

IN THE HIGH COURT OF SINDH AT KARACHI

CR. MISC. APPLICATION NO.23/2018

Date Order with signature of Judge

1. For hearing of case.
2. For hearing of MA No.1592/2018.

21.05.2018

Mr. Aamir Mansoob Qureshi advocate for applicant.
Mr. Abrar Ali Khichi, APG.

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ORDER

SALAHUDDIN PANHWAR, J. This criminal miscellaneous application assails order dated 09.02.2018 passed by XXVIIIth Civil & Judicial Magistrate, Karachi East on submission of final charge sheet under section 173 Cr.P.C. in Crime No.2/2018, u/s 324/34 PPC, PS New Town, Karachi.

2. Brief facts of the case are that complainant Muhammad Arif S/o Shah Rehman lodged FIR stating that on 04.01.2018 about 06:15 p.m. he was on his duty at main gate of Irum Plaza meanwhile two vehicles, one of golden color with Qatar number plat and second vehicle was of black color bearing number plate of AFR 2017, both vehicles with tinted glasses, were parked in front of gate due to which passerby were facing problems, Complainant requested them to park their vehicles in parking area, but armed men in civil dresses said that you don't know whose vehicles are these, we are Abu Bakar Balouch's men and these vehicles will not be moved, upon which hot words were exchanged and one armed man whom I can identify hit me from his gun on my head and injured me. People converged, President of union Irum Plaza Akram Khan Kohati came to talk to these people upon which these men said to Akram Khan Kohati that if you do not leave, you all will be killed; they opened fire, one guard was getting

instructions by mobile. Then both the guards fired around 50 bullets and ran away on Golden Vehicle bearing Qatri Number plate. Thereafter, the three injured persons\ victims Complainant himself and Akram S/o Zareen Khan and Justin Manzoor were brought to the hospital for medical treatment as all sustained bullet injuries. Subsequently. After recording of the statement of the complainant under section 154 Cr.P.C. the instant case was registered. From the place of occurrence fired arm empties and blood dust particles were seized.

3. In addition, the investigation was entrusted to SIP Saleem Khan who inspected the place of occurrence and also captured the photographs of the place of occurrence. In the meanwhile, alleged accused persons namely (1) Salman s/o Abdul Baqi and (2) Meer Ali S/o Salman were arrested under section 54 Cr.P.C. and one riffle 223 bore alongwith 20 rounds were recovered from the possession of accused Salman. A separate case was registered against the accused persons vide FIR No.3/18 under section 23(i)A. The I.O. deposited the recovered riffle and empties for examination of ESL. Likewise, the blood dust (earth) particles were also deposited in the office of chemical examiner.

4. The Investigation Officer formed his opinion that alleged accused Abu Bakar Baloch is not involved in this matter as he was at office of Metro Channel during the intervening time of occurrence. However, through impugned order learned Magistrate disagreed with *opinion* of the investigating officer rather found the case, involving application of Section 6 of the ATA, therefore, returned the charge sheet alongwith R & Ps to investigation Officer with direction to submit the same before the competent court (*ATA Court*), having jurisdiction.

5. The learned counsel for the applicant has argued that the alleged offence did not create any panic, terror and insecurity amongst the people, sense of fear and insecurity in the minds of people therefore, the learned Magistrate committed serious illegality while passing the impugned order thereby returning the charge sheet for its submission before the ATA Court. He added that case was lodged as an *ordinary* crime and there came no evidence justifying application of Section 6 of the ATA therefore, impugned order is not tenable. He also added that learned Magistrate was also not justified in disagreeing with placement of names of accused in *column-II*. In the last, he prayed for setting aside of the impugned order and direction for acceptance of charge sheet, as it was presented.

6. On the other hand, the learned APG stoutly challenged the maintainability of the instant petition and supported the *impugned* order.

7. I have heard both the respective counsels and have also examined the available material *carefully*.

The question, appearing from peculiar facts, is that:

“Whether an order by an *ordinary* Magistrate returning charge sheet (challan) for its submission before a *Special Court* could be assailed by way of inherent jurisdiction of this Court under section 561-A Cr.P.C ?”

At the very outset, I would say that while dealing with a report under section 173 Cr.PC the Magistrate can *competently* agree with police report as well can *disagree* therewith. In other words, the Magistrate can competently take cognizance onto police report or even can order cancellation thereof under clauses (a) to (c). Such act *however* does not prejudice the rights of complainant party to file a complaint even in case of disposal of case under

(b) or (c) classes. Such view is based on famous case of Bahadur & another (PLD 1985 SC 62) wherein it is held as:

“Though a magistrate in cancelling or registered criminal, case is required to act judicially in that he has to act fairly, justly, and honestly, duty common to the exercise of all state power, there is no lis before him, there is no cability attaching to the order. The parties is left free to institute a complaint on the same faces, and the same Magistrate even after passing such an order render himself functus officio. **On the contrary he is quite competent to entertain and deal with such a complaint on material presented to him.** These peculiarities establish beyond any doubt that in so concurring with a report submitted under section 173 Cr.PC he does not function as a criminal court. For that reason his order is not amenable to revisional jurisdiction under Section 435 to 439 Cr.PC and 439ed or complaint thereof”.

I would also add that *ipsi dixit* of the police is never of any binding effect upon the Magistrate rather he (*Magistrate*) is always believed to act fairly and *judiciously* even while taking cognizance or ordering for disposal of case under ‘(a) to (c) classes. Reference may be made to the case of Syed Paryal Shah v Behram Ali & 3 others (2012 P Cr. LJ 189) wherein it is held as:-

“6. There is no cavil to this proposition that the report under section 173 Cr.PC is not binding upon the court which is well-settled now and the Hon’ble Supreme Court also held supra that the Magistrate can take cognizance even in case of negative report. Such report is not binding upon the court and the court can take the cognizance and summon the accused to face the trial. **At the same time it is also indispensable and imperative that the order passed by the Magistrate should be judicious and not an arbitrary order without reasons and justifications. The Magistrate is required to consider the report under section 173 Cr.PC in the light of the material collected during investigation and then pass an order. In my view also the power conferred upon the Magistrate though administrative in nature yet that has to be just and judicious and while passing the order and showing disagreement to the report submitted by the I.O under section 173 Cr.PC entire material collected during the investigation should be considered with raison d’etre as to why the learned Magistrate is not inclined to accept the report.**”

An order passed on a police report in administrative capacity i.e taking cognizance or disposal of case can well be challenged / questioned by resorting to inherent jurisdiction of this Court subject to *criterion*, so set for such purpose.

8. In the instant matter, *prima facie*, the Magistrate has neither taken the cognizance onto the matter nor has ordered for cancellation of the case crime but has *simply* come of the view that facts of case involves application of section 6 of the ATA which is to be tried by a '**Special Court**' hence has *only* returned the papers (charge sheet) back to investigating officer (police) for its presentation before competent court (ATA Court), having jurisdiction.

9. At this *juncture*, before going any further, it is necessary to make it clear here that there can be no *denial* to the legal position that status of a Judge of an Anti-Terrorism Court, per Section 19(6) of the Act, is that of a '**Magistrate**' and he exercises all *powers* of a Magisterial Court during course of *investigation* except that of 'recording 164 Cr.PC statement (s) and holding *identification parade*'. The Judge of the Court takes *cognizance* directly on the police report which *act* shall always be believed to be an *independent* act. Thus, I would say that whenever a police report is *directly* presented before an *ordinary* Magistrate or before *Special Judge* (ATA court, as in the instant matter), the following proposition (s), being by *now* settled, shall be kept in view by either Court (s) while dealing with a directly presented *police report* i.e:

- i) Magistrate has to consider the police report and investigated material, attached therewith;
- ii) *ipsi dixit* of police is not binding upon Magistrate;
- iii) Magistrate has *discretion* to agree or not to agree with police report;
- iv) Magistrate has to pass an *independent* order whereby he can *competently* take cognizance or even can *competently* decline;

At this juncture it would be pertinent to add here that competence *squarely* lies with a *Special Court* to find the case to be one of being tried by it (taking cognizance) or otherwise, therefore, such view would be binding upon an *ordinary* magisterial court only to extent of question of *jurisdiction*. However, an *ordinary* Magistrate on a police report, directly submitted before it (*Magistrate*), even if comes to view that case requires to be tried by *Special Court* yet such opinion, in no way, shall be of any binding effect upon the *Special Court* (ATA Court, as in the instant matter) which (*Special Court*) would be at *liberty* to decide question of taking cognizance or otherwise without being influenced from order / view of *ordinary*.

10. Now, the above criterion for dealing with a police report, on its return by ordinary magistrate or Special Court, would stand include this as well:-

Special Court

View / opinion of ordinary magistrate on a police report regarding an ordinary offence to effect of it to be tried by special court would not be of any binding effect;

Ordinary Magistrate

View / opinion of Special Court on a police report regarding special /schedule offence, to effect of its being tried by an ordinary court would be binding upon such ordinary magisterial court who (ordinary magistrate) would not examine such aspect while exercising jurisdiction under section 190 Cr.PC"

Now, I would resume the discussion from the point, it was *paused*. Since from above discussion, it should be no more ambiguous that return of the charge sheet to investigating officer for its presentation before the *Special Court* would neither mean '*taking of cognizance*' nor would it mean '*disposal of the case*' rather has left things opened for the Special Court either to agree with the *view* of the ordinary magistrate or to competently

disagree therewith. Till such time, the investigating officer presents such charge sheet before the Special Court for an *independent* view with regard to jurisdiction *legally* it cannot be said that question of *jurisdiction* has been determined by the competent *foray* rather it would be *safe* in concluding that such question is yet to be determined.

11. Further, that even on taking cognizance by a Special Court, the Act *itself* provides to question such act of *taking cognizance* by filing an application under section 23 of the Act which reads as:

“23. Power to transfer cases to regular Courts. – Where, after taking cognizance of an offence, (Anti-Terrorism Court) is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.”

Since, such order of the *magistrate* legally has no binding effect/force hence a challenge thereto would not be available by way of *inherent jurisdiction* of this court which *legally* is meant to secure the ends of justice so as to seek redressal of a grievance for which no other procedure is available. Reliance may safely be placed on the case of *Asfandyar and another v. Kamran & another* 2016 SCMR 2084 wherein it is held as:-

“The remedy under section 561-A Cr.PC is not an alternate or substitute for an express remedy as provided under the law in terms of sections 435 to 439 Cr.PC. Jurisdiction under section 561-A Cr.PC is neither alternative nor additional in its nature and is to be rarely invoked only to secure the end of justice so as to seek redress of grievance for which no other procedure is available.”

Thus, suffice to say that till the report is not presented before the Special Court there would be no *grievance* for either accused or prosecution because question of *jurisdiction* could be said to have *legally* been decided once the competent Special Court does so and not by a mere view of an *ordinary*

Magistrate, particularly when it is of no binding effect upon such Special Court.

12. In consequence of what emerges from above legal discussion, the answer to above *framed* proposition would be nothing but a big 'NO'.

Accordingly, I find no substance in the instant petition rather the same, being *pre-mature*, merits dismissal and is dismissed, as such.

However, while parting, I would add that a question of *jurisdiction* is always to be decided *first* therefore, when a *magistrate* is of the view that such question is involved in a matter before it then it would always be advisable not to make any view with regard to accused persons, placed in column-II or *otherwise* and let this remain wide opened for the proper and competent *Special Court* to decide.

13. Needless to add that the Special Court while dealing with police report shall *independently* determine the question of jurisdiction but keeping in view the *latest* criterion, so chalked out by Apex Court with regard to application of section 6 of the Act.

14. Learned MIT shall circulate this order to all the learned Magistrates and learned Presiding Officers of Special Court in whole Province.

JUDGE