

S.S.Kilaje

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL INTERIM APPLICATION NO. 494 OF 2019
IN
CRIMINAL APPEAL NO. 1413 OF 2018

Swapnali Shashir Bansode

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. Makrand M. Kale i/by Mr. Sukumar R. Ghanavat for the Applicant
 - Ms. P. P. Shinde, APP for the State
 - Mr. Rajaram V. Bansode for Respondent No.2
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**CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

DATE : APRIL 19, 2022

P.C.:

1. This is an Interim Application in Criminal Appeal No. 1413 of 2018. In Criminal Appeal No. 1413 of 2018, the Appellant has challenged the order dated 03.11.2018 passed by the learned Special Judge / Additional Sessions Judge, Vaduj in Criminal Bail Application No. 259 of 2018 thereby rejecting the application under Section 439 of the Code of Criminal Procedure (Cr.P.C.) filed by the Appellant in Crime No. 152 of 2018 registered with Mhaswad Police Station. The Appellant therein was charged with the offence punishable under Section 376, 452, 323, 504, 507 of the Indian Penal Code as well as under Section 3(2) of the Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Act, 1989 and under Section 7 of the Protection of Child Rights Act, 1955.

2. The Division Bench of this Court (Coram : Indrajit Mahanty & A.M. Badar, JJ.) had heard the matter finally on 24.04.2019 with the consent of the parties. The Court had perused the records and proceedings as well as the photographs of the prosecutrix alongwith the Appellant / accused. The Court had also perused whatsapp chats between both of them. It was urged before the Division Bench that there was consensual sexual relationship between the complainant and the accused. The complainant happened to be a married woman and a mother of two children. The Court had observed that despite service the complainant did not cause her appearance before the Court. In paragraph 10 of the order, the Court had observed as under:-

“10. Papers of investigation *prima facie* reveals that the prosecutrix was a consenting party to the incident which had taken place with her for a period of more than one year. She had not protested against the alleged act of the appellant / accused during this period though she was staying in joint family, though she was familiar to the appellant accused, who was not having any criminal antecedents. Considering this nature of evidence against the appellant / accused, his pre-trial detention is not warranted and therefore, the Order:-

- (i) The Appeal is allowed.
- (ii) The impugned Order dated 03.11.2018 passed by the learned Special Judge / Additional Sessions Judge, Vaduj in Criminal Application No. 259 of 2018 is quashed and set aside.
- (iii) Bail Application No. 259 of 2018 for grant of bail filed by the appellant / accused is allowed.
- (iv) He be released on bail on his executing P.R. Bond of Rs. 15,000/- and on furnishing surety in the like amount.

- (v) As a condition of this Order, the appellant / accused should not contact the prosecutrix and other prosecution witnesses in any manner during pendency of the trial.
- (vi) He should not extend any threat, promise, inducement to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any other police officer;
- (vii) The Appeal is accordingly disposed of.”

3. The present Application is filed by the Applicant i.e. the original complainant seeking the relief of cancellation of bail granted in favour of Respondent No. 2 vide order dated 24.04.2019. The Application is mainly filed for breach of conditions imposed upon Respondent No. 2 vide clauses (v) and (vi) of the order dated 24.04.2019.

4. It is the contention of the Applicant that Respondent No. 2 had not only breached all the conditions but had harassed the complainant and had also sent messages on whatsapp that he was waiting for her near her house. The Applicant was harassed and therefore her life had become miserable. She had approached the police station and lodged a report in respect of the incident on the basis of which Crime No. 93 of 2019 is registered against the Respondent with Mhaswad Police Station, Satara for the offences punishable under Section 354-D and 509 of Indian Penal Code (IPC) as well as Section 3(1)(2), (w), (i) and (YA) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocity) Act, and Section 7(1)(d) of the Protection of Civil Right Act,

1955. Respondent No. 2 had filed an application seeking bail in Crime No. 93 of 2019. The same was rejected by the Sessions Court. Respondent No. 2 had challenged the said order by filing Criminal Appeal No. 1072 of 2019. By an order dated 02.12.2019, this Court (Coram : Nitin W. Sambre, J.) had observed that the Appellant / Accused i.e. Respondent No. 2 herein had jumped condition of bail, thereby indulging into present offence. The Court had disposed of the Appeal as not pressed with liberty to the Appellant i.e. Respondent No. 2 herein to move afresh, in case Division Bench with whom the Application for cancellation of bail is pending, rejects the same. The Application for cancellation of bail moved by the complainant was also informed to be pending before the Division Bench for consideration. Hence this matter was circulated.

5. On the last occasion, we had directed the learned counsel for the complainant / Applicant to place on record the whatsapp messages which were sent by Respondent No.2 to the complainant after 24.04.2019. It appears that Respondent No. 2 had sent the messages to the complainant from 05.05.2019 to 09.05.2019. We have perused the whatsapp chat messages. Prima facie we are of the opinion that the Respondent No.2 happens to be an obsessed lover. That he was in relationship with the complainant for more than a year. After that, he was in a custody for more than 8 months before he was released on

bail. The messages clearly indicate that the complainant had also showered love upon Respondent No.2. The messages are in no way indicative of the fact that there is a breach of condition Nos. (v) and (vi) imposed on Respondent No.2 while granting the bail vide order dated 24.04.2019. We are surprised as to why the contact number of Respondent No. 2 was not blocked by the complainant on 5th May, 2019 in case she had not approved of the messages received from Respondent No. 2. She continued to receive the messages for more than five days. Mr. Bansode, learned counsel appearing for Respondent No. 2 submitted that these messages were stored only for seeking cancellation of bail. Another ground of challenge is that the Respondent No.2 had criminal antecedents, and this was not brought to the notice of the Court on 24.04.2019 and therefore the court had granted bail to the Respondent No.2.

6. We have perused the FIRs which are annexed to the application by the complainant. It is contended that the complainant had received a copy of these FIRs under the Right to Information Act and that she was unaware of the said criminal antecedents while she was in a relationship. The learned counsel for Respondent No.2 has placed on record a copies of the judgments dated 18.05.2018, 04.05.2018 and 31.08.2018 which indicate that the Respondent No.2 was acquitted of the said cases even prior to filing of the Application / Appeal for bail.

The said judgment is of the year 2018. All the offences were triable by the J.M.F.C. and Respondent No.2 was acquitted of all the charges leveled against him in the past and therefore in our opinion it was not necessary to place the said FIR's on record.

7. That apart, though the present application was filed on 04.10.2019, it was not circulated. As on today also, it is the Respondent No.2 who has circulated the said Appeal in view of the order dated 02.12.2019 passed by Justice Nitin W. Sambre. Mr. Bansode submitted that, the Respondent No.2 had circulated the matter before this Court, however the same could not be heard since the Advocate for the complainant remained absent. Further there is no explanation in the Application for the delay of 5 months in filing of the present Application.

8. We have seen that on 13.03.2020, the Appeal was adjourned at the request of the learned counsel appearing for the complainant / Applicant. On 16.03.2020, the Division Bench of this Court had observed that none appeared for the Applicant. On 29.03.2022, this Court had once again observed that none appeared for the Applicant and directed issuance of notice to the Applicant through Mhaswad Police Station. This Court had also passed an order that in the eventuality of the Applicant in Criminal Interim Application No. 494 of

2019 does not appear on 07.04.2022, the application will be heard on merits. On 07.04.2022 for the first time the complainant was represented by an Advocate. Today, the learned counsel for the informant has placed on record the whatsapp chats running into 56 pages of messages sent by the Respondent No.2 from 05.05.2019 to 09.05.2019 unilaterally. None of the messages sent relate to any threat, coercion or inducement to the Applicant. Moreover the Applicant has persisted receiving the messages over a period of 6 days from the Respondent No.2 without demur and only after 5 months in October 2019, has filed the present application. We have also observed the conduct of the Applicant in keeping the present application pending despite the order dated 02.12.2019 of the learned single judge. We have also noted that the present application has been filed on the ground of the incidents that took place between 05.05.2019 and 10.05.2019 which are enumerated in paragraph Nos.5 and 6 of the application. The Applicant has asserted that the messages which are reproduced in paragraph Nos.5 and 6 were sent by the Respondent No.2 to the Applicant stating that the Respondent No.2 was deeply in love with the Applicant despite spending 8 months in jail and calling upon the Applicant to come and meet him as he had come near her residence. Both these messages which are reproduced in paragraph Nos.5 and 6 of the application, in fact, do not figure or find place in the whatsapp chat messages which are produced by the Applicant in the

Court today. Therefore the very basis of the application itself is based on conjunctures and surmises of the Applicant.

9. The prayer clause in the present Interim Application reads as follows :

- “(a) This Hon’ble High Court be pleased to call for records and proceedings pertaining to the Judgment and Order dated 24.04.2019 passed by this Hon’ble High Court in Criminal Appeal No.1413 of 2018 and after examining its legality, validity and correctness of the same, this Hon’ble Court be pleased to cancel the bail granted to the Accused by this Hon’ble Court’s order dated 24.04.2019 and further directed that Respondent No. 2 – Accused be re-arrested forthwith.
- (b) Any other appropriate reliefs in the facts and circumstances of the present case be granted in favour of the Applicant.
- (c) And for this act of kindness, the Applicant has in duty bound shall every prays.”

10. On reading of the aforesaid prayer clauses, we are afraid to state as to how we can examine the legality, finality and correctness of the order dated 24.04.2019 passed by the seniormost co-ordinate Division Bench of this Court. There is complete non- application of mind while filing the present Application by the Applicant. The learned counsel for the Applicant has apologized for the same.

11. In view of the above, we do not see any merit in the application and the application deserves to be dismissed.

12. We allow the learned counsel for Respondent No.2 to circulate the Appeal before the learned Single Bench. Learned counsel appearing for Respondent No.2 has submitted that Respondent No.2 is in custody since 10.05.2019 i.e. since the registration of Crime No. 93 of 2019 and hence this matter be heard at the earliest.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV, J.]

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KILAJE

Digitally signed
by SONALI
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2022.04.22
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