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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Misc. Appln.S- 337 of 2017.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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1. For orders on office objection 'A'.
2. For orders on M.A.No.3444/2017.
3. For orders on M.A No.3445/2017.
4. For Hearing of main case.

09.10.2017.

Mr. Sarfraz Khan Jatoi, advocate a/w petitioners.

Mr. Khadim Hussain Khooharo, Addl. P. G.

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This Cr. Misc. Application has been filed by applicants namely Zulfiqar Ali and Ali Asghar impugning order dated 12.09.2017, passed by the Civil Judge & Judicial Magistrate-V, Larkana, whereby while disagreeing with the police report U/S 173 Cr.P.C he has issued N.B.Ws against all the absconders.

Learned counsel for the applicants submits that the learned Magistrate was not justified in issuing N.B.Ws against the present applicants as they had joined the investigation; and their names were placed in column No.2 by the Investigating Officer; whereas, learned Magistrate has not appreciated the said aspect of the case and in one go N.B.Ws have been issued against all accused including the present applicants also, despite the fact that they were not absconders. In support he has relied upon order dated 8.11.2010 passed by the Hon'ble Chief Justice in Cr. Misc. Appln. No.S-165 of 2010. On such facts, he submit that the instant Criminal Misc. Application be allowed by converting the N.B.Ws into B.Ws enabling the applicants to furnish appropriate surety before the trial Court.

On the other hand, learned Addl. P.G present in Court waives notice and submits that he has no objection if this Court comes

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to a conclusion that N.B.Ws are to be converted into B.Ws at least in the name of persons who have joined the investigation.

I have heard both the learned counsel and perused the record.

It appears to be an admitted position that while filing the final report with original police papers the present applicants were let off on the basis of Investigation and statements of DW's including the CDR data of Cell phones. However, learned Magistrate has though disagreed with the recommendations of police, to which there is no cavil as the Magistrate is not merely a post office to send all the accused nominated by the police for trial and let off those placed in column No.2 of the challan as this proposition is by now settled through various judgments of the Hon'ble Supreme Court in a number of cases. However, at the same time if the Magistrate decides to join a person who has been placed in column No.2 of the challan he has to first make effort to summon such person but should not directly issue N.B.Ws. According to the police report, the applicants have been let off as innocent by placing their names in column No.2 and, therefore, if their presence was required by the Magistrate, at the first instance he should have issued B.Ws and if the said accused failed to appear then only coercive measures should have been adopted. In this regard Reliance may be placed on order dated 24.09.2012 passed by this Court in Criminal Misc. Application No.S-74/2012 re-Muhammad Younis & another v. The State and order dated 11.12.2002 passed by the Hon'ble Supreme Court of Pakistan in Criminal Petition No.105-K of 2002 re-Shah Murad & others v. The State.

Further reliance may also be placed on order dated 08.11.2010 passed by the then Hon'ble Chief Justice in Crl. Misc. Application No.S-165/2010 re-Loung Khan & others v. The State, wherein the following observations are relevant and read as under:

"I have heard learned counsel for the applicants as well as learned State Counsel. Indeed, there is no cavil with the proposition that the concerned Magistrate is not merely a post office to send up all accused nominated by the police for trial and let of those placed in column No.2 of the challan has been held by the Honourable Supreme Court of Pakistan in a number of cases including the case of Safdar Ali and others. The Magistrate has to apply his conscious mind and thereafter make up his mind to agree or disagree with the police report. Indeed, he takes cognizance of the offence and not particular persons named in the challan. Consequently, if the Magistrate decides to join the persons who have been placed in column No.2 of the challan, he is duty bound to summon him. This may also include using coercive process viz. issuance of N.B.Ws and proceedings under section 87/88 Cr.P.C, if such persons despite efforts do not appear before the Magistrate. However, in cases where such accused persons have been cooperating with the police as in the present case and have been placed in column No.2, then it would be indeed harsh to issue N.B.Ws in the first instance as has been held in the case of Shah Murad (supra). In such cases, the Magistrate should in the first instance issue B.Ws and if the accused are not appearing then coercive methods should be adopted. Consequently, N.B.Ws issued against the applicants are quashed. They are directed to present themselves before the concerned Magistrate immediately. Cr.Misc. Application No.S-165/2010 stands disposed of in the foregoing terms.

A copy of this order shall be circulated amongst all the learned Sessions Judges in the province of Sindh for compliance who shall ensure that the Magistrate working under them should strictly follow the rule laid down by the Honourable Supreme court of Pakistan in the case cited above."

In the aforesaid case even copy of the said observations so recorded by the Hon'ble Chief Justice was also circulated to all concerned; however, it is regrettably observed that every now and then orders of Magistrates are being impugned before us wherein, directly NBW's are issued in such cases. This is in fact defiance of the directions of the Hon'ble Chief Justice, whereas, it is unnecessarily burdening the High Court with such misconceived and illegal orders. The District Judge, Larkana is directed to take note of this and shall ensure that the order as above is complied with in letter and spirit and specially in this case call for the explanation of the concerned officer as to how such an order in defiance of the directions contained as above in the order dated 8.11.2010 has been passed, whereas, compliance report shall also be placed to that effect before this Court through the Additional Registrar.

In view of aforesaid directions as well as the earlier orders passed by the Hon'ble Supreme Court in an unreported case of Shah Murad v.

The State in Cr. Petition No.105-K/2002, this criminal miscellaneous application is allowed by modifying the impugned order to the extent that the N.B.Ws issued against the aforesaid applicants, namely, Zulfiqar Ali and Ali Asghar are converted into B.Ws in the sum of Rs.50,000/- each so as to enable the applicants to surrender themselves before the Trial Court, and to seek proper bail through proper application and join further proceedings in the case. The Applicants shall appear before the Trial Court on 11.10.2017, whereas, the learned trial Court shall proceed with the matter expeditiously in accordance with the law. Instant Cr. Misc. Application is allowed and disposed of with the above observation.


Judge
9.10.17