

(2023) 07 DEL CK 0035

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 7121 Of 2022, Criminal
Miscellaneous Application No. 8829 Of 2023

Mohd. Amaan Malik

APPELLANT

Vs

State Govt Nct Of Delhi & Anr

RESPONDENT

Date of Decision : 05-07-2023

Acts Referred:

Constitution of India, 1950 — Article 226
Indian Penal Code, 1860 — Section 363, 366A, 376, 505
Code Of Criminal Procedure, 1973 — Section 155(2), 156(1), 161, 164, 482
Protection of Children from Sexual Offences Act, 2012 — Section 6, 42A
Prohibition of Child Marriage Act, 2006 — Section 12

Citation : (2023) 07 DEL CK 0035

Hon'ble Judges : Swarana Kanta Sharma, J

Bench : Single Bench

Advocate : Ankit Rana, Rahul Sand, Sudhir Kumar, Manoj Pant

Final Decision : Dismissed

Judgement

Swarana Kanta Sharma, J

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioner seeking quashing of FIR bearing No. 162/2021, registered at Police Station Daryaganj, Delhi for the offences punishable under Sections 363/366A/376/505 of the Indian Penal Code, 1860 ('IPC') and Section 6 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

2. The brief facts of the case are that the present FIR was registered on 29.05.2021 on the statement of victim 'A', daughter of 'N', resident of 'W', aged about 17 years. As per statement of the victim, she used to live with her mother at Daryaganj and had shifted to Wazirabad about two months prior to 29.05.2021. While she was residing at Daryaganj, she used to go to attend tuitions at Chhatta Lal Mian where she had met accused Mohd. Amaan Malik a

resident of Daryaganj, Delhi who was aged about 20 years. At the tuition centre, they had developed friendship and had started communicating with each other on mobile phone. The victim had further alleged in the complaint that in the month of March, the accused had called her at Sabzi Mandi and had taken her to a guest house at Sarai Kale Khan in his car. Thereafter, he had given her alcoholic substance and had made physical relations with her without her consent. The victim further alleged that thereafter, the accused had started blackmailing her that he will post her inappropriate photographs on the social media, and under this threat, he had taken her to the guest house at Sarai Kale Khan several times and had forcibly made physical relations with her. On 07.04.2021, she had realized that she was pregnant and had informed her mother about the same and her mother had called the accused on phone and had informed about the pregnancy. Thereafter, accused Amaan had visited her house and had threatened the victim and her mother. On 09.04.2021, he had married the victim by threatening her mother at Turkman Gate and thereafter, he had taken the victim and her mother to sign documents for marriage ceremony. Thereafter, he had started residing on rented accommodation with the victim at Wazirabad near house of her mother. After two days, he had gone missing and whenever he used to come at rented accommodation, he used to beat and molest the victim and also used to extend threats and pressurize her for abortion. When she had asked the accused to take her to her matrimonial home, he had told that he had performed the marriage only in order to get rid of her. During the course of investigation, the victim was got medically examined at LHMC Hospital and her pregnancy report was found positive. Her statement was recorded under Section 164 Cr.P.C. where she had corroborated her statement. During further investigation, her pregnancy was terminated at LHMC Hospital and the fetus was preserved. The accused was arrested on 29.05.2021. Blood samples of the accused and the fetus of the victim and blood samples of the victim were obtained and sent for DNA examination. As per DNA examination, the biological father of the fetus was found to be the accused/petitioner. During the course of investigation, the proof of marriage of victim was obtained. As per her school records, her date of birth was found to be 12.05.2004 and therefore, she was 17 years of age at the time of solemnizing of her marriage with the accused. Further, the entries from the Sagar Palace guest house were obtained. During investigation, the factum of marriage of the victim and accused was verified but Qazi Abul Khalid who had performed the marriage of the victim had expired. After conclusion of investigation, the chargesheet was filed.

3. Learned counsel for the petitioner argues that the documentary evidence in this case is contradictory to the allegations leveled by the victim. It is stated that the documentary evidence in this case falsifies the statement of victim herself and therefore, it is a fit case for quashing. It is also stated that the statement of the victim in this case itself is not trustworthy and therefore, the FIR be quashed. It is argued that it is a case of love affair and consensual relationship between the parties and the parties had got married to each other out of their own will,

and that the family of the victim was in constant touch with the petitioner. It is also stated that since both the parties are Muslims, they are governed by their personal laws for the purpose of adjudication of controversy involved in the present case. It is, therefore, stated that the facts of the present case do not disclose commission of any offence or contravention of any provisions of law.

4. It is also argued that the CDRs were not taken into consideration by the Court concerned while deciding the bail application of the petitioner and the Court had not paid attention to the romantic conversation of the parties for a long time. It is also stated that the conduct of the victim indicates her consent. It is further argued that the victim and her mother had travelled a long distance from Wazirabad to the house of the Qazi situated at Turkman Gate with the accused for signing the papers of the ceremony of marriage without raising any alarm. It is, therefore, clear that the mother and the daughter both had given their consent to enter into marital relationship with the petitioner. It is also stated that the statement of witnesses of the Nikahnama were recorded under Section 161 Cr.P.C. which will also prove that the Nikah was performed without any coercion or force. It is stated that after solemnization of the marriage of the petitioner, both the parties had started living together at the rented accommodation. It also stated that the certificate of the concerned school does not relate to the prosecutrix and is of a different person of identical name of another house. It is also stated that the documents of age are not connected with the victim. It is further argued that the Manager of the guest house where the alleged offence had taken place also revealed that the entries related to the register of the guest house relate to another name and the documents provided to the guest house owner are also not of the present petitioner.

5. It is further argued that as per Muslim Law, the marriage between the parties is valid as the victim has already attained the age of 15 years i.e. age of menarche. It is also argued that the family of victim was not happy with the marriage, therefore, the petitioner has been falsely implicated in the present case. It is also stated that the marriage between the victim and the accused was solemnized earlier with the consent of the victim's family and no complaint was lodged with any authority for two months after the marriage. It is also stated that as per several judgments of the Hon'ble Supreme Court and this Court, marriage between two muslims according to Muslim rites where the age of the victim is above 15 years, is not an offence and the provisions of POCSO Act will not be attracted. It is, therefore, prayed that the present FIR be quashed.

6. Learned APP for the State, on the other hand, submits that the case is pending for arguments on charge before the learned Trial Court and the victim has supported the case of prosecution in her statement recorded under Section 164 Cr.P.C. It is also stated that in this case, the consent of the minor is no consent in the eyes of law. It is also stated that the physical relations were made forcibly by the accused with the victim which is mentioned in the statement under Section 164 Cr.P.C. and in the FIR, and thus, the petition be dismissed.

7. This Court has heard arguments on behalf of both the parties and has perused the material available on record.

8. Since the petitioner has approached this Court seeking quashing of the FIR registered against him, it is pertinent to refer to the principles that govern quashing of FIRs.

9. In *State of Haryana and Ors. v. Ch. Bhajan Lal and Ors.* 1992 SCC (Cri) 426, the Hon'ble Apex Court had laid down the principles to be considered while quashing FIRs. The same are reproduced as under for reference:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. The Hon'ble Supreme Court in *Neeharika Infrastructure v. State of Maharashtra* 2021 SCC OnLine 315, has analysed the precedents and culled out the relevant principles that govern the law on quashing of FIRs under Section 482 of the Cr.P.C. The Court has held as under:

"57. From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of *Khawaja Nazir Ahmad* (supra), the following principles of law emerge:

- i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;
- ii) Courts would not thwart any investigation into the cognizable offences;
- iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;
- iv) The power of quashing should be exercised sparingly with circumspection, in the 'rarest of rare cases'. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);
- v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;
- vi) Criminal proceedings ought not to be scuttled at the initial stage;
- vii) Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;
- viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the abuse of the process by Section 482 Cr.P.C.
- ix) The functions of the judiciary and the police are complementary, not overlapping;
- x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

- xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;
- xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;
- xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;
- xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint; and
- xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR."

11. In the present case, there are specific allegations in the FIR as well as in the statement recorded under Section 164 Cr.P.C. that the present accused/petitioner had taken the victim, who was a minor at the time of alleged incident, to a guest house at Sarai Kale Khan and had committed sexual assault upon her. There are further specific allegations that he had prepared her inappropriate photographs and videos and had constantly threatened her that he will post them in the social media platform. Under the said threat, he had continued to sexually assault her and she had become pregnant. It is not in dispute that due to this sexual assault in the year 2021, the victim had conceived and was pregnant at the time of registration of present FIR. It is the case of prosecution that the victim's mother had later come to know from the victim that she was pregnant as she had been repeatedly sexually assaulted by the petitioner under threat of posting her inappropriate photographs on the social media platforms. It is therefore, prima facie clear that the sexual assault had taken place in the year 2021, whereas due to social pressure which exists in many societies including India as the victim had become pregnant, the mother of victim had given in to the pressure of the

accused to get her daughter married to him as he was the biological father of the child that the victim was pregnant. Throughout this entire period, it was not in dispute that the victim was minor. The Nikahnama dated 09.04.2021 also proves that though the Nikah had taken place on 09.04.2021 that is much after the allegations of sexual assault upon the victim, victim was still a minor at the time of Nikah and had not attained the age of majority.

12. It is also the case of the petitioner that the parties in the present case will be governed by the Muslim personal laws and the POCSO Act will have no applicability in the present case. In this regard, this Court notes that this issue has been a contentious one and remains at the heart of controversy in several cases decided by the High Courts across the country. The Hon'ble Karnataka High Court in *Aleem Pasha v. State of Karnataka* 2022 SCC OnLine Kar 1588 observed that the POCSO Act, being a special legislation to protect children from sexual offences, will have an overriding effect on Muslim personal law. Earlier also, similar observations were made by Hon'ble Karnataka High Court in *Rahul v. State of Karnataka* 2021 SCC OnLine Kar 12728. Recently, the Hon'ble Kerala High Court in *Khaledur Rahman v. State of Kerala & Anr.* 2022 SCC OnLine Ker 5833 also held that the marriage between Muslims under personal law is not excluded from the scope of the POCSO Act and if one of the parties to the marriage is a minor, irrespective of the validity or otherwise of the marriage, offences under the POCSO Act will apply. The Court, while referring to Section 42-A of the POCSO Act observed that the POCSO Act will prevail over personal laws and customary laws. To the contrary, this Court in *Fija v. State (NCT of Delhi)* 2022 SCC OnLine Del 2527 had observed that where the accused, who was a Muslim, had sexual intercourse during the course of marriage with his wife who was a minor Muslim, he was not guilty under the POCSO Act as the personal law has an overriding effect on special laws. Further, the Hon'ble Punjab and Haryana High Court in case of *Gulam Deen v. State of Punjab* 2022 SCC OnLine P&H 1485 had taken a view that the marriage of a Muslim girl is governed by Muslim personal law, and a Muslim girl above 15 years of age is competent to enter into marriage. However, in Special Leave Petition (Criminal) No. 26834/2022 filed by National Commission for Protection of Child Rights (NCPCR) against the said decision, the Hon'ble Apex Court had agreed to examine the question if a minor Muslim girl can marry on attaining puberty. Similarly, the Hon'ble Punjab and Haryana High Court in *Javed v. State of Haryana* CRWP-7426-2022(O&M) also had held that Muslim female aged 15 years and above could marry a person of her choice on her own willingness and consent, and such a marriage would not be void in terms of Section 12 of the Prohibition of Child Marriage Act 2006. However, vide order dated 13.01.2023 in Special Leave Petition (Criminal) No. 35376/2022 filed by NCPCR, the Hon'ble Apex Court ordered that the judgment in case of *Javed* (supra) should not be relied upon as a precedent in any other case. In a nutshell, as on date, the issue as to whether a girl attaining age of majority as per puberty after 15 years of age would be governed by the provisions of the POCSO Act/Child Marriage Restraint Act or not, is pending for

consideration and adjudication before the hon'ble Apex Court.

13. Thus, there are conflicting judgments on the point as to whether a minor who is married under the Muslim Law will be governed by the provisions of the personal law or the POCSO Act and the Child Marriage Restraint Act. In any case, in the present case, the allegations of rape are not after the marriage but before the marriage between the parties, and this Court is not going into the aspect of the validity of marriage of the present petitioner with the victim. Learned counsel for petitioner had also argued that the fact that the parties were married and the mother of the girl had participated in the Nikah and had signed Nikahnama should become the ground for holding that it was not only consensual relationship even before the Nikah was performed, but since the parties were married, it conclusively proves that it was a consensual relationship. Even if this Court will consider this argument to be correct, this Court again reaches the same conclusion that when the alleged offence had taken place, even if that had taken place with the consent of the minor, which she denies completely and states that the same was under threat, pressure and intimidation, there is no ground made out for quashing of the FIR as the consent of a minor was of no consequence for the purpose of sexual relationship.

14. In any case, in the present case, the minor victim specifically denies that sexual relationships were made with her consent and explains the circumstances in which she was first sexually assaulted and thereafter was repeatedly sexually assaulted under threat of making her inappropriate photographs public. In such circumstances, the present case is not covered either by the case of Bhajan Lal (supra) or Neeharika Infrastructure (supra) and on merits of the case, this Court cannot come to the conclusion that the allegations against the petitioner are absurd in nature or improbable or that the offence alleged could not have taken place.

15. However, this is an alarming scenario that serves as a stark reminder. In certain instances, following a sexual assault, a disturbing pattern emerges where the accused marries the victim, seemingly to evade criminal charges, only to promptly abandon the victim once the FIR is quashed or bail is secured. Shockingly, numerous cases have come to light where the accused deceitfully enters into a marriage under the guise of willingness, particularly when the victim becomes pregnant as a result of the assault and subsequent DNA testing confirms the accused as the biological father, and even after solemnization of marriage and subsequent immunity from criminal prosecution, the accused heartlessly deserts the victim within a few months.

16. Considering the overall facts and circumstances of the case, this Court is not inclined to use its inherent power under Section 482 Cr.P.C. for the purpose of quashing of FIR in question. However, since the arguments on charge are yet to be heard, the contentions raised before this Court can be raised before the learned Trial Court which will be dealt as per law.

17. Accordingly, the present petition stands dismissed along with pending application.

18. It is, however, clarified that observations made hereinabove shall have no bearing on the merits of the case during trial.

19. The judgment be uploaded on the website forthwith.