

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

CRIMINAL APPEAL NO.513 OF 2023

Kishor Shivdas Shinde,
Age-22 years, Occu:Nil,
R/o-Sarangkheda, Taluka-Shahada,
District-Nandurbar.

...APPELLANT

VERSUS

1) The State of Maharashtra,
Through it's Police Inspector,
Sarangkheda Police Station,
Taluka-Shahada, District-Nandurbar,

2) X. Y. Z.

...RESPONDENTS

...
Mr. N.L. Choudhari Advocate for Appellant.
Mr. A.M. Phule, A.P.P. for Respondent No.1 - State.
Ms. Manjushri V. Narwade Advocate for Respondent No.2.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 21st JULY, 2023

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

1. Admit.

2. Present Appeal has been filed by the original accused under Section 14-A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (for short "the Atrocities Act") to challenge the order dated 15th March 2023 by the learned Special Judge under the Atrocities Act / the Additional Sessions Judge, Shahada, District-Nandurbar thereby rejecting the bail application under Section 439 of the Code of Criminal Procedure, at Exhibit-27 in Sessions Case No.52 of 2020.

3. Heard Mr. Choudhari, learned Advocate appearing for the appellant, Mr. Phule, learned APP appearing for respondent No.1 and Ms. Manjushri Narwade, learned Advocate appearing for respondent No.2.

4. It has been vehemently submitted on behalf of the appellant that the appellant came to be arrested on 24th October 2020 and since then he is in jail. The charge-sheet is filed, therefore, his custody is not required for the purpose of investigation. Present respondent No.2 filed the First Information Report (for short "the FIR") contending that his daughter, who was aged 15 years, taking education in 10th standard in 2020, went missing in the intervening night of 22nd October, 2020 and 23rd October 2020. Search was undertaken but she could not be

found. Around 6.00 a.m. on 23rd October 2020, her *Odhani* was found in front of house which was stained with blood, but her whereabouts could not be found. Even police along with villagers took intensive search and then the dead body of the girl was found in the field of one Sharad Babulal Patil and it appears that at the time of FIR, suspicion was expressed against the present appellant, as he had expressed love for the girl and the girl was not ready to go with him.

5. Learned Advocate for the appellant further submitted that perusal of the charge-sheet would show that the case of the prosecution is resting on extra judicial confession alleged to have been given to one Vijay Padvi, that too on phone. However, at this stage the call details have not been collected and attached. Such statement of the said person has been recorded on 26th October 2020 i.e. three days after the incident. With such evidence the appellant need not be kept behind bars. The appellant is ready to abide by the terms of the bail. The learned Special Judge absolutely not considered all the facts while dealing with application Exhibit-27.

6. Per contra the learned APP as well as learned Advocate appearing for respondent No.2 strongly opposed the Appeal and

submitted that the learned Special Judge has used the discretion properly in rejecting the bail application. Perusal of the postmortem report would show that there were six surface wounds on the dead body. There was also fracture of C7 vertebrae on Palpation. The probable cause of death is "Shock due to cut throat injury (unnatural). Associated findings – Genital injury." The throat of the girl was cut with sharp weapon and the said weapon has been discovered by the present appellant. The girl was residing adjacent to the house of the accused and therefore, he had knowledge about the caste of the girl. The girl is member of the scheduled tribe and therefore, offence under Section 3(2)(v) of the Atrocities Act is involved in this case. The family members are saying that the girl was not ready to flee with the accused as she was minor, though the accused used to say that he loves her. Witness Vijay Padvi appears to be friend of the appellant and he says that around 9.00 p.m. on 22nd October 2020 while accused and he himself were chitchatting, accused expressed that he loves the girl and he is therefore asking her to come along with him but she is not ready, if the girl does not accompany him that night, then he would kill her. Then the friend had advised the accused that he should not do such act. But then in the next morning around

8.00 a.m. to 9.00 a.m. said friend received phone call from accused saying that he is repenting for killing the girl. At present this is the evidence against the accused, which is sufficient to prove offence against him and therefore, this is not a fit case to use the discretion.

7. Before we consider the facts of the case and see as to whether the trial Court has used the discretion appropriately or not, we would like to say that the learned Special Judge has written a very cryptic order, that too, without following the mandatory provisions. It is in fact high time to tell all the Special Judges under the Atrocities Act, as to what they should consider while dealing with the bail applications. This has been told again and again but still we do not find any improvement in the same. In ***Criminal Appeal No.919 of 2022*** (Amol s/o Babasaheb Sonawane @ Sonu Fitter vs. the State of Maharashtra and another) and the companion matters, decided by this Court on 20th February 2023, this Court has made following observations in Paragraph Nos.12 to 15 of the order:-

“ 12. Further, before going to consider the merits another situation has arisen which is of wide importance, as this Court is coming across various such orders by Special Judges under the Atrocities Act that they are not following /

observing the mandatory requirement under Section 15-A of the Atrocities Act. Section 15-A of the Atrocities Act gives statutory right to the victim to get the knowledge about the proceedings before the Court including bail application.

13. In ***Hariram Bhambhi vs. Satyanarayan and another*** (supra), it has been observed that victims are often relegated to the role of being a spectator in the criminal justice system. The victims of crime often face hurdles in accessing justice from the stage of filing the complaint to the conclusion of the trial and therefore, those rights of the victims have been acknowledged by the Hon'ble Supreme Court as well as those are incorporated under Section 15-A of the Atrocities Act. In connection with the said provision, in the aforesaid decision, it has been held in Paragraph Nos. 13, 14, 15 and 18 as under:-

" 13. Section 15A of the SC/ST Act contains important provisions that safeguard the rights of the victims of caste-based atrocities and witnesses. Sub-sections (3) and (5) of Section 15A specifically make the victim or their dependent an active stakeholder in the criminal proceedings. These provisions enable a member of the marginalized caste to effectively pursue a case and counteract the effects of defective investigations. Sub-sections (1) to (5) of Section 15A are extracted below:

"15A(1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victims age or gender or educational disadvantage or poverty.

(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(4) A victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court, as the case may be, to summon parties for production of any documents or material, witnesses or examine the persons present.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing."

(emphasis added)

14. Sub-section (3) of Section 15A confers a statutory right on the victim or their dependents to reasonable, accurate, and timely notice of any court proceeding including a bail proceeding. In addition, sub-section (3) requires a Special Public Prosecutor or the State Government to inform the victim about any proceeding under the Act. Sub-section (3) confers a right to a prior notice, this being evident from the use of the expression "reasonable, accurate, and timely notice of any court proceeding including any bail proceeding". Sub-section (5) provides for a right to be heard to the victim or to a dependent. The expression "dependent" is defined in Section 2(bb) thus:

"2(bb) "dependent" means the spouse, children, parents, brother and sister of the victim, who are dependent wholly or mainly on such victim for his support and maintenance;"

15. The provisions of sub-section (3) which stipulate the requirement of notice and of sub-section (5) which confers a right to be heard must be construed

harmoniously. The requirement of issuing a notice facilitates the right to be heard.”

“ 18. The finding of the Gujarat High Court that the requirement of issuing notice of a court proceeding to a victim or a dependent under Section 15A(3), in order to provide them an opportunity of being heard, is mandatory, finds echo in multiple High Court decisions 13 including a decision of the Rajasthan High Court 14. We find ourselves in agreement with the proposition and hold that sub-sections (3) and (5) of Section 15A are mandatory in nature.”

14. Further, it has been observed in Paragraph No.22 in the aforesaid decision of **Hariram Bhambhi vs. Satyanarayan and another** (supra), that:-

“ 22. We also emphasize that sub-section (3) of Section 15A provides that a reasonable and timely notice must be issued to the victim or their dependent. This would entail that the notice is served upon victims or their dependents at the first or earliest possible instance. If undue delay is caused in the issuance of notice, the victim, or as the case may be, their dependents, would remain uninformed of the progress made in the case and it would prejudice their rights to effectively oppose the defense of the accused. It would also ultimately delay the bail proceedings or the trial, affecting the rights of the accused as well.”

15. We are constrained to observe that, many Courts/ Special Judges are not following the said procedure which is in fact in derogation to the mandate of the law. Secondly, even if the notice is given, the order that is passed on the bail application is many times silent about the submissions/ say put forth by the victim. When the statutory right is given of being heard to the victim, then the natural corollary would be that those submissions

which have been put forth by the victim should be reflected in the order by the learned Special Judge.....”

8. Further, it will not be out of place to mention here that, again in ***Criminal Appeal No.293 of 2023*** (Raees Hanif Sayyed vs. the State of Maharashtra and another), decided by this Court on 10th April 2023, the above Paragraphs from the decision in ***Criminal Appeal No.919 of 2022***, (referred above), were taken into consideration and then this Court has made following observations in Paragraph No.8 of the order:-

“ 8. The aforesaid order passed by this Court in Criminal Appeal No.919 of 2022 and other companion matters, has been circulated throughout the State and still the learned Special Judge, Parbhani, in the impugned order, is silent as to whether he had heard the victim- informant or not. We would like to take the things further. When the victim in such matters are served and if they are unable to engage Advocate because of their financial constraints or otherwise, then such Special Courts should provide legal aid to those victims. The Legal Services Authorities Act provides for giving free legal aid to the members of the scheduled caste or scheduled tribe. Further, it can also be said that such legal aid should be given or Amicus Curiae should be

appointed to represent the cause of such victim even in case of failure of the victim to remain present after due service of notice. When it is a substantive right that has been given to a particular class of litigants, then it should be the endeavour of the Courts to respect the said legal right. "

9. At the cost of repetition, we say that the present order does not speak that the notice was issued to the informant and he was heard in view of the right that has been given under Section 15A (1) and (3) of the Atrocities Act. It cannot be said that as case is not made out for releasing an accused involving in the offence under the Atrocities Act; it is not necessary to issue notice to the informant. It is the first step that is required to be taken after the presentation of the application for bail. When right has been given to the informant or the victim, then notice should be issued and he or she should be heard and then only either order can be passed, allowing or rejecting the application.

10. Secondly, when the entire charge-sheet is before the learned Special Judge, then it should be properly perused. The learned Special Judge herein has observed that due to difference of opinion there was quarrel between them and thereby accused cut her throat by sharp weapon and murdered. From where the

learned Special Judge is getting basis for such observations, is not known. If it is from the alleged confession then the learned Judge should consider that extra judicial confession is very weak kind of evidence. Prime consideration should be given to the restoration of the liberty. As the charge is framed and summons have been issued to the witnesses, cannot be a ground to reject the bail application. Writing of cryptic orders will have to be deprecated.

11. Perusal of the postmortem report would certainly show that it is a brutal murder. But what is the evidence that has been collected to connect the said crime to the accused is required to be considered. The contents of the FIR would show that it is much based on suspicion. It is said that the accused was asked by the family members of the girl, especially the father that he should not keep love relationship with the girl and therefore, the informant says that for some reason the accused might have called the girl outside the house at night time and would have killed her. However, when the entire charge-sheet is produced, the statement of the informant under Section 164 of the Code of Criminal Procedure is also required to be considered. He has given some different picture and has not whispered that the accused had expressed love for the girl and there was resistance

on their part. Rather informant says that his daughter has been killed by the accused but for what purpose he is not aware. The statements of the other family members are on the same line.

12. The prosecution appears to be more relying on the extra judicial confession alleged to have been given by the accused to witness Vijay Padvi. In fact extra judicial confession is a very weak kind of evidence. It is stated that extra judicial confession is given on the mobile phone. The mobile numbers are not reflected in the statement under Section 161 and 164 of the Code of Criminal Procedure. CDR has not been collected.

13. The next in line the evidence alleged to have been collected against the accused is the discovery of the articles i.e. murder weapon and his own clothes. If the case is based on circumstantial evidence, then it is rather doubtful that the conviction can be awarded only on the basis of discovery under Section 27 of the Indian Evidence Act.

14. Taking into consideration the material on record, we are of the opinion that it was a fit case to exercise the discretion under Section 439 of the Code of Criminal Procedure by the learned Special Judge. There was no question of bar under Section 18 or

18-A of the Atrocities Act as it was the regular bail. We, therefore, hold that the case is made out to allow the Appeal. Accordingly, following order is passed:-

ORDER

(I) The Appeal stands allowed.

(II) The order passed below application Exhibit-27 in Sessions Case No.52 of 2020 dated 15th March 2023 by the learned Special Judge under the Atrocities Act / Additional Sessions Judge, Shahada, stands set aside. The said application stands allowed.

(III) Appellant – Kishor Shivdas Shinde, who has been arrested in connection with Crime No.355 of 2020 registered with Sarangkheda Police Station, Taluka-Shahada, District-Nandurbar for the offence punishable under Sections 302, 201 of the Indian Penal Code, Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and Sections 7, 8, 9 and 10 of the Protection of Children from Sexual Offences Act, be released on bail on P.R. Bond of Rs.50,000/- with two solvent sureties of Rs.25,000/- each.

(IV) The appellant shall not visit or reside in Sarangkheda, Taluka-Shahada, District-Nandurbar till

the conclusion of the trial. Appellant should reside elsewhere, and before submission of bail papers, he should give complete address of his proposed residence with his Mobile Number to the Trial Court as well as to the Investigating Officer.

(V) Appellant shall not tamper with the evidence of the prosecution in any manner.

(VI) Appellant shall not indulge in any criminal activity.

(VII) Bail before the trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JULY23