

ORDER SHEET  
**IN THE HIGH COURT OF SINDH,**  
CIRCUIT COURT, HYDERABAD.

Cr.Misc.Appl.No.S- 206 of 2012

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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1. For Katcha Peshi.
2. For hearing of MA 1810/2012.

25.10.2016.

Mr. Ishrat Ali Lohar, Advocate for applicants.  
Mr. Noor Ahmed Memon, Advocate for respondent No.1.  
Mr. Shahid Shaikh, A.P.G. for the State.

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Through instant application, applicants have assailed the order dated 31.03.2012 passed by learned Magistrate, on a police report U/s 173 Cr.PC for disposal of case under "C" class, whereby he, while disagreeing with report, took cognizance against the applicants.

Learned counsel for the applicants *inter alia* contends that complainant party moved application with Director Regional Office, Provincial Ombudsman, Badin (Mohtasib) wherein only the name of Noor Muhammad was mentioned and date of application is shown as 4<sup>th</sup> January 2009. Subsequently, order passed by the Director on 23.11.2011 whereby he directed the concerned police that they shall record the statement of complainant and if cognizable offence is made out same may be converted u/s 154 Cr.P.C; that Director was not having the jurisdiction to exercise powers; that FIR No.179/2011, lodged in pursuance of order passed by the Director, shows the date of offence as 08.08.2009; witnesses did not support the fact even then the learned Magistrate has taken adverse view which is unwarranted under the law. He also relied upon the Establishment of the office of Ombudsman for the Province of Sindh Act,1991 and contends that the matter before the Ombudsman was corum non-judice; as Ombudsman was not competent to investigate or inquire into the matters which are pending before the Judicial

Tribunal or Board in country. Besides Ombudsman has no power to investigate in complaint filed by a Public Servant to the Agency in which he is or has been working with regard to personal grievance.

In contra, learned counsel for complainant contends that respondent, being poor person, had no alternate remedy but to file application before the Ombudsman and direction of Ombudsman is not violating law of land; as well Ombudsman is having jurisdiction to redress the grievance of any common man, whereas learned A.P.G. is not supporting the order passed by the Magistrate, however, he contends that in police papers certificate with regard to injured witnesses are available showing the date of examination viz. 09.08.2009, however, they have not supported in 161 Cr.P.C. statements.

Heard and perused the record.

At the outset, it would be conducive to refer Section 9 as emphasized by learned counsel for the applicants, which is that:-

***“9. Jurisdiction, functions and powers of the Ombudsman:- (1) The Ombudsman may on a complaint by any aggrieved person, on a reference by the Governor or the Provincial Assembly, or on a motion of the Supreme Court or the High Court made during the course of any proceedings before it or of his own motion, undertake any investigation into any allegation of mal-administration on the part of any Agency or any of its officers or employees:***

***Provided that the Ombudsman shall not have any jurisdiction to investigate or inquire into any matters which:-***

***(a) are sub judice before a Court of competent jurisdiction of judicial tribunal or board in Pakistan on the date of the receipt of a complaint, reference or motion by him; or***

***(b) relate to the external affairs of Pakistan or the relations or dealings of Pakistan with any foreign state or government; or***

***(c) relate to, or are concerned with, the defence of Pakistan or any part thereof, the Military, Naval and Air Forces of Pakistan, or the matters covered by the laws relating to those forces.***

**(2) Notwithstanding anything contained in subsection (1), the Ombudsman shall not accept for investigation any complaint by or on behalf of a public servant or functionary concerning any matters relating to the Agency in which he is, or has been, working in respect of any personal grievance relating to his service therein.**

**(3) For carrying out the objectives of this Act and, in particular for ascertaining the root causes of corrupt practices and injustice, the Ombudsman may arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication.**

**(4) The principal seat of the Office of Ombudsman shall be at Karachi, but he may set up regional offices, as, when and where required.”**

Reading of the above provision *prima facie* permits the *Ombudsman* to entertain and investigate a complaint / application by an aggrieved on allegation of **mal-administration** on the part of any ‘Agency’ or any of its Officers or employees albeit *Ombudsman* cannot exercise the ultimate jurisdiction of Civil Court as well investigate the matters which are pending in the competent Courts as enshrined in the above referred Section 9. Thus, the *prima facie* object of domain of the *Ombudsman* appears to be of ‘supervisory’ in nature whereby *Ombudsman* can pass appropriate order in event of any *maladministration*. The term *maladministration* shall include failure to perform legal duty or a poor *management* in performing legal duty/obligation.

Since, within meaning and object of Section 154 of 155 of the Code an officer *in-charge* of a police station is under *mandatory* duty to record statement of any *informant* but recording thereof in 154 or 155 Cr.PC Register(s) is subject to showing commission of *cognizable offence* or *non-cognizable offence* which the Officer-in-charge is to decide. A failure to perform such mandatory obligation would include in poor management by *officer-in-charge* of a police station therefore, a direction even by an *Ombudsman* to one (SHO) to perform what he *otherwise* is obliged cannot be made to influence the proceedings controlled by Chapter-XIV,

Part-V of the Code under title of '**Information to the Police and their powers to investigate**'.

In view of above discussion, I find no substance in the *first* objection, raised by the learned counsel for the applicant with reference to Section 9 of Ombudsman Act particularly when it has caused no *prejudice* to applicants.

With regard arguments regarding change of date in FIR and mentioning one name in application, I have examined that application which shows that offence was committed by Noor Muhammad and others. The applicants *legally* cannot take benefit of such *writing* particularly when the *criterion* of 'application' and 'FIR' are altogether different. Even otherwise, the FIR was lodged much later to such application hence disclosure of '*names*' of those who were mentioned in application as '**and others**' is not of much significance.

Although the police has given opinion that witnesses in 161 Cr.P.C. statements have not supported the FIR but the version of the *injured* is supported / backed by the medical evidence. In such eventuality the learned Magistrate was justified in taking the cognizance particularly when the complainant's party denies contents of 161 Cr.P.C statements to be theirs. Needless to add that status of 161 Cr.P.C. statements cannot be equated with the status of evidence.

I would further add that I am equally conscious of the legally established principle that *ipsi dixit* of police is not binding upon the Courts, even while dealing with reports under chapter-V of the Code, therefore, a Magistrate can *competently* taken cognizance on a *negative* report even hence mere recommendation of police for disposal of case under 'C' class is of not much relevance if the Magistrate *otherwise* has disagreed under umbrella of 'reasons'. Even otherwise, a mere taking cognizance *legally* does not decide the fate of allegation rather brings the prosecution under obligation to *first* prove the charge and yet the accused, on his

turn, may disprove the same. The agony of trial *alone* cannot be made an excuse to avoid the trial of a charge / allegation.

For setting aside an order of *taking cognizance* could only be set-aside if it is shown that order, passed by the Magistrate, *in administrative capacity*, is *prima facie* non-speaking and contrary to law which *too* examining the material not as a *judge* shall be required to do while recording a *judgment* because pre-trial judgment cannot be given by the police or the Magistrate. The impugned order in question in my view is well speaking and well reasoned. Accordingly, instant Criminal Miscellaneous Application is dismissed alongwith pending application and the interim order is hereby recalled. The trial Court shall proceed with the case in accordance with law.

JUDGE

Tufail