

(2020) 09 J&K CK 0044

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No. 725 Of 2018, IA No. 1 Of 2018, Bail Application No. 195 Of 2018

Saleem Ahmed And Others

APPELLANT

Vs

State Of J&K

RESPONDENT

Date of Decision : 22-09-2020

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 109, 363, 376, 511
Code Of Criminal Procedure, 1973 — Section 155(2), 156(1), 156(3), 161, 164(A)
Code Of Criminal Procedure, 1898 — Section 561(A)

Citation : (2020) 09 J&K CK 0044

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : Sunil Sethi, Waheed Choudhary, Aseem Sawhney

Final Decision : Disposed Of

Judgement

Rajnesh Oswal, J

CRMC No. 725/2018, IA No. 1/2018

1. By the medium of this petition, petitioners seek quashing of FIR No. 218/2018 dated 29.09.2018 registered with Police Station Surankote for commission of offence under sections 363, 511 and 109 RPC against the petitioners. It is stated that one person, namely, Zaffar Iqbal was having love affair with the daughter of the complainant and she out of her free will went away with the said person in the night intervening 2nd and 3rd of September, 2018.

2. The families of both the complainant and the Zaffar Iqbal made efforts to search both of them on 03.09.2018. Both these persons were found in the nearby vicinity. On 04.09.2018 both the families and other residents of the area convened a meeting and resolved the issue amicably whereby the families of both boy and girl have sworn in affidavits that they would not lodge any criminal case against each other. It is further pleaded that the complainant on being

guided by person having vested interest to extract money from the petitioners, filed an application under section 156(3) Code of Criminal Procedure (Cr.P.C.) before the court of Sub Judge, Surankote on 20.09.2018 alleging therein that in the night intervening 2nd-3rd of September, 2018 the daughter of the complainant was kidnapped by Zaffer Iqbal with the connivance of as many as ten other persons. It was further alleged in the said application that on 12.09.2018 the persons arraigned as accused in the said application including the petitioners made an abortive attempt to again kidnap the daughter of the complainant but could not succeed. The matter was reported to the police on 13.09.2018 but no action was taken on it and accordingly, complainant invoked the provisions of section 156(3) Cr.P.C. The learned Magistrate, Surankote on 20.09.2018 forwarded the said application to the SHO of Police Station, Surankote. It is pleaded by the petitioners that the respondents without conducting the preliminary investigation to verify the allegations as alleged in the complaint, in total arbitrary manner registered the FIR that is impugned in this petition. It is further stated that the statement of the prosecutrix was recorded before the learned Sub Judge, Surankote on 10.10.2018. She has stated that in the night intervening 2nd-3rd of September, 2018 she was kidnapped by Zaffer Iqbal, Yaser Iqbal, Riaz Ahmed and Parvej Ahmed. She further alleged that she was taken in the Tata Sumo vehicle and was taken to a school where she had alleged to have been raped by Zaffer Iqbal and other persons were present. She further alleged in her statement that the petitioners herein were alleged to be speaking on phone with the persons present in the room.

3. The petitioners have sought quashing of the FIR on the grounds, firstly, that the FIR is liable to be quashed as the story projected in the FIR is in contrast to the statement made by the prosecutrix before the learned Magistrate under section 164-A Cr.P.C. Secondly, that the impugned FIR is bad in law inasmuch as it has been lodged after 20 days from the date of alleged occurrence i.e. in the night intervening 2nd-3rd September, 2018 and thirdly, that none of the ingredients of sections 363, 511 and 109 RPC are present and the involvement of the petitioners is only to extract money from the petitioners.

4. Respondents have filed the status report in which it is stated that on 20.09.2018 the complainant, namely, Mohd. Akram S/o Fazil Hussain had filed an application at Police Station, Surankote duly marked/endorsed by Sub Judge Surankote under section 156(3) Cr.P.C. against one Zaffar Iqbal S/o Mohd Farooq, 2. Mohd Farooq S/o Munshi, 3. Parvaiz Ahmed S/o Abdul Majid, 4. Taseer Iqbal S/o Mohd Farooq, 5. Shoket Hussain S/o Mohd Rafiq, 6. Saleem Ahmed S/o Abdul Majid, 7. Shamim Akhter W/o Abdul Ghani, 8. Abdul Qayoom S/o Mohd Bashi, 9. Mohd Alam S/o Mir Hussain and 10. Rayaz Ahmed S/o Mohd Younis. The complainant and the all accused are residents of the same village. The accused Zaffar Iqbal on the instigation of others during night hours with criminal intention tried to kidnap his minor daughter on 12.09.2018. The aforementioned accused persons trespassed into his house but could not succeed in their designs and after that they threatened the complainant and his minor daughter of dire

consequences. Aggrieved thereof, the complainant has filed the aforesaid application and the instant case was registered and investigation was entrusted to ASI Tufail Hussain of Police Station, Surankote. During the course of investigation, statements of the witnesses under section 161 Cr.P.C. were recorded, medical examination of the prosecutrix from the District Hospital Poonch was also got conducted and the medical report was also obtained. On receipt of the medical report, offence under section 376 RPC was incorporated and accordingly, the statement of the victim under section 164-A Cr.P.C was also got recorded. The Investigating Officer established the offences under sections 363 and 376 RPC against the accused Zaffar Iqbal and established offences under sections 363, 511 and 109 RPC against the other nine accused persons including the petitioners. It is further stated that the other seven accused are still absconding and further investigation is still going on.

5. Mr. Sunil Sethi, learned Senior Advocate appearing for the petitioners has vehemently argued and reiterated the grounds taken in the petition and he also argued that the complainant did not follow the mandate of *Priyanka Srivastava and others v State of Uttar Pradesh and others*, (2015) 5 SCC 287 before filing application u/s 156(3) Cr.P.C and as such FIR is required to be quashed.

6. On the contrary, Mr. Assem Sawhney, learned AAG appearing for the respondents has argued that the FIR cannot be quashed by appreciating the statements recorded during the investigation. He has further argued that the complainant has not followed the mandate of *Priyanka Srivastava's* case (*supra*) before filing application u/s 156(3) Cr.P.C is not a ground that has been pleaded by the petitioners in the instant petition for quashing of FIR. He further submitted that a bare perusal of the FIR would reveal that the ingredients of all the offences are present in the impugned FIR.

7. Heard and considered the rival arguments of the parties.

8. Before appreciating the rival contentions of the parties, it would be appropriate to note down the law laid down by the Apex Court in *State of Telangana vs. Habib Abdullah Jeelani and others*, AIR 2017 SC 373 and the relevant para is reproduced as under:

"12. The illustrations given by the Court need to be recapitulated: (*Bhajan Lal case [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604]* , SCC pp. 378-79, para 102)

"(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 FIR 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 FIR 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 Act concerned (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 Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides 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."

It is worthy to note that the Court has clarified that the said parameters or guidelines are not exhaustive but only illustrative. Nevertheless, it throws light on the circumstances and situations where the Court's inherent power can be exercised."

9. Thus, it is evident that the FIR can be quashed if the same does not disclose commission of any offence or the allegation made in the FIR do not constitute the cognizable offence but constitute only a non-cognizable offence and no investigation is permitted by a police officer without a order of Magistrate and also where the allegation made in the FIR are so absurd and improbable on the basis of which no reasonable and a prudent person can reach a just conclusion that there are sufficient grounds for proceeding against the accused or where there is legal bar in any provision of the Cr.P.C. or the Act to the institution and continuance of the proceedings and also when the criminal proceeding is manifestly instituted with mala fide and with ulterior motive or wrecking vengeance against the accused. Now this Court would examine the case of the petitioners on the basis of law laid down by the Apex Court in State of Telangana vs. Habib Abdullah Jeelani and others.

10. The first contention is that the story projected in the FIR is contradictory to the statement of the victim recorded under section 164-A Cr.P.C. The said ground is not available to the petitioners on the basis of which the petitioners can seek quashing of the impugned FIR. The contradiction between the FIR and the statement of the prosecutrix (if any) are to be appreciated during the course of

the trial in the event of filing of the challan but they cannot not be adjudicated upon by this Court in exercise of powers under section 561-A Cr.P.C. (now section 482 of the Central Code). The Apex Court in *Rajeev Kourav v Baisahab and others* reported in 2020(3) SCC 317 has held:

"10. We do not agree with the submissions made on behalf of Respondents 1 to 3. The conclusion of the High Court to quash the criminal proceedings is on the basis of its assessment of the statements recorded under Section 161 CrPC. Statements of witnesses recorded under Section 161 CrPC being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 CrPC [*Rajendra Singh v. State of U.P.*, (2007) 7 SCC 378 : (2007) 3 SCC (Cri) 375] ."

11. Thus, it is evident that the statements recorded during the course of investigation cannot be made a ground for quashing the criminal proceedings by assessing as well as evaluating the statements made by the witnesses during investigation. No doubt in the instant case the statement of the prosecutrix has been recorded under section 164-A Cr.P.C but the statement made under sec 164- A Cr.P.C is also not a substantive piece of evidence and is akin to the statement made under section 161 Cr.P.C. with only difference that where the statement made under section 161 Cr.P.C can be used for the purpose of contradiction only, the statement under section 164-A Cr.P.C. can be used not only for the purpose of the contradiction of the witness but also for the purpose of corroboration. Besides the consequences from resiling the statement made under sec 164-A Cr.P.C are stringent. (See *R. Shaji versus State of Kerala* (2013) 14 SCC 266.)

12. The second contention raised by the petitioners is that the FIR has been lodged after 20 days of occurrence. This ground is also misconceived as the FIR under section 363, 115 and 109 RPC has been registered with regard to the occurrence alleged to have taken place in the night of 12.09.2018. It was further pleaded in the application filed under section 156(3) Cr. P. C. that the complainant approached the police on 13.09.2018 and as per FIR, the complainant annexed copy of application and affidavit along with application u/s 156(3) Cr.P.C. Thus, prima facie there is no delay in lodging the impugned FIR.

13. The third contention is that the FIR lacks ingredients of sections 363, 511 and 109 RPC and the same has been lodged for the purpose of extracting money from the petitioners are also not tenable. A bare perusal of the FIR would reveal that there are specific allegations made against the petitioners for which the FIR has been registered and during investigation, the Investigating Officer has also established the commission of offence under sections 363, 511 and 109 RPC against the petitioners. This Court cannot conduct a mini trial in order to find out whether the offences against the petitioners are made or not as the same are to be established during the course of trial. Allegations with regard to extraction of money are also vague and bereft of necessary particulars and, as such, do not deserve any consideration by this Court at this stage.

14. Lastly, learned senior counsel for the petitioners made an attempt to persuade the Court that the complainant has not followed the mandate of Priyanka Srivastava's case (supra) before filing application u/s 156(3) Cr.P.C and the Magistrate has passed order in mechanical manner. He further supplements his contention by stressing that the petitioner had not approached SHO or SSP concerned before filing application before Magistrate. This Court find substance in the objection raised by Mr. Aseem Sawhney, learned AAG that the said ground has no where been pleaded in the petition. The perusal of petition would reveal that the petitioners have nowhere laid down the factual foundation in the instant petition for adjudication of this ground and the said ground cannot be termed as pure question of law that can be addressed without advertence to facts. A bare perusal of the FIR reveals that the complainant has annexed the copy of the application filed by him with the Police Station on 13.09.2018 as well as affidavit along with his application filed under section 156(3) Cr.P.C. Even the petitioners in ground (J) of their petition have mentioned that the complainant has managed the lodging of FIR through Senior Superintendent of Police concerned. The petitioners have neither placed on record any order passed by the court of learned Magistrate under section 156(3) Cr.P.C. nor at any point of time have made any effort to get the said order summoned, that clearly shows that the petitioners were never serious in challenging the FIR on the said ground. Otherwise also the perusal of the FIR would further reveal that the police concerned has registered the FIR after perusing the contents of the application and not on the mere directions by the Magistrate. Thus, on this ground as well the petitioners have no case at all for seeking quashing of the FIR.

15. For all what has been said and discussed above, the petitioners have miserably failed to bring out their case within the parameters of law laid down by Apex Court in State of Telangana vs. Habib Abdullah Jeelani and others (supra) for quashing criminal proceedings/FIR. This petition has no merit and is dismissed along with connected CMs.

BA No. 195/2018

1. Vide order dated 20.11.2018 the petitioners were granted bail in anticipation of their arrest in FIR No. 218/2018 dated 20.09.2018 and till date there is no complaint from the respondents that the petitioners have ever violated the conditions of the bail already granted to them, rather in the status report furnished by the respondents in the connected matter bearing CRMC No. 725/2018, it is mentioned that seven accused other than the petitioners have absconded meaning thereby the petitioners are participating in investigation.

2. In view of the above, interim bail granted to the petitioners is made absolute on the same terms and conditions.

3. Bail application is, accordingly, disposed of.