

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

CRIMINAL APPEAL NO. 320 OF 2022

Ganesh S/o. Sandipan Gonde
Age. 20 years, Occ. Business,
R/o. Chinchoti, Tq. Wadwani,
Dist. Beed.

....Appellant

Versus

1. The State of Maharashtra

2. Victim X

....Respondents

Advocate for Appellant : Ms. S.A. Kothari h/f. Mr. S.G. Ladda
APP for Respondent No. 1 : Mr. S.D. Ghayal
Advocate for Respondent No. 2 : Mr. J.K. Bansod

**CORAM : SMT. VIBHA KANKANWADI &
RAJESH S. PATIL, JJ.**

DATED : 21 SEPTEMBER, 2022

ORAL JUDGMENT [PER : SMT. VIBHA KANKANWADI, J.] :

1. **Admit.**

2. Present appeal has been filed under Section 14-A of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "the Atrocities Act") to challenge the dismissal of the bail application filed under Section 439 of Code of Criminal Procedure (For short, "Cr.p.c.") by the present appellant, passed by the learned Special Judge/Additional

Sessions Judge, Majalgaon, District Beed, on 01.04.2022, whereby, application at Exh. 04 came to be rejected.

3. Heard learned Advocate Ms. Kothari holding for learned Advocate Mr. Laddha for appellant, learned APP for respondent No. 1 – State and learned Advocate Mr. Bansod for the respondent No. 2.

4. Learned Advocate Ms. Kothari holding for learned Advocate Mr. Laddha, vehemently submitted that the informant who is the paternal aunt of the victim was not even present in the village when the alleged incident has taken place. She states that she came to know about the incident from her daughter who was pregnant and was in the house of the informant for the purpose of delivery. It can further be seen from the statement of the victim who is stated to be aged 11 or 13 years that she had not disclosed the alleged incident for about two days to her cousin sister. The cousin sister says that when she found that the victim is not properly taking meals, on 01.11.2021, she asked her as to what is the reason and then the incident was told by the victim to her. The incident is stated to have taken place on 30.10.2021 as well as 31.10.2021. As regards the incident dated 30.10.2021 is concerned, it is then stated that the victim had gone for purchasing of pen to the shop of one Pintu Gonde and near the said shop, the appellant was standing. He forcibly taken her inside the shop and by closing the shutter of the shop, it is stated that she was sexually assaulted. It was also then stated

that by showing the knife he told that she should come on the next day. She also then stated that she went to the shop on the next day and at that time, the appellant had tried to remove her clothes but since somebody came, the accused/appellant asked her to go. If we consider her statement under Section 161 of Cr.p.c. with the medical evidence, then it can be seen that the history was narrated by her to the Medical Officer and as per that history it is stated to be the aggravated penetrative sexual assault. However, it appears that the hymen was intact and there was no injury on her body. The final opinion has not been given by the Medical Officer. The appellant is taking the defence of *alibi* as well as false implication and for that purpose, the photographs from the CCTV of the petrol pump where he filled the petrol have been produced. The investigation is over and charge-sheet is filed, therefore, further custody of appellant is not required. The appellant is ready to abide by the terms of the bail.

5. Per contra, the learned APP as well as learned Advocate appointed through Legal Aid to represent the informant have objected for grant of bail, by way of appeal, to the appellant. It has been submitted by them that delay in lodging the FIR would be subject for the trial Court to assess as to whether there is sufficient reason to condone, in a way that if the sufficient reason can be given by the prosecution at the time of trial then the said point does not carry the importance. Further in cases of sexual assault delay is always not an

important factor because fear to approach the police station is the major cause. Here in this case, in fact the parents of the victim had gone for sugarcane cutting at a different place and only the married cousin sister and cousin brother were with the victim. It is also stated by the victim that the appellant had put her under fear by showing knife and taking into consideration her age as 11 years, she might not have disclosed immediately the incident that had taken place with her. In her statement under Section 161 of Cr.p.c. she has disclosed all the acts those have been done by the appellant with her. Further the appellant and the victim are from the same village and, therefore, the appellant had every knowledge that the victim is a member of scheduled caste in spite of that such heinous act has been committed by him. The history was told by the victim to the Medical Officer and that history can also be considered, may be in absence of the final opinion, at this stage, as the piece of evidence showing the aggravated penetrative sexual assault. The CA report is awaited and, therefore, the Medical Officer might not have given the final opinion. The appellant has also been medically examined. The plea of *alibi* and false implication will have to be proved by the appellant at the time of trial and, therefore, it is not a fit case where the appellant should be released on bail. The victim is from a poor family, she is also handicapped and, therefore, possibility of tampering with the evidence cannot be ruled out.

6. At the out set, it is to be noted that in this appeal the

order that has been challenged is the rejection of the bail application under Section 439 of Cr.p.c. and, therefore, we are required to consider the appeal within the scope i.e. available under Section 14 – A of the Atrocities Act. Here the appellant is arrayed for committing offence punishable under Sections 376, 376 (AB), 376 (2), 376 (2) (I), 376 (2) (J), 376 (2) (L), 342, 354 B, 506 of IPC, Sections 4, 5 (K), 6, 8, 12 of POCSO Act and Sections 3 (1) (w) (i), 3 (1) (w) (ii), 3 (2) (v) of the Atrocities Act. Though, there appears to be some minor discrepancies as regards the exact age of the victim but it is to be noted that by any stretch of imagination it can not be more than 18 years and, therefore, *prima facie*, the victim appears to be “child” as defined under POCSO, Act. The second point that is required to be considered is as to whether there is evidence that has been collected against the appellant so that he should not be released on bail. When bail is rule and jail is exception, then whether those circumstances have been pointed out by the prosecution disentitling the appellant from being released on bail.

7. The investigation is complete and charge-sheet has been filed and, therefore, *prima facie*, it can be said that further custody of the appellant is not required for the purpose of investigation. We will have to then see what evidence has been collected.

8. The informant is the parental aunt of the victim and it can be seen from the FIR that she was not even present in the

village when the alleged incident has taken place. There are statements of other relatives of the victim including her parents and uncle but admittedly, they were not in the village on that day. The victim was with her married cousin sister who had come for delivery and cousin brother. Therefore, the statement of these three persons i.e. victim, cousin sister and cousin brother are required to be considered. As regards the cousin sister and brother are concerned, they have stated what the victim had informed them. According to the informant, she had gone to purchase pen in the shop of one Pintu Gonde on 30.10.2021. At that time, the appellant was standing near the shop. Here the statement is not clear enough and rather gives an impression that Pintu Gonde and Ganesh Gonde are two different persons. The Investigating Officer has not recorded the statement of Pintu Gonde nor any document produced which would suggest that Pintu is the nick name of the appellant. What is the relationship between these two persons, has also not been stated in the entire charge-sheet. The victim then says that by taking her forcibly inside the shop and closing the shutter of the shop, she was ravished and then she says that thereafter, that means after the act was done, the appellant had shown knife to her and by giving threat that she should not disclose the incident to anybody, otherwise she would be killed, he had asked her to come on the next day to the shop. She then states that she went to the shop on the next day. She has not stated that due to the threat that was given by the appellant she has not disclosed the incident to her cousin sister. Prosecution will have to then also

explain whether the said threat was of such a nature that without informing the cousin sister the victim would have gone to the shop on the next day again. The charge-sheet that has been supplied to the appellant, does not contain the statement of the victim under Section 164 of Cr.p.c, it is stated that it was given in a sealed packet. We presume that such statement has been recorded and it would be in the same line as under Section 161 of Cr.p.c.

9. The other documents on record specially the medical examination and the report that has been given by the Medical Officer would show that the victim herself had given the history and from that history it was the aggravated penetrative assault. However, the medical report shows that the hymen was intact, other organs were intact and internal organs were intact. It is to be noted that the final opinion has not been given by the Casualty Medical Officer nor the report says that since the samples have been sent for chemical analysis, the final opinion is reserved. There is only communication in the form of letter by Investigating Officer to the Medical Officer. But then how till today that final opinion has not been given and the CA reports are not submitted is a question.

10. As regards the defence, the appellant intends to take i.e. false implication and the plea of *alibi*, he will have to prove it at the time of trial and the photographs those have been produced cannot be considered at this stage. These are the

photographs which can be considered as an electronic evidence and, therefore, how they would be proved by the accused is his look out.

11. When the investigation is over and the charge-sheet is filed, then with this kind of evidence the appellant need not to be detained in jail till the conclusion of trial. No doubt, the appellant and victim are from the same village and the possibility that the victim was member of scheduled castes was within the knowledge of the appellant is not ruled out; yet, taking into consideration the evidence that has been collected, the appellant needs to be released on bail. Learned Special Judge, Majalgaon, Beed, ought to have considered the entire charge-sheet in proper perspective and by simply saying that there is evidence, the application ought not to have been rejected. The said application deserves to be allowed, however, by imposing stringent conditions.

12. For the aforesaid reasons, the following order is passed :

ORDER

- i. Appeal stands allowed.
- ii. The order below Exh. 04 in Special Case No. 74/2021 passed by the learned Special Judge, Majalgaon, District Beed, on 01.04.2022 is hereby set aside.

iii. The said application Exh. 4 in Special Case No. 74/2021 under Section 439 of Cr.p.c. filed by the appellant stands allowed.

iv. The appellant be released on P.R. bond of Rs. 50,000/- (Rupees fifty thousand) with two sureties of Rs. 25,000/- (Rupees twenty five thousand) each.

v. The appellant shall not reside in village Chinchoti, Taluka Wadwani, District Beed, till the conclusion of the trial.

vi. He should not visit the said village during the pendency of the trial.

vii. He should inform his place of residence which he intends to stay till the end of the trial along with his mobile number to the Special Court under POCSO Act, where Special Case No. 74/2021 is pending, so also to the Investigation Officer and the Police Station Officer of Wadwani Police Station, District Beed, at the time or before he tenders the bail papers.

viii. He shall not tamper with the evidence of the prosecution in any manner.

ix. He should comply with the requirements under paragraph Nos. 12 (1) to (6) of Chapter – I of the

Criminal Manual, whichever are applicable, before he released on bail.

[RAJESH S. PATIL, J.]

[SMT. VIBHA KANKANWADI, J.]

SPChauhan