

## **THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

CrI. Misc. Application No.S-583 of 2023  
(*Ghulam Nabi & another v. The State & others*)

Mr. Achar Khan Gabol, Advocate for the applicants.

Mr. Abdul Raheem Ansari, Advocate for the respondent No.4.

Syed Sardar Ali Shah Rizvi, Additional P.G for the State.

Date of hearing(s): **21.05.2024**

Date of decision: **21.05.2024**

### **ORDER**

**MUHAMMAD IQBAL KALHORO, J:-** Applicants have challenged the order dated 18.08.2023, passed by learned Civil Judge & Judicial Magistrate-II, Sukkur taking cognizance of the offence against them in FIR No. 52 of 2023, registered at P.S, Airport-Sukkur under sections 302, 324, 395, 396, 148, 149, 114, 452, 436, 427, 337H(ii) & 120-B PPC on a report submitted under section 173 CrPC by the I.O putting their names in column-II, which means that there was insufficient evidence to refer them to the Court for the purpose of trial.

2. Learned counsel for applicants in his arguments has submitted that he has challenged the impugned order mostly on two grounds. First, the applicants were not heard by learned Magistrate while passing such order, and second, he did not go through the entire material collected during investigation by the I.O depicting innocence of the applicants. He, therefore, has submitted that this case may be remanded back to learned Magistrate for hearing the applicants and deciding report under section 173 CrPC afresh. He has relied upon cases reported as **PLD 2008 SC 412, 2012 SCMR 1235, 2021 YLR Note 8, 2014 MLD 1477, 2015 PCrLJ 78, 2006 MLD 663 & 2012 PCrLJ 189.**

3. On the other hand, learned counsel for respondent No.4 and learned APG have opposed this application and have submitted that the order passed by the Magistrate is not a judicial order but an administrative one in which hearing of the parties is not obligatory and the learned Magistrate by going through the material submitted by the I.O declaring a particular set of accused as innocent can form

his opinion disagreeing with the I.O and take cognizance of the offence against those accused. Learned APG has relied upon cases reported as **PLD 1985 SC 62, 1972 SCMR 335, PLD 1994 Lahore 407 & PLD 2013 Sindh 423.**

4. I have heard learned counsel for parties, gone through material available on record including the case law relied upon by learned counsel to support their respective pleas. It is a settled proposition of law that Magistrate can, irrespective of opinion of the I.O cancelling the case, take cognizance of the offence if upon material before him he finds *prima facie* the case is made out against the accused. It is also equally settled that the order passed by the Magistrate either agreeing or disagreeing with the report of I.O cancelling a criminal case is an administrative order and the Magistrate is not bound by law to hear the parties or their counsel. However, it is still up to the Magistrate to hear the parties if he so desires for clarification of any fact or a question of law involved in the case.

5. In the impugned order it is clear that learned Magistrate has taken a thorough visit of entire record and only thereafter has given reasons in support of his findings, basically not agreeing with the opinion of I.O putting applicants in column-II, and declaring them as innocent on the basis of insufficient evidence by referring to defence evidence put up by the applicants revolving around the plea of alibi. Although, learned counsel for applicants has put much emphasis on the ground that learned Magistrate has not considered material collected by the I.O. But despite constant queries by the Court, he did not succeed in pointing out to any material which although was collected by the I.O in favour of applicants to have lost sight of the Magistrate while passing the impugned order. In paras-3&4, learned Magistrate has taken account of all the facts alleged against the applicants and defence evidence offered by them to show their innocence, and has rightly concluded that on the basis of such evidence, which is yet to be put to the trial, summarily, applicants cannot be opined to be innocent. It is for the Court to determine so by putting prosecution evidence in juxta-position with the defence version of the accused.

6. The I.O has no power to make such opinion and declare accused innocent by disregarding the prosecution evidence brought

on record in the shape of 161 CrPC statements and other pieces of evidence collected during the investigation, for instance, FSL report, recovery of empties etc. In this case, the I.O was required to submit the report u/s 173 CrPC by referring the applicants as accused with their defence version of alibi and left the matter to the Court to decide it in accordance with law by comparing defence version to evidentiary value of the prosecution case.

7. Seen in the light of above discussions, I do not find any error or irregularity in the impugned order to justify its upsetting or remanding the case back to the said Magistrate for deciding it afresh. Accordingly, this Crl. Misc. Application along with pending application(s) therefore is **dismissed**.

**J U D G E**

Ahmad