

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
CrI. Misc. A. No.568 of 2023

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Date

Order with signature of Judge

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For hearing of case.

**28.11.2023**

Raja Rashid Ali, advocate for the applicant

Mr. Abrar Ali Khichi, Addl. PG

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This Criminal Miscellaneous Application has been directed against the order dated 12.7.2023 passed by the learned 1<sup>st</sup> Additional Sessions Judge Karachi Central in Revision Application No.32 of 2023 filed under section 439-A of Cr.P.C. by the applicant whereby the learned judge maintained the order dated 29.09.2023, passed by Learned V- Civil Judge & Judicial Magistrate, Karachi Central whereby learned Judicial Magistrate dismissed the application filed by the applicant under section 190 Cr. P C. for impleading respondent Husne-e-Kamil as accused in criminal Case No 3037 of 2022, arising out of crime No 516/2021 under section 489-F, PPC of PS Samanabad. An excerpt of the order is reproduced as under:-

*“For what has been discussed above, I am convinced that an order of Judicial Magistrate allowing or dismissing an application for taking cognizance being an executive order is not amenable u's 435 & 439-A CrPC before this court in revisional jurisdiction. Hence Revision application stands dismissed.”*

2. Learned counsel for the applicant contended that during the evidence complainant and her witnesses produced sufficient evidence against the co-accused namely Husn-e-Kamil whose name was placed in column No. 2 of the challan by the investigating officer and the learned trial Court accepted the challan and application for arraying the co-accused in the case was dismissed. Learned counsel prayed for setting aside the impugned orders and order for arraying Husn-e-Kamil as accused in the aforesaid proceedings.

3. On the other hand, learned Additional PG has supported the impugned orders.

4. I have heard the learned counsel for the parties and perused the record with their assistance.

5. The charge against the main accused has already been framed by the trial court with the allegations that the accused dishonestly issued a cheque bearing No. 2447211052 of Rs. 10, 00,000/- dated 26-03- 2021 at

Allied Bank, Safora Goth Scheme No. 33, Karachi, in favor of applicant/complainant namely Mst. Syeda Madiba Abbas Zaidi towards repayment of consideration amount of Flat on 7th floor. situated at BS-1, Block-12, F.B.Area, Karachi in the project of Zaidi Al-Nisa Blessing, which was dishonored on presentation in his bank account at Bank al Habib, Gulberg Branch, Karachi on 31-05-2021.

6. It appears from the record that the partial evidence of the prosecution witnesses has already been recorded and the trial court rejected the application of the applicant under section 190 Cr.P.C., which was maintained by the revisional court.

7. The question is whether in the case of 489-F PPC another person can be booked or only a person who issued the cheque could be tried under the law.

8. The allegation against the accused in the subject F.I.R is that he issued a cheque to the applicant/complainant, which on presentation was dishonored and, therefore, a criminal case under section 489-F, P.P.C. was registered against him, and in the meanwhile the applicant moved an application under section 190 Cr.P.C., to join co-accused as a party to the proceedings without adding section 420 PPC to widen the net, however, the investigating officer only applied section 489-F PPC and the trial court accepted the charge-sheet without adding the section 420 PPC and the revisional court also of the same view that there was no need to widen the net to book the co-accused in the case as nether he issued the cheque nor involved in cheating to the applicant and in absence of such material section 190 Cr. P.C. cannot be invoked at the later stage when the partial evidence is recorded.

9. In the instant case, prima facie, the circumstances indicate that the cheque in question was not issued to the complainant by the co-accused however; he came into the picture when the complainant and her witnesses recorded their statement and attempted to implicate him in the case. That being so, one of the foundational elements of section 489-F, P.P.C. is prima facie missing against the co-accused. The invocation of penal provision would therefore remain a moot point.

10. It may further be observed that the Judicial Magistrates have been conferred with powers under section 190, Cr.P.C. to take cognizance of the offense upon receiving the complaint of facts which constitute offense {under section 190 (1) (a) *ibid*}; upon the report in writing of such facts made by any police officer {under section 190 (1) (b) *ibid*}; and upon information received from any person other than a police officer or

upon his knowledge or suspicion {under section 190 (1) (c) *ibid*} that such offense has been committed.

11. It is well-settled law that a report submitted by the I.O. under section 173, Cr.P.C. is not binding on the Judicial Magistrate who, therefore, notwithstanding the recommendation of the I.O. regarding not sending up the accused for trial, cancellation of the case, and discharge of the accused from the case, may proceed to take cognizance as provided in section 193, Cr.P.C. and summon the accused person to join the trial. In principle under subsection (1), when the investigation is completed the police officer is required to forward a report to the Magistrate in the prescribed form. Under sub-section (3) when it appears from the report forwarded under section (1), that the accused has been released on the bond the Magistrate shall pass an order for the discharge of such bond or otherwise as he thinks fit. It is clear that under sub-section (3) a Magistrate may agree or may not agree with the police report. It, however, does not say what step the Magistrate should take if he disagrees with the police report. If the Magistrate wants to start a proceeding against the accused, he must act under section 190 of the Code of Criminal Procedure.

12. Section 190 Code of Criminal Procedure provides that a Magistrate 'may take cognizance of any offense (a) upon a complaint, (b) upon a police report, or (c) upon information received by him.

13. Now, the question is, if the Magistrate disagrees with the report under section 173, Cr.P.C., can he take action under clause (b) against those whose names have been placed under column 2 of the Challan.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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**.

19. 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 learned Magistrate refused to entertain the application of the complainant under Section 190 Cr. P.C. on the ground that order in terms of 173 Cr. P.C. had already been passed and the matter was fixed for evidence. The aforesaid order was affirmed by the learned Revisional Court on 12.07.2023.

20. Since the parties have leveled allegations and counter-allegations against each other on the issuance of the cheque, 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 name of the proposed accused in column No.2 of the Charge-sheet and the learned Magistrate has concurred with him as well as learned Revisional Court, however, the applicant/complainant is still

insisting for inclusion of the name of the proposed accused i.e. Husn-e-Kamil in crime No. 516 of 2021 under Section 489-F PPC of PS Samanabad Karachi. Once the Magistrate has formed his point of view based on the evidence collected by the Investigation officer, and concurred by the Revisional Court, 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, as the applicant has emphasized that the co-accused was/is nominated in the F.I.R. by name with the specific role of being the front man in the project. However, the Investigating Officer let him off in the final charge sheet based on lack of evidence.

21. In view of the above facts and discussion, the impugned order does not suffer from any illegality or infirmity, to call for any interference by this Court under its inherent jurisdiction under section 561-A, Cr.P.C. Consequently, this Cr. Misc. Application having no substance is dismissed along with listed applications.

22. These are the reasons for my short order dated 28.11.2023 whereby the instant Criminal Miscellaneous Application was dismissed.

**J U D G E**

Shahzad Soomro

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Reasons to follow, the Criminal Miscellenous Application is  
dismissed.

JUDGE