

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

CRIMINAL BAIL APPLICATION NO. 3242 OF 2019

Atul Gorakhnath Ambale ..Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Sujay Gangal a/w Mr. Anand Shalgaonkar for the Applicant

Ms. P. P. Shinde, A.P.P for the Respondent–State

CORAM : REVATI MOHITE DERE, J.
FRIDAY, 1st APRIL 2022

ORAL ORDER :

1 This is the second bail application preferred by the applicant.

2 The first bail application was withdrawn as the Court was not inclined to enlarge the applicant on bail. The same is recorded in the order dated 15th October 2019. The said order dated 15th October 2019 reads as under :

“1. After arguing for some time, when the Court was not inclined to enlarge the applicant on bail, learned counsel for the applicant seeks leave to withdraw this application.

2. Accordingly, the application is dismissed as withdrawn. However, having regard to the age of the prosecutrix, i.e. 11 years, the trial of the applicant is expedited.”

3 Learned counsel for the applicant does not press this application for bail on merits. The grievance of the learned counsel for the applicant is that despite the trial having been expedited, having regard to the age of the prosecutrix i.e. 11 years, the evidence of the prosecutrix has not been recorded till date. Learned counsel for the applicant, however, seeks bail on medical grounds i.e. the applicant is HIV positive.

4 As far as interim bail sought on medical ground is concerned, it is not in dispute that the applicant is HIV+ve. However, the medical report tendered as of today, shows that the applicant’s medical condition is stable and that he is being taken care of by the jail authorities. The report of the viral load sample is not yet received.

5 Considering the aforesaid, the application seeking bail on medical ground, is rejected. Needless to state, that the jail authorities shall provide all medical and necessary treatment to the applicant for his medical condition.

6 Needless to also state, that the applicant is at liberty to file a fresh application on medical ground, if the need so arises. If such an application is filed the learned trial Court to consider the same, having regard to the medical condition of the applicant, at the relevant time.

7 The trial Court to conclude the applicant's trial as expeditiously as possible and in any event, within six months from the date of receipt of this order.

8 Whilst hearing the bail application, it was noticed that despite expediting the trial, having regard to the age of the prosecutrix, aged 11 years, the recording of prosecutrix's evidence had not even commenced.

9 In the present case, the mother of the prosecutrix lodged an FIR/complaint on 6th February 2019 which was registered vide C.R. No. 37/2019 with the Mankhurd Police Station alleging offences punishable under Sections 376 (a) (b) and 342 of the Indian Penal Code and Sections 4, 5(M) (N), 8 and 12 of the POCSO Act.

10 According to the complainant (mother of prosecutrix), her daughter, aged 11 years, was sexually assaulted by the applicant. When the applicant preferred the first bail application, as the Court was not inclined to enlarge the applicant on bail, the said application was withdrawn by the learned counsel for the applicant. This Court, whilst dismissing the said application as withdrawn, expedited the trial, having regard to the age of the prosecutrix aged 11 years. Despite expediting the trial and despite the mandate of the POCSO Act, the prosecutrix was not examined till filing of this application. It appears that only when this Court passed an order on 2nd February 2022 observing that the examination of the victims who are minor, should be completed as expeditiously as possible, that the prosecutrix's examination commenced on the very next day i.e. on 3rd February 2022.

11 It would not be out of place to mention that this Court has come across several cases, where the child/victim's evidence is not recorded for years and hence, it would be appropriate to issue some directions to the trial Courts conducting cases under the Protection of Children from Sexual Offences Act ('POCSO').

12 First and foremost, it is pertinent to note that under Section 35(1) of the POCSO Act, the evidence of the child/victim is to be recorded by the Special Court within a period of 30 days of taking cognizance of the offence and reasons for delay, if any, are to be recorded by the special Court. Sub-section (2) mandates that the Special Court shall complete the trial as far as possible within a period of one year from the date of taking cognizance of the case. Having regard to the large number of cases under the POCSO Act and paucity of Judges, it may not be possible to complete the trial as far as possible within one year from the date of taking cognizance of the case and therefore, in cases such as POCSO, where the child/victim is young, it is imperative that the learned Judge should record at least the evidence of the child/victim, as expeditiously as possible, lest

the minor forgets the incident due to passage of time. Younger the child/victim, earlier the recording and strict adherence to sub-section (1) of Section 35 of the POCSO Act.

13 It is pertinent to note, that in cases of sexual assault, the child/victim, suffers not only physical trauma, but even mental and emotional trauma, requiring the child/victim to undergo counselling and at times, even psychiatric help. The endeavour of the counsellor is to help the child/victim tide over the trauma. Delay in examination of the child/victim would only add to the trauma, as the child/victim has to re-live the sexual assault, whilst deposing in Court. This would certainly add to the trauma of a child/victim. If the child/victim is examined expeditiously as mandated by sub-section (1) of Section 35 of the POCSO Act, the child/victim would be in a position to recall the incident vividly, as it happened and nail the perpetrator. Infact, if the child/victim is examined after a couple of years, delay in examination of the child/victim would only stand to benefit the accused, as the child/victim through counselling, is counselled to deal and overcome the emotional trauma and wipe out the traumatic memories, thus, making it difficult for the child/victim to recall the incident vividly, whilst

deposing in Court. Due to passage of time, the child/victim who has undergone the sexual trauma, may not be able to recall the incident vividly, giving an undue advantage to the accused. Delay in trials in cases of sexual abuse of victims, often leads to re-victimization and ignominy, as the trial process itself makes the victim re-live the horrific experience. In case of small children/children of very tender age, due to their vulnerability, it may lead to further trauma. Delay in recording depositions would bring back the memories which the child/victim would want to forget, to haunt the child/victim, thus adding to the trauma. The possibility of the child being won over due to delay, rendering the victim hostile, also cannot be ruled out. It is possible that the appearance of the accused may undergo some change, making it difficult for the child/victim to identify/recognize the perpetrator, thus, benefiting the accused. It is also possible that the child/victim is from a different State and would want to go back to her home town. These are some of the contingencies which are stated hereinabove, there could be many more. It appears that it is with this very solemn object, that the legislature in its wisdom specified the time frame within which the child/victim is to be examined, after the court takes cognizance.

14 It is noticed that in several cases that the child/victim are not examined for years and therefore, it is imperative to give some directions to all Special Courts, with respect to examination of the child/victim in POCSO cases. The trial Courts i.e. Special Courts dealing with POCSO cases to atleast record the evidence of the child/victim, as expeditiously as possible and at the earliest, keeping in mind the mandate of sub-section (1) of Section 35. There may be cases where the child/victim has suffered a psychological trauma, due to which, it may not be possible to record the deposition of the child/victim, in terms of the mandate of sub-section (1) of Section 35 of the POCSO Act, hence, in these circumstances, certainly the recording of the evidence of the said child/victim can be postponed by the learned Judge or for any other reasons, however, reasons must be recorded for the said delay. Younger the child/victim, the Courts to endeavour to record their evidence, keeping in mind the mandate of Section 35(1) of the POCSO Act, lest, the child/victim forgets the incident due to passage of time and through counselling.

15 Accordingly, the following directions are issued to all the Special Courts in Maharashtra:

(i) The Special Courts to ensure that the deposition of the child/victim is recorded as expeditiously as possible, keeping in mind the mandate of the POCSO Act, and the observations made by this Court hereinabove.

(ii) The Special Courts to conclude the recording of evidence i.e. examination-in-chief and cross-examination of the victim, as expeditiously as possible, preferably on the same day, unless adjournment is warranted.

(iii) The Courts to also ensure that the victim/child is not called frequently to the Court, as this would add to victim/child's trauma.

(iv) Adjournments whilst examining the child/victim should be minimal and if granted, reasons be recorded warranting adjournment. Unwarranted adjournments should not be entertained.

(v) When the child/victim is examined, all precautions/safeguards i.e. child friendly practices be taken/adopted to ensure that the child/victim feels safe, is comfortable, and that the child/victim is not in any way exposed to the accused; that the proceedings are conducted in-camera; that all measures as stipulated in the Act and directions given by various judgments are duly complied with. It is always open for the learned Judge in cases, where necessary, to call the child/victim to Court, prior to recording of the deposition, so that, the child/victim is acclimatized/familiarized with the set-up, so that the child/victim has no fear of what to expect in Court on the day of the deposition, which can aid in the child/victim in deposing freely, without fear or anxiety.

(vi) The Court to ensure that the parents of the child or any other person in whom the child has trust or confidence, is present at the time of examination of the child, as mandated under Section 37 of the POCSO Act. If the Court is of the opinion that the child needs to be examined at a place other than the Court, it shall do so in terms of the proviso to Section 37.

(vii) The directions of the Apex Court in ***Children in Street Situations, In Re, 2022 SCC OnLine SC 189*** and other judgments in this regard be followed scrupulously whilst conducting trials under the POCSO Act.

16 Application is disposed of in the aforesaid terms with the aforesaid directions.

17 Registry to forward a copy of this order to all Special Courts (dealing with POCSO cases) in Maharashtra.

18 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.