

(2018) 10 J&K CK 0054

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No. 514 Of 2018, Bail Application No. 119, 122 Of 2018

Naresh Kumar @APPELLANT@Hash State Of Jammu & Kashmir

Date of Decision : 17-10-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 156, 161, 164A, 169, 482, 488, 561A
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 34, 306, 366, 376D

Citation : (2018) 10 J&K CK 0054

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : A. K. Sawhney, Raman Sharma

Final Decision : Dismissed

Judgement

1. In the bail applications, both the petitioners/accused persons seek grant of bail in the same FIR. Since in the bail applications, both the accused persons are involved in the same FIR, and petition for quashing of FIR has been filed by one of the accused persons namely Naresh Kumar, so I propose to dispose of these bail applications along with petition under Section 561-A (CRMC) vide common order.

CRMC No.514/2018

2. In this petition filed under Section 561-A of the Code of Criminal Procedure, the petitioner-Naresh Kumar seeks quashing of FIR No.140/2018 dated 27.07.2018 registered at Police Station, Reasi under Section 366/34 RPC against the petitioner on false and flimsy grounds by abusing the process of law.

3. In the petition, it has been stated that the petitioner has not committed any crime whatsoever and it seems that a girl has gone missing or eloped or escaped and the family has lodged an open/general report, without naming the petitioner or anyone but the police has detained the petitioner without any rhyme or reason as neither the petitioner has any role in the escape of the girl nor has committed any crime. It is also stated that merely on suspicion the petitioner has been

arrested since 04.08.2018 and the petitioners' family has not been given any grounds of arrest, neither any arrest memo prepared nor copy was provided to the petitioner or his family, therefore, violating the celebrated judgment in D. K. Basu's case. The petitioner is innocent and has not committed any crime and has been falsely implicated in this false and frivolous case by the respondent. It is further contended that strangely, the girl who is missing has not been found, then how the respondent has concluded that the petitioner is suspect or accused and added other offences. At the most it could be a case of suspicion for which the petitioner has been in custody from last several days and cooperated with the police and is ready for any other sort of cooperation but the petitioner is not at all involved in kidnapping or eloping of the girl. It is also stated that the allegations levelled in the FIR are totally false. As a matter of fact, if a girl has gone missing, there has to be a missing report and without that an FIR for kidnapping cannot be registered. Here the petitioner has been arrested and there being no information or evidence of kidnapping against him. It is also stated that may be she escaped out of her free volition or even if kidnapped, in all these situations the impugned FIR is illegal and cannot sustain as there is not even an iota of evidence against the petitioner.

4. The petitioner has filed the instant petition on the following grounds:

(a) Because Section 561-A of the Cr.P.C categorically saves the inherent power of High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. In the instant case it is pertinent in the ends of justice and to prevent an abuse of the process of law that the impugned FIR be quashed.

(b) Because High Court is empowered to quash a criminal proceeding where it 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. The Courts are also empowered to quash in case where the allegations in the FIR even if taken at their face value do not satisfy the ingredients of offence complained therein like in the present case. Reliance in this regard is placed on the decision of State of Haryana v Bhajan Lal (1992 AIR 604).

(c) Because the present FIR is a result of abuse of the process of law and unfair and lackadaisical and unprofessional investigations and violation of the Police Rules and Apex Court Judgment.

(d) Because the complaint/FIR is just to harass and blackmail the petitioner and to ensure that the petitioner faces harassment and is defamed.

(e) That the FIR is against the canons of law as settled by the Hon'ble Supreme Court in number of judgments. Same constitutes abuse of the process of law and causes miscarriage of justice.

(f) That the allegations in the FIR are improbable and not made out at its face

value and self contradictory. The girl has not been found but the respondent had lodged abetment to suicide and rape also, unknowing of any information or credible evidence till now.

5. Learned counsel for the petitioner has submitted that the instant case is squarely falls in the categories as provided by the Hon'ble Apex Court in State of Haryana and others vs Ch. Bhajan Lal and others reported in 1992 AIR 604.

BA Nos.122/2018 & 119/2018

6. In these bail applications, the petitioners have stated that the respondent has arrested the petitioners on 04.08.2018 & 24.07.2018 respectively in connection with some false FIR No.140/2018, registered at Police Station Reasi and since then the petitioners are under arrest. It is further stated that the petitioners have not committed any crime whatsoever and it seems that a girl has gone missing or eloped or escaped and the family has lodged an open/general report, without naming the petitioners or anyone but the police has detained the petitioners without any rhyme or reason as neither the petitioners have any role in the escape of the girl nor have committed any crime. It is also stated that merely on suspicion the petitioners have been arrested since 04.08.2018 /24.07.2018 and the petitioners' family has not been given any grounds of arrest or any arrest memo prepared or copy provided to the petitioners or family, therefore, violating the celebrated judgment in D. K. Basu's case. The petitioners are innocent and have not committed any crime and have been falsely implicated in this false and frivolous case by the respondent. It is further contended that strangely the girl, who is missing has not been found, then how the respondent has concluded that the petitioners are suspect or accused and added other offences. At the most it could be a case of suspicion for which the petitioners have been in custody from last several days and cooperated with the police and are ready for any other sort of cooperation but the petitioners are not at all involved in kidnapping or eloping of the girl. The respondent without application of mind and without preliminary inquiry registered the FIR. It is further contended that the petitioners undertake to cooperate with the police and also undertake to abide by all conditions imposed by the Court, the petitioners shall not tamper any evidence and shall not try to win over any witnesses. It is, therefore, prayed that the petitioners may kindly be released on bail in case FIR No.140/2018 registered at Police Station, Reasi under Section 366/34 RPC.

7. During course of the arguments, learned counsel for the petitioners, in support of his arguments, has relied upon the case law on bail as held by the Apex Court in D. K. Basu: Ashok K. Johari Vs. State of West Bengal and others 1996 (4) Crimes 233; CRL.A No. 578 of 2012 of Kerla High Court in case titled Ratheesh v State of Kerala DOD 13.01.2017; BAIL APPLN. No. 311/2013 in case titled Rohit Chauhan v State NCT of Delhi DOD 22/5/2013 (Delhi High Court); and Criminal Appeal no. 13/2016 (arising out of SLP(Crl.) No.4896 of 2015) in case titled Tilak Raj v. The State of H.P. (Supreme Court of India) DOD 06.01.2016.

8. On the other hand, learned State counsel has filed objections stating therein that investigation is at initial stage; petitioners have committed heinous offence due to which girl has committed suicide; that petitioners are involved in gang rape and abetment to suicide.

9. Heard considered the arguments and law on the subjects in detail.

10. Brief facts of the case as are evident from police report and C/D file are that on 24.07.2018, one Abdul Rashid S/o Abdul Gani, caste-Kashmiri Sheikh R/o Vijaypur, Reasi reported at Police Station Reasi with a written application stating therein that he is brother of late Bahar Din and uncle (chacha) of Kulsum Akhter D/o Lt. Bahar Din Caste-Kashmiri Sheikh R/o Talwara. On 18.07.2018 at about 02 p.m. his brother's daughter namely Kulsum left Jammu for Talwara, Reasi, but neither she reached her native house at Talwara nor at his uncle's house at Vijaypur, whose whereabouts are not known till date. On this, a missing report was entered in the daily diary of P/S Reasi vide DDR No.39 dated 24.07.2018 and the search was started. It is further stated that during the search of the missing girl, on 27.07.2018, the complainant stated that, it has come to his knowledge that the accused persons namely Pankaj Khajuria S/o Dev Raj Sharma R/o Talwara Zero Morh, Naresh Kumar S/o Dewan Chand R/o Talwara Zero Morh and Paramjeet Singh S/o Kapoor Singh R/o Gran Morh with common and criminal intention kidnapped his daughter from Baradari and took her away in an unknown place. On the statement of complainant, a case FIR No.140/2018 u/s 366/34 RPC was registered at Police Station, Reasi and investigation of the case was taken up by Inspector Ashwani Kumar SHO, Police Station, Reasi himself. During the course of investigation, I.O recorded the statements of the complainant and one Abdul Rashid S/o Mohamadu caste-Kashmiri Sheikh R/o Talwara u/s 161 CrPC. On their statements, I.O visited the spot at Baradari Bridge, prepared the site plan of place where from the daughter (victim) of complainant was kidnapped on a Motorcycle and also got the photographs of the place of occurrence. Thereafter, the accused persons namely Pankaj Khajuria S/o Dev Raj Sharma R/o Talwara Zero Morh & Paramjeet Singh S/o Kapoor Singh R/o Gran Morh were arrested and seized two mobile phones from the possession of accused Pankaj Khajuria. During questioning the accused Pankaj Khajuria disclosed that he had a love affair with Kulsum Akhter and had promised to marry her and thought that Kulsam Akhter had gone to the house of her elder sister at Nagrota since last 18/20 days. On 18.07.2018, he took the advantage of Kulsam Akhter's emotions, sentiments, feelings and called her at Baradari. On the same day in the evening, when she reached at Baradari, Pankaj Khajuria with the help of his friend namely Naresh Kumar S/o Dewan Chand R/o Talwara kidnapped her and took her away to his newly under construction house at Talwara on motorcycle bearing registration no. JK02A-2180, where Pankaj Khajuria and his friend raped her turn by turn and after this happening Kulsam Akhter felt perturbed and she complained to Pankaj that "this is not fair, since he had betrayed her and she is unable to show her face to anyone in the society and said that instead of living shameful life it's better to commit suicide". Thereafter,

she went to Baradari Bridge, called Pankaj Khajuria and said that "she is standing on Baradari Bridge and is going to jump over the bridge into river Chenab". Pankaj Khajuria replied that he doesn't care about it. Pankaj Khajuria called his friend namely Rahul to check whether Kulsam Akhter is virtually standing on the Baradari Bridge or not and he after checking replied that she is standing on the middle of the bridge and talking on mobile phone. On this, accused Pankaj Khajuria along with co-accused Naresh Kumar immediately came on the bridge to check, but could not find her. Pankaj Khajuria further disclosed that while raping her twice, he had used two condoms and his friend Naresh Kumar had used one, one of which he threw on the spot and other he threw on the road side. He further disclosed that the sim which he used to call Kulsam Akhter was of his friend Paramjeet Singh S/o Kapoor Singh R/o Gran Morh, which he had borrowed two months back. It is further stated that on the disclosure of Pankaj Khajuria I.O along with accused went on spot in newly under construction house of the accused Pankaj Khajuria at Talwara, got conducted the photography of the scene of crime prepared site plan and seized/sealed two used condoms from the spot and one of the used condom which was thrown by accused Pankaj on the road side could not be recovered, despite of all best possible efforts. Motorcycle bearing registration No.JK02A-2180 used in the commission of the offence was also seized as evidence. Accused further disclosed that there are certain voice calls recording present in one of the seized phone. Thereafter, the mobile of accused person was sent to cyber cell DPO Reasi for technical analysis and it was found that the accused had saved the number of the victim in his mobile as "Talwara jugad" and had called his friend Paramjeet Singh on 18.07.2018 i.e., the day of occurrence and the voice call recording confessing the crime was also present in the phone. The same was sought and seized in the shape of DVD for further technical comparison by experts of CGSL Chandigarh. The I.O also sought and seized the call details of accused Pankaj Khajuria, Naresh Kumar and kidnapped girl Kulsam Akhter from cyber Section DPO Reasi. During the course of investigation, I.O got recorded the statements of material witnesses u/s 164-A Cr.P.C. before JMIC at Reasi and also arrested the other accused namely Naresh Kumar S/o Dewan Chand R/o Talwara. The exhibits already seized/sealed from the scene of crime were got resealed through executive Magistrate 1st Class Reasi. The blood samples of both the accused were obtained in presence of a Magistrate and sent for matching of DNA profile with the seized condoms from the scene of crime. In light of the above circumstances, as per the statement u/s 164-A Cr.P.C. and material witnesses, I.O. added the offence u/s 376-D/306 RPC in the case.

11. During the course of investigation, the involvement of accused Paramjeet Singh could not be established, so his name was dropped by giving the benefit of Section 169-Cr.P.C. As Paramjeet was a material witness as well as a witness of extra judicial confession, I.O firstly got his statement video graphed in presence of Magistrate and then got recorded his statement u/s 164-A Cr.P.C. before JMIC Reasi. I.O got recorded the vice sample of the accused Pankaj Khajuria S/o Dev

Raj R/o Talwara in the presence of an Executive Magistrate 1st Class, Reasi. The same has been sent to CFSL, Chandigarh for comparison purpose with the suspected call voice recording extracted from the seized mobile phone of the accused. The extra judicial confession made by the accused Pankaj Khajuria with his friend Samriti Atri on mobile phone has also been got recorded u/s 164-A Cr.P.C. in the Court of law and the mobile phone along with sim given by the accused Pankaj Khajuria to his friend Samriti Atri has also been seized as a piece of evidence. During the course of investigation, it has come to fore that the kidnapped girl might have jumped over the Baradari Bridge into River Chenab but despite of all best possible efforts, the victim could not be traced in this regard, the help of SDRF Reasi has also been sought to search the victim in the Chinab river. A look out notice has also been published in the daily news paper

"Daily Excelsior". But till date, the victim could not be traced.

12. From bare perusal of allegations leveled in FIR and facts which have emerged during investigation, cognizable offences of serious in nature have been made out; the investigation so far has been conducted, prima facie, shows involvement of petitioners in commission of crime. The disputed question of facts cannot be appreciated for quashing the FIR. Police has statutory duty to investigate the cognizable offences in terms of section 156 of C.P.C; this duty cannot be scuttled, while exercising jurisdiction under section 561-A Cr.P.C. The defense of accused cannot be considered at this stage. The FIR need not be encyclopedia of all relevant facts and more incriminating material will be unfolded only during investigation. FIR cannot placed on the same pedestal as the charge; in case a FIR showing facts which makes out cognizable offence is nipped in the bud even before the entire facts are unraveled , incalculable harm might be caused by depriving the police of their right to collect evidence. It is not the case of petitioners that there is some legal bar in law in investigating the matter.

13. In 2008 (3) SCC 753 in case titled Som Mittal v. Govt. of Karnataka, it has been held as under:-

"(10) In a catena of decisions this Court has deprecated the interference by the High Court in exercise of its inherent powers under Section 482 of the Code in a routine manner. It has been consistently held that the power under Section 482 must be exercised sparingly, with circumspection and in rarest of rare cases. Exercise of inherent power under Section 482 of the Code of Criminal Procedure is not the rule but it is an exception. The exception is applied only when it is brought to the notice of the Court that grave miscarriage of justice would be committed if the trial is allowed to proceed where the accused would be harassed unnecessarily if the trial is allowed to linger when prima facie it appears to Court that the trial would likely to be ended in acquittal. In other words, the inherent power of the Court under Section 482 of the Code of Criminal Procedure can be invoked by the High Court either to prevent abuse of process of any Court or otherwise to secure the ends of justice.

(11) This Court, in a catena of decisions, consistently gave a note of caution that inherent power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. This Court also held that the High Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extra-ordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whims and caprice.

(12) We now refer to a few decisions of this Court deprecating the exercise of extra ordinary or inherent powers by the High Court according to its whims and caprice. (13) In *State of Bihar v. J.A.C. Saldanha* (1980) 1 SCC 554 this Court pointed out at SCC p. 574:

The High Court in exercise of the extraordinary jurisdiction committed a grave error by making observations on seriously disputed questions of facts taking its cue from affidavits which in such a situation would hardly provide any reliable material. In our opinion the High Court was clearly in error in giving the direction virtually amounting to a mandamus to close the case before the investigation is complete. We say no more. (14) In *Hazari Lal Gupta v. Rameshwar Prasad* (1972) 1 SCC 452 this Court at SCC p. 455 pointed out:

In exercising jurisdiction under Section 561-A of the Criminal Procedure Code, the High Court can quash proceedings if there is no legal evidence or if there is any impediment to the institution or continuance of proceedings but the High Court does not ordinarily inquire as to whether the evidence is reliable or not. Where again, investigation into the circumstances of an alleged cognizable offence is carried on under the provisions of the Criminal Procedure Code, the High Court does not interfere with such investigation because it would then be the impeding investigation and jurisdiction of statutory authorities to exercise power in accordance with the provisions of the Criminal Procedure Code.(15) In *Jehan Singh v. Delhi Administration* (1974) 4 SCC 522 the application filed by the accused under Section 561-A of the old Code for quashing the investigation was dismissed as being premature and incompetent on the finding that prima facie, the allegations in the FIR, if assumed to be correct, constitute a cognizable offence.

(16) In *Kurukshetra University v. State of Haryana* (1977) 4 SCC 451, this Court pointed out:

It surprises us in the extreme that the High Court thought that in the exercise of its inherent powers under Section 482 of the Code of Criminal Procedure, it could quash a first information report. The police had not even commenced investigation into the complaint filed by the Warden of the University and no proceeding at all was pending in any court in pursuance of the FIR. It ought to be realized that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be

exercised sparingly, with circumspection and in the rarest of rare cases. (emphasis supplied) (17) In *State of Bihar v. Murad Ali Khan* (1988) 4 SCC 655 this Court held that the jurisdiction under Section 482 of the Code has to be exercised sparingly and with circumspection and has given the working that in exercising that jurisdiction, the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not."

14. The law cited, *Ch. Bhajan Lal's case* (supra), in this regard by learned counsel for the petitioners, is not applicable. This law reveals general grounds for quashing of charge/complaint/F.I.R. In view of above, I do not find any ground to quash the FIR. Petition u/s 561-A Cr.P.C., is accordingly dismissed.

15. So far as bail applications are concerned, it is evident from facts and circumstances of the case that the accused persons have been involved in heinous offence of gang rape; due to this gang rape victim has committed suicide by jumping into the river Chenab as is evident from the investigation conducted by the police till date. Although dead body of the victim has not yet been recovered, but it can be inferred at this stage that due to gang rape, victim committed suicide. Further investigation in this regard is going on. The punishment for offence u/s 376-D RPC is rigorous imprisonment for a term which shall not be less than twenty five years, which may extend to life which shall mean imprisonment for the remainder of that persons natural life and with fine. Law is now well settled that while considering the bail petitions especially during investigation, (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and (c) Prima facie satisfaction of the court in support of the charge, are some of relevant consideration. As already held accusations against accused are serious in nature and punishment is also severe. Investigation has yet not been concluded. The laws cited by counsel for petitioners at all are not applicable in present set of circumstances. So both bail applications are dismissed at this stage.