

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.851 OF 2022

Kiran Raosaheb Fulsunder
Age: 27 years, Occu.: Labour,
R/o. Tanpurewasti, Tq. Rahuri,
Dist. Ahmednagar

.. Appellant

Versus

1. The State of Maharashtra
Through : Police Inspector,
Rahuri Police Station, Rahuri,
Tq. Rahuri Dist. Ahmednagar

2. XYZ

.. Respondents

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Mr. Kunal A. Kale, Advocate for appellant.
Ms. P. V. Diggikar, APP for respondent No.1 - State.
Mr. Adinath B. Jagtap, Advocate for respondent No.2.

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

DATE : JANUARY 11, 2023.

JUDGMENT :- [Per Smt. Vibha Kankanwadi, J.]

. **Admit.**

2. Present appeal has been filed under Section 14(A) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act") to challenge the order of rejection of bail application by learned Special Judge, under the Atrocities Act/Additional Sessions Judge, Ahmednagar in Special

Case No.172 of 2022 on 07.10.2022. The said application was filed under Section 439 of the Code of Criminal Procedure. The appellant was arrayed as accused in Crime No.603 of 2022 registered with Rahuri Police Station, Dist. Ahmednagar for the offences punishable under Sections 376(2)(n), 354(A), 354(D), 452, 506 of Indian Penal Code and under Section 3(1)(w)(i), 3(1)(w)(ii), 3(1)(r), 3(2)(v), 3(2)(va) of the Atrocities Act.

3. Heard learned Advocate Mr. Kunal A. Kale for the appellant, learned APP Ms. P. V. Diggikar for respondent No.1 - State and learned Advocate Mr. Adinath B. Jagtap for respondent No.2.

4. It has been vehemently submitted on behalf of the appellant that perusal of the FIR would show that there is delay of 26 days in lodging the report. Rather it is the case of consensual nature and after it was realized by the husband of the informant that the informant is behaving in such a manner, it appears that she has gone to the police station and lodged the report. The informant - respondent No.2 is a 27 year old married lady having son and it is also to be noted that the investigation is over and charge-sheet is also filed and the statement of the son of the informant would disclose that the appellant was known to the husband of the informant. The facts of the case would further reveal that now the father-in-law and mother-in-law of the informant are contending that they had seen the appellant running from the house at the intervening night of

06.06.2022 and 07.06.2022. In spite of that how till 01.07.2022, the FIR was not lodged, is a question. Rather it is also to be seen that she had gone along with the appellant to one Nita Lodge, Opposite Rahuri Bus Stand and then she says that the appellant had sexual intercourse at that place against her wish. All these factors definitely show that it is consensual in nature and, therefore, there is no question of provisions of the Atrocities Act. Now, the further custody of the appellant is not required. He is ready to abide by the terms of the bail. The learned Special Judge had not considered the evidence and wrongly rejected the application under Section 439 of the Code of Criminal Procedure. The said order deserves to be set aside.

5. Per contra, the learned APP as well as learned Advocate for respondent No.2 strongly opposed the appeal and supported the reasons given by the learned Special Judge. The consent theory could not have been believed by the concerned Judge at this stage, because the consent cannot be so inferred. The informant has specifically stated in her FIR as to what were the circumstances because of which she succumbed to the acts of the appellant. The sexual intercourse in the intervening night of 06.06.2022 and 07.06.2022 was the outcome of the threats those were given by the appellant and when the threats to defame were given, she was forced to go to the hotel near bus stand. When such consent is obtained by way of force or threats, it cannot be said to be a consent and, therefore, the learned Special

Judge has rightly stated that it cannot be considered to be a case of consensual nature. Perusal of the charge-sheet would show that there is evidence against the appellant and, therefore, the learned Special Judge was right in rejecting the application.

6. At the outset, it is to be noted that now the investigation is complete and the charge-sheet is filed. Therefore, the evidence that has been collected will have to be considered to appreciate the points those have been raised on behalf of the appellant. The informant is 27 year old married lady and it is claimed that she is the member of Scheduled Tribe. Her husband is a labour and she says that while going to his work, he used to leave his mobile phone at home. Appellant - accused, who is not a member of Scheduled Tribe or Scheduled Caste, used to give phone call on the mobile of the husband of the informant and used to ask about the whereabouts of the husband. Informant states that there used to be attempts by the accused to speak to her and even after her husband gone for work, the accused used to roam around her house and used to see to her with ill eye, but she was avoiding to talk to him. When she had gone to fetch her son from his school around 10.30 a.m. on 02.06.2022, accused went near her and by expressing that he likes her and loves her, asked her that she should keep sexual relationship with him. She refused and went away, but she was frightened and, therefore, she had not told the said the fact to anybody. Thereafter, around 8.00

p.m. on 06.06.2022, her husband had gone for the labour work. The informant was in her house along with her two children, father-in-law and mother-in-law. The informant and her two children were sleeping inside the house but they had just closed the door of the house (indicating thereby no latch was put to the door from inside) and her parents-in-law were sleeping in the courtyard. Around 12.30 a.m. on 07.06.2022, the accused came inside the house, by gagging the mouth of the informant, gave her threat that she should keep physical relations with him, otherwise he would kill her husband and because of the said threat, she did not resist him. He had sexual intercourse with her, but due to threats she had not disclosed the said fact to anybody in the house. The informant further states in her FIR that the accused had again, by giving threats, said that if she does not keep physical relations with him, then he would disclose it to her husband that she had kept sexual intercourse with him and she would be defamed. Because of this kind of threat, she went to Nita Lodge, opposite Rahuri Bus Stand and at that time, the accused had sexual intercourse with her without her consent. She then states that after 30.06.2022, the accused was giving phone calls on the mobile of her husband and, therefore, the husband asked the informant as to why the accused is calling, at that time, the informant had told all those things to the husband, but as her mental condition was not proper, she had not gone to the police station immediately, but she went to the police station along with the husband on 01.07.2022 and lodged

the report.

7. Thus, it is to be noted that though many times the opportunity was there, the informant had not even disclosed, about the alleged threats, to her husband and in-laws.

8. Together with the said contents in the FIR if we consider the statement of the husband, then it is on the same line, however, if we consider the statements of the parents-in-law, surprising part to be noted is that they say that when they were sleeping in the courtyard at night time of 06.06.2022, because of some noise they got up around 12.30 a.m. (father-in-law got up first and then woke mother-in-law) and at that time, it was noticed by them that somebody was trying to enter their house and when they saw minutely, he was identified as the appellant, who resides at a distance of about 500 meters from their house and then they say that when accused realized that the father-in-law has seen him, he fled away. Thus the statement of these two persons taken as it is would disclose that at the time of getting entry in the house, when it was realized by the accused that somebody is looking at him, the accused had fled away. That means the accused could not have entered the house. But then their statement is silent as regards whether they had made inquiry about the incident with the informant. Further, the surprising fact to be noted is that though in the FIR dated 01.07.2022 it is stated that the informant had come to police station along with the husband, the

statement of the husband is recorded on 13.08.2022, which can be said to be a belated statement. Even there is a statement of the son of the informant from which it can be gathered that the accused was known to the husband of the informant. No doubt, the boy says that the accused used to stop the informant in the road and used to give threats by saying that she should talk to him on phone, otherwise he would assault her and then his mother used to raise her voice thereby causing the accused to go away.

9. Another piece of evidence is the register of the Lodge, but the name of the Lodge is Sai Chatra Lodge and not Nita Lodge as reflected in the FIR. The entry about arrival in the lodge is of 14.06.2022 and the date of departure is stated to be 16.06.2022, how many persons had stayed is not reflected in the register. The statement of the owner and manager does not say that the accused was accompanied by a lady. Though it is stated that the CCTV is installed, it is stated that there is no backup. Rather the backup is of only 9-10 days and since it was asked beyond that date, they are unable to provide. Under such circumstance, that evidence is also not *prima facie* supporting. With this kind of evidence, the charge-sheet has been filed. The possibility of consensual relationship cannot be ruled out and it does not reflect from the entire charge-sheet that the appellant has acted in such a manner only to ravish the informant as she belongs to a Scheduled Tribe. The learned Special Judge has not

considered all these facts and rather when the charge-sheet is filed, then at the time of considering the application for bail under Section 439 of the Code of Criminal Procedure, the evidence that has been collected has to be appreciated only with a *prima facie* view and there is no question of bar under Section 18 and 18-A of the Atrocities Act. It is to be noted that the learned Special Judge on his own has arrived at a conclusion that the accused being the neighbour of the informant possibility of tampering cannot be ruled out and, therefore, that is taken as one of the ground for refusing the application. He has not taken into consideration the factor, which he can take into account, that the condition can be imposed that the accused should not enter the said area and reside elsewhere and thereby the tampering can be avoided. It appears that some superficial reasons have been found out just to reject the application.

10. It appears that the learned Special Judge has also considered the criminal antecedents of the appellant - accused and it was disclosed that he is facing Sessions Case No.83 of 2022 for the offences punishable under Sections 143, 147, 36, 353, 504, 506 of Indian Penal Code, Summary Criminal Case No.67 of 2021 before the Rahuri Court and further the Sessions Case No.74 of 2022 for the offences punishable under Sections 353, 332, 379, 504, 506 read with Section 34 of Indian Penal Code. Here, it is to be noted that every criminal antecedent cannot be the ground to reject the bail

application. The two Sessions Cases appear to be involving Section 353 and other Sections, meaning thereby there was something against the public officer and the accused is not alone, who has been prosecuted in those cases. The delay of 26 days has also not been properly considered and, therefore, the impugned order deserves to be set aside. The case was in fact made out to grant bail. Hence, the following order :-

ORDER

- i) The appeal stands allowed.
- ii) The order passed by learned Special Judge under the Atrocities Act/Additional Sessions Judge, Ahmednagar in Special Case No.172 of 2022 dated 07.10.2022 stands set aside. The application stands allowed.
- iii) Appellant - Kiran Raosaheb Fulsunder, who has been arrested in connection with Crime No.603 of 2022 registered with Rahuri Police Station, Dist. Ahmednagar for the offences punishable under Sections 376(2)(n), 354(A), 354(D), 452, 506 of Indian Penal Code and under Section 3(1)(w)(i), 3(1)(w)(ii), 3(1)(r), 3(2)(v), 3(2)(va) of the Atrocities Act, be released 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 village Tanpurewadi, Tq. Rahuri, Dist. Ahmednagar till the conclusion of 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) He shall not tamper with the evidence of the prosecution in any manner.

vi) He shall not indulge in any criminal activity.

vii) Bail before the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm