

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Miscellaneous Application No.621 of 2023

Date	Order with signature of Judge
------	-------------------------------

For hearing of main case

22.11.2023

Syed Fazal-ur-Rehman advocate for the applicant
Ms. Rubina Qadir, Deputy PG alongwith IO/ASI Mukhtiar Ali Lashari of
PS Defence Karachi
Sardar Zarak Khan advocate for respondent No.5
Mr. Danial Shaikh advocate for respondent No.6

Through this Criminal Miscellaneous Application under Section 561-A Cr. P.C., the applicant Mst. Farina Moid has assailed the legality of the order dated 11.07.2023 passed by the learned Ist Judicial Magistrate (South) Karachi in Final Report No. 130 of 2023 (*State v Muhammad Shahid & 2 others*) whereby, the learned Magistrate approved the report submitted by the Investigating Officer under 'C' Class, arising out of FIR No. 178 of 2023, registered for offenses under Sections 506/509 PPC at P.S Defense Karachi, inter-alia on the ground that the applicant was not heard before passing the impugned order.

2. Brief facts of the case are that the applicant Mst. Farina had lodged an FIR bearing No. 178 of 2023 against respondent No.6 at P.S Defence Karachi with the narration that the applicant had supplied spare parts worth crore of rupees to the respondents; that in the year 2013 the respondent No.5 in connivance with respondent Nos. 6 and 7 requested to the applicant to make him partner in his factory but applicant's husband refused thereafter the respondent No.4 had been causing harassment to the applicant's husband and also demanded Toyota Corolla Car and also threatened to the applicant for dire consequences. Such report of the incident was given to P.S Defence Karachi, who registered the subject F.I.R. After investigation, the Investigating Officer submitted the report under Section 173 Cr.P.C. before learned First Judicial Magistrate Karachi South, for approval under 'C' Class, and the same was approved vide order dated 11.07.2023.

3. Syed Fazal-ur-Rehman advocate for the applicant argued that the impugned order does suffer from many illegalities as well as infirmities and, hence, is liable to be set aside. He while referring to relevant short para of the impugned order, submits that the Judicial Magistrate has not assigned a single reason to accept the report submitted by the Investigating officer; he submits that by granting this application, impugned order may

be set aside and case may be remanded with directions to Magistrate concerned to hear the applicant and take cognizance of the crime. He lastly prayed for allowing the instant Criminal Miscellaneous Application.

4. Sardar Zarak Khan advocate for private respondents has contended that the incident occurred on 24.5.2018, whereas, the FIR was registered on 27.3.2023, however, no plausible explanation has been furnished for such an inordinate delay. He added that the investigating officer submitted the Final Report under section 173 Cr. PC with the findings that no case for extortion was made out as applicant failed to prove such allegations. He lastly prayed for dismissal of the instant Criminal Miscellaneous Application.

5. Mr. Danial Shaikh advocate for respondent No.6 has supported the argument of learned counsel for respondent No.5 and also prayed for dismissal of the instant Criminal Miscellaneous Application.

6. Ms. Rubina Qadir, Deputy PG, has supported the argument of learned counsel for the respondents and also opposed the Criminal Miscellaneous Application.

7. I have heard learned counsel for the parties and have perused the material available on record.

8. The question involved in the present proceedings is whether the Judicial Magistrate is bound to hear the parties when the report under section 173 Cr. PC is submitted by the Police. In principle, there is nothing in Section 173 Cr. PC to suggest that the court is obliged to hear the accused before any such direction is made. Casting any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded the opportunity of being heard. As the law does not require it.

9. In the case of *Sughra Bibi reported as PLD 2018 Supreme Court 595*, the Supreme Court has held that during the investigation the investigating officer is obliged to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice and, as required by Rule 25.2(3) of the Police Rules, 1934 "It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person." Ordinarily, no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification

exists for his arrest and such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules, a suspect is not to be arrested straight away or as a matter of course, and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding the correctness of the allegations leveled against such suspect or regarding his involvement in the crime in issue. It was further held in the judgment (**supra**) that upon conclusion of the investigation the report to be submitted under section 173, Cr. P.C. is to be based upon the facts discovered during the investigation irrespective of the version of the incident advanced by the first informant or any other version brought to the notice of the investigating officer by any other person. In the case in hand, the investigation officer who investigated the present case and after the investigation recommended the case to be disposed of under the "C" class and the learned Magistrate issued notice to the parties, however only the accused side appeared and after hearing the Investigating officer and accused agreed with the report submitted by the investigating officer, which factum triggered the cause to the applicant call in question the order on the plea that applicant has not been heard.

10. Before attending to the merits of the case it is deemed appropriate to first discuss the difference between the role of the Investigating Officer and that of the Magistrate in investigation and the outcome thereof, which is germane to the case.

11. Foremost, there are three classes provided for disposal of a State Case namely (i) A-Class, (ii) B-Class and (iii) C-Class and the report of investigation under Section 173 of Cr.P.C. has to be filed either in the form of a charge-sheet if the accused is sent for trial or in the form of a Final Report, in other cases. As per practice/usage, the Class "A", "B" and "C" are defined as:- CLASS 'A': FIR is true, but the accused is untraceable, therefore, Magistrate can dispose of the case till the appearance/arrest of the accused; CLASS 'B': FIR is maliciously false and after passing summary orders by directing the SHO to initiate proceedings for an offense punishable under Section 182, P.P.C. against the complainant/ person, who gives information, which he knows or believes to be false; and CLASS 'C': FIR can be disposed of being a non-cognizable offense.

12. Going ahead on the subject issue, primarily, every investigation is conducted concerning Chapter XIV of the Criminal Procedure Code as well as the relevant Police Rules. The vitality of the role of the

Investigating Officer cannot be denied because it is the very first person, who as per law, is authorized to dig out the truth too, without any limitations including that of the version of the informant/complainant. However, after registration of the FIR, the Investigation Officer has the authority to determine the truthfulness or falsehood of the allegations leveled against the accused but the same is subject to affirmation of the competent Court. If the Investigation Officer concludes that the allegations contained in the FIR are incorrect, he may refer the matter under section 63, Cr.P.C. to the Magistrate for discharge of the accused. The Police Officer has also the authority to release the accused in terms of section 169, Cr.P.C. if he concludes that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate. Such Officer shall, if such person is in custody, release him on executing a bond with or without sureties and direct him to appear, if and when required before the Magistrate empowered to take cognizance of the offense. It is then the Magistrate to pass such order as deemed appropriate under section 173, Cr.P.C. for discharge of such bond or otherwise as he deems fit. On the subject issue the authoritative view of the Supreme Court, given in the case of *Mst. Sughran Bibi as discussed supra*, is clear in its terms and needs no further deliberation on my part.

13. In principle upon conclusion of the investigation the report to be submitted under section 173, Cr.P.C. is to be based upon the facts discovered during the investigation irrespective of the version of the incident, advanced by the first informant or any other version brought to the notice of the investigating officer by any other person.

14. From above, it is quite clear that an Investigating Officer is not bound to base his conclusion on the version of the informant or defense but on facts, discovered during the investigation. Such conclusion shall be submitted in the shape of a prescribed form, as required by section 173 of the Criminal Procedure Code.

15. A bare perusal of the above provision explicitly makes it clear that after every investigation, a police report shall be forwarded to the Magistrate so empowered to take cognizance thereon which must include all details, as directed in the above provision. However, it is nowhere described as to how the Magistrate shall deal with such report, it empowers the Magistrate to agree or disagree with the act of Investigating Officer in releasing an accused during investigation under section 173, Cr.P.C.

16. The Supreme Court in the case of *Bahadur v. State* **PLD 1985 SC 62** wherein it has authoritatively been laid down that a Magistrate

in canceling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all state powers, there is no lis before him, there is no duty to hear the parties, there is no decision given, no finality or irrevocability attaching to the order. It was ruled that the party is left free to institute a complaint on the same facts and the same Magistrate does not even after passing such an order render himself functus officio. On the contrary, he is quite competent to entertain and deal with such a complaint on material presented to him. After such assessment, the Supreme Court concluded that these peculiarities establish beyond doubt that in so concurring with a report submitted under section 173, Cr.P.C. he does not function as a criminal court. The Supreme Court has expressed the view that some of the powers of the Magistrate are administrative, executive, or ministerial and he discharges these duties not as a court but as a 'personal designate'. This view was further followed in the case of *Arif Ali Khan v. State* **1993 SCMR 187**, *Muhammad Sharif v. State* **1997 SCMR 304**, and *Hussain Ahmed v. Irshad Bibi* **1997 SCMR 1503**.

17. Ratio decidendi in all the above cases appears to be that since the Magistrate while concurring with a police report submitted under section 173, Cr.P.C. does not act as a Criminal Court inferior to the Court of Session and the High Court, his order cannot be revised and modified under the provisions of sections 435, 439, Cr.P.C. but in that case it is amenable to the inherent jurisdiction of the High Court under section 561-A, Cr.P.C. provided the order amounts to abuse of process of Court. However, it is made clear that the discharge of an accused by a Magistrate is not legally possible after taking cognizance of the case. It may also be added here that after taking cognizance by the trial court only three results are possible in a criminal case, firstly conviction of the accused either upon admission of guilt by him or based on the evidence led by the prosecution; secondly, the acquittal of the accused either under sections 249-A/265-K, Cr.P.C. or based on the failure of the prosecution to prove its case on merits beyond a reasonable doubt; and thirdly, withdrawal from prosecution by a Public Prosecutor under section 494, Cr.P.C. However in the present case, the final report under "C" Class submitted by the Investigation Officer, has been approved by the learned Magistrate vide order dated 11.7.2023.

18. I have also gone through the impugned Order dated 11.7.2023 passed by the learned Judicial Magistrate. Though the learned Judicial Magistrate has attempted to dilate upon the substance submitted by the Investigation Officer and passed the order on the analogy put forth by the Investigation Officer, at the same time he applied his judicial mind

to the ingredients of the offenses and rightly opined that no offenses under sections 506/509 PPC were/are made out from the evidence so collected by the Police during the investigation as the law confers upon the Court powers to secure the ends of justice.

19. Since the parties have leveled allegations and counter-allegations against each other on the issue of the alleged extortion and threats, therefore, judicial propriety demands that the aggrieved party may take the resort of appropriate remedy under the law where she would be at liberty to bring the material to prove her case as in the present case investigation officer recommended the case under C-Class and the learned Magistrate has concurred with him, however, the complainant is still insisting for remand of the case to the Magistrate to hear the complainant. Once the Magistrate has formed his point of view based on the evidence collected by the Investigation officer, this Court cannot substitute its view as no material has been shown to this Court to take a contrary view. However, it is open for the complainant to file a Direct Complaint and if filed the same shall be decided on its own merits.

20. In principle the inherent jurisdiction of this Court under section 561-A of Cr.P.C. cannot be exercised to judicially correct an action or inaction of a police officer during the investigation of a criminal offense, however, at the same time, the Magistrate, even while concurring in cancellation of a case is required to judicially examine the report admitted under section 173, Cr.P.C. in that he has to act fairly, justly and honestly, a duty common to the exercise of all state power, as there is no lis before him to decide, in such circumstances, there is no duty cast upon him to hear the parties but he has to judicially assess the investigation report calling investigating officer to appraise him about the fate of the investigation and after perusal of such report, he has to act under law however at the same time he is free to call the parties for his assistance though not required under the 173 Cr.P.C. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of *Bahadur and another v. The State and another* (PLD 1985 SC 62).

21. In view of the above the order dated 11.7.2023 passed by the learned Judicial Magistrate-1 Karachi South in Criminal Case No. Nil of 2023 (*State v Muhammad Shahid and 2 others*) is sustained; resultantly, the Criminal Miscellaneous Application is dismissed, leaving the applicant at liberty to avail the remedy, if any, before the competent forum. However, it is made clear that the same, if availed shall be decided strictly under law.

JUDGE