IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Cr. Misc. A. No. S – 619 of 2021

Petitioner	:	Nazakat Abbas through Mr. Ayaz Ali Leghari, Advocate
Respondent -5	:	Asad Raza through Mr. Imtiaz Ali Abbasi, Advocate
		Mr. Fayaz H. Sabki, A.P.G. along with Ghulam Abbas Gadehi, DSP CIA Hyderabad.
Date of Hearing & Decision	:	06 .12.2021

O R D E R

ADNAN-UL-KARIM MEMON J: Through instant Cr. Misc. Application, the applicant has called into question order dated 10.8.2021, passed by learned IXth Civil Judge & Judicial Magistrate, Hyderabad in Crime No. 52 of 2021 registered under Section 302, 147, 148, 149 & 109 PPC whereby the learned Magistrate, while disagreeing with the report of I.O, directed him to submit challan against the applicant.

2. Brief facts of the case are that on 17.4.2021 at about 0300 hours respondent No.5 lodged the above FIR alleging therein that one day before the registration of FIR his father and relatives after attending the case at High Court of Sindh were going to their village when they reached Miyani Forest, they noticed one motorcycle and a corolla car were chasing them; they stopped their motorcycle and car before this car and started firing with pistols due to which Akbar @ Akan and Ghulam Hyder Leghari down and succumbed to the injuries. The Complainant identified them as Qurban Leghari, Hussain Hyder Leghari, Munawar, Mohsin, Ali, and Faheem, and one unknown person lodged the above FIR.

3. After registration of FIR, investigation was carried out and the I.O submitted interim challan/report before the concerned Magistrate under Section 173 Cr.P.C. recommending proceeding of trial against all the accused persons excluding applicant due to insufficient evidence against him. The learned Magistrate did not concur with the

I.O and passed the order dated 10.8.2021. The concluding part of the order is as under:-

> "After through perusal of the whole material, available on the record, I reach to the same conclusion that the name of one accused person has been placed in Column No.2 of the challan is just on his plea of Alibi, which could be considered at the trial court after recording of evidence. Accused person has not been nominated in the FIR but Complainant has disclosed his name in his further statement and question of involvement or innocence of any accused in case under Section 302 PPC is purely mandate of Honourable Sessions Trial Court. In instant case two persons have been murdered.
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> In the light of above discussion, I do not agree with the recommendation of investigation officer, consequently, I accept charge sheet and take cognizance against all accused persons namely (1) Hadi Bux s/o Jam Khan b/c Leghari, (2) Jam Khan s/o Ali Bux Leghari (3) Qurban s/o Jamal b/c Leghari (4) Muhammad Hanif @ Hussain Haider s/o Qurban Ali Leghari (5) Ali Sher s/o Ali Bux Leghari (6) Faheem Haider s/o Mukhtiar Ahmed Leghari (7) Mohsin Ali s/o Masood Ali Leghari (8) Munawar s/o Masood b/c Leghari and Nazakat Abbas s/o Ghulam Muhammad Leghari. Issue N.B.Ws against abscond accused".

4. Learned counsel for the applicant has argued that the impugned Order is erroneous as it is the outcome of misreading, non-reading, and non-appreciation of facts and not maintainable under the law; that admittedly the applicant was previously known to the Complainant but he did not mention his name at the time of registration of FIR; that on 26.4.2021 the Complainant has given further statement implicating the applicant assigning him the role of abettor without the corroborative piece of evidence and source of such information. Moreover, he disclosed that applicant is residing at Barrage Colony Hyderabad and the abetment has taken place in the said colony at the house of applicant, whereas as per investigation there is no any house of applicant in the said colony; that the statement of witness Dhani Bux was recorded after ten days of further statement of complainant in which he disclosed the name of applicant; that the I.O without conducting investigation arrested the applicant on 5.5.2021 from his office and blackmailed him for payment of illegal gratification, therefore, his father applied for transfer of investigation to District & Sessions Judge, Hyderabad, hence the investigation was transferred from DSP Qasimabad to CIA Incharge Hyderabad and the applicant was enlarged on bail by learned Additional Sessions Judge No.1, Hyderabad on 22.5.2021; that on 7.7.2021 the statement of

witness Dhani Bux was again recorded wherein he disclosed that the applicant was standing at main gate of Barrage Colony Hyderabad whereas he in his first statement had stated that he was in the house of Nazakat Abbas on 15.4.2021 at about 2:00 hours; that at the time of incident the applicant was on duty at National Bank, Tando Muhammad Khan Branch. He lastly prayed for setting aside the order of learned Magistrate and discharging the name of applicant from the challan.

5. Learned APG assisted by learned counsel for the complainant opposed the present applicant and prayed for dismissal of the same while arguing that, if at all the applicant presumes himself to be innocent, he has the remedy before the trial Court under Section 265-K Cr.P.C.

6. I have heard the learned counsel for the parties and perused the material available on record as well as impugned order dated 10.08.2021, whereby the learned Judicial Magistrate did not agree with the recommendation of Investigating Officer concerning placing the name of the applicant in column No.2 of the challan.

7. Further statement of complainant Asad Raza came to be recorded by the police on 26.4.2021. It is a one page statement. Relevant portion of this statement reads thus:

> " میں اسد رضا ولد اکبر علی عرف اکن قوم لغاری سکنہ گوٹھ سعید خان لغاری تعلقہ وضلع مٹیاری کا بیان دیتا ہوں کہ میں نے مورخہ 17-04-2021 کو تھانہ ھٹڑی پر اپنے والد اکبر عرف اکن اور اپنے پھوپھی ذات غلام حیدر لغاری والوں کے قتل کا مقدمہ بنام جام خان ولد علی بخش ۲- قربان ولد جمال لغاری ۳- علی شیر ولد علی بخش لغاری ۴- فہیم ولد مختیار ۵- منور ولد مسعود لغاری ٦- محسن ولد مسعود لغاری ۷- ہادی بخش ولد جام لغاری ۸- حسین حیدر ولد کرم علی لغاری ۹- اور ایک نامعلوم کے خلاف مقدمہ الزام نمبر 52/2021 بجرم 109 ، 149 ، 148 ، 147 ، 302 کا داخل کرایا تھا —
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> ابھی حاضر ہوکر وضاحتی بیان دیتا ہوں کہ میرے FIR کے بالا ملزمان میں ملزم بنام حسین حیدر ولد کرم علی کا دیا ہے جو کہ حسین حیدر کا پورا نام مُحَمَّد حنیف عرف حسین حیدر ہے اور اسکے حقیقی والد کا نام کرم علی ولد جمال لغاری ہے جوکہ سال 1994 میں کرم علی لغاری ذاتی دشمنی میں مارا گیا تھا جسکے بعد مُحَمَّد حنیف عرف حسین حیدر کو اسکے چاچا بنام قربان علی لغاری نے گود لیکر پالا تھا جوکہ مُحَمَّد حنیف عرف حسین حیدر اپنے چاچا قربان علی کی بچپن کی پرورش میں رہنے کی وجہ سے اپنا والد مانتا ہے جس وجہ سے مُحَمَّد حنیف عرف حسین حیدر نے اپنے شروعاتی تعلیم سے لیکر تمام کاغذات میں اپنا والد کا نام قربان علی لغاری دیا ہے-
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> اسکے علاوہ ہمارے کیس میں نامزد ملزم ہادی بخش ولد جام سکنہ ٹنڈو مُحَمَّد خان کا جوکہ بنام نزاکت ولد غلام مُحَمَّد لغاری سکنہ اصل سعید خان لغاری تعلقہ ہالہ وضلع

مٹیاری حال بیراج کالونی حیدرآباد کا رشتہ دار ہے جسکے گھر پر جرم ہونے سے پہلے مورخہ 15/16-04-2021 کی درمیانی شب پر بٹھیک ہوعی ہے جہاں ہر اس جرم کا پالان بنایا گیا ہے جبکہ نزاکت جوکہ ٹنڈو مُحَمَّد خان میں NBP میں ملازم ہے جس نے اس جرم کے فورا بعد اس کیس کے ملزمان منور اور علی ہادی بخش والوں کو اپنی گاڑی میں بٹھاکر دوسری جگہ پر پناہ دینے کیلعے لیکر گیا ہے لہذا یہ میرے کیس میں نامزد ملزمان کو پناہ دینے ، سہولت کاری کرنے اور منصوبہ بندی کرنے کا جرم کیا ہے لہذا بنام نزاکت ولد غلام مُحَمَّد لغاری کو میرے کیس میں ملزم کی حیثت سے شامل کیا جاعے۔

8. Perusal of the statement of complainant goes to show that deceased Akbar @ Akan and Ghulam Hyder Leghari were not in contact with the applicant, before; and / or after their death, prima facie the name and description of the applicant is not clear in the statement which creates doubt in his statement; besides that the Complainant is not an eye-witness of the alleged crime, even nobody has seen that the alleged conspiracy had taken place in the house of applicant as portrayed by the Complainant in his further statement. In these circumstances investigating officer has put the name of applicant in column No.2 of the challan due to lack of evidence, however, the learned Magistrate took cognizance without any proof which needs to be looked into in its true perspective in the light of evidence brought on record in investigation..

9. As discussed in foregoing paragraph, prima facie there is no direct evidence to infer even that applicant is connected with the aforesaid crime. In the present case, except the apprehension expressed by the complainant, the statement made by him does not relate to the cause of the death of deceased persons or to any circumstance of the transaction which resulted in their death. Once I hold so, the further statement does not satisfy the requirement of section 154,161 and 162 Cr.P.C. The further statement, therefore, in my opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under 173 and 190 of the Code.

10. The learned Magistrate based on its findings on the further statement of the complainant. The question involved in the present application is whether the Magistrate is competent to take cognizance of the matter in which the Investigating Officer through the investigation opined concerning innocence of applicant that he is not involved in the aforesaid crime. His findings are based on the statement of independent witnesses and other material collected

during investigation and the learned Magistrate simply disagreed with him without assigning any reason, as the learned Magistrate has not investigated the matter, yet to form an opinion concerning innocence and guilt of the applicant and it was for the complainant to come forward in the witness box to give testimony on Oath that certain persons, who are involved in the crime may be booked in that FIR; however, learned Magistrate without recording the statement of complainant on Oath disagreed with the report furnished by Investigating Officer under Section 173 Cr.P.C. This approach is prima facie is against the norms of justice for the simple reason that Magistrate cannot act mechanically at the behest of any party either complainant or police. He has to apply judicial mind whether any concrete evidence is available on record to connect him with the crime under investigation, which is not the case in hand rather the Magistrate just opined that the report of Investigating Officer is incorrect and jumped directly to the conclusion that the applicant is involved in the crime, therefore, he be brought to book. This is against the law, therefore, the impugned order to the extent of the applicant is set aside; let the matter be proceeded by the trial Court; if during the trial any concrete evidence comes on record against the applicant, the trial Court is competent to take cognizance thereof and join the applicant in trial proceedings; however, that is subject to all just exception, as provided by the law.

11. The instant Criminal Miscellaneous Application stands disposed of accordingly.

JUDGE

Fahad Memon