

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Misc. App. No. S – 35 of 2024

(Zahoor Ahmed Shaikh & others versus The State & others)

Date of hearing : 29.04.2024

Date of decision : 29.04.2024

Mr. Sikandar Sadar Siddiqui, Advocate for applicants along with applicant No.1.

Mr. Zulfiqar Ali Laghari, Advocate along with respondent No.3, who has filed power and objections on her behalf.

Mr. Muhammad Aslam Jatoi, Assistant Attorney General along with Sub-Inspector Muhammad Ali Sawand, IO, FIA Cyber Crime, Sukkur.

ORDER

Muhammad Iqbal Kalhoro, J. – As per record, respondent No.3 made a complaint before FIA, Cyber Crime Wing, Sukkur against one Imran S/o Jan Muhammad, her ex-fiancé and a cousin, alleging that he, after engagement done with consent of their parents, when she happened to talk with him and came close to him, demanded her to send him her nude / obscene pictures on phone, which she obliged. Then on one occasion, he recorded a video call with her when she was in nude / obscene condition. But when after some time, the engagement was broken, he started blackmailing her and threatened her that he would share and make her pictures viral on social media. Meanwhile, he however shared such pictures and his conversation with her with her brother, namely Abdul Qudoos on his WhatsApp number. He also sent the same to her relatives, friends and her step mother.

2. When such complaint was taken up by FIA for enquiry, she moved another application naming Muhammad Adil, Noor Jahan, Fayaz Ahmed, Ghulam Fatima and Zahoor Ahmed, relatives of main accused, to be his accomplices and equally involved in the case. After such application, the enquiry was expedited and the accused were issued notices to join the same. They replied the notices and recorded their statements. The statement of complainant / respondent No.3 was also recorded.

3. While the enquiry was going on, respondent No.3 filed an application u/s 22-A & B CrPC before the Ex-Officio Justice of Peace / Ist Additional Sessions Judge, Sukkur and succeeded in getting directions for FIA, CCRC, Sukkur to register FIR against above said accused. After the FIR, scope of enquiry was converted into investigation, the mobile phones of all accused were taken into custody by FIA immediately and sent for forensic examination to a

relevant lab. The lab report, when received, belied allegations against the applicants at least, but found main accused Imran in active WhatsApp conversation, not appropriate, with complainant / respondent No.3. With no evidence collected through scientific methods against the applicants on the one hand complainant herself, as per report of FIA, also failed to submit any tangible proof of harassment to her by the applicants through any other mode including through WhatsApp messages etc. on the other hand. Finding absolutely no evidence against the applicants except an unsubstantiated word of the complainant, the IO submitted the Challan against only Imran for the offence u/s 20, 21(d), 24 of Prevention of Electronic Crimes Act, 2016 read with Section 109, 506/2 PPC and let off the applicants u/s 497 CrPC by placing their names in column No.2.

4. When such report prepared u/s 173 CrPC was submitted before learned Judicial Magistrate-I, Sukkur, he heard the parties, after due notice, rejected opinion of the IO, and proceeded to take cognizance of the offences against the applicants and joined them as accused vide impugned order dated 11.12.2023. The applicants have challenged the same through this application.

5. I have heard the parties (applicant No.1, respondent No.3 and her father), their advocates and gone through material available on record. The reason, which has weighed with the learned Judicial Magistrate to take cognizance of offences against the applicants, and which he has mentioned in the impugned order, is that they are named in FIR with specific role, and which PWs in their statements have supported. Apart from these generic observations, learned Magistrate has not referred to any incriminating evidence against the applicants cementing, in his view, their involvement in the offence. The orders is completely bereft of a mention of any details about their so called specific role or any piece of evidence as a reason to justify making applicants as accused in the case to stand a trial on the said charges.

6. Initially, respondent No.3 / complainant had moved a complaint against her ex-fiancé only leveling allegations against him of harassment, blackmailing, threatening, sharing her nude pictures and video clips with her relatives, friends etc. It was only later, during pendency of such complaint, she came up with the second version of the events expanding scope of the matter by leveling identical allegations against the applicants. After registration of FIR, since the main allegations were of misuse of mobile phones by applicants and main accused Imran for spreading her nude pictures / conversation etc. with the relatives, friends and her brother, their mobile phones were seized immediately by the IO. However, when they were subjected to a forensic examination,

nothing of the sort as alleged was found. Neither any nude picture(s) of respondent No.3 / complainant, nor any message / record / data, whereby such pictures were transmitted to anyone, was detected. The thrust of allegations qua applicants thus got undermined substantially. When such report is taken into account plus absence of any other evidence establishing sharing of any nude pictures etc. of complainant on any WhatsApp group etc. by the applicants, nothing incriminating except a word of the complainant, without any tangible proof, would remain against the applicants.

7. Leveling allegations against an accused by a complainant in FIR would not mean that such allegations would be treated gospel truth and the moment they are made would be deemed to have been proved sans of any need to subject them to any investigation to verify their truthfulness and genuineness. It appears that the Judicial Magistrate without taking into consideration all these settled propositions, and without referring to any incriminating evidence, got influenced by mere a word of the complainant and witnesses that the applicants were causing harassment and threatening her through mobile phones with dire consequences including sharing her nude pictures or inappropriate conversation with Imran, and formed a view that the applicants were *prima facie* involved in the offence and the trial against them was warranted.

8. No doubt, in the case in which there is a negative report of the IO u/s 173 CrPC regarding guilt of an accused, the Magistrate has the powers to disagree with him and take cognizance of the offence against such accused. But it goes without saying that such exercise is to be carried out judiciously and in consideration of material which although has been collected during investigation or is otherwise available on record, but either was not considered by the IO, or was considered but in the wrong context and made irrelevant to the facts of the case. The Magistrate can disagree with the ipse dixit of the police in such cases and can form a different view. But it shall be kept in mind that exercise of such discretion by the Magistrate is not unbridled and is subject to availability of incriminating material against the accused to justify him taking a different view than the IO. In absence of incriminating material against the accused, it would not lie within competence of a Magistrate to proceed and take cognizance of the offence against any set of the accused who have otherwise been declared innocent by the IO due to absence of any evidence.

9. In this case also, as observed above, learned Magistrate has exercised his powers without referring to any incriminating material and has taken cognizance of the offence against the applicants in a cursory manner ignoring

the fact that when their mobile phones were subjected to a forensic examination, nothing as alleged by the complainant was found in them.

10. During the arguments, learned Counsel for the complainant showed some screenshots of conversation between complainant and applicant No.5 Adil to indicate that he had been in conversation and threatening her. IO of the case has verified this point by stating that applicant Adil is a minor boy aged 16 years, his purported phone was actually in possession of Imran who was using the same with his name along with his own phone for making inappropriate conversation with the complainant. After such clarification, and no record that the SIM purportedly used by applicant Adil was in his name, he cannot be dragged into criminal case and subjected to rigor of trial as accused.

11. I, therefore, find the impugned order not sustainable in law and a result of mis-appreciation of facts on record and the report submitted by the IO. The same is, therefore, **set aside** and report of IO to the extent of applicants declaring them innocent and placing their names in column No.2 is accepted. This application is accordingly **allowed** in the same terms.

12. Notwithstanding, if in the trial any incriminating evidence is brought against the applicants by the complainant, or in any subsequent investigation such material is found against them and is submitted before the Court, the prosecution or complainant, or both would be at liberty to file a proper application for joining the applicants, which if filed, shall however would be dealt with by the Court on its own merits.

Criminal miscellaneous application is accordingly **disposed of** along with pending application(s) if any.

J U D G E

Abdul Basit