- v. Dattatray Suresh Katke V/s. State of Maharashtra in Criminal Bail Application No. 686 of 2022 with Interim Application No.3279 of 2022 dated 3rd October, 2022.*
- vi. Indra Vishnoi V/s. Union of India, Through Director, Central Bureau of Investigation, Lodhi Road, New Delhi decided by High Court of Rajasthan At Jodhpur in S.B. Criminal Miscellaneous Bail Application No.12687 of 2021 dated 15th September, 2021.*
- vi. Avinash Anant Pawar @ Ajit Dada V/s. The State of Maharashtra in Special Leave to Appeal (Crl.) No.1452 of 2022 dated 11th August, 2022.*
- vii. Sagar Tatyaram Gorkhe And Anr. V/s. The State of Maharashtra in Criminal Appeal No.11 of 2017 dated 3rd January, 2017.*
- viii. Angela Harish Sontakke V/s. State of Maharashtra in*

Criminal Appeal No.440 of 2016 dated 4th May, 2016.

ix. Union of India (UOI) V/s K. A. Najeeb in Criminal Appeal No. 98 of 2021 dated 1st February, 2021.

7. Learned Special Public Prosecutor appearing for State has submitted that the previous applications preferred by the Applicant were rejected by this Court on merits. There is no change in circumstance to entertain the present application. The Special Leave Petition before Apex Court challenging order dated 24th February, 2021 has been rejected by order dated 22nd October, 2021. All the Accused are acting in connivance to delay the proceedings. The offence is of serious nature. The investigation was conducted by special investigation team. There is sufficient evidence against the Applicant to show her involvement in the crime. Repeated applications are preferred by the Accused before trial Court to delay the proceedings. The Accused are dodging the proceedings. The witness examined by the prosecution had been attending the Court regularly. Reliance is placed on the Roznama and the affidavit-in-reply filed the prosecution opposing the application for bail. On 26th December, 2020, without intimation to the Court, the Harayana Police took custody of Accused No.8 from Taloja Jail and lodged him at Bhondasi Central Jail, Gurgaon,

Haryana. Production warrants were issued to Superintendent Jail, Bhaondasi Central Prison, Gurgaon for production of said Accused. Accused No.1 filed application Exh.277 to direct the prosecution to provide list of witnesses. Prosecution filed say and opposed the application and contended that the application was filed to delay the trial. The application was disposed off on 8th September, 2022. Another application was preferred on 8th September, 2022 vide Exh.279 under Section 231(2) of Cr.PC. Court issued notice and called say of prosecution. PW-1 entered the witness box. After his examination-in-chief was over an application was filed by Accused Nos. 1, 2 and 7 seeking adjournment to defer cross-examination of PW-1 till the decision on Exh.279. On 29th November, 2022 application was filed by Accused Nos. 4, 5 and 8 to conduct cross-examination after decision on application by Accused No.7. Thereafter, on 16th January, 2023 the Accused Nos. 4, 5 and 8 did not press that application. The Applicant/Accused No.4 preferred hand written application from jail Exh.307 for plea bargaining on 16th January, 2023 and it was withdrawn on same day. On 8th March, 2023, Accused No.7 preferred application to go to Gurugram Court. Accused No.8 preferred similar application. The Roznama of the proceedings would indicate that the Accused are deliberately protracting the trial.

8. Learned Special Public Prosecutor has relied upon the following decisions :

- i. Bhoopendra Singh V/s. State of Rajasthan and Ors. decided by Supreme Court in Criminal Appeal No.1279 of 2021 dated 29th October, 2021.*
- ii. Shahazad Hasan Khan V/s. Istiaq Hasan Khan and Ors. decided by Supreme Court in Criminal Appeal No.464 of 1986 dated 28th April, 1987.*
- iii. Sohan Singh V/s. Union Territory of J & K decided by the Court of Jammu and Kashmir At Jammu in Bail Application No.253 of 2020 dated 24th June, 2021.*
- iv. Hemant Ramesh Gaikwad V/s. The State of Maharashtra decided by High Court of Bombay in Criminal Bail Application No.3039 of 2022 dated 15th November, 2023.*

9. Perused documents annexed to the application, additional documents tendered by the learned Advocate for the Applicant, Affidavit-in-reply filed by the prosecution and the decisions relied upon by both the sides.

10. This application for bail has been preferred on the ground that the Applicant is in custody from 14th July, 2016 and long incarceration affects the liberty under Article 21 of the Constitution

of India. It is not disputed that the Applicant is in custody from 14th July, 2016 and she is custody for about 6 years and 11 months. The list of witnesses refers to 171 of witnesses. The prosecution would not examine all the witnesses but even if half the witnesses are examined it would take substantial time to conclude trial. The applicant had preferred application for speedy trial on 4th February, 2017. The case was thereafter adjourned for framing charge. On 14th November, 2019 charge was framed. Accused pleaded not guilty. On several occasions repeatedly, case was adjourned for compliance by prosecution. On 4th March, 2020 the trial Court noted that charge was framed on 14th November, 2019, and since then the prosecution has not made compliance and seeking adjournment time and again. The Accused are in custody. Again case was adjourned from time to time. Sometimes witness was absent. The Applicant had preferred the applications referred to above in November-2022 and January-2023. The Applicant has not protracted the trial. It is also required to be considered that the Applicant is in jail almost for a period of 7 years. The Applicant was aged around 18 years at the time of alleged incident. There are no criminal antecedents against Applicant. It cannot be said that the Applicant is responsible for prolonging the trial for a period about 7 years. The Hon'ble Supreme Court had rejected the petition

challenging order dated 24th February, 2021. The application was rejected on merits. Trial was expedited vide order dated 24th February, 2021. The Special Leave Petition was rejected on 22nd October, 2021. Even thereafter period of 18 months has passed, but there is no progress in trial.

11. In the case of *Union of India (UOI) V/s K. A. Najeeb (supra)*, the Apex Court had observed as follows :

“Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent’s prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellants right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondents’ rights guaranteed under Part III of our Constitution have been well protected.”

12. In the case of *Chintan Vidyasagar Upadhyay V/s. The State of Maharashtra (supra)*, the Apex Court granted bail to the Petitioner therein considering the fact that he was in custody for nearly 6

years. It was observed that the trial is in progress and 28 witnesses have been examined and 12 witnesses are yet to be examined. In the case of *Khushi Ajay Sahjwani V/s. The State of Maharashtra (supra)*, the Apex Court granted bail to the Petitioner/Accused considering the fact that she is a female undertrial prisoner, who has been in custody for more than three years and also considering the fact that the final report was filed way back on 28th July, 2018 and family situation of the Petitioner. In the case of *Indrani Pratim Mukerjea V/s. Central Bureau of Investigation and Anr. (supra)*, the Supreme Court granted bail to the Petitioner/Accused, taking into account the fact that she was in custody for 6 and half years, and even if fifty percent of the remaining witnesses are given up by the prosecution, the trial will not complete soon. In the case of *Paras Ram Vishnoi V/s. The Director, Central Bureau of Investigation (supra)*, it was observed that no doubt the matter is serious and offence is heinous. The Court is faced with the position where the Appellant amongst other accused has been in custody for eight and a half years. The prosecution evidence is over and statement of all the Accused is to be recorded under Section 313 of Cr.P.C. The person cannot be kept in custody pending the trial for indefinite period of time and taking into consideration the period of custody and the fact that the other Accused are yet to lead defence

evidence, bail was granted to the Accused. In the case of *Avinash Anant Pawar @ Ajit Dada V/s. The State of Maharashtra (supra)*, the Hon'ble Supreme Court granted bail to the Petitioner therein taking into consideration the fact that he had suffered incarceration for approximately 4 years. There was no likelihood of an early conclusion of the trial. In the case of *Sagar Tatyaram Gorkhe And Anr. V/s. The State of Maharashtra (supra)*, the Apex Court had observed that the charges against the Accused are serious. Such charges will have to be balanced with certain other facts like the period of custody suffered and the likely period within which the trial can be expected to be completed. The Court noted that in the previous order the prosecution had made a statement that the trial would be completed within stipulated period and even then first witness was under examination. The Court was pleased to grant bail. In the case of *Angela Harish Sontakke V/s. State of Maharashtra (supra)*, the Apex Court has held that undoubtedly the charges are serious but the seriousness of the charges will have to be balanced with certain other facts like the period of custody suffered and likely period with which the trial can be expected to be completed. It was noted that Accused was in custody for over 5 years and that there were about 200 witnesses proposed to be examined.

13. *In Ashim Alias Asim Kumar Haranath Bhattacharya alias Aseem Kumar Bhattacharya V/s. National Investigation Agency, (2022) 1 SCC 695*, it is observed that the charges against the Accused are undoubtedly serious but the charges will have to be balanced with certain other factors like the period of incarceration which the Appellant has undergone and the likelihood period within which the trial can be expected to be finally concluded. Paragraph Nos. 9, 10 and 11 of the decision are as follows :-

“9. We have to balance the nature of crime in reference to which the appellant is facing a trial. At the same time, the period of incarceration which has been suffered and the likely period within which the trial can be expected to be completed, as is informed to this Court that the statement of PW-1/defacto complainant has still not been completed and there are 298 witnesses but indeed may counter-affidavit that it may examine only 100 to 105 witnesses but indeed may take its own time to conclude the trial. This fact certainly cannot be ignored that the appellant is in custody since 6-7-2012 and has completed nine-and-half years of incarceration as a undertrial prisoner.”

“10. This Court has consistently observed in its numerous judgments that the liberty guaranteed in Part III of the Constitution would cover within its protective ambit

not only due procedure and fairness but also access to justice and a speedy trial is imperative and the undertrials cannot indefinitely be detained pending trial. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge him on bail.”

“11. Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice.”

14. This Court in the case of *Ajit Bhagwan Tiwde V/s. State of Maharashtra in Criminal Bail Application No.995 of 2021 dated 19th January, 2022*, taken into consideration several decisions of the Apex Court and based on the consideration that long incarceration affects the right of the Accused under Article 21 of the Constitution of India granted bail. It is true that the nature of crime and long incarceration are required to be balanced. The Applicant is a lady and she has been in custody almost for a period of 6 years and 11 months.

15. Learned Special Public Prosecutor has relied upon certain decisions while opposing the grant of bail. In the case of *Bhoopendra Singh V/s. State of Rajasthan and Ors. (supra)*, the factual matrix of the case indicate that bail was granted to the Accused by the High Court which was sought to be cancelled before the Apex Court by the son of the deceased. The Accused had preferred several application before the High Court. Subsequently bail was granted to him. The Apex Court observed that while entertaining the 5th bail application of the Accused the High Court had failed to consider the seriousness and gravity of the crime and specific role attributed to the Accused. The Court also noted the facts of the case and observed that the deceased was due to testify in the trial in the prior case under Section 307 of the IPC and the murder was committed barely a fortnight prior to the date on which he was to depose. There was no change in circumstances. The High Court proceeded on a palpable erroneous basis while granting bail. Bail granted to the Accused was cancelled. In the case of *Shahazad Hasan Khan V/s. Istiaq Hasan Khan and Ors. (supra)*, it was observed that the Court had disregarded the fact of the case and considered the period of custody. The Court had failed to consider the question that there were serious allegations of tampering of evidence by the Accused. The eye witnesses had

made serious allegations against the brother of the Accused. They have alleged that they were kidnapped and the signatures and thumb impression were obtained on blank papers and they were threatened with dire consequences and request was made by them for being granted police protection. It was observed that one of the salutary principles in granting bail is that the Court should be satisfied that the Accused being enlarged on bail will not be in a position to tamper with the evidence. When the allegations of tampering of evidence are made it is duty of the Court to satisfy itself whether those allegations have basis and if the allegations are not found to be concocted it would not be a proper exercise of jurisdiction in enlarging the Accused on bail. In the case of *Sohan Singh V/s. Union Territory of J & K (supra)*, the Petitioner was facing trial for the offence under Section 302 RPC. The High Court noted that there was some delay in completion of trial on account of COVID-19 which was beyond the control of anybody. The same cannot be the sole ground for enlarging an Accused on bail. The High Court had not considered several decisions of Apex Court on long incarceration in custody and grant of bail. In the case of *Hemant Ramesh Gaikwad V/s. The State of Maharashtra (supra)*, this Court had rejected an application preferred by the Accused therein although it was contended that he was in custody for

substantial period of time. In the light of strong material against the said Accused the application was rejected. The prosecution had made statement that prosecution will keep the witnesses present on every date and directions were issued to produce the Accused before the Court of date of hearing. All these decisions can be distinguished on the fact of the case. In several decisions as noted hereinabove the Apex Court as well as this Court has granted bail to the Accused who were languishing in custody for substantial period of time.

16. The Applicant is a lady and she is in custody almost for a period about 7 years and there is no likelihood of trial getting over within short span of time. At the time of incident the Applicant was aged around 18 years. Considering all factual aspects, Applicant can be granted bail on certain conditions.

ORDER

- i. Criminal Bail Application No.354 of 2023 is allowed.
- ii. The Applicant is directed to be released on bail in connection with C.R. No. 92 of 2016 registered with M.I.D.C. Police Station, Mumbai which was subsequently investigated by Crime Branch, SIT vide C.R. No.12 of 2016 for the offences punishable under Sections 302, 193, 182, 201 r/w Section 34

of Indian Penal Code and Sections 325 and 327 of the Arms Act on executing P.R. Bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount;

iii. The Applicant shall report local Police Station where she resides once in a month on first day of the month between 11:00 a.m. to 1:00 p.m.

iv. The Applicant shall attend the trial Court on the date of hearing of the case regularly unless exempted by the Court.

v. The Applicant shall furnish her permanent residential address and contact details to the trial Court while executing the bail bond.

vi. The Applicant shall not tamper with the evidence.

vii. The Applicant shall not leave Indian without permission of the trial Court. The Applicant shall deposit her passport with the trial Court while executing the bail bond. If the Applicant does not have the passport, she shall file an affidavit before the trial Court stating so while executing the bail bond.

viii. Application stands disposed off.

(PRAKASH D. NAIK, J.)