

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Rev.Appln No.155 of 2006

Date

Order with signature of Judge

1. For orders on M.A No.9658/2015
2. For hearing of case

25.08.2016.

Mr. A. Q. Halepota, advocate a/w applicants.
Mr. Ansari Abdul Latif, advocate for Complainant.
Ms. Seema Zaidi, A.P.G.

Mr. A. Q. Halepota, learned counsel contends that this Cr. Revision Application U/s.435, 439, Cr.P.C may be converted and treated as Cr. Misc. Application U/s. 561-A Cr.P.C. Learned counsel for the complainant has no objection. Order accordingly.

2. This criminal Misc. Application is directed against the administrative order passed by the Judicial Magistrate, Hyderabad on police report under **Section 173 Cr.P.C** whereby the learned Magistrate disagreed with the report of investigating officer and directed him to challan all the applicants within (7) seven days. After hearing at length and going through the material placed on record it has transpired that only two applicants namely Sajid Ali and Allah Dino both by caste Lakho were named in FIR No. 1070/2006 dated **8.8.2006**. The prosecution witnesses in their statement under Section 161 Cr.P.C have also named them. However, other two applicants namely Taj Muhammad and Ghulam Mustafa who happened to be real brothers of the other accused, were not mentioned in the FIR as well as in the statement of witnesses under Section 161 Cr.P.C. Their names were introduced by the complainant party in their additional statement after two weeks on **22.8.2006**.

3. The police in its report under Section 173 Cr.P.C suggested to dispose of case in 'B' class against all the accused. Learned Magistrate while going through the material disagreed with the findings of police and directed that all four accused should have been sent for the trial.

4. Learned counsel for the applicants was unable to justify the police report for disposing of case of an offence of causing injury to the complainant party against the accused whose name were mentioned in the FIR with specific role. He has attempted to build his case by referring to the quality of prosecution story such delay in lodging of FIR and the possible weaknesses in the statements of PWs under Section 161 Cr.P.C. Learned Counsel for the complainant while supporting the impugned order has contended that sufficient material was available against the accused to prove their guilt and therefore they should face the trial.

5. The plea taken by learned counsel for the applicants before this Court may help them in the trial court. An administrative order under Section **173 Cr.P.C** passed by a Magistrate is not supposed to be examined by the Superior Court under **Section 561-A** by minutely examining the material before the Magistrate for sending the accused for trial or not. It is settle law that the reports of police under **Section 173 Cr.P.C** is not binding on the Magistrate. It is premature for the Magistrate to examine the effect of delay in lodging FIR and discrepancies in the statement of PWs under Section 161 Cr.P.C while examining the report of I/O under Section 173 Cr.P.C. This is not the stage to take the judicial notice of the material before the Magistrate and give final verdict about the guilt of accused. Similarly this Court under **Section 561-A Cr.P.C** while reviewing administrative order passed by a Magistrate under **Section 173**

Cr.P.C cannot comment on the quality of material placed before the Magistrate by the I/O. Any comment by this Court on the material available before the Magistrate would prejudice the case of either at the trial. However, even the administrative order is supposed to show application of mind by the Magistrate concerned by referring to the material placed by the police with report under **Section 173 Cr.P.C.**

6. The order impugned does not refer to the material against applicants, Taj Muhammad and Ghulam Mustafa, whose names were added in the story by complainant after two weeks and that too, without any explanation. However, the learned Magistrate has rightly rejected the plea of alibi taken by the applicants, Sajid Ali and Allah Dino before the police and Investigating Officer recommended the case even against them for disposal in 'B' class by ignoring the fact that they were named in the FIR.

7. In view of the facts, the report of I/O to dispose the case against all the four accused in 'B' class was unjustified since at least the accused named in the FIR and 161 Cr.P.C statement of witnesses should not have been declared innocent by the I/O merely on the plea of alibi. Plea of "alibi" in defense is definitely required to prove at the trial and prove such plea even if placed before the I/O, it needs to be established on oath by the accused and has to withstand the test of cross-examination. Likewise the complainant had hardly any justifiable material against the two accused who were not even shown on the spot and whose names were included in the story by complainant after two weeks in their additional statement before police. Both the learned Counsel for the complainant and the applicant accused both have conceded that in view of the material available before the police and placed before the Magistrate only two accused named in the FIR should have been recommended for the

trial and not all the four. Therefore, by consent of the learned counsel for the complainant, the impugned order is modified to the extent that instead of four accused the I/O should have been directed to send the challan only two accused. Therefore, applicants Sajid Ali and Allah Dino were rightly directed to stand trial as their name are mentioned in the FIR and that trial against the applicants Taj Muhammad and Ghulam Mustafa has wrongly commenced. Consequently the proceeding before the Vth Additional Session Judge, Hyderabad in Session case No.372/2006 are partly quashed against the applicant Taj Muhammad and Ghulam Mustafa only.

8. With the above observation, this Cr.Misc. Application is partly allowed. Applicant,. Sajid Ali and Allah Dino are directed to appear before the Court of Vth A.D.J, Hyderabad within 15 days to face trial of Session Case No.372/2006. Notice may be issued if they remain absent.

JUDGE

SM