

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.2793 OF 2022
IN
CRIMINAL APPEAL NO.1597 OF 2019

Mubarak Mohammadali Sayyad @ .. Applicant
Chaudhari

Versus

The State of Maharashtra .. Respondent

...

Mr.Ajit M. Savagave for the Applicant.

Mr.Y.M.Nakhwa, A.P.P. for the State/Respondent.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 06th SEPTEMBER, 2023

PRONOUNCED ON : 27th SEPTEMBER, 2023

ORDER :-

1. The present Application pose a question, whether a second application for suspension of sentence and release on bail under Section 389 of the Code of Criminal Procedure (for short, "**the Cr.P.C.**") can be entertained, during the pendency of the Appeal, despite rejection of an application on an earlier occasion.

2. Heard the learned counsel Mr.Ajit Savagave for the Applicant, who has taken out the application in pending Appeal, being admitted on 02/12/2019.

I have also heard Mr.Nakhwa, the learned A.P.P. for the State. Respondent No.2, though represented by the learned counsel Mr.Mandar Bagkar, is informed to be not present on account of his ill-health.

3. The Appellant/Applicant face a charge for committing an offence punishable under Section 376 of the Indian Penal Code (for short, **“the IPC”**) as well as under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, **“the POCSO Act”**) in Special Case (POCSO) No.132 of 2016 and the Additional Sessions Judge, Thane, by the impugned judgment dated 16/11/2019, convicted him for an offence under Section 376 of IPC alongwith Section 4 of the POCSO Act and sentenced him to suffer R.I. for ten years and fine of Rs.25,000/-, in default of fine, to undergo S.I. for six months. He came to be acquitted of the offences under Sections 8 and 12 of the POCSO Act.

4. On being aggrieved by the impugned judgment, he approached this Court through an Appeal, which is pending for adjudication.

He took out Interim Application No.1 of 2019 under Section 389 of Cr.P.. on the ground that there is no substantive evidence brought on record, establishing the date of birth of the prosecutrix, as below 18 years and it was specifically contended that the couple shared bond of love and it resulted in physical proximity and, hence, since the sexual indulgence could not be said to be without her consent, and no offence of rape is made out.

The application was opposed by the prosecution on the ground that there is ample evidence establishing his involvement in the crime, which is substantiated from the DNA report, as the Applicant is found to be the biological father of the foetus, which was aborted by the prosecutrix.

5. My Predecessor (Justice P.N.Deshmukh, as he was then), on going through the judgment, concluded that the prosecution had sufficiently established its case before the Special Judge, and proved that the Applicant had sexually assaulted the prosecutrix time and again, even after she conceived and she was forced to terminate the pregnancy, but it is established that the foetus was born from the Applicant.

Apart from this, the evidence of the prosecutrix, PW 1 established that her date of birth as 31/10/1999, which is corroborated by the evidence of the Headmistress of Thane Municipal School, proved on the basis of the School Register and Admission Form and, hence, it was rightly held by the trial Judge that she was minor. Considering that the consent of the minor is immaterial, the application for suspension of sentence, was found to be devoid of merits and, hence, it was dismissed.

6. Before I consider the merits of the matter, I must deal with the objection of Mr.Nakhwa that the present application, being filed as a second application, with no change in circumstance, the application need not be entertained.

This contention is contested by Mr.Savagave, by relying upon the decision of the Hon'ble Apex Curt in the case of ***Babu Singh Vs. State of Uttar Pradesh***¹ as well as a further decision of the Hon'ble Apex Court in the case of ***State of Maharashtra Vs. Buddhikota Subha Rao***².

7. In ***Babu Singh*** (supra), the Apex Court was called upon to decide an application for suspension of sentence and release on bail and it propounded upon the exercise of judicial discretion. The facts of the case would reveal that on an earlier stage, the application for bail was rejected by the Court and, therefore, in the primorial paragraph of the judgment, Their Lordship V.R. Krishna Iyer, outlined the scope of the bail application filed for a second time, in the following words :-

“2. Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning, we must mention that, at an earlier stage, their application for bail was rejected by this Court on September 7, 1977, But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application an evaluate the merits pro and con.”

8. The background facts before the Apex Court disclose that the petitioners were charged with an offence of murder under Section 302 of the IPC, but they came to be acquitted by the Sessions Court and the State successfully appealed against the

1 1978(1) SCC 579

2 1989 (supp.2) SCC 605

acquittal and the High Court, reversing the finding, held all the petitioners guilty and sentenced them all to life imprisonment.

Upon the High Court setting aside the acquittal, the petitioners approached the Apex Court, by filing an Appeal and on the first instance, when application was rejected, filed an application for the second time and while propounding the factors, which would govern the exercise of discretion while releasing an accused on bail, reference was made to the observations of the Apex Court in the case of ***Kashmira Singh Vs. The State of Punjab***³, when the practice of the Court not to release on bail a person, who has been sentenced to life imprisonment for an offence under Section 302 of the IPC was referred, by juxtaposing it with the disposal of a trial within a measurable distance of time and as concluded by Justice Bhagwati, speaking for the Bench, the following pertinent observation is of immense significance:-

“The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person : “We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?” What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this court, that a person may serve out of his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to a person who has already served out of his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this court

³ AIR 1977 SC 2147

has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily unless there are cogent grounds for acting otherwise release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.”

Having regard to this contellation of considerations, viewed in the jurisprudential setting, the petitioners were held eligible to be enlarged on bail.

9. I must also make a reference to another decision in the case of *Buddikota Subha Rao* (supra), where the successive application for bail was frowned upon by Their Lordships, in the peculiar facts that the second bail application was filed two days after the rejection of the earlier one by another single Judge of the High Court and the accused was directed to be enlarged on bail for a period of two months.

Recording that there was only gap of two days and no drastic changes could have been taken place within two days, necessitating the release of the accused, it was inferred that the order granting bail was not proper and it is liable to be set aside. The observations in the said decision to the effect that the successive applications cannot be entertained, has to be read in the peculiar facts, as it was noted that before the ink could dry on the first order, the request was moved before another Judge of the High Court and he was persuaded to upturn the earlier order.

10. The learned counsel for the Applicant would also rely upon the decision of the Uttarakhand High Court in the case of

Arun Kumar Ranjan Vs. CBI⁴, when an application preferred in an Appeal, preferred against the impugned judgment, convicting the Appellant for the offence under the Prevention of Corruption Act and on having been sentenced to undergo 10 years of R.I. with a fine of Rs.1,00,000/-, the first bail application was rejected. An SLP was preferred against the same and even it was dismissed. A second bail application was moved almost after a period of two years, after the rejection of the first bail application and the High Court held that the subsequent bail application would not be tenable, but there is a possibility to file a second bail application and in the light of the decision of the Apex Court, which had affirmed the rejection of the first bail application, it was held that the rejection for the first time, will not bar the appellant from filing the second bail application, which is to be considered on its own merits.

In the second bail application, the passage of time and the chance of early culmination of the trial, was the primary ground that was raised, which was further substantiated by infringement of the liberty guaranteed under Article 21 of the Constitution of India, as the accused was in custody for over three years. Reliance was placed upon the decision of the Apex Court in ***Kashmira Singh*** (supra) as well as the decision in the case of ***Babu Singh*** (supra) and while releasing the applicant on bail, Justice Sharad Kumar Sharma made the following pertinent observations :-

“20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage has the intermediate acquittal pertinence to a bail plea when the appeal before this Court

4 2019 Cri.L.J. 4866

depends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the fact that a fair finding-if that be so-of innocence has been recorded by one court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the court into a complacent refusal."

11. The learned A.P.P. has invited my attention to a decision by the Division Bench of this Court in Criminal Application filed in an Appeal (**Criminal Application No.1301 of 2018 in Criminal Appeal No.1155 of 2015**), when third application was filed, the earlier two having been dismissed on merits, seeking suspension of sentence and the release on bail. The merits of the matter came to be canvassed, while the application was filed in the pending Appeal and it was sought to be submitted that these submissions were neither urged nor considered in the previous application and another ground, which was pressed into service was large pendency of Appeals before the Court, with no possibility of Appeal being taken up for hearing in near future.

After referring to the decision in the case of *Babu Singh* (supra) as well as in the case *Buddikota Subha Rao* (supra), the Division Bench observed thus :-

"11. It is thus well settled principle of law that successive bail application can be entertained only when there is substantive change in fact situation or circumstances during the period between

the two applications. The embargo on filing repeated bail applications on the same facts is to ensure some degree of finality to the order passed and to maintain judicial discipline and propriety.

12. The present application is not filed on the ground of change in circumstance but bail is sought on grounds, which were already available at the time of filing of the previous bail application. Such application would not be maintainable as it would virtually amount to review of the previous order.”

It was rightly held by the Division Bench that mere the fact that some of the grounds, which were available, but were not raised in the previous application or that the said grounds are not reflected in the previous order, would not justify entertaining the subsequent bail application.

The Division Bench also concluded that the ground of staggering pendency of the Appeal and the period of detention undergone, by itself cannot a ground for reconsideration, though the Appellant remained to be incarcerated since 2014.

12. In light of the pertinent observations in *Babu Singh* (supra), where it is undubitably held that an order refusing an application for bail, does not necessarily preclude another one , on a later occasion, giving more materials, further developments and different considerations and, since, it is held that an application preferred for the second time, cannot be barred from re-consideration at a later stage, by considering the application for bail to be an interlocutory relief and, since, an interim direction is not a conclusive adjudication, an updated reconsideration would not amount to overturning an earlier negation and this does not preclude the Court from hearing the application on merits.

True it is that the observations are made in the backdrop of the peculiar facts about the acquittal of the petitioners by the Sessions Court and its reversal by the High Court, but as far as the Apex Court is concerned, the principal question for consideration is, whether the subsequent bail application can be entertained, the first having been rejected.

If one look at the order of grant of bail or refusal of bail, to be interlocutory in nature, then definitely it is not a conclusive adjudication and as indicated in *Babu Singh* (supra), on a later occasion, on offering some more materials, further developments and different considerations, would warrant entertainment of the second application.

In *Dal Chand & Ors. Vs. State of Uttar Pradesh*⁵, the Allahabad High Court, speaking through Justice G.P.Mathur, has thrown light upon the very same question, whether Section 389 of Cr.P.C. creates an embargo on the power of the Appellate Court to grant bail to a convicted person, if his application for bail is rejected on an earlier stage.

This question was approached, from an angle whether there is any statutory provision, which create a bar in hearing the second bail application.

Falling back on the principle that the Court or Tribunal is not entitled to reopen or review its decision finally disposing of a case except for the limited purpose of correcting a clerical or arithmetical error unless such power is specifically conferred by the statute, the pertinent observations deserve a mention;

⁵ 2000 Cri.L.J.4579

“4. The Code of Criminal Procedure contains some provisions which create a bar against rehearing the matter. Section 362, Cr. P.C. lays down that save as otherwise provided by the Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall after or review the same except to correct a clerical or arithmetical error. The bar created here is against altering or reviewing a judgment or final order disposing of a case. An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties. There can be no dispute that the order passed on a bail application is an interlocutory order and cannot be said to be judgment or final order disposing of a case. Therefore, Section 362, Cr. P.C. can have no application to rejection of a bail application. Section 300, Cr. P.C. lays down that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not liable to be tried again for the same offence. This provision creates a bar against a second trial of a person who has once been tried by a Court of competent jurisdiction for an offence and has either been convicted or acquitted for such an offence. Section 300, Cr. P.C. will also not apply to a bail application as a decision on the said application neither convicts nor acquits the accused. There is no other provision in the Code which may create a bar against maintainability of second bail application and consequently the statutory provisions of the Code of Criminal Procedure do not at all create a bar in entertaining a second bail application at the instance of a convicted accused in an appeal.”

13. Reliance was placed upon the decision in the case of ***Babu Singh*** (supra) and by specifically referring to paragraph 13 of the said judgment, it is categorically held that a second bail application would be maintainable only on some substantial ground, where some point which has a strong bearing on the fate of the appeal and which may have the effect of reversing the order of conviction of the accused.

Apart from the ground of merits of the case, unusual long delay in hearing the Appeal is also permitted as a ground for consideration of the application preferred on the second

occasion, as by this time, the convicted accused has undergone the major part of the sentence and thus the purpose of filing of the Appeal may be frustrated.

14. The aforesaid observation by Justice Mathur is based on the scheme of the Code of Criminal Procedure, when very rightly it has been held that the bar created in the Code is against altering or reviewing a judgment or final order disposing of a case and would not cover order passed on the bail application, which is interlocutory order and is not a conclusive determination, in form of a judgment or a final order.

It may be equally true that successive bail applications filed in a manner, as has been held in *Buddikota Subha Rao* (supra), are not to be entertained at the drop of the hat and, particularly, when it is only with an intention to take a chance of approaching another Bench for the same relief, which was earlier turned down. However, it is equally possible that a long incarceration of the accused and the likelihood of the Appeal, being taken up for final hearing are some other factors, which may have considerable bearing.

A point on facts or law, which could have relevance and which was not argued on an earlier occasion, when the first bail application was entertained, may allow the same Judge or any other Judge, before whom the application is placed to view the matter with a fresh look and if the order is not a final order, I see no difficulty in looking at this view point, particularly when there is a considerable time gap between the rejection of the first bail application and preference of the second one.

In any case, when the judgment of conviction is overruled, the presumption of innocence of guilt, supported by the reasoning flowing from the appreciation of evidence, when it is evident that the Appeal cannot be heard soon, it is no gain say in denying this opportunity, when the Court is not in a position to hear the Appeal within a reasonable period of time. Ultimately, even at the stage of considering an application for bail by an under-trial or considering an application for suspension of sentence and release on bail during the pendency of the Appeal, the question that deserve to be pondered upon is, whether the guilt established by the first Court deserve to be confirmed or if there is any chance that it may not, then the accused deserve his release, as upon the Appeal being heard, if the judgment and conviction is converted into an acquittal, the question which should be asked is, whether the system can compensate him for his incarceration, which is found to be unjustifiable today.

On being satisfied that the application deserve an hearing despite a similar relief having been rejected on the first occasion, I have heard the learned counsel for the Applicant on the reliefs sought in the application.

15. The Applicant stand convicted for committing an offence under Section 4 of the POCSO Act and he is sentenced to suffer R.I. for ten years alongwith fine.

The basic question, which arise in the Appeal is, whether the prosecution has proved that the victim was minor, as he is charged for committing an offence of penetrative assault upon a girl, aged 17 years and causing her to be pregnant.

16. As per the victim, her date of birth is 31/10/1999 and it is so accepted by the Special Judge on her deposition and it is held that it is substantiated by the evidence of PW 2, the Head Mistress of Thane Municipal Corporation School through Exh.30, the School Register and Admission Form.

On careful perusal of the deposition of the victim, on being cross-examined, she admit that she do not recollect that while she was engaged in the company, she had disclosed her date of birth as 31/10/1997 and she is aware that no person, below 18, can be engaged in company. She also admit that while lodging complaint with the police, she had not disclosed her date of birth as 31/10/1999 and that since she was not aware of the exact date of birth, she had not disclosed it to the police.

The above admission, according to the learned counsel for the Applicant, has clearly created a doubt about her status as “minor”.

17. To corroborate the case of the prosecution, PW 2, the Head Mistress in Thane Municipal Corporation School has stepped into the witness box and has deposed that as per Admission Form and the Register, her date of birth is 31/10/1999. She produced the original of the same before the Court, but in the cross-examination, she has admitted that she has no knowledge about the person in whose handwriting, the entry is taken in the Admission Register. She also admit that there is reference of document on the basis of which the birth date is mentioned. Another admission comes from the Head Mistress, when she depose as under :-

“It is true to say that, the birth date of victim was not verified by the school. It is true to say that I cannot tell whether the birth date is true or false.”

18. The Investigating Officer also does not throw any light upon the date of birth of the victim, as he only deposed that the victim had given her date of birth as 17 years and he admit that he had not issued any letter to the victim's mother to produce document about her date of birth.

19. In the wake of the above, the prosecution case of an offence under the POCSO Act being made out, becomes highly doubtful.

It is settled position of law that an entry of the date of birth, as recorded in the School Register, is relevant and admissible in evidence under Section 35 of the Evidence Act. However, such an entry would be of no evidentiary value in absence of the material on the basis of which the age is recorded. In the case of *Harpal Singh & Anr. Vs. State of Himachal Pradesh*⁶, it is held by the Apex Court that an entry in the Birth Register, even in absence of an Officer or Chowkidar who recorded it, is admissible in Section 35 of the Evidence Act, as it was made by the concerned Officer in discharge of his official duties. In the recent decision of the Apex Court in the case of *Manoj @ Monu @ Vishal Chowdhary Vs. State of Haryana & Ors.*⁷, it is held that only a document which satisfy the test under Section 35, is admissible in evidence.

⁶ (1981)1 SCC 560

⁷ 2022 (6) SCC 187

A clear admission from PW 2 that she is unaware about the source on which the date of birth is recorded in the School Register, itself establish that the entry recorded in the School Register cannot be said to be a relevant fact.

20. The above important aspect is not adverted to by the learned Judge, while convicting the Appellant for committing an offence under the POCSO Act, since as per the prosecution, the girl is below 18 years.

The position of law will have to be appreciated at the time when the Appeal is heard, but since at present, prima facie I am of the view that the prosecution was duty bound to discharge the burden, that the victim was a “child” on the date of incident, but in absence of any such proof, the conviction under the POCSO Act, become doubtful and this is a matter to be considered, when the Appeal will be heard.

21. In the wake of the aforesaid, I deem it appropriate to release the Applicant on bail, by suspending the sentence imposed upon him, by the following order.

: ORDER :

- (a) The Interim Application is allowed.
- (b) The sentence imposed on the Applicant vide the impugned Judgment and Order dated 16/11/2019 passed by the District Judge-6 and Additional Sessions Judge, Thane in Special Case (POCSO) No.132 of 2016 is suspended, pending the Appeal.

- (c) The Applicant shall be released on bail in Special Case (POCSO) No.132 of 2016 on furnishing P.R.Bond to the extent of Rs.25,000/- with one or more sureties in the like amount.
- (d) The Applicant shall mark his attendance Wagale Estate Police Station, Thane on first Monday of every alternate month between 5.00 p.m. to 6.00 p.m.
- (e) The Applicant shall not attempt to contact the victim by any mode and shall not directly or indirectly make any inducement, threat or promise to her
- (f) On being released on bail, the Applicant shall furnish his contact number and residential address to the Investigating Officer and shall keep him updated, in case there is any change.

(SMT. BHARATI DANGRE, J.)