2024:BHC-AUG:26094-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.2908 OF 2024

Ashwinkumar Pandhari Sanap,
Age 43 yrs., Occ. Labour,
R/o Kingaon Raja, Tq. Sindkhedraja,
Dist. Buldana.
At present R/o Rajput Layout, Buldana,
Tq. & Dist. Buldana.

… Applicant

… Versus …

1 The State of Maharashtra
Through the Police Inspector,
City Police Station, Hingoli,
Tq. & Dist. Hingoli.

2 Pandit Jagannath Tare,
Age 38 yrs., Occ. Police Constable,
R/o Mangalwara Bazar, Vanjarwada,
Tq. & Dist. Hingoli.

3 The Investigation Officer,
(Narendra Bhimrao Padalkar)
City Police Station, Hingoli,
Tq. & Dist. Hingoli.

4 Narendra Bhimrao Padalkar
(Police Inspector)
Age Major, Occ. Service,
R/o City Police Station, Hingoli,
Tq. & Dist. Hingoli.

… Respondents

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Mr. B.S. Dhawale, Advocate for applicant

Mr. A.R. Kale, APP for respondent No.1

Mr. S.E. Shekade, Advocate for respondent Nos.2 to 4

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CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.

RESERVED ON : 14rd OCTOBER, 2024

PRONOUNCED ON : 23rd OCTOBER, 2024

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application is filed under Section 482 of the Code of Criminal Procedure, 1973 for quashing First Information Report vide Crime No.427/2024 dated 27.06.2024 registered with City Police Station, Hingoli, Tq. & Dist. Hingoli, which was initially registered for the offence punishable under Section 500 of the Indian Penal Code, 1860 [356(2) of the Bharatiya Nyaya Sanhita] and Section 66-A and 66-B of the Information Technology Act, 2000 (For short, "I.T. Act"). First Information Report has been lodged by respondent No.2, who is a Police Constable in his personal capacity and not as a representative of the State.

2 It will not be out of place to mention here that by order dated 19.08.2024 this Court had taken note of the fact that offence under Section

66-A of the I.T. Act has been registered on 27.06.2024 even when that section was held unconstitutional by Hon'ble Supreme Court in **Shreya Singhal vs. Union of India** [AIR 2015 SC 1523]. It was also observed that Section 66-B of the I.T. Act was not applicable to the facts of the case as it provides punishment for dishonestly receiving stolen computer resource or communication device. When these both sections were not attracted at all; yet, the applicant came to be arrested at 00.31 hours on 06.08.2024 i.e. midnight and at the time of arrest the First Information Report was standing for the offence punishable under Section 66-A and 66-B of the I.T. Act, but later on when the applicant was produced before the Magistrate at about 4.50 p.m. on 06.08.2024 along with a report that Section 66-A and 66-B of the I.T. Act should be deleted and Section 67-A of the I.T. Act should be added; this Court permitted the applicant to carry out the amendment and add the Investigating Officer and Police Inspector of Hingoli Police Station by their names as party respondents. This Court also directed that in the notice to respondent Nos.2 to 4 it should be mentioned as why they should not be asked to pay the compensation to the applicant. In pursuant to the said notice the amendment has been carried out and it appears that the Police Inspector of Hingoli Police Station and the Investigating Officer is same. He appeared through Advocate Mr. S.E. Shekade and respondent No.2 is also represented by him. They have not filed any affidavit.

3 Heard learned Advocate Mr. B.S. Dhawale for applicant, learned APP Mr. A.R. Kale for respondent No.1 and learned Advocate Mr. S.E. Shekade for respondent Nos.2 to 4.

4 It has been vehemently submitted on behalf of applicant that the applicant is the husband of sister of respondent No.2. Two years prior to the registration of First Information Report there was divorce between the applicant and sister of respondent No.2. Applicant's wife had lodged First Information Report for the offence punishable under Section 307, 498-A, 504, 506, 325 of the Indian Penal Code. The applicant had given a message on the WhatsApp of relative of respondent No.2, which was defamatory. In the said message it was contended that sister of respondent No.2 when staying with the applicant used to videograph the obscene acts between them and those videos used to be circulated by respondent No.2 on groups. The family of respondent No.2 has no standard. Family of respondent No.2 has harassed applicant and his family. Sister of respondent No.2 had stolen Tur crop from applicant's land. Respondent No.2 used to utter bad words against mother and sister of applicant etc. According to respondent No.2, this post is defamatory and, therefore, he lodged the said report. This Court had already expressed that when the applicant came to be arrested at that time it was under such an offence which was declared unconstitutional and another

offence was not even made out. Therefore, the arrest of the applicant was unconstitutional and illegal. Now, Section 67-A of the I.T. Act has been replaced, but even that section is not applicable taking into consideration the contents of the First Information Report as it is. The learned Advocate for applicant relies on **Apoorva Arora vs. State (Govt. of NCT of Delhi)** [AIRONLINE 2024 SC 188], wherein it has been held that Section 67-A criminalizes publication, transmission, causing to publish or to transmit in electronic form any material that contains sexually explicit act or conduct. The Court should consider that literal meaning is not required to be considered. The common usage of these words is reflective of emotions of anger, rage, frustration, grief or perhaps excitement. There could be sexually explicit act or conduct which may not be lascivious. Equally, such act or conduct might not appeal to prurient interests. On the contrary, a sexually explicit act or conduct presented in an artistic or a devotional form may have exactly the opposite effect, rather than tending to deprave and corrupt a person. Therefore, by applying the said standards and the ratio it cannot be said that the contents even if considered that it was given by the present applicant will not attract section 67-A of the Indian Penal Code. As regards Section 500 of the Indian Penal Code is concerned, it is a non cognizable offence and cognizance of the same can be taken by a Magistrate only upon a complaint. Therefore, the First Information Report needs to be set aside as

well as the present applicant needs to be compensated.

5 Learned Advocate for respondent Nos.2 to 4 submitted that the First Information Report was got registered by Police Station Officer under wrong sections, but prior to production of applicant before the Magistrate that mistake was realized and by submitting report that Section 66-A and 66-B of the I.T. Act are required to be deleted, addition of Section 67-A of the I.T. Act was informed and then the learned Magistrate by order dated 06.08.2024 took the accused in Magisterial Custody. On the same day the applicant came to be released on bail by learned Judicial Magistrate First Class, Hingoli (Court No.1). There was no ill intention on the part of the Investigating Officer. As regards respondent No.2 is concerned, he has given the First Information Report and it was for the police to register the offence. It cannot be said that all this has been done in the *mala fide* way.

6 We would like to deal with the point of arrest of applicant first. At the cost of repetition, it is to be noted that we have already observed on 19.08.2024 that when the applicant came to be arrested at 00.31 hours on 06.08.2024 i.e. intervening night of 05.08.2024 and 06.08.2024, the sections on record were Section 66-A and 66-B of the I.T. Act. The I.O. has not filed affidavit-in-reply and has not explained when the investigation was handed

over to him, but certainly it would be prior to the arrest of applicant. It is beyond imagination that before the arrest the Investigating Officer will not apply his mind, as to which are the sections those are invoked, what is the punishment, that is, prescribed and whether he can make a legal arrest in such situations ? The realization of the wrong section, after the arrest of a person, would be a suicide attempt by an Investigating Officer, because he is bound to follow the law before and at the time of effecting arrest. The Investigating Officer should take note of Section 41-A of the Code of Criminal Procedure and the decisions in **Arnesh Kumar vs. State of Bihar** [2014 (8) SCC 273] and **Satender Kumar Antil vs. Central bureau of Investigation and another** [(2022) 10 SCC 51]. These two decisions mainly will have to be strictly observed by any Investigating Officer. The Investigating Officer i.e. respondent No.3 (respondent No.4 also) cannot arrest a person for committing an offence which was declared unconstitutional by the Supreme Court. That means, it was not in books at the time of the arrest of that person. At the cost of repetition, we would once again observe that in spite of declaration of Section 66-A of the I.T. Act being unconstitutional still the offences are being registered. This is the indication of high handedness of the police machinery in utter disregard to the law laid down by Hon'ble Supreme Court. Section 67-A of the I.T. Act was not at all attracted taking into consideration the facts of the case/contents of the First Information

Report reproduced above. That means, the arrest of applicant was in respect of an offence which was declared unconstitutional and in respect of another offence which was not made out. Certainly, when this arrest is made at midnight, it is in total violation of the personal liberty enshrined under the Constitution of India.

7 As aforesaid, it is the bounden duty of the Investigating Officer to give reason for arrest of a person when such person is produced before the Magistrate and such reasons are necessary when the offence is punishable with imprisonment of less than seven years i.e. as per section 41-A of the Code of Criminal Procedure. Similar provision is there in Section 35 of the Bharatiya Nagarik Suraksha Sanhita, 2023. Copy of the remand report which is stated to be under Section 187 of the B.N.S.S. is made available. There is absolutely no reason given by respondent No.3 as to why the applicant came to be arrested. Further, that report shows that panchnama of the spot was effected (when that message is given on mobile, why panchnama of the spot and of which place was required is not understandable.), statements of witnesses were also recorded and it is said that when the applicant was found, he admitted the guilt and then he has been arrested, his mobile has been seized. It is not stated that when the accused was given information as to the ground of arrest, then at that time which sections were told to him, in

other words, respondent No.3 is not explaining as to what he communicated to applicant that his arrest is under which provisions and for which offence. Therefore, we take that it would have been certainly disclosed that his offence was under Section 66-A and 66-B of the I.T. Act when arrested. We are constrained to observe that learned Judicial Magistrate First Class, Hingoli (Court No.1) has also not taken into consideration as to whether the arrest was necessary and whether it was under the provisions of law or not. Even if we take at the time of production of the accused Section 67-A of the I.T. Act was invoked, then it can be seen that for the first offence the imprisonment prescribed is to the extent of five years and with fine, which may extend to ten lac rupees. There was no document produced before the learned Magistrate to show that it was the second or subsequent offence alleged against accused. Section 67-A of the I.T. Act further prescribes that if the offence is second or subsequent, then upon conviction such accused can be convicted with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lac rupees. Therefore, even for Section 67-A of the I.T. Act in the present case, which should be taken as first offence, the arrest was not mandatory. That arrest ought to have been under Section 41-A of the Code of Criminal Procedure or Section 35 of the B.N.S.S. together with the law laid down in **Arnesh Kumar** (supra) and **Satender Kumar Antil** (supra). It ought to have been seen by the

Magistrate that whether arrest is legal before he takes the said accused under Magisterial Custody. The said order passed by the concerned Magistrate is without application of mind. Though he has released the accused on bail on same day, it was his duty to consider the said legal position. We have constrained to observe, taking into consideration the recent experiences, that the Magistrates including the Judges who are having powers of Magistrate like the Special Courts (before whom the accused persons are produced after arrest) are not considering the ratio laid down in **Arnesh Kumar** (supra) and **Satender Kumar Antil** (supra) seriously. Mechanical orders are passed without considering whether there is compliance of the mandatory provisions and requirements by the Investigating Officer. We deprecate such kind of practice. The Magistrates should avoid such situation in view of the observations in **Arnesh Kumar** (supra) when directions are given that even the Magistrates will be held responsible for any such negligence.

8 The conduct of the prosecution and respondent Nos.2 and 3 is also required to be considered when the bail application was filed and it has been opposed. We also clarify that prosecution is a separate wing than investigation and, therefore, it is the duty of the Prosecutors also to see whether the arrest is legal or not. Unnecessary objection to the bail applications should be avoided. Here, in his say, respondent No.3 has again

quoted Section 66-B of the I.T. Act, which shows that still he had no intention to apply his mind to the facts of the case. The say given by respondent Nos.2 and 3 expresses only concern that the applicant would defame the informant and his sister.

9 As aforesaid, taking into consideration contents of the alleged message on the WhatsApp it cannot be said that offence under Section 67-A of the I.T. Act has been made out, which criminalizes publication, transmission, causing to publish or transmit in electronic form any material that contains sexually explicit act or conduct. We have observed in the past also that if the said message is on WhatsApp, which is encrypted end to end, unless the recipient chooses to forward it, it can only be read by the person who receives it. The sender then cannot have or intended to have intention to defame a person in society. Here, the First Information Report does not say that, that message was put on some group or to various persons individually. When the First Information Report not even discloses Section 67-A of the I.T. Act, it deserves to be quashed and set aside, definitely, to that effect and as regards Section 500 of the Indian Penal Code is concerned, the cognizance of the same can be taken by a Magistrate only, upon a complaint, defined under Section 2(d) of the Code of Criminal Procedure. Here, in this case, respondent No.2 being Police Constable himself was aware that he

could not have lodged First Information Report only for the offence under punishable under Section 500 of the Indian Penal Code and, therefore, it appears that he lodged the First Information Report with the Sections under the I.T. Act. It cannot be said that he has lodged the First Information Report and then rest was not in his hand as to which section would then be applicable and it was not his intention to get the applicant arrested. Certainly, there appears to be dispute going on between the applicant and his wife, who is the sister of respondent No.2 and, therefore, the present First Information Report has been lodged with *mala fide* intention. The observations from the decision in **Apoorva Arora** (supra) are certainly helpful to the applicant and those parameters have been considered by us.

10 For the aforesaid reasons, we consider this to be a fit case where the First Information Report needs to be quashed and set aside. We have heard respondent Nos.2 and 3/4 on the point of compensation. In view of observations made above, we direct respondent No.2 as well as respondent No.3/4, to compensate applicant. Compensation amount is more in respect of respondent No.3 as he has caused illegal arrest. Hence, we pass following order.

ORDER

1 Criminal Application stands allowed.

2 The First Information Report vide Crime No.427/2024 dated 27.06.2024 registered with City Police Station, Hingoli, Tq. & Dist. Hingoli, for the offence punishable under Section 500 of the Indian Penal Code, 1860 and Section 67-A of the Information Technology Act, 2000 (originally under Section 66-A and 66-B of the I.T. Act) stands quashed and set aside.

3 Respondent No.2 to pay compensation of Rs.50,000/- (Rupees Fifty Thousand only) to the applicant. Said amount be deposited in this Court on or before 14.11.2024.

4 Respondent No.3 (who is also respondent No.4) to pay compensation of Rs.2,00,000/- (Rupees Two Lac only) to the applicant for causing illegal arrest of the applicant. Said amount be deposited in this Court on or before 14.11.2024.

5 Both the amounts, upon deposit, be given to the applicant.

6 Copy of this order be sent to Superintendent of Police, Hingoli for further action, in view of decision in **Arnesh Kumar** (supra).

(S.G. CHAPALGAONKAR, J.) **(SMT. VIBHA KANKANWADI, J.)**

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