

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 1124 OF 2021

APPLICANT : Harish S/o Rajendra Rathod, Aged
about 21 Years, Occ. Student, R/o.
Zilla Parishad Colony, Khadki, Akola,
Dist. Akola.

//VERSUS//

NON-APPLICANT : State of Maharashtra through PSO, PS,
Ramdaspath, Distt. Akola.

Mr. N.R. Tekade, Advocate for the Applicant.
Mr. S.A. Ashirgade, APP for the Non-applicant.

CORAM : G. A. SANAP, J.
DATED : 13th FEBRUARY, 2023.

ORAL JUDGMENT

Heard.

02] **Admit.** The application is heard finally by consent of the
learned advocates for the parties.

03] In this application, challenge is to the order dated
8th September, 2021 passed by the learned Extra Joint District
Judge & Additional Sessions Judge, Akola in Sessions Trial

No.46/2018, below Exhs. 71, 72 and 72, whereby the learned Judge was pleased to reject those applications. The application at Exh. 71 made for adjournment. The application at Exh. 73 was made for de-exhibiting the document (Exh. 68). The pursis at Exh. 72 was for opposing to exhibit the school leaving certificate.

04] The applicant-accused is facing trial for the offences punishable under Sections 363, 376(2)(j), 376(2)(n) of the Indian Penal Code, 1860 (IPC), Sections 4, 8, 5(l) and 6 of the Protection of Children From Sexual Offences Act, 2012 (POCSO Act) and Section 3(2)(va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. After commencement of the trial, the prosecution examined the witnesses. The prosecution had earlier made applications at Exhibits 51, 52 and 54 for placing on record certain documents. The production of documents was allowed by the learned Judge. The said order was challenged by filing Criminal Application (APL) No.621/2021. This Court (Coram: Manish Pitale, J.) *vide* order dated 2nd August, 2021 had allowed the application and set aside the orders passed below Exhibits 52 and 54. It is pertinent to note that, as per the order dated 2nd August, 2021, this Court had made it clear that the documents, which were not part of the charge-sheet, could not be

permitted at the stage of trial, without recourse to Section 173(8) of the Code of Criminal Procedure, 1973 (Cr.PC).

05] It is to be noted at this stage that the documents, which are marked as Exhs. 68 and 69, were produced and exhibited by the learned Judge in the earlier part of the trial. The same was challenged by filing above application. The said order was set aside.

06] It appears that after order dated 2nd August 2021 the prosecution examined witness No.7 on 8th September, 2021 and on the basis of the evidence of this witness, the documents, which were not part of the charge-sheet, were admitted in evidence and given exhibit numbers 68 and 69. It is to be noted at this stage that the documents at Exhibits 68 and 69 were those documents, which were sought to be produced and exhibited by the prosecution in the earlier round of litigation. The order, granting permission for production, was set aside by this Court *vide* order dated 2nd August, 2021.

07] The accused on being confronted with this position or rather aggrieved by admission of the documents, filed an

application at Exhibit 71 for adjournment. He made an application at Exhibit 73 for de-exhibiting the document marked as Exhibit 68. He also filed pursis at Exhibit 72 opposing the admission of the school leaving certificate in evidence. The learned advocate during the course of the argument has pointed out that the accused did not make a specific application for de-exhibiting the document marked as Exhibit 69. The learned advocate took me through this application and pointed out the necessary averments in the application, challenging the order of the learned Judge exhibiting the photocopy of the school register as Exhibit 69.

08] On hearing the arguments of learned advocate for the applicant and the learned Additional Public Prosecutor for the non-applicant and on going through the record, it appears that the learned Judge committed grave error in admitting the two documents under Exhibits 68 and 69 in evidence.

09] The learned Additional Public Prosecutor in all fairness concedes that in respect of these two documents, the earlier order permitting the production of these documents, was set aside. It is to be noted that since the order granting production of these documents was set aside, it was open for the prosecution to

consider its position and first produce these documents on record in terms of the provisions of Section 173(8) of the Cr.PC. Instead of learning the lesson from the order passed by this Court earlier, the In-charge Prosecutor before the learned Additional Sessions Judge, through a witness PW-7, introduced these two documents on record. The documents have been admitted in evidence and given exhibit numbers as Exhibits 68 and 69. In my view, this order passed by the learned Judge is without considering the order passed by this Court dated 2nd August, 2021. The order also suffers from patent illegality. Therefore, the application deserves to be allowed.

10] The application is accordingly **allowed**. The order dated 8th September, 2021 passed by the learned Extra Joint District Judge & Additional Sessions Judge, Akola in Sessions Trial No.46/2018, rejecting the application made at Exhibit 73 for de-exhibition of the document marked as Exhibit 68, is set aside. The said application is allowed. The document be accordingly de-exhibited. Similarly, the document marked as Exhibit 69 was exhibited contrary to the order passed by this Court. Therefore, the same shall also be de-exhibited.

11] The learned Judge shall ensure that the procedure prescribed under law is strictly followed. The prosecution, if so advised, can produce the documents, which are absolutely necessary and relevant for deciding the issue by taking recourse to the provisions of Section 173(8) of the Cr.PC.

12] The application stands **disposed of**.

(G. A. SANAP, J.)

Vijay