

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

CRIMINAL APPEAL NO. 108 OF 2021

XYZ

...Appellant

Versus

1. The State of Maharashtra
At the instance of the PI.
Vadner Khakurdi Police Station,
Nashik.

2. ABC

...Respondents

...

Mr. Aniket Nikam i/b. Mr. Vivek Arote for appellant.

Mrs. S.D. Shinde, APP for State.

Mr. Ganesh Bhujbai, appointed advocate for Respondent No. 2.

...

**CORAM : S. S. SHINDE &
MANISH PITALE, JJ.**

RESERVED ON: 4th MARCH 2020.

PRONOUNCED ON: 8th MARCH 2020.

JUDGMENT [PER S.S. SHINDE, J.]:

. At the outset it is required to be noted that since the allegations against the appellant are in respect of the alleged sexual assault, the identity of the appellant and Respondent No. 2 needs to be concealed, and the appellant is referred to as “XYZ” and Respondent No. 2 as “ABC”. The Registry is directed to maintain the record accordingly.

2. This appeal takes an exception to the order dated 07/03/2020 passed under Special Atrocity Sessions Case No. 19/2019 vide Exhibit-8. Learned counsel appearing for the appellant submits that custodial interrogation of the appellant is no longer required. There is no possibility of the appellant tampering with the evidence or fleeing free from the course of justice. The appellant has sufficiently undergone police custody. There is nothing further left to be interrogated from the appellant. Learned counsel for the appellant submits that the alleged role attributed to the appellant will not attract the provisions of sections 376 (2)(n) of Indian Penal Code and under sections 3(1)(w), 3(2)(v-a) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 and under sections 4,6,8, of POCSO Act. The elements of sections charged against the appellant are not at all attracted to the facts of the present case. Learned counsel for the appellant further submits that the appellant is behind the bars since his arrest. The interrogation of the accused is already over and there is nothing further left to investigation. It is submitted that there is no iota of evidence on the basis of which the elements of the offence with which the appellant is charged are attracted. The FIR is extremely nebulous and fails to spell out the essential elements of the offences with which the appellant is charged.

It is submitted by the learned counsel for the appellant that in case the appellant is released on bail, he will abide by the conditions and

will not tamper with the prosecution evidence and witnesses.

3. It is further submitted that the alleged sexual relations of the appellant with 2nd respondent were consensual and the 2nd respondent was on the verge of attaining majority, therefore, the appellant has not committed any offence. In support of said contention learned counsel appearing for the appellant has placed reliance upon exposition in the case of *S. Varadrajan Vs. State of Madras*¹.

4. On the other hand, learned APP appearing for Respondent-State relying upon the reasons recorded in the impugned order passed by Additional Sessions Judge and charge sheet submits that the informant on the date of alleged incident was minor and therefore she was not competent to give consent. Hence, learned APP submits that the appeal may be dismissed.

5. We have given careful consideration to the submissions of learned counsel for the appellant and learned APP for the State. With their able assistance perused the grounds taken in the appeal memo, annexures thereto and the investigation papers. It appears that the appellant earlier filed applications for bail and 2nd respondent gave consent for allowing the said applications of the appellant for enlarging him on bail. However, the Special Court rejected the said applications on 30.11.2021.

1 (1965) 1 SCR 243

6. Thereafter, the appellant filed 2nd bail application, the said application was also rejected. The investigation officer filed the charge sheet bearing no. 83/2019. Thereafter, the appellant preferred 3rd application before the Additional Sessions Judge, Malegaon. While rejecting the 3rd application of the appellant, the Additional Sessions Judge, Malegaon in paragraph 6 of the order observed thus:-

“06] Perused the documents on record, it appears from the statement of victim that the applicant/accused has kept physical relations with her under the pretext of marriage and when she was pregnant then he discard his relations with the informant. Informant is minor. Her consent was obtained by fraud. At present informant is residing in Reformatory House. Previous bail petition was rejected on the same ground. In this context, learned advocate Shri. M.D. Hiray argued that in bail petition, at Para 6 they have specifically mentioned that the age of accused is 19 years, therefore, there is legal difficulty to perform the marriage. Accused is ready and willing to perform the marriage after attaining the age of 21 years. However, in my opinion assurance by accused to perform the marriage with victim can not be the ground to grant the bail to him. Hence, I pass the following order.”

7. The submission of learned counsel for the appellant that the appellant had consensual sex with the 2nd respondent cannot be accepted.

Admittedly, on the date of alleged incident the Respondent No. 2 was minor and she was not competent to give her consent. The reliance placed by the learned counsel for the appellant in the case of *S. Varadrajan* (supra) is misplaced in the facts of the present case, since in the facts of the present case sections 4,6 and 8 of the The Protection of Children from Sexual Offences Act, 2012 and sections 3(1)(w), 3(2)(v-a) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 are invoked. There is no change in circumstances to consider the bail application of the appellant. In case, the appellant is released on bail, there is every possibility of tampering with the prosecution evidence and witnesses. In that view of the matter, we are not inclined to entertain the appeal. Hence, the appeal stands dismissed.

8. The observations made herein above are prima facie in nature and confined to the adjudication of the present appeal only and the Trial Court shall not get influenced by the said observations during the course of trial.

9. We direct the concerned Trial Court to frame charge, if already not framed, and commence the trial immediately and complete the same as expeditiously as possible, however, within six months from today.

10. We appreciate the able assistance rendered by Advocate Mr. Ganesh Bhujbal, appointed for representing the Respondent No 2. We quantify his fess at Rs. 7500/- to be paid by High Court Legal Services Committee, Mumbai, within four weeks from the receipt of copy of this order.

(MANISH PITALE, J.)

(S. S. SHINDE, J.)