

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 1443 OF 2023

Somnath Bhivaji Gaikwad	...Applicant
<i>Versus</i>	
The State of Maharashtra & Anr.	...Respondents

Ms. Sana Raees Khan, Advocate, for the Applicant.
Ms. Veera Shinde, APP, for the Respondent No.1-State.
Mr. Sidheshwar N. Biradar, Advocate for the Respondent No.2.
Mr. Pravin Abdagire, A.S.I.-Hadapsar Police Station, Pune present.

CORAM: MADHAV J. JAMDAR, J.
DATED: 18th APRIL 2024

P.C.

1. At the outset, Ms. Khan, learned Counsel for the Applicant seeks leave to amend the cause title to mask/hide the name of Respondent No.2.

2. Leave granted. Amendment be carried out forthwith.

3. Heard Ms. Khan, learned Counsel for the Applicant, Ms. Shinde, learned APP for Respondent No.1-State and Mr. Biradar, learned Counsel for Respondent No.2.

4. This is a second Bail Application preferred under Section 439 of the *Code of Criminal Procedure, 1973* (“CrPC”). The relevant details are as follows:-

1.	C. R. No.	1546 of 2020
2.	Date of registration of F.I.R.	27/10/2020
3.	Name of Police Station	Hadapsar, Pune
4.	Section/s invoked	363, 366-A, 376(3), 376-D and 376-DA of the Indian Penal Code, 1860 (“IPC”); 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”)
5.	Date of incident	26/10/2020
6.	Date of arrest	31/10/2020
7.	Date of filing of Charge-sheet	25/12/2020

5. A learned Single Judge [Anuja Prabhudessai, J.] by Order dated 2nd December 2022 dismissed as withdrawn the Bail Application No.118 of 2022 filed by the present Applicant. The said Order dated 2nd December 2022 reads as under:-

“Learned APP states that Bail Application No.4247/2021 filed by the co-accused has been rejected on merits.

2. Learned counsel for the Applicant seeks leave to withdraw the Application with liberty to file fresh

application in the event the trial does not commence within a reasonable time.

3. Leave with liberty is granted. Bail Application is dismissed as withdrawn.”

6. Ms. Khan, learned Counsel for the Applicant states that in view of Order dated 2nd December 2022, she is not going to argue the Bail Application on merits. She only states that by said Order dated 2nd December 2022, although the Bail Application was dismissed as withdrawn, liberty was granted to file a fresh Bail Application in the event the trial does not commence within a reasonable time. She states that the Applicant was arrested on 31st October 2020 and that there is no further progress in the trial till date and even the Charge is also not framed yet. She therefore submitted that the Applicant is entitled for bail on the ground of prolonged incarceration.

7. On the other hand, Ms. Shinde, learned APP for Respondent No.1-State strongly opposed the Bail Application. She submitted that this is a very grievous case where the victim was subjected to gang rape. She submitted that the offence in question is punishable under Sections 363, 366-A, 376(3), 376-D and 376-DA of the

Indian Penal Code, 1860 (“IPC”). She submitted that the offence is *inter alia* under Section 376-DA of IPC as the victim was 15 years and 5 months old when the incident occurred. She submitted that the punishment prescribed under Section 376-DA of IPC is imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine. She also pointed out Section 4(2) of the POCSO Act.

8. It is shocking that yesterday, when this matter was taken up by this Court, the Respondent No.2-father of the victim was present in Court along with the victim and Mr. Biradar, learned Counsel Respondent No.2 submitted that the Respondent No.2 and the victim is consenting for grant of bail to the Applicant.

9. This is a very serious case where the allegation is that the Applicant is involved in committing the offence of gang rape. By Order dated 2nd December 2022, a learned Single Judge [Anuja Prabhudessai, J.] dismissed the first Bail Application as withdrawn. Therefore, Ms. Khan, learned Counsel for the Applicant stated that she will not be arguing the matter on merits and that she is arguing the matter only on the ground of prolonged incarceration.

10. In the present case, the Applicant is incarcerated since 31st October 2020. Till date there is no progress in the trial. Thus, there is some substance in the contention of learned Counsel for the Applicant that there is delay in the trial. However, it is to be noted that the right to speedy trial is well established and therefore Section 436-A was inserted in the CrPC by Act 25 of 2005 and the same has come into effect from 23rd June 2006. Section 436-A of CrPC reads as under:-

“436-A. Maximum period for which an undertrial prisoner can be detained.— Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period

of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

Thus, what is contemplated by Section 436-A of the CrPC is that in case an under-trial prisoner has undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he or she shall be released by the Court on his or her personal bond with or without sureties. In fact, Section 436-A of the CrPC also contemplates that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him or her on bail instead of the personal bond with or without sureties.

11. However, it is required to be noted that no straitjacket formula is prescribed for holding that there is long incarceration. The same depends on several factors. The criteria laid down under Section 436-A of CrPC is one of the guiding factors to be taken into

consideration. In any case, while determining the same, quantum of punishment is required to be taken into consideration. It is further significant to note that Section 436-A of the CrPC specifies that even if an under-trial prisoner has completed half of the punishment, then also, for the reasons to be recorded in writing, the Court can order the continued detention of the under-trial prisoner.

12. It is required to noted that the offence is *inter alia* under Sections 376-D and 376-DA of the IPC and Section 4(2) of the POCSO Act. Section 376-DA of the IPC reads as under:-

“376-DA. Punishment for gang rape on woman under sixteen years of age.—Where a woman under sixteen years of age is raped by one or more persons constitutiing a group or acting in furtherance of a common intention, each of those persons shall be deemed to be have committed the offence of rape and shall be **punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine:**

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

(Emphasis added)

13. Section 4(2) of the POCSO Act reads as under:-

“4. Punishment for penetrative sexual assault.—

(1)...

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life or that person, and shall also be liable to fine.”

(Emphasis added)

14. Thus, it is clear that under Section 376-DA the minimum punishment prescribed is imprisonment for life which shall be imprisonment for remainder of that person’s life. Under Section 4(2) of the POCSO Act, the minimum punishment is not less than twenty years.

15. The Supreme Court of India in the decision of *Gurwinder Singh v. State of Punjab*¹ held that mere delay in trial pertaining to

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grave offences cannot be used as ground to grant bail. Paragraph No.46 of *Gurwinder Singh* (Supra) is relevant and reads as under:

*“46. The Appellant's counsel has relied upon the case of KA Najeeb (supra) to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and substance. In KA Najeeb's case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court's decision to consider bail was grounded in the anticipation of the impending sentence that the respondent-accused might face upon conviction and since the respondent-accused had already served portion of the maximum imprisonment i.e., more than five years, this court took it as a factor influencing its assessment to grant bail. Further, in KA Najeeb's case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of trial in near future. However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario **if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail.** Hence, the aforesaid argument on the behalf the appellant cannot be accepted.”*

(Emphasis added)

16. Thus, it is evident that mere delay in the trial pertaining to grave offences, by itself cannot be a ground to enlarge an accused on bail, de hors the facts. As noted herein above, this is a case of gang rape. When the incident took place, the victim was 15 years and 5 months old. Therefore, there is no case made out for grant of bail even on the ground of long incarceration.

17. There is one more important aspect for rejecting Bail Application. It is to be noted that this Court has issued notice to Respondent No.2 by Order dated 21st February 2024 and also directed the Investigating Officer to inform Respondent No.2 that he can engage an Advocate of his own choice or an Advocate can be appointed through High Court Legal Services Committee, Mumbai. It is significant to note that the said notice has been served on Respondent No.2 who in writing has intimated to the Investigating Officer on 4th December 2023 as well as on 6th April 2024 that an Advocate through High Court Legal Services Committee, Mumbai be appointed to represent him. However, as noted earlier, Mr. Biradar, learned Counsel appeared in the matter yesterday on behalf of Respondent No.2 and stated that

Respondent No.2 has no objection if the Applicant is granted bail. In fact, Respondent No.2 along with the victim was present in the Court for giving consent to grant of bail to the Applicant. This is a very serious case of gang rape. The conduct of the Respondent No.2 and of the victim clearly shows that the Accused are influencing the witnesses. In the facts and circumstances of this case, it is absolutely essential to expedite the trial. Accordingly, the learned Trial Court is requested to conclude the trial expeditiously within a period of 9 months from today.

18. Although the Bail Application is disposed of, the learned Trial Court is requested to file periodical reports before this Court after every three months to ensure that the trial is concluded expeditiously and in any event within a period of 9 months from today. This direction is issued as the case is of gang rape and the Accused persons are attempting to influence the victim and the witnesses and are also tampering with the evidence.

19. Registry of this Court is directed to communicate this order to the learned Trial Court.

20. It is clarified that the Trial Court shall decide the case on its merits, uninfluenced by the *prima facie* observations made in this order.

[MADHAV J. JAMDAR, J.]