

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO. 91 OF 2021

X.Y.Z. .. Applicant

Versus

1. The State of Maharashtra
Through Police Station
Ambejogai City, Taluka Ambejogai,
District Beed
2. Shyam S/o. Digambar Warkad,
Age 42 years, Occu. Service,
R/o. Ekatmata Colony,
Ambejogai, Tq. Ambejogai,
District Beed .. Respondents

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Mr. J. M. Murkute, Advocate for Applicant
Ms. Vaishali Patil Jadhav, A.P.P. for Respondent no. 1 - State
Mr. S. P. Salgar, Advocate holding for Mr. N. V. Gaware, Advocate
for Respondent no. 2

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of Reserving the Order :
04-03-2022**

**Date of Pronouncement the Order :
09-06-2022**

ORDER :-

Present application has been filed under Section 439(2) of the Code of Criminal Procedure, 1973 (in short, "Cr.P.C.") by the original informant challenging the order passed below Exhibit-70

in Special POCSO Case No. 11 of 2020 by the learned Additional Sessions Judge, Ambejogai / Special Judge under the POCSO Act, on 08.04.2021, whereby respondent no. 2 came to be released on bail under Section 439 of the Cr.P.C.

2. Heard Mr. J. M. Murkute, learned Advocate for the applicant, Ms. Vaishali Patil, learned A.P.P. for respondent no. 1 – State, Mr. S. P. Salgar, learned Advocate holding for Mr. N. V. Gaware, Advocate for respondent no. 2.

3. It has been vehemently submitted on behalf of the applicant that the victim is a minor and accused-respondent no. 2 was her Teacher. The act done by the Teacher on the student will have to be categorized as one of the heinous act as respondent no. 2 had raped the victim. The learned Special Judge on earlier occasion had rejected the bail application under Section 439 of the Cr.P.C. filed by respondent no. 2, which was a well reasoned order. Respondent no. 2, thereafter, came to this Court by filing Bail Application No. 415 of 2020. There were observations on merits except a line that there appears to be some inconsistency between medical evidence. However, when the evidence was before the learned Special Judge and the matter is yet not decided, the same Court ought not to have expressed any opinion on the merits of the case while deciding the Bail Application Exhibit-70. Though,

this Court had given liberty to respondent no. 2 to revive the Bail Application after the evidence of the victim as well as medical evidence, that should not have been taken by the concerned Judge as permitting the Court to grant the bail application. The manner in which the offence has been committed was narrated by the victim in her testimony. The true copies of depositions have been made available and the learned Advocate for the applicant has taken this Court through the same. He has also taken this Court through the deposition of PW-2 Dr. Vaishali Subhash Ganjewar, who is the Medical Officer. The Medical Officer has categorically stated that though on the first occasion the medical examination could not be carried out due to physical reason of the victim, but thereafter when the medical examination was conducted, she found the evidence of rape. There was no inconsistency at all in the ocular as well as medical evidence. The prosecution had also examined PW-3 Dr. Shalini Balasaheb Karad, who was the private medical practitioner. She had examined the victim on 23.12.2019. But, she refers that when she was informed that the victim was examined earlier her hymen was not ruptured and the father of the victim obtained opinion of this witness. For deciding the bail application, merits of the case cannot be considered, and therefore, the order passed by the learned Special Judge is illegal, which deserves to be set-aside.

4. Mr. Salgar, learned Advocate holding for Mr. Gaware, learned Advocate for respondent no.2 supported the reasons given by the learned Special Judge, while granting bail to respondent no.2 and also relied on affidavit-in-reply filed by respondent no.2. It was then stated that respondent no. 2 is abiding by the terms of the bail.

5. At the outset, it is to be noted that, First Information Report has been filed on 18.12.2019 and it is stated that the victim who was in athletics used to practice for sports, she has taken part in various tournaments, she had gone for such tournament on 17.10.2019. After she had returned, she was not speaking properly and used to be in her own world. However, she used to say that there was stomach ache, she was taken to Doctor. But, Doctor told that because of change in atmosphere, she might be feeling so. Thereafter, on 16.12.2019, it was noticed by the Teacher of her School and informed to the father of the victim that the victim was not paying attention in studies. She was feeling frightened and then by taking the victim in confidence, the parents revealed that girl was ravished by respondent no. 2 on 17.10.2019.

6. Earlier Bail Application No. 11 of 2020 under Section 439 of the Cr.P.C. was rejected by the learned Special Judge on

13.03.2020 and then respondent no. 2 came to this Court by filing Bail Application No. 415 of 2020. It was found that, the charge was framed in the case, though it was pointed out that there is inconsistency between the medical evidence, it was specifically observed that it is not proper to make any comments in that regard, that means, this Court had not tried to give any importance to that discrepancy that was pointed out in the evidence, may be in ocular evidence or medical evidence or with two medical opinions. However, a direction was given to the trial Court to examine the victim first and then the medical officers within a period of five months and then the applicant was granted liberty to revive the Bail Application thereafter. It appears that after the victim as well as both the medical officers were examined, respondent no. 2 filed application for bail at Exhibit-70. Taking into consideration the evidence then recorded, the learned Special Judge has allowed the bail Application by imposing conditions. It has been taken note of that, there is inconsistency in medical evidence, but the learned Special Judge again said the same fact that, what would be the effect of inconsistency is a question to be decided at the time of merit and at this stage when the matter is part-heard, the Court found that it is not proper to enter into that arena. It can be seen that, this approach is correct only *prima facie* inconsistency is considered, but its effect on the

merits of the case are not at all spelt out. If that *prima facie* inconsistency was seen, that was sufficient to resort the liberty of respondent no.2. The applicant cannot ask that respondent no. 2 should remain in jail till conclusion of the trial. With this kind of inconsistency that the liberty was granted by this Court, it was utilized by respondent no.2. Another aspect that has been considered by the trial Court is that, already testimony of victim is over, and therefore, there is no question of tampering any evidence. Therefore, all the precautions have been taken and the bail has been granted. This cannot be taken as a fit case where the exceptional powers under Section 439(2) of the Cr.P.C. should be exercised. Application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

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