

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.869 OF 2022

Sajjan s/o Hirchand Gusinge,
Age: 30 years, Occu.: Agri.,
R/o. Fatiyabad, Aurangabad
At Present R/o. Gokulwadi Post
Maliwada, Tq. Gangapur,
Dist. Aurangabad.

.. Appellant

Versus

1. The State of Maharashtra
Through Police Inspector,
Police Station, Aurangabad,
Taluka and District Aurangabad.

2. X. Y. Z.

.. Respondents

...
Mr. M. S. Karad, Advocate for appellant.
Mrs. Preeti Diggikar, APP for respondent No.1 - State.
Mr. A. K. Bhosale, Advocate for respondent No.2.

...

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

DATE : February 08, 2023.

JUDGMENT :-

. **Admit.**

2. Present appeal has been filed by the appellant under Section 14-A(2) 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 his bail application under Section 438 of the Code of Criminal Procedure by learned Special Judge, under the Atrocities Act, Aurangabad in Bail Application No.2100 of 2022 on 04.11.2022.

3. Respondent No.2 is the original informant, who has filed FIR vide Crime No.161 of 2022 with Vedant Nagar Police Station, District Aurangabad for the offences punishable under Sections 376, 313, 323, 506 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(2), 3(2)(va) of the Atrocities Act on 20.10.2022 contending that during the period 27.07.2020 to 22.04.2022, the present appellant has committed sexual intercourse with the informant by giving promise to marry and also caused abortion of the informant, though the appellant was knowing that she is a member of Scheduled Caste and in March 2022, the appellant had abused her in the name of caste.

4. The learned Special Judge under the Atrocities Act has rejected the application on the ground that it is barred under Section 18 and 18-A of the Atrocities Act. Hence, this appeal.

5. Heard learned Advocate Mr. M. S. Karad for the appellant, learned APP Mrs. Preeti Diggikar for respondent No.1 - State and learned Advocate Mr. A. K. Bhosale for respondent No.2.

6. It has been vehemently submitted on behalf of the appellant that perusal of the FIR lodged by respondent No.2 would show that she is 27 years old lady. She got married in 2010 and has son aged 10, however, her husband expired in 2019. But even two years prior to the death of the husband, she was residing with her parents. She has stated that the present appellant had given her friend request on facebook and that's how they came in contact with each other. The appellant had expressed his love to her. She states that the appellant had knowledge about the death of her husband, but given her promise that he would perform marriage with her and maintain her son. In view of the said promise, she used to go to the places where the appellant used to call her. She has given certain dates and the places i.e. the lodge where according to her when she had gone to meet appellant, the appellant had sexual intercourse with her against her wish. It is then stated that she became pregnant in 2020-2021 from the appellant, but the appellant used to give her threats, because of which she got herself aborted. Whenever she used to ask for marriage, the appellant was avoiding on one or the other pretext. She has then stated that in the month of March 2022, the appellant had abused her in the name of caste. She then states that on 22.04.2022, she was forcibly taken in a car to a lodge. She was assaulted there and her obscene pictures were taken. Threat was

given that those photographs would be made viral and, therefore, she had not lodged any report. The said story would show that at one place she says that there was love affair between them and then at another place she denies it. If the appellant was having love affair with her, then there cannot be question of insult in the name of her caste. It is not her case that she had not disclosed her caste to the appellant. The offence under the Atrocities Act cannot be said to have been made out. It has been wrongly inferred by the learned Special Judge that the application filed by the present appellant under Section 438 of the Code of Criminal Procedure was barred under Section 18 of the Atrocities Act. Further, during the pendency of the present appeal when the interim protection was granted, the investigating officer has completed the investigation and filed the charge-sheet before the learned Special Judge, under the Atrocities Act. Under such circumstance, the physical custody of the appellant is not necessary.

7. Per contra, the learned APP as well as learned Advocate for respondent No.2 strongly opposed the appeal and submitted that though the charge-sheet is filed, the investigation is still remaining. Further, it appears that the appellant has systematically done every act. He has gained confidence of the informant and thereafter, it appears that he has sexually used her. He has taken disadvantage of

the fact that the informant is a widow. There are statements of witnesses who have seen the arrogant behaviour of the appellant with the informant and even the fact that she had informed or disclosed the relationship to her friend prior to the FIR. She believed in the statement of the appellant, but now he is not accepting the relationship and is not performing marriage with her. Therefore, this cannot be the case where the discretion should be used. There was definitely bar under Section 18 of the Atrocities Act.

8. At the outset, it is to be noted that the informant herself in her FIR has stated that she came to know the appellant through social media. As per the FIR when the appellant had forwarded friend request, at that time, her husband was alive. Though she had accepted the request, but when he expressed love towards her, she states that she refused. She doesn't say that in between they had the occasion to meet with each other. Whatever was going on it was through messages. She had told that she is a married lady having a son, but still according to her, the appellant was giving threat to commit suicide. In the meantime, her husband expired and thereafter, the appellant had sent her friend request once again. Again she accepted the friend request and in categorical term she says that they started loving each other. Therefore, when there was love between them there was no question of hurdle of caste. It is not

the statement of the informant that merely because she belongs to the said caste, the appellant had given her such request. Acceptance of that request was in her hands and when she had accepted it, now she cannot say that there was no reciprocal love. She has stated that when the promise was given, she had gone to those places where she was called by the appellant. In fact that could have also been refused by her and she could have put a condition that unless he performs marriage, she will not come to any such place like lodge. The relationship between them appears to be from July 2020 and even she had become pregnant. She has stated that after the threats she had got her abortion done. Perusal of the charge-sheet would show that there is no evidence collected in that respect. As regards the abuses in the name of caste are concerned, she has not stated where those abuses were given in order to attract the offence under Sections 3(1)(r) and 3(1)(s) of the Atrocities Act. Such abuses/intentional insult should be in public view, but those ingredients are missing. Then she states about the incident dated 22.04.2022 when she was called by the appellant near railway station and then she states that forcibly she was made to sit in a car and was taken to a lodge where her obscene pictures were taken. Statement of witness auto-rickshaw driver would show that he was knowing the informant since her childhood and used to drop her to railway

station many times. It is said by him that once he had seen the appellant coming in red colour car and at that time, he asked the informant as to who is that person. She gave the name of the appellant. He had also seen the appellant in her house once. In 2019, when he had left the informant near the lodge at that time, he had heard the appellant abusing informant and quarreling with her. He doesn't say that abuses in the name of caste were given to the informant.

9. The statement of the informant is taken under Section 164 of the Code of Criminal Procedure also, however, she has stated that in March, 2022, when she had asked as to when the appellant is going to perform marriage, at that time, the appellant told that he is Rajpoot and cannot marry with a girl of lower caste. In spite of that it appears that she has not lodged any report at that time and her FIR is in the month of October, 2022. Thereafter, there is further statement that when she was coming to house from police station at that time, the appellant and his wife had got down from the car and abused her in the name of caste. Therefore, it appears that the story has been further developed.

10. All these facts would show that the relationship appears to be consensual and when it is consensual, there is no question of hurdle

of caste. It can be said that the offence under the Atrocities Act are *prima facie* not made out and, therefore, in view of ***Prathvi Raj Chauhan Vs. Union of India and others, [(2020) 4 SCC 727]***, the application was not barred under Section 18 or 18-A of the Atrocities Act. The learned Trial Judge erred in dismissing the application holding that it is barred under Section 18 of the Atrocities Act.

11. Now, the investigation is over and the charge-sheet is filed. This Court by order dated 30.11.2022 had granted interim protection to the appellant and then the investigating officer has filed charge-sheet on 20.12.2022. Therefore, physical custody of the appellant is not necessary. Even then when it was submitted that the custody is required as the mobile phone of the appellant is yet to be seized; by order dated 24.01.2023 this Court had given directions to the appellant to remain present before the Investigating Officer. It has been now orally submitted by the learned APP that as per the order passed by this Court, the appellant appeared before the Investigating Officer. The mobile has been seized and he is corroborating with the investigation. Under such circumstance, there is no hurdle in confirming the interim protection.

12. Another fact which will have to be mentioned here that when the charge-sheet is filed, it was stated to be under Section 299 of the

Code of Criminal Procedure against the appellant. Time and again this Court has observed that Section 299 of the Code of Criminal Procedure is an enabling Section, which enables the Court to record the evidence against an absconding accused. It does not empower the investigating agency to file charge-sheet under that Section. It will have to be shown by the investigating officer that there were efforts to arrest the concerned accused. Before considering an accused as absconding, the procedure as contemplated under Section 82 of the Code of Criminal Procedure will have to be undergone. Interestingly, in this case, an application was filed by the investigating officer, who is of the rank of Deputy Superintendent of Police before the learned Special Judge on 09.01.2023 seeking amendment to be carried out in the charge-sheet. Instead of Section 299 of the Code of Criminal Procedure, he wanted to insert "High Court has granted interim protection in Criminal Appeal No.869 of 2022". That application also came to be allowed by the learned Special Judge and the amendment has been carried out. Learned APP before us could not point out the legal provision, under which the said application dated 09.01.2023 was filed before the learned Special Judge.

13. In this case, not only the offence under the Atrocities Act are involved, but also the offence under Section 376 of Indian Penal Code

is involved and the investigation is done in that respect. Charge-sheet is also filed for that offence. We would like to specifically mention here that Section 228-A was inserted in Indian Penal Code with effect from 25.12.1983, which prohibits disclosure of identity of the victim of certain offences. By S.4 of Act 13 of 2013, words “offence under Sections 376, 376A, 376B, 376C or section 376D” were substituted/inserted with effect from 03.02.2013. Thereafter, by Act 22 of 2018 further amendment in respect of other Sections has been made with effect from 21.04.2018. Thus, the identity of the victim cannot be disclosed by any of the authorities in the charge-sheet. Nowadays, we are finding that photographs are taken i.e. either the old photographs are collected or even victim showing the spot of occurrence are taken and those photographs are produced in the charge-sheet. We do not say that such photographs should not be collected or should not be taken, but we expect that those photographs should not be openly added as part of charge-sheet. A charge-sheet travels from the office of the investigating agency (may be handled by many persons), then it comes to either the Court of Judicial Magistrate First Class or directly presented before the learned Special Judge where also it is handled by many persons. Under such circumstance, the identity of the victim is disclosed. The investigating agency has to be sensitive in the matter. If they want to

produce such documents, then it should be put in a sealed envelope including in the copies of the charge-sheet also, so that the identity of the victim is not disclosed in any manner. In the catena of judgments of the Hon'ble Apex Court as well as this Court, it has been stressed that the identity of the victim in such cases, i.e. under Section 376 and other Sections of Indian Penal Code, POCSO Act, should not be disclosed. We are constrained to make these observations, as we are coming across such incidences time and again. We may also observe that when it was found that the accused facing charge under these Sections want to rely on certain photographs in which victim is seen then those photographs are openly placed/annexed in the petition. Coordinate Bench at Principal Seat has given directions that they should be filed under sealed envelope. We take those directions further and direct all the concerned agencies, who are dealing with the investigation of such crime that henceforth the photographs of such victims should be filed in sealed envelope before the concerned Courts. We may also say that failure to follow the directions may invite the action for the offence under Section 228-A of the Indian Penal Code. These directions are also to the concerned Courts where the charge-sheet is accepted. They should also see that such photographs are produced in sealed envelope before them and the identity of the victim is not disclosed in any manner. With these

directions, we allow the appeal. Hence, the following order :-

ORDER

- i) The appeal stands allowed.
- ii) The order passed by learned Special Judge under the Atrocities Act, Aurangabad in Bail Application No.2100 of 2022 dated 04.11.2022 stands set aside. The said application stands allowed.
- iii) The interim protection granted by this Court earlier to the appellant vide order dated 30.11.2022 is hereby confirmed and made absolute. In other words, the appellant - Sajjan s/o Hirchand Gusinge, who has been arrested in connection with Crime No.161 of 2022 registered with Aurangabad City Police Station, Dist. Aurangabad for the offences punishable under Sections 376, 313, 323, 506 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(2), 3(2)(va) of the Atrocities Act, be released on P.R. Bond of Rs.15,000/- with one surety in the like amount, if not already released.
- iv) He shall not tamper with the evidence of the prosecution in any manner.
- v) He shall not indulge in any criminal activity.
- vi) Bail before the Trial Court.
- vii) The directions given in paragraph No.13 of this order to be followed scrupulously by the investigating agency/police authorities and all the Courts in Maharashtra.

viii) Learned Registrar (Judicial) to circulate this judgment to all the Courts, Director of Prosecution and Director General of Police, who would give further directions to all the police officers all over Maharashtra to follow the directions.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm