

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Misc. Application No.515 of 2023
Criminal Misc. Application No.516 of 2023

Applicant : Mst. Gul-e-Rana D/o Syed Zaheed
Alam in both Crl. Misc. Applications
through M/s. Raj Ali Wahid Kunwar &
Amer Raza Naqvi, Advocates

Respondents : The State & others
through Mr. Abrar Ali Khichi,
Addl. Prosecutor General, Sindh
a/w SIP Muhammad Aslam

Mr. Javaid Ahmed Chhattari, Advocate
for Respondents No.2 & 3 in Crl. M.A.
No.515/2023 and for Respondent No.2
in Crl. M.A. No.516/2023

Date of hearing : **04.09.2023**

Date of order : **12.09.2023**

ORDER

AMJAD ALI SAHITO, J – Since in both the applications the same question of law is involved through this single order, I intend to dispose of both the captioned Criminal Miscellaneous Applications filed by applicant Mst. Gul-e-Rana, whereas she prayed in Cr.Misc App. No.515 of 2023 for setting aside the impugned orders dated 15.05.2023 & 25.07.2023 passed by the learned Civil Judge and Judicial Magistrate III South Karachi & learned Addl. Sessions Judge-III, Karachi South respectively. So also she prayed in Cr. Misc. application No. 516 Of 2023 for setting aside impugned orders dated 25.01.2023 & 25.07.2023 passed by the learned Civil Judge and Judicial Magistrate II South Karachi & learned Addl. Sessions Judge-III, Karachi South respectively.

2. The detailed facts and particulars are already available in the memo of application as well as FIR, hence, need not to reproduce the same hereunder.

3. The complainant/applicant filed application before the learned trial court as well as learned appellate court that the photographs were made viral on social media, therefore section 354-A PPC and section 377-A PPC is applicable in this case. After hearing the parties the Criminal Revision Application No.28/2023 was dismissed by the learned Additional Session Judge-III vide order dated 25.07.2013. The relevant Para of the impugned order is reproduced as under;-

“On perusal of the record, it appears that nothing is available on record to show that the photographs, if any, were made public, therefore, section 354-A PPC is not applicable in this case. Furthermore, Osja is not victim in this case but he is an accused person, therefore, section 377-A PPC is also not applicable in this case. Accordingly, the impugned order dated 15.02.2023 passed by learned Magistrate does not suffer from any illegality or irregularity, hence the instant revision application is hereby dismissed.”

4. Whereas the applicant/complainant also filed application under section 227 Cr.P.C for amendment of charge before the learned trial court on the ground that Section 354-A PPC is applicable in this case. After hearing the parties the said application was dismissed by the learned trial court vide order dated 25.01.2023. Being aggrieved, the complainant filed Cr. Rev Application No. 29/2023 before the appellate court same was also dismissed vide order dated 25.07.2023. The relevant Para of the impugned order is reproduced as under:-

*“On perusal of the record, it appears that nothing is available on record to show that the photographs, if any, were made public, therefore, section 354-A PPC is not applicable in this case. Accordingly, the impugned order dated 25.01.2023 passed by learned Magistrate does not suffer from any illegality or irregularity, hence the instant revision application is hereby dismissed. However, offence under section 354 PPC is scheduled offence under Anti Rape (Investigation and Trial) Act, 2021 and exclusively triable by Special Court under the Act *ibid.*”*

5. Learned counsel for the applicant appearing in both the applications argued that Section 354-A PPC is very much applicable in this case as the photographs were made viral on social media; that lady accused induced/coerced male

accused Osja for engaging sexual abuse with victim Komal, therefore, Section 377-A PPC is also applicable in this case. Learned counsel has mainly argued in CrI. Misc. Application No.516/2023 that he has filed an application under Section 227 Cr.P.C. for amendment of the charge on the ground that Section 354-A PPC is also applicable in this case; however, the same was dismissed. He further argued that this case also falls within the definition of the Anti-Rape (Investigation and Trial) Act, 2021 [hereinafter referred to as “**Act**”] as such investigation conducted by the I.O. may be set aside in view of the above said Act and special sexual units (SSOUIs) may be directed to investigate the matter. He lastly prays that the impugned orders may be set aside and the instant applications filed by the applicant may be allowed.

6. On the other hand, Mr. Jawaid Ahmed Chhatari, Advocate has shown his appearance and undertakes to file Vakalatnama for Respondent Mst. Rubina Miraj, Mst. Farwa Miraj and Osja Miraj in the office; however, he has argued that no scheduled offence has been committed by the above-said Respondents/accused, as such, the investigating officer has rightly conducted the investigation. Learned Addl. P.G. also supports the version of the complainant and states that impugned orders were passed in accordance with law and as such they do not require any interference of this Court.

7. I have heard the learned counsel for the parties and also examined the police papers with the assistance of the learned APG.

8. The case of the prosecution is that on 21.05.2022 the complainant and her daughter Komal were present in the house when at about 09:30 pm in the night time neighbours Rubina, her daughter Farwa and her son Tharja (Osja) entered into her house and kicked her daughter Komal and thereafter they kept beating the complainant and kicking her daughter on stomach and delicate parts of the body, as such she raised cries but even then, they grabbed her and her daughter from hair and threw her on ground so also started

breaking the things available there and mobile; however, due to noise, people gathered outside. Thereafter, the accused while issuing threats left the house. At the end of the FIR, the complainant disclosed that the only allegation against the accused was that **“My claim is against Rubina, Farwa and Osja who entered in my house and beaten us and disturbed the honour of my daughter.”**

9. The main contention of learned counsel for the applicant is/was that the clothes of the victim were torn as such Section 354-A PPC is very much applicable in this case. In this regard, I would like to reproduce Section 354-A PPC for the sake of convenience, which reads as under:-

“354-A. Assault or use of criminal force to woman and stripping her of her clothes. *Whoever assaults or uses criminal force to any woman and strips her of her clothes and, in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.]”*

10. Bare reading of the aforesaid provision of law would show that to attract the said penal provision, two conditions must be fulfilled, firstly, there should be stripping of the clothes and secondly the victim in that condition be exposed to the public view. Both the conditions must co-exist to bring the case within the mischief of section 354-A, P.P.C., which fact is missing in the instant case, as the alleged incident took place inside the house of the Complainant during night hours, neither the Complainant, nor the Complainant’s daughter were stripped of their clothes. Similarly exposure of the Complainant or Complainant’s daughter to the public at large is also missing as no one from general public was present at the alleged place of incident. In Case of **Qadir Shah and others v. The State (2009 SCMR 913)**, it was held by the Apex Court that: *“The plain reading of above provision of law would reveal that to attract the said penal provisions, two conditions must be fulfilled, firstly, there should be stripping of the clothes and secondly the victim in that condition be exposed to the public view. Both the conditions must co-exist to bring the case within the ambit of section 354-A, P.P.C., which*

fact is missing in the instant case, as the occurrence took place in the fields, the clothes of the victim were just torn and not stripped of. Similarly exposure of the victim to the public at large is also missing as no one from general public was present at the scene of incident. In view of above, we are of the view that provisions of section 354-A, P.P.C. are not attracted rather the case fall under section 354, P.P.C.”

11. In the instant case, learned counsel for the respondents admitted that both the families are known to each other. There was a dispute between them on petty matters and was a simple dispute/quarrel between them but the complainant falsely implicated the respondents/accused person in this case, otherwise, no offence had been committed by the accused persons. Further, the complainant has simply stated in the FIR that the accused persons had beaten her and accused Osja had disturbed the honour of her daughter. But nowhere the complainant has disclosed that her clothes or her daughter's clothes were stripped and in that condition, she was exposed to the public view. By taking the guide line from above cited case law I am of the view that prima face the ingredients of Section 354-A PPC are missing in this case/FIR therefore Section 354-A PPC is not applicable in this case.

12. So far the next contention raised by the learned counsel for the applicant is/was that in the instant case the investigation conducted by the local police/investigating officer (I.O.) violates the Act by having no force. The background of promulgation of the Act was that at least 11 rape cases were reported in Pakistan daily with over 22037 rape cases reported to police across the country in the last six years. According to the Human Rights Commission of Pakistan, more than 5200 women reported being raped in the country in 2021, while as per available data and official statistics, Given the alarming surge in cases of rape, sexual violence and abuse within the country and in wake of two horrendous incidents i.e. wherein in the month of January 2018, the rapped and murder of eight-year-old Zainab Ansari unleashed waves of grief, horror and anger across Pakistan.

The reports of more rapes and murders of children continued to appear. The helpless pain and rage continued to simmer. In the month of September 2020 gang-rape of a woman stranded on the Sialkot-Lahore motorway shook Pakistan from its apathetic stance on sexual violation against women. The woman who was beaten and raped in front of her children became the tragic rallying sign for the imperativeness of steps for prevention of rape and certainty of punishment. In December 2020 the Ordinance was passed with the title ***“The Anti-Rape (Investigation & Trial) Ordinance, 2020*** so also the amendment was made in the Pakistan Penal Code titled Criminal Law (Amendment) Ordinance, 2020. The concept of promulgating of both the Ordinances was only to provide speedy dispensation of justice to all victims of sexual violence or rape. The preamble of the Ordinance shows that the said Ordinance was enacted to ensure expeditious redressal of rape and sexual abuse crimes in respect of women and children through special investigation teams and special Courts providing for efficacious procedures, speedy trial, evidence and matters connected therewith or incidental thereto. However, there was a realization within the government ranks that conviction rates across the country were extremely low. The experiences of women who report rape are awfully horrific in terms of investigation, filing of a case, and a trial that takes extremely long. The step was taken to alter the existing laws and the above Ordinance was introduced with the aim to ensure that the conviction is certain. Further, the cases do not take very long and have special courts that try cases of rape and sexual violence. The idea of the new anti-rape Ordinance was to provide a sufficient system of investigation, prosecution and trial for those who were victims of the heinous offence of sexual violence and rape. After the lapse of the Ordinance, the bill was passed by the Majlis-e Shoora (Parliament) regarding the Anti-Rape (Investigation & Trial) Act, 2021 which also provides a full mechanism and provide speedy justice to the victims of sexual violence or rape.

13. The term “**Rape**” has generally been defined as unlawful sexual activity or sexual intercourse against a person without his/her consent. The legal definition of rape is when a person intentionally penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of another person or makes to do so with or any other person. It is now elaborately defined in section 375 PPC, where in addition to other instances a person is also to be said to commit rape with or without consent if the victim ages to be below sixteen years.

14. The preamble of the Act is/was only to ensure expeditious redressal of rape and sexual abuse crimes in respect of women and children through special investigation and special Courts providing for efficacious procedures, speedy trial, evidence and matters connected therewith or incidental thereto. This Act provides a mechanism through the establishment of a Special Court (Section 3), Anti-Rape Crisis Cells (ARCC) (Section 4&5), Special prosecutor (Section 8), Special Sexual Offence Investigation Units (SSOIOUs-Section 9) and register of sex offenders (Section 24). It is suffice to say that Section 5 of the Act provides power duties and functions etc. of Anti Rape Crises Cell. Further, when the Cell receives information from any source, on its own accord or upon application by any person, orally or in writing, of an offence mentioned in Schedule-II it shall without any delay ensure the following, procedure namely:-

- (a) conduct of a medico-legal examination without any delay;
- (b) securing, collection and gathering of such evidence as may be expedient;
- (c) conduct of a forensic analysis or examination;
- (d) registration of an first information report (FIR) by the police; and
- (e) performing of any other action as may be necessary.

15. Section 9 provides the procedure for investigation in respect of scheduled offences for the purpose of investigation.

Under this Act, Special Sexual Offences Investigation Units (SSOUIs) shall be established in every district by the Provincial Governments.

16. Now reverting to the case of the applicant, whereas the main contention of the learned counsel for the applicant is/was that Section 354 PPC is a Schedule-I offence as such the investigation should be conducted as per this Act. It evidently manifests from the preamble that the basic purpose of this special Act is to expeditiously address the matters concerning the crime of rape and the crime of sexual violence and abuse, i.e. rape and other sexual offence in respect of women and children by providing for special procedures. In the instant case as alleged by the complainant the accused persons (Two women and one boy) beat them and Osaja disturbed the honour of her daughter. The main aim of the Act is in line with the above-cited cases in which the victim was raped and murdered. The record further reflects that after registration of the FIR, the I.O SIP Rana Muhammad Ilyas started an investigation and recorded the statements of the prosecution witnesses and completed other formalities, and in pursuance of the notification issued by Inspector General police in connection with Anti-Rape (Investigation and trail) Act,2021, vide order dated 27.05.2023 Superintendent of Police Investigation South transferred the investigation to the DSP Amjad Khalyar of the district (SSIOUs) to investigate the matter as offence falls within the schedule-1 of the Act. After receiving the police papers he started the investigation and recorded the statements of the prosecution witnesses and accused persons. Finally, after completing the investigation he submitted a report under section 173 Cr. P.C (challan) before the concerned Magistrate for an offence under section 452, 354,337/A (i) and 427PPC.

17. Further Section 27 of the Act provides that ***“Act not to derogate from other law;- In respect of offences mentioned in Schedule-I, the provision of this Act shall be in addition to and not in derogation of any other law for the time being in force.”*** Hence, if any investigation is

conducted by the I.O. under the Code of Criminal Procedure and in view of Section 27 of this Act, any offence mentioned in Schedule-I is also in addition to and not in derogation of any other law for the time being in force. Whereas Section 28 of the Act provides overriding effect in respect of offences mentioned in Schedule-II, the provision of this Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force. However, the difference of Sections 27 and 28 of this Act is to be maintained.

18. In the instant case, if any offence is committed by the present accused and if the same falls within schedule-I of the Act and I do not find any violation on the part of the investigating officer. However, it cannot be said that the offence allegedly committed by the accused persons falls within the ambit of schedule-11 of this Act as the Ordinance and Act of Anti-Rape (Investigation & Trial), 2021 promulgated only to provide speedy justice to the victims of sexual violence or rape/gang rap. In the present case, there is no allegation against the accused persons that they have committed rape or sexual violence with the complaint and her daughter.

19. In view of the above discussion, both Crl. Misc. Applications being devoid of merit are dismissed.

JUDGE