

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Misc. Application No.S-673 of 2024.

Mumtaz Ali v. Dothi & another.

Applicant : Mumtaz Ali through Mr. Hemandas S.Sanghani, Advocate.

Respondent : Through Mr. Shawak Rathore, DPG for the State.

Date of hearing : 17.02.2025.

Date of Decision : 28.02.2025.

ORDER

Miran Muhammad Shah, J:- Through this application, the applicant has impugned the order dated 12.09.2024 passed by learned 2nd Additional Sessions Judge, Badin, whereby Cr. Revision Application filed by applicant (Mumtaz Ali) against respondents by challenging an order dated 11.05.2024 passed by learned 2nd Civil Judge/J.M Badin in crime No.24/2024 was dismissed.

2. To understand the controversy of the case in hand, the brief facts are that on 12.04.2024 respondent (complainant) Dothi lodged FIR alleged therein that they have dispute with accused Mumtaz Ali & others over plot and such petition is also pending before Honourable High Court, and who pressurize them to withdraw from petition. On 12.04.2024 at about 0730 hours he and his brothers namely Piyar Ali Chandio & Ghulam Mustafa Chandio were present at house, meanwhile accused Anwar Jat having repeater, accused Mumtaz Ali Jat with empty hands & accused Akber Jat with empty hands came in the street and loudly starting using abusive language. In the meantime, complainant, his brothers namely Piyar Ali and Ghulam Mustafa went outside of the house, where accused Mumtaz Ali instigated to other accused persons to commit their murder, thereafter, accused Akber Jat gave kicks and fists blows to the brother of complainant Piyar Ali and abused, while accused Anwar Ali Jat made fire from his repeater and the palate hit on the head of Piyar Ali, who sustained injury. Thereafter, all accused persons went away by issuing murderous threats and asking that if they shall not withdraw the petition, they shall commit their murder and also an aerial firing was made by accused Anwar Ali. Hence, complainant lodged FIR against accused Mumtaz Ali (applicant), Akber & Anwer bearing crime No.24 of 2024 U/s 506/2, 114, 504, 337Ai, 337Hii & 34-PPC at PS Kadhan Distt: Badin.

3. After registration of FIR, Inspector/SHO Mir Muhammad Kaloi of PS Kadhan submitted final report U/s 173 Cr.P.C in above mentioned crime before 2nd Civil

Judge/Judicial Magistrate Badin, who after hearing complainant, injured & I.O observed that the prima facie case under section 324 PPC is made out and accepted the challan U/s 324, 506/2, 114, 504, 337Ai, 337Hii & 34-PPC vide order dated 11.05.2024. Thus, being aggrieved and dissatisfied with the order of learned Magistrate, accused (applicant) challenged such order by filing a Cr. Revision Application No.10 of 2024, which too was dismissed by learned 2nd Additional Sessions Judge Badin, hence this Cr. Misc. Application is preferred.

4. Learned counsel for applicant has argued that the order passed by both the learned lower courts are against the law, facts & principles of criminal justice. The Investigating officer after proper, fair & impartial investigation and recording statements of witnesses came to the conclusion and submitted his challan report, but the learned Civil Judge/Judicial Magistrate erred by adding section 324-PPC on his own without considering the material evidence which are available on the record. He has further argued that since no any offence as alleged in the said FIR had taken place, therefore, Investigation Officer had rightly investigated the case and recommended the case, but the learned Judicial Magistrate without examining the material, passed the impugned order, which is nothing but bad in the eyes of law and against the criminal justice. Lastly, he prayed that the impugned order passed by learned Judicial Magistrate may be set-aside and Section 324-PPC added by the learned Magistrate may be deleted. He relied upon the case laws reported as 2021 P.Cr.L.J 198 & PLD 2007 Supreme Court 31.

5. On his turn, learned D.P.G for the State argued that both the learned trial courts have rightly passed the impugned order; that the learned Magistrate after going through the FIR as well as other material available before him, rightly passed the order which is speaking one and does not require any interference. Lastly, he relied upon the case laws reported as 1997 SCMR 304, PLD 1967 Supreme Court 425, PLD 2007 Karachi 489 & 2002 SCMR 63.

6. Through this Criminal Misc. Application, the legal proposition has arisen whether “The Magistrate under Section 173 Cr.P.C has the powers to insert or delete any Section of Pakistan Penal Code on its own and after discarding the challan report of the investigation officer?” At this stage, I feel it appropriate to reproduce Section 173 & 190 Cr.P.C hereunder;

“173. Report of Police-officer.- (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer incharge of the Police-station shall, [through the Public Prosecutor]:--

- a) Forward to a Magistrate empowered to take cognizance of the offence on a police-report, a report in the form prescribed by the [Provincial Government], setting forth the names of the parties, the nature of the information and the names of the person who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

- b) Communicate, in such manner as may be prescribed by the [Provincial Government], the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given

[Provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer incharge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the court decides that the trial should not so commence.]

2. Where a superior officer of police has been appointed under Section 158, the report shall, in any cases in which the [Provincial Government] by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer incharge of the police-station to make further investigation.

3. Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

4. A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

[(5). Where the officer incharge of a police station forwards a report under sub-section (1), he shall along with the report produce the witnesses in the case, except the public servants, and the Magistrate shall bind such witnesses for appearance before him or some other Court on the date fixed for trial.]

190. Cognizance of offences by Magistrates. [(1) All Magistrates of the First Class, or any other Magistrate specially empowered by the Provincial Government on the recommendation of the High Court, may take cognizance of any offence-

- a) upon receiving a complaint of facts which constitute such offence;
- b) upon a report in writing of such facts made by any police officer;
- c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion,

that such offence has been committed which he may try or send to the Court of Session for trial and]

[(2)]. A Magistrate taking cognizance under sub-section (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial].

7. Section 173, Cr.P.C. provides that after completion of investigation, the incharge of Police Station shall submit report through Public Prosecutor before the Magistrate empowered to take cognizance of the offence on it and if he finds that there is sufficient evidence against the accused then he has power to take the cognizance of the offence, furthermore if, the Magistrate is of the view that the proper investigation, has not been conducted and required further investigation then, he can direct the officer incharge of the police station to make further investigation. In view of Section 190, Cr.P.C. if, a Magistrate after taking cognizance of offence observes that if an offence is triable exclusively by a Court of Session, then without recording any evidence he sends the case to Court of Sessions for trial. In case of **Muhammad Nasir Cheema v. Mazhar**

Javaid and others reported in PLD 2007 Supreme Court 31, the Honourable Supreme Court of Pakistan has held;

"The only provision relating to the subject which is available in the Code of Criminal Procedure is section 173 which commands expeditious conclusion of the investigations and further ordains that on conclusion of every investigation, the concerned SHO shall submit a report of the result thereof in the prescribed manner to the Magistrate competent to take cognizance under section 190, Cr.P.C. No powers vest with any Court including a High Court to override the said legal command and to direct the SHO either not to submit the said report (mentioned as challan in the Police Rules and also in the impugned order) or to submit the said report in a particular manner i.e. against only such persons as the Court desires or only with respect to such offences as the Court wishes. The impugned order can also not be sustained because, as has been mentioned above, the challan in question stood already submitted in Court and was thus beyond to reach of the concerned SHO."

8. It also came in notice of this court after perusing the court file of this matter that an explanation was called from learned 2nd Civil Judge/Judicial Magistrate Badin that under what provision of law he inserted Section 324-PPC through impugned order dated 11.05.2024. In reply of such explanation call, the learned Magistrate has admittedly stated in his reply of explanation that "I sincerely regret that the subject order may have required comprehensive reflection of the case law of Honourable Supreme Court as well as the reported case of our own Honourable High Court as mentioned by his lordship in the order dated 13.01.2025 passed in Cr. Miscellaneous Application No.S-673 of 2024". He further stated that "I have always tried to exercise meticulousness and ensure fairness in my judicial responsibilities, however, by acknowledging my oversight in this case, I humbly assure his lordship that I will be more cautious in the future to uphold the highest standards of justice and apologize for any inconvenience caused sincerely request that the explanation issued to me may be kindly vacated".

9. In the light of above admission made by the learned trial Magistrate it is fairly clear that the dictum laid down by the Honourable Supreme Court of Pakistan is that deletion or additional of any Section by the Magistrate on its own is neither within his power nor this power is to be exercised by any other court of the law including this court. Therefore, I am of the view that the learned trial Magistrate has erred while disposing of the challan in a hasty manner and without consulting the case law as prescribed by the Honourable Supreme Court, therefore, I allow this Cr. Misc. Application No.S-673 of 2024 filed by applicant Mumtaz Ali. The impugned order passed by the learned Magistrate-II Badin is set-aside and the Cr. Misc. Application No.S-673 of 2024 is allowed.

JUDGE