



Judgment

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.548 OF 2024

1. Mohd Ali Azam Mohd Israfil Sheikh,
aged about 29 years, occupation – labour,
r/o Nayatola Donawa, Raghunathpur, tahsil
Dholi Sakra, district Muzaffarpur, Bihar.

2. Mohd Nirale Mohd Israfil Sheikh,
r/o Nayatola Donawa, Raghunathpur, tahsil
Dholi Sakra, district Muzaffarpur, Bihar.

3. Mohd Tausif Mohd Asif Sheikh,
r/o Nayatola Donawa, Raghunathpur, tahsil
Dholi Sakra, district Muzaffarpur,
Bihar. **Appellants.**

:: V E R S U S ::

1. State of Maharashtra,
through Police Station Officer,
Police Station Ashti, district Wardha.

2. XYZ victim,
crime no.285/2018 PS Ashti,
district Wardha. **Respondents.**

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Shri M.N.Ali, Counsel for Appellants.
Shri N.B.Jawade, Additional Public Prosecutor for
Respondent No.1/State.
Ms.Aastha Sharma, Counsel Appointed for Respondent
No.2/Victim.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 14/11/2024
PRONOUNCED ON : 22/11/2024

JUDGMENT

1. The present appeal is preferred under Section 14A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the Atrocities Act) challenging order dated 1.7.2021 passed by learned Ad-hoc Additional Sessions Judge, Wardha in Misc.Criminal Application No.256/2021 whereby the application moved by appellants (accused persons) for grant of bail was rejected.

2. Heard. **Admit.**

3. Crime against accused persons was registered on the basis of a report lodged by respondent No.2 (the victim). As per her report, she studied upto 10th Std.. On 26.12.2018, due to ill-health, she returned home in the afternoon from work and was taking rest. In her neighbourhood, accused persons were residing. Appellant No.1 promised her to perform marriage with her. She disclosed him that she belongs to "Mahar" community. At

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about 9:30 pm, appellant No.1 called her and pulled her inside his house. At the relevant time, appellant Nos.2 and 3 were also present in the house. They all subjected her for forceful sexual assault. On the basis of the said report, the police registered the crime against accused persons. During investigation, the victim was referred for medical examination. Relevant statements were recorded and after completion of investigation, chargesheet was submitted. Initially, bail applications filed by accused persons were rejected considering the nature of the offence, which is serious in nature. The application was filed before the special court on ground of delay in trial. It is submitted that accused persons were arrested on 29.12.2018 and since then they are behind bars. There is no progress in the trial and the same is not concluded yet.

4. Heard learned counsel Shri M.N.Ali for accused persons, learned Additional Public Prosecutor Shri N.B.Jawade for respondent No.1/State, and learned counsel Ms.Aastha Sharma appointed for respondent No.2/State.

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5. Learned counsel for accused persons submitted that there is incarceration of more than four years and the trial is not concluded. The accused persons are incarcerated for no reason. The evidence of material witness i.e. the victim was already recorded from which it reveals that there was love relationship between her and appellant No.1. She did not support the prosecution case. There is also no medical evidence to connect accused persons with the alleged offence. He also placed on record entire Roznama, which shows that the trial is not concluded. In support of his contentions, he placed reliance on Criminal Appeal No.591/2024 (**Satish s/o Kesharaoji Bajait vs. State of Mah., thr.PSO PS Sindi (Rly.), Wardha and anr** decided by this court on 15.10.2024.

6. Learned Additional Public Prosecutor for the State and learned counsel appointed for the victim submitted that the trial is at fag end and only three witnesses are remained to be examined. Mere delay in trial pertaining to grave offences cannot be used as a ground to grant bail and they pray for dismissal of the appeal.

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7. After hearing learned counsel appearing for respective parties and perusing investigation, it reveals that allegation against accused persons is that they subjected the victim for sexual assault. As far the statement of the victim and the evidence recorded are concerned, the same reveals that the victim was having love affair with appellant No.1. The similar history was narrated by her before the Medical Officer. As far as allegations against accused persons are concerned, it is consistent that they subjected her for sexual assault against her consent. Thus, accused persons are facing the charge which is of a serious in nature i.e. gang rape. As far as status of the trial is concerned, the trial is already underway and only three witnesses are remained to be examined.

8. Learned counsel for accused persons relied upon Criminal Appeal No.2790/2024 (**Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari vs. State of Uttar Pradesh**) decided by the Hon'ble Apex Court on 18.6.2024, wherein issue regarding speedy trial was

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considered and it is held that if the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.

The decision in the case of **Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari** *supra* was relied upon by Three-Judge Bench of the Hon'ble Apex Court in the case of **Union of India vs. K.A.Najeeb, reported in (2021) SCC OnLine SC 50** wherein respondent therein was in jail for more than five years and charges were framed and 276 witnesses were left to be examined and the Hon'ble Apex emphasized that liberty granted by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and speedy trial. No under trial can be detained

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indefinitely 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 them on bail.

The decision in the case of **Union of India vs. K.A.Najeeb** *supra* was distinguished by Two-Judge Bench of the Hon'ble Apex Court in the case of **Gurwinder Singh vs. State of Punjab, reported in (2024)SCC OnLine SC 109** and it is observed that in the case of **Union of India vs. K.A.Najeeb** *supra* this court considered that the appellant has been in jail for last five years which is contrary to law laid down in the case of **K.A.Najeeb**. 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

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i.e., more than five years. He was released on bail. It is held that mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as ground to grant bail.

In a subsequent decision, in the cases of **Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari** *supra* by referring decisions in cases of **K.A.Najeeb** and **Gurwinder Singh**, the Hon'ble Apex Court held that. In **Gurwinder Singh** *supra* on which reliance has been placed by the respondent, a Two Judge Bench of this Court distinguished **K.A.Najeeb** *supra* holding that the appellant in **K.A.Najeeb** *supra* was in custody for five years and that the trial of the appellant in that case was severed from the other co-accused whose trial had concluded whereupon they were sentenced to imprisonment of eight years; but in **Gurwinder Singh**, the trial was already underway and that twenty two witnesses including the protected witnesses have been examined. It was in that context, the Two-Judge Bench of this Court in **Gurwinder Singh** *supra* observed that mere delay in trial pertaining to grave

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offences cannot be used as a ground to grant bail. It was further held that right to life and personal liberty enshrined under Article 21 of the Constitution of India is overarching and sacrosanct. A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused under trial under Article 21 of the Constitution of India has been infringed. In that event, such statutory restrictions would not come in the way. Even in the case of interpretation of a penal statute, howsoever stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law of which liberty is an intrinsic part. In the given facts of a particular case, a constitutional court may decline to grant bail. But it would be very wrong to say that under a particular statute, bail cannot be granted. It would run counter to the very grain of our constitutional jurisprudence. In any view of the matter, **K.A.Najeeb's** case *supra* being rendered by a three Judge Bench is binding on a Bench of Two-Judges.

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9. Thus, having regard to the above discussion, facts of the present case also show that accused persons subjected the victim for sexual assault against her consent. The factors considered in the case of **K.A.Najeeb** are that other co-accused were sentenced imprisonment upto eight years and he was behind bars for more than five years.

10. In the light of observations of the Hon'ble Apex Court in the case of **Gurwinder Singh** *supra*, in the present case, the trial is already underway and only three witnesses are remained to be examined. It is specifically observed by the Hon'ble Apex Court in paragraph No.34 that in the given facts of a particular case, a constitutional court may decline to grant bail. There is no dispute as to the fact of a right of accused of speedy trial and right of life of person enshrined under Article 21 of the Constitution. But, considering that trial is already underway and only three witnesses are remained to be examined, release of accused persons may be hurdle to dispose of the trial.

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11. In such circumstances, in the present case, it would be appropriate to direct the prosecuting agency and the court to expedite the trial and dispose of the same within two months from today. The accused persons would be at liberty to move this court if the trial is not concluded within two months from today.

12. In the light of the above, the appeal deserves to be dismissed and the same is **dismissed**.

13. Fee of learned counsel Ms.Aastha Sharma appointed for respondent No.2/victim is quantified and the same be paid to her as per Rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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