

Ajay

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

CRIMINAL BAIL APPLICATION NO. 2354 OF 2024

Bijay Rajaram Mhaske .. Applicant
Versus
The State of Maharashtra and Anr. .. Respondents

**WITH
CRIMINAL BAIL APPLICATION NO. 3020 OF 2024**

Deepak Bhalchandra Pagare .. Applicant
Versus
The State of Maharashtra and Anr. .. Respondents

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- Mr. Rajesh Bhosale, appointed Advocate for Applicant through Legal Aid for Applicant in BA No.2354 of 2024.
 - Mr. M.S. Mulla, Advocate for Applicant in BA No.3020 of 2024.
 - Mr. Hitendra J. Dedhia and Ms. Shilpa K. Gajare- Dhumal, APPs for Respondent – State in both Bail Applications.
 - Ms. Devyani Kulkarni, appointed Advocate through Legal-aid for Respondent No.2 in both Bail Applications.

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CORAM : MILIND N. JADHAV, J.
DATE : MAY 02, 2025.

P.C.:

1. Heard Mr. Bhosale, learned appointed Advocate for Applicant in BA No.2354 of 2024; Mr. Mulla, learned Advocate for Applicant in BA No.3020 of 2024; Mr. Dedhia and Ms. Gajare – Dhumal, learned APPs for Respondent No.1 - State in both Bail Applications and Ms. Kulkarni, learned appointed Advocate for Respondent No.2 in both Bail Applications.

2. These are two Bail Application filed under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R. No.202 of 2020 registered with Parksite Police Station for offences punishable under Sections 376-D, 363, 354, 354-A(1) readwith 34 of the Indian Penal Code, 1860 (for short “**IPC**”). Applicants before me are arraigned as Accused Nos.3 and 1 respectively and are in incarceration since 02.05.2020 i.e. 5 years pending trial.

3. First Informant is sister of prosecutrix. Prosecutrix is a lady suffering from a psychological disorder as seen from the record. Briefly stated case of prosecution is that on 21.04.2020 during Covid -19 lockdown she went for a walk and wanted some tobacco and approached Accused persons. They gave her the tobacco and she was taken in an auto-rickshaw to a playground between Building No. 11 and 12 in the colony where they stayed and outraged her modesty. On 05.05.2020 First Informant and Secretary of Ratna Foundation where she works went to the police station and prosecutrix recorded her above statement that she was sexually abused by Applicants. Hence Section 376-D of IPC was added.

4. Mr. Bhosale and Mr. Mulla, learned Advocates for Applicants would submit that all offences except the offence under Section 376-D are bailable and there is no *prima facie* evidence for corroborating the

fact that the said offence is made out as prosecutrix refused medical examination. They would submit that two eye-witnesses to the alleged incident have not stated anything about commission of the offence of rape as the place of the alleged incident is an open playground in a residential complex covered by CCTV surveillance. They would submit that there is nothing incriminating found / observed in the CCTV footage which would suggest commission of rape on prosecutrix. They would submit that in such circumstances where there is no *prima facie* corroborative evidence to establish the offence under Section 376-D and other offences being bailable such long incarceration of Applicants for 5 years in prison pending trial is clearly unwarranted. They would submit that Applicants do not have any criminal antecedents to their discredit. They would submit that the trial will not be completed or concluded in the near foreseeable future and hence considering the case against Applicant based on circumstantial evidence and based solely on the statement of prosecutrix, Bail Applications be allowed.

5. Mr. Dedhia and Ms. Gajare – Dhumal, learned APPs have vehemently opposed the Bail Applications. They would argue that in such offences where crime is of such a nature Courts should be cautious while adjudicating Bail Applications. They have referred to and relied upon decisions of the Supreme Court in the case of *State of Jharkhand Vs. Anil Ganju*¹ and *X Vs. State of Rajasthan & Anr.*² to

¹ 2024 SCC OnLine SC 3321

² Order dated 27.11.2024 in Special Leave Petition (Cri) No. 13378 of 2024

contend that in cases where Court is considering grant of bail in severe offences like murder, rape and dacoity, once trial commences and prosecution starts examining witnesses, Court should be loathe in entertaining the Bail Application. They would submit that Supreme Court has referred to certain guidelines enumerated in paragraph No. 13 of the decision in the case of *State of Jharkhand* (*supra*) while referring to a previous decision of the Supreme Court in the case of *Mahipal Vs. Rajesh Kumar @ Polia*³ and those guidelines are required to be considered by the Court. They would submit that discretion of Court while granting bail in serious and heinous offences should be curtailed especially when the trial has commenced as in the present case as there is every likelihood that Applicants may influence and/or tamper with evidence and/or witnesses. They would submit that there is ample material on record to prove *prima facie* guilt of Accused and hence would urge the Court to reject the Bail Applications. On the ground of long incarceration of more than 5 years in prison pending trial, they both would submit that prosecution will do its best to complete the trial expeditiously and appropriate directions to complete the trial in a time bound manner be passed.

6. Ms. Kulkarni, learned Advocate appointed through Legal-aid to represent and espouse the cause of Respondent No.2 would adopt and support the submissions made by the learned APPs and

³ 2019 INSC 1325

additionally would submit that the CCTV footage clearly indicate that Applicants were seen pulling the victim by hand from the bushes near the playground and also from the auto-rickshaw. She would therefore submit that in such facts a clear inference of complicity of Applicants in the crime can be drawn by the Court and no leniency should be shown to the accused persons despite their long incarceration and would urge the Court to reject the Bail Applications.

7. With the able assistance of learned Advocates at the bar, I have perused the record of the case.

8. In the present case record indicates that *prima facie* there is no corroborative evidence to substantiate the allegations under Section 376-D of IPC which would impel me to reject the Bail Applications at this stage considering the facet of long incarceration of more than 5 years pending trial when right to speedy justice and personal liberty of Applicants is at stake. Also all other alleged offences except offence under Section 376-D are bailable. The snail's pace of trial impinges upon Applicant's fundamental right to speedy trial and personal liberty guaranteed under Article 21 of the Constitution of India. In such circumstances I am impelled to consider the present Application only on the ground of long incarceration of Applicants pending trial. The period of more than 5 years in prison pending trial when the trial would take an uncertain time to complete further persuades me to

consider the present Applications.

9. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the Court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents are required to be considered in such cases.

10. It is seen that while dealing with Bail Applications the material available for consideration and adjudication is limited. It is brought to the notice of the Court that trials are taking perpetuity to conclude and prisons are also simultaneously overcrowded in some segments. This Court regularly deals with Bail Applications of under-trials who have been in custody for long period and is also equally aware of the conditions of our prisons. To give an example in the city of Mumbai, recently in one of the cases before me, a Report dated 12.12.2024 made by the Superintendent of Mumbai Central Prison addressed to the Chief Government Pleader was placed before me by the Public Prosecutor which stated that the Mumbai Central Prison (Arthur Road Jail) is overcrowded beyond its sanctioned capacity by more than 5 – 6 times and every barrack sanctioned to house 50 inmates as on date houses anywhere between 220 – 250 inmates. Such

an incongruity leads us to answer the proposition: “*How can Courts find a balance between the two polarities?*”

11. Argued before me is a case concerning liberty of under-trials who have been incarcerated for 5 years, a situation impacting the rights of under-trial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of High Court to grant bail is concerned, when the case is such that involves a question of personal liberty of an under-trial who is incarcerated for a very long period, the powers are wide and unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defence.

12. In the case of *Emperor Vs. H.L. Hutchinson*⁴, the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukerji writing for the Bench in paragraph

4 AIR 1931 ALL 356

No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

13. The Supreme Court in a landmark decision of 1978 in the case of *Gudikanti Narasimhulu & Ors. Vs. Public Prosecutor, High Court of Andhra Pradesh (supra)* observed as under:-

“6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective...” (emphasis supplied)

14. Thereafter the Supreme Court in a plethora of judgements have discussed the rights conferred by Article 21 qua grant of bail and that such rights cannot be taken away unless the procedure is reasonable and fair and in cases where there is unreasonable delay in trial it would undoubtedly impact the rights of an undertrial. Some of the important decisions of the Supreme Court and some of the High Courts are discussed herein under:-

14.1. In the landmark judgement of *Maneka Gandhi Vs. Union of India*⁵, the Supreme Court held that the right to life and personal liberty under Article 21 is not limited to mere physical existence but includes the right to live with dignity. The court emphasized that the procedure established by law must be fair, just, and reasonable, and it cannot be arbitrary, oppressive, or unreasonable.

14.2. In the case of *Hussainara Khatoon Vs. Home Secy., State of Bihar*⁶ the Supreme Court held as under:-

“Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

14.3. The Supreme Court in the case of *Shaheen Welfare Association Vs. Union Of India*⁷ dealing with a Public Interest Litigation seeking relief for under-trial prisoners charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 due to gross delay in disposal of cases qua Article 21 of the Constitution of India held as under:-

5 1978 (1) SCC 248

6 (1980) 1 SCC 81

7 1996 SCC (2) 616

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh’s case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

14.4. The Supreme Court in the case of *Union of India v. K. A. Najeer (supra)* while commenting upon the possibility of early completion of trial and extended incarceration held as under:-

“18. 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 appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.”

15. Applicants in present case have been in custody for 5 years. There is no possibility of the trial concluding in the near future. Detaining an under-trial prisoner for such an extended period further violates his fundamental right to speedy trial flowing from Article 21 of the Constitution. At this juncture I deem it appropriate to list certain observations of the Supreme Court shedding light on concerns underlying the “Right to speedy trial” from the point of view of an accused in custody whose liberty is affected. In the case of *Abdul*

Rehman Antulay & Ors. Vs R.S. Nayak & Anr.⁸ the Supreme Court held as under:-

“86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the Right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) – (11) -----X-----” (emphasis supplied)

16. The Supreme Court has also held in a series of judgements and orders that in situations where the under-trial-prisoner / accused persons have suffered incarceration rather long incarceration for a considerable period of time and there is no possibility of the trial being completed within the foreseeable future, Constitutional Courts can

⁸ 1992 (1) SCC 225

exercise power to release the accused under-trial on bail, as bail is the rule and jail is the exception.

17. In the case of *Supreme Court Legal Aid Committee (Representing undertrial prisoners) Vs. Union of India*⁹, the Supreme Court has held that:-

“17. We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals. Since harsh punishments have been provided for under the Act, the percentage of disposals on plea of guilt is bound to be small; the State Government should, therefore, have realised the need for setting up sufficient number of Special Courts immediately after the amendment of the Act by Amendment Act 2 of 1989. Even after the Division Bench of the Bombay High Court refused to grant en bloc enlargement on bail on 1-2-1993 in Criminal Application No. 3480 of 1992 and B.D. Criminal No. 565 of 1992, no substantial improvement in the pendency is shown since new cases continue to pour in, and, therefore, a one-time exercise has become imperative to place the system on an even keel. We also recommend to the State Government to set up Review Committees headed by a Judicial Officer, preferably a retired High Court Judge, with one or two other members to review the cases of undertrials who have been in jail for long including those released under this order and to recommend to the State Government which of the cases deserve withdrawal. The State Government can then advise the Public Prosecutor to move the court for withdrawal of such cases. This will not only help reduce the pendency but will also increase the credibility of the prosecuting agency. After giving effect to this order the Special Court may consider giving priority to cases of those undertrials who continue in jail despite this order on account of their inability to furnish bail.”

18. In the case of *Javed Gulam Nabi Shaikh Vs. State of Maharashtra and Anr.*¹⁰, the Supreme Court while granting bail to accused incarcerated for 4 years in paragraph Nos.16 and 17 held as

⁹ (1995) 4 SCC 695

¹⁰ (2024) 9 SCC 813

under:-

“16. Criminals are not born but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

17. 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.”

19. This Court in the case of *Ganesh Madhukar Mendarkar (supra)* while referring to an article dated 01.05.2018 “*How prison changes people*” ¹¹ written by Dr. Christian Jarret, Editor of British Psychological Society's Research Digest published on BBC discussed the negative effects on a person's mental and physical health due to long incarceration and granted bail to the Accused who suffered incarceration of more than 9 years in a matter under 302 of IPC. Paragraph No.29 of the judgment is relevant and reads as under:-

“29. In view of the above decisions and considering the long incarceration of the Applicant, I would like to highlight one more important issue which persuades me to consider the present case and that is the effect of long incarceration. Long incarceration can have many negative effects on a person's mental and physical health. Long incarceration can lead to post-

¹¹ Available at <https://www.bbc.com/future/article/20180430-the-unexpected-ways-prison-time-changes-people>

incarceration syndrome which can include depression, anxiety and poor self-esteem. It can promote unhealthy behaviours like drug abuse. Inmates face social stigma which can disrupt relationships with family and friends. Incarceration persons often suffer long-term consequences from having been subjected to pain, deprivation and extremely atypical patterns and norms of living and interacting with others. Prima facie incarceration rather long incarceration exposes under-trial accused to carceral environment which can be inherently damaging to the mental health of the under-trial accused coupled with the appalling conditions in the prisons. Researchers have even theorized that incarceration can lead to Post-Incarceration Syndrome, a syndrome similar to PTSD.”

20. In view of the my above *prima facie* observations and the period of long incarceration of Applicants in the present case i.e. 5 years pending trial and the above judicial pronouncements, without expressing any opinion on merits and completing or conclusion of trial being a distinct impossibility in the near foreseeable future, in my opinion both Applicants can be released on bail. Needless to state that complicity of Applicants in the crime can be proved by prosecution at trial.

21. Hence, both Bail Applications are allowed subject to the following terms and conditions:-

- (i) Both Applicants are directed to be released on bail on furnishing P.R. Bond in the sum of Rs.15,000/- each with one or two sureties in the like amount;
- (ii) Before their actual release from jail, Applicants shall furnish their address where they proposes to reside after their release from jail to the concerned Police

Station and also to the trial Court;

- (iii) After their release from jail, Applicants shall report to the Investigating Officer as and when called for;
- (iv) Applicants shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicants shall mark presence on the next working day;
- (v) Applicants shall not make any attempts to re-associate with the prosecutrix in any manner either through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing until the trial is concluded. Investigating Officer shall specifically ensure that this condition is followed;
- (vi) Applicants shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if they do so, it will entitle the prosecution to apply for cancellation of this order;

(vii) Applicants shall not leave the State of Maharashtra without prior permission of the Trial Court;

(viii) Applicants shall not influence any of the witnesses or tamper with the evidence in any manner; and

(ix) In case of any infraction of the above conditions and / or two consecutive defaults in marking their attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.PC. i.e. for cancellation of bail.

22. It is clarified that the observations made in this order are limited for the purpose of granting bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

23. This Court appreciates the assistance rendered by Mr. Bhosale, learned Advocate appointed through Legal Aid to represent and espouse the cause of Applicant in BA No.2354 of 2024 and Ms. Kulkarni, learned Advocate appointed through the Legal Aid to espouse the cause of Respondent No. 2 in both Bail Applications. Their fees be paid by the High Court Legal Aid Services Authority as per rules on production of a server copy of this order and other compliance.

24. Both Bail Applications are allowed and disposed.

[MILIND N. JADHAV, J.]

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