

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.206 of 2023

Applicant	Muhammad Sohail through Mr. Mohsin Khan, Advocate.
Respondent No.1	Jamshed Mahmood Raza @ Jami through Mr. Asif Ali Khawaja, Advocate.
Respondents 2 & 3	Through Mr. Mumtaz Ali Shah, Asst. P.G.
Date of hearing	21.08.2024
Date of order	<u>26.08.2024</u>

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ORDER

Shamsuddin Abbasi, J:- Muhammad Sohail Javed, applicant, is a director by profession, filed a direct complaint under Section 200 Cr.P.C. against respondent No.1 seeking cognizance of offence against respondent No.1 of publishing multiple times a letter on his *facebook* page "Jami Moor" from an anonymous girl about an incident of her sexual assault at the hands of applicant, which insinuated the applicant to the general public and specially people from the field of show business. It is alleged that all averments made in the publication are false and concocted and do not even bear an iota of truth, but a figment of respondent No.1's slanted and trite imagination with malicious purpose to defame and disgrace the applicant.

2. After holding preliminary inquiry in the matter, the learned Magistrate sent up the matter to the Court of Sessions. The Court took cognizance of the matter, supplied copies under Section 265-C, Cr.P.C. and framed a charge against respondent No.1. The applicant appeared and recorded part of his examination-in-chief, which was reserved and thereafter instead of recording his further examination-in-chief, he has filed an application under Section 540, Cr.P.C. seeking permission to exhibit USB containing a video of the incident in evidence and sent the same to Forensic Division for examination and report.

3. The learned trial Court (Additional Sessions Judge-X, Karachi South) after hearing the parties respective counsel dismissed the application vide

order dated 20.09.2023. The applicant being aggrieved by the order of dismissal preferred the present Criminal Revision Application and prayed for following relief(s):-

- (a) *That this Honourable Court may be pleased to set aside the impugned order dated 20.09.2023, passed by the learned X AD&SJ South in Complaint No.498/2019 and direct the trial Court to allow the applicant to produce the USB containing the video of the incident as stated in paragraph 8 of the complaint and send the USB to the forensic agency for their report, transcript, and/or analysis, etc.*
- (b) *Any other or further order/relief which this Hon'ble Court may deem fit and proper in the interest of justice".*

4. It is mainly contended on behalf of the applicant that respondent No.1 published a letter on his *facebook* page containing defamatory remarks against applicant multiple times, which not only has affected the reputation of the applicant seriously but also created hatred and ridicule in the eyes of the public. It is next submitted that the material that was published on *facebook* page has been deleted but a video is available in the USB, which is essential to arrive at a just and fair adjudication of the matter. It is also submitted that the learned trial Court has erred in law by not allowing the applicant to exhibit the USB, inasmuch as, the whole case of the applicant revolves around the judicial determination of crucial evidence lying in the USB and once the USB is allowed to be placed on record, the offence committed by the respondent No.1 will be proved, and if the same is not permitted to be exhibited, then the applicant will suffer adversely. The learned counsel while summing up his submissions has submitted that a Court of law could not have refused to exhibit per se admissible evidence, which is essential to arrive at a just and fair decision in the matter. In support of his submission, he has placed reliance on the cases of *Ch. Muhammad Anwar v Judge Accountability Court No.IV, Lahore and 2 others* (2021 MLD 648) and *Taimoor Mirza v Maliha Hussain and others* (2020 CLC 1029).

5. The learned counsel for the respondent No.1 and the learned Assistant Prosecutor General while supporting the impugned order have submitted that the learned trial Court has rightly declined applicant's prayer with lawful authority and jurisdiction observing that the applicant never

disclosed about the USB containing video of the incident and he has only brought this fact to the notice of Court at a belated stage while recording his evidence, therefore, this revising being misconceived, merits dismissal.

6. I have given my anxious consideration to the submissions of respective parties' and perused the entire material available before me with their able assistance.

7. The controversy revolves around a USB which was sought to be exhibited in evidence. The case of the applicant is that the USB contained a video of alleged incident which would be a sufficient proof to substantiate his case, hence the same is necessary to arrive at a just and fair decision in the matter. On the other hand, the contention of the respondent No.1 is that the applicant did not disclose about availability of evidence in USB and intend to exhibit the same only at a belated stage while recording his examination-in-chief. The learned trial Court turned down the applicant's request for bringing on record the USB and dismissed the application under Section 540, Cr.P.C. observing that if such an evidence was available with the applicant he should have brought the same on record at earlier stage, hence at belated stage the same cannot be exhibited in evidence.

8. A USB is a modern device generated through an automated system, hence the same can be exhibited in evidence as provided in Articles 46-A and 164 of Qanun-e-Shahadat Order, 1984. For the sake convenience, the same are reproduced below:-

"46-A. Relevance of information generated, received or recorded by automated information system. Statements in the form of electronic documents generated, received or recorded by an automated information system while it is in working order are relevant facts.

164 Production of evidence that has become available because of modern devices etc. In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques."

9. Article 164 of the Order *ibid* provides wide powers to the Courts to make use of evidence generated by modern devices and techniques; Articles 46-A and 78-A of the Order as well as provisions of Electronic Transactions Ordinance have smoothened the procedure to receive such

an evidence subject to restrictions/ limitations provided therein. Reliance in this behalf may well be made to the cases of *Ishtiaq Ahmed Mirza v. Federation of Pakistan* (PLD 2019 SC 675) and *Ali Raza v. State* (2019 SCMR 1982). If USB is allowed to be exhibited in evidence, the respondent has a right to disprove such piece of evidence in cross-examination. It is the jurisprudence of law that cross-examination is a litmus test of the truthfulness of what deposed on oath in examination-in-chief. The Honourable Supreme Court in the case of *Nawabzada Shah Zain Bugti and others v The State* (PLD 2013 Supreme Court 160) held that a Court should not summarily dismiss an application under section 540, Cr.P.C. merely on the grounds that it was filed just to fill lacuna of the case or that it was a belated application. The Courts are duty bound to decide the case on merits after affording an opportunity to the parties to place on record all available evidence with them. Section 540 Cr.P.C. empowers a Court to summon all relevant evidence and place on record at any stage of the trial, necessary to decide the controversy between the parties. The record is suggestive of the fact that besides the present proceedings, the applicant has also filed a suit against respondent seeking damages on the same subject of defamation and during pendency of such suit an application under Order VI Rule 17, CPC was filed by applicant (plaintiff) for bringing on record the USB containing video of alleged incident, which was allowed with the consent of the respondent (defendant). On one hand, the respondent has given consent for bringing on record the USB in civil litigation, but on the other hand he has objected for production of same USB in criminal litigation. Such an act of the respondent has drawn an adverse inference and finds support the case of the applicant that such an evidence is essential for arriving at a just and fair decision in the matter. As to the question of forensic analysis of video clip in USB is concerned, the learned trial Court would be competent to get a report from Forensic Division.

10. Reviewing the findings of the learned trial Court coupled with the peculiar facts and circumstances of the case and the case law cited by the learned counsel for the applicant, I am clear in mind that the learned trial Court was not justified in declining the request of the applicant for bringing on record the USB in evidence and dismissing application under Section 540, Cr.P.C. This Criminal Revision Application is, therefore, allowed, the impugned order dated 20.09.2023, passed in Direct

Complaint No.498 of 2019, is set-aside and the application under Section 540 Cr.P.C. filed by the applicant is allowed.

JUDGE

Naeem/PA