

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.41 OF 2021
WITH
CRIMINAL APPLICATION NO.396/2021

Mahesh Bhikaji Badave
Age: 48 Yrs., occ.Estate Broker,
R/o 4, Nandanvan Society,
Tarwala Nagar, Dindori Road,
Nashik, Tal. and Dist.Nashik. = APPELLANT

VERSUS

- 1) The State of Maharashtra
Through P.I.,Upnagar,
Police Station, Dist.
Nandurbar, Vide CR 684/2020
- 2) Dipa Shamshon Valvi
Age: 35 Yrs., occu. Social
Service, R/o Shahu Nagar,
Plot No. 24, Nandurbar, = RESPONDENTS

Mr.Anup Nikam, Adv. h/for Mr. RA Tambe, Advocate
for Appellant;
Mr.AA Darandale, Advocate for Intervenor;
Mr.SB Narwade, APP for Respondent-State.
Mr. Sameer Shaikh, Adv. For Resp.No.2.

CORAM : SMT.VIBHA KANKANWADI,J.
DATE : 4th May, 2021.

JUDGMENT

1. Criminal Application No.396/2021 moved to
intervene in the appeal is allowed and disposed of.
2. Present appeal has been filed under
Section 14A of the Scheduled Castes and Scheduled
Tribes (Prevention of Atrocities) Act, (hereinafter

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referred to as the SC and ST Act), by the original accused, challenging rejection of his Bail Application No.2/2021 moved under Section 438 of Cr.P.C., by learned Sessions Judge, Nandurbar on 13.1.2021. The appellant was apprehending his arrest in connection with CR No.684/2020 registered with Nandurbar City police station for the offences punishable under Section 507 of IPC and Sections 3(1)(r)(s), 3(1)(w)(II) of the SC and ST Act.

3. Heard learned Advocates and learned APP appearing for the respective parties.

4. Admit. The learned Advocates and learned APP waive notice for respective parties. By consent, taken up for final disposal.

5. It has been vehemently submitted on behalf of the appellant that the informant is near relative of wife of the appellant. The informant has performed inter-caste marriage. She originally belonged to a member of scheduled tribe. She has stated that since the appellant is brother-in-law of her husband, the appellant had every knowledge about the caste of the informant. She also states that there is domestic discord between the present appellant and his wife and, therefore, the appellant's wife is now residing with the informant. The informant claims that she is doing social work and many social workers from Adiwasi community visit her place. At about 9.00 pm on 27.12.2020, her mother had visited her place. Two

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social workers from the area had also come to her house. The informant, her husband and mother were sitting in the court-yard of her house. Then she says that the appellant gave a phone call on her mobile, she told that he should settle the dispute between him and his wife. But the appellant was making grievances against his wife with the informant. She had cut the phone after giving the advise. But, thereafter, according to her, the present appellant was calling her again and again and abusing. She further says that two social workers, who were with her, advised her to put the phone on speaker mode and listen as to what the appellant is saying. It is stated that the present appellant gave abuses in the name of caste to the informant. She also states that the present appellant had sent messages to his wife and had abused the informant in filthy language referring to her caste and, therefore, she has lodged the FIR.

6. After giving the entire story in the FIR, the learned Advocate appearing for the appellant, submitted that the offences under the provisions of the SC and ST Act, cannot be said to have been made out for a simple reason that the conversation was on mobile phone and he had no idea that she had put the mobile phone on speaker mode. Intentional insult in "public place" is the main ingredient that will be required to be proved, which is absent in the present case, even if we accept that such phone call was given. This aspect was not

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considered by the learned Special Judge. Only the allegations have been considered to arrive at a conclusion that prima facie offence has been made out and thereby connecting it to Section 18A of the SC and ST Act, for rejecting the bail application under Section 438 of Cr.P.C. The main aspect that she had put the mobile phone on speaker mode was not at all in the knowledge of the appellant and it could not have been so, and, therefore, the intention suffers. Further, as regards the persons, who were present at the spot, can be said to be interested persons and not a single independent person was present at that place. Two social workers are from the same community or tribe to which the informant belongs. The others were the family members of the informant. Another aspect, that is required to be considered, is that the informant states that they all were sitting in the court yard, which will have to be considered as "private place" and not "public place". As regards the messages sent by the appellant to his wife are concerned, the case would be squarely covered under the ratio laid down in Criminal WP No.557/2018 (Nivrutti S/o Hariram Gaikwad Vs. The State of Maharashtra and Ors.) decided by the Division Bench of this Court on 11.3.2020, wherein it has been held, -

"10. Thus, the literature published on Website clearly indicates that the WhatsApp messages sent by one person to another are end-to-end encrypted which means, only the sender of the message and the recipient of the message can read the messages. It also claims that nobody in

between, not even WhatsApp, can read these messages. These messages are secured with lock and only the recipient and sender have special key needed to unlock and read them. It further claims that every message sent has its own unique lock and key. It also claims that the WhatsApp does not store the messages on server, once they are delivered. Thus, this literature available on the Website of the WhatsApp, makes it abundantly clearly that such types of messages are strictly personal messages and nobody even the WhatsApp can have access to these messages which means nobody except the sender and the recipient can read the messages. Thus, when these messages cannot be read by others, it ipso-facto goes to show that no third person nor even WhatsApp can have access to those messages. Therefore, WhatsApp cannot be a public place if messages are exchanged on personal accounts of two persons. If these messages had been posted on WhatsApp Group, in that case the same could have been called as public place because all the members of the group, will have access to those messages. It is not the prosecution case that the alleged obscene messages were posted on WhatsApp Group of which the petitioner and the respondent No. 2 and others are the members. Therefore, sending the personal messages on WhatsApp will not amount to utterance of obscene words in public place. Therefore, [Section 294](#) of the I.P.C. cannot be invoked."

. Though it was under Section 294 of IPC, it would be applicable to the provisions under the SC and ST Act also.

7. The learned Advocate further relied on the decision in the case of Sopan Krushan

Wahanmane Vs. The State of Maharashtra and Anr. (Criminal Appeal No.1330/2018), decided by the Principal Bench of this Court on 27th September, 2019, wherein the decision in the case of Balu s/o Bajirao Galande Vs. State of Maharashtra and Anr. - 2006 6 AIR(Bom)(R) 251, was relied, wherein, it is observed, -

"19. Considering the judicial pronouncements on the subject, the expression within public view must be construed to mean that the insult or humiliation must take place in the presence of or in the proximity of at least one independent person. The test of audibility and visibility can be taken to have been satisfied if an independent person is actually present or is at a place where the utterances are clearly audible and reaches the scene of occurrence while the incident is still in progress."

8. He, therefore, submitted that the learned Special Judge went wrong in rejecting the application filed by the present appellant. The nature of the offence per se does not require custody and, therefore, the appellant deserves to be released on bail by setting aside the impugned order.

9. It will not be out of place to mention here that Criminal Application No.396/2021 is filed as intervention application by wife of the present appellant. The learned Advocate appearing for the said intervenor-applicant could not give specific provision under which the application has been

filed. He submitted that only that she should bring the real fact on record, the wife of the present appellant wanted to intervene. In fact, the intervenor-applicant, i.e. wife of the appellant, is supporting the appellant and she has categorically stated that the appellant has not sent any messages on her mobile, imputing the informant.

10. The learned APP as well as learned Advocate for Respondent No.2 Adv. Sameer Shaikh, strongly opposed the application and they submitted that the Special Judge has correctly rejected the application. It has been properly demonstrated as to how the offence can be said to have been committed in "public place" and within "public view". The abuses have been heard by the public when the informant was in her court yard. Further, the appellant has given the abuses in the name of the caste to the informant by writing it and transmitting it through Whatsapp to her to his wife. The present appellant has criminal background. He is involved in CR No.77/2012 registered with Panchwati Nasik city police station for the offences punishable under Sections 143, 147, 148, 149, 452, 336, 323, 504, 506 of IPC and Section 135 of Maharashtra Police Act. Another offence under Section 135 of the Maharashtra Police Act has been registered vide CR No.3142/2011 with Bhadrakali Nasik city police station and similar offence vide CR No.99/2008 with Sarkarwada Nasik police station. The mobile used in the commission

of the offence is required to be seized. The investigation is still pending. Taking into consideration the criminal background of the appellant, possibility of commission of further offence by him cannot be ruled out and, therefore, he does not deserve to be released on bail. His bail application under Section 438 of Cr.P.C. was not maintainable at all in view of the Bar under Section 18A of the SC and ST Act.

11. At the outset, the police papers are provided, which show that substantive investigation appears to have been done. The contents of the FIR and the statements of certain witnesses, especially the husband and mother of the informant as well as two social workers, who were allegedly present in the house of the informant, wherein all of them have stated that they were sitting in the court yard when the present appellant alleged to have given phone call to the informant. If we consider the CDR of mobile No.9822111179, which appears to be mobile number of the present appellant, it is not reflecting the number of the present informant-Respondent No.2, except at one place. No doubt, if we consider the call around 9.00 pm on 27.12,.2020, there is only one call, duration of which is said to be 302 seconds. Therefore, whatever CDR has been collected; it does not, prima facie, support the contents of the FIR, wherein she has stated that she had cut the phone, but then appellant was calling her again and again and abusing. It is then further required to be noted that either in

the FIR or in the statements of the witnesses, they have not stated that they had given idea to the appellant that they were sitting in the court yard and the informant had put her mobile on speaker mode. Under such circumstance, question arises as to whether it was the intention of the appellant to abuse or insult the informant, who is a member of the scheduled tribe in "public place" or within "public view". Prima facie it does not appear to be so. However it is subject to the further collection of evidence. But this point will have to be considered in favour of the appellant for the bail purposes.

12. Further as regards the message that is given to wife of the present appellant by the appellant on Whatsapp is concerned, definitely it is covered in the decision by the Division Bench of this Court in the case of Nivrutti Gaikwad (cited supra), since the messages on Whatsap are end-to-end encrypted, it cannot be said to be a place of "public view". We need not go into the aspect as to whether with the intervention application, when the wife of the appellant is now supporting the appellant, whether she had shown her mobile to the informant or not and then how the screen shot was collected by the Investigating Officer. The panchanama has been drawn on 28.12.2020, which states that screen shot was produced by the informant before the police, which was in fact in the Whatsapp of her sister-in-law, i.e. appellant's wife. The statement of the appellant's wife

appears to have been recorded on 29.12.2020. She has not stated that she had forwarded the said screen shot to the informant. The question then arises as to how the informant could have produced that screen shot before the police.

13. Another aspect that will have to be considered by the Trial Court, as to whether the place, where the offence is alleged to have been committed, is a "public place" or within "public view". No doubt, we are also guided by the decision in the case of Swaran Singh and Ors. Vs. State through Standing Counsel and Anr. - 2008 Cri.L.J. 4369 (SC), wherein it is observed that, -

"... Where it is alleged in the FIR that first informant, was insulted by appellants by calling him a 'Chamar', when he stood near the car which was parked at the gate of the premises. This was certainly a place within public view, since the gate of a house is certainly a place within public view and offence would be covered under Section 3(1)(x) of SC and ST Act. One must not confuse the expression 'place within public view' used under Section 3(1)(x) with the expression 'public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or Gaon-sabha or an instrumentality of the State, and not by private persons or private bodies."

14. The fact that is then ought to have been thoroughly considered by the learned Special Judge,

Nandurbar was whether the appellant had knowledge about putting the mobile phone on speaker mode by the informant. Certainly when no such document is forthcoming, at this stage, at the cost of repetitions, it can be said that prima facie, the offence under the SC and ST Act is not made out.

15. In the case of Prathvi Raj Chauhan Vs. Union Of India -(Writ Petition No.1015/2018 decided on 10 February,2020), following observations have been made, -

“10. ...Concerning the applicability of provisions of section 438 Cr.PC, it shall not apply to the cases under Act of 1989. However, if the complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989, the bar created by section 18 and 18A (i) shall not apply. We have clarified this aspect while deciding the review petitions.

16. In view of the fact that prima facie offence has not been made out against the appellant, there is no question of Bar under Section 18A of the SC and ST Act. The physical custody of the appellant is not required. The alleged criminal background of the appellant cannot be taken into consideration here with the background of the present dispute as the background of domestic dispute between wife of the appellant and appellant himself. Further, those offences appear to be old one and the present status of those cases have not been produced on record. The

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impugned order, therefore, deserves to be quashed and set aside and the appellant deserves to be enlarged on bail subject to conditions. Hence, following order, -

ORDER

i. The Criminal Appeal is hereby allowed;

ii. The judgment and order dated 13th January, 2021 passed by learned Sessions Judge, Nandurbar, District Nandurbar in Criminal Bail Application No.2/2021, is hereby set aside. The said application stands allowed.

iii. In the event of arrest of the appellant in connection with CR No.684/2020 registered with Nandurbar City police station for the offences punishable under Section 507 of IPC and Sections 3(1)(r)(s), 3(1)(w)(II) of the SC and ST Act, he be released on PR and SB of Rs.15,000/- each.

iv. The appellant shall attend the concerned police station on every Monday and Thursday between 10.00 AM to 2.00 PM till filing of charge sheet.

iv. The appellant shall not tamper with evidence of the prosecution in any manner and shall not indulge in any

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criminal activity.

v. It is clarified that the observations made by this Court are restricted for deciding the bail application only and the Trial Court shall not get influenced by the same while considering disposal of the case on merits.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV