

ORDER SHEET
THE HIGH COURT OF SINDH AT KARACHI
 Cr. Misc. Application No. 85 of 2021

 Date: Order with signature(s) of the Judge(s)

For hearing of main case

05th October 2022

Mr. Riasat Ali, advocate for the Applicant
 Mr. Shujaat Abbas, advocate for respondent No.1
 Mr. Muhammad Hanif Samma, Amicus Curiae
 Mr. Zahoor Shah, APG

ORDER

SALAHUDDIN PANHWAR, J: Through this Criminal Miscellaneous Application, applicant (Rozeena Razzaq) has challenged orders dated 09.01.2021 and 25.01.2021, whereby the learned Magistrate while declining to take cognizance on the report under section 173 Cr.P.C, directed that the FIR is barred under section 195 Cr.PC.

2. Precisely the relevant facts are that applicant (complainant) lodged FIR against respondent No.1 stating that the respondent No.1 contracted marriage with her on 27.11.2019, concealing the fact that he was already married, having three children and further he belongs to Fiq-e-Jaferia faith. According to her, the Nikah was performed with the respondent No.1 was under Sunni faith. On 02.06.2020, the applicant received divorce through WhatsApp, hence, the applicant lodged FIR and after due investigation, report under section 173 Cr. PC was submitted before the learned Magistrate, with the opinion that respondent No.1 has committed offence of cheating and false statement before Nikahkhwan, but the learned Magistrate while disagreeing with the opinion of the I.O passed the impugned orders.

3. Learned counsel for the applicant *inter alia* contends that impugned order is against the spirit of law as the learned Magistrate has just referred section 195 Cr.PC, while disagreeing with the report submitted under section 173 Cr.PC, whereas; in the present case according to the I.O, the respondent No.1 has also committed offence of cheating with the applicant, hence the impugned orders passed by learned Magistrate requires interference by this Court.

4. Learned counsel for the respondent No.1 while relying on Muslim Family Law Ordinance, 1961 and 2018 YLR 2548 contends that applicant being wife, if was divorced, she was competent to approach Union Council and the trial court has rightly observed that criminal case cannot be lodged against the respondent No.1 (husband).

5. In this matter, Mr. Mohammad Hanif Samma, advocate was appointed as *Amicus Curiae* and he has assisted the Court while referring sections 20 and 21 and Chapter XX of PPC. According to Mr. Samma, *Amicus Curiae*, Nikahakhanwan is public servant in view of chapter 21 of Pakistan Panel Code and admittedly Nikahanma attached herein shows with regard to non-disclosure of earlier marriage. During investigation a family certificate was surfaced which reflects that respondent No.1 was already married and father of three kids, therefore, Section 192 PPC will come into motion and section 193 PPC provides punishment of false evidence. He has also referred section 493-A and 495 PPC, which are reproduced as under:-

“493-A PPC-----Every man who deceitfully causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and shall also be liable to fine.

“495 PPC-----Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”

Besides he has relied upon case laws reported in *PLD 2000 Lahore 355, SBLR 2022 Sindh 210 and PLD 2017 Sindh 515*.

6. Admittedly, two orders are on the record. Earlier was passed by the learned XII Judicial Magistrate Karachi Central and the later was passed by the learned VI Judicial Magistrate Karachi Central. The later order has been passed on the basis of the earlier order. In the earlier order the learned Magistrate has given its opinion that the act of the accused of posing himself to be a Sunni and single person falls under section 177 PPC, this sections falls under the minor offence and the said Court was not competent to proceed with minor hence the challan was returned to the I.O. with direction to submit the final report before the competent Court having such jurisdiction.

7. Accordingly, the I.O. submitted the final report before the learned XII Judicial Magistrate, Karachi Central, where the order dated 25-01-2021 was passed.

8. Surprisingly, both the Magistrates have only dilated upon section 177 PPC and have miserably failed to consider the other sections applied in the charge sheet. In the order dated 25-01-2021 the findings of the learned Magistrate is reproduced hereunder: -

“Moreover it is provided U/s 195 Cr.PC that the court shall not take cognizance of any offence under section 172 to 188 PPC, except on the complaint in writing, hence it is very clear that there is an embargo on taking cognizance by the court U/s 177 PPC.

In view of above attending circumstances I am of the view that no cognizable case against accused U/s 177 PPC is made out. Accordingly FIR stands cancelled under “C” class.”

9. The contention of the applicant/complainant is that the respondent No.1 has not only furnished false information before a public servant but has also cheated her. The material collected by the I.O. during investigation, from which it is clear that the respondent No.1 at the time of his *nikah* with the applicant/complainant has

furnished false information to a public servant. During investigation the respondent No.1, himself has admitted that he belongs to Fiqa-e-Jafria and was already married, while in the Nikahnama he got mentioned himself as Sunni and concealed his earlier marriage. From the material collected by the I.O. during investigation, it comes on surface that the accused provided false information with regard to his faith as 'Sunni' and his earlier marriage, with an object to commit cheating with the applicant/complainant. Cheating has been provided under section 415 PPC. For the sake of convenience the section 415 PPC is reproduced as under: -

***“415. Cheating.**Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person [or any other person' in body, mind, reputation or property is said to “cheat”.”*

10. The perusal of the above section shows that for attracting the offence of cheating, the deception is an essential element, which prima facie is available in the case of the applicant and is attracting to the respondent No.1.

11. In the charge sheet the section 420 PPC is also applied by the I.O. The section 420 PPC is reproduced hereunder: -

***“420. Cheating and dishonestly inducing delivery of property.**Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of valuable security, or anything which is signed or sealed, and which is capable or being converted into a valuable security, shall be punished with imprisonment of either description for a term which may seven years and shall also be liable to fine.”*

12. In this section the word *shall* has been used for *whoever cheats... ..or anything which is signed or sealed... ..*. In this case the respondent No.1 has signed Nikahnama in which he has furnished false information with regard to his faith as Sunni and earlier marriage though during investigation he has disclosed his

faith Ahl-e-Tashee and about his earlier marriage. During investigation the respondent No.1 has not given any explanation that as to why he had wrongly informed about his faith and did not inform about his earlier marriage. In absence of such explanation, at the very initial stage it can be presumed that the intention of the respondent No.1 is nothing but to deceive the applicant/complainant. Hence prima facie section 420 PPC is also attracting to the case of the respondent No.1.

13. The I.O. has also added the section 469 PPC in the charge sheet which provides "*Forgery for purpose of harming reputation.*" Forgery is defined in section 463 PPC, which is reproduced hereunder: -

"Forgery. Whoever makes any false document or part of a document with intention cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intention to commit fraud or that fraud may be committed, commits forgery."

14. Bare reading of the section 469 PPC coupled with section shows that the section 463 PPC shows that prima facie this section too is attracting to the case of the respondent No.1.

15. Besides this, the state of mind of an accused is to be ascertained from his conduct. As discussed above, during investigation the respondent No.1 has not furnished any explanation that as to why he has shown his faith as *Sunni* though he is Ahl-e-Tashee and he was already married and such document has been brought on record. The contention of the respondent No.1 during investigation shows his state of mind that he with the mind of cheating and committing fraud with the applicant/complainant showed himself to be *Sunni* and did not disclose her about his previous marriage.

16. The main contention of the learned counsel for the respondent No.1 to support the impugned orders is that the applicant being

wife, if was divorced, she was competent to approach Union Council. *Needless to mention here that the applicant/complainant is not aggrieved with the divorce but she is aggrieved with the act of cheating, fraud and forgery allegedly committed by the respondent No.1 and being aggrieved with such acts of the respondent No.1, she lodged FIR, hence this contention of the learned counsel for the respondent No.1 has no force.*

17. The perusal of the order dated 25-01-2021 shows that the learned VI Judicial Magistrate while passing the impugned order has not considered the above discussed facts but has announced a pre-trial judgment and thereby the learned Magistrate has skipped the procedure. The learned Magistrate was not competent to pass a pre-trial judgment and was required to examine material brought on record by the prosecution. No doubt, the opinion of the police was not binding upon the learned Magistrate but in the instant matter the learned Magistrate completely ignored the investigation conducted and material collected by the I.O, which is disclosing that respondent No.1 having advanced age contracted marriage with daughter of his patient and according to respondent No.1, he used to visit their house as mother of applicant was not in a position to move freely. During investigation it appears that in Nikahanma earlier marriage was not disclosed as well as false information was provided to the Nikahakhwan, who is public servant in view of section 21 PPC and subsequently claim of the respondent No.1, that he being Ahla-e-Tashee has divorced his second wife (the applicant). Whereas, divorce deed reflects that same is under *Sunni* Law. Though learned counsel for the respondent contends that Nikahanama was performed under *Sunni* Law then divorce is to be given under same *Sunni* faith.

18. Keeping in view judgment and arguments of learned respective parties in juxtaposition of investigation, I am of the view that learned Magistrates have failed to examine the material and sufficient evidence brought before them to take cognizance, which

prima facie, makes out the case against the respondent No.1 for the sections applied in the charge sheet.

19. Keeping in view the above aspects of the case, impugned orders dated 09-01-2021 and 25-01-2021 are set-aside and respondent No.1 is sent up for trial before the competent court. The VI Judicial Magistrate Karachi Central is directed to send the R & Ps of the FIR Crime No.474/2020 to the XII Judicial Magistrate Karachi Central for its disposal in accordance with the law.

20. The instant Criminal Misc. Application is disposed of accordingly.

JUDGE

Rafiq/PA