

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Misc. Application No. 163 of 2020

Nasir Hussain and another.....Applicants

Versus

The State and others.....Respondents

Criminal Misc Application No. 187 of 2020

Nabi Gul and others.....Applicants

Versus

The State and others.....Respondents

Date of hearing: **29.05.2020.**

Date of Order: ____ .06.2020.

Mr. Khwaja Shamsul Islam applicant No. 2 in Cr. Misc. App. No. 163/2020 and applicant No. 3 in Cr. Misc. App. No. 187/2020, in person

M/s. Muhammad Farooq and Shehzad Mehmood and Khwaja Saif-ul-Islam, advocates for rest of the applicants.

Mr. Muhammad Rehman Ghous, advocate for the complainant

Mr. Hussain Bux Baloch, Additional Prosecutor General, Sindh.

ORDER

FAHIM AHMED SIDDIQUI, J:- Since both the subject criminal miscellaneous applications pertain to the same criminal case and having similar questions; therefore, this order will suffice for disposal of the same.

2. The factual matrix of the case is based on an F.I.R. bearing No. 126/2019 lodged at Police Station Gizri in which complainant Muhammad Amin reported the incident of murder of his brother namely

Zulfikar Ali. In the said F.I.R., he alleged that he received information through his elder brother Jalaluddin about receiving firearm injuries by his brother Zulfikar Ali. On such information, he reached Jinnah Hospital and found the dead body of his brother in the mortuary. According to him, on getting information, he came to know that his brother was killed by two unknown pillion riders at about 10:45 hours near Ibrahim Mosque, DHA, Phase-IV. In the F.I.R., the complainant has shown his strong suspicion that Mr. Khwaja Shamsul Islam, advocate (applicant No. 2 in Cr. Misc. App No. 163/2020 and applicant No.3 in Cr.Misc.Application No.187/2020) killed his deceased brother on account of some old dispute, as he was working with him about two years back as a driver.

3. The nominated accused Khwaja Shams-ul-Islam, who is a senior advocate of this Court, succeeded in getting anticipatory bail by this Court and as per directions, he joined the investigation. Since the peculiar circumstances of this case demands so; therefore, on the directions of this Court a JIT was formed and the investigation was transferred to DSP Siraj Lashari. Apparently, the applicant Khwaja Shams-ul-Islam cooperated with the investigation process, as neither the JIT nor investigation officer has complained regarding any non-cooperation from his side. After thorough investigation, the report was submitted before the learned Judicial Magistrate concerned under A-Class (untraceable culprits) declaring the applicant Khwaja Shams-ul-Islam as not the author of the offence. Since no any piece of evidence was collected, which may go against him and other applicants; therefore, learned Judicial Magistrate approved such report under A-Class vide order dated 21-09-2019, which is impugned in Cr. Misc. App No. 163/2020.

4. After submission and approval of the aforementioned report under A-Class, Nabi Gul (applicant No.1 in Cr.M.A. No.187/2020) and one Muhammad Aqueel were arrested in this case (F.I.R. No. 126/2019 of PS Gizri) and were produced for a police custody remand before the

concerned Judicial Magistrate, which was refused. The said investigation officer has challenged such order of the learned Judicial Magistrate before the Sessions Court by filing Criminal Revision Application No. 65/2020, which was allowed by learned Additional Sessions Judge-II, Karachi South through an order dated 19-05-2020, which is impugned in Cr. Misc. App. No. 187/2020.

5. Mr. Shamsul Islam advocate (one of the applicants) prefers to argue himself. Before opening his arguments, he portrayed a picture of the background of the whole affairs. According to him, since he is very vocal in the bar against the ruling political party of the province; therefore, a plan was hatched against him to involve in this case considerably by some of the party leaders duly motivated by its lawyer wing. He submits that they just took advantage of the employment of the deceased sometime in the past and an unfortunate act during that period. He submits that he was targeted just because he remained critical and very vocal not only in bar-room but also appearing in numerous cases against the smutty interests of the ruling class of the province. He submits that after getting interim relief, he cooperated with the investigation fully and has handed over all his mobile phones and other gadgets and produced his associates and friends before the investigators and their statements were recorded and even the mobile phones of his friends were collected by the investigating officer. According to him, the investigation was carried out by a very competent officer under the supervision of JIT duly constituted under the directions of this Court, and a report was submitted in favor of the nominated accused. He submits that the complainant of the case was misguided rather pressurized to involve him in this case with ulterior motives. He submits that now the complainant has come to know about the real scheme behind the game and he has filed an affidavit, which is self-explanatory in this respect. He further submits that when the case was ended up in A-Class, the same self-centered persons tried to involve

some of his friends in this case just to tease him and harass his friends. He points out that just after two months of the disposal of the case under A-Class, the miscreants' action against the friends and family members of the applicants was started. He submits that after two months his friend Nabi Gul was picked up and then shown in a false illegal weapon case and thereafter involved in this case. He submits that after showing his arrest, the police revealed to newsmen that a terrorist was arrested but the case was registered under Arms Act only. According to him, when the case is ended up in A-Class, the respondents cannot involve him or his friends in this case in any manner. He submits that it will be better that instead of disposal of the case in A-Class, the same may be declared as disposed of in B-Class, i.e. false case. In support of his contentions, he relies upon the following cases:-

- State through Advocate General Sindh vs Bashir and others (PLD 1997 Supreme Court 408)
- Syeda Afshan vs Syed Farukh Ali and 3 others (PLD 2013 Sindh 423)
- Niaz Hussain and 4 others vs the State and 2 others (2014 PCrLJ 1738)
- Syed Muhammad Ali Raza Zaidi vs the State (2017 PCrLJ 1083)
- Hussain Ali vs the State (2020 MLD 70)
- Naseer Ahmed and 2 others vs the State (2020 MLD 282)

6. Mr. Muhammad Farooque, learned counsel for applicant Nasir Hussain (in both the applications) and applicant Nabi Gul in Cr. Misc. App. No. 187/2020) has adopted the arguments advanced by Mr. Shams. In addition to the same, he submits that applicant Nabi Gul remained with Mr. Shams as a shield to protect him from the troublemakers. According to him, applicant Nabi Gul and some other persons remained with Khwaja Shams-ul-Islam for sheltering him from any

untoward situation due to an unpleasant incident in the Bar Room. He submits that after disposal of the case under A-Class, under the instance of the some persons, the investigation officer purposefully tried to involve those who are near and dear to Mr. Shams. He submits that applicant Nabi Gul was illegally detained by the law enforcers, as such a constitutional petition regarding missing person was filed. He submits that the police have initially shown Nabi Gul and one Aqueel arrested as terrorist by claiming that they were involved in target killing cases of law enforcement agencies personals but no anti-terrorism case was registered and only involved them in a case of illegal arms by foisting a pistol.

7. According to Mr. Farooque, the applicant Nabi Gul was involved in this case with an ill-design as he succeeded in getting bail in Sindh Arms Act case. He submits that the police officer, who sought remand in this case, was no more the investigation officer as the investigation had already been transferred to DSP Siraj Lashari. He points out that in this scenario, the entire act for involving the applicant Nabi Gul is illegal. Regarding applicant Nasir Hussain, he submits that he also apprehends to be involved in this case illegally. He submits that the entire case against the applicants is nothing but a result of originating a conspiracy, which is evident from the affidavit filed by the complainant before the learned Judicial Magistrate as well as before this Court. He submits that the substance of the affidavit is very much incorporated in the order of the learned Judicial Magistrate while disposing of the case under A-Class. He submits that in these circumstances the entire case against the applicant Nabi Gul may be declared as illegal and all the applicants are provided protection of the law.

8. Mr. Rehman Ghaus, the learned counsel for the complainant also prefers his submissions. He submits that the complainant was misled by some political figures and attorneys belonging to a political party. He submits that when the complainant realized that he was playing in the

hands of those briefers, who have their ill-designs for involving Mr. Shams in a false case, he came forward and filed his affidavit in support of the applicants. He submits that none has seen the incident and the complainant had no intention to involve the applicants in the case of the murder of his brother but he was persuaded to do so by those who have some grudge against Mr. Shams. He further submits that even the complainant has no intention to involve the other applicants in the murder of his brother, as he is not of the view that they have any hand in the incident.

9. Mr. Hussain Bux Baloch, Addl P.G. frankly agreed that the investigation officer, who has furnished report against applicant Nabi Gul was not competent to do so, as the investigation was not in his hand and no fresh order to entrust the investigation to him is on the record. However, he contends that in this case a citizen of state was killed, as such the case cannot be declared as false and the investigation should be continued to locate the actual culprits. He points out that the investigation officer in his report under A-Class has shown suspect against applicant Nabi Gul and Nasir Hussain. He further contends that as far as the present applicants are concerned, the investigators and JIT could not find any material which may go against them.

10. I have heard the arguments and have gone through the entire material placed before me. I have also gone through the citations relied upon during arguments.

11. So far as the case of applicant Khwaja Shams-ul-Islam is concerned, he has already been found innocent in a thorough investigation by a JIT duly constituted under the direction of this Court. There is not a slightest complaint by the investigation officer of the non-cooperation of the applicant during the investigation. It is a fact that applicant Khwaja Shams-ul-Islam is a renowned, busy, and senior advocate of this Court. It is also a fact that sometimes, a lawyer suffers by

the hands of those against whose interest his wit and intelligentsia are used. It also happens that a lawyer comes into trouble due to professional rivalries and perhaps such was the position in the case of the applicant Khwaja Shams-ul-Islam. Whatever the reason behind-the-scenes would be, the fact is that a thorough investigation is ended in his favour. Being a professional lawyer, his conduct during the investigation remained stupendous and he has cooperated up to the extent that he welcomed the investigators to probe into not only all his properties but also his very personal affairs and even private information stored in the shape of physical or digital data. Even, he extended full cooperation to the investigators to interview his family members including his daughter, as allegedly he was the key figure of the motive of the alleged murder of deceased Zulfikar Ali. Nevertheless, not a single iota of non-cooperation of any sort can be put upon Khwaja Shams-ul-Islam in respect of the investigation, which was conducted by DSP Mr. Siraj Lashari under the instructions of JIT comprising some of the able investigators of the province in such types of cases. The complainant has already filed an affidavit before the learned Judicial Magistrate in which he has exonerated Mr. Shams and clearly stated that the nomination of Mr. Shams in F.I.R. is due to some exterior factors. The learned Judicial Magistrate has also mentioned the said affidavit in his order. A similar affidavit has also been filed by the complainant before this Court who has attended the Court with his counsel to verify the same. The counsel of the complainant also submits that Mr. Shams was wrongly nominated on the instance of some persons. The complainant and his counsel are also of the view that the other persons are also not the real culprits and have been wrongly involved by the police on their own.

12. Now come to the legal and technical aspects of the case. Admittedly, an F.I.R. was lodged in which Khwaja Shams-ul-Islam was nominated as an accused. The complainant has shown his suspect on the

ground of some annoyance of Mr. Shams with his deceased brother, who remained in service of Mr. Shams sometime back as a driver. The motive described in F.I.R. may be worth convincing, as the police, during the investigation, have collected some evidence in connection with the motive but only motive is not sufficient to connect a person with the offence. According to police, the deceased brother of complainant has transgressed his limits and remained involved in opaque and voyeuristic activities and allegedly tried to sneak within the family of Khwaja Shams-ul-Islam. It has also been collected during the investigation that the mobile phone of the deceased was full of prurient material about some other women of different families. It is also reflected from the police report and pointed out by the learned Judicial Magistrate in her order that the deceased was a habitual blackmailer. I consider that this aspect of the case is also important and should be given proper attention during the investigation. If it is so, the same motive could be available to a good number of people for putting the life of the deceased at an end; and only based on the same, a reputable lawyer should not be predestined with such a harsh allegation. It is also noteworthy that nothing was collected from the scene of offence as direct or extrinsic evidence or even in the shape of res-geste. It is also not clear that the alleged murder of the deceased was actually taken place at the reported scene of offence. Even no mark of blood was found on the alleged place of the incident while present or past investigation officers could not collect the CCTV footage from the official or private surveillance cameras installed in the neighborhood of the place of incident. Apparently, in the instant case, the investigation was carried out in a unilateral direction aiming towards the nominated accused Khwaja Shams-ul-Islam. Unfortunately, the investigators did not put heed to the pleas of applicant Khwaja Shams-ul-Islam that he was made a prey of animosity due to his professionalism and vocalist attitude in certain matters. I think that along-with the other

directions, this aspect of the case should also be probed seriously by the investigating officer, as there is a dead body of a young man, who mysteriously lost his life. Nevertheless, the investigation was carried out aiming at applicant Khwaja Shams-ul-Islam only and it reflects from the record that the principal accused i.e. Khwaja Shams-ul-Islam remained cooperative during the investigation. He has not only surrendered his mobile phones but also the mobile phones of his associates. What is more, he has provided access to other digital data/evidence including CCTV installed at his properties. He also produced his associates and family members before the investigators and after going through the entire material collected, the investigators concluded that the quantity and quality of the evidence are not sufficient to warranting trial, rather the evidence collected during investigation was not leading towards applicant Khwaja Shams-ul-Islam. However, it cannot be said the case is false, as there is a dead-body, who suffered an unnatural death. In such a situation, there was no other option left with the option but to furnish report under A-Class i.e. no clue to locate the actual culprit i.e. the actual accused is untraceable.

13. In the present case, such a report has not only been submitted but the same was approved by the learned Judicial Magistrate. The furnishing of reports in the form of three categories namely A-Class, B-Class, and C-Class is a unique customary practice, which exists in the Province of Sindh only. This practice was followed in Bombay Presidency to which the present province of Sindh was a part and subsequently, it got the status of a province by separating from Bombay Presidency. The police department in Sindh has inherited the said practice from the Bombay Presidency Police Guide (hereinafter referred as 'BPPG'), which was actually rules and regulations for the purpose of policing in Bombay Presidency. It is prescribed under the BPPG that after completing the investigation, the investigating officer has to file a report either in the form

of charge-sheet as per provision of Section 173 of the Code of Criminal Procedure, 1898 (hereinafter referred as 'the Code') to enable the Court to initiate trial or in the form of a report in three different categories for disposal of F.I.R. Under BPPG, such report was submitted, if the case does not require trial due to any of the three situations mentioned as categories or classifications commonly referred as A-Class (true case but accused is untraceable), B-Class (maliciously false case) and C-Class (neither true nor maliciously false but F.I.R. was lodged under mistake or misconception). It is worth noting that Rule 24.7 of Police Rules, 1934 suggests provision for cancellation of F.I.R. but the rules governing under the BPPG are more exhaustive, as it categorizes the canceled F.I.R. into two categories; one is maliciously false (B-Class) and the other is innocently false and lodged due to some mistake and misconception (C-Class). It has also provided another sphere that pertains to a criminal case, which is true but the author of the crime is unknown and untraceable (A-Class). After separation from Bombay Presidency and establishment of Province of Sindh, the Police Rules, 1934 were extended to the newly created province of Sindh including Karachi. Since the said rules were silent about the aforementioned categories; therefore, it was felt appropriate by the police officers to seek disposal of such cases in which accused is untraceable or the case is false by invoking the old practice and the Courts consider them beneficial started handling such reports, which now becomes a customary practice in the entire Sindh.

14. I have gone through the report of investigation officer under A-Class in which it is mentioned that due to insufficient evidence, the applicant Khwaja Shams-ul-Islam was let off while suspicion is there against the other persons namely Nabi Gul and Nasir Hussain. In this respect, I am of the considered view that there is no provision for seeking disposal in A-Class due to insufficient evidence. Similarly, there exists no ground to show suspicion in a report under A-Class. The filing of a report

under A-Class indicates that the police were unable to trace out the actual culprit(s) and the author(s) of the offence is still unknown. If police intend to let off some of the nominated accused due to deficiency of evidence and intend to continue the search of some suspected and absconding accused, whose names are mentioned in F.I.R. or known to police, the proper course was to release the nominated accused by following the procedure laid down under Section 169 of the Code and file a charge-sheet under Section 512 against the absconding suspects. However, such a course was not adopted and a report was filed under Section 173 of the Code under A-Class. Irrespective of the fact that a report under A-Class itself indicates that the investigation officer is oblivion of the actual accused and the persons arrested or involved in the case are innocents.

15. Now come to another facet of the case, the report under A-Class was furnished by investigation officer DSP Siraj Lashari. The learned Judicial Magistrate in his order has issued a specific direction to the investigation officer to continue the investigation and furnish a quarterly report regarding the investigation. Subsequently, a request for remand of the applicant Nabi Gul was made by Sub-Inspector Nasrullah Khan, as investigation officer. Notably, the investigation of the case was already withdrawn from him and entrusted to DSP Siraj Lashari. The prosecution could not produce any order of re-assigning the investigation to S.I. Nasrullah Khan, as such his action for arresting and producing applicant Nabi Gul and others for seeking remand, is questionable. After the dismissal of his request of police remand by the learned Judicial Magistrate, he filed a Criminal Revision Application directly without any endorsement from the learned District Public Prosecutor. No appeal or revision on behalf of the State can be entertained if not presented by the Public Prosecutor. No doubt, a Sessions Court may initiate a criminal revision on its own but a criminal revision petition on behalf of the State can only be filed and pleaded by the Public Prosecutor as per provision of

Section 493 of the Code or by a person acting under his direction as provided under Section 4(t) of the Code. The remand report was submitted before the learned Judicial Magistrate through the Public Prosecutor but the revision application was not filed by or through the Public Prosecutor, which means that the state was not feeling aggrieved but the investigation officer on his own filed a revision application, which was entertained by the learned Sessions Court. I am of the view that only issuing notice does not amount to initiate a suo-moto revision proceeding. If the learned Sessions Judge intends to take notice of such a revision application on his own, he has to pass a speaking order on the application after penning down brief reasons for doing so.

16. Although the complainant has shown his suspicion in the F.I.R. but subsequently he has turned on his heels by saying that he has involved Mr. Shams on the instance of some persons. He has filed such affidavit before this Court and he remained in attendance and supported the contents of his affidavit. The complainant in para 4 of his affidavit has not only exonerated Khwaja Shams-ul-Islam but he has also exonerated applicants Nasir Hussain and Nabi Gul from the commission of offence.

17. In the existing position of affairs, it can safely be said that since in the instant case, a report under Section 173 of the Code in A-Class was filed, which means that at the time of filing such report the police were fully convinced after a thorough investigation that the actual author of offence is unknown and untraceable. In the said report, a request for discharging of the applicant Khwaja Shams-ul-Islam was also made. The remaining two applicants are involved only on the ground that they are friends or acquaintances of the applicant Khwaja Shams-ul-Islam, while the complainant has also exonerated them in his affidavit filed before this Court. I am of the considered view that there exists not even a remote or standoffish chance of involvement of the remaining applicants in the instant case and after approval of a report under A-Class, the applicants

Khwaja Shams-ul-Islam, Nabi Gul and Nasir Hussain were actually discharged in F.I.R. No. 126/2019 of PS Gizri, as prima facie no criminal case is made out against them in connection with the referred F.I.R. Since the prosecution has admitted after investigation that no evidence against the applicants was collected while complainant has already stated that none of them is the culprits and name of Khwaja Shams-ul-Islam was given by him under the influence and misguidance, hence the applicants cannot be involved in this case again and such discharge is amounting to technical acquittal in the peculiar circumstances of the case in hand.

18. The ultimate outcome of the above discussion is that both the criminal miscellaneous applications are allowed in the above terms with directions that no action in the instant criminal case should be taken against the applicants. Nevertheless, the investigation in F.I.R. No. 126/2019 of PS Gizri, will be continued so that the real culprits should be traced out and placed before the competent court for trial. In this respect, the investigation officer is directed to comply with the order of learned Judicial Magistrate regarding the investigation in the letter and spirit.

J U D G E