

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Misc. Appl. No. S - 619 of 2012

DATE

ORDER WITH SIGNATURE OF JUDGE

1. For Katcha Peshi.

2. For hearing of M.A. No. 7148 of 2012.

Date of hearing : 29.01.2013.

Mr. Muhammad Ali Rind, Advocate for the applicant.

Mr. Shahzada Saleem Nahyoon, A.P.G. for the State.

NADEEM AKHTAR, J,-

1. **Katcha Peshi** :

The brief facts of this case are that one Mst. Sanam contracted marriage with the applicant on 29.06.2009 with her own free will. At the time of the marriage, the said Mst. Sanam was a major. She executed an affidavit to this effect and to the effect that she was marrying the applicant with her own free will. The family members of Mst. Sanam were not happy with the marriage, and as such they started threatening the couple of dire consequences. As the family members of Mst. Sanam could not succeed in their ulterior motives, her mother lodged an F.I.R. on 29.07.2009 bearing Crime No.128/2009 against the applicant for kidnapping Mst. Sanam. In order to seek protection, the applicant and his wife Mst. Sanam filed Constitutional Petition No. S-221/2009 before this Court against the father, mother and brother of Mst. Sanam, as well as against the police officials concerned. The said petition was disposed of vide order dated 25.08.2009 with directions to the I.O. to appear before the Civil Judge and Judicial Magistrate No.IV, Hyderabad, on the same day with Mst. Sanam for recording her statement under Section 164 Cr.P.C., and the Magistrate was directed to pass order thereafter in accordance with law.

The case bearing Crime No.128/2009 registered against the applicant was finally disposed of under cancelled 'C' Class vide order dated 29.09.2009 passed by the Civil Judge and Judicial Magistrate-IV, Hyderabad. Thereafter, the couple lived happily and they were blessed with a daughter born on 16.08.2010. On 23.12.2011, Mst. Sanam and her infant daughter were kidnapped by Mst. Sanam's father, Sikandar Khawaja. The applicant lodged an F.I.R. bearing No. 191/2011 against Sikandar Khawaja. While Mst. Sanam was in the custody and under the influence of her parents, she was produced before the Judicial Magistrate-Xth, Hyderabad, where she was forced to record her statement under Section 164 Cr.P.C. She stated that she was kidnapped by the applicant. The applicant has alleged that the said statement was given by Mst. Sanam after about three years under compulsion and undue influence of her parents. On the basis of the said statement, the Judicial Magistrate passed the impugned order dated 06.09.2012 directing the S.H.O. Police Station City, with specific directions to submit charge sheet within seven days against the

applicant for the offence of abduction of Mst. Sanam and robbery. The applicant surrendered himself before the learned Sessions Judge, Hyderabad, where he was granted interim pre-arrest bail vide order dated 06.11.2012.

Meanwhile, Mst. Sanam filed a suit for dissolution of her marriage with the applicant, which was strongly resisted by the applicant. It has been averred by the applicant that the suit was filed at the instigation and under the influence of the parents of Mst. Sanam. The applicant has further averred that, because of the compelling circumstances and unbearable pressure, he pronounced divorce to Mst. Sanam. The learned counsel for the applicant submitted that the first F.I.R. lodged against the applicant by the mother of Mst. Sanam for her kidnapping, was disposed of in "C" class on 29.09.2009, therefore, directions given by the Judicial Magistrate for the alleged abduction of Mst. Sanam pursuant to her purported statement recorded under Section 164 Cr.P.C. after three years, was not justified. He submitted that Mst. Sanam remained the legally wedded wife of the applicant for three years, and from the wedlock, she gave birth to a daughter.

In support of his submissions, the learned counsel for the applicant cited and relied upon (1) Zafarul Haq Khan V/S Muhammad Amin and others, PLD 2005 Karachi 375 (Division Bench), (2) Ali Hassan and 3 others V/S Ghulam Qadir and another, 2005 YLR 3020, and (3) Muhammad Saleem Akhtar V/S Station House Officer, Police Station Chotiana and 3 others, 2005 P.Cr.L.J. 1789. In the aforementioned reported cases, the police submitted reports before the Magistrate for cancellation of the cases, which were accepted and the cases were cancelled. After many years, the Magistrate directed the police to submit challan against the accused in respect of the same offences which were the subject matter of the previous cases. It was held by the learned Division Bench of this court and the learned Single Judges of this court and the Lahore High Court that without recalling the earlier orders of cancellation of the

cases, the Magistrate could not initiate further proceedings. The orders having been passed without jurisdiction were set aside / quashed.

The facts of the present case and those of the cases relied upon by the learned counsel by the applicant are similar, therefore, the principles laid down in the aforementioned cases are fully applicable to the present case. In the present case also, the Judicial Magistrate has erred in law by not recalling the earlier order, which is still in the field, whereby the F.I.R. lodged against the applicant on the same ground and for the same offence had been disposed of in "C" class. Without recalling the said earlier order, the Police has been directed by the Judicial Magistrate through the impugned order to submit charge sheet against the applicant for abducting Mst. Sanam. As the Judicial Magistrate has committed a serious error in law, the impugned order is liable to be set aside / quashed. Before passing the impugned order on the basis of the purported statement of Mst. Sanam, the Judicial Magistrate did not consider important aspects of the case, such as, Mst. Sanam remained legally wedded wife of the applicant for three years and from the wedlock she gave birth to a daughter ; she had filed a Constitutional Petition before this court for seeking protection from her family members, wherein she had confirmed her marriage with the applicant with her own free will ; she had appeared with the I.O. before the Magistrate and recorded her statement to the effect that she had not been kidnapped by the applicant ; filing of suit for dissolution of the marriage, though the same was filed by her under undue influence according to the applicant, was sufficient to show that she and her family members had not disputed her marriage with the applicant. Had all the above been considered by the Judicial Magistrate, he would not have passed the impugned order.

The above are the reasons of the short order announced by me on 29.01.2013, whereby this Criminal Miscellaneous Application was allowed as prayed.

2. For hearing of M.A 7148 of 2012 :

As the main application has been allowed, this application has become infructuous. Accordingly, the same is disposed of.

J U D G E

Tufail/-