

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Miscellaneous Application No.401 of 2023

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| Date | Order with signature of Judge |
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For order as to maintainability of Criminal Miscellaneous Application and MA No.7120/2023 (As per order dated 05.7.2023)

28.11.2023

Mr. Haq Nawaz Talpur advocate for the applicant
Mr. Faheem Ali Memon advocate for respondent No.2
Mr. Abrar Ali Khichi, Additional PG

The Applicant Manoj Kumar Ahuja being aggrieved by and dissatisfied with the order dated 27.05.2023 passed by the learned IInd Judicial Magistrate South, Karachi in FIR No. 104 of 2023 dated 29.03.2023 for the offense under Section 489-F of the Pakistan Penal Code, 1860 of Police Station Tipu Sultan, whereby the Learned IInd Judicial Magistrate South, without applying its judicial mind on the extraneous considerations has taken the cognizance of the offense wherein with ill will and malafide, the applicant was nominated as an accused. Later on, the magistrate directed the DG FIA as well as the DG NADRA to block the passport and the CNIC of the Applicant.

2. Brief facts of the case are that on 29-03-2022, the respondent/Complainant namely Jaywanti Darpan lodged F.I.R No. 104 of 2023 under Section 489-F PPC at Police Station Tipu Sultan, against the applicant with the narration that the applicant is her nephew and through him she booked a 05 Marla Plot in DHA Valley Islamabad and had paid the amount of such plot, however, he demanded original file of subject Plot in reply she demanded her amount back resultantly the applicant issued a cheque bearing No SB-0810567 amounting Rs. 65,00,000/- dated 15-12-2022 of Bank Alfalah Limited and when the complainant deposited such cheque into her account on 13-03-2023 at concerned Bank and the same was dishonored due to closure of the account and Insufficient Fund, therefore, the complainant lodged FIR against the applicant.

3. Learned counsel for the applicant has contended that the alleged transaction between parties is purely civil in nature which has the genesis and nexus to the sale and purchase of the immovable property; that in the instant case, the transaction as mentioned in the instant FIR between the applicant and the alleged informant at the best is of civil nature and can only be resolved through remedies under the relevant civil laws as the

converting the civil disputes into criminal proceedings is clear abuse process of law. He next contended that the learned Magistrate had completely overlooked the civil transaction as stated in the FIR by the informant/Respondent No.2 while handing down the impugned order. In support of his contention, he relied upon the documents attached to the memo of Cr. Misc. Application and prayed for allowing the Criminal Miscellaneous Application.

4. Mr. Faheem Ali Memon advocate for respondent No.2 has contended that the applicant is out of the country and instant application has been maintained through an attorney, which is not maintainable. He has further contended that the case has been challaned, which is pending before the learned trial Court, and the trial has not yet commenced the proceeding. He further submitted that the report submitted by the I.O is not binding on the Court and the Court notwithstanding the recommendation of the Investigating Officer regarding the cancellation of the case and discharge of the accused from the case, may decline to cancel the case and proceed to take cognizance as provided in Section 190 Cr. P.C. and summon the accused to face the trial. Learned counsel referred to Section 173 Cr. P.C. and the report submitted by the Investigating Officer for cancellation of the case and order passed thereon by the learned Magistrate. He further submitted that the applicant has to surrender before the trial Court as still he is at large and fugitive from law and has no legal support and locus-standi to pur appearance before this Court through an attorney until and unless he surrenders before the competent Court of law to face the charges. However, he agrees to the proposition that the applicant may be allowed to surrender by obtaining bail before arrest and/or protective bail or this lis may be converted into protective bail enabling him to face the charge of Section 489-F PPC. In support of his contention he relied upon the case of Federation of Pakistan & others v Malik Mumtaz Hussain & others 1997 SCMR 299 and Federation of Pakistan & others v Malik Mumtaz Malik & others 1997 SCMR 299. In case the aforesaid proposition is not accepted then he prayed for dismissal of the instant Criminal Miscellaneous Application.

5. I have heard learned counsel for the parties and have perused the material available on record and case law cited at the bar. There is no cavil to the proposition that the report submitted by the Investigating Officer under Section 173 Cr. P.C. is not binding upon the Court in terms of law laid down by the Supreme Court in its various pronouncements. However, in the present case, the Investigation officer submitted the final report Under Section 173 CrPC before the concerned Magistrate under C Class

on the ground that the checkbook of accused Manoj Kumar was lost for which he had lodged FIR No.335/2023 in Police Station Korangi for the offence under Section 379/427 PPC. The learned Magistrate disagreed with the report, took cognizance of the offense, and issued non-bailable warrants of the applicant vide order dated 27.05.2023 on the following premise:-

“Heard the Complainant and his Counsel as well as perused the record placed before me.

A perusal of the record shows that the Investigating Officer before submitting this final report as C Class, had submitted interim Challan wherein he had shown the accused as an absconder. The record further shows that the accused had lodged FIR No 335/2023 in Police Station Korangi for the offense under Section 379/427 PPC due to the theft of his cheque Book and in that FIR it is shown that the cheque Book of the accused was theft on 17-10-2021 at Sindh TV Channel Parking Area, Sector 613, Mehran Town Korangi Karachi as disclosed by him, while the travel history of the accused submitted by IO shows that the accused arrived in Pakistan on 13-09-2021 and departed from Pakistan on 02-10-2021, which clearly shows that at the time of the incident of theft of cheque Book on 17-10-2021, accused was not in Pakistan.

The record further shows that, as per the travel History of the accused, the accused again arrived in Karachi on 28-02-2023 at 1:47.53, and on the same day at about 16:40 he directly went to the PS Korangi to lodge an FIR which is a coincidence. It is pertinent to mention here that the accused had not filed a Civil Suit for Cancellation of Cheques yet, though the travel History of the accused, the IO has failed to collect CCTV Footage of the accused from the concerned Airport. The IO has ignored to consider such aspect of the case, which shows that the Investigating Officer has not properly investigated this aspect of the case It is pertinent to mention here that the Investigation Officer in his report Under Section 173 Cr.PC submitted that the Counsel for the accused appeared at the Police Station and produced an affidavit before IO stating that the accused is innocent, however, the IO failed to record the statement of the accused It is pertinent to further mention here that ng Counsel has appeared or filed Vakalatnama on the behalf of accused before this Court Needless to say that the investigation is the only collection of evidence and is subject to decision of the Court.

As per provision of Section 4(I), of the Code of Criminal Procedure, 1898, the definition of the investigation is reproduced as follows:-

"(1) "Investigation". "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf Bare reading of the aforesaid provision of law, the investigation is mere collection of evidence by the police officer but his opinion as to the guilt or innocence of the accused.

In the case of Federation of Pakistan through Secretary Finance, Islamabad & another v. Malik Mumtaz Hussain and 4 others (1997 SCMR 299), the Honorable Supreme Court of Pakistan has been pleased to propound the principle at Page No 302 as follows:-

"5. It is well-settled law that a report submitted by the Investigating Officer under section 173, Cr.P.C. is not binding on the Court, The Court, therefore, notwithstanding the recommendation of the IO regarding cancellation of case and discharge of the accused from the ease, may decline to cancel the case and proceed to take cognizance as provided in section 190 Cr.P.C. and summon the accused person to face the trial".

For the foregoing reasons, I disagree with the report of the Investigating Police Officer submitted for its approval under "C-Class" and the note of the learned ADPP for the State is

also overruled. Thus there is sufficient evidence available to take cognizance against the accused. Consequently, the report submitted by the I.O. under C-Class is hereby declined and cognizance is taken against the accused. Let the case be registered against the accused namely Manoj Kumar Son of Sudhamo I.O. is directed to arrest the accused. Let the office be directed to issue NBW against the accused. The Investigation Officer is directed to execute the NBW against the accused as well as provide a list of witnesses within the shortest possible time.”

6. It appears from the record that the applicant has filed Civil Suit No.1008 of 2023 before this Court on 20.6.2023 and this court vide order dated 4.7.2023 has passed the following order:-

“Both Defendants are present in Court and have produced their original CNICs for verification, which after identification are returned to them. They request for some time to engage their counsel. Time is allowed. Learned counsel for the Plaintiff has referred to an earlier order of this Court passed in Criminal Misc. Application No.401 of 2023, that one of the FIRs, lodged by Defendants, was recommended for "C-Class" and the "C-Class" recommendation was declined by learned Magistrate concerned and such order was suspended by this Court vide order dated 16.06.2023. He has referred to the Agreements between the parties that the relevant document(s) and Bank's Cheques will be handed over, one such Settlement Agreement is at page-63. In view of the above, parties are directed to maintain the status quo.”

7. 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.

8. 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, the 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.

9. Going ahead on the subject issue, primarily, every investigation is conducted about 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 otherwise as he deems fit. On the subject issue the authoritative view of the Supreme Court, given in the case of *Mst. Sughran Bibi v. The State* (PLD 2018 SC 595), is clear in its terms and needs no further deliberation on my part.

10. 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.

11. 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.

12. 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.

13. 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**.

14. 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, had been disapproved by the learned Magistrate vide order dated 27.05.2023 and too cognizance against the accused was taken and issued non-bailable warrants against the applicant on the aforesaid premise.

15. I have also gone through the impugned Order dated 27.05.2023 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 other than the analogy so put forth by the Investigation Officer, at the same time in his abortive attempt applied his judicial mind to the ingredients of the offense of dishonoring cheque and opined that offense under Section 489-F PPC was/is made out

by invoking the provision of Section 190 Cr.P.C. other than the evidence so collected by the Investigating Officer during the investigation.

16. In my tentative view, the Magistrate can take cognizance of the offense subject to, having certain incriminating material available on record to show that such an offense has taken place whereas the police have not found any material against the applicant and recommended for cancellation of the case as such the recourse ought to have been with the learned Magistrate to direct for further investigation of the case so that the sufficient material could be collected to charge the accused. However, in the present case, this Court vide order dated 4.7.2023 in Civil proceedings directed to maintain the status quo on the subject transaction based on the agreement and subsequent issuance of the cheque. In such a scenario, it would be better for the learned Magistrate to hear the parties fresh on the subject question of law as well as on facts.

17. Since the parties have leveled allegations and counter-allegations against each other on the issue of the alleged business transaction, theft of the cheque, delivery of the subject cheque and its subsequent presentation in the bank, and its dishonoring, before the trial Court, and this Court in Civil Suit No. 1008 of 2023 has already directed to maintain a status-quo in civil proceedings, which matter seems to be of civil nature and pending adjudication, therefore, judicial propriety demands that the applicant is required to appear before the trial court and submit his vision and the trial court after hearing both the parties pass appropriate order under law.

18. In view of the above without prejudice to to the rights of the parties on the subject issue, the order dated 27.05.2023 and subsequent orders passed by the learned IInd Judicial Magistrate South, Karachi in FIR No. 104 of 2023 dated 29.03.2023 for the offense under Section 489-F of the Pakistan Penal Code, 1860 of Police Station Tipu Sultan, are not sustained; resultantly, the Criminal Miscellaneous Application is disposed of with a direction to the applicant to appear before the learned IInd Judicial Magistrate South, Karachi who shall hear the parties afresh on the report submitted by the Investigating Officer in the aforesaid crime and after that pass a speaking order under the law. The aforesaid exercise shall be undertaken within one month.

JUDGE