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ORDER SHEET

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD

Present

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

C.P. No.D-1973 of 2016.

Muhammad Hussain

Versus

District & Sessions Judge, Mirpurkhas and others

Petitioner : Muhammad Hussain	Through M/s Syed Haider Imam Rizvi and Abdul Rauf, Advocates
Respondents No.1 and 2	Through Syed Meeral Shah Bukhari, Deputy Prosecutor General
Respondents No.3 to 11 :	Through Mr. Abdul Aziz Memon, Advocate
Date of hearing	09.05.2017
Date of judgment	19.05.2017

ORDER

MOHAMMAD KARIM KHAN AGHA, J.-Through instant constitutional petition, petitioner Muhammad Hussain has impugned the orders dated 04.05.2016 and 23.04.2016, passed by learned Sessions Judge, Mirpurkhas (Ex Officio Justice of Peace) in Cr. Misc. A. Nos.261/2016 and 233/2016 (moved under section 22-A-6(i) Cr.P.C.), whereby the Sessions Judge dismissed both the aforementioned applications (the impugned orders). Hence, the instant petition.

SEAL OF THE HIGH COURT OF SINDH

2. The facts of the petitioner's case as stated in the instant petition are that the petitioner was Kamdar/Land Manager of Mst. Fiza Junejo. His duty was to look after the land of Mst. Fiza Junejo and her four other sisters. There is a family dispute between Mst Fiza Junejo and her other sisters with her/their brother Asad Junejo over distribution of their ancestral land. That due to the harsh and threatening behaviour of her brother, Mst Fiza Junejo moved an application before the Inspector General of Police and Deputy Inspector General of Police, Mirpurkhas, conveying her apprehension that the goons of her brother are planning to cause harm to her, her four sisters and their employees, but no action was taken.

3. That on 20.04.2016 at about 11:00 hours when the petitioner was present on the aforesaid land, he was intercepted by private respondents No.3 to 11, who came there in one Vigo Pickup No.500 and two Corolla cars. All respondents were armed with deadly weapons. They caught hold of the petitioner and started beating him in front of the people present there. The said respondents severely beat and manhandled the petitioner, cut off his eyebrows, his hair and moustache; took him away by putting him into said Vigo pickup, brought him at the bungalow of respondent No.4 Ghalib Junejo and tortured him, due to which the petitioner sustained factures over his nose, knee and other body parts. Subsequently, the said accused / respondents handed over the custody of the petitioner to SHO Police Station Sindhri; when brother of the petitioner namely, Muhammad Umar came to know about the said illegal acts of the respondents, he approached the Sessions Judge, Mirpurkhas and filed an application under section 491 Cr.P.C. The learned Sessions Judge ordered to conduct a raid for the recovery of the detenue, which was complied with and according to the petitioner the report of the Raid Commissioner proves that the petitioner was kidnapped and tortured by the private respondents. Thus the brother of the petitioner approached the police station for filing F.I.R. against the culprits but the police refused to register the same.

4. Thereafter the brother of the petitioner moved an application under section 22-A Cr.P.C. seeking direction from the Court of Sessions Judge Mirpurkhas to lodge an F.I.R. based on the above narrated facts which was declined vide order dated 23-04-2016 with an advice to the applicant to file a direct complaint. Thereafter, the petitioner himself filed an application seeking similar relief, however, the same was also dismissed vide order dated 04-05-2016 as it was deemed to be a review of the earlier order which was not permissible. Hence the petitioner has moved this court for relief.

5. Learned counsel for the petitioner has argued that the learned Sessions Judge / Ex-Officio Justice of Peace has passed the impugned orders in contravention of law; that the learned trial court has erred by not appreciating the fact that enough material is available in shape of Raid Report and photographs of the inquiry and excess caused by the culprits for giving direction to the police for lodging an F.I.R.; that the learned Sessions Judge / Ex-Officio Justice of Peace has grossly erred in not appreciating that when a complainant approaches the police for registering an FIR for a cognizable offence then the police is legally bound to register the FIR. Similarly the Ex-officio Justice of Peace has a legal duty to direct the police for the registration of an FIR when a cognizable offence is spelt out from the contents of the allegations; that the learned Ex Officio Justice of Peace has arbitrarily failed to exercise his jurisdiction under section 22-A(6) Cr.P.C. although he was fully conversant with the facts of the allegations as he had himself ordered for the raid and the raid report clearly suggests the commission of cognizable offence punishable under sections 365, 342, 337-L(ii), 337-V(ii), 337-F(iii), 504, 506(ii), 147, 148, 149 PPC; that the learned Ex Officio Justice of Peace while passing the impugned order has erred in law and exceeded his jurisdiction to hold that the petitioner should instead file a private complaint; that the F.I.R that has been filed against him is false and has been made with a view to defeating the lodging of his own FIR which is based on the truth; that the learned Ex Officio Justice of Peace did not apply his judicial mind and arrived at an erroneous conclusion and has failed to appreciate that the Honourable Supreme Court and the

High Courts have directed for registering a second / counter F.I.R. in the event of different and conflicting stories coupled with allegation of mala fide of police is averred by the complainant; that the impugned orders are perverse in law and against the principles of law as laid down by the superior courts and thus should be struck down and the concerned SHO directed to lodge his FIR.

6. In support of his contentions, learned counsel for the petitioner has relied upon the cases of **Ali Muhammad v. Syed Bibi** (PLD 2016 Supreme Court 484), **Mushtaq Hussain v. State** (2011 SCMR 45), **Muhammad Bashir v. Station House Officer** (PLD 2007 Supreme Court 539), **Ghanwa Bhutto v. Government of Sindh** (PLD 1997 Karachi 119), **Inayatullah Khilji v. Ist Additional District and Sessions Judge** (2007 PCr.LJ 909), **Mumtaz Ali v. S.H.O. Naushahro Feroz** (2011 PCr.LJ 268) and **Wajid Ali Khan Durani v. Government of Sindh** (2001 SCMR 1556).

7. Learned counsel for private respondents No.3 to 11 has argued that this petition is not maintainable as the petitioner has an adequate alternate remedy as spelt out in the impugned orders. Namely he can file a direct complaint; that there is already an FIR registered against the petitioner and as such there was no need for the registration of a second FIR arising out of the same incident, namely FIR 15/2016 dated 20-04-2016 registered at PS Sindhri at 2100hrs by complainant Abid Ali which in effect states that, *"I am residing at the above address and lookafter the land of Asad Sahib Junejo, today at about 2:00 p.m. we were present at the land, in the mantime (1) Muhammad Hussain S/o Kandero Junejo with pistol (2) Muhafiz Ali S/o Sajro Junejo with pistol who came on the motorcycle and started filthy language against us and also warned to go from the land otherwise we will kill you, Muhammad Hussain Junejo ready to fire therefore he started firing which was hitted to my leg hence I felt down. Muhafiz Ali S/o Sanjro Junejo also intention to fire for killing, therefore after firing* ***both the accused person absconded on their motorcycle, therefore we informed the police and request to the SHO of the police station and injured***

person was sent for medical treatment in the hospital. (bold added)

I therefore request to please lodge the FIR against the above accused person for firing with the intention to kill on the Mohafiz Ali."

8. That the aforesaid FIR is the true version of events and that the petitioner is now trying to muddy the water and confuse the issue by attempting to file a second FIR in order to save his skin. That the petitioner does not work for Ms Fiza Junejo and is in fact a chowkidar of Government High School Sindhri and that enmity exists between the petitioner and respondents 3 to 11 which has lead to him now wanting to file a false complaint against the respondents 3 to 11. That Abid Ali's FIR is supported by the mashirnamas of arrest and recovery whereby the petitioner was arrested on the spot by the police on the lands of Asad Junejo

9. Learned counsel for respondents No.3 to 11 has relied upon the case of **Younas Abbas and others v. Additional Sessions Judge, Chakwal and others** (PLD 2016 Supreme Court 581).

10. Learned Deputy Prosecutor General (DPG) submitted that in his view the petition was maintainable and that under the law an FIR must be registered under S.154 Cr.PC if a cognizable offense is made out. Learned DPG did not support the impugned orders passed by learned Sessions Judge ex officio Justice of Peace

11. We have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

12. With regard to maintainability we find that this court in its constitutional jurisdiction has ample discretionary powers to entertain and determine this petition under Article 199 of the Constitution in a case such as this.

13. In this respect reliance is placed on the Supreme Court case of **Wajid Ali Khan Durani v. Government of Sindh** (2001 SCMR 1556) which concerned the registration of a third FIR in respect of the same incident whilst dealing with the issue of the alternate remedy of a direct complaint and the constitutional jurisdiction of

the High Court upheld the decision of the Sindh High Court in this regard in the case of **Ghanwa Bhutto v. Government of Sindh** (PLD 1997 Karachi 119) and held as under at P.1558.

> "The learned High Court while dealing with the question, whether alternate remedy was available to the aggrieved party to file direct complaint in the Court if they were not satisfied with the police report, held as under:--
>
> "A question therefore arises, when can discretion be exercised by the High Court in favour of an aggrieved party. It may not be out of place to mention here that, according to the principle laid down by the superior Courts, discretionary power must be exercised in good faith having regard to all relevant considerations and it should be exercised justly, fairly and reasonably. Therefore, although an alternate remedy is provided to an aggrieved party under the law, by way of complaint yet, the mere fact that an alternate remedy has been provided for, may not deter the Court from giving directions to the police to record a F.I.R. in an appropriate case."

14. With regard to the case of **Younas Abbas (Supra)** this case primarily concerned the constitutionality of S.22 (A) (6) Cr.PC which was found to be in line with the Constitution and was considered to be a good and inexpensive way of allowing less well off people to get FIR's registered if SHO's refused to do so at the behest of influential members of society. It enhanced the concept of access to justice and equality before the law. In our view it in no way debarred the petitioner from approaching the High Court in its constitutional jurisdiction in respect of such matters. Even otherwise the decision of the judicial magistrate in such cases was deemed to be of a quasi judicial nature which was subject to judicial review

15. In our view the real point at issue does not primarily revolve around the impugned orders but whether or not under the facts and circumstances of this case another FIR can now be registered. This is because the whole episode seems to have unfolded because the

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SHO of PS Sindhri refused to take the petitioners statement and register an FIR in respect of his complaint which left him to persue the alternate avenue under S.22 (A) (6) Cr.PC without success which lead to him moving this Court

16. Since this case revolves around the ability to register an FIR, or a 2nd FIR S.154 Cr.PC which deals with this issue is set out below for ease of reference:

> "S.154.Cr.PC. *Information in cognizable cases.* Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the 1[Provincial Government] may prescribe in this behalf."

17. There is a plethora of authority on the point that when a person approaches an officer in charge of a police station (PS) and wants to make a statement concerning a crime that statement **must** be recorded by the concerned SHO/police officer at the PS in writing and then entered as a cognizable offense under S.154 Cr.PC or a non cognizable offense under S.155 Cr.PC. In this respect the concerned police officer has no discretion. He must record the statement and must either record it as a S.154 statement or a S.155 statement. His only role is to determine whether the statement discloses that a cognizable or non cognizable offense is made out and place the statement in the appropriate book whereafter either an IO from his PS will be appointed to investigate the case if a cognizable offense is made out or it will be sent to a magistrate to deal with in accordance with law if a non cognizable offense is made out.

18. **The concerned police officer has no lawful authority whatsoever to refuse to record a person's statement in respect of an alleged crime.**

19. In our view an informative analysis of this legal position is made in the case of **Muhammed Bashir v State** (PLD 2007 SC 539) in the following terms at P.545 which is set out as under for ease of reference:

> "9. Such an exercise of powers by the learned A.S.J under section 22-A (6) of the Cr.P.C. in such a manner raises some serious questions in our minds, that is:
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> (a) do the provisions of law regulating the recording of F.I.Rs permit or even envisage an enquiry into the correctness or otherwise of the information which is received by an Officer Incharge of a Police Station for the purpose of being reduced into writing as a F.I.R.?
>
> (b) does the law empower an Officer Incharge of a Police Station to refuse to record an F.I.R. only because, in his opinion, the allegations conveyed to him were false? And,
>
> (c) what is the proper scope of the powers conferred through the newly-added provisions of section 22-A(6) of the Cr.P.C. and whether the said provisions conferred any new, extra or additional powers on an Ex-officio Justice of the Peace in the matter of recording of F.I.Rs."

10. The expression "REGISTRATION OF A CRIMINAL CASE", used in section 22-A (6), Cr.P.C. was alien to law i.e 'to the Code of Criminal Procedure and the Police Rules of 1934 till the addition of the said subsection (6) to the said section 22-A of the Cr.P.C. through the Code of Criminal Procedure (Third Amendment) Ordinance, No.CXXXI of 2002 which was promulgated on 21-11-2002. We shall, however, presume that what was intended to be meant by the said expression was, in fact, the recording of F.I.R. We may also add that even the expression "FIRST INFORMATION REPORT" (F.I.R.) was not an expression of the Code of Criminal Procedure, 1898 but was in fact the name given to the "INFORMATION" mentioned in section 154 of the Cr.P.C. by Chapter XXIV of the Police Rules of 1934.

11. For some purposes, including recording of F.I.Rs, criminal offences have been categorised by the Cr.P.C. into two classes i.e. the ones which were cognizable and the others which were non-cognizable. Section 154 of the Cr.P.C. prescribes the manner in which an information conveyed to a S.H.O. with respect to the commission of a cognizable offence was to be dealt with while the provisions of section 155(1) of the said Code tell us of the procedure envisaged vis-a-vis the information relating to a non-cognizable offence. These provisions read as under:-

> "154. Information in cognizable cases.—Every information relating to the commission of a

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COGNIZABLE OFFENCE if given orally to an Officer Incharge of a Police Station SHALL be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf."

155. Information in non-cognizable cases.---(1) When information is given to an Officer Incharge of a Police Station of the commission within the limits of such station of a NON-COGNIZABLE OFFENCE, he SHALL enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate." (The Emphasis and underlining is ours)

12. **The scheme of law which becomes apparent from a bare perusal of these provisions is that whenever an Officer Incharge of a Police Station receives some information about the commission of an offence, he is expected first to find out whether the offence disclosed fell into the category of cognizable offences or was one which was non-cognizable. And once he was through with this exercise then the word "SHALL' appearing in the said provisions of section 154, Cr.P.C. would take over which obliged, the S.H.O. thereafter to reduce the said information to writing in the First Information Report Register as, what is called by Chapter XXIV of the Police Rules of 1934, a F.I.R. if the offence disclosed was cognizable or else to merely record the same in the Station Diary as mentioned by section 155(1) of the Cr.P.C. and rule 24.3 of the said Rules and refer the informant to the competent Magistrate if the offence be non-cognizable.** As has been mentioned above sections 154 and 155 of the Cr.P.C. are the only two provisions in the said Code which talk about the manner in which information received by a S.H.O. relating to the commission of an offence was to be treated.

13. **It may be reiterated and even emphasized that there was no provision in any law, including the said section 154 or 155 of the Cr.P.C. which authorized an Officer Incharge of a Police Station to hold any enquiry to assess the correctness or the falsity of the information received by him before complying with the command of the said provisions which obliged him to reduce the same into writing irrespective of the fact whether such an information was true or otherwise.**

14. The wisdom was not far to find. If the S.H.O. was given the authority to determine the truthfulness or the falsehood of the allegations levelled against some one and

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thereafter to decide to record or not to record such allegations as F.I.R., then such a police officer would have got blessed with the power to decide about the guilt or innocence of an accused person. This was, however, far from the envisaged by the law-makers regarding the identification and the consequent acquittal or conviction of accused persons as the said task stood assigned only to the courts of law and had never been conceded to police officers.

15. **It may be added that the Police force was not a creation of the Code of Criminal Procedure but was a force initially established by the Police Act of 1861. The Code of Criminal Procedure only borrowed some, from amongst this force, and asked them to perform some of its functions. They had, therefore, no powers to go around doing things according to their whims or desires in the matter of administration of justice in the field of crimes. The powers enjoyed by the members of the police force were limited to the authority conferred on them by law.** And it may be added that every step which the Cr.P.C. permitted a police officer to take, was subject to scrutiny and control of some court or Magistrate. It may be of benefit to give certain examples to highlight the kind of role and duties assigned to some of the members of the Police force by the Code of Criminal Procedure."

16 to 26.....

27. **The conclusions that we draw from the above, rather lengthy discussion, on the subject of FIR are as under:**

(a) no authority vested in the officer Incharge of a police station or with any one else to refuse to record an FIR where the information conveyed, disclosed the commission of a cognizable offense.

(b),(c),(d),(e).....

(f) the check against lodging of false FIR's was not the refusal to record such FIR's, but punishment of such informants under S.182 PPC etc, which should be, if enforced, a fair deterrent against misuse of the provisions of S.154 Cr.PC. (bold added)

20. Thus, it is clear, in our view, that the concerned SHO of PS Sindhri had no lawful authority to refuse to record the statement of the petitioner or even the petitioner's brother to see whether a cognizable or non cognizable offense had been made out especially as the petitioner's case related to a different incident most probably

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attracting different sections of the PPC to the incident already narrated in Abid Ali's already recorded FIR.

21. Now that an FIR has been registered the question arises whether a second FIR can be registered. Again there is a plethora of authority on the point that a second FIR can be registered as a counter version/cross case.

22. In this regard in the case of **Ghanwa Bhutto (Supra)** the Sindh High Court allowed a 3rd FIR to be registered arising out of the same incident since there were 3 completely different versions of the alleged offense which decision was upheld by the Hon'ble Supreme Court in the case of **Wajid Ali Khan Durani (Supra)**.

23. In fact the Sindh High Court in the **Ghanwa Bhutto case (Supra)** as was upheld by the Hon'ble Supreme Court as cited by the Supreme Court in **Wajid Ali Khan Durani case (Supra)** at P.1558 held that;

> "The learned High Court after considering several cases on the subject by the superior Courts, cited in the judgment, held as under:--
>
> > "Reference to the case-law, therefore, indicates that **there is no hard and fast rule that a second F.I.R. cannot be registered in respect of a different version given by an aggrieved party of the same occurrence. If information is subsequently given to a police officer, which discloses a different offence also cognizable by the police, then unless it is a mere amplification of the first version, it must be recorded by the police.** Therefore, direction to the police to record a second F.I.R. would depend upon the circumstances of each case. If true facts in respect of an occurrence are not reflected by the first F.I.R. then refusal to record a genuine version of the same occurrence would not be justified. The question has therefore, to be examined in the light of the circumstances of a particular case."

24. In our view the present case is also distinguishable from the usual authorities on the registration of 2nd FIR's which generally relate to counter versions/cross cases arising out of the same incident. **This is because the case of the petitioner as alleged in the petition is a totally different one to the case alleged against**

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him in the FIR lodged against him by Abid Ali. The incidents appear to us to be completely different and relate to different offenses. Thus in our view since the petitioner's case is based on different facts and circumstances (and a different incident) which would most probably attract different sections of the PPC it can be regarded as a 1st FIR in a new case if the petitioner through his statement is able to make out a cognizable offense and not a second FIR in respect of the same incident.

25. In our view there are also numerous important aspects of this case which, in the interests of justice, make the taking of the petitioner's statement by the concerned SHO mandatory to see if a cognizable offense is made out which are as follows:

(a) It appears that the police are prima facie favoring one party over the other perhaps because the party for whom they registered an FIR is influential whereas the petitioner is a so called common man without any backing.

(b) That under a complaint under S.491 Cr.PC the petitioner was found by a raiding party as per its report dated 21-04-2016 in a battered, bruised and humiliated condition at PS Sindri where no roznamcha entry or mashirnama of arrest was produced on account of a lame excuse. The petitioner had also not been produced before a magistrate or other court within 24 hours of his alleged arrest as provided by law and may not have been so produced had it not been for the raid. Significantly the petitioner narrated his same story to the raid party a day after his arrest which conformed with the version of his brother who had earlier filed the application under S.491 Cr.PC which lead to the raid

(c) That the petitioner's injuries have been confirmed through medical reports which are on record.

(d) The mashirnama of arrest of the petitioner states that when the police reached the scene of the shooting both the injured person and the petitioner were still present. This

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seems hard to fathom bearing in mind that the injured person ought immediately been taken to hospital and how was it possible to capture a duly armed petitioner by the locals who had already allegedly shot one person? Surely he would not have hung around to be caught and would have made his escape just like the other accused in the incident Muhafiz Ali. Why was it also necessary to mention in the mashirnama that the some of the petitioner's hairs, eye brows and moustache were already cut? Were the police pre-empting the petitioner's case that he was beaten up and humiliated by respondent No.4 Ghalib Junejo? There is however no mention that he is in an injured state despite him being found a day later at the PS being badly beaten by the raiding party which begs the question as to who gave him such a beating? The mashirnama of arrest and recovery also appears to contradict the FIR lodged against the petitioner which states that after the shooting incident both the accused absconded on their motor cycle. The said mashirnama also contradicts the said FIR by stating the injured was present at the time of the arrest of the petitioner at Abid Jatoi's lands when according to the FIR the injured went to the hospital after the incident. These appear to us to be major discrepancies/contradictions which prima facie seem to caste doubt on the case against the petitioner as per the FIR registered against him. There also appears to be a 9 hour delay in lodging the FIR which has gone unexplained keeping in view that it is settled law that the promptitude in lodging an FIR is one of the key factors in determining the credibility and reliability of its contents. There appears to be no reason why Abid Ali waited 9 hours before registering the FIR

26.Thus, in the interests of justice and for the above mentioned reasons the impugned orders are set aside and the SHO Sindri, based on the particular facts and circumstances of this case, is directed to record the statement of the petitioner without further

delay and register it as either a cognizable offense or non cognizable offense and then proceed further strictly in accordance with law

27. In view of the above discussion this constitution petition stands disposed of in the above terms.

Hyderabad.
Dated: 19.05.2017