

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 14TH DAY OF DECEMBER 2022 / 23RD AGRAHAYANA, 1944

CRL.MC NO. 2981 OF 2019

[TO QUASH ANNEXURE-A2 FINAL REPORT IN C.C.NO.989/2018 PENDING BEFORE
THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KODUNGALLOOR IN CRIME
NO.358/2018 DATED 16.05.2018 OF MATHILAKAM POLICE STATION]

PETITIONER/ACCUSED:

SWAPNA T.D.
AGED 35 YEARS
D/O. THUNDIYIL VIJAYAN, NO. 5/460, KRTVS SRIRAM NAGAR,
RAMASWAMY NAGAR EAST, UDUMALPET, THIRUPPUR, TAMIL NADU-
642 126
BY ADVS.
SHYAM PADMAN
C.M.ANDREWS
P.T.MOHANKUMAR
BOBY M.SEKHAR
LAYA MARY JOSEPH

RESPONDENTS/STATE AND COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM-682 031
- 2 MAHESH P. RAJ,
AGED 40 YEARS, S/O. P.K. RAJENDRAN, POOVATHUMKADAVIL (H),
PANANGAD P.O, THRISSUR-680 665
BY ADVS.
R1 BY SMT.SEENA C, PUBLIC PROSECUTOR
R2 BY SRI.SANTHOSH P.PODUVAL
SMT.R.RAJITHA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
12.12.2022, THE COURT ON 14.12.2022 PASSED THE FOLLOWING:

O R D E R

The petitioner is the accused in Crime No.358/2018 of Mathilakam Police Station, which is now pending as C.C.No.989/2018 pending before the Judicial First Class Magistrate Court, Kodungalloor. The offences alleged against the petitioner are under Sections 465 and 469 of the Indian Penal Code (IPC) and under Sections 66C and 66D of the Information Technology Act, 2000 (IT Act).

2. The facts leading to the filing of this Crl.M.C. are as follows:

The petitioner is the wife of the 2nd respondent/defacto complainant, and they are living separately due to certain matrimonial

disputes. The marriage between the parties was solemnized in the year, 2012 and due to some differences of opinion between them, they have been living separately since 2013 onwards. The 2nd respondent filed OP No.1820/2013 before the Family Court, Thrissur for dissolution of marriage and the same was dismissed by the Family Court as per the judgment dated 9.9.2016, which is now pending in appeal before this Court as Mat.Appeal No.175/2017. The petitioner filed M.C.No.312/2014 before the Family Court, Thrissur, for maintenance and the same was allowed by the Court and the Revision Petition filed by the 2nd respondent is pending before this Court as RP(FC) No.80/2017.

3. While so, on 22.03.2017, a complaint was submitted by the 2nd respondent against the petitioner before Sub Inspector of Police, Mathilakam Police Station alleging that the

petitioner created a fake profile on Facebook in the name 'Mpraj Mpraj', has been sending friend requests to his friends and also sharing photographs with him. Based on the same, Annexure-A1 F.I.R. was registered, and after completing the investigation, the police submitted Annexure-A2 final report alleging the offences mentioned above against the petitioner.

4. This Crl.M.C. is filed to quash Annexure-A2 final report and all further proceedings pursuant to the same as against the petitioner herein.

5. Heard Sri.Shyam Padman, the learned counsel for the petitioner, Smt. Seena C., the learned Public Prosecutor for the State and Sri. Santhosh P. Pothuval, the learned counsel for the 2nd respondent.

6. The contention put forward by the learned

counsel for the petitioner is that none of the offences alleged against the petitioner were made out from the materials placed on record along with Annexure A1 and Annexure-A2. On the other hand, the learned Public Prosecutor, as well as the learned counsel for the 2nd respondent, would oppose the aforesaid contentions.

7. I have gone through the records and heard the contentions raised from either side. As mentioned above, the offences alleged against the petitioner are under Sections 465 and 469 IPC and also under Sections 66C and 66D of the I.T. Act. The petitioner's case is that no materials are available on record for attracting the offences above. As far as the offences under Sections 465 and 469 of IPC are concerned, the allegation which, according to the prosecution, constitutes the aforementioned offences is the creation of a false profile on Facebook in the

name of 'Mpraj Mpraj', which is similar to the name of the 2nd respondent, i.e. 'Mahesh P Raj'. Annexure-A3 is the photograph alleged to have been shared by the petitioner with the friends of the 2nd respondent while making friend requests. It can be seen from Annexure-A3 that the shared photograph is a marriage photo in which, the petitioner and the 2nd respondent are seen. Even though the 2nd respondent alleged that the petitioner shared several photos from the contents of Annexure-A2 final report, it can be seen that, the prosecution has no case that, apart from Annexure-A3, no other photos were shared by the petitioner. Therefore, for the purpose of considering the question of the culpability of the petitioner, we have to proceed with the allegation that what was shared by the petitioner is the photograph shown in Annexure-A3, which is a marriage photo of both parties.

Therefore, the question that arises here is whether by creating a profile in the name which is similar to that of the 2nd respondent by the petitioner and sharing a photograph taken during their wedding, the offences would be attracted or not.

8. Section 465 of the IPC deals with the punishment for forgery, which is defined under Section 463 IPC. As per Section 463 IPC, whoever makes any false document or false electronic record or part of a document or electronic record, with the intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. Therefore, the crucial ingredient is to 'make a false document or false electronic record'. The

making of a false document or false electronic record is defined under Section 464 of the IPC, which reads as follows:

"464. Making a false document

A person is said to make a false document or false electronic record-

First-*Who dishonestly or fraudulently-*

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any electronic signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the electronic signature,

with the intention of causing it to be believed that such document or part of document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly-*Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or*

Thirdly-*Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person*

by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration."

Thus, it is evident that, for attracting offence under Section 465 IPC, the act allegedly committed by the petitioner must come within the definition of Sections 463 and 464 of IPC. When the ingredients of Section 464 IPC are considered, it is to be noted that one of the crucial elements to be in existence is making a false document or false electronic record, dishonestly or fraudulently. The term 'dishonestly' is defined under Section 24 of the IPC, which reads as follows:

24. "Dishonestly"

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly"

Similarly, the term 'Fraudulently' is defined under Section 25 of the IPC, which reads as

follows:

"25. 'Fraudulently'

"A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

9. Thus, it is evident that, in order to attract the offence under Section 465 IPC, the document or electronic record must have been created either dishonestly or fraudulently. In order to treat an act as one committed dishonestly, it must have been done to cause wrongful gain to one person or wrongful loss to another person. Similarly, in order to treat an act as the one committed fraudulently, the accused must have done that act with the intention to defraud. The necessary ingredients for attracting Section 464 IPC were considered by the Hon'ble Supreme Court in **Vimla v. Delhi Administration [AIR 1963 SC 1572]**. In the said judgment, it was observed as follows:

"8. The definition of "false document" is a part of the definition of "forgery". Both must be read together. If so read, the ingredients of the offence of forgery relevant to the present enquiry are as follows : (1) fraudulently signing a document or a part of a document with an intention of causing it to be believed that such document or part of a document was signed by another or under his authority; (2) making of such a document with an intention to commit fraud or that fraud may be committed. In the two definitions, both mens rea described in s. 464 i.e., "fraudulently" and the intention to commit fraud in s. 463 have the same meaning. This redundancy has perhaps become necessary as the element of fraud is not the ingredient of other intentions mentioned in s. 463. The idea of deceit is a necessary ingredient of fraud, but it does not exhaust it; an additional element is implicit in the expression. The scope of that something more is the subject of my decisions. We shall consider that question at a later stage in the light of the decisions bearing on the subject. The second thing to be noticed is that in s. 464 two adverbs, "dishonestly" and "fraudulently" are used alternatively indicating thereby that one excludes the other. That means they are not tautological and must be given different meanings. Section 4 of the Penal Code defines "dishonestly" thus :

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly".

9. "Fraudulently" is defined in s. 25 thus :

"A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

10. The word "defraud" includes an element of deceit. Deceit is not an ingredient of the definition of the word "dishonestly" while it is an important ingredient of the definition of the word "fraudulently". The former involves a pecuniary or economic gain or loss while the latter by construction excludes that element.

Further, the juxtaposition of the two expressions "dishonestly" and "fraudulently" used in the various sections of the Code indicates their close affinity and therefore the definition of one may give colour to the other. To illustrate, in the definition of "dishonestly", wrongful gain or wrongful loss is the necessary ingredient. Both need not exist, one would be enough. So too, if the expression "fraudulently" were to be held to involve the element of injury to the person or persons deceived it would be reasonable to assume that the injury should be something other than pecuniary or economic loss. Though almost always an advantage to one causes loss to another and vice versa, it need not necessarily be so. Should we hold that the concept of "fraud" would include not only deceit but also some injury to the person deceived, it would be appropriate to hold by analogy drawn from the definition of "dishonestly" that to satisfy the definition of "fraudulently" it would be enough if there was a non-economic advantage to the deceiver or a non-economic loss to the deceived. Both need not co-exist."

10. From the principles laid down by the Hon'ble Supreme Court as above, it is clear that, in order to treat an act as a fraudulent act, there must be an element of deceit or an injury. Injury is defined under Section 44 of the IPC, which reads as follows:

"44. 'Injury'

The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

Therefore, it is evident that, any harm illegally caused to a person would come under the term 'injury'. In this case, the act alleged against the petitioner is creating a profile on Facebook by using a name which is similar to the name of the petitioner and sharing of the marriage photo of the petitioner as well as the 2nd respondent. The crucial aspect to be noticed is that the prosecution does not have any material to show that the petitioner had shared anything which causes loss of reputation or otherwise affects any economical or non-economical injury to the 2nd respondent. Merely by creating a profile using a name similar to the name of the 2nd respondent, it cannot be concluded that an offence has been committed. To complete the offence, the accused must have done something more which caused injury to the complainant or exposed the complainant to any such injuries. In this case, it is evident

that the petitioner allegedly created the said profile on 4.12.2016 and deleted the said profile on 2.5.2017, which was before the registration of the crime. Apart from the fact that, some friend requests were seen sent to some of the friends of the 2nd respondent and sharing the wedding photo, no other acts which caused any injury or damage to the petitioner either economically, physically or to the reputation of the petitioner had occurred. Apart from sharing the wedding photographs, no other acts were alleged. From the available materials, it cannot be concluded that, the petitioner had created the profile with the intention to cause any loss/injury to the 2nd respondent. Mere act of creating a profile on Facebook in the name similar to that of the 2nd respondent, without causing any actual injury as defined under Section 44 of the IPC, cannot be treated as an act, committed by the petitioner

dishonestly or fraudulently. Therefore, the offence under Section 465 of IPC would not be attracted in the facts of this case.

11. Section 469 IPC is yet another offence alleged against the petitioner. If the act of the petitioner does not come within the definition of forgery, the offence under Section 469 IPC also would not be attracted as one of the necessary ingredients for attracting Section 469 IPC is the commission of forgery. Another ingredient for attracting the offence under Section 469 IPC is to commit forgery with the intention to harm the reputation. In this case, I have already found that, by merely creating a Facebook profile using a name similar to that of the 2nd respondent, no loss of reputation would be caused. It is also discernible from the records that the prosecution has no case that the petitioner has done anything which would result in the loss of reputation of

the 2nd respondent. Therefore, the said offence is also not attracted.

12. The other offences are under Sections 66C and 66D of the Information Technology Act. The aforesaid provisions read as follows:

"66C Punishment for identity theft. -Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine with may extend to rupees one lakh."

"66D Punishment for cheating by personation by using computer resource. -Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees."

On reading the aforesaid provisions, it can be seen that, one of the basic requirements to attract both the said offences is that the act must have been committed fraudulently or dishonestly. In this case, while discussing the culpability of the petitioner for the offences

punishable under Sections 465 IPC, I have already found that the act allegedly committed by the petitioner cannot be treated as the one committed dishonestly or fraudulently. In the light of the said finding, the offences alleged against the petitioner under Sections 66C and 66D of the Information Technology Act would not also be attracted.

13. There is yet another aspect which shows that no culpability can be attributed to the petitioner. As per the prosecution case, the profile was created on 4.12.2016 and it was allegedly maintained by the petitioner till 2.5.2017. During the said period, the petitioner was continuing as the wife of the 2nd respondent even though they were living separately. The petitioner advanced a definite case that she resisted the petitions submitted by the 2nd respondent before the Family Court for

dissolution of marriage under the hope that the marriage between them would work out and, ultimately, she would be able to continue her life along with the 2nd respondent as husband and wife. Therefore, it was specifically contended by the learned counsel for the petitioner that, as she was under a bona fide belief that the relationship between the parties would be recommenced, even if it is found that she created a profile in a name which is similar to that of the 2nd respondent, she is justified in doing that. In the peculiar facts of this case, I find that the contention raised by the learned counsel for the petitioner is only to be accepted.

14. Apart from the above, it is also contended by the petitioner that the mere creation of a profile without any noticeable injury or harm to the 2nd respondent, would not attract any offence. It is pointed out that, if

at all the same is treated as an act against the interest of the 2nd respondent, its impact is so trivial that no ordinary man would be affected. To substantiate the contentions above, the learned counsel relies on the observations made by this Court in **Narayanan and Ors. v. State of Kerala** [1987 CriLJ 741]. In paragraph 5 of the said decision, it was observed as follows:

"5. When considering the question whether the acts alleged against the petitioners would amount to an offence of wrongful restraint, the maxim "de minimis non curat lex" (the law does not take account of trifles) should be borne in mind if the harm caused or intended to be caused is so slight that no person of ordinary sense and temper would complain of such harm. The above principle is embodied' in Section 95 of the Code. The definitions of various offences in the Code are so framed as to bring a number of activities within the letter of the penal law. If we are to go by the definitions alone, "it is theft to dip a pen in another man's ink, it is mischief to crumble one of his wafers, it is assault to cover him with a cloud of dust by riding past him, it is hurt to incommode by pressing against him in getting into a carriage." At the same time those are but few of the innumerable acts without the performance of which men cannot live together in society, and acts which it is desirable that they should do. It depends upon the degree of the acts and that is why the authors of the Code took particular care in striking a note of caution by incorporating Section 95 in the Code."

As observed by this Court in the aforesaid decision, Section 95 of IPC provides that nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such damage. In this case, the allegations against the petitioner were that she created a profile using a similar name to that of the 2nd respondent and shared their marriage photographs. Even if it is treated as an act against the 2nd respondent, it will fall under the class of an act contemplated under Section 95 of the IPC. As mentioned above, mere creation of a profile would not cause any harm to the petitioner, mainly when the parties were husband and wife and photos allegedly shared by the petitioner was their wedding photo, wherein both of them were shown. The prosecution has no case

that the petitioner used any abusive language or shared anything which affected the privacy of the 2nd respondent through the said profile. Apart from creating a profile and sharing the wedding photograph, no other misuse of the said profile is alleged and no other materials indicating such misuse are there in the records produced by the prosecution. Therefore, I am of the view that the prosecution initiated against the petitioner based on Annexure-A1 and Annexure-A2 is a clear abuse of the process of law and the same is liable to be terminated prematurely, invoking the powers of this Court conferred under Section 482 of Cr.PC.

In the result, this Crl.M.C. is allowed, Annexure-A2 final report submitted in Crime No.358/2018 of Mathilakam Police Station and all further proceedings thereof, including the proceedings in C.C.No.989/2018 on the file of the

Judicial First Class Magistrate Court,

Kodungalloor are hereby quashed.

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

pkk

APPENDIX OF CRL.MC 2981/2019

PETITIONER'S ANNEXURES:

ANNEXURE A1	CERTIFIED COPY OF THE FIR IN CRIME NO. 358/2018 DATED 16.05.2018 OF MATHILAKAM POLICE STATION.
ANNEXURE A2	CERTIFIED COPY OF THE FINAL REPORT DATED 03.10.2018 IN C.C. NO. 989/2018 PENDING BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KODUNGALLUR.
ANNEXURE A3	TRUE COPY OF THE SCREENSHOTS OF FACEBOOK MESSENGER CHAT.
ANNEXURE A4	CERTIFIED COPY OF THE SUBSCRIBER DETAILS DATED 01.08.2018 RECEIVED FROM JIO AS PER THE REQUEST OF THE DISTRICT POLICE CHIEF, THRISSUR RURAL.
ANNEXURE A5	CERTIFIED COPY OF THE FACEBOOK BUSINESS RECORD DATED 05.05.2017.
ANNEXURE A6	TRUE COPY OF THE 161 STATEMENT OF THE WITNESS IN C.C. NO. 989/2018 SUBMITTED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KODUNGALLUR.