

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

CRIMINAL APPEAL NO. 487 OF 2022

1. Firoz s/o Haidar Shaikh,
Age : 20 years, Occu. Education,
2. Juned Bahuddin Shaikh,
Age : 19 years, Occu. Education,
3. Sanket s/o Rajendra Dhumal,
Age : 19 yers, Occu. Education
[Appeal infructuous as against appellant no. 3 as per
order dated 02.08.2022]
4. Vishal s/o Mohan Kangude,
Age : 30 years, Occu. Agri.,

All R/o. Mungusgaon, Tq. Shrigonda,
Dist. Ahmednagar.

.... **Appellants**
[Orig. Accused]

Versus

1. The State of Maharashtra,
Through Police Station Officer,
Belvandi Police Station,
Tq. Shrigonda, Dist. Ahmednagar.

2. XYZ

....**Respondents**

....
Mr. Rahul R. Karpe, Advocate for the appellants
Mr. B. V. Virdhe, APP for respondent no.1/State
Mr. Amol S. Gandhi, Advocate for respondent no. 2
....

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

DATE : AUGUST 24, 2022

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

1. Heard learned counsel Mr. Rahul R. Karpe for the appellants, learned APP Mr. B. V. Virdhe for the State and learned advocate Mr. Amol S. Gandhi for respondent no. 2 / victim.

2. Admit.

3. It has been vehemently submitted on behalf of the appellants that the appeal has become infructuous as against appellant no. 3 in view of the fact that he was arrested and order to that effect has been passed on 02.08.2022. The appeal now pertains to the reliefs claimed by the appellants no. 1, 2 and 4. They are apprehending their arrest in connection with C.R. No. 0185/2022 registered on 19.05.2022 with Belvandi Police Station, Dist. Ahmednagar, for the offences punishable under Sections 376 of the Indian Penal Code, 3(1)(a), 3(2)(va) and 3(1)(w) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as 'the Atrocities

Act’], which has been filed on the basis of FIR lodged by the present respondent no. 2. The allegations in respect of Section 376 of the Indian Penal Code are against accused no. 1 – Vaibhav Eknath Jathar, who is not before this Court and if the FIR is considered then initially it was against him alone. The co-accused i.e. present appellants were not arrayed as accused at that time though it appears that their names were mentioned in the FIR. If we consider the role attributed to them in the FIR, then it is stated that the appellant no. 1 – Firoz Shaikh and one Sohail Shaikh had come around 11:00 pm on 27.04.2022 near the road which passes between Pimpalgaon to Erandoli near temple of goddess and according to the informant, said accused no. 1 had kept the appellant no. 1 and said Sohail Shaikh to keep watch on respondent no. 2. She then states that accused no. 1 went to see Orchestra and returned after sometime. Around 01:30 a.m. on 28.04.2022, the accused no. 1 by taking her away in an open space in the jungle, had sexually assaulted her. Thereafter she again came on the public road in the village Erandoli near the motorcycle of accused no. 1 and she found that present appellant nos. 1, 2 and 4 along with three other persons including the appellant no. 3 herein were chitchatting. No overt act at that time has been alleged against the appellant nos. 1, 2 and 4. Learned advocate for the appellant has further submitted that as per the FIR, the mother of the informant was member of Scheduled Castes, however, she got married to a person from Marwadi

community. However, her father is no more. Under such circumstances, it cannot be said that the informant is a member of Scheduled Castes. The offence under the Atrocities Act are not attracted in this case. The learned Special Judge has not considered all these facts and summarily rejected the application filed for anticipatory bail. Such order deserves to be set aside, the appeal deserves to be allowed and the appellants deserve to be released on bail.

4. Learned APP has strongly opposed the appeal and submitted that the informant in her supplementary statement has stated that after she was taken by the accused no. 1, his friends six in number were called by him at the said place. They all had forced her to drink beer, groped her and thrown her on the person of accused no. 1 and insulted her. Thereafter, accused no. 1 had taken her in jungle and raped. This indicates that specific role has been played by the appellants and thereby they had helped accused no. 1 in commission of the crime. The mother of the prosecutrix by birth is member of Scheduled Caste and her school leaving certificate has been collected by the Investigating Officer. Her statement under Section 164 of the Code of Criminal Procedure was recorded twice but she has given explanation as to why the second statement was required to be given by her. Under such circumstances, when there is evidence against the present appellants and the fact that the informant is considering herself to

be a member of Scheduled Caste then the application filed by the appellants under Section 438 of the Code of Criminal Procedure was not maintainable in view of the bar under Section 18 of the Atrocities Act.

5. Learned advocate for respondent no. 2 while agreeing to the points raised by learned APP further submitted that in Writ Petition No. 3254 of 2021 [**Kasturi Sushma Khandekar Vs. State of Maharashtra and Ors.**] decided by the Division Bench of this Court at Nagpur on 22nd March, 2022, the State was directed to issue the validity certificate on the point that when the child has been brought up by the mother who belongs to Scheduled Caste then that should be the point that is required to be considered. It was then further submitted that due to the pressure from the villagers, some different statement was given by the informant in her first statement under Section 164 of the Code of Criminal Procedure, however, she has given explanation for the same and her detailed statement has been later on recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure. Over all evidence is then required to be considered and when the appellants had the knowledge about the caste of the informant, they acted in such manner to aid their friend to commit offence against the informant, the application filed under Section 438 of the Code of Criminal Procedure was not maintainable. The learned Special Judge was justified in rejecting the said application.

6. At the outset, it is to be noted that the appellants are raising a point or question about the caste of the informant. In her FIR, she has given her caste stating that she is member of Scheduled Caste. According to her, her mother was the member of Scheduled Caste, however, she got married to a person from Marwadi community. Later on, he expired but she states that she was brought up in the house of her grand parents. Whether to apply the decision in the case of **Kasturi Khandekar** (supra), would be decided by the trial Court, however, at this stage, it will have to be stated that that decision was arrived at after considering the entire evidence that was collected by the Scrutiny Committee. The enquiry through Vigilance Enquiry Officer was also made and definitely there was an opportunity to the petitioner therein to produce the evidence to stake the claim before the Scrutiny Committee. Taking into consideration the evidence that was adduced before the Scrutiny Committee when the Scrutiny Committee had come to the conclusion that the petitioner cannot be considered as belonging to the Scheduled Caste, it was held by the Division Bench that certain pieces of evidence have not been considered by the Scrutiny Committee especially the report submitted by Vigilance Enquiry Officer.

7. Here, only on the basis of a statement in the FIR, at this stage, that conclusion cannot be derived. Therefore, when the fact

itself is in question as to whether the informant can be said to be a member of Scheduled Caste, then the Special Court cannot be said to be justified in rejecting the application *in limine*. Learned Special Judge was not justified then in holding that there is a bar under Section 18 of the Atrocities Act. It is to be noted from the impugned order that the learned Special Judge had taken a note of the fact that the investigation is at a initial stage and, therefore, he was unable to conclude whether the provisions of the Atrocities Act are applicable or not. Then in that case the pendulum ought to have been in favour of the accused and not the prosecution.

8. Now turning towards the role attributed to the appellant nos. 1, 2 and 4. The first and foremost fact is that though the names were appearing in the FIR and certain role was attributed in a sense that the appellant no. 1 was kept for surveillance and the presence of appellant nos. 2 and 4 is stated to be there between 1:45 am to 02:30 am, yet they were not made as an accused. We will have to take into consideration the chronology then. The investigation was taken up as against the accused no. 1 only and statement of the informant came to be recorded by the learned Judicial Magistrate First Class under Section 164 of the Code of Criminal Procedure on 26.05.2022. In the said statement, she has stated that there was love affair between her and accused no. 1, however, there was rumour in her village against her and because of that she was under tension and then she had lodged the

complaint about rape against him but she has no complaint to make but want to take back the case. Thereafter, it appears that her supplementary statement was recorded on 01.06.2022. What was the occasion for the Investigating Officer to record the supplementary statement of the informant is not clarified on behalf of the prosecution. In her supplementary statement, she has then improved as compared to her FIR and then she has stated that all the six persons apart from accused no. 1 were called by accused no. 1 and all of them had forced her to consume beer, she was groped and then was thrown on the person of accused no. 1 and thereafter he had taken her in jungle and raped her by saying that he would perform marriage with her. She does not say as to who was present on the road when she came out of the jungle. Then in the chronology, it appears that, on 07.06.2022, her second statement under Section 161 of the Code of Criminal Procedure has been recorded which includes her said statements in the supplementary statement and further she improves that accused Firoz Shaikh used to quarrel with her, accused Sohail Shaikh used to say that he would bring Mangalsutra and he would arrange for the marriage between informant and Vaibhav (accused no. 1). Appellant no. 2 used to provide water bottles as well as liquor bottles at the place. Appellant no. 3 used to insult her, appellant no. 4 used to say that he loves her and he should get her. He used to threat her that she should meet him and there is no love affair between her and accused no. 1. Thus, we are noting

only the improvements those have been made by the prosecutrix in her statements. We are also taking note of the fact that the girl had gone along with accused no. 1 at night time. In fact, according to FIR, they had started around 07:30 p.m. and then she says that she came back home around 04:00 am.

9. From the entire story as aforesaid, it can be said that ingredients of Section 376 of the Indian Penal Code are not attracted against the present appellants.

10. As regards the Atrocities Act are concerned, at present, the Section that is invoked is 3(1)(a) of the Atrocities Act, which run thus :

“3(1)(a). puts any inedible or obnoxious substance into the mouth of a member of a Scheduled Caste or a Scheduled Tribe or forces such member to drink or eat such inedible or obnoxious substance;”

10. If we consider the contents of the FIR, what was stated to have been forced to be consumed by the prosecutrix is Beer. It cannot be said to be inedible or obnoxious. Therefore, it is doubtful as to whether the ingredients of Section 3(1)(a) of the Atrocities Act are attracted.

11. The second offence which is attracted is Section 3(2)(va), which runs thus :

“3(2)(va) Commits any offence specified in the Schedule,

against a person or property, knowing that such person is a member of a Scheduled Caste or Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine;]

12. The basic ingredient that is required to be proved by the prosecution to prove this offence is, the person committing the offence should know that the person against whom the offence is committed is a member of the Scheduled Caste or Scheduled Tribe. In the FIR, it is not stated as to how the present appellants were knowing the caste of the informant / prosecutrix. In fact, she has not stated since when the appellants were knowing her. Merely because they are the friends of accused no. 1, it cannot be presumed that they would have had knowledge about the caste of the informant.

13. The third Section that has been invoked is 3(1)(w) of the Atrocities Act. In fact, the said Section is consisting of (i) (ii). It is not then explained in the FIR as to whether which of the said sub-clause is attracted. Learned APP says that taking into consideration the facts stated, it would be under Section 3(1)(w)(i) of the Atrocities Act. Even if we consider both the sections, which runs thus; knowledge of the accused that the woman against whom the offence is committed is a member of Scheduled Caste or Scheduled Tribes is necessary and as aforesaid, that itself is

questioned.

3(1)(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

3(1)(w)(ii) uses words, acts or gestures of a sexual nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe.

Explanation.- For the purposes of sub-clause (i), the expression "consent" means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;

14. From the above said discussion, it can be said that the learned Special Judge could not have dismissed the application abruptly and without going into the evidence that has been collected.

15. For the aforesaid reasons, the appeal deserves to be allowed, however, stringent conditions are required to be imposed. The impugned order passed by the learned Special Judge deserves to be set aside. Hence, following order.

ORDER

[i] The appeal stands allowed in respect of appellant no. 1 - Firoz Haidar Shaikh, appellant no. 2 - Juned Bahuddin Shaikh and appellant no. 4 - Vishal s/o Mohan Kangude.

[ii] The appeal stands disposed of as infructuous as against appellant no. 3 - Sanket Rajendra Dhumal.

[iii] The order passed by the learned Special Judge/Additional Sessions Judge, Shrigonda, District Ahmednagar in Criminal M. A. No. 408/2022 on 28.06.2022, stands set aside.

[iv] The said application stands allowed.

[v] In the event of arrest of the appellant no. 1 - Firoz Haidar Shaikh, appellant no. 2 - Juned Bahuddin Shaikh and appellant no. 4 - Vishal Mohan Kangude in connection with C.R. No. 0185/2022 registered with Belvandi Police Station, Ahmednagar on 19.05.2022, for the offences punishable under

Sections 376 of the Indian Penal Code, 3(1)(a), 3(2)(va) and 3(1) (w) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, they be released on P.R. bond of Rs. 30,000/- (Rupees Thirty Thousand) each, with one or two solvent sureties of Rs. 15,000/- each. The appellants shall not commit any offence. They shall not reside at Mungusgaon, Tq. Shrigonda, Dist. Ahmednagar, till the conclusion of the trial. They should inform the place of their residence along with their mobile numbers to the Investigating Officer as well as learned Special Judge, Shrigonda and remain present before the Investigating Officer on every Monday and Thursday between 10:00 am to 02:00 p.m. till filing of the charge-sheet.

[v] The appellants shall not try to contact any of the witnesses including the prosecutrix in any manner.

. Needless to say such attempt may give rise to the respondent no. 2 her right to take appropriate steps for cancellation of bail.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE