

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

THURSDAY, THE 7<sup>TH</sup> DAY OF DECEMBER 2023 / 16TH AGRAHAYANA, 1945WP(CRL.) NO. 445 OF 2022PETITIONER:

XXXX

BY ADVS.  
T.B.MINI  
GAURAV AGRAWAL (6631/1999/BIH)  
C.GEORGE THOMAS (D/1081/2012)

RESPONDENTS:

- 1 STATE OF KERALA,  
REPRESENTED BY THE CHIEF SECRETARY,  
GOVERNMENT OF KERALA, SECRETARIAT, TRIVANDRUM-695001.
- 2 SECRETARY TO GOVERNMENT,  
HOME DEPARTMENT, GOVERNMENT OF KERALA, SECRETARIAT,  
TRIVANDRUM-695501.
- 3 DIRECTOR GENERAL OF POLICE,  
KERALA, POLICE HEAD QUARTERS, TRIVANDRUM-695010.
- 4 ADDITIONAL DIRECTOR GENERAL OF POLICE(CRIMES),  
POLICE HEAD QUARTERS, TRIVANDRUM-695010.
- 5 INVESTIGATING OFFICER,  
DEPUTY SUPERINTENDENT OF POLICE,CRIME BRANCH,  
ALAPPUZHA-688012.
- 6 STATE FORENSIC SCIENCE LABORATORY,  
REPRESENTED BY ITS DIRECTOR, THIRUVANANTHAPURAM-695011.
- 7 \*ADDL.R7: P. GOPALAKRISHNAN @ DILEEP,  
PADMA SAROVARAM HOUSE, KOTTARAKADAVU, ALUVA,  
ERNAKULAM DISTRICT.  
\*ADDL. R7 IS IMPLEADED AS PER ORDER DATED 22/07/2022 IN  
IA.1/2022 IN WP(CRL).  
BY ADVS.  
SRI.T A SHAJI, DIRECTOR GENERAL OF PROSECUTION  
SRI.P.NARAYANAN, SENIOR GOVERNMENT PLEADER  
SRI.SAJJU S SENIOR GOVERNMENT PLEADER  
SRI.B.RAMAN PILLAI (SR.)  
SRI.PHILIP T.VARGHESE  
SRI.THOMAS T.VARGHESE  
SMT.ACHU SUBHA ABRAHAM  
SMT.V.T.LITHA  
SMT.K.R.MONISHA  
SMT.NITYA R.

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON  
07.12.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



'C.R'  
K.BABU, J.

-----  
**W.P (Crl) No.445 of 2022**  
-----

Dated this the 7<sup>th</sup> day of December, 2023

**JUDGMENT**

A South Indian film actress, who was subjected to gang rape and sexual harassment, is before the Court complaining that the sexually explicit videos allegedly recorded by the culprits, which were seized and produced before the Court as evidence and kept in the safe custody of the Court, were unauthorisedly accessed, viewed, copied and transmitted. She apprehends that the contents of the video may be disseminated at any moment. The distress of the victim is beyond imagination.

2. The petitioner is the defacto complainant in Crime No.297/2017 of Nedumbassery Police Station. The case was registered based on the First Information Statement given by her on 18.02.2017, alleging that she was subjected to gang rape and sexual harassment. The Police submitted the final report before the jurisdictional Magistrate, which committed the case to the Sessions Court, Ernakulam. The case is now pending as Sessions



Case No.118/2018 before the Principal Sessions Court, Ernakulam.

3. The prosecution alleges offences punishable under Sections 120A, 120B, 109, 342, 366, 354, 354B, 357, 376D, 506(i), 201, 204, 212 and 34 of the Indian Penal Code and Sections 66-E and 67-A of the Information Technology Act, 2000.

4. The petitioner pleaded the following:

4.1. The petitioner was on her way to Ernakulam from Thrissur on 17.02.2017 in a Mahindra XUV car bearing registration No.KL-39-F-5744. Accused Nos.1 to 6 and respondent No.7 (accused No.8) hatched a criminal conspiracy to abduct the petitioner and commit rape on her. The petitioner was going from her home in Thrissur to Ernakulam to record a promotional song in connection with the movie 'Honey Bee 2'. Accused No.2, Martin Antony, was entrusted with picking up the petitioner from her house. Accused No.1 Sunil, made all arrangements to execute the crime as planned.

4.2. Accused No.2 moved to Ernakulam with the petitioner at about 7.45 p.m. He informed accused No.1 of the time-to-time locations throughout the journey. As planned, accused Nos.1, 3, and



4 were waiting in front of the Adlux Convention Centre, Angamaly, in a tempo traveller bearing registration No.KL-60-A-9338 awaiting the arrival of the vehicle carrying the petitioner.

4.3. When the vehicle carrying the petitioner reached in front of the Adlux Convention Centre, accused Nos.1, 3, and 4 followed the vehicle. When both the vehicles arrived at Kottai near Athani junction, accused No.1 intentionally hit his vehicle slightly behind the vehicle by which the petitioner was travelling with intent to create a fake accident scene as designed. This happened at 9.15 p.m. The intention of the accused was to stop the vehicle by which the petitioner was travelling. Accused No.2 stopped the vehicle, got down from the driver's seat, and made accused Nos.3 and 4 enter the car without her consent. They caught hold of her mouth and hand, overpowered her, and forcefully took away her mobile phone. Thereafter, accused No.2 entered the car, closed all the windows, centre locked the vehicle doors, wrongfully confined her in the car, and continued their journey towards Ernakulam.

4.4. Accused No.1 followed the car in the tempo traveller. Accused Nos.5 and 6 were waiting at Apollo Junction, Kalamassery.



When both the vehicles reached Apollo Junction, Kalamassery accused No.5 approached the petitioner's vehicle and got inside with the active connivance of accused No.2. After watching the situation in the car, accused No.5 got down from the vehicle and narrated the scene to accused No.1. Then accused No.6 got into the petitioner's vehicle and confined her in the rear seat along with accused No.3 and continued the journey. When they reached Palarivattom, accused No.6 got out of the vehicle, and accused No.5 got inside and sat beside her and confined her in the rear seat along with accused No.3. Accused No.4 also entered the vehicle and sat in the front side passenger seat and continued the journey.

4.5. Accused Nos.1 and 6 followed the vehicle. On their way to Ernakulam, when they reached near 'Design Wood Interior shop' at Vennala, both vehicles stopped and accused No.2 got down from the driver seat and handed over the vehicle to accused No.1. From there, the vehicle was driven by accused No.1. He stopped the vehicle in front of hotel Kamadenu at Chittethukara and asked accused No.5 to take his mobile phone from the tempo traveller.



He criminally intimidated the petitioner/victim to surrender herself to record her obscene videos. Accused No.1 threatened the petitioner/victim, committed forced sexual assault on her, and recorded obscene videos, including the visuals of sexual assault, in the mobile phone. After committing the gruesome act upon the petitioner, accused Nos.1 and 3 got down from the car and handed over the victim's car to accused No.2. He dropped the victim at the house of one Mr.Lal (CW6).

4.6. After the commission of the crime, accused No.1 went to his friend's residence at Alappuzha. When his photo was seen on the television, he left his friend's house at Alappuzha and reached the residence of Advocate Sri.Paulose at Angamaly. He handed over the phone with the memory card to Sri.Paulose.

4.7. Advocate Sri.Paulose, during the investigation, informed the Police that on 18.02.2017, accused No.1, and accused Nos.3 and 4, approached him at 9.00 p.m. to execute vakalath and entrusted a plastic cover containing ID proof, Passport etc,. After that, he realised that the cover contained a mobile phone and produced the articles before the jurisdictional Magistrate. The articles were



handed over to the Police. A memory card containing the visuals of sexual assault and rape was included in the items.

4.8. The Court prepared an inventory of the articles that were sent to the Forensic Science laboratory, Thiruvananthapuram, for examination on 25.02.2017.

4.9. The Forensic Science Laboratory examined the memory card, I.D card etc., on 27.02.2017, and submitted a report before the Magistrate's Court. The Forensic Science Laboratory (FSL) had assigned hash value for the memory card. They also had given two pen drives containing retrieved contents of the memory card, including cloned copies of the visuals, one to the Judicial First Class Magistrate Court, Angamaly and the other to the Investigating Officer. The memory card was perfectly sealed and returned to the Court to be kept in safe custody. The report showed that the visuals were recorded on 17.02.2017, and the memory card was accessed on 18.02.2017. The investigation revealed the involvement of a renowned Malayalam film actor Gopalakrishnan @ Dileep. The Investigating agency arrested him.

4.10. The Police submitted the final report before the Judicial



First Class Magistrate Court, Aluva, where the proceedings commenced as C.P No.16/2017. Accused No.8, during the committal proceedings, raised an objection that a copy of the memory card relied on by the prosecution was not furnished to him. He filed CMP No.49/2018 for a direction to the prosecution to hand over the cloned copies of the memory card's video footage and the human voice transcript. Meanwhile, accused No.8 was permitted to watch the video footage in the presence of his counsel and the Magistrate on 15.12.2017. The petition filed by accused No.8 seeking to issue a copy of the memory card was rejected.

4.11. Accused No.8 challenged the order before the Supreme Court, filing SLP No.10189/2018, which was renumbered as Criminal Appeal No.1794/2019. The Apex Court partly allowed Criminal Appeal No.1794/2019 {**P.Gopalkrishnan v. State of Kerala, [(2020) 9 SCC 161]**} observing thus:

“43. Resultantly, instead of allowing the prayer sought by the appellant in toto, it may be desirable to mould the relief by permitting the appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (“CFSL”), on all matters which the appellant may be advised. In that, the appellant can formulate queries with the help of an expert of his choice, for being posed



to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with CFSL. Similarly, the forensic report prepared by CFSL, after analysing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the accused or his authorised representative concerned until the conclusion of the trial. We are inclined to say so because the State FSL has already submitted its forensic report in relation to the same memory card at the instance of the investigating agency.

xxx      xxx      xxx  
xxx      xxx      xxx

49. If the accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he can request the Magistrate to provide him inspection in court, if necessary, even for more than once along with his lawyer and IT expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the accused to protract the trial. While allowing the accused and his lawyer or authorised IT expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may subserve the ends of justice and also effectuate the right of accused to a fair trial guaranteed under Article 21 of the Constitution.

50. In conclusion, we hold that the contents of the memory card/pen-drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting



effective defence during the trial. The court may issue suitable directions to balance the interests of both sides."

4.12. Following the directions of the Apex Court, on 19.12.2019, visuals in the memory card were shown to the counsel appearing for all the accused in the morning. Two IT experts from the State Forensic Science Laboratory, the Investigating Officer and the Special Public Prosecutor were also present. When accused No.8 objected, in the afternoon, the Presiding Officer, accused No.8 and his counsel, and two experts from the State Forensic Science Laboratory alone had seen the visuals in the memory card putting it into the laptop in the Court.

4.13. While so, accused No.8 filed a petition seeking direction to send the memory card to CFSL, Chandigarh. The Court allowed the petition and directed the State Forensic Science Laboratory to get the cloned copy of the memory card for sending it to CFSL, Chandigarh.

4.14. On 10.01.2020, a messenger from the police department collected the same and entrusted it to the Court. On 10.01.2020, the Joint Director of the State Forensic Science Laboratory,



Thiruvananthapuram, called the Investigating Officer and informed him that the hash value of the memory card had changed. A report to that effect was prepared and sent to the Court on 29.01.2020. A Compact Disc containing the visuals was also submitted to the Presiding Officer along with the report.

4.15. Though the issue regarding the change of hash value of the memory card was brought to the notice of the Court, the Presiding Officer kept it secret without any further proceedings. The Presiding Officer has also not resorted to reporting the matter to the High Court.

4.16. On 25.12.2021, one Sri.Balachandrakumar, who is admittedly a close associate of accused No.8, made a disclosure that the visuals of the inhuman sexual assault committed on the victim had reached accused No.8 through a VIP, and he witnessed the accused and others viewing the visuals.

4.17. Based on this information, the Investigating Officer filed a report seeking permission to conduct further investigation. As the hash value change of the memory card is a crucial issue, the Investigating Officer requested the Joint Director of State Forensic



Science Laboratory, Thiruvananthapuram, for a copy of the report.

In that report, it was stated that the last access to the memory card was on 13.12.2018.

4.18. The Investigating Officer filed a petition before the Sessions Court on 04.04.2022 requesting to send the memory card to the FSL for further examination to ascertain and report about the following:

- (i) Whether any folder of the memory card was accessed after 18.2.2017; and
- (ii) To furnish a copy of the file properties of all the files and folder of the memory card;

The Trial Court rejected the application.

4.19. The prosecution approached this Court by filing O.P(Crl) No.257/2022. As per the judgment dated 05.07.2022, this Court set aside the order rejecting the application filed by the prosecution by the Trial Court and directed the Court below to forward the document to the State Forensic Science Laboratory through the mode envisaged by law.

4.20. The State Forensic Science Laboratory submitted a report revealing that the memory card was connected to



computers/mobile phones installed with Windows and Android Operating Systems, Jio network application, Telegram, WhatsApp, Instagram etc., and new folders were created.

4.21. The prosecution raised the grievances of the victim before the Trial Court, raising concern over unauthorised access, copying and transmission of sexually explicit content.

### **Prayers in the Writ Petition**

5. The petitioner has prayed for the following reliefs:

- (i) To issue a writ of mandamus, order or direction directing the respondents 4 and 5 to do a free, fair and complete further investigation in Crime No.297/17 of Nedumbassery Police Station pending trial as S.C No.118/2018 before the Additional Special Session Court, (CBI/SPE-III, Ernakulam) inclusive of the illegal access, tampering and transmission of the contents of the memory card while it was in the safe custody of the trial court and also tampering made in the mobile phones surrendered by the Accused No.8 as per the direction of this Hon'ble Court and to monitor said investigation by this Hon'ble Court or any other authority as fixed by this Hon'ble Court without any illegal interference from any course by calling upon periodical report regarding the progress of the investigation till further final report is submitted before the court below;
- (ii) To issue a writ of mandamus, order or directions directing the 2<sup>nd</sup> respondent conduct a thorough investigation on the change of hash value of the memory card (Sandisk 8 GB Micro



SD Card seized by K.G.Babukumar, Dy.S.P.Aluva on 20.02.2017 and kept in the safe custody of the trial court (Principal Sessions Judge, Ernakulam) under the supervision of this Hon'ble Court;

- (iii) To direct the investigating officer to produce the report from the FSL which was seized by him with regard to the change of hash value of memory card during the same was in judicial custody along with the statement of the FSL authorities;
- (iv) To issue a writ of mandamus , order or direction by this Hon'ble Court initiating stringent action against the persons who are allegedly involved in the tampering of memory card in the judicial custody and direct the 2<sup>nd</sup> respondent to register a crime if so required with regard to tampering of memory card in the judicial custody; and to investigate the same either under the new crime or as part of the further investigation in Crime No.297/2017 of Nedumbassary Police Station [S.C.No.118/2018 of the Addl. Special Court (CBI/SPE III, Ernakulam)].
- (v) To issue a order or direction directing the Additional Special Sessions Court, (CBI/SPE-III, Ernakulam) to forward Ext.P1 application submitted by the investigating officer in Crime No.297/2017 filed before the Additional Special Sessions Court, (CBI/SPE-III, Ernakulam) on 04.04.22 along with the memory card to the 6<sup>th</sup> respondent for examination and to furnish details as specified in Exhibit P1.
- (vi) To issue such other order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

## **SUBMISSIONS**

6. Heard Sri.Gaurav Agrawal, the learned counsel for the



petitioner, Sri.T.A.Shaji, the learned Director General of Prosecution and Sri.B.Raman Pillai the learned Senior Counsel appearing for respondent No.7/accused No.8.

7. The learned counsel for the petitioner confined the reliefs to issue a direction to register a crime and investigate the incidents regarding the unauthorised access of the memory card and copying and transmission of its contents while it was in judicial custody. The learned counsel submitted that the petitioner is not pressing the other reliefs in the petition. The learned counsel further submitted that the registration of a new crime and investigation would not affect the trial of the main case. It is further submitted that the petitioner is interested in seeing that the trial is expedited.

8. The learned counsel for the petitioner further made the following submissions:

8.1. There is a change in the memory card's hash value, which shows that the memory card was illegally accessed on 09.01.2018, 13.12.2018 and 19.07.2021. The report of FSL dated 11.07.2022 shows that the hash value was found to have changed. The memory card had been illegally accessed when the same was in the custody of



different Courts. Some persons have illegally accessed, copied and transmitted the memory card's contents, including the video files.

8.2. The observation in the judgment of this Court dated 05.07.2022 in O.P (Crl) No.257/2022 that the access to a document after it was produced in the Court cannot be a matter of investigation or relevant for investigation under any circumstances since only the Court can pursue that in view of the bar in taking cognizance under Section 195 Cr.P.C does not come in the way of the reliefs prayed for by the petitioner.

8.3. Bar under Section 195(1) read with Section 340 Cr.P.C does not apply to the facts of the present case. It is evident that a memory card which contains eight video files of the sexual assault on the petitioner has been illegally accessed when the same was in a sealed condition in the custody of the Court using Windows Operating System, Android Operating System, and lastly, in a Vivo mobile phone leading to the inference that eight video files have been copied from the memory card into a computer or laptop or tablet or mobile phone. It is also to be inferred that the persons who have copied the sexual assault videos would have further



transmitted the said video files. The illegal access, copying and transmission of the video files would attract the offences under Sections 378, 405, 408, 411 and 425 of IPC, Sections 66-B, 66-E and 67 of the Information Technology Act, 2000 and Section 119 of the Kerala Police Act, 2011.

8.4. The acts of the culprits resulted in the gross violation of the petitioner's fundamental rights. No one should be able to unauthorisedly access any document in the custody of the Court except under due process of law. The violation of the petitioner's right to privacy is to be seriously viewed.

9. The learned Director General of Prosecution submitted the following:

There cannot be any dispute that the memory card was unauthorisedly accessed. This Court, in the order dated 22.09.2022 in Tr.P(Crl) No.52/2022, observed that the memory card was unauthorisedly accessed. The right to privacy of the petitioner is to be protected. The bar under Section 195, read with Section 340 Cr.P.C, is only for taking cognizance of the offence, and the same will not prevent the Police from conducting an investigation of a



cognizable offence.

10. The learned Senior Counsel Sri.B.Raman Pillai made the following submissions:

The Investigating Officer took custody of the memory card from the Court on 20.02.2017, and the same remained with him for five days until it was returned to the Court on 25.02.2017. The Investigating Officer had taken custody of the memory card, which had been kept in a sealed cover after opening the seal and was thereafter returned without any packing or sealing. The allegation that there had been illegal access, tampering and transmitting of the memory card's contents is a matter to be investigated. The allegation is solely based on the pleading that there has been a change in the hash value of the memory card kept in the custody of the Court. The petitioner cannot raise allegations or seek reliefs based on what is stated in the State Forensic Science Laboratory report, the veracity of which is to be established in the manner known to law. It is relevant that the State Forensic Science Laboratory is part of the Kerala Police Department.

10.1. The alleged change in the hash value does not establish



the commission of any criminal act.

10.2. The Supreme Court in **P. Gopalkrishnan v. State of Kerala, [(2020) 9 SCC 161]** settled the law that the content of the memory card is a document and therefore, access to the said document (memory card) during the proceedings of the case cannot be labelled as illegal or improper.

10.3. Neither the petitioner nor the Investigating agency filed any application before the Trial Court under Section 340 of Cr.P.C. Without resorting to the filing of such application, the petitioner cannot institute this writ petition seeking an investigation in view of the explicit prohibition under Section 195(1) of the Cr.P.C.

10.4. This Court, in judgment dated 05.07.2022 in O.P(Crl) No.257/2022, held that the investigation cannot be permitted to enter into matters which it has no authority to pursue. The memory card, pen drive and all electronic records were kept in the treasury chest for safe custody and have been in the treasury chest except when it was ordered to be produced before the Court.

10.5. During the proceedings of the case, the treasury chest containing the memory card, pen drive etc., was brought to the



Court on various dates.

### **Discussion and Conclusions**

#### **Unauthorised access to the memory card**

11. On 01.03.2017, the memory card was sent to the State Forensic Science Laboratory (SFSL). The report dated 03.03.2017 was prepared after analysing the memory card. As per this report, the hash value of the memory card was noted as 8189-566D-62C8-CF1B-7E29-9324-2899-824B. The memory card was again sent to the State Forensic Science Laboratory pursuant to the Supreme Court's order. After examination of the memory card, the State Forensic Science Laboratory prepared a report dated 29.01.2020, which would show that the hash value of the memory card had changed to 86a1 c2b3 fc2d b05e 0516 6cda 0c65 38ce. For the third time, the memory card was sent to the State Forensic Science Laboratory on 07.07.2022 pursuant to the order of this Court dated 05.07.2022 in O.P(Crl) No.257/2022. The State Forensic Science Laboratory prepared a report dated 11.07.2022, showing that the hash value had again changed to f37a df05 eddf 2086 7696 5ecf 8bf7 f091.



12. The report dated 11.07.2022 of the State Forensic Science Laboratory reads thus:

“ix. The creation of new folder/files and the variation of metadata of files are the reason for change in hash value of the questioned memory card marked Q3 from 8189-566D-62C8-CF1B-7E29-9324-2899-824B (Annexure-1) to 86a1 c2b3 fc2d b05e 0516 6cda 0c65 38ce (Annexure-1A).

x. Examination of the forensic image prepared on 07.07.2022 shows that 34 numbers of folders/files were newly created/updated in the questioned memory card marked Q3 on 19.07.2021. The file properties/metadata of the newly created/updated folders/files are enclosed in the report (Table-5).

xi. Examination of the forensic image prepared on 07.07.2022 shows that new folders named com.vivo.gallery, com.jio.myjio, org.telegram.messenger, .vivoRecycleBin, com.vivo.favorite, com.whatsapp and com.instagram.android were created/updated on 19.07.2021 12:19 hrs to 19.07.2021 12:54 hrs, which indicate that the questioned memory card marked Q3 is used in a Vivo make mobile phone having Android Operating System and Jio network application in which Telegram, Whatsapp, Instagram etc. were installed.

xxx xxx xxx

xiii. The use of questioned memory card in the Vivo make mobile phone and creation of system folder/files is the cause of change in hash value of the memory card from 86a1 c2b3 fc2d b05e 0516 6cda 0c65 38ce (Annexure-1A) to f37a df05 eddf 2086 7696 5ecf 8bf7 f091 (Annexure-1B).”

13. The State Forensic Science Laboratory report dated 11.07.2022 shows the date and time on which the memory card has



been accessed.

Date	Time	Particulars
09.01.2018	21:58:41	On 09.01.2018, 2 files namely System Volume Information and Indexer Volume Guid were created on the memory card, which indicates that the memory card was connected to a computer system having Windows Operating System.
13.12.2018	22:58:17	On 13.12.2018, 3 files namely Cache, data and com.android.gallery3d were created on the memory card, which shows that the memory card was used in a device having Android Operating System.
19.07.2021	12:19:12 Till 12:54:13	On 19.07.2021 34 folders/files were newly created/updated in the memory card. The creation of new folders named com.vivo.gallery, com.jio.myjio, org.telegram.messenger, vivorecyclebin, com.vivo.favorite, com.whatsapp and com.instagram.android indicates that, the questioned memory card marked Q3 was used in a Vivo make mobile phone having Android Operating system and Jio network application. In this device Telegram, WhatsApp, Instagram etc apps were installed.

14. There are eight video files in the memory card. The report dated 03.03.2017 shows that eight videos have been created on 18.02.2017 and last accessed on 18.02.2017. However, when the State Forensic Science Laboratory examined the memory card on



10.01.2020, it was found that eight video files created on 18.02.2017 were later accessed on 13.12.2018. The resultant conclusion is that somebody had illegally accessed the memory card.

15. The report dated 11.07.2022 shows that on 09.01.2018 at 21:58:41 hrs, two files were created on the memory card. It is reported that the memory card was connected to a computer having Windows Operating System. On 13.12.2018 at 22:58:17 hrs, three files were created on the memory card, namely cache, data and com.android.gallery3d, showing that the memory card was used in a device having Android Operating System. The report further shows that on 19.07.2021 between 12:19:12 hrs and 12:54:13 hrs 34 folders/files were created.

16. As per the report dated 11.07.2022, on 19.07.2021 between 12:19 hrs and 12.54 hrs, the memory card was used in a Vivo mobile phone having Android Operating System and Jio network application. Apps like Telegram, WhatsApp, and Instagram were installed on the device used.

17. This Court in Tr.P(Crl) No.52/2022 had concluded that there was a change in the hash value regarding the memory card



and that the memory card was accessed. The State Forensic Science Laboratory report dated 11.07.2022 indicates that the memory card was accessed at 22:58:17 hrs on 13.12.2018, at 21.58.41 hrs on 09.01.2018 and on 19.07.2021 between 12:19 hrs and 12:54 hrs as stated above. Undoubtedly, access to the memory card on 09.01.2018 and 13.12.2018 is unauthorised. Whether access to the memory card on 19.07.2021 was authorised or not will be discussed later in this judgment.

18. The learned counsel for the petitioner and the learned Director General of Prosecution submitted that the observation of this Court in O.P(Crl) No.257/2022 that access to a document after it was produced in Court cannot be a matter of investigation or relevant for investigation under any circumstances whatsoever, since only the Court can pursue that, in view of the bar in taking cognizance under section 195 of the Cr.PC, prevented the Investigating agency from investigating the allegations regarding unauthorised access, and copying and transmission of the sexually explicit contents in the memory card.

**Bar under Section 195(1) read with Section 340 Cr.P.C**

19. The learned counsel for the petitioner submitted that the bar under Section 195(1) read with Section 340 Cr.P.C is not applicable in the present case. The learned counsel submitted that the bar comes into play only in respect of the offences enumerated in Section 195(1) Cr.PC. It is submitted that only in the case of those offences, the procedure under Section 340 Cr.PC may have to be followed.

20. The learned Senior Counsel for respondent No.7 submitted that the bar under Section 195(1) Cr.PC is applicable in the present facts of the case. The learned Senior Counsel further submitted that the judgment of this Court in O.P(Crl).No.257/2022 would preclude this Court from directing an investigation. The learned Director General of Prosecution submitted that even if it is assumed that the bar under Section 195(1) Cr.PC is applicable, the relevance of the provision comes into play only when taking cognizance of the offences. Therefore, an investigation by the Police is not barred by the provisions. The learned counsel for the petitioner further submitted that the judgment dated 05.07.2022 in



O.P(Crl) No.257/2022 was passed prior to the State Forensic Science Laboratory report dated 11.07.2022, which enumerated the instances of illegal access to the memory card while the same was in the custody of the Court. The learned counsel submitted that in the judgment dated 05.07.2022, this Court observed that it was important for the prosecution to explain the change in the hash value.

21. The learned Senior Counsel for respondent No.7 relied on **Iqbal Singh Marwah v. Meenakshi Marwah [(2005) 4 SCC 370]** to support his contentions. The learned counsel for the petitioner relied on the following decisions:

- (i) **Patel Laljibhai Somabhai v. State of Gujarat [(1971) 2 SCC 376].**
- (ii) **M. Narayandas v. State of Karnataka [(2003) 11 SCC 251]**
- (iii) **CBI v. M. Sivamani [(2017) 14 SCC 855].**
- (iv) **Perumal v. Janaki [(2014) 5 SCC 377].**
- (v) **State of Punjab v. Raj Singh [(1998) 2 SCC 391].**

22. It is useful to extract Section 195 Cr.PC.

**“195. Prosecution for contempt of lawful authority of**



**public servants, for offences against public justice and for offences relating to documents given in evidence.-**

(1) No Court shall take cognizance-

- (a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860); or
- (ii) of any abetment of, or attempt to commit, such offence, or
- (iii) of any criminal conspiracy to commit such offence,  
except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

- (b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court; or
- (ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court; or
- (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "Court"



means a Civil, Revenue or Criminal Court, and includes a Tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

23. The object of the section is to protect persons from being needlessly harassed by vexatious prosecutions in retaliation. It is a check to protect innocent persons from criminal prosecution, which may be actuated by malice or ill will. The object of the section is to stop private persons from obtaining sanctions as a means of wreaking vengeance and to give the Court complete discretion in deciding whether any prosecution is necessary. The provision intends that in the case of offences where the act, greatly affects the dignity and prestige of the Courts concerned, it is deemed inexpedient to allow such acts to be the sport of personal passions.



24. The Legislature intended to prevent improper and reckless prosecutions by private persons for offences in connection with the administration of public justice and those relating to the contempt of lawful authority of a public servant. It is aimed at protecting parties and witnesses against vexatious or frivolous prosecution for their resorting to Courts and giving evidence therein. Such protection is afforded by prescribing the necessity of a complaint by the Courts in or in relation to whose proceedings the offence is alleged to have been committed.

25. The bar under Section 195, read with Section 340 Cr.P.C. is on the foundation that the majesty of the judicial process and the purity of the legal system are to be protected.

26. As the purity of the Court's proceedings is directly outraged by the crime, the Court is considered the only party entitled to consider the desirability of complaining about the guilty party. The offences about which the Court alone is clothed with the right to complain may, therefore, be appropriately considered to be only those offences, the commission of which has a close nexus with the proceeding in that Court.



27. While dealing with the *pari materia* provisions in the Code of Criminal Procedure, 1898 (the Old Code) in **Patel Laljibhai Somabhai** a Three-Judge Bench of the Supreme Court observed thus:

"7. The underlying purpose of enacting Section 195(1) (b) and (c) and Section 476, seems to be to control the temptation on the part of the private parties considering themselves aggrieved by the offences mentioned in those sections to start criminal prosecutions on frivolous, vexatious or insufficient grounds inspired by a revengeful desire to harass or spite their opponents. These offences have been selected for the court's control because of their direct impact on the judicial process. It is the judicial process, in other words the administration of public justice, which is the direct and immediate object or victim of those offence and it is only by misleading the courts and thereby perverting the due course of law and justice that the ultimate object of harming the private party is designed to be realised. As the purity of the proceedings of the court is directly sullied by the crime, the Court is considered to be the only party entitled to consider the desirability of complaining against the guilty party. The private party designed ultimately to be injured through the offence against the administration of public justice is undoubtedly entitled to move the court for persuading it to file the complaint. But such party is deprived of the general right recognized by Section 190 CrPC, of the aggrieved parties directly initiating the criminal proceedings. The offences about which the court alone, to the exclusion of the aggrieved private parties, is clothed with the right to complain may, therefore, be appropriately considered to be only those offences committed by a party to a proceeding in that court, the commission of which has a reasonably close nexus with the proceedings in that court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. It, therefore, appears to us to be more appropriate to adopt the



strict construction of confining the prohibition contained in Section 196(1)(c) only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party. It may be recalled that the superior Court is equally competent under Section 476-A CrPC, to consider the question of expediency of prosecution and to complain and there is also a right of appeal conferred by Section 476-B on a person on whose application the Court has refused to make a complaint under Section 476 or Section 476-A or against whom such a complaint has been made. The appellate court is empowered after hearing the parties to direct the withdrawal of the complaint or as the case may be, itself to make the complaint. All these sections read together indicate that the Legislature could not have intended to extend the prohibition contained in Section 195(1)(c) CrPC, to the offences mentioned therein when committed by a party to a proceeding in that court prior to his becoming such party. It is no doubt true that quite often — if not almost invariably — the documents are forged for being used or produced in evidence in court before the proceedings are started. But that in our opinion cannot be the controlling factor, because to adopt that construction, documents forged long before the commencement of a proceeding in which they may happen to be actually used or produced in evidence, years later by some other party would also be subject to Sections 195 and 476 CrPC. This, in our opinion would unreasonably restrict the right possessed by a person and recognized by Section 190 CrPC, without promoting the real purpose and object underlying these two sections. The court in such a case may not be in a position to satisfactorily determine the question of expediency of making a complaint."

28. In **Iqbal Singh Marwah**, a Constitution Bench of the Supreme Court, following **Patel Laljibhai Somabhai**, held that the section would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in



any Court, i.e. during the time when the document was in *custodia legis*. The Constitution Bench further declared that the provision only creates a bar against taking cognizance of an offence in certain specified situations except upon complaint by the Court.

29. It is trite that Sections 195 and 340 of the Code do not control or circumscribe the power of the Police to investigate under the Code of Criminal Procedure.

30. The Apex Court in **State of Punjab v. Raj Singh [(1998) 2 SCC 391]** held thus:

“2.....From a plain reading of Section 195 CrPC it is manifest that it comes into operation at the stage when the court intends to take cognizance of an offence under Section 190(1) CrPC; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceeding in court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 CrPC. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1) (b) CrPC, but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. The judgment of this Court in **Gopalakrishna Menon v. D. Raja Reddy [(1983) 4 SCC 240 : 1983 SCC (Cri) 822 : AIR 1983 SC 1053]** on which the High Court relied, has no manner of application to the facts of the instant case for there



cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil court and hence it was held that the court could not take cognizance on such a complaint in view of Section 195 CrPC."

### 31. In **M. Narayandas v. State of Karnataka [(2003) 11 SCC 251]**

the Supreme Court reiterated these principles and observed thus:

**"8. We are unable to accept the submissions made on behalf of the respondents. Firstly, it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise, there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of *State of Punjab v. Raj Singh [(1998) 2 SCC 391 : 1998 SCC (Cri) 642]* . In this case it has been held as follows:**

*"2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467 and 468 IPC by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii) CrPC prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195 CrPC it is manifest that it comes into operation at the stage when the court intends to take cognizance of an offence under Section 190(1) CrPC; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceeding in court. In other words, the statutory power of the police to investigate under the Code is not in any way*



*controlled or circumscribed by Section 195 CrPC. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1) (b) CrPC, but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. The judgment of this Court in Gopalakrishna Menon v.D. Raja Reddy [(1983) 4 SCC 240 : 1983 SCC (Cri) 822 : AIR 1983 SC 1053] on which the High Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil court and hence it was held that the court could not take cognizance on such a complaint in view of Section 195 CrPC."*

Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the court would not be competent to take cognizance. However, that court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340 of the Criminal Procedure Code is followed. Thus no right of the respondents, much less the right to file an appeal under Section 341, is affected."

**32. In Basir-Ul-Huq v. State of W.B. (AIR 1953 SC 293), a Three-Judge Bench of the Supreme Court held that though Section 195 does not bar the trial of an accused person for a distinct offence**



disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The Court added that merely by changing the garb or label of an offence, which is essentially an offence covered by the provisions of Section 195, prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it.

33. In **S. Dutt (Dr.) v. State of U.P.** (AIR 1966 SC 523), the Supreme Court observed that it is not permissible for the prosecution to drop a serious charge and select one which does not require the procedure under Section 195 of the Code of Criminal Procedure.

34. However, if in the course of the same transaction, two separate offences are made out, for one of which Section 195 of the Code is not attracted, and it is not possible to split them up, the drill of Section 195(1)(b) of the Code must be followed {Vide: **Bandekar Bros. (P) Ltd. v. Prasad Vassudev Keni** (AIR 2020 SC 4247)}.

35. While the bar against cognizance of a specified offence is



mandatory, the same has to be understood in the context of the purpose for which such a bar is created. The bar is not intended to take away remedy against a crime but only to protect an innocent person against false or frivolous proceedings by a private person. The protection intended by the section against a private person filing a frivolous complaint is taken care of when the High Court finds that the matter is required to be gone into in public interest. Such direction cannot be rendered futile by invoking Section 195 to such a situation. Once the High Court directs an investigation into a specified offence mentioned in Section 195, the bar under Section 195(1) cannot be pressed into service {Vide: **CBI v. M. Sivamani [(2017) 14 SCC 855]**}.

36. The High Courts, being constitutional Courts invested with the powers of superintendence over all Courts within the territory over which the High Court exercises its jurisdiction, are certainly Courts which can exercise the jurisdiction under Section 195(1) Cr.P.C. In the absence of any specific constitutional limitation of prescription on the exercise of such powers, the High Courts may exercise such power either on an application made to it or suo



motu whenever the interests of justice demand. The High Courts not only have the authority to exercise such jurisdiction but also an obligation to exercise such power in appropriate cases. Such obligation flows from two factors:

- (i) the embargo created by Section 195 restricting the liberty of aggrieved persons to initiate criminal proceedings with respect to offences prescribed under Section 195;
- (ii) such offences pertain to either the contempt of lawful authority of public servants or offences against public justice.

The power of superintendence, like any other power, impliedly carries an obligation to exercise powers in an appropriate case to maintain the majesty of the judicial process and the purity of the legal system. Such an obligation becomes more profound when the allegations of commission of offences pertain to public justice {Vide: *Perumal v. Janaki* [(2014) 5 SCC 377]}.

#### **The principles that emerge from the precedents**

- (i) The bar under Section 195(1) of the Code



applies only to the offences enumerated in sub-sections (i) and (ii).

(ii) The bar under Section 195 arises only when the Court proceeds to take cognizance of the offence alleged. Sections 195 and 340 of Cr.PC do not control or circumscribe the power of the Police to investigate under the Criminal Procedure Code. Once investigation is completed, then the embargo in Section comes into play and the Court would not be competent to take cognizance of the offence. The Court could then file a complaint for the offences based on the FIR and the materials collected during the investigation, provided the procedure laid down in Section 340 Cr.PC is followed.

(iii) By changing the garb or label of an offence, which is essentially an offence covered by the provisions of Section 195, the Court cannot



take cognizance of such offence by misdescribing it or putting a wrong label on it.

- (iv) It is not permissible for the prosecution to drop a serious charge and select one which does not require the procedure under Section 195 of the Code.
- (v) If more than one offence is made out in the course of the same transaction, for one of which Section 195 of the Code is not attracted, it is not possible to split them up, to avoid the procedure under Section 195 of the Code.
- (vi) The Legislature wanted to clothe with the Court alone the right to complain in respect of the offences that have close nexus with the proceedings in that Court. The Legislature wanted the majesty of the judicial process and the purity of the legal system to be protected.
- (vii) The High Courts, being constitutional Courts invested with the powers of superintendence



over all Courts within the territory over which it exercises its jurisdiction, can direct investigation into a specified offence mentioned in Section 195, and then the bar under Section 195(1) cannot be pressed into service.

### **Grievances of the Petitioner**

37. The petitioner was subjected to a brutal rape. The accused recorded the incidents (overt acts) on mobile phones. The Investigating agency seized the memory card containing the visuals of sexual assault. The memory card was entrusted to the Court. Later, it was revealed that when the memory card remained in the custody of the Court, somebody unauthorisedly accessed it on three occasions. The petitioner alleges that the contents in the memory card containing sexually explicit material were copied and transmitted. The Supreme Court, with intent to protect the privacy of the victim in Crl.A No.1794/2019 (**P.Gopalkrishnan v. State of Kerala**) clarified that it may be justified in only inspecting the video's contents by the accused and his lawyer for presenting



effective defence during the trial. The Supreme Court had directed that all care must be taken that those who are permitted to inspect the video shall not carry any devices, much less electronic devices, including mobile phones, which may have the capability of copying or transferring the electronic record or mutating the contents of the memory card/pen drive in any manner.

38. The learned Senior Counsel appearing for respondent No.7 raised a contention that access to the memory card, while it has been in the Court's custody, cannot be objectionable, especially when such access to the document is not prohibited in any manner as stated above. The Supreme Court has in Crl.A No.1794/2019 limited the access to the memory card/pen drive by way of the inspection alone by the accused and his lawyer. The considerations that weighed with the Supreme Court while limiting access to that extent were the victim's privacy and identity.

### **Privacy**

39. The dignity of the individual is a foundational pillar of the Indian Constitution. The dignity of the individual is closely linked with privacy, a constitutionally protected right that emerges



primarily from the guarantee of the life and personal liberty in Article 21 of the Constitution. Privacy is the constitutional core of human dignity. Privacy is the ultimate expression of the sanctity of the individual. There cannot be dignity to an individual without privacy. Privacy includes, at its core, the preservation of the sanctity of family life, individual autonomy, and the right and ability of the individual to protect vital aspects of his or her personal life. Privacy has both positive and negative content. The negative content restrains the State from intruding on a citizen's life and personal liberty. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual. The dangers to privacy in the age of technology can originate not only from the State but from the non-state actors as well {Vide: **K.S. Puttaswamy v. Union of India [(2017) 10 SCC 1]**}.

40. In **Puttaswamy** the Constitution Bench of the Supreme Court declared that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

41. In the case of women, it is their particular individual



situation coupled with pervasive societal gender-based discrimination that facilitates their being threatened and targeted by violence. In my view, the unauthorised access and viewing of the video is violence against the woman involved, if not an offence. Access to the memory card not in the manner and for the purpose as directed by the Supreme Court in **P.Gopalkrishnan v. State of Kerala** by any individual is an intrusion upon the victim's privacy. It is an infringement into the fundamental right of the petitioner under Article 21 of the Constitution.

42. Therefore, the contention of the learned Senior Counsel that access to the contents of the memory card is not objectionable deserves no merit.

### **Three instances of unauthorised access**

**09.01.2018**

43. On 09.01.2018 at 21:58:41 hrs, somebody accessed the memory card. Two files, namely System Volume Information and Indexer Volume Guid were created. The indication is that the memory card was connected to a computer device with Windows Operating System.



13.12.2018

44. Three files, namely, Cache, data and com.android.gallery3d, were created on the memory card. There was an unauthorised access to the memory card. The indication is that on 13.12.2018 at 22:58:17 hrs, the memory card was used in a computer device with Android Operating System.

19.07.2021

45. As per proceedings dated 16.07.2021, the Trial Court granted permission to the newly appointed counsel for accused No.1 to inspect the video footage on 19.07.2021. The Forensic Science Laboratory report dated 11.07.2022 shows that the memory card was accessed through a Vivo mobile phone with an Android Operating System and Jio Network Application installed with Telegram, WhatsApp, Instagram etc.

46. The learned Director General of Prosecution made available Annexure R5(h), a memo dated 19.07.2021 submitted by the counsel for accused No.1 stating that at 3.00 p.m, he viewed the video footage inside the Court hall. The learned Director General of Prosecution submitted that the counsel for accused No.1, who was



permitted to inspect the video footage on 19.07.2021, had not accessed the video between 12:19:12 hrs and 12:54:13 hrs. The learned Director General of Prosecution, relying on the prosecution records, submitted that till 2.00 p.m., on that day, the tower location of the phone regularly used by the lawyer was at Thrippunithura and Aluva. The learned Director General of Prosecution further submitted that the counsel for accused No.1 had never accessed the memory card on 19.07.2021 as reported in the Forensic Science Laboratory.

47. The learned counsel for accused No.1 must not have viewed the video from the memory card; rather he might have viewed the same from the pen drive. The learned counsel for the petitioner and the Director General of Prosecution relying on Anx.R5(h) (the original of which has been produced by the Trial Court confidentially to this Court) asserted that there was no possibility that the new counsel for accused No.1 inspected the memory card on 19.07.2021 between 12:19:12 hrs and 12:54:13 hrs. It is revealed from the State Forensic Science Laboratory report dated 11.07.2022 that at the time mentioned above, 34 folders/files



were newly created/updated in the memory card, indicating that the memory card was used in a Vivo mobile phone having an Android Operating System and Jio Network installed with Telegram, WhatsApp, Instagram etc.,

48. The alleged unauthorised access on 19.07.2021 has a very close nexus with the Court proceedings. I have no material to understand the procedure adopted by the Trial Court in permitting the counsel for accused No.1 to inspect the contents of the video. There are also no materials to conclude whether somebody authorised by the Court supervised the inspection of the video. The learned Director General of Prosecution asserted that the counsel for accused No.1 did not inspect the video between 12:19 hrs and 12:54 hrs. If that is the case, somebody unauthorisedly accessed the memory card.

49. It is important to note that the Supreme Court had specifically directed that all care must be taken to see that while allowing a person to inspect the video footage, he does not carry any device, much less electronic devices, including mobile phones, which may have the capability of copying or transferring the



electronic records thereof or mutating the contents of the memory card/pen drive in any manner. The Supreme Court specifically made it clear that as the matter involves the privacy of the victim or her identity, only inspection of the footage alone is to be permitted.

#### **Access to the memory card on 09.01.2018 and 13.12.2018**

50. The alleged unauthorised access on 09.01.2018 and 13.12.2018 has no nexus or connection with the Court's proceedings. It happened in the odd hours. I have gone through the proceedings of the Court below. No materials show that the Court concerned permitted anybody to take out the memory card from safe custody. It is presumed that the memory card remained in the safe custody of the Court on those days. Therefore, access to the memory card is undoubtedly unauthorised.

#### **Offences alleged**

51. The learned counsel for the petitioner and the Director General of Prosecution submitted that the alleged access to the memory card/pen drive, copying of the contents and transmission of the same as alleged by the petitioner make out cognizable offences. The learned counsel for the petitioner submits that the



illegal access, copying and transmission of the video files would attract the offences under Sections 378, 405 read with Section 408, 411 and 425 of IPC, Section 66-B, 66-E and 67 of the Information Technology Act, 2000 and Section 119 of the Kerala Police Act.

52. The learned counsel submitted that the memory card being a document, the acts alleged amounted to theft of computer resources or communication devices. It is further submitted that there is intentional capture, publishing or transmitting of the image of the private area of a person without his or her consent, violating the person's privacy. It is also submitted that the alleged acts amounted to transmission of obscene material in electronic form. This Court need not conduct a roving enquiry on the offences alleged, especially when there are no averments touching the ingredients of the offences alleged in the material produced before the Court.

#### **Impact of the observation of this Court in O.P (Crl) No.257/2022**

53. The learned counsel for the petitioner and the learned Director General of Prosecution submitted that the observations of this Court in O.P(Crl) No.257/2022 would not preclude conducting



the investigation into the offences allegedly committed following the unauthorised access. The learned counsel for the petitioner submitted that the judgment dated 05.07.2022 was passed prior to the State Forensic Science Laboratory report dated 11.07.2022. It is further submitted that the offences disclosed are not confined to the narrow ambit of Section 195 of Cr.PC. While passing the judgment dated 05.07.2022, this Court had not considered the nature of the offences allegedly committed.

54. A decision is binding not because of its conclusion but with regard to its ratio and the principle laid down therein. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. In other words, a case is only an authority for what it actually decides. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions



involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their reasonings. {Vide: **Quinn v. Leathem MANU/UKHL/0001/1901** : **B.Shama Rao v. Union Territory of Pondicherry (AIR 1967 SC 1480)** : **CIT v. Sun Engineering Works (P) Ltd., [(1992) 4 SCC 363]**}.

55. The legal problem disclosed by the facts before this Court were not under consideration while deciding O.P(Crl) No.257/2022.

56. The specific case of the petitioner is that the offences alleged do not come under Section 195 Cr.PC. Therefore, the necessary conclusion is that the observations of this Court in O.P(Crl) No.257/2022 will not bar any investigation into the offences alleged.

## **CONCLUSION**

57. On three occasions, the memory card was connected to computer systems installed with devices capable of copying or



transferring the electronic record or mutating the contents. The necessary conclusion would be that we failed to protect the victim's interest, which resulted in the violation of her fundamental constitutional right. The victim alleges that the contents of the video footage were copied and transmitted. The emotional and psychological harm being suffered by the victim is beyond imagination.

58. Can there be a situation where the victim of such a crime is rendered remediless? The victim raised the grievances long back. It is submitted by the learned counsel for the petitioner that the petitioner's grievances were brought to the notice of the prosecution and the Trial Court.

59. It is profitable to refer to the observation of the Supreme Court in paragraph 21 of the judgment in **Perumal v. Janaki**.

**"21. A Constitution Bench of this Court in *Iqbal Singh Marwah v. Meenakshi Marwah* [(2005) 4 SCC 370 : 2005 SCC (Cri) 1101] , while interpreting Section 195 CrPC, although in a different context, held that any interpretation which leads to a situation where a victim of crime is rendered remediless, has to be discarded. The power of superintendence like any other power impliedly carries an obligation to exercise powers in an appropriate case to maintain the majesty of the judicial process and the purity of the legal system. Such an obligation becomes more profound when these allegations of commission of offences pertain to public justice."**



60. An inquiry/investigation into the allegation that somebody unauthorisedly accessed the memory card, and copied and transmitted the contents of it will only remove the cloud on the judicial system. It will only maintain the majesty of the judicial process and the purity of the legal system. The offences alleged pertain to public justice. Therefore, the obligation of the system is more profound.

61. Therefore, the following directions are issued:

- (i) The District and Sessions Judge, Ernakulam shall conduct a fact-finding inquiry on the allegations of unauthorised access to the memory card and copying and transmitting its contents.
- (ii) The District and Sessions Judge is at liberty to seek the assistance of any agency, including the Police, for conducting the inquiry.
- (iii) The petitioner is at liberty to present written submissions before the District and



Sessions Judge.

- (iv) In the inquiry, if the commission of any offence is disclosed, the District and Sessions Judge shall proceed as provided in the Code of Criminal Procedure, 1973.
- (v) The District and Sessions Judge shall see that the inquiry does not affect the trial of the Sessions Case No.118/2018.
- (vi) The District and Sessions Judge shall complete the inquiry within one month from this day.

**THE GUIDELINES TO BE FOLLOWED IN THE MATTER OF HANDLING SEXUALLY EXPLICIT MATERIALS.**

62. Sri.Gaurav Agrawal, the learned counsel for the petitioner, suggested that this Court may lay down the guidelines to be followed by all concerned, including the Courts, to ensure that any sexually explicit material is preserved in such a manner that they are not accessed illegally. Sri.T.A.Shaji, the learned Director General of Prosecution, suggested that the Court may frame the



guidelines to be followed by the Law Enforcement agencies and the Courts so that sexually explicit materials are not leaked or transmitted in such a way as to infringe upon the fundamental constitutional rights of the victims. The learned Director General of Prosecution also submitted a series of suggestions.

63. Women and children often become victims of sexual offences. Law Enforcement agencies may recover electronic records containing sexually explicit materials during the investigation of those offences. These electronic records contain sexually explicit materials that are highly sensitive documentary evidence of the commission of the crimes.

64. It is submitted at the Bar that there are no rules that guide Law Enforcement agencies, experts, Courts, etc, on how to handle sensitive electronic records containing sexually explicit materials. It is further submitted that there is a pressing need to issue the guidelines to be followed by various agencies and institutions that may handle such electronic records containing sexually explicit materials.

65. Therefore, Law Enforcement agencies, Courts and



examining authorities are directed to comply with the following measures in the matter of handling sexually explicit materials till a law is enacted on the subject:

### **Measures to be adopted by Law Enforcement Agencies**

66. If any officer of a law enforcement agency happens to seize or recover any electronic record related to a crime and realizes or has reason to believe that it must be taken into custody, he shall seize it with the utmost caution, preventing any chance of destruction to the electronic records and their contents. This process should be conducted maintaining the highest level of secrecy and privacy regarding the contents. The process shall be documented separately in a mahazer.

66.1. The electronic record shall be separately packed and sealed in damage-proof packets. Each packet should be labelled with a unique label that clearly states 'Sexually Explicit Materials' (abbreviated as SEM) in luminous red ink.

66.2. The law enforcement agency should maintain a register of electronic records containing Sexually Explicit Materials that have been seized and are in their custody. This register should



include details such as the date, time, place of recovery, the source from whom it was recovered, the officer responsible for the recovery, and the officers involved in packing and sealing the material. All entries in the register should include the names and official designations of the officers involved and must be signed by them.

66.3. The sealed packet containing sexually explicit material shall be securely stored in lockers. The time and date of placing the packet in the locker shall be recorded in the aforementioned register, along with the acknowledgment of the person responsible for the locker's custody. It should only be removed from the locker for transmission to the relevant Court. When it is taken out of the locker for transmission to the Court, this action should also be recorded in the register, including the time, date, and details of the officer who removed the sealed packet from the locker. Furthermore, the details of the officer entrusted with the sealed packet for delivery to the concerned Court, and information regarding which Court it was transmitted to, must be documented in the same register.



66.4. If it is discovered that any person has accessed the electronic record after it has been sealed and before it is entrusted to the Court, the individuals responsible should be held accountable.

**Measures to be taken by the Courts in handling electronic records**

**containing Sexually Explicit Materials**

67. Every Court should maintain a register of electronic records containing sexually explicit materials received by the Court. This register should include the time and date of receipt, details of the crime, a description of the packet, and information about the person who presented the sealed packet to the Court. Additionally, there should be a declaration from the transmitting officer confirming that the packet was transmitted without any destruction or tampering.

67.1. The sealed packets shall be presented to the Chief Ministerial Officer of the Court. The Chief Ministerial Officer is responsible for examining the sealed packet and ensuring that it is properly sealed and has not been damaged or tampered with.

67.2. The officer who receives the sealed packet shall provide



proper acknowledgment to the officer who entrusted the sealed packet, provided that the sealed packet is received in proper condition. If the packet is not in proper condition or is suspected of tampering or misuse, it must be reported to the Judicial Officer. The Judicial Officer shall summon the officer responsible for transmitting the packet to the Court, and a proceeding shall be drawn up concerning signs of tampering of the packet with acknowledgment from the officer concerned. The details of such proceedings shall be recorded in the aforementioned register. If a scientific investigation is required to determine the misuse of the electronic record during its transmission, the Court shall order such an investigation.

67.3. Upon receiving the sealed packet in proper condition, which contains the electronic record containing sexually explicit material, it shall be presented before the Judicial Officer without delay. In the presence of the Judicial Officer, the packet shall be securely placed in a locker or chest, and the keys shall be Kept either by the Judicial Officer or the Chief Ministerial Officer.

67.4. The time, date and details such as which officer placed



the packet in the locker/chest, etc., shall be recorded in the aforementioned register.

67.5. If the Court receives any request for the examination of the electronic record by any authority, the packet shall be removed from the locker/chest in the presence of the Judicial Officer. Details regarding the time, date, and the officers who handled the material shall be noted in the said register.

67.6. The sealed packet containing the electronic record shall be further packaged within the Court without causing any damage to the sealed packet. An outer label shall be affixed, noting 'Sexually Explicit Material (SEM)' in luminous red ink.

67.7. The details of transmission for examination, including the date, time, destination authority, the officer through whom it was transmitted, etc., shall be recorded in the aforementioned register.

67.8. When the examining authority returns the electronic record after examination, it shall be sent to the Court in a sealed packet, following the same procedure detailed above. The date and time of receipt shall once again be entered in the register. The



sealed packet, along with any additional electronic records created by the examining authorities containing sexually explicit materials, shall be deposited in the locker/chest in the presence of the Judicial Officer in a similar manner.

**67.9. No copies of such sexually explicit electronic records, including newly created electronic records as a result of scientific examination, shall be provided to any person, including the accused, in the said case. The Court may allow the accused or their lawyer to view them under the conditions mentioned hereafter:**

- (a) Permission to view the electronic record in camera shall be granted by the Court only based on an order passed by the Court upon a petition for the same filed either by the prosecution or the accused. The Court shall aim to minimize instances of playing the electronic records, and all applications filed may be considered together, with a single opportunity made available for viewing by all petitioners together. The Court shall not



entertain further applications except in exceptional situations, for which the Court must record reasons before granting such permission. In cases with multiple lawyers for any accused, only one among them shall be allowed to view the electronic record.

- (b) The electronic record shall only be accessed by experts from the examining authority, and these experts shall take sufficient precautions to maintain the authenticity of the electronic records, including their hash value, despite viewing. If duplications of such electronic records are created during scientific examination, and the contents are identical, only the duplicated copy, such as a pen drive or CD, need be allowed to be viewed.
- (c) The Court shall take sufficient precautions to ensure that no equipment or secret devices are used by any person present while playing the electronic record, as ordered, which could



enable the copying, destruction, or mutilation of the contents of the electronic record.

- (d) The Court shall record detailed proceedings regarding the viewing/playing of the electronic record, including the participants' details, date, time, details of experts present, and the measures adopted to preserve the authenticity of the electronic document.
- (e) The date, time, and details of the proceedings shall also be entered in the aforementioned register.
- (f) Upon the finality of the case, including any appeals, the Court shall send the electronic record to the examining authority for permanent destruction. The Court shall obtain a detailed destruction report from the examining authority or a similarly notified authority. This report shall be retained by the Court as a permanent record, with the report's details entered into the aforementioned register. The transmission for



destruction, along with the necessary order for such destruction, in respect to the electronic document shall follow the same procedure as detailed above for its examination.

(g) The Judicial Officer shall not permit any Court officer to remove electronic records containing sexually explicit materials from the chest without a special order, and the details of this order shall be recorded in the special register mentioned above. The electronic record shall only be removed from the chest for trial, hearings, or any other trial-related matter upon a special written request from the prosecution or defense, or for any purpose deemed necessary by the Court based on a written order. Once the electronic record is removed from the chest, the Judicial Officer shall take suitable measures to ensure that any Court staff does not misuse it while the packet is unsealed.

**Measures to be adopted by the Examining Authorities.**

68. The Examining Authority shall maintain a register of electronic records containing sexually explicit materials to record such electronic record's receipt, return, or destruction.

68.1. The Examining Authority shall receive the sealed packets only after confirming that the sealed packet is received without tampering with its seals. The packets marked Sexually Explicit Material, shall be stored in lockers/chests after making proper entries in the aforementioned register. If there is any evidence of tampering with the seals or suspicion thereof, it shall be promptly reported to the Court for further instructions.

68.2. As and when the sealed packet containing Sexually Explicit Material is received, it shall be recorded in the register, providing details such as the time, date, the expert who conducted the investigation, and the examination period etc.,

68.3. The expert shall take sufficient precautions to ensure that no other person has accessed the electronic record while in his/her custody. If assistance from any other person is sought during the examination, the details of such persons shall also be



entered in the aforementioned register.

68.4. If any additional electronic documents containing Sexually Explicit Material are created during the examination or analysis, the details of the same shall also be entered in the aforementioned register. These newly created electronic records shall be returned to the Court in separate sealed packets, each clearly labelled in luminous red ink to indicate that it contains Sexually Explicit Material. No such electronic records shall be sent along with the reports; reports and electronic records shall be sent to the Court in separate sealed packets.

68.5. If the examining authority takes any copies of the electronic records or mirror images, the details of the same may also be entered in the aforementioned register. The examining authority shall securely store these copies in safe lockers for future examination purposes, and they shall be forwarded to the Court as detailed above, if ordered by the Court.

68.6. If any sexually explicit electronic record or any part or extractions from it are forwarded to any other division of the examining authority for examination, the internal transmission to



such division shall be recorded in the aforementioned register. The same procedures shall be followed in such internal transmission to preserve the authenticity and secrecy of such electronic records.

**68.7.** If any electronic record containing Sexually Explicit Material is received for destruction, it may be destroyed without providing any opportunity for copying or extraction. The procedure and proceedings regarding the destruction shall be reported to the Court.

**68.8.** The head of the department of the examining authority shall pay special attention to ensure that its officers follow the aforementioned directions without any lapses.

**69.** Before parting with this judgment, I would wish to request the Central and State Governments to formulate necessary rules for the safe handling of electronic records containing sexually explicit materials.

**70.** I place on record my appreciation for the able assistance rendered by Sri.T.A.Shaji, the learned Director General of Prosecution as well as Sri.Gaurav Agrawal, the learned counsel appearing for the petitioner in formulating the aforementioned



guidelines.

71. The Registry shall forward a copy of this judgment to the Chief Secretary to the Government of Kerala, the State Police Chief and the District Judges for necessary action.

The Writ Petition (Criminal) is disposed of as above.

Sd/-  
**K.BABU,**  
**JUDGE**

KAS

**APPENDIX OF WP(CRL.) 445/2022**

## PETITIONER EXHIBITS

EXHIBIT P1	TRUE COPY OF THE APPLICATION SUBMITTED BY THE INVESTIGATING OFFICER BEFORE THE TRIAL COURT WITH CONNECTED DOCUMENTS, DATED 4.4.2022.
EXHIBIT P2	TRUE COPY OF THE ARGUMENT NOTE SUBMITTED BY THE PROSECUTION BEFORE THE TRIAL COURT DATED 19.05.2022
EXHIBIT P3	TRUE COPY OF THE STATEMENT FILED BY THE FIRST RESPONDENT IN CRL.M.C 1106/2021 DATED 08.03.2022.
EXHIBIT P4	TRUE COPY OF THE PETITION FILED BY THE RESPONDENTS IN CRL.M.C 803/22 FOR EXTENSION OF TIME FOR COMPLETING THE INVESTIGATION DATED 07.04.2022.
EXHIBIT P5 (SEALED COVER)	TRUE COPY OF THE CYBER FORENSIC ANALYSIS REPORT OF THE STATE FORENSIC SCIENCE LABORATORY, TRIVANDRUM DATED 11.07.2022
EXHIBIT P6 (SEALED COVER)	TRUE COPY OF THE FINAL REPORT FILED BY THE DEPUTY SUPERINTENDENT OF POLICE, CRIME BRANCH, ALAPPUZHA BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT.

## RESPONDENT EXHIBITS

ANNEXURE R5 (a)	TRUE COPY OF THE REPORT FROM THE FSL, THIRUVANANTHAPURAM DATED 29.01.2020
ANNEXURE R5 (b)	COPY OF THE ORDER DATED 09.05.2022 OF THE TRIAL COURT
ANNEXURE R5 (c)	COPY OF THE FORWARDING NOTE DATED 30.05.2022 SUBMITTED BEFORE THE TRIAL COURT.
ANNEXURE R5 (d)	COPY OF THE STATEMENT OF SRI. PRASOON BENNY, THEN APP GR.II, JFCM, ANGAMALY.



ANNEXURE R5 (e) (SEALED COVER)	THE TRUE COPY OF THE ORDER DATED 07.02.2018 BY JFCM ANGAMALY IN CRLMP 49/2018 IN CP 16/2017
ANNEXURE R5 (f) (SEALED COVER)	THE TRUE COPY OF THE COMMON ORDER IN CRLMP 2968/2019, 3083/2019, 3113/2019, 3082/2019, 3084/2019, 3114/2019 IN SC 118/2018 BY ADDITIONAL SPECIAL JUDGE (SPE/CBI) III ERNAKULAM
ANNEXURE R5 (g) (SEALED COVER)	THE TRUE COPY OF THE PETITION CMP 1187/2021 IN SC 118/2018 FILED BY THE COUNSEL FOR A1
ANNEXURE R5 (h) (SEALED COVER)	THE TRUE COPY OF THE MEMO DATED 19.07.2021 FILED BY THE COUNSEL FOR A1
ANNEXURE R5 (i) (SEALED COVER)	THE TRUE PHOTOCOPY OF THE NEWSPAPER REPORT IN MALAYALA MANORAMA DAILY DATED 17.07.2022 AND ITS ENLARGED AND LEGIBLE PORTION
EXHIBIT R7	TRUE COPY OF THE ORDER OF THE SUPREME COURT OF INDIA IN M.A.NO.62/2022 IN CRL.A. NO.1794/2019 DATED 24.01.2022
EXHIBIT R7 (a)	TRUE COPY OF THE ORDER OF THE HIGH COURT OF KERALA IN CRL.M.A.NO.6/2022 IN CRL.M.C.NO.803/2022 DATED 19.04.2022
EXHIBIT R7 (b)	TRUE COPY OF THE ORDER OF HIGH COURT OF KERALA IN TR.P. (CRL) NO.52/2022 DATED 22.09.2022
EXHIBIT R7 (c)	TRUE COPY OF THE ORDER OF THE SUPREME COURT OF INDIA IN M.A.NO.1433/2022 IN CRL.A.NO.1794/2019 DATED 05.09.2022
EXHIBIT R7 (d)	TRUE COPY OF THE ORDER NO. NO.T9/28733/2017/PHQ ISSUED BY THE STATE POLICE CHIEF DATED 06.01.2022
EXHIBIT R7 (e)	TRUE COPY OF THE ORDER PASSED BY THE ADDITIONAL SPECIAL SESSIONS COURT (SPE/CBI)-III, ERNAKULAM IN SC NO.118/2018 DATED 17.12.2019
EXHIBIT R7 (f)	TRUE COPY OF THE JUDGMENT OF THE HIGH COURT OF KERALA IN OP (CRL) NO.257/2022 DATED 05.07.2022



EXHIBIT R7 (g) TRUE COPY OF THE PROCEEDINGS OF SC NO.118/2018 OF THE ADDITIONAL SPECIAL SESSIONS COURT (SPE/CBI)-III, ERNAKULAM DATED 16.07.2021 UPLOADED IN THE E-COURT SERVICES

Exhibit R7 (h) TRUE COPY OF THE PROCEEDINGS OF 11.08.2023 TAKEN FROM E-COURTS EVIDENCING ISSUANCE OF SUMMONS TO CW 437.