Cr.Misc.Appln. Nos.83 and 173 of 2008.

Ghulam Sarwar and others. . . . . Applicants.

Versus.

IInd Civil Judge/JM Kandiaro and ors..Respondents.

1.For orders on office objection as at Flag.A.
2.For orders on MA 2188/08.
3.For Katcha peshi.

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09.04.2009. Mr.Iftikhar Ali Arain, advocate for the applicants.
Mr.Manzoor Ahmed Junejo, advocate for the Complainant.
Mr.Ali Haider Dareshani, State counsel.

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ARSHAD NOOR KHAN,J- By these applications under section 561-A, Cr.P.C, the applicants have questioned the order dated 15.5.2008 passed by the learned IInd Judicial Magistrate, Kandiaro whereby he did not approved the report under Section 173, Cr.P.C and directed the Investigating Officer to submit challan against the applicants.

The case of prosecution in brief is that on 08.09.2007 at about 8 pm complainant was present at her house where the applicants forcibly entered in her house duly armed with mousers and they brought her inside the room

where on the force of weapons, the accused Khalilur Rehman and Sarwar forcibly committed Zina with her and while escaping from there, threatened her not to inform the incident to any one else she will face the consequences. The complainant thereafter tried to lodge the FIR but did not succeed, as such under the orders of ex-officio justice of peace, the FIR was registered and after usual investigation, the Investigating Officer did not find the case against the accused. The learned counsel for the applicants has also pointed out that the second enquiry was also conducted as per the orders of this Court and in the second enquiry, the Investigating Officer did not find out the case against the accused, therefore, the report under section 173, Cr.P.C was submitted before the learned magistrate for approval but after analyzing the material, the learned magistrate did not concur with the report for disposal of the FIR in 'C' Class and directed the Investigating Officer to submit challan against the applicants; hence the present application.

I have heard Mr.Iftikhar Ali Arain, learned counsel for the applicants, Mr.Manzoor Ahmed Junejo, learned counsel for the complainant and Mr.Ali Haider Dareshani, learned State counsel.

The learned counsel for the applicants vehemently contended that there was no sufficient evidence available on record to connect the applicants in the present crime and the learned magistrate did not record the evidence of any other witness and on shaky and contradictory evidence, the learned magistrate directed to submit the challan against the applicants, which is illegal and the order passed by the magistrate be set aside.

The learned counsel for the complainant opposed the submission advanced by the learned counsel for the applicants and has contended that the specific allegation of Zina has been leveled against the applicants and the version of the applicants, has been supported by the witnesses, the names of whom, have been mentioned in the FIR, as such the Investigating Officer submitted a vague report before the magistrate for disposal of the case in 'C' Class and the learned magistrate rightly disbelieved the same and directed him to submit challan.

The learned state counsel contended that, in case if the evidence is shaky and not supporting the version of complainant, it is incumbent upon the applicants to move before the concerned trial Court either under Section 249-A, Cr.P.C or under Section 265-K, Cr.P.C for their acquittal instead of challenging order passed by the magistrate on the report submitted under Section 173, Cr.P.C.

I have considered the arguments advanced on behalf of the parties and have gone through the material available before me.

In the FIR the complainant has made definite and specific assertions of committing Zina with her on the force of weapons by the applicants and while they were decamping from there PWs Khadim Hussain, Ashraf and Younis Lohar had also reached there and identified them. According to the learned State counsel, the statements of Khadim Hussain and Ashraf are fully supporting the version of the complainant. They both appears to be independent and natural witnesses of the occurrence while applicants were decamping from there to

whom, they identified, which support the version of the complainant contained in the FIR. The medical evidence no doubt has not supported the version of the complainant but one may not loose the sight that the complainant is married woman and FIR has been registered after so many days from the date of incident under the orders of the Court and naturally after the registration of FIR, her medical examination would be in negative for the reasons of inordinate delay in registration of FIR, which occurred on the part of police officials. Had the police officials been promptly registered the FIR, the position might had been different. The version of the learned counsel for the applicant also did not find favour at this stage that there is enmity in between the parties because of agricultural land, which she want to grab from the applicants. The arguments may be attractive but for such view of the matter, a lady could not come forward to stake her modesty just for recovery of possession of certain acres of the land. Even otherwise, such point also requires evidence before the trial Court. The Investigating Officer seems to have not been investigated the matter properly rather they have opined wrongly while submitting report under Section 173, Cr.P.C and the magistrate is not duty bound to accept the report of the Investigating Officer by closing his eyes from the evidence collected by the Investigating Officer during the course of investigation and it is well within the powers of the magistrate to examine the whole material available on record before acceptance of the report of the Investigating Officer under Section 173, Cr.P.C for disposal of the FIR in 'B' or 'C' Class.

For all the aforesaid reasons and circumstances, I do not find any illegality or infirmity in the order

passed by the learned magistrate, who correctly appraised the material available before him while directing the Investigating Officer to submit the challan. The applications merit no consideration, and, are therefore, dismissed alongwith listed application.

JUDGE

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Approved for reporting.