

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

Crl.Misc.Application No.S-22 of 2023

Date of hearing	Order with signature of Judge
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1. For orders on office objection "A".
2. For hearing of main case.

03.08.2023.

Mr. Nawabuddin Chandio, Advocate for the applicant.

Mr. Muhammad Ashique Chandio, Advocate for proposed
accuse No.1 and 2.

Mr. Sooran Riasat, Advocate for proposed accused No.3.

Mr. Aitbar Ali Bullo, Deputy Prosecutor General for the State.

ORDER

KHADIM HUSSAIN SOOMRO, J:- The concise facts leading to disposal of instant Crl.Misc.Application is that applicant Ali Akbar Chandio filed an application under Section 22-A & 22-B Cr.PC is seeking direction against the SHO, P.S Kamber City, for registration of FIR against the proposed accused on account of gross negligence on their part with regard to not maintain and/or to get repair of gutter within his premises, whereby his son Abdul Raheem aged about 2 ½ years by falling thereunder, lost his life. Such application after perusal of reports called from the concerned quarters and hearing the counsel for the parties was dismissed vide order dated 19.01.2023, passed by learned Sessions Judge/Ex-officio Justice of Peace, Kamber,-Shahdadkot @ Kamber, which the applicant has assailed before this Court by preferring the instant Crl.Misc.Application U/S. 561-A Cr.PC.

2. Mr.Nawabuddin Chandio, learned counsel for the applicant contended that due to negligent act of not maintaining the gutter, his son fell down and passed away; that firstly the application moved by the applicant to the proposed accused No.1 was referred to the proposed accused No.3 for redressal of his grievances but to no avail; that the applicant then moved an application to S.S.P Kamber-Shahdadkot @ Kamber which also went fruitless; that the act of the proposed accused comes within the definition of Section 320 PPC which is a cognizable offence; that the proposed accused No.1 and 2 were under obligation in terms of Section 3 & 8 of the Sindh Local Government Act, 2013, to maintain the drains as well as drainage lines and keep the city clean but due to nonperformance of their legal duty, the applicant has lost his son; that the learned Ex-Office Justice of Peace has committed illegality while recording dismissal of application of the applicant, which could be cured by this Court by setting aside of the impugned order and thus prayed for allowing of the instant application.

3. In rebuttal to above, Mr.Muhammad Ashique Chandio and Mr. Sooran Riasat, Advocates for proposed accused No.1 to 3 contended that the applicant was under obligation to look-after his minor son and did not let him to go outside his house without proper care and attention; that the applications relied by the applicant do not show its' receivings from the concerned authorities; that the proposed accused No.2 being the Accountant of Municipal Committee Kamber has nothing to do with the executive functions of Municipal Committee Kamber but has been joined as proposed accused in order to extract money from his pocket; that any act or omission in non-performance of duties do not create a criminal liability, however, at the most it creates a civil liability; that the malafide on the part of applicanties very much evident from the fact that firstly he did not press his application against the proposed accused No.3 with regard to his non involvement in the present incident before the learned Ex-Officio Justice of Peace and secondly joined him as proposed accused at this stage; that learned Ex-Officio Justice of Peace has committed no illegality by recording dismissal of application of the applicant, therefore, the instant application filed by him is liable to its dismissal.

4. Learned D.P.G for the State supported the impugned order and prayed for dismissal of the instant application

5. Heard learned counsel for the parties and perused the material made available on record with their able assistance.

6. The provision of Section 3 of the Sindh Local Government Act, 2013 provides that a Corporation, Municipal Committee or Town Committee shall arrange an adequate arrangement for the removal of refuse from all the public streets, public latrines, urinals, drains, all buildings and lands and Section 8 provides that the above cited authorities are under the statutory obligation to maintain the drains and keep the city clean for public, health and convenience, the non-performance of these functions by the proposed accused does not constitute an act of criminal liability, at the most, if the proposed accused are found guilty of negligence in non-performance of their duties, they are liable for the disciplinary action by their competent authorities rather than initiation of criminal proceedings against them.

7. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public generally or to an individual in particular which, having regard to all the circumstances out of which the charge has arisen in the instant case gross negligence has not been pointed out. The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not

necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens' rea must be shown to exist. In the present case, the essential element for constituting an offence is missing, as neither the applicant in memo of his application nor his counsel while advancing his arguments pointed out any ill-will on the part of proposed accused to have caused injury his son. However, since the proceeding under Section 22-A(6)(i) Cr.PC has been termed as quasi-judicial proceeding and while deciding the application, entire material either annexed with the application or relied by the counsel is to be examined; the material available on the record does not reflect negligence for which the criminal law may set into motion.

8. As to the distinction between criminal and civil negligence, the essential element which keeps both the wrongs pole apart from each other, is mens' rea which is missing in the present case. Simple, a lack of care such as this will constitute a civil liability and would not constitute a criminal liability for which directions could be issued for registration of FIR. The perusal of the material annexed with the case file does not constitute an act of criminal negligence, but it may constitute a tortuous liability, for which the applicant may exhaust appropriate remedy before the concerned forum. In that situation, the contention of learned counsel for the applicant carries no weight. Consequently, the instant Crl.Misc.Application being devoid of merits is dismissed accordingly.

JUDGE