

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

917 BAIL APPLICATION NO.172 OF 2022

**SUSHIL @ DNYANESHWAR BHAGWAT SHINDE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

Shri. S. J. Salunke, Advocate for the applicant
Shri. V. S. Badakh, APP for the respondent/State
Shri. V. M. Lomte, Advocate for the informant.

**CORAM : M. G. SEWLIKAR, J.
DATED : 7th APRIL, 2022**

PER COURT :-

1. This is an application under Section 439 of the Code of Criminal Procedure for releasing the applicant on bail in connection with Crime No. 0221 of 2021 for the offence punishable under Sections 376, 354-D read with Section 34 of the Indian Penal Code and under Sections 4, 6, 8 and 17 of POCSO Act registered with Sonpeth Police Station, District Parbhani.

2. Prosecution case in short is that the informant is the maternal uncle of the victim. Victim was aged 16 years. On 14th September, 2021 at 1.00 p.m., victim started vomiting. Mother of the victim asked her about the cause of vomiting, victim

answered that she had consumed poison. Victim was immediately taken to the Government Hospital, Ambajogai, from there, she was referred to Latur for treatment. Till 17th September, 2021 victim did not disclose the cause for consumption of poison. On 18th September, 2021 at 11.00 a.m., she called her brother and disclosed the real incident. She stated that on 12th September, 2021 between 1.00 p.m. and 5.00 p.m. child in conflict with law had called the victim at a dilapidated school at village Dighol. Applicant, Child in Conflict with Law and another Child in Conflict with Law committed rape on her and therefore she consumed poison. Police had come for recording dying declaration but Medical Officers working on her gave the opinion that she was not fit to give dying declaration.

3. On these allegations FIR came to be lodged against the applicant and another accused.

4. Heard Shri. Salunke, learned counsel for the applicant, learned APP Shri. Badakh for the respondent/State and Shri. Lomte, learned counsel for the informant.

5. Learned counsel Shri. Salunke submits that applicant

has no concern with the alleged offence. Victim was in love with Child in Conflict with Law referred to as 'X' for identification. There are screenshots of WhatsApp messages between victim and 'X'. These chats show that both of them were in love with each other. He submits that parents of the victim wanted her to marry her off in Rajasthan for which victim was not prepared. He submits that allegedly dying declaration of the victim has been recorded on a mobile. He submits that consistently Medical Officer treating victim had given opinion that she was not fit to give dying declaration. He submits that in these circumstances recording of dying declaration becomes doubtful. He further submits that medical evidence also does not support the prosecution.

6. Learned APP Shri. Badakh and Shri. Lomte, learned counsel submit that dying declaration was recorded by the brother of the victim on his mobile. Transcript of the said video clip is produced on record which shows that victim was ravished by the applicant and two Child in Conflict with Law. They submitted that this dying declaration clearly implicates the applicant. There is no reason to doubt the authenticity of this

dying declaration. They submit that she herself had called her brother and gave dying declaration about the real incident. They submitted that offence is serious in nature and therefore, application deserves rejection.

7. I have given thoughtful consideration to the submissions of all the learned counsel. WhatsApp messages between 'X' and the victim have been filed along with charge-sheet. They are between 28th January, 2021 and 14th September, 2021. The message dated 30th July, 2021 shows that 'X' and victim were in love with each other and they had expressed their love through these messages.

8. Prosecution case is that on 12th September, 2021, victim was gang raped by the applicant and two Child in Conflict with Law. However, on 14th September, 2021 'X' and victim exchanged messages with each other. On 14th September, 2021 victim communicated 'X' that her parents were planning to marry her off in Rajasthan. If the incident had taken place on 12th September, 2021, in normal course, she would not have texted the messages on 14th September, 2021 to 'X'. This

conduct of the victim goes against the allegations of gang rape.

9. The victim allegedly gave dying declaration on 18th September, 2021. This dying declaration was recorded on the mobile of the brother of the victim. Transcript of the dying declaration recorded on mobile is produced on record. It shows that victim had stated that all the three accused committed rape on her. On 18th September, 2021 itself Medical Officer had given opinion that victim was not in a fit state of mind to give dying declaration. The statement of brother of the victim shows that victim was wearing a oxygen mask. They removed the mask and recorded her dying declaration. Papers annexed with the charge-sheet further show that victim was put on ventilator. Moreover, from 14th September, 2021 to 17th September, 2021 victim was in general ward. She was shifted to Intensive Care Unit (ICU) on 18th September, 2021. She did not give any dying declaration from 14th September, 2021 to 18th September, 2021. All these circumstances cast doubt on the truthfulness of the dying declaration. The allegations are that victim was ravished by all the three applicants. However, medical evidence does not support the prosecution in this respect. Medical evidence shows

that there was old healed tear of hymen. She did not have any other injury when she was allegedly gang raped in a dilapidated school. Having regard to this, I am inclined to release the applicant on bail. Applicant has no criminal antecedents. He is not likely to flee from justice as he has agricultural land at vilalge Digol, Tal. Sonpeth. Hence the order.

ORDER

1. Application is allowed.
2. Applicant be released on bail on his furnishing PR bond of Rs. 50,000/- (Rupees Fifty Thousand only) with one solvent surety in the like amount in connection with CR No. 0221 of 2021 under Sections 376, 354-D read with Section 34 of the Indian Penal Code and under Sections 4, 6, 8 and 17 of POCSO Act registered with Sonpeth Police Station, District Parbhani, on condition that he will stay away out of the village Dighol, Tq. Sonpeth, District Parbhani till the conclusion of the trial.
3. Application is disposed of.
4. It is clarified that the observations made in the above order are restricted to the decision of this application only and the trial Court shall not get influenced by the same and can come to its independent conclusion during trial.

[M. G. SEWLIKAR, J.]

ssp