

ORDER SHEET
 IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.
 Criminal Misc. Application No. S- 550 of 2023

DATE	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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For hearing of main case.

22-04-2024.

Mr. Shabbir Ali Bozdar, Advocate for the Applicant.
 Mr. UbedullahGhoto, Advocate for Respondents Nos. 3 to 5.
 Mr. Gulzar Ahmed Malalno, Assistant Prosecutor General.

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The applicant Gulsher has assailed the order dated 07-08-2023 passed by the Ist Civil Judge & Judicial Magistrate Ubauro whereby he accepted and agreed with the report u/s 173 Cr.P.C submitted by the Investigating Officer whereby he had kept the names of respondents/accused No. 3 to 5 in column No.II of the charge sheet.

Learned counsel for the applicant has submitted that on the report submitted under section 173, Cr.PC, the Magistrate could, irrespective of the opinion of the Investigating Officer to the contrary, take cognizance of the offence against all accused though the names of the accused No. 3 to 5 had been put in column No. II, however he has failed to take cognizance against them. He next submitted that, if upon the materials before him he found that a prima facie case was made out against the accused persons, as in the present case the private respondents have specific role as mentioned in the FIR, thus they could not be exonerated from the charge until and unless they are found innocent by the learned Sessions Court as the offence are exclusively triable by the Court of Sessions. Per learned counsel, after all, the police is not the final arbiter of the parties. It is the Court that finally determine upon the police report whether it should take cognizance or not in accordance with the provisions of section 190(i)(b) of the Code of Criminal Procedure. He next submitted that even under the recently substituted sub-section

(3) of section 190 of Criminal Procedure Code, Magistrate who takes cognizance of any offence under any of the clauses of sub-section (1) of that section is required to apply his mind in order to ascertain as to whether the case is one which he is required to 'send' for trial to the Court of Session or whether it is one which he can proceed to try himself. *It must always be kept in view that an act of taking cognizance has nothing to do with guilt or innocence of the accused but it only shows that Magistrate concerned has found the case worth trying*, therefore, the Magistrate should never examine the matter in *deep* but only to make *prima facie* assessment of the facts about the commission of **offence** or otherwise. Once the Magistrate has taken cognizance of the offence exclusively triable by the Court of Session, he has to send the case to that Court. However, in the present case, though the Magistrate has taken cognizance but exclusion of the respondents Nos. 3 to 5 which is illegally and can be cured by this Court under section 561-A Cr.P.C as it is for the learned Sessions Court to see whether the private respondents are involved or otherwise in the presence crime, for that Magistrate cannot exonerate them at the wish and will of the investigating officer.

The aforesaid stance has been refuted by the learned counsel for the private respondents on the premise that Magistrate has taken cognizance of the offence against the accused and sent up the case for trial to the Court of Sessions, since the private respondents were not involved in the matter as has been rightly recommended by the investigating officer for putting their names in column No. II which factum has been discussed by the learned Magistrate in his order at Paragraph No. 4 & 5, as such no further indulgence of this Court is required. He prayed for dismissal of this Crl. Misc. Application.

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

Before touching the merits of the case, it is found quite appropriate first to discuss the difference between role of **investigating officer** and that of learned "*Magistrate*" in relation to **investigation** and outcome thereof. Every investigation is to be conducted with reference to *Chapter-XIV of the Criminal Procedure Code* and the Police Rules. The *vitality* of role of investigating officer cannot be denied because it is the very *first* person, who per law, is authorized to dig out the truth which, *too*, without any limitation including that of *version* of informant / complainant. Without saying more in that respect, the authoritative view of Supreme Court is given in the case of *Mst. Sughran Bibi Vs. The State (PLD 2018 SC 595)*; whereby certain legal position(s) were set at naught.

In the instant case, the private respondents are named in the FIR specifically, whatever is stated in the FIR. The complainant and his witnesses have been disbelieved by the Investigating Officer, so far as the private respondents are concerned, by doing so, *prima-facie* the investigating officer has assumed the role of the Court without material evidence which was/is not permissible at law and the learned Magistrate ought to have referred the matter to the learned Sessions Court as it is and where it is basis as the sections are triable by Sessions Court; since the investigating officer has kept the names of the private respondents in column No.II of the charge sheet, the learned Magistrate had accepted such report without deliberation about their role in the crime which amounts exoneration of the respondents Nos. 3 to 5, which in principle is the function of the trial Court as the offences are exclusively triable by the Sessions Court.

After confronting the aforesaid legal position of the case, both the parties agreed for disposal of instant Criminal Misc. Application in terms that since the matter has been referred by 1st Civil Judge & Judicial Magistrate Ubauroto the Sessions Court for trial and it had been presumed that the respondents Nos. 3 to 5 whose names were

kept in column No.II of the charge sheet had been exonerated on their plea. Be that as it may, at this stage, I deem it appropriate to direct the concerned Sessions Judge to look into the matter of the parties thoroughly and to see whether the names of respondents Nos. 3 to 5 were rightly kept in column No.II by the investigating officer and accepted by the learned Magistrate based on cogent reasons or otherwise. The aforesaid decision shall be made within two (02) weeks from the date of the receipt of the order. In the intervening period, the opinion of the investigating officer exonerating the respondents Nos. 3 to 5 and acceptance of such report u/s 173 Cr.P.C by the Magistrate to that extent shall remain in abeyance, trial decision.

By consent, the instant Criminal Misc. Application is disposed of in the above terms.

JUDGE