IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Misc. Application No. 19 of 2018

Date of hearing : 01-07-2019

Syed Jawaid Haider Kazmi, advocate for the Applicant.
Mr. Javed Ahmed Kalwar, advocate for Respondent No. 2
Syed Zahoor Hussain Shah, DPG

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O R D E R

FAHIM AHMED SIDDIQUI, J:- The applicant was arrested by the respondent No. 2 (a police officer) with a charge of having and keeping liquor. On a police report, the learned trial Court (Judicial Magistrate-VII, Karachi South) took cognizance regarding F.I.R. No. 262/2009 of PS Darakhshan, Karachi South under Section 4 PEHO, 1979. During trial, an application for pre-mature acquittal was moved and the same was declined. However, the learned Appellate Court (Additional Sessions Judge-II, Karachi South) allowed the application under Section 249-A filed before the trial Court. Prior to acquittal order, an application under Section 193 PPC was filed before the trial Court against the respondent No. 2 for his trial in respect of fabricating false evidence with intention to produce before the trial Court. As the applicant could not succeed in getting any relief from the lower forums; therefore, he approached this Court by filing the instant application.

2. As per narrative of the instant criminal miscellaneous application, the applicant was arrested by the police for a charge of having liquor and he was produced before the medicolegal officer for examination. The Medicolegal Officer has given his report in negative, as such the charge of having liquor against the applicant could not be established. Allegedly, instead of taking action as per medicolegal report, the respondent No. 2 has twisted the entire case by lodging the aforementioned F.I.R. for keeping liquor with him in his vehicle.

3. The learned counsel for the applicant submits that there are plenty of reasons available in the record to pursue a prudent mind that a false case was fabricated by the respondent No. 2 against the applicant. He points out that the applicant was arrested on 15.05-2009 and produced before the Medicolegal Officer by the respondent No. 2 with allegation that he was under intoxication with a smell of liquor from his mouth; as such a medical report was sought in this respect. The Medicolegal Officer's report, available in the record, indicates that the applicant was produced on 15-05-2009 at 2:50 AM, in which it is mentioned that the applicant was not under intoxication. According to him, after getting such report, the respondent No. 2 has fabricated a false Memo of Arrest showing his arrest on 15-05-2009 at 03:30 hours with allegation of having liquor with him. He submits that the date and time of the Memo of Arrest clearly shows that the same is a fabricated document, which was prepared after his detention and production before the Medicolegal Officer as well as after not getting a favorable opinion from the concerned doctor, and this fact verified by the said MLO in his statement before the trial Court. He submits that this fact indicates that the respondent No. 2 with ulterior motives has lodged a false and fabricated case against the applicant with intention to get him punished wrongfully from the Court of law. He submits that in these circumstances, it is the right of the applicant to move an application under Section 193 PPC and according to him the same has to be considered favorably by the trial Court. He further submits that the trial Court has dismissed the application on the ground that the accused has been acquitted by the appellate Court, while the court below have also observed that the application before the trial Court was filed by the counsel of the applicant instead of applicant himself. In this respect, his contention is that the application was moved on behalf of the applicant but after his acquittal from the appellate Court, the applicant did not bother to appear before the trial Court; and in such a situation there is no bar on the consul of the applicant to appear and proceed with the application already filed by and

on behalf of his client. He submits that a direction should be given to the trial Court for initiating an action by filing complaint under Section 193 PPC. In support of his contentions, he relied upon 2010 YLR 470.

4. The learned counsel for the respondent No. 2 have argued in a different tone by submitting that the instant criminal miscellaneous application is not maintainable as the same is filed by the counsel directly without any instructions from his client. According to him, an advocate cannot challenge an order passed against his client, as he himself is not personally considered as aggrieved person. He submits that the impugned judgement is well reasoned and the same does not require any interference. He emphatically submits that the applicant cannot file an application for taking action under Section 193 PPC as the same is solely under the discretion of the trial Court. He further submits that the accused has already been acquitted and thereafter he did not bother to appear before any forum, which indicates that he has no interest in the instant matter, as such the instant application is required to be dismissed.

5. The learned Prosecutor submits that from the record it appears that the F.I.R. was lodged subsequent to getting opinion of Medicolegal Officer, as such he has conducted grave illegality. According to him, the contention raised by the applicant regarding fabrication of a false case needs proper probe.

6. I have heard the arguments advanced and have gone through the relevant records available before me. I have also enlightened myself from the cited case-law. In the instant case, the trial Court has declined to take action under Section 193 PPC on the sole ground that the accused was acquitted from the Court of Additional Sessions Judge; therefore, only the Court from where the accused was acquitted, can take cognizance regarding such plea. On the other hand, the lower appellate Court did not entertain the plea of the applicant on the ground that the application was moved by the advocate and not by his client (i.e. accused Ayoob Bhatti),

as such he is neither the aggrieved not effected party; hence an application filed by the advocate of the accused is not maintainable. In this respect, my observation is that both the Courts below have erred in forming their opinion regarding the maintainability of the application filed before the trial Court. It is a fact that an appeal is the continuity of the original proceeding; therefore, the law has empowered the appellate Court to use all powers of trial Court at the time of dealing an appeal. However, usually the evidence is produced before the trial Court and the appellate Court can only take action under Section 193 PPC when the false and fabricated evidence is produced before the appellate Court as additional evidence under the provision of Section 428 CrPC, which happens in extraordinary situation as described under the said provision of law. Nevertheless, in the instant case no additional evidence was recorded and the lower appellate Court has acquitted the accused relying on the material collected during investigation or produced before the trial Court. I am of the view that in the existing position of affairs, only the trial Court is having jurisdiction to take action under Section 193 PPC.

7. In my considered view, the lower appellate Court has also erred in observing about non-maintainability of the application moved before the trial Court. The observation of the lower appellate Court in the impugned order is not based upon the correct factual position. The application before the trial Court was moved on behalf of the accused Ayoob Bhatti much prior to moving an application under Section 249-A CrPC for his pre-mature acquittal during trial. Meaning thereby that in fact the initial application before the trial Court was filed under the instructions of the accused. The copy of said application is available in the record of the instant application (page-55), which bears the signature of the accused as well as his advocate. Even otherwise, it is not the scheme of law that such application is required to be filed as it is the duty of the trial Court to secure the ends of justice by taking action against those who have fabricated false evidence in order to get some innocent person convicted

from the Court of law. However, a private party is not standoffish for initiating a proceeding under Section 193 PPC but as per provision under Section 195 CrPC, the same should be under the control of the Court for which a proper procedure has also been described under Section 476 CrPC. The intention of legislature for putting a bar on the private individuals under Section 195 CrPC has been beautifully explained by the Apex Court of India in a case reported as Patel Lalji Bhai v. State of Gujarat (AIR 1971 SC 1934), wherein it is observed as:

> *"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 prosecution 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 of victim of these offences and it is only by misleading the Courts and thereby prevent 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 proceeding 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 proceeding 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 is also pertinent to point out that a private party has an alternate and perhaps a more efficacious proceeding in the shape of filing a Suit for damages on account of malicious prosecution while no such remedy of damages is available to a private individual in case the proceeding is carried out under Section 476 CrPC.

8. On the other hand, it is noteworthy that the evil of fabricating false and frivolous criminal cases and giving false evidence is multiplying day by day. This problem becomes an elephant in the room, which requires to be checked. It is necessary that the Courts should adopt a proactive role to curb this menace, as such it is the need of time that action should be taken against those, who becomes so courageous to malign the Courts by fabricating and producing false evidence in order to get their ill designs. The whole purpose of criminal law is that 'no offence should go unchecked and no offender should go unpunished'; and this basic purpose of criminal law cannot be overlooked rather the same should be upheld. The Courts are not rubbery stamps in the hands of felonious persons to achieve their ill-designed motives; as such those, who intentionally fabricate or/and produce false evidence before a Court, can never be a favorite child of the Court. However, at the same time, it is also necessary that the judges, while acting proactively, should be very cautious in exercising their powers under Chapter IX of the Penal Code.

9. In the present case, the applicant/accused was arrested and produced before the Medicolegal Officer for his opinion regarding intoxication. If the accused was arrested with some quantity of liquor and there was suspicion that he was also under the influence of liquor then the Memo of Arrest should mention this fact and the same should be prepared prior to his production before the Medicolegal Officer. However, a big question mark is placed in respect of the act of respondent police officer that why subsequent to getting a negative opinion from the MLO, an F.I.R. against the applicant/accused was lodged for having liquor with him. No doubt, the enforcement official must have some leeway in prosecuting offenders, who are involved in crimes but it should not be a licence to extend their hands towards the innocent persons. There are certain gaps in the prosecution case, which have been accepted by the learned Additional Sessions Judge in his elaborated acquittal order, which attracts the possibility of fabrication of a criminal case by the respondent police

officer. Now question arises, whether lodging a false F.I.R. comes under the domain of fabricating a false evidence. No doubt, an F.I.R. is not a substantive piece of evidence unless it's maker affirmed its contents on oath before the Court of law. Admittedly, the author or maker of the said F.I.R. does not appear in the witness box due to pre-mature acquittal of the applicant/accused by the lower appellate Court. Nevertheless, the intention of the maker of F.I.R. i.e. respondent police officer was to produce the same before the Court of law for awarding punishment to the applicant. Now there is a possibility that the applicant/accused was arrested with liquor and at the same time it was felt that he was under intoxication, as such he was sent to MLO but in such case this fact should come in the Memo of Arrest and the same ought to be prepared at a point of time earlier for presenting the accused for medical examination, hence reasonable grounds are in existence in support of fabrication. I am of the view that if an FIR is lodged by a police officer and if at any stage, the Court came to conclusion that the FIR is patently false and fabricated then the Court should not be reluctant to take action against such police officer under Section 193 CrPC and such action should be taken immediately.

10. Now another question is required to be addressed. The alleged incident was taken place back in the year 2009, as such it is to be seen that any action can be taken after such a long delay. It is worth noting that the cognizance under Section 193 PPC can be taken as per procedure laid down under Sections 195 and 476 CrPC. Section 195 CrPC provides that when an offence under Section 193 'is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court'. In the present case the offence was allegedly taken place in relation to a proceeding before the trial Court (Judicial Magistrate-VII, Karachi South), as such only that Court can file a complaint in writing before the nearest Court of Magistrate. Nonetheless, in its nature the cognizance is somewhat similar to the cognizance as per provision of Section 480, according to which an offence committed

regarding some judicial proceeding at the face of Judge then the same Judge is competent to take cognizance of the case. I am of the view that on the basis of the same analogy, if any offence under Section 193 PPC is committed in a judicial proceeding or in relation to a judicial proceeding, then cognizance can only be taken by the same Presiding Officer before whom trial is continued or concluded. However, a successor in office can only take cognizance regarding an offence u/s 193 PPC, if the trial is still continued but if the trial is concluded and the said officer is transferred then the successor in office cannot take cognizance regarding the trial. In the present case, the trial has been concluded and after such a long time, the Judicial Officer before whom the proceeding was carried out must have been transferred, promoted or retired, as such any of the other Judicial Officers subsequently posted in the said court cannot take cognizance of the offence under Section 193 PPC. It is worth noting that the alleged fabricated Memo of Arrest and F.I.R. were supposed to be produced in the Court and allegedly the falsification of both documents is established by the deposition of concerned Medicolegal Officer; but the trial is concluded long ago and due to lapse of such a long time, it will be futile to give any direction to the trial Court, as the said presiding officer will certainly not be available under the canopy of the Court at this juncture of time. However, the respondent No. 2 is warned to be careful in future and should keep in mind that the power and authority given to a police officer is not only open for judicial review but in case of fabricating a false case or creating false evidence, he may also expose himself for criminal liability as per law.

With these observations, the instant criminal miscellaneous application is dismissed.

Dated:_____ J U D G E