

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

C.P. No.D-974 of 2017

PRESENT

*Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi.*

Date of Hearing: 26.03.2018

Date of Order: 26.03.2018

*Petitioner: Nasrullah s/o Allah Jurio Bugo
Through Mr. Muhammad Akbar
Mughal, Advocate*

Respondents/accused:

- (i) Raza Muhammad s/o Allahdino.*
- (ii) Nabi Bux s/o Azizullah.*
- (iii) Rasool Bux @ Karo s/o Asadullah.*
- (iv) Abdul Waheed s/o Abdullah.*
- (v) Mumtaz s/o Ahsan.*
- (vi) Iqbal s/o Kashif Hussain.*

*Through Mr. Khadim Hussain Soomro,
Advocate.*

*The State: Through Syed Meeral Shah Bukhari,
D.P.G. Sindh.*

ORDER

NAIMATULLAH PHULPOTO, J:- Through the instant Constitutional Petition petitioner / complainant Nasrullah has called in question the order dated 20.03.2017, passed by Civil Judge & Judicial Magistrate Daulatpur, in Crime No.118 of 2016, registered at Police Station Daulatpur under sections 324, 337-F(iii), 147, 148 PPC, whereby report submitted by the Investigation Officer in the

aforesaid crime under section 173 Cr.P.C. in 'C' class was approved.

2. Brief facts of the prosecution case are that complainant cultivates his land. Incident took place at 8-00 p.m. on 19.09.2016. Complainant was present in his lands. It is alleged that accused Raza Muhammad and others appeared there. It is further alleged that there was an old dispute between the complainant and Raza Muhammad and others. Complainant has further stated that his brother P.W. Sanaullah was also present at the lands. Eight accused persons namely Raza Muhammad son of Allahdino armed with pistol, Nabi Bux s/o Azizullah, Rasool Bux alias Karo s/o Asadullah, Abdul Waheed s/o Abdullah, Mumtaz s/o Ahsan and Iqbal s/o Kashif Hussain armed with lathis appeared there. They were identified on the torch light. As soon as accused appeared it is alleged that Raza Muhammad challenged to the complainant and fired upon him with intention to kill and fire hit to the complainant at his right leg and he fell down. It is alleged that remaining accused caused lathi injuries to P.W. Sanaullah which hit him at his fingers and other parts of the body. Complainant raised cries which attracted his brother Asadullah and his father Allah Jurio. Complainant had clearly seen the accused. Accused while seeing the other P.Ws went running while abusing to the complainant party. Complainant and his brother were brought in the injured condition to Police Post Shahpur Jahania from there both injured were referred to the Civil Hospital Nawabshah for treatment. It appears that on the orders of the 1st Additional Sessions Judge Shaheed Benazirabad F.I.R. was recorded at Police Station

Daulatpur vide crime No.118 of 2016 under section 324, 147, 148, 337-F(iii) PPC. Investigation was conducted. On the conclusion of the investigation I.O. recommended disposal of the case in 'C' class. Such summary was submitted by him before 1st Civil Judge & Judicial Magistrate, Daulatpur. Learned Magistrate agreed with the Investigation Officer and approved the report in 'C' class. Hence this constitutional petition is filed by petitioner Nasrullah challenging the aforesaid orders.

3. Learned Advocate for petitioner has mainly contended that petitioner/complainant Nasrullah and P.W Sanaullah had sustained the injuries and ocular evidence is supported by the medical evidence. He has further submitted that accused attacked upon the complainant party due to previous enmity. Lastly it is submitted that opinion of the Investigation Officer was not binding upon the Magistrate but Magistrate without application of the mind concurred with the opinion of the Investigation Officer.

4. Mr. Khadim Hussain Soomro, Advocate appearing on behalf of the respondents/accused contended that there was inordinate delay in lodging of the F.I.R. There was old enmity between the parties. It is also contended that there was no material against accused to connect them in the commission of the offence. Judicial Magistrate has rightly agreed with the opinion of the Investigation Officer.

5. Syed Meeral Shah Bukhari, A.P.G. supported the impugned order.

6. We have carefully heard the learned counsel for the parties and perused the relevant record.

7. Relevant portion of the impugned order dated 20.03.2017 is reproduced as under:-

***“Heard I/O, counsels for both sides and perused the material available on record. It appears that complainant and P.W. Sanaullah was suffered injuries; which alleged to be caused by accused persons and this regard medical certificates are also produced. But it is matter of record that PW Sanaullah caused injuries by hard and blunt substance, so he may be caused by any other accident and the complainant by exaggerating the facts implicates accused persons. F.I.R. hs been lodged with delay of three months from date of incident and order of Hon’ble Addl. Session Judge which also creates doubt in prudent mind in respect of false implication of accused persons. The complainant party are accused in murder case initiated from F.I.R. No.92 of 2014, U/S 302 PPC of P.S. DaulatPur, which lodged by accused persons and the instant F.I.R. is counterblast to earlier F.I.R. and lodged only to pressurize the accused persons for making compromise in murder case. An old enmity existed between the parties which is also admitted by the complainant into F.I.R. There is no material evidence which proves that alleged injuries are caused by accused persons.*”**

Under the circumstances and in view of aforesaid reasons, I am of humble view that there is no sufficient/tangible/material evidence available on record in support of complainant/prosecution’s allegations against the accused persons to implicate them and even if cognizance is taken no positive result would be achieved. I.O. has rightly suggested for disposal of the instant case / crime in “C” Class, hence I agree with the investigation carried by the

I.O. and hereby approved the instant report in “C” Class. Let the original police papers and the copy of this order be sent to concerned SHO for information and necessary compliance.”

8. No doubt Magistrate is empowered under section 173 Cr.P.C. to examine the material collected by the Investigation Officer during investigation but Magistrate is not bound to rely upon the opinion of the Investigation Officer without application of judicial mind. Magistrate can take cognizance of an offence even in case of negative report submitted by police as held by Honourable Supreme Court in the case of SAFDAR ALI v. ZAFAR IQBAL [2002 SCMR 63] as under:-

“6. A bare perusal of the said order would reveal that entire record has been examined including the statements of complainant; prosecution witnesses and F.I.R. and thus, it can be inferred safely that the same has not been passed in a mechanical manner or arbitrarily. It may not be out of place to mention here that learned Ilaqa Magistrate was not supposed to pass an exhaustive order for the simple reason that he was not deciding the case at all and, therefore, it was not obligatory for him to dilate upon each and every aspect of the matter which falls within the jurisdictional domain of learned trial Court. 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. In this regard reference can be made to case titled Waqarul Haq v State

(1988 SCMR 1428). Malik Rabnawaz Noon learned Advocate Supreme Court could not mention any provision in Cr.P.C. in support of his contention that evidence should have been recorded prior to summoning the respondents whose names were admittedly placed in column No.2 of the challan. In this regard we are fortified by the dictum as laid down in case titled Falak Sher v. State (PLD 1967 SC 425) which has been followed in various judgments passed by this Court and relevant portion whereof is reproduced hereinbelow for ready reference:--

"In our opinion, the action of the Magistrate in issuing summons to these appellants despite the fact that the Investigating Officer in his report under section 173, Cr.P.C. placed their names in column No.2, was clearly correct. Section 173, Cr.P.C. is in these terms:--

"173(1). Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the Officer Incharge of the police station shall--.

- (a) forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and
 - (b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.
- (2) Where a superior officer of police has been appointed under section 158, the report shall, in

any cases in which the Provincial Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the Officer Incharge of the police station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4)

Under subsection (1), when the investigation is completed the police officer is required to forward to the Magistrate a report in the prescribed form. Under subsection (3) when it appears from the report forwarded under section 1, that the accused has been released on his bond 'the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit". It is clear that under section 3 a Magistrate may agree or may not agree with the police report. It, however, does not say what step the Magistrate should take if he disagrees with the police report. If the Magistrate wants to start a proceedings against the accused, he must act under section 190 of the Code of Criminal Procedure.

Section 190 provides that a Magistrate may take cognizance of any offence (a) upon a complaint (b) upon a police report, or (c) upon information received by himself.

Now, the question is, if he disagrees with the report, can he take action under clause (b) against those whose names have been placed under column 2 of the challan. As already pointed out, the Magistrate is not bound by the report submitted by the police under section 173. When the said report is received by the Magistrate, the Magistrate on the report itself may not agree with the conclusions reached by the Investigating Officer. There is nothing in section 190 to prevent a Magistrate from taking cognizance of the case under clause (b) in spite of the police report. This Court in the case of Sardar Ali and others v. The State P.S.L.A. No.66 of 1966, while dealing with a similar question, observed:--

Reference to section .173, Cr.P.C., which prescribes the details that must go into a police report of the relevant kind shows that the requirements are of a factual nature, so that, irrespective of the Investigating Officer's opinion, a Magistrate takes cognizance on a police report, when he proceeds against a person whose name is mentioned

therein as one accused of the offence reported upon."

In conclusion, we may observe that this has been the consistent view of the High Court of West Pakistan and that Court has correctly interpreted the meaning and scope of sections 173 and 190 of the Code of Criminal Procedure in Muhammad Nawaz Khan v. Noor Muhammad and others (PLD 1967 Lah. 176)."

A similar proposition was discussed in case titled Muhammad Akbar v. State (1972 SCMR 335) as under:--

"Even on the first report alleged to have been submitted under section 173, Cr.P.C., the Magistrate could, irrespective of the opinion of the Investigating Officer to the contrary, take cognizance, if upon the materials before him he found that a prima facie case was made out against the accused persons. After all the police is not the final arbiter of a complaint lodged with it. It is the Court that finally determine upon the police report whether it should take cognizance or not in accordance with the provisions of section 190 (1) (b) of the Code of Criminal Procedure. The view finds support from a decision of this Court in the case of Falak Sher v. State (PLD 1967 SC 425). "

9. Under section 4(i) Cr.P.C. Investigation is meant collection of evidence helping to form an opinion by the Investigation Officer for submission of final report. Investigation Officer has no authority to decide the guilt or innocence of accused but in this case Investigation Officer recommended the disposal of the case in 'C' class without legal justification Civil Judge & Judicial Magistrate in his order has mentioned that there was delay in lodging of the F.I.R. and there is old enmity between the parties. These findings recorded by the Magistrate on the summary orders were unwarranted in the law. It is only the prerogative of Court to give finding regarding guilt or innocence of accused. Under the law

Magistrate should not follow the summary report as a routine matter but he should keep in mind that Investigating Agency has no authority to decide the guilt or innocence of the accused. Prima facie ocular evidence is corroborated by medical evidence there is sufficient material on record to connect the accused in the commission of the offence. Impugned order passed by the Civil Judge & Judicial Magistrate is not sustainable under the law and requires interference by this Court.

10. Considering the above facts and circumstances instant constitutional petition is allowed. Concerned Civil Judge & Judicial Magistrate shall take cognizance of offence and proceed further in the matter in accordance with law.

JUDGE

JUDGE

A.