

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Criminal Miscellaneous Application No.S-206 of 2024

Applicants : 1. Anwar Ali 2. Akbar Ali 3. Munawar Ali
4. Amir 5. Azhar, all sons of Abdul Rehman
Daidano 6. Khuda Dino s/o Abdul Raheem
Daidano 7. Subhan Ali s/o Abbas Ali Daidano
and 8. Nadeem s/o Muhammad Ramzan
Machhi, all through Mr. Syed Tariq Ahmed
Shah, Advocate

Respondent No.1 : The State, through Ms. Sana Memon,
Assistant Prosecutor General Sindh

Respondent No.2 : Ghulam Murtaza s/o Ghulam Mujtaba,
through Mr. Muhammad Hashim Laghari
Advocate
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Dates of Hearing : 16.08.2024
Date of Order : 06. 09.2024
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ORDER

ZAFAR AHMED RAJPUT, J-. The respondent No.2, Ghulam Murtaza, lodged an F.I.R. being Crime No.65/2023 at P.S. Sheikh Bhirkio, under sections 324, 506(2), 504 and 337-H (ii), P.P.C., alleging therein that he owns agricultural land in Deh Burira, regarding which the applicants/accused party is in dispute with him. On 30.07.2023 at 12:00 noon, the applicants along with two unknown persons, duly armed with firearms, hatchets and *lathies* came at his land. Applicant Anwar made straight fire on him with intension to kill him and other applicants issued criminal intimidation to cause death in case he again came at the land and then they went away by making aerial firing. After investigation, the investigating Officer (*I.O.*) submitted final report under section 173, Cr. P.C. for disposal of the case under B-Class of Police Rules. The Judicial Magistrate-V, Tando Muhammad Khan declined the report and took the cognizance against the applicants, vide order dated 15.02.2024. It is against the said order that the instant CrI. Misc. Application has been preferred by the applicants.

2. Learned counsel for the applicants has contended that the impugned order is against the law, facts and equity; that the learned Judicial Magistrate failed to appreciate the material collected by the I.O. during course of investigation, including statements of independent witnesses and scientific evidence of modern devices i.e. CDR; that the learned Judicial Magistrate disagreed with the plea of alibi on technical grounds that, on 26.07.2023, the principal of Government Decree College issued the letter under covering letter No. 54, showing the presence of applicant Azhar Ali, Assistant professor, from 30.07.2023 to 31.07.2023 for necessary arrangement in the College after summer vacation; however, subsequently, I.O. also collected copy of outward registered SR. No. 105 dated 22.09.2023 which confirmed that the said letter was issued on 22.09.2023 after the date of incident; that applicant Akbar Ali was under treatment at District Head Quarter Hospital, TMK, he was admitted at 10:00 a.m. and discharged at 5:50 p.m. on the day of incident i.e. 30.07.2023, while the time of incident has been shown at 12:00 noon and such medical certificate was issued by the Medical Superintendent on 14.03.2023; that the learned Judicial Magistrate ignored all alleged piece of evidence collected in investigation while declining report of I.O. for disposal of the case under B-Class; hence the impinged order is not sustainable in law.

3. Conversely, learned counsel for the respondent No. 2 while supporting the impugned order has maintained that the plea of alibi being a distinct plea is required to be proved by adducing cogent and concrete evidence, which aspect of the matter has been ignored by the I.O.; that the Judicial Magistrate is not bound by the findings of innocence reflected in final report submitted by the police.

4. Learned Asstt. P.G. has adopted the arguments of learned counsel for the respondent No.2.

5. Heard the learned counsel for the parties and perused the material available on record.

6. It may be observed that the Judicial Magistrates have been conferred with powers under section 190, Cr. P.C. to take cognizance of offence upon receiving the complaint of facts which constitute offence {under section 190 (1) (a) *ibid*}; upon report in writing of such facts made by any police officer {under section 190 (1) (b) *ibid*}; and upon information received from any person other than a police officer or upon his own knowledge or suspicion {under section 190 (1) (c) *ibid*} that such offence has been committed. It is well- settled law that a report submitted by the I.O. under section 173, Cr. P.C. is not binding on the Judicial Magistrate who, therefore, notwithstanding the recommendation of the I.O. regarding not sending up the accused for trial, cancellation of case and discharge of the accused from the case, may proceed to take cognizance as provided in section 193, Cr. P.C. and summon the accused person to join the trial. In this regard, reference may be made to the case of *Falak Sher v. The State (PLD 1967 SC 425)* wherein the scope of section 173, Cr. P.C. came up for consideration before the Apex Court of Pakistan and following observations were made:-

“Under subsection (1), when the investigation is completed the police officer is required to forward to the Magistrate a report in the prescribed form. Under sub-section (3) when it appears from the report forwarded under section (1), that the accused has been released on the bond the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. It is clear that under sub-section (3) a Magistrate may agree or may not agree with the police report. It, however, does not say what step the Magistrate should take if he disagrees with the police report. If the Magistrate wants to start a proceeding against the accused, he must act under section 190 of the Code of Criminal Procedure.

Section 190 provide that a Magistrate ‘may take cognizance of any offence (a) upon a complaint, (b) upon a police report, or (c) upon information received by him.

Now, the question is, if he disagrees with the report, can he take action under clause (b) against those whose names have been placed under column 2 of the Challan. As already pointed out, the Magistrate is not bound by the report submitted by the Police under section 173. When the said report is received by the Magistrate, the Magistrate on the report itself may not agree with the conclusions reached by the Investigating Officer. There is nothing in section 190 to prevent a Magistrate from taking cognizance of the case under clause (b) in spite of the police report."

In the light of the above-stated legal position, it appears in the case in hand that the applicants are nominated in the F.I.R. by names with specific role but the I.O submitted the final report for disposal of the case under B-Class of Police Rules on the basis of plea of alibi, statements of defense witnesses and CDR of complainant

7. Plea of absence of accused from the place of occurrence at the time of commission of offence is "*plea of alibi*"; it is in fact plea of defence. Plea of *alibi* is the weakest type of plea and cannot be given any weight unless same is proved at trial from very cogent, convincing and plausible evidence. Burden to prove plea of *alibi* is on the accused which is to be proved in accordance with law at trial; however, the statements of defense witnesses recorded under section 161, Cr. P.C. in support of plea of *alibi* are not relevant and admissible for inferring innocence of the accused at investigation stage, as deciding plea of *alibi* at investigation stage would amount to pre-trial verdict, which jurisdiction is not vested with the investigation officer/agency.

8. As regard the CDR, nothing is available on record to establish that any authentic transcript of the CDR of the complainant was obtained by the I.O. during investigation. The complainant has recorded F.I.R vide Crime No. 65 of 2023, while the applicant party has also lodged two cases being Crime Nos. 64 and 66 of 2023 against the complainant party in the same police station.

9. In view of above facts and discussion, the impugned order does not suffer from any illegality or infirmity, so as to call for any interference by this Court under its inherent jurisdiction under section 561-A, Cr. P.C. Consequently, this Cr. Misc. Application having no substance is dismissed, accordingly.

JUDGE

Hafiz Fahad