

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Misc. Appln. D- 33 of 2023

Before:

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Arbab Ali Hakro

Hearing of case

1. For orders on office objections at flag 'A'
2. For hearing of MA No.908/2023 (S/A)
3. For hearing of main case

24.01.2024

Mr. Zuber Ahmed Rajput, Advocate for Applicant

M/s Muhammad Ali Ansari and Atta Hussain Chandio,
Advocates along with Complainant

Mr. Aftab Ahmed Shar, Additional PG for the State along with
Inspector Muhammad Bachal Qazi and SIP Ghulam Akber,
Investigation Officers

ORDER

Muhammad Iqbal Kalhoro, J:- Initially, an FIR bearing Crime No.283 of 2022 was registered at Police Station, Shaheed Murtaza Mirani, District Khairpur U/S 364 PPC on 18.10.2022 against unknown accused by complainant Abdul Basit reporting missing of his brother, namely Abdul Aziz. After due but inconclusive investigation, firstly, interim Challan was submitted on 13.11.2022, in which accused Younis was referred to the Court for a trial, whereas co-accused Imran and Khursheed engaged in investigation on suspicion were let off U/S 497(2) CrPC.

2. The investigation continued and it was found that the missing person was actually murdered in the quarter/premises of applicant given to accused Younis and Ali Raza, his labourers/servants for

the purpose of its demolition. However, despite such information, applicant was not arraigned or referred to the Court for a trial in the subsequent Challan submitted on 18.04.2023. Meanwhile, after submission of second interim Challan, in the investigation, statements of co-accused Younis, Ali Raza and Abdul Qadeer were recorded. They disclosed name of applicant and stated that after the incident, he had visited the quarter/premises and found blood stains peppered all over the place. On inquiry, they had informed him about murder of deceased Abdul Aziz Langah and the fact that he was buried there. He directed them to remove his dead body from quarter and burry him somewhere else.

3. On the basis of such statements, applicant was engaged in the investigation, during which a judicial confession of accused Abdul Qadeer was recorded on 28.02.2023 before learned Magistrate concerned. In his judicial confession, he, however, did not take name of the applicant or assigned him any role as detailed above. The Investigating Officer kept on doing investigation on the basis of such material, but since did not find any evidence against applicant, released him U/S 169 CrPC and submitted such report with final Challan before the Anti-Terrorism Court, Khairpur. The Anti-Terrorism Court, Khairpur, while disagreeing with the opinion of the Investigating Officer has taken cognizance of the offence against the applicant vide impugned order dated 18.09.2023, which he has challenged by means of this Criminal Miscellaneous Application.

4. We have heard learned counsel for the parties and perused material available on record.

5. Learned counsel for the applicant in defence has contended that in the entire investigation no evidence was found against the applicant, hence, he was let off by the police U/S 169 CrPC; the learned Judge, Anti-Terrorism Court without referring to any material against the applicant has taken cognizance of the offence against him; that only evidence alleged against the applicant is statements of co-accused U/s 161 CrPC, which are inadmissible in evidence and cannot be used or made a basis of conviction against him; that except the statements of co-accused, who have even not been turned approver by prosecution rendering their statements valueless in law; no evidence has been collected or found against applicant; that barring the above claim, yet to be proved, in view of the recovery of dead body from somewhere else, nothing against the applicant is on the record to suggest that the incident took place in his premises; that without pointing out to any shred of evidence leading to presence of applicant at the place of incident; which is not even the prosecution case, conviction cannot be recorded against him; that before submission of final Challan in which applicant has been let off, a further statement of complainant on 29.03.2023, after about 05 months of the incident, was recorded, in which he has alleged that applicant was aware of the commission of the offence. He states that such statement was recorded in terms of his application stating in para-2 that he had come to know about role of the applicant through 161 CrPC statements of the co-accused, namely Younis, Ali Raza and Abdul Qadeer. Per him, for the time being there is no incriminating evidence against applicant to justify his trial u/s 302 PPC. In

support of his contentions, he has relied upon the cases of Moula Bux and others vs. The State and others **(1977 SCMR 292)**, Muhammad Rafique & others vs. The State & others **(2010 SCMR 385)**, Muhammad Khan vs. Haji Ghulam Qadir Brohi & another **(1996 PCr.L J 99)**, Rao Jamshad Ali vs. The State **(2003 YLR 836)** and Abdul Rasheed vs. The State **(2012 P Cr.LJ 210)**.

6. Learned counsel for the complainant and learned Addl.PG for the State have opposed his contentions by stating that the evidence, already referred to above, is sufficient to justify trial of the applicant. However, they have not controverted the fact that unless such evidence is presented in the Court and found incriminating and admissible in evidence, the cognizance of the offence against applicant by the trial Court is premature. It is proposed by Addl. PG that after the evidence is recorded and if some incriminating material admissible in evidence is found against applicant, he could be joined in the trial and proceeded against.

7. We are also of a view for foregoing facts and circumstances and the evidence referred to in arguments by the counsel that the learned trial/Judge, Anti-Terrorism Court, Khairpur has acted in haste by taking cognizance of offence against the applicant and joining him as accused. The material he has relied in his order to support his finding has been allegedly disclosed by the co-accused before the police. The question whether such disclosure is admissible in evidence and forms incriminating evidence has not been attended to judiciously by learned trial Court while passing the impugned order. The trial Court has not discussed how the prosecution can present such material in the Court as evidence

disclosed by the co-accused in their 161 CrPC statements, and through whom, as the IO has already let off the applicant.

8. We, therefore, with consent, set aside the said order and allow this Criminal Miscellaneous Application in the terms as above with directions that in case after recording of material evidence, some material against applicant incriminating in nature comes on record which is found admissible in evidence, the trial Court on its own motion or on the application of the complainant or Prosecutor would be competent after due notice to take cognizance of the offence against the applicant and join him as accused.

The Criminal Miscellaneous Application is accordingly disposed of along with listed application.

Judge

Judge

ARBROHI