IN THE HIGH COURT OF SINDH, CIRCUIT COURT, MIRPURKHAS
Criminal Miscellaneous Application No. S-35 of 2025

Present:
Mr. Justice Dr. Syed Fiaz ul Hasan Shah

Applicants: Liaquat Ali Rahimoon and another.
Through Mr. Afzal Karim Virk, Advocate &
Mr. Tahseen Ahmed H. Qureshi, Advocate.

The Respondent: Learned Civil Judge & JM-II Umerkot & another
Through Mr. Ghulam Abbas Dalwani, D.P.G.

The Complainant: Asadullah.
through Mr. Muhammad Azhar Arain, Advocate.

Date of hearing: 19.03.2025.

Date of Order: 25.04.2025.

O R D E R

Dr. Syed Fiaz ul Hasan Shah, J:

1. The applicants Liaquat Ali Rahimoon and Jumoon being aggrieved with the impugned order dated 21-01-2025 passed in FIR being crime No.215 of 2024 by Civil Judge & Judicial Magistrate-II Umerkot, vide which learned Magistrate taken cognizance against applicants under sections 302, 201, 34 PPC, hence applicants filed instant application under section 561-A Cr. P.C. with prayer to set aside the aforementioned impugned order and restore the report dated 09.01.2025 submitted by the Police.

2. The brief facts of prosecutions' case are that on 30-10-2023 the complainant and his father sold their Alto car to Jummon Rahimon

for Rs. 32,50,000/-. An agreement (No. 954, dated 30-10-2023) was made, which stated that the remaining amount of Rs.22,50,000/- was to be paid by 01-11-2024. However, on the due date, Jumoon Rahimon failed to make the payment. The complainant informed Rahimon's friend, Dil Karar Mari (resident of Bhit Bhaiti), about the situation, and he assured that the remaining amount would be paid. On 05-11-2024, at approximately 10:00 AM, the complainant, along with his father, uncle Shahid, and Asif, traveled from Umerkot to Bhit Bhaiti in their car to meet Dil Karar Mari. They reminded Mari about the outstanding payment from Jumoon Rahimon, and he assured them that Rahimon would settle the amount. Mari then left and returned with a gun and a bag. The group then headed back to Umerkot, arriving at Jumoon Rahimon's house on Ratnor Road around 04:30 PM, where they found Jumoon Rahimon (son of Karim), Liaquat (son of Jummon), and an unidentified individual in Jumoon Rahimon's room. Dil Karar Mari sat next to Jumoon, while the complainant's father sat opposite him, and the complainant and others sat on the side chairs. The complainant's father demanded the remaining payment, which caused Jumoon to become angry. The unknown individual locked the door, and Jumoon Rahimon took the gun from Dil Karar Mari, loaded it, and aimed it at the complainant's father with the intent to kill him. The father attempted to defend himself, causing the gun's barrel to lower. However, the gun fired, and the bullet struck the father in his left knee. He screamed in pain and collapsed. As the complainant and others stood up, Liaquat Rahimon pulled out a pistol and threatened to kill all of them, if they did not sit down. Fearing for their lives, they

complied. The complainant's father lost consciousness due to severe blood loss. The accused then unlocked the door, left the room, and got into a vehicle. They drove away toward the city. The complainant then took his father to the Civil Hospital in Umerkot, where doctors confirmed his death. The incident was reported to the police, who arrived, completed the necessary documentation, and conducted a post-mortem. The body was then taken for funeral rites the following day. Due to the arrival of guests, the ceremony was delayed. The complainant is now submitting this complaint, stating that the accused had premeditated the crime, confined them, and ultimately caused the murder of his father. The complainant requests that justice be served."

3. The learned counsel for applicant has contended that JM-II Umerkot has not considered that the investigation officer did not find sufficient evidence against the applicants and submitted final charge sheet against the applicants by placing their names of applicants in column No: II of charge sheet. The respondent No: 02 and applicants have previous enmity prior to the incident, therefore, on account of that reason he falsely implicated the applicants in present matter. The police during course of investigation reached to conclusion that the applicants were not present at the place of incident, therefore, the police placed the names of applicants in column No: II of charge due to insufficient evidence against them. The police during the investigation also found that the sections 302, 120-B PPC have been misapplied in the FIR, therefore, the investigating officer submitted final charge sheet before the respondent No. 01 by inserting section 322 PPC

and deleted sections 302, 120-B PPC but the respondent No. 1 took cognizance against the applicants and co-accused persons for the offences punishable under section 302, 201, 34 PPC vide order dated 21.01.2025. Furthermore he contended that the medical evidence shows that the route of injury is from upward to downward and per prosecution case their instance is that the applicant No: 02 made fire from front side but the medical evidence does not support them and Hospital is at a distance of around 01 km from the alleged place of Incident but surprisingly the deceased was brought at Hospital after two hours of the incident, such fact also indicates that the complainant and PWs were not present at alleged place of incident. The investigating officer during the course of investigation also collected the CDR report of complainant and PWs which also shows that they were not present at alleged place of incident as narrated in the FIR by the complainant. He further contended that the impugned order passed by the respondent No.2 is against the law and prayed to set aside the order dated 21.01.2025 passed by JM-II Umerkot and report dated 09.01.2025 submitted by the police may be restored.

4. The learned D.P.G assisted by the counsel for applicant vehemently opposed the contentions of counsel for the applicant and contended that the learned Magistrate has rightly passed the order and police with malafide intention kept the names of applicants in column-II. Furthermore, there is sufficient evidence against the applicants, which will be observed at the time of recording of evidence.

5. I have heard the arguments of the Counsel for the Applicants and DPG and have also perused the record. The learned Counsel for the Applicants contended that since the Applicant was absent at crime scene during the commission of offence, therefore, the Investigation officer has considered such important fact in his Police Report but the Magistrate has failed to appreciate the said plea of alibi and has taken cognizance of the case without proper appreciation of record.

6. **Plea of Alibi**—The Applicants have taken plea of alibi as they were not available at the place of incident. The Plea of absence of accused from the place of occurrence at the time of commission of offence is “plea of alibi”. In other words, the plea of alibi is direct assertion based on physical impossibility of being at the scene of crime. Reliance can be placed on case ***“Muhammad Yaqoob Versus State”, (PLJ 1982 Cr. 343)***.

7. **Alibi is a rule of Evidence—**such plea is taken by defence in a criminal charge. and it is not available with the Investigation Officer or Prosecutor during pre-trial or post-trial scrutiny or Supervisory Magistrate as the said plea is recognized as a defense plea and requires strict positive proof in order to brush aside incriminating material as adduced by the prosecution. Reliance can be placed on ***“Muhammad Aslam v. State”, (1997 P. Cr.L.J 1689).*** The plea of alibi would have to undergo the test of judicial scrutiny on the basis of evidence. Reliance can be placed on case “***Zar Ghulab Khan Versus State”, (PLJ 2004 CrC 53; NLR 2004 Criminal 26).*** The defense side has to give cogent reasons and grounds for believing plea of alibi raised by accused. Reliance can be placed on the case

"Muhammad Hanif Versus State", (2000 SCMR 1806). The Burden of prove the plea of alibi initially lies upon the defense side /accused. However, the burden of prove does not adjudge or decide on the same criteria as has been obligated in the case of prosecution to prove its own case against the accused. Reliance can be placed on the case ***"State Versus Saif-ur-Badshah", [1990 P.Cr.L.J 1669 (DB)].*** Unlike the onus to prove case upon Prosecution, an accused with plea of Alibi is not under obligation to prove the case beyond reasonable doubt as mandatory upon Prosecution. An accused would have to demonstrate that he is /was absent at the crime scene when the commission of offences have committed and that he has no privy with the commission of offence. Reliance can be placed on the case ***"Maqsood Javed v. State", (1984 PCr.LJ 2923)***.

8. Conversely, the Onus of disproving evidence produced by accused lies on prosecution and evidence produced by an accused is accepted as correct unless rebutted by the prosecution through cogent evidence and impeachment during cross-examination of an Accused person who has brought up his defence on plea of Alibi and in failure to do so, alternatively, the burden of an accused stands discharge when an Accused with defence plea of Alibi show reasonable possibility of plea being true. Reliance can be placed on case ***"Muksad Molla and Others v. The Crown", (PLD 1957 Dacca 503).***

9. The Counsel for the Applicants has relied upon case law reported in ***PLD 2005 Karachi 528 (Mukhtiar Ali and 3 others Vs. The State and another)*** which is distinguishable. In the said case, the Investigation Officer has released the accused with his specific

observations that no evidence was found against the Accused and in present case the Applicants have agitated on the ground of Alibai i.e. the Applicant/accused were not available at crime scene at the time of commission of offence. Admittedly, the Applicant/accused has challenged the Order dated 21.01.2025 passed by the Judicial Magistrate-II Umerkot whereby the learned Magistrate has taken cognizance of the case while not appreciating the plea of alibi raised by the Applicants . Similarly, the second case law relied upon by the Counsel for Applicant is the case reported in ***"Ghulam Qasim vs. Nazir Ahmed and 3 others" (1996 P Cr. LJ 1187 Peshawar)*** and it is also distinguishable as facts and circumstances of the case are quite different so also reliefs. It pertains to Order passed by Magistrate putting endorsement on the police report wherein accused was released in exercising power conferred under section 169 Cr.P.C and the same was assailed before the Hon'able Peshawar High Court who held that the released of accused on the basis of police report without proper judicial scrutiny was against the judicial norms. The third case law relied upon by the Counsel for the Applicants reported in ***"Saif Ullah vs. The State" (2005 YLR 2338 Lahore)*** is also distinguishable in said case Criminal Revision application was filed against the Order of Trial Court whereby it has taken cognizance on the ground that Investigation Officer and Judicial Magistrate has declared the accused as innocent whereas in present case the Judicial Magistrate has not declared the applicant/accused as innocent, on the contrary recommended to the Court of Sessions for trial upon police report under section 173 Cr.P.C.

10. **Police Report—Section 173 Cr.P.C**: A Magistrate while accepting or rejecting the police report, a Judicial Magistrate is not bound to always agree with the police report and he can form another viewpoint. A Magistrate is not bound by the Police Report for disposal of the case under any class or oppositely by taking cognizance of the case. The law has interpreted the word ***"may"*** which has been used in Section 173 Criminal Procedure Code contemplates that Magistrate always vests competence to agree or disagree with the police report prepared and filed under Section 173 Criminal Procedure Code. Reliance can be placed on ***"Anwar Shamim and another v. The State" (2010 SCMR 1791); "Muhammad Ahmed (Mehmood Ahmed) Vs. The State" (2010 SCMR 660), "Safdar Ali V. Zafar Iqbal" (2002 SCMR 63); "Muhammad Shahid Khattak Vs. The State" (PLD 2013 Sindh 220); "Muhammad Akbar v. State" (1972 SCMR 335); "Falak Sher v. State" (PLD 1967 SC 425).***

11. **Nature and scope of Order of Magistrate—**The case of Shahnaz Begum is milestone towards understanding the very nature of Order pass by a Magistrate on Police report under section 173 Cr.P.C. The case reported as ***"Shahnaz Begum v. the Hon'ble Judges of the High Court of Sind and Balochistan and others" (PLD 1971 SC 677)***, is a rule-making decision of Honorable Supreme Court and in fact it is the foundational structure of judicial interpretation with regard to the nature and value of the orders pass by a Magistrate while dealing with a Police Report/Charge Sheet/Challan under section 173 of the Code and held that inherent jurisdiction of a High Court under

section 561-A of the Code, spanned over the judicial orders and not orders passed or steps taken during an investigation of a case. Later, the Hon'ble Supreme Court of Pakistan in another case reported as ***"Bahadur and another v. The State and another" (PLD 1985 SC 62)*** endorsed the Shahnaz's Begum case and drew distinction between administrative and judicial functions of the magistrate under the ibid Code. It was held that while passing an order of cancellation of a criminal case, the magistrate exercises administrative powers, thus not functioning as a court. Therefore, such an order was not amenable to Revisional jurisdiction.

12. It is now a settled law that a Magistrate has to deal with the charge sheet/ Challan under Section 173 of the Code or to dispose of any situations based on unique facts of each case, it has been ruled by the Hon'ble Supreme Court that nature, scope and powers of the Magistrate are administrative, executive, or ministerial and he discharges these duties **not as a Court** but as a personal designate. Reliance can be placed on cases ***"Arif Ali Khan v. State" (1993 SCMR 187), "Muhammad Sharif v. State" (1997 SCMR 304), and "Hussain Ahmed v. Irshad Bibi" (1997 SCMR 1503); "Soofi Abdul Qadir v. The State" (2000 P. Cr.L.J 520 & (PLD 1985 SC 62).***

13. Therefore, whenever a Magistrate decide to accept a Police report present to him under section 173 Cr. P.C., such a Magistrate would have to take cognizance of Police report. For this reason, the nature of any Order to take cognizance is not a judicial one but it is an administrative in nature. Reliance can be placed on ***"Bader Maqbool V. The State" (2008 MLD 1676); "Ashiq***

Hussain V. Sessions Judge, Lodhran and 3 others" (PLD 2001 Lahore 271) and "Messer M.Y Malik & Company and 2 others V. Messrs. Splendors International through M.D" (1997 SCMR 309).

14. Furthermore, the same principles have again reminded by the Supreme Court of Pakistan in case ***"Sher Muhammad Unar vs. State", (PLD 2012 SC 179)*** that the nature of order of a Magistrate is administrative in nature in the following manners:

> "The finding of guilt or innocence by the police at the investigation stage is not a finding in trial culminating in conviction or acquittal and therefore the principle of double jeopardy cannot be invoked by the petitioners. Even if when an accused is discharged by the Magistrate/trial Court, the consequence would be that he is discharged from his bond at a stage when his custody is no longer required by the investigating agency. <u>But such an order is only an executive order passed at the investigating stage when the case has yet to go for trial.</u> Nevertheless, the Court can still try him if some fresh material is brought before it. Petitioners were not even discharged by the trial. The order of discharge based on police report cannot be equated with acquittal. The Court is not bound by such a finding of innocence reflected in the final report submitted under section 173, Cr. P.C and it can still summon the accused."
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> ***(Emphasis provided)***

15. **Scheme of law for cognizance—**A Magistrate has to deal with the Police Report described under Section 190 Cr. P.C. For the sake of convenience, the provision of section 190 Cr. P.C is re-produced hereunder:

> **Section 190. Cognizance of offences by Magistrates.**
> 190. 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;
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> (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.
>
> (1) 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.

As discussed above since the Order of any Magistrate in its nature is “administrative” or “executive” or “personal designate”. Undoubtedly, “Court” are determined from the statutes such as

Criminal Procedure Code, 1898 or established under any special law. In “Muhammad Aslam and others v. Mst. Natho Bibi” PLD 1977 Lahore 535), the Lahore High Court held that a Magistrate seizes power to take cognizance in every criminal case whether triable by him directly or indirectly. After the Amendment in the Land Reform Ordinance, 1972, the only difference appears that a Magistrate could try cases which fell within his jurisdiction and would commit only those cases for trial which would fall in the exclusive jurisdiction of the Court of Session. Similarly, the cases which are empowered to try under special statutes does not need requirement of procedure under section 190 of the Criminal Procedure. In ***“Riffat Hayat v. Judge Special Court for Suppression of Terrorist Activities, Lahore, and another” (1994 SCMR 2177),*** held that the special court constituted under special statutes the Special Court (established under the Suppression of Terrorist Activities Act, 1975) could take cognizance directly without fulfilling the requirement of section 190 of the Code. The relevant portion is delineated as under:

> “Subsection (3) of section 5 of the Act provides that the Special Court may directly take cognizance of a case triable by that Court without the case being sent to it under section 190 of the Criminal Procedure Code. A comparison of provisions of section 190 of the Criminal Procedure Code with section 5 of the Act will show that neither application of section 173 nor section 190 of the Code is excluded either specifically or by necessary implication. The provisions relating to taking of direct cognizance by the Special Court contained in subsection (3) of section 5 of the Act is not a

> new one as a similar provision for taking cognizance of the case directly by a Magistrate already existed under subsection (2) of section 190 of the Code. Section 5 of the Act, which appears to be a combination of sections 173 and 190 of the Code, differs from these provisions only to the extent hereinafter indicated ... A Court of Session under section 193 of the Code is debarred from taking cognizance of a case as a Court of original jurisdiction unless the case is sent to it by a Magistrate under section 190(3) of the Code whereas a Special Court under the Act can take cognizance of a case directly as a Court of original jurisdiction in the same manner as a Magistrate is empowered to take cognizance of a case under section 190 of the Code."

16. The Order of a Magistrate in terms of Section 190 of the Code is not an Order of a Court but an Administrative Order in its peculiar nature. The law specifically permit the Court as defined under section 6 of the Criminal Procedure Code, 1898 or under any special statutes is empowered to try the cases and competent to record evidence and pass Sentence. Therefore, the plea of Alibi cannot be considered by any authority, investigation agency or administrative Magistrate being not the competent court to try the offences. It seemed to this Court that the Applicants needed to demonstrate that that order impugned before me was, in some way, wrong in principle. After all, the extent to which a Magistrate accedes (or otherwise) to a submission that he should draw an adverse inference or appraisal of record pertaining to plea of Alibi

as raised by the Applicants is not within his remit in view the embargo of Article 117 of Qanun-e-Shahadat Order, 1984. But, beyond saying that the Magistrate should have found that factual matrix or record collected by the Investigation Officer, did not approach the level of exhibited document or factual matrix on oath. Therefore, the Applicants have had failed before the Magistrate to the effect that, a plea of Alibi which had kept the records were not obliged to. It seems to me, for the reasons noted above, that this ambitious submission, attractively though it was argued, must fail for a variety of reasons referred above.

17. I have also considered carefully the adverse inference point made by Counsel for Applicants, but I do not find it helpful in this case. The difference between the application of plea of Alibi during investigation or prior to the framing of charge rested in large measure on their very different interpretation and analogous understanding of word ***"court"*** used in the provision of Section 6 of the Criminal Procedure Code, 1898 or that have established under special statutes. The correctness does not warrant to appreciate the plea against the material collected by the Investigation Officer or cognizance ordered by a Magistrate as it cannot be termed as ***"evidence"***, which required judicial determination after undergoing test of deposition and cross-examination on oath. Any measuring of levels of investigations or its collected material could only have assisted in relation to Police report for cognizance or otherwise but in no way or manner helpful to the Applicants for plea of defence as plea of Alibi would then have been the subject of judicial determination as to what such plea of absent claimed or relied upon by the Applicants

under burden of prove. Any measurement of investigation level or consideration of record would not have assisted in relation to identifying the plea of Alibi, which essentially required judicial determination after recording of the evidence.

18. It does not seem to me be a sustainable argument that the lack of appreciation of plea of Alibi by investigation officer should lead the Magistrate to adopt uncritically factual matrix of Alibi Plea in circumstances where I have concluded that they do not reflect the factual matrix or record and I have found to exist at the relevant time when the Applicants will adduce evidence of Defence plea after completion of prosecution evidence and material record.

19. The plea of alibi is the weakest type of plea and cannot be given any weight unless same is proved before the Court at trial from very cogent, convincing and plausible evidence. In terms of Article 117 of the Qanun-e- Shahadat Order, 1984, the burden to prove plea of alibi is on the accused which is to be proved in accordance with law at trial. Since the challan has been submitted before the Trial Court and still evidence has not been adduced, therefore the present application is pre-mature as the plea of the alibi could be taken during trial of the case when the parties will record their evidence. Even the statements of defense witnesses recorded under section 161, Cr. P.C. in support of plea of alibi are not relevant and inadmissible for inferring innocence of the accused at investigation stage, as deciding plea of alibi at investigation stage would amount to pre-trial verdict, which jurisdiction is not vested with the investigation officer/agency but it is vested with the trial Court.

20. In view of above reasons, I have reached to an inescapable conclusion that the criminal Miscellaneous application is not maintainable and it is dismissed accordingly.

JUDGE

Adnan Ashraf Nizamani