

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

Criminal Misc. Application No. S- 535 of 2022

*(Ashique Ali v. Saeed Ahmed and others)*

Date of hearing	Order with signature of Judge
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Mr. Abdul Rasheed Kalwar, Advocate for applicant.  
 Mr. Qurban Ali Malano, Advocate for respondents No.1&2.  
 Mr. Khalil Ahmed Maitlo, Deputy P.G.

Date of Hearing: **24-07-2023**

Date of Order: **24-07-2023**

**ORDER**

**AMJAD ALI BOHIO J.:-**Through the instant criminal miscellaneous application, applicant being complainant of crime No. 31/2022 PS Jarwar (Ghotki) has assailed the impugned order dated October 3, 2022 passed by the learned Judicial Magistrate-I (MTMC), M. Mathelo whereby accused namely Saeed Khan and Noor Muhammad were let off by accepting their names placed by the investigation officer under column No-2 in the report submitted under Section 173 Cr.PC'. The said accused were nominated by the complainant in F.I.R. No. 31/2022 of PS Jarwar lodged under Sections 302 PPC etc. in the said F.I.R., the complainant has assigned specific role to them with main offenders.

2. The facts in brief relevant to this matter are that complainant lodged above crime as regards incident wherein deceased Gul Hassan was murdered and PW Rahab received injuries at the hands of respondents No. 1&2 nominated in the FIR. Investigation was conducted and initially interim report was submitted wherein three accused were shown in custody, one accused as absconder, whereas three accused including respondents No.1&2 namely Saeed Khan and Noor Muhammad on bail. Such interim report was then followed with submission of final report under section 173 Cr.PC wherein, accused Saeed Khan and Noor

Muhammad previously shown on bail were declared as innocent and their names were placed in column No. 2 on the basis of CDR (Call Detailed Record), a laboratory slip of Agha Khan University Hospital and alleged CCTV clips of ATM of a Commercial Bank installed within the said hospital situated at Karachi, by the Investigation Officer. Such report u/s 173 Cr.P.C., was forwarded alongwith scrutiny memo submitted by ADPP whereby he opposed plea of alibi considered by the I.O. for accused Saeed Khan and Noor Muhammad and placement of their names in column No.2.

3. The concerned Judicial Magistrate-I Mirpur Mathelo having jurisdiction in the matter passed impugned order whereby he accepted the report and the let off accused persons namely Saeed Khan and Noor Muhammad were not joined as accused to face the trial. Complainant has therefore challenged such order through instant application.

4. I have heard the learned counsel appearing for their respective parties as well as the learned Deputy P.G. I have also gone through the available record in the light of illustrious submissions made before me. I also enlightened myself from the citations relied upon during the course of arguments.

5. Learned counsel for the applicant has argued that specific allegations have been levelled as against the let off accused persons for firing upon the deceased and the injured, which stance has been supported by the PWs. But the Investigation Officer without considering the statements of the prosecution witnesses recorded by him and without giving any justified reasons has believed upon the plea of alibi raised by these accused persons. Learned counsel further argues that such plea is an afterthought as admittedly such plea was not taken at the time of submission of interim report by the I.O. According to him the learned Judicial Magistrate did not apply his judicial mind whilst passing the impugned order. He contends that the CDR only is not a reliable piece of evidence at this stage and the impugned order is silent regarding viewing the video clip of the ATM of the said bank. He further submits that the learned Judicial has not considered the scrutiny memo filed by the prosecutor and even the impugned order is silent about the same. He, therefore, prays that the

order passed by Judicial Magistrate is illegal, unlawful and liable to be set aside and the let off accused persons may be ordered to take cognizance against respondents No. 1&2 to face the trial in the case. In support of his arguments he has placed reliance on case law reported as 2013 YLR 1948 and 2010 P.CrLJ 733.

6. The learned counsel for the private respondents while opposing the instant application preferred his arguments at length. According to him, the impugned order is based on proper reasoning and sound grounds. He submits that the CCTV clips pertain to a reputed bank and there is no reason to brush aside such evidence. He has also challenged the jurisdiction of this court to invoke Section 561-A Cr.P.C., in such cases. He submits that reverting the order of the learned Magistrate is amounting to interfering in the investigation, which cannot be done under Section 561-A CrPC. In support of his contentions, he relies upon the following cases;

1. Muhammad Saeed Mehdi vs the State (2002 SCMR 282),
2. Naseer vs Khuda Bakhsh (2011 SCMR 1430),
3. Muhammad Nasir Cheema vs MazharJaved (PLD 2007 SC 31)

7. Learned D.P.G. representing the State has argued that while passing the order, the concerned Judicial Magistrate has not even considered the scrutiny memo submitted by ADPP, as such he does not support the impugned order.

8. Before proceeding to decide this application, I would like to discuss the case laws relied upon by the learned counsel for let of accused persons as these case laws have been cited on the ground that this court lacks jurisdiction to pass any order in the matter. Therefore such exercise is quite necessary in order to properly understand the decisions made in these cases by the Apex Court. In case reported as P L D 2007 Supreme Court 31 (MUHAMMAD NASIR CHEEMA---Petitioner Versus MAZHAR JAVAID and others---Respondents), it has been observed as under:

*“5. The impugned order was passed by the learned High Court on 29-5-2006. As has been noticed above, the report under section 173, Cr.P.C. (called challan under the Police Rules) had already been submitted in the Court which fact was in the knowledge of the High Court as would appear from the interim orders passed in the Writ*

*Petition in question which have been appended with this petition. Being cognizant of the said situation, the impugned order of the learned High Court directing that only MazharJaved accused will be challaned and that also only under section 471, P.P.C. and for no other offence and that the other accused persons will not be challaned at all, is not understandable.*

*6. The only provision relating to the subject which is available in the Code of Criminal Procedure is section 173 which commands expeditious conclusion of the investigations and further ordains that on conclusion of every investigation, the concerned S.H.O. shall submit a report of the result thereof in the prescribed manner to the Magistrate competent to take cognizance under section 190, Cr.P.C. No power vests with any Court including a High Court to override the said legal command and to direct the S.H.O. either not to submit the said report (mentioned as challan in the Police Rules and also in the impugned order) or to submit the said report in a particular manner i.e. against only such persons as the Court desires or only with respect to such offences as the Court wishes. The impugned order can also not be sustained because, as has been mentioned above, the challan in question stood already submitted in Court and was thus beyond the reach of the concerned S.H.O.*

*7. Having thus examined all aspects of the matter, we find that the impugned order of the learned High Court, dated 29-5-2006 passed in Writ Petition No.17961/Q of 2005 was not valid in law."*

This case does not oust the jurisdiction of the High Court in the matter. But it specifies that specific directions for submission of challan/report or for non- submission of report in a particular manner cannot be issued by the High Court.

The other case relied upon by learned counsel for let off accused persons reported 2011 SCMR 1430 NASEER and others Versus KHUDA BAKHSH and others speaks as under:

*"6. We have considered the submissions and have perused the material available on the record. It may be stated that section 173, Cr.P.C. provides that on conclusion of investigation the concerned SHO is required to submit a report of the result thereof in the prescribed manner to the Judicial Magistrate competent to take cognizance under section 190, Cr.P.C. No power vests with any court including a High Court to override the said legal provision and to direct the police, either not to submit the said report or to submit the said report in a particular manner i.e., against certain persons as the Court desires or only with regard to such offences as the Court wishes.*

*7. Adverting to the facts of the present case in view of the legal position stated above, it must be observed that the order of the High Court to the extent of setting aside the order of the Magistrate passed on the summary submitted by the police appears to be correct. But further direction to the*

*police for submission of Challan was unwarranted and not sustainable in law. It may be noted that power of investigation into accusation made in the First Information Report vests with the police. On the basis of material collected by the police, the police has either to send up the accused person to stand trial or to submit a report to the Magistrate concerned for disposal in accordance with law."*

This case too does not oust the jurisdiction of the High Court to entertain the application under section 561-A Cr.PC it also endorses the earlier view of the Apex Court that specific directions for submission of challan in a particular manner cannot be issued.

Third case law relied upon by the learned counsel for let off accused persons reported as 2002 SCMR 63 does not relate to the provision of section 561-A Cr.P.C., therefore, not relevant .

The case laws relied upon by the learned counsel for complainant relate to the merits of the case, which are not being further discussed at this stage for reasons as mentioned in following paragraph.

9. After hearing, the main controversy between the parties rest on the two vital propositions.

First; Whether this Court has jurisdiction to pass an order in the instant situation? and

Second; whether the learned Magistrate has passed an order after applying his judicial mind after considering all the material facts?

So far as to the first proposition is concerned, the contention of Mr. Qurban Malano is that this Court has no jurisdiction to pass an order under Section 561-A CrPC. According to him, it amounts to interfering within the investigation, which obviously is not warranted under the law. Before entering into further discussions, I would consider it appropriate to reproduce Section 561-A CrPC, which reads as under;

*"561 A. Saving of inherent power of High Court. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such order as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

From the above statutory provision, it is obvious that the law has given ample power to a High Court to pass appropriate order in the following three situations

- i) To give effect to any order passed under the Code, i.e. the Code of Criminal Procedure;
- ii) To prevent the abuse of the process of any Court (definitely the subordinate court), and;
- iii) To secure the ends of justice;

10. After having considered the above case laws, appreciating the arguments of the learned counsel for the parties and perusing the record, it appears that the prosecution version of the case and defence plea in the light of the scrutiny memo submitted by the concerned ADPP has not been considered by the Judicial Magistrate while passing the impugned order. Rather as it appears that the Judicial Magistrate has not even mentioned the fact of submission of scrutiny memo of ADPP in the impugned order. It is not a mere submission of the ADPP individually but a stance of the prosecution on behalf of the State as it is the State who is responsible for the prosecution of every criminal case. Therefore by not considering such an important document, the concerned Judicial Magistrate has committed an illegality, which cannot be sustained. On the contrary, in a celebrated case reported as **Arif Ali Khan and another vs the State and 6 others (1993 SCMR 187)**, a full bench of the Hon'ble Supreme Court has observed as;

*“The learned counsel for the petitioners very vehemently contended before us that the order of Magistrate dated 20-8-1991 having been passed on the report of police officer submitted to him under section 173, Cr.P.C., the order was not revisable under sections 435 to 439, Cr.P.C. In support of his above contention the learned counsel relied on the case of Behadur v. State PLD 1985 SC 62. It is true that in the above cited case this Court clearly-laid down that a Magistrate while cancelling a registered criminal case, acting on the report of police submitted to him under section 173, Cr.P.C., though required to act judicially but his orders so passed are not amendable to revisional jurisdiction under sections 435 to 439, Cr.P.C. But this does not mean that where the Court reaches a positive conclusion in a case that a particular order passed by the subordinate criminal Court amounted to an abuse of the process of Court, it would be powerless to rectify the injustice. In the case before us, firstly, the application filed by respondent No.2 before the High Court was not under sections 435 to 439, Cr.P.C. but it was a petition under section 561-A, Cr.P.C. Secondly, on the facts of the case the learned Judge in Chamber reached the conclusion that exclusion of the names of petitioners from the first challan submitted to the*

*Court was a mala fide act on the part of police and the manner in which the orders were obtained from the Magistrate by the police for discharge of petitioners from the case clearly amounted to an abuse of the process of the Court.*

*On these considerations, the learned Judge in Chamber in our view was fully justified in setting aside the order of Magistrate under section 561-A, Cr.P.C. and direct him to dispose of the case in accordance with the law. No interference is called for with the order of High Court."*

{emphasized and underlined supplied by me}

11. Accordingly, in view of the above discussions, I deem it appropriate not to discuss the merits of case of either parties' at this stage but only to set aside the impugned order and direct the concerned Judicial Magistrate to peruse the scrutiny memo submitted by ADPP, police papers and after hearing the parties and considering all the material available and/or placed before him. Such exercise must be concluded within a reasonable time preferably within 15 days of receipt of this order.

12. The instant Application is allowed in the above terms.

J U D G E