

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.119 OF 2023

Rijwan s/o Karim Shaikh
Age: 52 years, Occ.: Business,
R/o. House No.406, Kanjar Lane,
Sadar Bazar, Bhingar, Ahmednagar,
Tal. And Dist. Ahmednagar
At Present in Jail.

.. Appellant

Versus

1. The State of Maharashtra
Through the Superintendent of Police,
Ahmednagar.
2. The In-charge Investigation Officer,
Kotwali Police Station,
Tal. And Dist. Ahmednagar.
3. XYZ

.. Respondents

...
WITH

CRIMINAL APPEAL NO.974 OF 2022

Almas w/o Rijwan Shaikh
Age: 44 years, Occ.: Household,
R/o. House No.406, Kanjar Lane,
Sadar Bazar, Bhingar, Ahmednagar,
Tal. And Dist. Ahmednagar

.. Appellant

Versus

1. The State of Maharashtra
Through the Superintendent of Police,
Ahmednagar.
2. The In-charge Investigation Officer,
Kotwali Police Station,
Tal. And Dist. Ahmednagar
3. XYZ

.. Respondents

...

WITH
CRIMINAL APPEAL NO.946 OF 2022

1. Pappu @ Irfan Karim Shaikh
Age: 48 years, Occu.: Business,
R/o. House No.406, Pension Lice,
Bhingar, Ahmednagar, Dist. Ahmednagar,
2. Altaf Irfan Shaikh
Age: 20 years, Occu.: Education,
R/o. House No.406, Pension Lice,
Bhingar, Ahmednagar,
Dist. Ahmednagar

.. Appellants

Versus

1. The State of Maharashtra
Through Sub Divisional Police
Station Officer, Nagar Rural
Division, Ahmednagar,
Dist. Ahmednagar
2. XYZ

.. Respondents

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Mr. S. R. Andhale, Advocate for appellants in Criminal Appeal Nos.119 of 2023 and 974 of 2022.
Mr. Shaikh Mazhar A. Jahagirdar, Advocate for appellants in Criminal Appeal No.946 of 2022.
Mrs. V. S. Choudhari, APP for respondent – State and Investigation officer in all the cases.
Mrs. Rani R. Tandale, Advocate for respondent No.3 in all the cases.

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 11th April, 2023.

JUDGMENT :-

. Admit.

2. All the three appeals have been filed under Section 14-A(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act"). All the appellants are accused in Crime No.950 of 2022 registered with Kotwali Police Station, Dist. Ahmednagar for the offences punishable under Sections 498-A, 323, 504, 376(2)(n), 377, 417, 328, 313, 506 read with Section 34 of Indian Penal Code, under Section 3(1)(r), 3(10)(s), 3(2)(va) 3(1)(w)(i), 3(1)(w)(ii) of the Atrocities Act. The said offence came to be registered on the basis of first information report lodged by present respondent No.2 in all the appeals. The appellant in Criminal Appeal No.119 of 2023 had filed bail application under Section 439 of the Code of Criminal Procedure before the learned Special Judge, under the Atrocities Act/Additional Sessions Judge, Court No.3, Ahmednagar bearing Bail Petition No.1974 of 2022. It came to be rejected on 06.12.2022. The appellant in Criminal Appeal No.974 of 2022 had filed bail application under Section 438 of the Code of Criminal Procedure by filing Bail Petition No.1967 of 2022. It came to be rejected by the same Court on 06.12.2022, whereas the appellant in Criminal Appeal No.946 of 2022 had filed bail application under Section 438 of the Code of Criminal Procedure before the same Court vide Bail Petition No.1961 of 2022 and the same Court has rejected the bail application on the same date i.e.

06.12.2022. Hence, all these appeals.

3. Heard learned Advocate Mr. S. R. Andhale for the appellants in Criminal Appeal No.119 of 2023 and Criminal Appeal No.974 of 2022, learned Advocate Mr. Mazhar A. Jahagirdar for appellants in Criminal Appeal No.946 of 2022, learned APP Mrs. V. S. Choudhari for respondent – State and Investigating Officer in all the appeals. Notice was issued to the respondent – original informant. She was served, however, failed to cause appearance and, therefore, learned Advocate Mrs. Rani R. Tandale was appointed as *amicus curiae* in all the matters to represent the original informant – prosecutrix. She has also been heard.

4. It has been vehemently submitted on behalf of the appellants that initially the informant had lodged the FIR on 25.11.2022 for the offence punishable under Sections 498-A, 323, 504 of Indian Penal Code only and it was only against original accused No.1 Rijwan, who is appellant in Criminal Appeal No.119 of 2023, however, on the next day i.e. 26.11.2022, her supplementary statement has been recorded. On the basis of the same, the other Sections came to be added. Therefore, as on today, it will have to be considered as to whether the supplementary statement, which has drastically changed the story, can be treated as FIR as contemplated under Section 154 of the Code

of Criminal Procedure. Even if the things are taken as it is, now the investigation is over and charge-sheet is filed before the learned Special Judge, under the Atrocities Act, Ahmednagar on 24.01.2023. The appellants in Criminal Appeal Nos.946 of 2022 and 974 of 2022 have been released on interim bail by this Court and they have not misused the liberty granted to them. In her supplementary statement also, no specific case is made out against the other two appellants i.e. Almas and Pappu @ Irfan. They being the relatives of husband of the informant have been implicated. Those two appellants were never staying together with the informant and Rijwan. In her supplementary statement, the informant had stated that she is member of Scheduled Caste. She had developed acquaintance with Rizwan in 2018. She says that they started talking with each other and thereafter, after some days they developed love. They used to meet each other. Even on one day Rijwan had asked her about her caste and then at that time she had told her caste to him. He told that though she is a member of Scheduled Caste, he loves her and he is ready to marry her. She gave consent for the marriage, but then he had said that she should stay at her house and he would meet her frequently. She should take permission from her family members for the marriage. She has then stated that between 2018 to 2019, said accused Rijwan used to call her at various places and used to have

sexual intercourse with her. She was insisting upon marriage, but he used to force her to keep the physical relations. After there was love affair between them, after about 3 months, she came to know on the basis of his Aadhar card that he is Muslim by religion and had told his name as Ravi. According to her, he had misrepresented her to develop love relations. She got annoyed with him and told that she would lodge a report against him in police. At that time, he disclosed that he is married and has two daughters, still he loves her and want to marry her. It is also stated by her that in the year 2019, she had become pregnant from him and on his say that he wants to settle the marriage of his elder daughter and, therefore, she should get her aborted. She was taken to hospital and her abortion was done. Even she has stated that thereafter she had told him that she would lodge report against him, as he was avoiding to perform marriage. Then he put a condition that if she convert her to Muslim religion then only he would perform marriage with her. She got agreed and performed marriage as per Muslim rites with accused Rijwan on 15.07.2022. It is then stated that after the marriage, she started residing with Rijwan at a separate place, however, Rijwan's wife Almas i.e. appellant in Criminal Appeal No.974 of 2022 used to come there and abuse her in the name of caste and used to say that she should give divorce to Rijwan. She had made allegations about unnatural

intercourse against accused Rijwan also. Then ultimately on 26.07.2022 Rijwan told that he is going to reside with his wife and daughters and then when informant tried to contact him, his phone was switched off. Two to three days thereafter informant had visited his house at that time accused Almas and Pappu Shaikh had abused her in the name of caste. They had given threats to kill. She could not find Rijwan and, therefore, lodged a missing report with Kotwali Police Station on 08.08.2022. She says that accused Rijwan had forcible sexual intercourse with her on 12.10.2022 and also abused her in the name of caste.

5. On the basis of this supplementary statement, when the further Sections have been added; both the learned Advocates for the appellants submit that offence under the Atrocities Act cannot be made out, as the informant herself had stated that she got converted to the different religion. The documents on record would show that it was her voluntary decision. When after the conversion has taken place and she had become the wife of accused Rijwan, the physical relations will not attract Section 376(2)(n) of Indian Penal code. Now, with the *mala fide* intention she is making allegations about unnatural sexual intercourse so that accused Rijwan should not get bail. There was no question of administration of any poisonous substance and forcible abortion. Therefore, the learned Trial Judge

ought to have allowed the applications. The reasons given are not satisfactory.

6. Per contra, the learned APP as well as learned Advocate, who appointed to represent the cause of the informant have submitted that though initially the offence was only under Sections 498-A, 323, 504 of Indian Penal Code, yet the supplementary statement given by the informant on the next day would make it clear as to how accused Rijwan has defrauded the informant. Further, though she has converted the religion she has not given up her caste and, therefore, the learned Special Judge has rightly observed that the caste is attached to the person by birth and will not go merely by conversion. All those details have been given which amounts to the addition of the offence. Everything has been done by accused Rijwan knowing very well that she is the member of Scheduled Caste. The accused persons are still giving threats to the informant and they are the influential persons. Possibility of tampering with the evidence then cannot be ruled out. There is sufficient evidence against the accused persons which would disentitle them from claiming bail.

7. We would like to deal with the allegations against accused Almas and Pappu @ Irfan Shaikh. Accused Almas is the wife of accused Rijwan and Pappu @ Irfan is the brother of accused Rijwan.

As aforesaid, the initial report was only against accused Rijwan and, therefore, the offence was registered only under Sections 498-A, 323, 504 of Indian Penal Code against him. But then on the basis of said supplementary statement of which major contents have been reproduced earlier, we will have to consider where the role of accused Almas and Pappu Shaikh has been described. As per the said FIR, accused Almas came in picture after marriage between Rijwan and informant on 15.07.2022. She says that after they both started residing together at a different place, accused Almas used to go there in the house and used to abuse her by saying that she is not Muslim, but of the inferior caste and, therefore, she should give divorce to her husband. Here, the alleged abuse is stated to be inside the house and, therefore, it cannot be considered as a public place and not even within the public view to attract Section 3(1)(r) and 3(1)(s) of the Atrocities Act. It is not stated in the supplementary statement as to who had heard those abuses. If the informant and the said accused Almas were the only person present in the house, then it will not even attract Section 3(2)(va) of the Atrocities Act. Thereafter it is stated that the informant had gone to the house of Rijwan two to three days after 26.07.2022. Rijwan's house is situated in Kanjar Lane, Sadar Bazar, Bhingar, Tq. and Dist. Ahmednagar. In the said house, she was beaten by accused Almas and abused in the name of

caste. It is then stated that at the same time accused Pappu Shaikh, who was present in front of the house of Rijwan as well as accused Altaf, who is nephew, abused her in the name of caste. She has not stated exact where the incident has taken place, but since she was inside the house when accused Almas has abused her in the name of caste, there is a scope to consider that the alleged abuses by the other two accused i.e. Pappu @ Irfan and his son Altaf were also inside the house. At the cost of repetition it can be said that these statements taken as it is will not attract Sections 3(1)(r) and 3(1)(s) much less Section 3(2)(va) of the Atrocities Act. Police have also invoked Section 3(1)(w)(i), 3(1)(w)(ii) of the Atrocities Act, but they cannot be against accused Almas and Pappu @ Irfan. Nobody else has seen them assaulting the informant. The scrutiny of all these contentions was required in order to see as to whether offence under the Atrocities Act has been made out or not. In view of the decision in ***Prathvi Raj Chauhan Vs. Union of India and others, [(2020) 4 SCC 727]***, if *prima facie* case is not made out against the accused invoking the Atrocities Act, then such accused can be released on bail under Section 438 of the Code of Criminal Procedure, as there will not be bar under Section 18 or 18-A of the Atrocities Act. We, therefore, come to conclusion at this stage on the basis of the material which is before us that no such *prima facie* case has been made out to attract

the offence under the Atrocities Act against accused Almas and Pappu Shaikh. Their application before the learned Special Judge under Section 438 of the Code of Criminal Procedure was not barred under Section 18 or 18-A of the Atrocities Act. All these aspects have not been considered by the learned Trial Judge.

8. As regards the offence against accused Rijwan is concerned, it is to be noted that he appears to be aged 52 and the informant is aged 28. The other documents on record would show that they have performed marriage i.e. Nikah on 15.07.2022 and there are affidavits by informant that she is getting converted to Muslim religion voluntarily, as she had decided to perform marriage with Rijwan. In her affidavit, it is also stated that the said decision was conveyed by her to her parents and the parents have also agreed to the same. If this is the fact and the said affidavit was sworn before the Notary public and then acted upon in the form of performance of Nikah, then whether she would be justified in saying that it is forcible act by Rijwan on her. Definitely, there is arguable point as to whether informant can still be said to be a member of Scheduled Caste after conversion. Now, when the investigation is over and charge-sheet is filed, the physical custody of accused Rijwan is also not required and with the evidence that is collected, he need not be asked to languish in jail for years together. His application under Section 439 of the

Code of Criminal Procedure should have also been allowed.

9. Before parting, we would like to say that when it was brought to the notice of this Court that charge-sheet is filed, directions were given by order dated 21.03.2023 that any of the appellant may file the copy of the charge-sheet. Accordingly, accused Rijwan has filed copy of the charge-sheet on record on 05.04.2023 (as per the farad sheet it was filed before its due date i.e. today). The appellants were aware about the fact that Section 376 of Indian Penal Code has been added. Under such circumstance, it was necessary to keep the identity of the informant under mask. Though she has been made as respondent her name is masked, but when it come to the documents i.e. Nikahnama, affidavits and documents under the charge-sheet i.e. photographs, which disclosed that they were of the prosecutrix informant. In view of the decision of this Court in ***Sajjan s/o Hirchand Gusinge Vs. The State of Maharashtra and another***, [Criminal Appeal No.869 of 2022 decided on 08.02.2023], this Court has observed that the photographs along with the charge-sheet should also be presented by the investigating officer in sealed envelope and even when it comes to production of any such document, utmost care should be taken that the identity of the victim is not disclosed in view of Section 228 of the Indian Penal Code. Those directions have not been followed and, therefore, we propose to impose cost.

10. As aforesaid all the three applications ought to have been allowed by the learned Special Judge. Since the discretion has not been properly used, interference is required and, therefore, the appeals deserve to be allowed. Hence, the following order :-

ORDER

- i) Criminal Appeal Nos.119 of 2023, 974 of 2022 and 946 of 2022 stand allowed.
- ii) The orders passed below Exhibit-1 in Bail Petition Nos.1974 of 2022, 1967 of 2022 and 1961 of 2022 dated 06.12.2022 by learned Special Judge, under the Atrocities Act/ Additional Sessions Judge, Court No.3, Ahmednagar, stand set aside. The said applications stand allowed.
- iii) The Appellant in Criminal Appeal No.119 of 2023 i.e. **Rijwan s/o Karim Shaikh**, who has been arrested in connection with Crime No.950 of 2022 registered with Kotwali Police Station, Dist. Ahmednagar for the offences punishable under Sections 498-A, 323, 504, 376(2)(n), 377, 417, 328, 313, 506 read with Section 34 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(2)(va), 3(1)(w)(i), 3(1)(w)(ii) of the Atrocities Act, be released on P. R. Bond of Rs.50,000/- with two solvent

sureties of Rs.25,000/- each.

iv) The interim relief granted earlier to the appellants in Criminal Appeal Nos.946 of 2022 and 974 of 2022 vide orders dated 16.12.2022 and 13.12.2022 respectively stand confirmed and made absolute. In other words, in the event of arrest of appellant in Criminal Appeal No.974 of 2022 viz., **Almas Rijwan Shaikh** and appellants in Criminal Appeal No.946 of 2022 viz., **(i) Pappu @ Irfan Karim Shaikh and (ii) Altaf Irfan Shaikh** in connection with Crime No.950 of 2022 registered with Kotwali Police Station, Dist. Ahmednagar for the offences punishable under Sections 498-A, 323, 504, 376(2)(n), 377, 417, 328, 313, 506 read with Section 34 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(2)(va), 3(1)(w)(i), 3(1)(w)(ii) of the Atrocities Act, they be released on P.R. Bond of Rs.15,000/- each with one surety in the like amount, if not already released.

v) The appellants in all the appeals shall not enter the jurisdiction of Mahatma Phule Vasahat, Katwankhandoba, Tq. and Dist. Ahmednagar till the conclusion of trial.

vi) The appellants in all the appeals shall not tamper with the evidence of the prosecution in any manner.

- vii) They shall not indulge in any criminal activity.
- viii) Bail before the Trial Court.
- ix) We make it clear that breach of any condition imposed to the bail would give right to the prosecution as well as the informant to file application under Section 439(2) of the Code of Criminal Procedure,.
- x) Appellant – Rijwan s/o Karim Shaikh to deposit cost of Rs.1,000/- with the High Court Legal Services Sub Committee, Aurangabad within a period of two weeks.
- xi) Fees of learned Advocate, who is appointed to represent the cause of respondent No.3 in all the appeals, is quantified at Rs.10,000/- to be paid by High Court Legal Services Sub Committee, Aurangabad.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm