

(2021) 04 KAR CK 0052
In the Karnataka High Court
Case No : Criminal Petition No. 5672 Of 2020

Asif Faruk Kadawala

APPELLANT

Vs

State & Others

RESPONDENT

Date of Decision : 20-04-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 354, 354(B), 354(D), 376, 447, 506
Information Technology Act, 2000 — Section 66C, 66E, 66E(c)
Evidence Act, 1872 — Section 65B
Family Courts Act, 1984 — Section 14, 20

Citation : (2021) 04 KAR CK 0052

Hon'ble Judges : H.P. Sandesh, J

Bench : Single Bench

Advocate : Jeetin Sehgal, H.R.Showri, Basawa Prasad Kunale

Final Decision : Dismissed

Judgement

H.P. Sandesh, J

1. This petition is filed under Section 482 of Cr.P.C, praying this Court to quash and set aside an FIR in Crime No.44/2020 dated 21.02.2020 registered

at Pulakeshinagar Police Station, Bengaluru, for the offences punishable under Sections 354(B), 354(D), 506, 376, 447, 354 of IPC read with Section

66C and 66E of the Information Technology Act, 2000 (the IT Act, 2000 for short) and direct the Investigating Officer not to take any

coercive action against the petitioner.

2. The factual matrix of the case is that, respondent No.2 had lodged a complaint at the first instance against accused No.1 making the allegation

against him that on 13.02.2020 in the night at 9 p.m., he trespassed her house and snatched her mobile and when she demanded to return the mobile,

he assaulted her. It is also an allegation that forcibly he made her to remove her clothes and when she started screaming he closed her mouth and forcibly committed rape on her and spilled the sperm on her face. It is also alleged in the complaint that thereafter he called the house owner and he did not help her. Accused No.1, sent her personal photos and other information, which were in her mobile to her relatives and friends. It is also an allegation that by making use of the bank application available in the mobile, he got transferred the amount of Rs.61,000/- to his account and also destroyed her passport. Hence, requested to take the action against accused No.1. In pursuance of the complaint, the police have registered a case against accused No.1 at the first instance. Thereafter, one more complaint was given on 20.08.2020, in addition to the earlier complaint. In the said complaint, an allegation is made against the present petitioner that before shifting to Bengaluru on 28.12.2019, she had filed a Domestic Violence complaint in the Amboli Police Station, Andheri, Mumbai and also a Domestic Violence case in Andheri Magistrate Court. It is alleged in the complaint that accused No.1, illegally handed over the said iphone 7 plus to her husband Asif Faruk Kadawala, Asif has hijacked her phone with his Laptop (name-Asif hp Window 6) and misused several personal data, details, photos and chats of her and presented the same as an evidence in the ongoing case of Domestic Violence which she had filed against the petitioner herein and his family, which is pending before the Magistrate Court, Andheri, Mumbai. It is also alleged in the complaint that she had also attached an attested copy from the Magistrate Court, Andheri, Mumbai of the data and (Personal pictures, chats, emails, uber receipts) which came through post to the Pulakeshinagar Police Station, Bengaluru, that accused No.2 had illegally presented the same in the Court. It is also alleged in the complaint that she had also submitted evidence of her icloud ID logged in by accused No.2 by the name (windows 6-Asif HP) taken screenshots from her new iphone as she could get data of her previous phone's location that had been robbed by accused No.1 with details of places where the phone was found.

3. It is alleged against this petitioner that the above evidences prove that the main accused No.1 and her husband i.e., accused No.2 (petitioner herein) have planned this heinous act. They have always been hand in glove with each other. This petitioner should be equally accused in the ongoing case

and should be thoroughly investigated. The above facts prove that accused No.2 had sent accused No.1 to take her personal phone, robbed her old passport which had address of her marital house, also physically abused and raped her. Based on this complaint, the police have requested the Court to arraign this petitioner as accused No.2 vide letter dated 28.08.2020 and in view of arraigning this petitioner as accused No.2, the present petition is filed.

4. The main contention of the learned counsel appearing for the petitioner before this Court is that there is no any allegation against this petitioner in the first complaint and also in the subsequent complaint; allegations do not disclose the commission of any offence by the petitioner herein. The police in a mechanical manner without taking into consideration that the FIR does not disclose anything against this petitioner erroneously arraigned him as accused No.2. The petitioner has been falsely implicated in the present FIR, based on the supplementary complaint dated 20.08.2020. It is contended that the petitioner has received the phone of respondent No.2 through accused No.1 and accused No.1 himself called the petitioner and handed over the mobile to him and there was no conspiracy between the petitioner and accused No.1. The investigating agency failed to conduct any independent inquiry and mechanically arraigned this petitioner at the behest of respondent No.2. This petitioner on the date of the alleged incident was at Mumbai. The Investigating agency turned a blind eye to the fact that the petitioner had produced the mobile on the phone in a court of law and had always been ready and willing to deposit the same before the Family Court, Bandra. Respondent No.2 herself had admitted her adulterous relationship with accused No.1. Respondent No.2 had deserted and abandoned the petitioner almost three years ago and the present complaint is filed in the year 2020.

5. The learned counsel also vehemently contends that the ingredients of section 66E of the IT Act, 2000 are not made out against the petitioner as the material in question was not circulated in public domain, but in fact produced before a Court of Law and in accordance with law. The petitioner is ready and willing to join investigation in the present FIR. Respondent No.2 is constantly threatening the petitioner that she has close terms with several high-ranking police officials. Hence, it requires an interference of this Court.

6. The learned counsel for the petitioner in support of his arguments, relied upon

the order passed by this Court in Criminal Revision Petition

Nos.152/2014 and 1358/2010 in the case of Sushma Rani v. H.N. Nagaraja Rao decided on 01.10.2020, and brought to the notice of this Court

paragraph No.14, wherein, it is observed that, the imputation should be either made directly to the knowledge of third parties, or the same should be

published to the knowledge of the third parties. No such things have taken place in the present case and the same is produced before the Court and

there was no publication.

7. The learned counsel for the petitioner also relied upon the order of the Apex Court in the case of Ankur Gupta v. State of U.P. and another

reported in 2017 SCC OnLine SC 2023, and brought to the notice of this Court paragraph Nos.6 and 7, wherein, the Apex Court discussed with regard

to exercising of powers under Section 482 of Cr.P.C., the power should be used sparingly and with abundant caution. Such power will be exercised

either to prevent abuse of the process of Court or otherwise to secure the ends of justice, though it may not be possible to laid down any precise,

clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein

such power should be exercised.

8. The learned counsel for the petitioner also relied upon the order of the Apex Court in the case of Khatri and Others v. State of Bihar and Others

decided on 10.03.1981 in Writ Petition Nos.5670 and 6216/1980, and brought to the notice of this Court paragraph No.8, wherein, the Apex Court

discussed with regard to the accused in an inquiry or trial is not entitled to call for the case diary or to look at it, save for a limited purpose, it is difficult

to believe that the Legislature could have ever intended that the complainant or a third party should be entitled to call for or look at the case diary in

some other proceeding, for that would jeopardize the secrecy of the investigation and defeat the object and purpose of Section 172 and therefore,

applying the principle of that section, we should hold that the case diary is totally protected from disclosure and even the complainant or a third party

cannot call for it or look at it in a civil proceeding.

9. The learned counsel for the petitioner also relied upon the judgment of the Apex Court in the case of Naresh Kumar Yadav v. Ravindra Kumar

and Others decided on 23.10.2007 in Criminal Appeal No.1462/2007, and

brought to the notice of this Court paragraph Nos.23 and 24, with regard to, the Court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused.

10. The learned counsel for the petitioner also relied upon the judgment of the Allahabad High Court in the case of Amit Kumar and Others v. State of

U.P. and another decided on 29.05.2009 in Criminal Misc. Application No.5299/2009, and brought to the notice of this Court paragraph Nos.6 and 8,

an allegation with regard to the marriage and demand of dowry.

11. The learned counsel for the petitioner also relied upon the judgment of the Apex Court in the case of Ahmad Ali Quraishi and another v. State of

Uttar Pradesh and another reported in (2020) 13 SCC 435, and brought to the notice of this Court paragraph Nos.23 and 24, wherein, the Apex Court

held that, where criminal proceedings have been initiated by the complainant with an ulterior motive due to private and personal grudge. The principles

laid down in the judgment of State of Haryana v. Bhajan Lal reported in 1992 Supp (1) SCC 335, come to the rescue of the accused and the criminal

proceeding which has been maliciously instituted with ulterior motives, permitting such criminal proceeding to go on is nothing but the abuse of the

process.

12. The learned counsel for the petitioner referring to these judgments would vehemently contend that it is a fit case to exercise the powers under

Section 482 of Cr.P.C. and to quash the proceedings initiated against this petitioner.

13. Per contra, learned counsel appearing for respondent No.2 would vehemently contend that the petitioner is not disputing the fact that he has

received the mobile belongs to the complainant and use the said phone as evidence before the Court.

14. The learned counsel in support of his arguments, relied upon the order passed by the Kerala High Court in Crl.M.C.No.534/2016 in the case of

Dr. Joy Anto v. C.R. Jaison and another decided on 10.03.2021, and brought to the notice of this Court paragraph No.18, wherein, it is observed

that, if the pleadings filed in the court contain defamatory statements, it amounts to publication. Once a statement is filed in a Court of law, it can be

considered as published. Hence, he cannot contend that the same is not

published.

15. The learned counsel for respondent No.2 also relied upon the order passed by the High Court of Andhra Pradesh at Hyderabad in

C.R.P.No.6456/2006 in the case of Rayala M. Bhuvaneswari v. Nagaphanender Rayala decided on 20.12.2007, wherein, the Court has discussed;

Husband was recording conversation of his wife with third parties. It also shows that person who is party to conversation, when conversation is

between spouses, can tape conversation. But a person cannot tape conversation of a spouse while he or she is talking to other people. Therefore act

of tapping itself by husband of conversation of his wife with others was illegal and it infringed right of privacy of wife.

16. learned High Court Government Pleader would vehemently contend that the voluntary statement of the accused is very clear that he had handed

over the mobile belongs to the complainant to this petitioner and when such materials are available and when the petitioner has made use of the mobile

belongs to accused No.2 with regard to the defamatory contents of the photographs, it requires the investigation.

17. The learned counsel for the petitioner would vehemently contend that no publication with regard to the offences to be invoked under Section 66C

and 66E of the IT Act, 2000 and when there is no publication the invoking of the offences under the IT Rules, 2000 also will not attract.

18. Learned High Court Government Pleader would vehemently contend that the offences which have been invoked against the petitioner under the

IT Act, 2000 attract the ingredients of the offences of the IT offences attract against the petitioner. It is not in dispute that the pictures were taken

and the phone was handed over to the husband by accused No.1 and this petitioner received the same and used the same as evidence. Hence, it

requires investigation or otherwise it amounts to interfering at the pre-mature stage.

19. The learned counsel for respondent No.2, also relied upon the judgment passed by the High Court of Delhi in CM (M) 40/2019 and CM Appl.

No.1226/2019 in the case of Deepti Kapur v. Kunal Julka decided on 30.06.2020, wherein, the Delhi High Court also discussed with regard to test of

admissibility of evidence and an elaborate discussion was made with regard to scope of Section 65B of the Evidence Act and also the scope of

Sections 14 and 20 of the Family Courts Act, held that, the approach of the Family Court is required to be realistic and rational to the facts in hand

rather than technical and narrow. With regard to receiving the pictures of phone belongs to respondent in paragraph No.35, it is held that, "All

proceedings must be conducted strictly within the bounds of decency and propriety; and no opportunity should be given to any party to create a

spectacle in the guise of producing evidence. In egregious cases, the Family Court may initiate or direct initiation of legal action against a litigating

party or other person, who may appear guilty of procuring evidence by illegal means. Any party aggrieved by the production of such evidence would

also be at liberty to initiate appropriate proceedings, whether in civil or criminal law, against concerned parties for procuring evidence illegally, although

the initiation or pendency of such proceeding shall not make the evidence so produced inadmissible before the Family Court.

20. Having heard the arguments of the respective counsel, this Court has to examine the material on record. It is not in dispute that the marriage was

taken place in the year 2007 between the petitioner and respondent No.2 and also it is admitted by the petitioner herein that in the said wedlock they

were having four children and those four children were also residing along with the petitioner herein. It is the contention of the petitioner that the

respondent No.2 left the Mumbai in the year 2017 and also an allegation is made that she is having adulterous life. It is also emerged on perusal of the

complaint at the first instance of respondent No.2, it is clear that there is an adulterous relationship between respondent No.2 and accused No.1. An

incident was taken place at Bengaluru between respondent No.2 and accused No.1. It is also not in dispute that the mobile, which belongs to

respondent No.2 has been snatched by accused No.1 and also the petitioner not disputing the fact that accused No.1 called him and handed over the

same to him. It is also not in dispute that he has received the same and taken out the pictures and produced the same before the Court since there

were cases between them filed by respondent No.2 and also this petitioner has filed divorce petition before the Family Court at Mumbai.

21. The learned counsel for the petitioner is also not disputing the fact that he has handed over the same to the Court. The learned counsel for the

petitioner has produced some photographs before this Court and email correspondence in a sealed cover and those photographs and email addresses

disclose with regard to taking of nude pictures of respondent No.2.

22. Having perused Section 66E of the IT Act, 2000, it is clear that, whoever, intentionally or knowingly captures, publishes or transmits the image of a

private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment,

which includes transmitting, capturing, private area and publishes, means reproduction in the printed or electronic form and making it available for

public. No doubt, in the case on hand, it is not made as available for public but the fact that the same has been produced before the Court is not in

dispute. Section 66C is with regard to whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique

identification feature of any other person, shall be punished. In the case on hand, on perusal of the complaint, a specific allegation is made against this

petitioner also making use of the password and taking out the print from the mobile belongs to the accused No.2. It is also alleged in the complaint that

both accused Nos.1 and 2 are hand in glove with each other and colluding each other, they have committed the offences. It is settled law that if the

complaint prima facie discloses committing of cognizable offence and when the allegations are made in the complaint prima facie discloses committing

of the offence. The Court has to allow the Investigating Officer to probe and unearth the crime as held by the Apex Court in the case of

DINESHBHAI CHANDUBHAI PATEL v. THE STATE OF GUJARAT reported in 2018 (3) SCC 104, summarized the principles as to how to

deal with regard to the context of challenge to FIR. In this judgment the Apex Court has held that in order to examine as to whether factual contents

of FIR disclose any prima facie cognizable offence or not, High Court cannot act like an investigating agency and nor can exercise powers like an

Appellate Court. The question is required to be examined, keeping in view, contents of FIR and prima facie material, if any, requiring no proof. At

such stage, High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is more so, when

the material relied on is disputed. In such a situation, it becomes the job of investigating authority, at such stage, to probe and then of the Court to

examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

Once the Court finds that FIR does disclose prima facie commission of any cognizable offence, it should stay its hand and allow the investigating

machinery to step in to initiate the probe to unearth the crime in accordance with the procedure prescribed in the Cr.P.C.

23. Having perused the contention of the learned counsel for the petitioner, the offences which have been invoked do not constitute an offence against

this petitioner, Sections 66C and 66E of the IT Act, 2000, prima facie attract against the petitioner herein. I have already pointed out that the petitioner

also not disputes the taking and using of the mobile belongs to respondent No.2 as evidence before the Court of law and the Kerala High Court also in

the judgment referred supra held that if the pleadings filed in the Court contain defamatory statements, it amounts to publication. Further, it is observed

that once a statement is filed in a Court of law, it can be considered as published. In the case on hand, the very photographs which have been taken

with regard to the private area i.e., naked or undergarment clad genitals, pubic area, buttocks or female breast comes within the purview of offence

under Section 66E(c) of the IT Act, 2000. When such being the case and when the same has been made use of evidence before the Court of law, I

am of the opinion that the matter requires to be probed and investigated by the Investigating Officer.

24. The very contention of the learned counsel for the petitioner is that the complainant herself is leading the adulterous life with several men cannot

be a ground to quash the FIR registered against the petitioner herein and it requires investigation and the matter has to be probed in accordance with

law as established under the Code of Civil Procedure. Hence, I do not find any merit in the petition to invoke Section 482 of Cr.P.C.

25. In view of the discussions made above, I pass the following:

ORDER

(i) The petition is dismissed.

(ii) However, the petitioner is given liberty to approach the Court after filing of the charge sheet, if need arises.

In view of the dismissal of the main petition, I.As., if any do not survive for consideration and hence, the same stand disposed of.