

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
Criminal Miscellaneous Application No.653 of 2022

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

1. For hearing of main case
2. For hearing of MA No.13041/2022

**07.12.2023**

Mr. Saathi M. Ishaque advocate assisted by Mr. S.K. Lodhi advocate for applicant along with applicant Aijaz Ahmed Hashmi.  
Mr. Saleem Akhtar Buriro, Additional PG

Applicant Aijaz Ahmed Hashmi has assailed the legality of order dated 13.10.2022 passed by learned XIV-Civil Judge & Judicial Magistrate Karachi South in Case No.4511/2021 [*The State versus Aijaz Hashmi*], arising out of FIR No.60/2021, registered under Sections 420/468/471 PPC at PS Mithadar Karachi, whereby the presiding officer disposed of the matter by referring the case to learned Sessions Court for trial as the offense under Section 466 PPC was attracted in the case. For convenience sake, an excerpt of the order is reproduced as under:-

**“5: Hence in view of the arguments of counsel for the accused and the alleged accused person (in person) as well as the arguments advanced by the prosecution and the facts and reasons as discussed above, this matter/Case in question, prima facie attracts the section 466 PPC, which is exclusively triable by the Honorable District and Sessions Judge. Therefore, in view of the above-stated facts and reasons, and after hearing detailed and lengthy arguments made by the counsel for the accused on Application under section 249-A Cr.P.C. filed for acquittal of the accused person at this stage finds no merit and the same is also dismissed, therefore, this office is directed to dispatch the Record and proceedings of this case/FIR No.60.2021 P.S Mithadar to the office of the Honorable District and Sessions Court, after completing all necessary formalities at the earliest, accordingly.”**

2. A progress report has been submitted by the learned Xth Additional Sessions Court Karachi South, which reflects the following aspects of the case:-

**“I have the honor to respectfully submit with reference to your good office letter, referred above on the captioned subject and to say that the instant case had been tried by the learned XIVth Judicial Magistrate Karachi South where the statement of accused had been recorded under section 342 Cr.P.C. However the learned Magistrate on an application filed by the learned state counsel referred the matter to the Hon'ble District & Sessions Judge Karachi South, wherefrom the matter has been assigned to this Court but on the request of learned defense counsel for accused, the case could not proceed further. However the matter is fixed on 08.12.2023 for further proceeding”**

3. The questions involved in the present proceedings, are whether the learned XIVth Judicial Magistrate Karachi South was/is competent to refer the subject case to the learned Sessions Court after recording the statement

of the accused under section 342 Cr.P.C. And whether the Judicial Magistrate is competent to add the section of PPC in the case pending before him, after recording the statement of the accused under section 342 Cr.P.C.

4. The allegation against the applicant is that during his tenure of service in the Police Department, he tampered in his date of birth, which document later on was found bogus, consequently, vide office Order No. SSP/CITY/DISTRICT/LEGAL/238 Dated: 16/02/2021 Mithadar Police registered FIR No. 60/2021 under section 420/468/471 against the applicant. The investigation officer submitted the charge sheet and the trial court framed the charge against the applicant and recorded the statement of prosecution witnesses and also recorded the statement of the applicant under section 342 Cr.P.C. However the story did not end here, during the proceedings the learned Magistrate took cognizance of the offense of section 466 PPC on the application of the learned prosecutor and referred the matter to Sessions Judge for trial as the offense under section 466 PPC was exclusively triable by the Sessions Court. The applicant being aggrieved by and dissatisfied with the aforesaid decision has preferred this Criminal Miscellaneous Application under section 561-A Cr.P.C.

5. Mr. Saathi M. Ishaque learned counsel for the applicant has submitted that the actual date of birth of the applicant is validly recorded as 15.09.1966 as per Government record as well as seniority issued by the competent Authority from time to time as such the Investigation Officer does not need to recommend the case under Section 170 Cr. P.C., however, did so with malafide intentions and ulterior motives. He further submitted that the learned Magistrate had failed and neglected to adhere to the legal position of the case in terms of sections 346 and 347 Cr. P.C. and erroneously acted upon the advice of the prosecution by adding the Section 466 PPC which was/is not attracted at all in terms of Notification issued by the Government of Sindh whereas his date of birth was recorded as 15.09.1966. He further submitted that an application under Section 249-A Cr. P.C was moved before the learned Magistrate on the premise that there was/is no likelihood of the applicant to be convicted of the offense and the charge framed against him was/is groundless, however the learned Magistrate in the intervening period received an application from the learned ADPP that Section 466 was/is made out on the premise that the birth certificate issued by the KMC shown his date of birth as 15.09.1963 and later on found bogus this assertion of the learned ADPP require evidence but the learned Magistrate dismissed his application under Section 249 Cr. P.C. and forwarded the case to the learned Sessions Court for Trial without applying his judicial mind. He prayed that the

order passed by the learned Magistrate was perverse and against the law and dicta laid down by the Supreme Court from time to time.

6. Learned Additional P.G for the State has conceded to the fact that if ultimately after the trial, punishment for more than three years is to be awarded, then the Magistrate has no jurisdiction and the case would then be required to be sent to the Sessions Court by following the procedure, as provided under Sections 346 and 347 Cr.P.C. and also agrees that the matter needs to be remanded to the learned Sessions Judge to assign this case to another Judicial Magistrate for conclusion of trial as the statement of the applicant has already been recorded under section 342 Cr.P.C.

7. I have heard both learned Counsel as well as learned Additional P.G. for the State and perused the record.

8. There is no cavil to the proposition that if the learned Judicial Magistrate after commencement of trial and before signing the judgment, at any stage of the proceedings, finds that the case ought to be tried by the Court of Session or High Court then he shall send the case to the Court of Session or High Court, as the case may be, for trial as provided under section 347 Cr.P.C.

9. A perusal of the record reflects that all these offenses as alleged in this case are triable by the Magistrate. However, insofar as Section 466 PPC is concerned, the punishment is for a term that may extend to [seven] years. In that case, if the Magistrate concludes based on evidence that a punishment of up to three years is to be awarded, then definitely he can award such punishment on his own. However, if the Magistrate concludes that the case has been proved, and a higher punishment of more than three years is to be awarded, then he will not be competent to award such punishment. For such cases, the procedure has been provided in Sections 346 and 347 of the Criminal Procedure Code, and the same reads as under:

**“346. Procedure of Magistrate In cases which he cannot dispose of: (1) If, in the course of an inquiry or trial before a Magistrate in any district, the evidence appears to him to warrant a presumption that the case is one which should be tried or sent for trial to the Court of Session or the High Court, by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to the Sessions Judge or to such other Magistrate, having jurisdiction, as the Sessions Judge, directs.**

**(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or send the case for trial to the Court of Session or the High Court.”**

**347. Procedure when after commencement of trial, Magistrate finds case should be tried by Court of Session or High Court: (1) If, in any trial before a Magistrate before,**

**signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, he shall send the case to the Court of Session or High Court, for trial.”**

10. From the perusal of the aforesaid provision of section 346 *ibid*, it appears that if a Magistrate has any evidence that warrants a presumption that the case should be tried by the Court of Sessions or the High Court, or by some other Magistrate in such district, he shall stay the proceedings and submit case with a brief report explaining its nature to the Sessions Judge or such other Magistrate having jurisdiction as the Sessions Judge directs. Section 347 *ibid* further provides that if in a trial before a Magistrate before signing any judgment, it appears to him that the case ought to be tried by the Court of Sessions or the High Court, he shall send the case to the Court of Sessions or High Court for trial. The reason being, if after completion of evidence or during the trial, the Magistrate concludes that a punishment of more than three years has to be awarded under Section 466 PPC, then admittedly he cannot award the said punishment and will have to take recourse to Sections 346 and 347 Cr. P.C. and as a consequence thereof, the matter will then be sent to the Court of Sessions. Therefore, depriving a forum of appeal to an aggrieved person and the consequent dismissal of the Application under section 249-A Cr.P.C. by the learned Magistrate on the aforesaid analogy does not appear to be the correct approach. To that extent, there appears to be a valid ground made out on behalf of the Applicant for remanding the case to another Magistrate for completion of the trial.

11. The principal question that arises for determination in the instant Criminal Miscellaneous Application is whether the Magistrate is empowered to add or delete Sections of P.P.C. in the charge sheet. On the aforesaid proposition, there is a clear decision rendered by the Supreme Court in the case of *Muhammad Ajmal and others v. The State and others* (2018 SCMR 141) the Honourable Supreme Court has held at paragraphs 21& 22 as under:-

**“It may also be pointed out that the successor Additional Sessions Judge while passing the impugned order dated 23.4.2015 has fallen into patent error, holding that the earlier judgment of the Additional Sessions Judge, Bahawalpur has not debarred the Magistrate to add a section of law i.e. section 302 PPC because the then Additional Sessions Judge had rightly held that the Magistrate may exercise powers after holding the trial and recording evidence. The mode and manner adopted by the Magistrate examining the senior medical officer on the point of the cause of death of the deceased is completely alien to the Law of Evidence and Code of Criminal Procedure.”**

12. I have noticed that a Judicial Magistrate has been conferred with wide powers to take cognizance of an offense not only when he receives information about the commission of offense from a third person but also

when he has knowledge or even suspicion that the offense has been committed

13. Touching the functions of the Magistrate as the subject issue as well as the powers of the police which are entirely different, and the Magistrate cannot impinge upon the jurisdiction of police, by compelling them to change their opinion to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding the formation of opinion by the police which is the final stage in the investigation has been provided in section 190(1)(C) Cr.P.C. When a report forwarded by the police to a Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offense appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offense and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offense appears to have been committed. When such report is placed before the Magistrate he has again the option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offense and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled upon receipt of a police report under Section 173(2). The Magistrate is entitled to take cognizance of an offense under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of witnesses examined by the police during the investigation and take cognizance of the offense complained of and order issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offense only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case if he thinks fit in the exercise of powers under Section 190(1)(b) and issue process to the accused.

14. I may add here that the expressions charge-sheet or final report are not used in the Code, but it is understood in Police Rules / Manuals

containing the Rules and the Regulations to be a "Report" by the police filed under Section 170 of the Code, described as charge-sheet. In case of reports sent under Section 169 Cr. P.C., i.e., where there is no sufficiency of evidence to justify forwarding a case to a Magistrate, it is termed variously i.e., referred charge, Final Report, or Summary.

15. Having said so on the aforesaid points, it has come on record that the opinion of the learned Magistrate is based on the reasoning that the basic ingredients of the offense under section 466 PPC was/is made out before signing the judgment, however, he did not act on his own accord but based his opinion on the application moved by the prosecution which shows that he has not made up his mind on the application of Section 466 PPC as a consequence, he ordered the addition of the Section 466 PPC and forwarded the case without applying the judicial mind. In such circumstances, this Court is left with no option but to set aside the order passed by the learned Magistrate, and refer the matter to the Sessions Court concerned to assign Case No.4511/2021 to another Magistrate for trial as the learned Magistrate has already made up his mind, therefore judicial propriety demands that he may not hear the same case.

16. In view of the above, discussion and dicta laid down by the Supreme Court on the subject issue, I, therefore, dispose of this Criminal Miscellaneous Application along with the pending application(s), and set aside the order passed by the learned Magistrate, with direction to the learned Sessions Judge to transfer the Case No.4511/2021 and assign to another Judicial Magistrate to proceed with the matter for the conclusion of the trial from the same position, however, it is made clear that before signing the judgment after considering the pros and cons of the case; and, if he finds no sufficient material available to approve the addition of Section 466 PPC, he shall proceed with the matter and culminate the Criminal proceedings in its logical conclusion within a reasonable time, however, if he finds that the case is made out and he cannot award punishment, he is at liberty to form his judicial mind and decide the issue under law.

17. This Criminal Miscellaneous Application stands disposed of in the above terms along with the listed / pending application(s).

JUDGE