

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Misc. Appln. No. S— 162 of 2019

Date	Order with signature of Judge
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Priority case

1. For orders on office objection at flag 'A'
2. For hearing of main case
3. For orders on MA No.1226/2019 (S/A)

Date of hearing : 14.09.2020

Date of order : 14.09.2020

Mr. Shamsuddin Rajper Advocate for the Applicant/complainant

Mr. Rizwan Ahmed Jagirani Advocate for respondents 2 and 3

Mr. Fayyaz Ahmed A. Soomro Advocate for respondents 4 to 6

Mr. Aftab Ahmed Shar, Additional PG for the State

ORDER

AFTAB AHMED GORAR J, Through instant Criminal Miscellaneous Application u/s 561-A Cr.PC, the applicant/complainant has impugned order dated 24.01.2019 passed by learned Additional Sessions Judge, Pano Akil, whereby the application filed by the applicant/complainant for transfer of the case to the Anti-Terrorism Court for its trial, has been dismissed.

2. The facts in brief necessary for disposal of instant Criminal Miscellaneous Application are that the applicant/complainant lodged FIR on 23.02.2017 at 1420 hours in respect of the incident, which took place on 28.09.2016 at 7:00 pm (evening) with Police Station, Baiji Sharif, alleging therein that the private respondents after having formed an unlawful assembly and in prosecution of their common object have

committed *Qatl-e-Amd* of his brother Gul Hassan and maternal-uncle Akhtiar by causing them hatchet and lathi blows and then forcibly threw them under the rear wheels of Troller on the main National Highway, resultantly they were smashed and died there, they raised cries, as such the accused persons escaped away. They informed the Baiji Sharif police, who arrived there and after completing the legal formalities and police due to political influence wanted to spoil the case, therefore, he filed an application u/s 22-A(6)(i) Cr.P.C, and after getting order for registration of FIR from the Court of learned Additional Sessions Judge, Pano Akil, ultimately lodged the report.

3. The SHO Police Station Baiji Sharif on receipt of the information submitted Karwai / Report No.01/2016 under Section 174 Cr.P.C before the Court of learned Civil Judge & Judicial Magistrate-II, Pano Akil, stating therein that one Ali Gul Siyal reported the matter on 28.09.2016 that his brother Gul Hassan and Akhtiar Ahmed Siyal along with injured Nisar alias Safar Siyal were coming to Pano Akil from their village and deceased Gul Hassan was riding rashly, he tried to cross the Troller and his bike slipped and they all three persons went under the rear wheels of said troller Registration No.TID-052, resultantly Gul Hassan and Akhtiar Ahmed died and Nisar alias Safar became injured in that incident. The learned Civil Judge and Judicial Magistrate-II, Pano Akil has passed the order on the said report u/s 174 Cr.P.C, the relevant portion thereof reads as under;

“That on 31.10.2016 this karwai moved in this Court, and despite of notices Muhammad Ilyas SHO P.S Baiji Sharif who has reported this matter to this Court did not appear, today SIP Allah Wadhayo Bullo appeared and disclosed that he has conducted all the investigation of this matter on the orders of SHO and SHO Muhammad Ilyas has been transferred to Sukkur, statement of SIP Allah Wadhayo has recorded in which he stated that this unfortunate occasion has been happened due to rush and negligence drive / ride of the deceased Gul Hassan Siyal, his statement kept on record.

Heard perused the record very carefully, record reveals that the death of deceased Gul Hassan and Akhtiar Ahmed Siyal caused due to slip of their motorcycle and in its result their heads have been crushed by the wheels of troller. Therefore, in view of aforesaid facts and circumstances, this report disposed of accordingly.”

4. Thereafter on 31.01.2017, the applicant/complainant filed an application u/s 22-A(6)(i) Cr.P.C before the Court of learned Sessions Judge / Ex-Officio Justice of Peace, Sukkur, which was allowed by the Court of learned Additional Sessions Judge / Ex-Officio Justice of Peace Pano Akil, vide order dated 16.02.2017 and then got registered his FIR as stated above. On conclusion of investigation, the Investigating Officer filed report under Section 173 Cr.P.C, thereby recommended the case for its disposal under ‘C’ class before the Court of learned Civil Judge and Judicial Magistrate-II, Pano Akil by placing the names of private respondents in column No.2 of the charge-sheet, but learned Civil Judge and Judicial Magistrate-II, Pano Akil, did not concur with the opinion of the police and vide order dated 30.03.2017 took cognizance of the offence by observing as under;-

“Minute perusal of record shows that after registration of FIR investigation of this matter was

entrusted to ASI Khan Muhammad Abbasi, who conducted investigation. He recorded statements u/s 161 Cr.P.C of witnesses namely Mir Hassan and Rab Dino on 17.03.2017. Both witnesses have supported contention of complainant in their statements u/s 161 Cr.P.C, he also recorded statements u/s 161 Cr.P.C of independent witnesses who have stated otherwise, which is the defence plea of the accused and on 27.03.2017 I/O submitted final report of the above case under cancel 'C' class before this Court.

Today matter called in open Court, I have heard I/O, complainant and his counsel, Junior partner of learned counsel for the complainant argued that this is double murder case, all the accused persons are nominated in the FIR; furthermore the malafide of the police is very much clear that the SHO PS Baiji Sharif moved a Karwai of 174 Cr.P.C for the murder of two innocent persons, by showing it an accidental death. He added that SHO PS Baiji Sharif has obtained a handsome amount from the accused persons for spoiling the case of complainant, and for such reasons, the investigation officer has not investigated this matter and without any investigation, he has disposed of the case under cancel 'C' class; learned counsel further argued that this is a murder case and it is trial of Honourable Sessions Court, and this Court has to act as post office and this summary may be sent to the Court of Honourable Sessions Court.

It is matter of record those statements of witnesses recorded u/s 161 Cr.P.c and version of complainant in FIR are well corroborated to each other, in whose presence both the deceased have embraced to death. The medical evidence is also supporting to the contents of FIR and has much weight. The investigation reports also not denying un-natural death of deceased Gul Hassan and Akhtiar Siyal. It is well settled principle of law that no offence should go un-checked and no offender should go un-punished. There is sufficient evidence of offence against accused nominated in FIR.

The investigation of heinous offence conducted in haphazard manner, which indicate the poor supervision and lack of vigilance. Above all, at this stage the guilt or innocence of the accused is not required to ascertain. Therefore, from perusal of the

evidence available on record and keeping guidelines given by the Hon'ble Supreme Court's Judgment reported as PLD 1967 SC 425, and other judgment as Mansha and 7 others vs. Illaiqa Magistrate, Police Station Bahlak, District Faisalabad and 7 others (PLD 1997 Supreme Court 339) and Reference may also be made to Bahadur and another v. The State and another (PLD 1985 Supreme Court 62) and Ghulam Hussain and others v. The State (1985 P.Cr L J 2334).

In view of above discussed facts and circumstances as well as after scrutinizing and scanning the entire record, and without going to further detail as to the merits and demerits of the case, which is not required at this stage, I have reached to an unequivocal conclusion that, offence under section 302 PPC is exclusively triable by the court of Honourable Sessions Judge and sufficient material is available on record for commencement of trial against the accused persons named in FIR. After having glanced to the aforesaid story; I do not agree with the recommendation of the SHO P.S Baiji Sharif. In light of above discussion, I am satisfied that from the material placed before me that accused persons with their common object have committed the murder of deceased Gul Hassan and Akhtiar Ali within the jurisdiction of this Court, or which a prima facie case is made out for commencement of trial against the accused persons who are nominated in FIR. I hereby take the cognizance of the offence under section 147, 148, 149, 302 PPC against all accused namely each one Qurban Ali, 2. Yasin, 3. Nisar Ahmed @ Safar, 4. Ibrahim, 5. Gahi and Manzoor @ Dadan all by caste Siyal as mentioned in FIR. The SHO P.S Baiji Sharif is directed to submit the list of witnesses on prescribed Proforma within 7 days after receipt of this order, without fail."

5. After taking cognizance, the case is pending trial before the Court of learned Additional Sessions Judge, Pano Akil, the charge has been framed against the private respondents and the examination-in-chief of the complainant Ali Gul has been recorded. The applicant/complainant filed an application for transfer of the case to Anti-Terrorism Court,

which has been dismissed vide order dated 24.01.2019, which is impugned in the instant matter.

6. It is contended by learned counsel for the applicant/complainant that the private respondents have committed an offence, which created terror and sense of insecurity amongst the general public in the area, as two innocent persons were first caused lathi and hatchet blows and then threw them under the rear wheels of the trolley crossing through National Highway, resultantly, both the deceased were smashed and they died at the spot. It is further contended that the fear and sense of insecurity has been created amongst the people of the area, whereas, the police just to spoil the case of the applicant/complainant in which two innocent persons have lost their lives, has submitted the challan before the Ordinary Court of Law. In support of his contentions, he has relied upon the case of Ghulam Hussain and others vs. The State and others (**PLD 2020 Supreme Court 61**). He lastly prayed that the impugned order may be set-aside and case may be ordered to be tried by the Anti-Terrorism Court.

7. As against the above, learned counsels appearing for private respondents as well as learned Additional PG for the State prayed for dismissal of the instant Criminal Miscellaneous Application by contending that this was not the offence as narrated by the applicant/complainant in the FIR, but admittedly it was an unfortunate road accident, hence such Karwai under Section 174 Cr.P.C before

lodgment of the FIR was submitted before the learned Civil Judge & Judicial Magistrate-II Pano Akil against the present respondents and the said report u/s 174 Cr.P.C was approved and such order of the Magistrate was not challenged by the applicant/complainant. It is further contended that there was old enmity between the complainant Ali Gul and the private respondents over the matter of *karap* and number of FIRs have already been registered against each other by the parties. It is contended that though the report/karwai was disposed of by the learned Magistrate, which was not challenged by the applicant/complainant whereas, after passing sometime, the applicant/complainant filed an application u/s 22-A(6)(i) Cr.P.C and after getting order lodged the FIR in respect of the same incident. After investigation, the Investigating Officer recommended the case for its disposal under 'C' cancelled class being false one and such Summary report under Section 173 Cr.P.C was submitted before the same Magistrate, who this time did not concur with the report of the Investigating Officer and sat over his own opinion already formed in Karwai/report No.01/2016 vide order dated 19.12.2016 and took cognizance. It is contended that the learned Magistrate has passed the Summary order which was patently illegal and against the principles of natural justice, whereas, the learned Magistrate without notice to the private respondents has passed the order disagreeing with the report of the Investigating Officer. It is contended that the personal vendetta and vengeance of the applicant/complainant is involved in the matter due to long standing enmity and there is series

of FIRs registered by the applicant/complainant party against the private respondents in which they have been acquitted by the trial Courts. They lastly prayed that from the story narrated in the FIR, as well as the previous enmity existed between the parties, it does not make out an offence to be tried by the Anti-Terrorism Court, therefore, the present Criminal Miscellaneous Application is liable to be dismissed.

8. I have heard the learned counsel for the parties and perused the record as well as impugned order. The applicant/complainant has lodged the FIR, in which he has not mentioned any word, which may suggest that the private respondents have created any sort of terror and sense of insecurity amongst the general public of the area at the time of incident. The perusal of facts further reveal that the applicant/complainant has stated that the deceased Gul Hassan and Akhtiar Ali were thrown beneath the rear wheels of the Troller on the National Highway, whereas, at present only examination-in-chief of the applicant/complainant has been recorded and yet the evidence of other witnesses will come on record and it could be determined after recording the evidence of material witnesses either from the act done by the private respondents any terror or sense of insecurity has been created amongst the general public at the place of incident or not. Admittedly, there was previous enmity existed between the parties over the matter of *Karap* and series of FIRs have been registered against each other. In such situation, there is no material to suggest that the ingredients of

Section 6 of the Anti-Terrorism Act, 1997, have been attracted in the present case. It is true that two persons have been done to death in the manner as stated in the FIR, and there is nothing on record which may suggest that it was preplanned incident, which may call for its adjudication by the Court constituted under the provisions of Anti-Terrorism Act, 1997.

9. In case of ***Province of Punjab through Secretary Punjab Public Prosecution Department and another Vs. Muhammad Rafique and others (PLD 2018 SC-178)***, it has been held by the Honourable Apex Court that;

*“---S. 6 & Preamble---Cases not attracting the provisions of Anti-Terrorism Act, 1997---Scope---Personal vendetta or enmity---Preamble of the Anti-Terrorism Act, 1997 clearly indicated that the said Act was promulgated for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences---In cases of the terrorism, the mens rea should be an object to accomplish the act of terrorism and carrying out terrorist activities to overawe the state, the state institutions, the public at large, destruction of public and private properties, assaulting the law enforcing agency and even at the public at large in sectarian matters---Ultimate object and purpose of the offending act must be to terrorize the society but in ordinary crimes committed due to **personal vendetta** or enmity, such elements were always missing, so the crime committed only due to personal revenge could not be dragged into the fold of terrorism and terrorist activities”.*

10. The order dated 19.12.2016 passed by learned Civil Judge & Judicial Magistrate-II, Pano Akil on the report/Karwai No.01/2016 submitted by the SHO Police Station Baiji Sharif under Section 174, Cr.P.C

which was not challenged by the applicant/complainant, therefore, it is presumed that the report submitted by the police which was agreed upon by the learned Magistrate was true and the same has attained finality, whereas, in existence of such order how the learned Magistrate by ignoring such fact, has passed the another order of the same incident on the report u/s 173, Cr.P.C submitted by the Investigating Officer.

11. From the above discussion, it transpires that the ingredients of Section 6 of Anti-Terrorism Act, 1997 are conspicuously missing in the present case, and that being so, the alleged act cannot be considered or deemed as 'terrorism'.

12. For what has been discussed above, the impugned order dated 24.01.2019 passed by learned Additional Sessions Judge, Pano Akil, does not call for any interference which is maintained. Consequently, the instant Criminal Miscellaneous Application is dismissed along with listed application. The case-law relied upon by the learned counsel for applicant/complainant is distinguishable from the facts and circumstances of the present case.

13. Before parting with this order, it is observed that **(Mr.Aijaz Ahmed Tunio)** learned Civil Judge and Judicial Magistrate-II, Pano Akil has passed two conflicting orders in respect of the same incident, first when the Station House Officer Police Station Baiji Sharif submitted Karwai/report No.01/2016 u/s 174 Cr.P.C regarding disposal of the karwai which was accepted, whereas, in the second phase vide order dated 30.03.2017

passed on the report submitted by Investigating Officer u/s 173, Cr.P.C for disposal of the case/FIR No.18/2017 lodged by the applicant/complainant, whereby he disagreed with the report of the police for disposal of the case under 'C' cancel class. It is very astonishing to note that how the learned Magistrate has acted upon by forming two conflicting opinions in respect of same incident as stated herein above in *para* 3 and 4, such act of the Magistrate tantamount that there is lack of knowledge and inefficiency on the part of Judicial Officer, which shakes the administration of justice. Let copy of this order be sent to the Member Inspection Team-II, for taking necessary action as per Rules.

Judge

ARBROHI