

(2018) 02 J&K CK 0065

In the Jammu And Kashmir High Court

Case No : Pet u OF s 561-A Cr.P.C No. 64 OF 2016

MOHD. MUSHTAQ AND ORS

APPELLANT

Vs

STATE OF JAMMU & KASHMIR AND OTHERS

RESPONDENT

Date of Decision : 09-02-2018

Acts Referred:

Jammu and Kashmir Code of Criminal Procedure, Act, 1989 — Section 164A, 173(3), 178(8), 561A

Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 34, 109, 148, 149, 302, 343, 366, 376, 380

Indian Penal Code 1860 — Section 120B, 406, 420, 426, 467, 468, 471, 477B

Code of Criminal Procedure, 1973 — Section 313, 178(8)

Citation : (2018) 02 J&K CK 0065

Hon'ble Judges : JANAK RAJ KOTWAL

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. This is a petition under Section 561-A of the J&K Code of Criminal Procedure, Svt. 1989 (for short the Code).

2. Background facts are these. On 08.12.2011, Jamshed Begum (hereinafter to be referred as the informant) lodged a written information at Police

Station, Rajouri alleging inter alia that in the night intervening 2nd and 3rd December, 2011, one Mohd. Kabir (hereinafter to be referred as the

accused) and nineteen others abducted her daughter (hereinafter to be referred as the victim) from her house with the intention of committing rape on

her. On this information police registered offences under Sections 366, 380 and 109 RPC as FIR No. 652/2011 and took up the investigation. The

victim was recovered from the custody of the accused. In her statement recorded under Section 164-A of the Code, the victim revealed that besides

the accused, persons, namely, Mohd. Mushtaq, Mohd. Younis, Mohd. Arif, Mohd.

Alyas and Mst. Naseema Akhter (herein petitioners) were involved in her abduction and commission of rape on her. After completion of the investigation, police, however, submitted charge-sheet under Sections 366, 376 and 343 RPC against the accused alone, which came to be committed for trial to the court of learned Sessions Judge, Rajouri (with additional charge of Sessions Judge, Rajouri). The informant approached this court in OWP No. 104/2012 with her grievance that the persons named by the victim were not arraigned in the FIR by the police. That petition was disposed of by this court vide order dated 26.02.2015 with the consensus of counsel on each side by issuing a direction to the trial court to consider and decide the application of the prosecutrix (victim) in regard to complicity of the persons actually involved in the occurrence and further that the learned trial court may if deemed appropriate direct further investigation in the matter by a high ranking police officer not below the rank of Superintendent of Police.

3. Learned trial court vide its order dated 09.04.2015 after having regard to the facts of the case and statement of the victim recorded under Section 164-A of the Code noticed that the victim has levelled serious allegation of abduction and rape against herein petitioners and another but the chargesheet has been filed against one person only and therefore, held that investigation was not conducted according to well established procedure of law and returned the charge sheet to SSP, Rajouri with a direction to further investigate the case in terms of Section 173(8) of the Code by an officer not below the rank of Superintendent of Police. Operative part of this order is extracted:

“In view of what has been discussed above and as per direction of Hon’ble High Court, the challan is returned to SSP, Rajouri with direction to further investigate in the matter in terms of Section 173(8) Cr.P.C by a high ranking Police Officer not below the rank of Superintendent of Police (SP). The investigation be completed expeditiously preferably within 30 days from the date of receipt of order and challan. The complete challan be produced thereafter. Office to send the challan along with copy of order to SSP, Rajouri through APP for compliance.”

4. Pursuant to and in compliance with the order dated 09.04.2015 passed by the learned trial court further investigation in the case was conducted by

the ASP, Rajouri and after further investigation police submitted additional (supplementary) charge-sheet No. 194-A/2014 under Sections 343, 366,

376 and 109 RPC against petitioners Mohd. Arif, Mohd. Mushtaq and Mohd. Elyas, under Sections 343, 366 and 109 RPC against petitioner Mohd.

Younis and under Section 366/109 RPC against petitioner, Naseem Akhter.

5. In this petition under Section 561-A of the Code petitioners have invoked inherent jurisdiction of this Court to seek quashing mainly of FIR No.

652/2011 (supra), order dated 09.04.2015 passed by the learned Additional Sessions Judge, Jammu, the supplementary charge-sheet submitted by the

police and all the proceedings out of the supplementary charge-sheet.

6. Grievance of the petitioners primarily is that they have been falsely implicated. It was demonstrated by the learned counsel for the petitioners, Mr.

Abhinav Sharma, Advocate, that the younger brother, Ali Aksar, of petitioner No. 3 was killed by Mohd. Afzal Khan, the father of the victim and his

party. In this regard FIR No. 367/2012 under Sections 302/34, 148 and 149 RPC (annexure-A) was registered with the Police Station, Rajouri on

05.10.2010 and charge sheet was filed against eleven persons. All the petitioners were prosecution witnesses in that case, petitioners 3 and 4 being

eye witnesses. The statement of the victim recorded under Section 164-A of the Code dated 12.12.2011, which is the sole basis of the learned trial

court ordering further investigation in the case and filing of the additional chargesheet against the petitioners, is false and fabricated inasmuch as the

victim was tutored by her father, brother and other relatives to make a false statement against the petitioners to deter them from pursuing the case of

murder and making statements against father of the victim and her accomplice.

7. Learned counsel for the petitioners argued primarily that learned trial court has committed illegality by returning the original charge sheet, filed

against the accused to the police and ordering further investigation in the matter. Learned counsel argued that trial court after taking cognizance has

no jurisdiction to return the charge-sheet filed by the investigating agency and order further investigation though it has the power to arraign any person

or persons as additional accused and call any person or persons as additional witnesses. In support of his argument, learned counsel relied upon

Supreme Court judgments in *Amrutbhai Shambhubhai Patel v Sumanshai*

Kantibhai Patel and others, (2017) 4 SCC 177. Learned counsel also assailed the veracity of the statement under Section 164-A of the Code made by the victim by pointing out that none of the petitioners were named in the list of the nineteen persons named by the informant at the time of lodging of the FIR, who allegedly were involved in abduction of the victim from her house and argued also that the learned Magistrate had not recorded the requisite certificate while recording the statement of the victim under Section 164-A of the Code. Learned counsel, thus, argued that ordering further investigation on the statement of the victim as also filing of the charge sheet against the petitioners and their trial on the basis of the said statement is misuse of the process of the court and a great injustice to the petitioners, which makes out a strong case for showingÂ indulgence by this Court by quashing the order dated 09.04.2011 passed by the learned trial court and all subsequent proceedings including filing of additional charge sheet against the petitioners and their trial.Â

8. Per contra, Mr. B. L. Chatta, learned counsel for respondent No. 4 as also learned Government Advocate opposed the petition. The bottom line of submissions made by them was that the earlier charge-sheet was filed by the police in utter disregard to the statement of the prosecutrix so learned trial court had no option than to direct further investigation in the case and the error committed at an earlier stage was rectified by the police by filing the supplementary charge-sheet.Â

9. Under Section 173(2) of the Code the police (investigating agency) after and as soon investigation in a case (FIR) is completed submits a report to the court of the competent Magistrate in a prescribed form. This report when it forwards a person (or persons) for trial for commission of an offence or offences is called as charge-sheet and when it reports closure of the investigation without forwarding any person for trial for commission of any offence is called the final report. As a general principle, investigation of a case and thereby role of the investigating agency comes to an end with filing of the report under Section 173 (2) of the Code. However, sub Section (8) of Section 173, which has been inserted in the Code vide amendment Act XXXVIII of 1978,carves out an exception to the said general principle as it empowers and permits the police to continue with further investigation, if the need be, even after filing of the report under sub-Section (2). Sub Section

(8) reads:

173(8) Nothing in this Section shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-Sections (2) to (6) shall as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-Section (2).

10. Section 173(8) of the Code on its plain reading as a matter of fact preserves the power of the police (investigating agency) not only to investigate the case further after filing the report (final report or charge-sheet) under sub-Section (2) but also to file additional (supplementary) charge-sheet in the case.

11. In this case learned trial court ordered the further investigation not on the request of the investigating agency but on the application of the victim pursuant to and in compliance with the order dated 26.02.2015 passed by this Court in OWP No. 104/2012 after the charge-sheet against the accused alone was filed by the police and cognizance was taken by the trial court. Contextually, it is important to restate and note that the informant had earlier approached this Court in OWP No. 104/2012 with a grievance that the persons named by the victim in her statement were not arraigned as accused in the FIR, while as some persons who were not named by her were so arraigned. When that writ petition came up before this Court on 26.02.2015, the learned AAG informed the Court that charge-sheet in the case has been filed and sought disposal of the petition by permitting the petitioner to move an application before the learned trial court with regard to her grievance. Learned writ court, therefore, with the consensus of learned counsel on each side disposed of that petition inter alia with a direction to the trial court to decide the application of the prosecutrix (victim) and order further investigation in the case, if deemed appropriate. The operative part of the order passed by this Court on 26.02.2015 is reproduced:

Accordingly, in view of the statement of learned counsel for the parties, the petition is disposed of with a direction to the learned Trial Court to

consider and decide the application of the prosecutrix with regard to complicity of accused named by her as being actually involved in the offences

committed against her. Learned Trial Court is directed to decide the matter as expeditiously as possible preferably within a period of four weeks for

the date of receipt of certified copy of order. The learned Trial Court may if deemed appropriate direct further investigation in the matter by a high

ranking Police Officer not below the rank of Superintendent of Police (SP). Needless to mention that any observation made in this order shall not be

taken as a reflection upon the merits of the case.â??

12. The primary and important question, thus, arising for consideration is; whether after charge-sheet under section 173(2) of the Code has been filed

and cognizance taken by the Court, the trial court or any Magistrate has the power to order further investigation in the case under section 173(8) of

the Code on the request of the informant or the victim of the offence or a relative of the deceased, in a case of death?Â

13. The question so arising, however, is no more res integra as it has a straight reply in Amrutbhai Shambhubhai Pate's case(supra).Â In that case the

First Information Report (FIR) was registered on the basis of a report lodged by the appellant therein against therein respondents under Sections 406,

420, 426, 467, 468, 471, 477B and 120B of the Indian Penal Code (IPC). After the charge-sheet was submitted in the court, charges were framed by

the trial court against the respondents, trial was conducted and statements of respondents were recorded under Section 313 Cr.P.C. (342 of State

Code). At that stage, the trial court on the application of the informant therein directed further investigation in terms of Section 173(8)Cr.P.C. The

question taken up by the Supreme Court in that case was :

â??whether such a power is available suomoto or on the prayer made by the informant, in absence of request by the investigating agency after

cognizance has been taken and the trial is in progress after accused has appeared in response to the process issued is the issue seeking scrutiny

hereinâ??.

14. The Supreme Court after overall survey of law and earlier pronouncements of the Court has held that no such power under Section 173 (8) of the

Code is available to the court after cognizance has been taken on the basis of earlier report and accused has entered appearance.Â Paragraphs 47

and 48 of the judgment are extracted:

49. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo moto nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.Â Â

50. The un-amended and the amended sub Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment significantly had limited its proposal to the empowerment of the investigating agency alone.Â??

15. The Supreme Court has further held that the Magistrate, once cognizance is taken and the accused person appears pursuant thereto, would be bereft of power to direct further investigation either suo moto or acting on the request of complainant/informant. Honâ??ble Court further held that â??had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) Cr.P.C. would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereofâ??.Â

16. Legal position is, thus, clear too. In terms of section 173(8) of the Code, even after the charge-sheet under Section 173(2) of the Code has been filed and cognizance taken by the court, the police/investigating agency has the

power to continue with the further investigation of the case, desirably after informing the court which is seized of the matter, and file an additional/supplementary charge-sheet, but no further investigation at that stage can be ordered by the court suo moto or on the request of the informant, victim, or a relative of the victim, in a case involving death of a person. It would, however, be worthwhile to say here that trial court has not been rendered without jurisdiction and helpless to do anything even on noticing that some other person(s) might be involved in commission of an offence or an important piece of evidence, though available, has not been collected or cited by the investigating agency. Under Section 351 of the Code (Section 319 of the Central Code) trial court has the power to arraign any person as accused for the purpose of trial even if he has not been sent for trial by the investigating agency and Section 540 of the Code (Section 311 Central Code) empowers the trial court to summon and examine any person as witness even if he is not cited as a business by the investigating agency. It is thus open for the trial court to exercise power under Section 351 or Section 540 of the Code, but the trial court cannot order further investigation under Section 173(8) as the power under this provision is vested in the police/investigating agency alone. This aspect is sufficiently indicated in the following observation of the Supreme Court in Amrutbhai Shambhubhai Patel's case (supra):

Not only such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of Sections 311 and 319 Cr.P.C, whereunder any witness can be summoned by a court and a person can be issued notice to stand trial at any stage, in a way redundant.

17. In view of the ratio of the judgment in Amrutbhai Shambhubhai Patel's case (supra) the direction for further investigation issued by the trial court and filing of additional (supplementary) charge-sheet against the petitioners could not have sustained. However, the ratio of the judgment has to be applied with a distinction in this case as the further investigation was ordered by the trial court under the direction of this Court passed in OWP No.

104/2012. As pointed out hereinabove also, in OWP No. 104/2012, learned writ court, while disposing of the writ petition by virtue of order dated

26.02.2015 had inter alia directed the trial court to direct further investigation in the matter, if deemed appropriate. This direction was complied with by

the learned trial court vide order dated 09.04.2015 after the trial court found that the persons (petitioners) named by the victim have been left out while

filing charge against one person, namely, Mohd. Kabir. Contextually, it is important to note that the judgment in Amrutbhai Shambhubhai Patel's

case (supra) has come later than the order passed by the writ court in OWP No. 104/2012.

18. The other ground taken up in this petition relates to veracity of the statement of the victim recorded under Section 164-A of the Code and the

manner in which the said statement was recorded by the Magistrate. Such questions, however, cannot be taken up and adjudicated upon in a petition

under Section 561-A of the Code and need to be considered after trial of the case.Â

19. For all that said and discussed above, this petition is dismissed. It shall, however, remain open for the petitioners to work out their remedy in

respect of order dated 26.02.2015 (supra) passed in OWP No. 104/2012, whereby trial court was directed to direct further investigation in the case on

the application of the victim if deemed appropriate.

20. Disposed of.