

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Misc. Appl. No. S-944 of 2023

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.
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For hearing of main case

19.03.2024

Mr. Shabbir Ali Bozdar, Advocate for applicant
 Mr. Abdul Majeed Memon, Advocate for respondents No.3
 and 5 called absent.
 Mr. Zulfiqar Ali Jatoi, Addl. P.G for the State

1. The applicant has come up before this Court challenging the order dated **20.12.2023**, passed by the Court of learned 1st Civil Judge and J.M Ubauro in summary No. 148/2023 Re-Muneer Ahmed vs. Shahbaz Ali @ Shahbazi and others, wherein he disagreed with a report furnished by the police under section 173 Cr.P.C **for taking cognizance** against the accused persons and disposed of the FIR under 'C' class.

2. Brief facts of the FIR are that Mst. Zakia aged about 16 years is the niece of complainant; one Ali Raza Rind demanded the hand of his niece for his cousin Madad Ali, on which they refused. Due to such grudge on 26.08.2023, at 07.30 hours, the accused Ali Raza armed with K.K, Shahbaz @ Shahbazi with K.K, Madad Ali with pistol and two unidentified persons have entered in their house and they have controlled upon them, accused Ali Raza and Shahbaz @ Shahbaz Ali have took his niece forcibly and went outside of the house. The complainant along with PWs followed the accused and came out from the house where he found standing a Corolla Car GLI and one motorcycle 125 of black color. The accused have kidnapped Mst. Zakia with intention to commit Zina with her or get merry with her. The complainant lodged FIR with police station Ubauro on 03.09.2023, at 1700 hours as stated above.

3. After completing investigating, the I.O submitted report U/S 173 Cr.PC for taking cognizance against the accused persons but the Magistrate did not agree with the report of I.O. and disposed of the case under 'C' class, hence the applicant/complainant has filed instant Misc. Application.

4. After institution of instant Crl. Misc. Application notices were issued to the respondents, R & Ps were called. During the hearing it was pointed out that several supported cases were disposed of by the same Magistrate in the same manners therefore a report in respect of orders

passed by the Civil Judge and J.M-I Ubauro for a period of six months from the District and Session Ghotki was called in the matters wherein positive reports for taking cognizance were submitted by the police but the same were cancelled in 'C' class. The Sessions Judge Ghotki has submitted such report along with PS copies of orders passed by the Magistrate, which reflects that **71 cases where police submitted report U/S 173 Cr.P.C for taking cognizance against the accused persons were cancelled under "C" class** which is taken on record and such issued will be take up/decided on the administrative side.

5. It is contended by learned counsel for the applicant/complainant that the learned Magistrate has passed the impugned order in slipshod manner; that that the learned Magistrate did not consider the material available on record and straightaway disposed of the case under cancelled class. He, therefore, prayed for setting-aside the impugned order and requested to issue directions for taking cognizance on the report U/s 173 Cr.P.C against the accused persons as they have committed the cognizable offence and ample evidence was collected by the investigation officer against the accused persons.

6. Learned counsel for the private respondents appeared on some dates however remain absent and on 19-02-2024 counsel for the applicant was heard and notice through General Secretary of District Bar Association was issued to the counsel for the respondent and then on 04-03-2024 he put his appearance seeks time but today he is called absent and no intimation is received. Learned Addl. P.G supported the contentions agitated by the learned counsel for the applicant/complainant and submits that order passed by the Magistrate is based on misreading and non-reading of the material facts, therefore the same is liable to be set-aside.

7. Heard learned counsel for the parties and have gone through the material available on record.

8. It is observed that the Magistrate while relying on the cases of Hakim Ali, SIP and 7 others vs. The State and 2 others (PLD 2006 Karachi 302) and Falak Sher and another vs. The State (PLD 1967 SC 425) has passed the impugned order. On perusal of the both the Judgments 'Supra' it reflects that the observation of the courts was in the cases where the investigation officer found the accused innocent and kept the name in column 2 of the report or the cases were found false

and seeks disposal under 'B' class and the Magistrate while disagreeing took cognizance of offence under section 190 (2) Cr.P.C. **In the case in hand the Abductee/victim Mst. Zakia was recovered from the accused persons on the directions of this court issued in C.P No: S-216 of 2023 and was examined by this court, she supported the version of FIR so also contents of the petition and stated that she was kidnaped and then subjected to Zina including selling her by the accused persons and thereafter a Nikah was managed. She was sent to Darul Aman, Sukkur and the directions for investigation in respect of the allegations levelled by her were issued and in compliance thereof SDPO, Ubauro appeared and submitted that she was produced before the Magistrate for recording her statement under section 164 Cr.P.C wherein she supported the version of complainant and after completing investigation report under section 173 Cr.P.C for taking cognizance and trial of the accused persons was submitted and then the petition was disposed of by issuing certain directions on 24-11-2023.** In the cases of abduction / kidnapping normally the case would depend upon the evidence of the abductee. In such like cases the abductee shall always be regarded as **star-witness** while the other evidence would be that of corroborative piece of evidence. In the instant case, the star witness of the case is Mst. Zakia/Abductee who during the investigation has fully supported the case of prosecution so also before this court has supported the contents of petition and the FIR instead of that the Magistrate disposed of the FIR under "C"/cancel class on the positive report of the Investigation officer.

9. The law has now been settled that in a positive report of Investigation Officer in investigation referring the accused to a trial, the Magistrate has no jurisdiction to disagree with the said report by disposing of the case or deleting a particular section. When the investigation Officer drawn his conclusion after collecting the material during the investigation that a particular offence or the case as reported has been made out for the Court to hold a trial thereon then the Magistrate is not competent to discard the same as it requires examination of witnesses. Therefore, it would be for the Court, be it Magistrate's trial or the Sessions' trial, to apply its mind, in the trial, and decide whether the case is made out; or there is sufficient material to attract applicability of a particular section and then follow the procedure

accordingly. The Magistrate's power to disagree with the opinion of Investigation Officer is limited to only reports disposing of the case or deleting a particular section. In such cases, the Magistrate by going through the material can form his own opinion disagreeing with the opinion of Investigating officer and take cognizance of offence against the accused by accepting the Challan or restoring the deleted sections. The ratio laid down in ***Jalal and 2 others v The State and another (1972 516)***, ***Habib v. The State (1983 SCMR 370)***, ***Abdul Hafeez Junejo vs. The State (SBLR 2010 Sindh 306)*** and ***Amanat Ali vs. 1st Civil Judge and J.M Daharki and others (YLR 2015 2312)*** postulates that the Magistrate has no power to dispose of the case recommended for trial by the Investigating Officer on the basis of his investigation. The same rule would be equally applicable in the case where the Magistrate proceeds to delete a particular provision, although the same has been opined to have been made out by the Investigating Officer on the basis of material collected in the investigation. The investigation of a criminal case falls within the exclusive domain of the police and if on the one hand independence of the judiciary is a hallmark of a democratic dispensation then on the other hand independence of the investigating agency is equally important to the concept of rule of law. Undue interference in each other's roles destroys the concept of separation of powers and works a long way towards defeating justice as has been held by the Supreme Court in the case of ***Muhammad Hanif vs. The State (2019 SCMR 2029)***.

10. Thus based upon the above discussion I am of the view that the Magistrate has passed order by violating the law and against the facts of the case in hand by not applying his judicial mind. Therefore, the impugned order dated: 20-12-2023 passed in Summary No. 148 of 2023, is set-aside and the case is remanded back to him for passing a fresh order keeping in view the ratio laid down by this court as well as by Supreme Court in the above cited cases, within 15 days and the copy of fresh order be sent to this court through Additional Registrar for perusal.

11. Accordingly, this CrI. Misc. Application along with pending application is disposed of in the above terms.

J U D G E