

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

CRIMINAL APPEAL NO.850 OF 2022

Asif @ Ashu Liyakat Pathan,
Age-30 years, Occu:Driver,
R/o-Ward No.02, Shrirampur,
Taluka-Shrirampur, Dist-Ahmednagar

...APPELLANT

VERSUS

1) The State of Maharashtra,
Through Police Station Officer,
Shrirampur City Police Station,
Taluka-Shrirampur, Dist-Ahmednagar,

2) X. Y. Z.

...RESPONDENTS

...
Mr. Shaikh Mazhar A. Jahagirdar Advocate for Appellant.
Mrs. P.V. Diggikar, A.P.P. for Respondent No.1. -State.
Mr. Mohit Lalit Deoda Advocate appointed for Respondent No.2.
...

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

DATE OF RESERVING JUDGMENT : 25th JANUARY 2023

DATE OF PRONOUNCING JUDGMENT : 17th FEBRUARY 2023

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

1. **Admit.**

2. Present Appeal has been filed under Section 14A (2) of the Scheduled Castes and Scheduled Tribes Act (for short "the Atrocities Act") by original accused No.4 to challenge the order of rejection of his bail under Section 439 of the Code of Criminal Procedure in Criminal Bail Application No.234 of 2022 by learned Special Judge under the Atrocities Act / Additional Sessions Judge, Shrirampur, District-Ahmednagar on 13th October 2022.

3. Present respondent No.2 is the original informant who has filed First Information Report (for short "FIR") vide Crime No. 733 of 2022 with Shrirampur City Police Station, Shrirampur, District-Ahmednagar on 30th August 2022 alleging that the present appellant – original accused No.4 and other three accused persons have committed offence punishable under Sections 376(2)(n), (l), 376(d) of the Indian Penal Code and Sections 3(1)(w)(i)(ii) and 3(2)(V-A) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015. In the FIR, the informant has contended that she is the member of scheduled caste. However, it will not be out of place to mention here that when the charge-sheet has been filed, at that time it was found that informant is not the member of

scheduled caste and therefore, the charge-sheet has been filed only for the offences under the Indian Penal Code and that too, the charge-sheet is presented before the learned Judicial Magistrate First Class, Shrirampur. The charge-sheet came to be filed on 10th November 2022 i.e. after the rejection of the bail application by the learned Special Judge.

4. Heard learned Advocate Mr. Jahagirdar appearing for the appellant, Mrs. Diggikar, learned APP appearing for respondent No.1. -State and Mr. Deoda, learned Advocate appointed for Respondent No.2.

5. It has been vehemently submitted on behalf of the appellant that perusal of the FIR would show that the prosecutrix – informant is 40 years old lady and in the FIR itself she has stated that she has adopted Christianity and thereafter married with the person from Muslim community. Therefore, according to the appellant, the offence ought not to have been registered for any of the offences under the Atrocities Act. Further in the FIR it is stated that about a year prior to the FIR, as son of the informant was beaten by someone and she was crying, accused Nos.1 and 2 met her, tried to offer support and asked for sexual favour. It is then stated that accused Nos.1 and 2 had committed

rape on her in presence of each other. The informant is handicapped and she says that therefore she could not resist. The FIR further says that thereafter accused Nos. 1 and 2 made phone call to accused No.3, who came there and asked for the sexual favour contending that when she has allowed accused Nos. 1 and 2 to do the sexual act with her, why he should not do the act with her and then he has done the said act. She has then stated that accused No.1 called the present appellant and then the appellant was pushed by accused No.1 on the person of the prosecutrix and thereafter he had committed rape on her. She has then stated that accused Nos.1 and 2 came to her house 5 to 6 days thereafter and for about a month later they were committing rape on her. During that period the appellant once and accused No.3 had committed rape on her twice. With these allegations the informant has arrayed the appellant as accused No.4. Thus, there is apparent delay of about a year in lodging the report. At no point of time the informant has stated that the present appellant had the knowledge that the informant belongs to scheduled caste.

6. Learned Advocate for the appellant has further stated that now the investigation is over and charge-sheet is also filed and therefore, further physical custody of the appellant is not

required. It was also pointed out that the statement of the informant has been recorded under Section 164 of the Code of Criminal Procedure before the learned Judicial Magistrate First Class, Shrirampur on 3rd October 2022 and in that statement as against the preset appellant is concerned, she has not made allegations that he had done sexual intercourse with her. Taking into consideration all these aspects, the application under Section 439 of the Code of Criminal Procedure ought to have been allowed by the learned Special Judge. For rejection of the application the criminal antecedents of the appellant were also considered, however, out of nine offences now six are pending. In one offence i.e. Crime No.136 of 2014 closure report was filed on 2nd January 2023 by Shrirampur City Police Station. From Crime No.13 of 2017 i.e. Sessions Case No.7 of 2017 and Crime No.169 of 2020 i.e. Sessions Case No.25 of 2021 the appellant has been acquitted. The copy of the Judgments in both the cases has been produced. For the said alleged criminal antecedents the appellant need not be asked to remain in jail as in this case there is no evidence against him.

7. Learned APP as well as learned Advocate Mr. Deoda appointed to represent the cause of respondent No.2 strongly opposed the Appeal by submitting that in fact now the Appeal

will not be maintainable in view of the fact that after the investigation it has been transpired that offence under the Atrocities Act has not been made out and therefore, the charge-sheet has been filed before the learned Judicial Magistrate First Class. Further, on merits of the case there is evidence even against the present appellant. A conviction for the offence under Section 376 of the Indian Penal Code can be based on the sole testimony of the informant if it inspires confidence and therefore, when the statements of the witnesses, especially prosecutrix, her son support each other and it is also supported by the medical evidence, this cannot be taken as a fit case in which discretion should be exercised.

8. In support of his submissions, learned Advocate for respondent No.2 has relied on the decisions in ***Meena Devi vs. State of U.P. and another, 2022 All SCR (Cri.) 1642, Ms. Y (Manisha) vs. State of Rajasthan and another, 2022 (9) SCC 269, Kamla Devi vs. State of Rajasthan and another, 2022 AIR (SC) 1524, Sunil Kumar vs. the State of Bihar and another, 2022 AIR (SC) 715, State of Orissa vs. Mahimananda Mishra, 2019 (1) SCC (Cri.) 325, Chandrakeshwar Prasad @ Chandu Babu vs. State of Bihar and another, 2016 (9) SCC 443, Neeru Yadav vs. State of***

U.P. and another, 2015 AIR (SC) 3703 and ***Mansoor Alam vs. State of U.P. and another, 2015(4) SCC 731***. In the nutshell learned Advocate for respondent No.2 wanted to submit that the criminal antecedents of the appellant are required to be considered as it appears that accused is history-sheeter. Even at times the Hon'ble Supreme Court has rejected the bail or even cancelled the bail that was granted as the antecedents of the accused were not considered. When a reasoned order has been passed, it need not be quashed and set aside. The criterias for considering an application under Section 439 of the Code of Criminal Procedure have been laid down by the Hon'ble Supreme Court in many cases including ***Neeru Yadav vs. State of U.P. and another*** (supra). When prima facie case is made out for the charge then in such heinous crimes bail should not be granted. Learned APP as well as learned Advocate appointed for respondent No.2 have prayed that the criminal antecedents of the appellant should be taken into consideration.

9. At the outset, we would like to say that we are not appreciating the point raised in respect of the maintainability of the appeal. The bail application under Section 439 of the Code of Criminal Procedure was presented before the learned Special Judge under the Atrocities Act and then he has rejected the said

application. Challenge to that application can only be under Section 14(a) of the Atrocities Act. The second point is that the charge-sheet came to be filed after rejection of the bail application. Rather it is also after the present appeal has been filed. Therefore, it will not lie in the mouth of the prosecution to say that the appeal is not maintainable.

10. Another fact to be noted is that in the FIR itself the informant has given her caste as "Hindu Mahar", but thereafter she has categorically stated that she has adopted the Christianity and then married to a person from Muslim community. As to when the informant has adopted or got herself converted to Christianity, has not been explained by her but certainly it is before the FIR itself. Acceptance of Christianity presupposes that informant had given up her earlier caste and religion. She has not specified as to when her Baptisma was made. All those details would have been necessary if anybody wants to challenge the statement. But when that fact is admitted or stated by the informant herself in the FIR, it presupposes that she has given up Hindu religion and she could not have been considered as a person from "Hindu Mahar" caste. The offence ought not to have been then registered under the Atrocities Act. The FIR came to be lodged on 30th August 2022 and the charge-

sheet has been filed on 10th November 2022. Again we would like to say that when all these facts came up before this Court, we had called the investigating officer and asked him as to whether he had gone through the contents of the FIR or not immediately after it was handed over to him for further investigation. Though he has stated that he had studied it but in reality it does not appear to be so. The investigating officer continued the investigation by treating the offence under the Atrocities Act also. It was then pointed out that on 8th November 2022, the investigating officer, who is of Deputy Superintendent of Police rank, had collected the information that by birth the informant is Hindu Wanjari and she is not the member of either scheduled caste or scheduled tribe and therefore he decided to drop the offence under the Atrocities Act. We are constrained to observe that the efforts ought to have been made in the beginning itself to know what is the caste of the informant and as aforesaid with the confusion in the FIR stating that the informant has adopted to Christianity and then married to the person from Muslim community, whether still the investigation can be for the offence under the Atrocities Act. We were not expecting such lethargy on the part of the investigating officer, who is the rank of Deputy

Superintendent of Police and when the allegations are in respect of rape, that too by four persons.

11. Another point that is also required to be considered is that the headmistress of the school from where the informant had taken education, has given the extract of the register of admission to the investigating officer on 13th October 2022. Then from 13th October 2022 till 8th November 2022 why the investigating officer had not given a report to the Special Judge under the Atrocities Act, is a question. If the said document would have been made available to the learned Special Judge then he would have taken different course and could not have taken note of the offences under the Atrocities Act. We are constrained to observe all these facts in view of the fact that the FIR is also under the Atrocities Act, but now the charge-sheet does not contain any of those offences. When the rejection of the application is under Section 439 of the Code of Criminal Procedure and at that time the offences were also under the Atrocities Act, the only provision to challenge that order was under Section 14(a) of the Atrocities Act. Hence, the appeal is maintainable.

12. Now, coming to the facts of the case, the contents of the FIR in respect of role of the present appellant is concerned, it is stated that about a year prior to the FIR the appellant was called by accused No.1 by giving a phone call. The investigating officer has not collected the CDR of the phone numbers of accused No.1 as well as this appellant. Secondly, it is stated that when the appellant came he had stared at the informant and then accused No.1 pushed appellant on the person of informant and thereafter the appellant had committed sexual intercourse with the informant in presence of the other accused persons. Thereafter, it is stated that once the appellant had again committed rape on informant. Admittedly the FIR is registered about a year later. At this stage itself we would like to consider the statement of the informant under Section 164 of the Code of Criminal Procedure and in the said statement though she has confirmed the fact that the appellant was called by accused No.1, accused Nos. 1 and 2 asked the appellant that he should also do the same act and at that time appellant went near her, he made odious face and then all of them went away. She does not say that appellant had performed sexual intercourse with her on that day and thereafter she does not say that the appellant had ever come to her and

had sexual intercourse. Therefore, there is apparent different role assigned by the informant herself to the present appellant.

13. As regards the statement of the son of the informant is concerned, it appears that he is 23 years old youth. He also states that on the day of incident about a year prior to the FIR when he had returned home the informant had narrated the entire incident to him. But then he has stated that at that time there was terror of the accused persons and therefore, they had not lodged any FIR. Another witness, who is friend of the son of the informant, also states that informant had informed about the incident to him also but the action was not taken. Except these statements, there is almost nothing. There is also a supplementary statement of the informant on record, dated 8th November 2022 giving her own history, as to how her maiden name is different, who was her father and how her mother performed second marriage etc. It leads to connect with her school record.

14. With this kind of evidence in fact the learned Special Judge ought to have allowed the application. The act of collecting evidence was almost over when the learned Special Judge passed the order. At the cost of repetition it can be said that he

has not considered as to how the offence under the Atrocities Act ought not to have been registered at all. It appears that he went on the basis of criminal antecedents of the appellant. The decisions relied on by the learned Advocate for respondent No.2 will not be applicable to the facts of the case, as the role of the appellant in the present case is also required to be considered. The role is thus assigned by the informant herself and as aforesaid it is changed in her statement under Section 164 of the Code of Criminal Procedure. Though about six cases are still pending against the appellant, yet that cannot be the hurdle for not considering the present application / appeal.

15. For the aforesaid reasons, the impugned order deserves to be set aside and the application filed by the appellant under Section 439 of the Code of Criminal Procedure deserves to be allowed. Hence the following order:

ORDER

(I) The Appeal stands allowed.

(II) The order passed by the learned Special Judge under the Atrocities Act and Additional District Judge, Shrirampur, District-Ahmednagar in Criminal Bail

Application No.234 of 2022 dated 13th October 2022 stands set aside. The said application stands allowed.

(III) The appellant – Asif @ Ashu Liyakat Pathan, who has been arrested in connection with Crime No.733 of 2022 registered with Shrirampur City Police Station, Shrirampur, District-Ahmednagar, for the offence punishable under Sections 376(2)(n), (l), 376(d) of the Indian Penal Code and Sections 3(1)(w)(i)(ii) and 3(2) (V-A) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, be released on bail on P.R. Bond of Rs.30,000/- with two solvent sureties of Rs.15,000/- each.

(IV) The appellant shall not enter the jurisdiction of Bajrang Chowk, Ahilyadevi Nagar, Ward No.2, Shrirampur, District-Ahmednagar till the conclusion of the trial. He should reside elsewhere, and before submission of bail papers, the appellant 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.

(VIII) Fees of the learned Advocate, who is appointed to represent the cause of respondent No.2, is quantified at Rs.5000/- to be paid by the High Court Legal Services Sub Committee, Aurangabad.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/FEB23