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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

**Present:**

Mr. Justice Muhammad Iqbal Kalhor.  
Mr. Justice Fahim Ahmed Siddiqui.

Constt. Petition No. D-549 of 2017.

Fayyaz Mahmood Shaikh. ....Petitioner.

**Versus**

The State & others. ....Respondents.

Constt. Petition No. D-665 of 2017.

Maqbool Ahmed Shaikh. ....Petitioner.

**Versus**

The State & others. ....Respondents.

M/S Farooq H. Naek & Inayatullah Morio, Advocates for  
petitioners in both the petitions.

Mr. Ghulam Dastagir A. Shahani, Advocate for respondent No.4  
in C.P No. D-549/2017

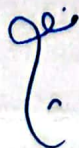
Syed Sardar Ali Shah, D.P.G for the State.

Date of hearing: 08.02.2018.

Date of Judgment: 15-03.2018.

**J U D G M E N T**

**Fahim Ahmed Siddiqui, J.-** As both the aforementioned petitions pertain to the one and the same incident; therefore, this single judgment will suffice for disposal of both of them. In C.P. No. D-549/2017, the petitioner has questioned the order dated 16.06.2017 passed by the learned Additional Sessions Judge-III, Shikarpur, whereby a private complaint filed by respondent No.3 was taken on regular file for trial of nominated accused. In C.P No. D-665/2017, the order dated 24.05.2017 passed by the learned Judicial Magistrate-VI, Shikarpur is assailed, whereby the learned Magistrate has taken cognizance of the offence



against all the accused including the petitioner, who was let off by the investigating officer.

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2. The factual matrix of the case is that respondent Shahnawaz Khan (complainant) lodged FIR No.30/2017 at P.S New Faujdari, Shikarpur alleging therein that they had a squabble with Fayyaz Mehmood Sheikh, which was subsequently patched up but he remained animus towards the complainant party. The son of complainant namely Qadir Bux alias Baboo was doing snooker game business in Shikarpur town. It was 07:00 p.m. on 27.04.2017 when complainant along with his relatives was present at his son's snooker shop; Fayyaz Mehmood Sheikh along with his associates came there on a land cruiser and four motorbikes. The main culprit Fayyaz instigated his team and directed them not to spare the complaining party. Thereafter, accused Fayyaz opened fire which hit Qadir Bux alias Baboo on his abdomen, accused Dadoo alias Wadan fired on Qadir Bux, causing injury to him on his buttock, accused Abdul Hameed fired upon Qadir Bux, hitting him on his right leg, who after receiving such injuries fell down. Subsequently all the accused persons made aerial firing for creating terror and they also issued threats for dire consequences and decamped from the scene of offence. Due to injuries, Qadir Bux became unconscious and after arranging a vehicle, he was taken to police station for obtaining a referral letter to Civil Hospital Shikarpur. However, due to his serious condition, he was referred to Civil Hospital Sukkur, but on the way, he succumbed to his injuries. Thereafter, the complainant returned to the police station and obtained a letter for post-mortem and lodged FIR.

3. It is alleged in C.P No.549/2017 that at the time of said incident, the petitioner (Fayyaz Mehmood Sheikh) was under treatment at Karachi. The petitioner (Fayyaz Mehmood Sheikh) apprehended an improper investigation at Shikarpur; therefore, he moved an application to D.I.G.P for transferring the investigation, which was accordingly transferred to J.I.T, formed by D.I.G.P Larkana. But respondent Shahnawaz Khan agitated such transfer and succeeded in getting the





investigation back to the same investigating officer by obtaining an order from the Court. However, the same investigating officer continued investigation and ultimately filed a Final Report under Section 173 Cr.P.C placing the name of petitioner (Fayyaz Mehmood Sheikh) in column No. 2. After going through such report, the learned Judicial Magistrate declined to concur with the opinion of the investigating officer and took cognizance of the offence against all the nominated accused including petitioner vide Order dated 24.05.2017.

4. It is contended in C.P No.665/2017 that after registration of abovementioned FIR, respondent Shahnawaz Khan also filed a private complaint under Section 200 Cr.P.C before the Judicial Magistrate-VI, Shikarpur against the petitioner (Maqbool Ahmed Sheikh) and twelve other accused persons regarding the same offence. It is alleged by the petitioner (Maqbool Ahmed Sheikh) that the complainant has made improvement in his case by falsely implicating him in private complaint. The learned Judicial Magistrate vide order dated 03.6.2017 sent up the said complaint to learned Sessions Judge, Shikarpur, as the offence alleged is exclusively triable by Sessions Court; who after recording the statement of the complainant sent the case back to the same Judicial Magistrate for holding preliminary enquiry and report. After which, the record and proceedings were again sent up to the Sessions Judge from where it was transferred to the Additional Sessions Judge-III, Shikarpur, who vide order dated 16.06.2017 brought the case on regular file as a Sessions case, and issued bailable warrant against the petitioner (Maqbool Ahmed Sheikh).

5. Through these petitions, the petitioners are seeking relief of setting aside the order of learned Judicial Magistrate-VI, Shikarpur dated 24.05.2017 and order of learned Additional Sessions Judge, Shikarpur dated 16.06.2017 so that the name of the petitioner Fayaz Mehmood Sheikh in CP No. D-549/2017 may be excluded from the trial, as well as cognizance in private complainant No.07/2017 (Shahnawaz Khan v/s Fayaz Mehmood Shaikh) against the petitioner (Maqbool Ahmed



Sheikh) be also declared unlawful and void ab-initio as such the same may be quashed.

6. Heard the arguments of learned counsel appearing for petitioners/accused and also the learned counsel appearing for respondent/complainant as well as learned D.P.G for the State.

7. Learned counsel for petitioners during the course of arguments submits that the material produced by the complainant does not show that there is any prima facie case against both of the petitioners. He also submits that the learned Magistrate without application of mind mechanically took cognizance of the offence and joined petitioner Fayaz, who was placed in column No.2. He next submitted that the learned trial Judge issued process in the private complaint filed against the accused including petitioner Maqbool Ahmed Sheikh without applying judicial mind. He contends that the incident took place on 27.04.2017 at 07:00 p.m. and the F.I.R was lodged on 28.04.2017 after midnight, while the final report was submitted on 23.05.2017 in which the name of petitioner Fayyaz Ahmed Sheikh was put in column-2 but learned Judicial Magistrate took cognizance against him. According to him, the investigation was transferred on the request of petitioner Fayyaz Ahmed Sheikh but the respondent/complainant got it transferred back to the previous investigating officer, who after completing the investigation filed a final report in favor of petitioner Fayyaz. He submits that the investigating officer rightly placed the petitioner/accused Fayyaz Ahmed Sheikh in column No.2 because he was under treatment at Civil Hospital Karachi. He has pointed out that the medical record of Civil Hospital Karachi is available and establishes that on the date and time of the incident, the petitioner/accused was not available at Shikarpur. He further submits that the investigating officer also collected footages of CCTV camera installed in the house of petitioner, which indicates that at the date and time of the incident the petitioner/accused Fayaz was available in his house at Karachi. He submits that convincing material is available in respect of the plea of alibi for the petitioner Fayaz.



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8. The learned counsel for the petitioners further submits that the respondent/complainant Shahnawaz Khan is an advocate and he himself lodged FIR on 28.04.2017 in which he has not mentioned anything about petitioner Maqbool Ahmed Sheikh. Thereafter complainant's statement under Section 161 Cr.P.C. was recorded on 02.05.2017, in which he has stated nothing about Maqbool Ahmed Sheikh. He submits that after a long time he filed a private complaint in which the name of petitioner Maqbool Ahmed Sheikh was mentioned by him, which is an improvement and an addition and has been done with mala-fide intention. He submits that in such a situation it would be appropriate that the order of learned Additional Sessions Judge in the private complaint be declared illegal and the said private complaint be quashed. During argument, the learned counsel for the petitioners relied upon 1972 SCMR 335, KLR 1985 Cr.C. 498 & 2011 YLR 2587.

9. Conversely, the learned counsel for the respondent Shahbaz Khan submits that learned counsel for the petitioners could not point out any illegality in the impugned order passed by the learned Judicial Magistrate, for associating the accused placed in column No.2 in the trial; that the order of Additional Sessions Judge regarding private complaint is a judicial order and no ground for its quashment is available. He criticizes the mode of investigation conducted by the investigating officer and further submitted that he was not authorized to let off the accused on the basis of defence evidence as the defence plea cannot be considered at the stage of investigation and the proper time of consideration of defence is the trial. According to him, the police officer is not competent to decide the case and he cannot enter in the shoes of a Judge. He submits that the material, pointed out by the learned counsel for the petitioners, cannot be considered at this stage. At the end, he submitted that it is hardly believable that nowadays a person of high stature like the petitioner will go to the civil hospital for treatment. In support of his submissions, he relied on PLD 2016 Supreme Court 55, PLD 2013 Supreme Court 401, 2002 SCMR 63, 2010 SCMR 1791, 2013



P.Cr.L.J 727, 2014 P.Cr.L.J 1031, 2005 P.Cr.L.J 560, 2004 P.Cr.L.J 1023, PLD 1997 Lahore 164, PLD 2016 Supreme Court 585 & 2017 YLR105.

10. The learned D.P.G, submits that the prayer clause-2 in C.P No. D-549/2017 has become infructuous in view of the order dated 22.06.2017 passed by this Court in the said petition. He submits that the learned counsel for the petitioners has relied upon so many documents e.g. hospital records, call detail record (CDR), statements recorded under Section 161 Cr.P.C and CCTV camera shots, which requires deep appreciation of evidence for which a trial is needed. Regarding CCTV camera shots, his contention is that the same cannot be relied upon without producing and analyzing the DVR and without ascertaining its authenticity. According to him, there is not only the role of instigation but also firing upon the deceased is attributed to the accused Fayaz Mehmood Sheikh, as such prima-facie his involvement in the case is very much apparent. According to him, at this stage only tentative assessment of the available evidence is to be done. In support of his contentions, he places reliance on 2015 P.Cr.L.J 890, SBLR 2010 Sindh 789, PLD 2013 Lahore 64 and 2013 SCMR 106.

11. We have considered the arguments advanced before us and have gone through the material placed before us in the light of qualitative arguments made before us.

**C.P No. 549/2017**

12. The petitioner of C.P No.549/2017 has challenged the order of the learned Magistrate for associating the petitioner in a criminal case as accused in spite of his name placed in Column-2 of the Final Report under Section 173 Cr.P.C. by investigating officer. It may be noted that the impugned order is passed after giving ample opportunities of hearing to the concerned parties. It may also be noted that, the learned Magistrate has passed a detailed order after citing some celebrated case laws in support of his reasoning to take cognizance of the case. There is





no dispute with the abstract proposition of law regarding power of Magistrate to take cognizance of the case even in presence of a negative police report. There is no convincing material placed before us to show that the impugned order was passed without application of mind; except that there is some material which was supplied by the petitioner to the investigating officer. It is however clear that the investigating officer has relied on the same without verifying it. The learned Magistrate in impugned order has taken care of every aspect of the case and has rightly concluded that there is prima-facie material against the petitioner which justifies his being joined in the trial. His observation is relevant that version of complainant and his witnesses could not be discarded on the strength/basis of defence evidence including documents and affidavits produced by the accused party to the investigating officer.

13. The learned Magistrate is not required to act mechanically on the basis of the report filed by the investigating officer. If he finds that there is a prima-facie evidence against those, whose names are mentioned in column No.2, he can summon them.

14. In our considered opinion, whenever a final report under Section 173 Cr.P.C is filed before the Magistrate, it gives rise to two situations. Firstly, the report may conclude that the offence appears to have been committed by a particular person or persons. Secondly, that in the opinion of the investigating officer, no offence appears to have been committed at all or it was not committed by some nominated accused. In the latter case, i.e. where the report negates the commission of an offence by all or any of nominated accused, three courses are open to the Magistrate viz. (a) he may accept the negative report and take action accordingly; (b) he may disagree with such report and reject or amend the same by taking cognizance of the offence against all accused including let off accused (c) he may direct for further investigation. There are several columns in the prescribed format of Final Report commonly known as challan. The column-2 is prescribed for those accused against whom no material could be found during the course of

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investigation. It is not the scheme of law to assign the role of court to investigation officer to decide finally that the particular accused is not the author of the crime on the basis of some defence evidence produced by the said accused during investigation. We consider that act of investigating officer of placing the name of accused in column No.2 of the challan on the basis of a plea of alibi is beyond his function and duty. Besides, it is a settled law that the opinion of the investigating officer is not binding on the Magistrate. The learned Magistrate is fully empowered to reject negative report and take cognizance of offence against all the accused including the one, who is let off. The Hon'ble Supreme Court in the case of *Safdar Ali v. Zafar Iqbal and another* (2002 SCMR 63) has observed as under:

*"It is well-settled by now that the Magistrate can take cognizance of an offence even in case of negative report submitted by police that accusation is baseless and no case is made out against the delinquents: There is no cavil to the proposition that the accused placed in column No. 2 of challan cannot be summoned by the learned trial Court to face the trial and there is no legal bar whatsoever that at first instance the evidence should be recorded to ascertain as to whether the prima facie case is made out against them."*

15. In view of the above legal proposition and after careful analysis of the entire material, we have come to conclusion that the learned Magistrate has applied his mind judiciously while passing the impugned order and there is nothing wrong to warrant interference by this Court.

**C.P No. 665/2017**

16. The petitioner of C.P No. 665/2017 has challenged the order of learned Additional Sessions Judge-III, Shikarpur, whereby he brought the private complaint filed against him on the regular file as a sessions case. There is no cavil about it that a Private Complaint may be initiated along-with F.I.R by the same complainant. Even there is no bar in the law that the complainant after registering of the F.I.R cannot file a direct complaint against same accused mentioned by him in the F.I.R or against additional or new set of accused. The only question is that he has to





satisfy the Court in preliminary enquiry about prima-facie evidence being available warranting taking cognizance thereof. The impugned order dated 16.06.2017 was passed after a proper preliminary enquiry conducted under the directions of the learned Sessions Judge. After going through the entire material including preliminary enquiry, the trial Court came to a conclusion that there exist reasons for trial in the private complaint as a separate sessions case. We have gone through the impugned order dated 16.6.2017 passed by the learned Additional Sessions Judge-III, Shikarpur, which is proper and speaking one.

17. It is also an indisputable position that a Sessions Judge or Additional Sessions Judge may dismiss a private complaint if there is no convincing material after recording preliminary enquiry or there are serious contradictions in the statements of witnesses which are sufficient to persuade him about falsification of the allegations. In case, if the complainant establishes a prima facie case and there are considerable reasons to proceed with the case of the private complaint, it is better for the sessions judge, not to hesitate to bring such a private complaint on regular file as a sessions case. In this respect guidance, may be taken from a reported as *Muhammad Faiz Khan v. Ajmer Khan and another* (2010 SCMR 105), wherein it is held as:

*"It is settled principle of law that appreciation of evidence at preliminary enquiry with the yardstick of trial Court is not the purpose under section 202. The trial Court has to believe only to see a prima facie case is to be made out or not that is why full dress rehearsal of trial is not possible. This is the general principle with regard to examining the evidence on record before issuing process under section 204, Cr.P.C. Section 202 falls under Chapter XVI of Criminal Procedure Code. Therefore, the scope of this section is to separate unfounded from substantial cases at the outset at the initial stages that is why command of the section bound the Magistrate who has to satisfy himself before issuing of process to the respondent/accused."*

18. A perusal of direct complaint indicated that the complainant has added some new facts in it, when he came to know after registering F.I.R

about role of the said culprits. Such assertion of the complainant can only be weighed in the trial and not at this stage. As such, he may not be deprived from putting his case through a private complaint solely due to omission of name of the accused in the FIR. It would be premature to state that the appellant has made improvement in the case so as to involve the other two accused with a view to harass them. We cannot, therefore, agree with the contention of the learned counsel for the petitioner that the private complaint be quashed because it is based on improvement.

19. In this case, the complainant was dissatisfied with the police report inasmuch as according to him, the police report excluded some persons who were real culprits. We are of the considered view that the Court below is not un-justified in taking the case, on private complaint, on regular file and conducting it as the sessions case.

20. However, what is important is that in such cases, there should be depiction of application of mind at the time of passing such orders either by Magistrate or Sessions Judge before taking cognizance. In the instant matter, both the orders are well reasoned and whatever defence has been taken by the learned counsel for the petitioners, the same also demand that a proper trial should be initiated and concluded on merits so that the grain may be separated from chaff.

21. The ultimate outcome of the above discussion is that there is no wrong in the two impugned orders passed in both the petitions. Resultantly, both the subject petitions are dismissed.




JUDGE

  
12-3-2018  
JUDGE

Amended copy us.

  
Judge

  
Judge 15/03/2018