



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 1688 OF 2020

1. Moiz Ahmed S/o Abdul Razzak,
Age : 45 Years, Occ. Business,
R/o. Umar Colony, Degloor Naka,
Nanded

2. Mohd. Samir S/o Moiz Ahmed,
Age : 20 Years, Occ. Business,
R/o. As above.

Applicants
(Ori. Accused Nos 2 & 3)

VERSUS

1. The State of Maharashtra
Through Police Station
Nanded

2. X. Y. Z.

.. Respondents
(Resp. No.2 is ori.
Complainant)

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Advocate for the applicants : Mr. B. N. Gadegaonkar
A.P.P for Respondent No.1 State : Mr. S. A. Gaikwad
Advocate for Respondent No.2 : Mr. J.M. Murkute

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CORAM : SMT. VIBHA KANKANWADI AND
ROHIT. W. JOSHI, JJ.

DATED : DECEMBER 06, 2024

JUDGMENT (Per Rohit W. Joshi, J.):

1. The applicants in the present matter are accused Nos. 2 and 3 in R.C.C. No. 681 of 2021 pending on the file of learned Additional Chief Judicial Magistrate Court No.4 Nanded. The said Criminal case is registered pursuant to First Information Report registered with Police Station Nanded, District Nanded, for the offences punishable under

Sections 354,354-C, 506 read with Section 34 of the Indian Penal Code (Herein after referred to as" IPC" for brevity) vide Crime No. 00560 of 2020 dated 23.07.2020. After the lodging the said First Information Report, the police authority has conducted investigation in the matter and filed final report before the learned Magistrate vide Charge Sheet No. 241 of 2021 dated 19.06.2021. Initially, the present First Information Report was lodged against the present applicants. However, during the course of investigation name of one Mohd. Saroar son of Abdul Gafar came to be arrayed as accused No.1 and the present applicants have been arrayed as accused Nos. 2 and 3. Respondent No.2 is the informant. Taking into consideration contents of First Information Report, we prefer to mask her name, in order to protect her identity. After filing of the present application, the learned 5th Additional Chief Judicial Magistrate, Nanded has framed in the charge vide Exh.20 on 24.09.2021. Copy of the same is produced on record by the learned Advocate for the applicants. It is taken on record and marked as Exhibit "A" for the identification.

2. Respondent No.2 has stated in the FIR that her husband is engaged in the work of erection of Towers for Cell Phone Companies. She states that around one and half years before lodging of the First Information Report, her husband had a dispute with his tenant namely Moiz Ahmed son of Abdul Razzak (the applicant No.1) in relation to the work of installation of Tower and therefore the said work

remained pending.

3. She has stated that on 13.01.2020, due to some dispute in the family they left their residential house and went to sleep in a tin shed in front of Malang Baba Building which is adjacent to the house of the tenant Moiz Ahmed. She alleges that while sleeping together while they were intending to get into sexual activity being husband and wife, one Saroar who is brother-in-law (wife's brother) of the said tenant namely Moiz Ahmed (applicant No.1) moved one of the tin of the tin shed and recorded a video clip of the respondent No.2 along with her husband. The said Saroar tried to blackmail the husband of respondent No.2. However, when evidence regarding their marriage was shown to him, he left the spot. She states that on 22.07.2020 at around 4 p.m. a meeting of people in the locality was arranged in order to discuss the issue regarding installation of Mobile Tower. In the said meeting, applicant No.1 and his son applicant No.2 displayed the video clip recorded by Mohammad Saroar in front of all the persons.

4. On the basis of said complaint, offence punishable under Sections 354, 354-C, 506 read with Section 34 came to be registered against the present applicants.

5. As stated above after completion of investigation name of Mohammad Saroar came to be added as accused No.1 along with the

present applicants who are added as accused Nos. 2 and 3. The said final report has resulted in registration of RCC No. 681 of 2021 which is pending on the file of learned 5th Additional Chief Judicial Magistrate (Herein after referred to as “ 5th A.C.J.M.” for brevity). As stated above the charge is framed in the matter on 24.09.2021 vide Exh. 20. By the present application filed under Sections 482 of the Code of Criminal Procedure, the applicants/accused Nos. 2 and 3 have prayed for quashing of the said First Information Report. After filing of the charge sheet and registration of the criminal case, they have amended the application in order to challenge charge sheet No. 241 of 2021 dated 19.06.2021 and Regular Criminal Case No. 681 of 2021.

6. The learned Advocate for the applicants has argued that ingredients of section 354 and 354-C are not made out even if the entire material in the charge sheet is accepted as true and correct. He states that the offence of outraging modesty of woman punishable under Section 354 of the IPC would be attracted only in case where any woman is assaulted or subjected to criminal force with an intent to outrage her modesty. He would submit that there is no allegation regarding assault or use of criminal force. According to him, the act of displaying video clip in the meeting would not attract the essential element of Section 354 as also 354-C of the IPC. He further states that Section 506 of the IPC is non cognizable offence. He sums up

submissions stating that since offence under cognizable sections is not made out, the FIR and consequently charge sheet and criminal case are liable to be quashed against the present applicants.

7. As against this, Shri. S.A. Gaikwad, learned A.PP submits that the act committed by respondent Nos. 2 and 3 of disseminating video clip of a man and woman being together just before indulging in a private sexual activity as husband and wife is a heinous crime. He submits that ingredients of Section 354-C of the IPC are certainly attracted and as such the FIR and consequent criminal prosecution cannot be quashed against the applicants. He would further submit that the learned public prosecutor appearing in the proceeding below so also the learned Magistrate has missed to notice some other provisions of the IPC and Information Technology Act, 2000 (Herein after referred to as "I.T. Act" for brevity). He has drawn our attention to provisions of Section 292 of the IPC and Section 66-E and 67 of the I.T. Act. The learned A.PP has drawn our attention to the statement of witnesses recorded during the course of investigation which confirm the fact of display of video clip during the course of meeting attended by a sizable number of people. Shri J. M. Murkute, the learned Advocate for the respondent No.2 has advanced similar submissions. He further states that if charge under Section 354-C is framed against accused No.1 for recording the objectionable Video Clip, it should have been certainly framed against the present applicants as well who

have disseminated the said Video Clip.

8. We agree with the submission of the learned Advocate for the applicants that offence under Section 354 of the IPC is not made out. Section 354 speaks of an act by a person assaulting or using criminal force against any woman with an intent to outrage or knowing that such act would outrage modesty of woman. Use of criminal force or act of assault are essential pre-requisites to attract Section 354 of the IPC. The terms, 'force' and 'criminal force' are defined under Sections 349 and 350 respectively of the IPC. Section 349 states that a person is said to use force to another if he causes motion, change of motion or cessation of motion to a person or to any object which may then come into contact with the person either by his bodily powers or by any object or by inducement to any animal. When force is used without consent of person subjected to force and it causes or is likely to cause injury fear or annoyance the force become criminal force as per Section 354 of the IPC. Likewise the term assault as defined under Section 351 of the IPC means any gesture or preparation that can cause any person present to apprehend that the person making gesture or preparation is about to use criminal force. Both these elements of criminal force and assault are completely absent. Since assault and/ or criminal force are essential elements of Section 354, offence under Section 354 of the IPC is also not made out. Offence

under Section 354 of the IPC is made out only if a woman is assaulted or subjected to criminal force with an intention to outrage her modesty.

09. We are of the considered opinion that the learned A.C.J.M. completely erred in framing charge against the the applicants (accused Nos. 2 and 3) for the offence punishable under Section 354 of the IPC.

10. The second charge framed by the learned A.C.J.M. is under Section 354C of the I.P.C. This charge is framed only against accused No.1. The charge is framed on the ground that he had recorded Video Clip of the respondent No.2 engaging in a private act within the meaning of Explanation 1 to Section 354C. Dissemination of an objectionable Video Clip will also be an offence punishable under Section 354C. The allegation against present applicants/accused Nos. 2 and 3 is that they have disseminated the said Video Clip recorded by the accused No.1. It is therefore, obvious that charge under Section 354C of the IPC should also have been framed against present applicants/accused Nos. 2 and 3.

11. We are also of the opinion that Section 66-E of the I.T Act 2000 may also be attracted. Section 67-E of the I.T. Act has close resemblance with Section 354-C of the IPC. Whereas Section 354-C pertains to recording and dissemination a woman engaged in a private act, Section 66-E speaks about recording and/or transmitting image of

private area of any person without his or her consent. Section 354-C applies only when the wrong is committed against a woman. Section 66-E of the IT Act applies when wrong is done against a male or female. Section 354C speaks of 'private act' which may expose private parts posterior or breast of a woman exposed or covered in under clothes. Section 66-E refers to 'private area', of a male or female exposed or covered by under clothes. The term 'private area' means private parts, posterior or breast of a female. Since charge under Section 354-C of the IPC is framed, charge under Section 66-E may also be required to be framed. The distinguishing feature between 354-C of the IPC and 66-E of the IT Act are that 354-C is attracted only against a woman whereas Section 66-E of the IT act applies to both man and woman. Likewise, Section 354-C speaks of a private act and 66-E speaks of 'private area'. The learned Magistrate should consider as to whether 66-E of the IT Act is attracted.

12. Apart from the above, Section 67 of the Information Technology Act, 2000 (Hereinafter referred as "IT" Act for brevity) also appears to be attracted. Section 67 of the I.T Act is synonymous to Section 292 of the I.P.C. Whereas Section 292 deals with offence regarding sale, distribution or public exhibition of a book, pamphlet, paper etc. which is lascivious or appeals to prurient interest. Section 67 of the IT Act in turn deals with transmission of lascivious material or material which appeals to be prurient interest or tends to deprave and corrupt

persons who may read or see it in electronic form.

13. The material on record indicates that the video clip was recorded by accused No.1 while respondent No. 2 and her husband were about to get intimate as husband and wife. Viewing of such material in electronic form can be considered to be lascivious or such material appeal to be prurient interest or tend to deprave and corrupt persons who viewed it.

14. Section 67 of the I.T Act, 2000 is a cognizable offence in view of Section 77-B of the said Act. The mobile phone of applicant No.2 and the memory card in which recording was stored by accused No.1 Mohd. Saroar has been seized during the course of investigation. The said video clip should be viewed in order to find out whether the material answer to the description of being obscene on account of being lascivious or appealing to be prurient interest or tending to deprave and corrupt persons who viewed it.

15. Normally when the applicants have approached us, we would not have passed any order which would put them to more disadvantageous position than to one which they would have been had they not approached this Court. However, the applicants have approached this Court under Section 482 of the Code of Criminal Procedure. The said provision is a salutary provision which preserves inherent powers of the High Court to do complete justice. One of the

objects of Section 482 of the Code of Criminal Procedure is to prevent abuse of legal process so also to prevent miscarriage of justice. We are of the considered opinion that on account of collective failure of the investigating agency, the learned public prosecutor appearing before the learned trial Court as well as the learned Magistrate, provisions of law which appear to be attracted have skipped the attention of all the concerned and therefore have not been invoked in the present case. In such circumstances, we are of the opinion that we should not turn a blind eye and must do the needful to address the situation. Learned 5th Additional Chief Judicial Magistrate, Nanded is directed to revisit the matter with view to consider as to whether charge can be framed against the applicants under Section 354C of the IPC along with Section 66-E and 67 of the Information Technology Act.

16. Framing of charge is very important stage in any criminal trial. The provisions of Chapter XVII of the Code of Criminal Procedure deal with forms of charges. The charge has to be framed by providing brief description of the offence, provisions of law and specific name of the offence, if any. The date time and place and manner in which the offence is committed must be stated. The persons against whom the charge is being framed are required to be named. The charge must be so framed that it gives the accused a sufficient idea of exact nature of allegations levelled against him. Section 216 of the Code of Criminal

Procedure provides that a Court may alter or add any charge at any time before the judgment is pronounced. However, duty is cast on the Court to read out and to explain such additional charge or alteration in the charge. Depending on whether prejudice would be caused to the accused or not, the Court may either proceed with the matter as if the altered or added charge had been framed along with the original charge or may direct fresh trial or adjourn the trial for a reasonable period.

17. The present case would be one of warrant trial. The procedure for conducting warrant trial initiated on police report is provided in Chapter XIX-A of the Code of Criminal Procedure. Section 239 of the Code of Criminal Procedure provides that the learned Magistrate is required to consider the police report and documents sent to him along with the police report under Section 173 of the Code of Criminal Procedure and after giving the prosecution and the accused an opportunity of hearing if the Magistrate feels that the charge against the accused is groundless, he shall pass an order discharging the accused for reasons to be recorded in the order. However, upon consideration of the material and hearing the parties, if the Magistrate is of the opinion that there is a reasonable ground for assuming that the accused has committed the offence, he shall frame the charge, provided the matter falls within his jurisdiction.

18. A valuable right is conferred upon the accused at the stage of framing of charge. If the charge is groundless, he has right to get order of discharge forthwith. In such circumstances, he will not have to face the agony of undergoing criminal trial. Likewise, it is also essential for the prosecution that appropriate charge is framed against the accused unwarranted complications do not arise at the advanced stage of the case. Although error in framing of charge is not a material defect, in the event the accused can establish any consequent prejudice or failure of justice, it becomes a material defect in view of Sections 215 & 464 of the Code of Criminal Procedure. To avoid such possibility, it is essential that proper and definite charge under appropriate provision/s of law is/are framed under Section 240 of the Code of Criminal Procedure. In this regard, we refer to judgment of the Hon'ble Supreme Court in the matter of ***Sandarajan Vs. State represented by Inspector of Police Vigilance Anti-Corruption Dindigul*** reported in ***2023 SCC Online (SC) 424***, wherein commenting upon the importance of the stage of framing of charge, the Hon'ble Supreme Court has observed as under :-

“16. We find that, in this case, the charge has been framed very casually. The Trial Courts ought to be very meticulous when it comes to the framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial due to an order of remand which can be passed under sub-section (2) of Section 464 of Cr.P.C. Apart from the duty of the Trial Court, even the public prosecutor has

a duty to be vigilant, and if a proper charge is not framed, it is his duty to apply to the Court to frame an appropriate charge.”

19. Framing of charge is very important stage in a criminal proceeding. Trial of the case commences with framing of charge. Charge has to be framed after hearing the public prosecutor as also after upholding opportunity of hearing to the accused. Framing of proper charges is essential to provide the accused a fair idea of the allegations against him which he has to meet. This is an essential element of principles of natural justice. Apart from this, just as a failure to frame proper charge may cause prejudice to the accused, omission to frame appropriate charge with respect to an offence/s will definitely cause prejudice to the victim of a crime and will lead to travesty of justice. In fact from the stage of taking cognizance of the matter, the Court should be vigilant about the particular sections of law which are attracted in the matter. Particularly at the stage of framing charge, it is duty of the Court to ensure that all the applicable provisions are properly adverted to and considered and charge is framed under the provisions of the law that are attracted in the facts of the case. However, we are constrained to observe that this important stage regarding framing of charge is being observed mechanically without application of judicial mind.

20. In the present case, we find that this important stage has been

observed in a rather casual manner. The learned Magistrate has not adverted to and has not properly appreciated essential ingredients Section 354 of the IPC and has erroneously framed charge under the said provision against the present applicants/accused Nos. 2 and 3 although it is undisputed that they had not used any criminal force or committed any act which amounting to assault. Likewise, while framing the charge under Section 354-C of the IPC against the accused No.1 for recording the video clip, same charge has not been framed against the present applicants/accused Nos. 2 and 3 who have disseminated the said video clip, which is also an offence under Section 354-C of the IPC. We also find that the provisions of Section 66-E and 67 have completely skipped the attention of the learned Magistrate.

21. We must however also record that, we are aware of the burden of judicial work on all Magistrates. It is duty of the learned public prosecutor so also the learned counsels representing the accused, to properly assist the Magistrate at all stages of a criminal proceedings including at the stage of framing of charge. It is unfortunate that in most of the cases, charge is framed with respect to offences which are mentioned in the 173 report mechanically without application of prudent mind. The present case, unfortunately, is one more such case where non application of mind is writ large on the face of the charges

framed.

22. We therefore direct the learned Magistrate to frame the charges once again, in the light of above observations. We also clarify that the observations made herein above with respect to material on record and provisions of law are *prima facie* observations for guidance of the learned Magistrate. The learned Magistrate must apply his mind independently to determine what charges must be framed against the accused persons and under which provision of law. Hence, we pass the following order.

ORDER

- (I) The charge framed on 24.09.2021 vide Exhibit 20 in Regular Criminal Case No. 681 of 2021 pending on the file of the learned 5th Additional Chief Judicial Magistrate, Nanded is hereby quashed.
- (II) The learned 5th Additional Chief Judicial Magistrate, Nanded is directed to revisit the matter from the stage of Section 239 and 240 of the Code of Criminal Procedure for considering discharge/framing of charge in accordance with law, in the light of observations made herein above.

(ROHIT W. JOSHI)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE