

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.192 of 2017

Present: **Mr. Justice Nazar Akbar**

Applicant : Mohsin Abbas S/O Abdul Rehman
Through Mr. Rasheed Ashraf, Advocate.

Versus

Respondent No.1 : Qadir Khan Mandokhail. (Nemo).
Respondent No.2 : Muhammad Arshad Butt. (Nemo).
Respondent No.3 : SSP (Investigation-I)
Respondent No.4 : DSP Admin (Investigation-I)
Respondent No.5 : SIO, PS Boat Basin, Karachi
Respondent No.6 : Learned Judicial Magistrate No.XXII
Respondent No.7 : The State,
Through Ms. Seema Zaidi, D.P.G.

Date of Hearing : **07.03.2019**

Date of Decision : **12.04.2019**

JUDGMENT

NAZAR AKBAR, J.- Applicant has preferred this Criminal Revision Application against the order dated **10.10.2017** whereby learned XXII-Judicial Magistrate, South Karachi under **Section 203** of the **Cr.P.C** has been pleased to dismiss Criminal Case No.NIL/2017 filed by the applicant/ complainant under **Section 200** of the **Cr.P.C.**

2. To be very precise, the facts of the case are that the applicant/ complainant filed Criminal Complaint under Section 200 of the Cr,P.C against respondents No.1 and 2 stating therein that the accused No.1 and 2 with their common intention issued threats of kidnaping, murder and extracting money from applicant/

complainant during the period between 2012 to 2015 for which applicant/ complainant has registered an FIR No.488/2015 at P.S Clifton, Karachi. The police recommended to dispose of said FIR in “A” class on the ground that phone in which intimidating messages and calls were allegedly received was not produced by the applicant/ complainant for FSL analysis from expert. CDR of phone of accused/respondent No.1 was obtained by the police in which his contact with complainant was not proved, therefore by order dated **05.01.2016** the case was disposed of in “A” class. Thereafter the applicant/complainant on being dissatisfied by the inquiry/ investigation conducted by the police filed the instant criminal complainant under Section 200 of the Cr.P.C in the Court of Respondent No.6. On **30.08.2017** the learned Magistrate passed an order to ascertain truthfulness or falsehood of allegations leveled in the complaint through SSP Investigation-I, South Karachi, who pursuant to said order issued a letter directing SIO Boat Basin to conduct an enquiry. The SHO issued letter to the applicant/ complainant but he refused to participate and cooperate with the I.O by his endorsement dated **25.09.2017**. Therefore, the trial Court has passed the impugned order.

3. I have heard learned counsel for the Applicant as well as learned DPG for the State and perused the record.

4. Learned counsel for the applicant contended that the impugned order is suffering from non-reading and misreading of the evidence/record. He further contended that the enquiry officer has not conducted the enquiry afresh as mandatory under Section 202 of the Cr.P.C. He argued that the applicant has not refused to provide his cell phone for FSL analysis from expert and it was wrongly

mentioned in the impugned order, therefore, the impugned order is liable to be set aside.

5. Conversely, learned DPG has supported the impugned order and contended that the trial Court has rightly been passed the impugned order.

6. The perusal of record shows that both the counsel have failed to address the Court on the question of filing of this revision under **Section 439** of the **Cr.P.C** before this Court as the remedy against the impugned order passed by the Court of Judicial Magistrate-XXII South, Karachi was revision before the learned District & Sessions Judge. The impugned order has been passed by Magistrate, South Karachi under **Section 203** of the **Cr.P.C** whereby direct complaint has been dismissed. The impugned order cannot be termed an order of acquittal since the case has not been registered against the private respondents, therefore, revision should have been filed before the District & Sessions Judge and not before this Court. The District & Sessions Judge has an exclusive jurisdiction to call for record of inferior criminal Courts within the local limits of it on an application by the aggrieved party whereas under **Section 439** of the **Cr.P.C**, the High Court may exercise powers of **appellate Court** and that too in the case in which the proceeding has been called by the **High Court itself** and not on an application of an aggrieved party. To appreciate the difference, both the **Sections 435** and **439** of the **Cr.P.C** are reproduced below.

435. Power to call for records of inferior Courts. (1) *The High Court or any Sessions Judge * * * * may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety*

of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court ²[and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

[Explanation. *All Magistrates shall be deemed to be inferior to the Sessions Judge for the purpose of this sub-section.]*

439. High Court's powers of revision. *(1) In the case of any proceeding **the record of which has been called for by itself * * * or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections, 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.***

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

Subsections 3 to 6 of Section 439 of the Cr.P.C are not relevant for the issue in hand, therefore, it has not been reproduced.

7. The perusal of above quoted law shows that the High Court's powers of Revision under **Section 439** of the **Cr.P.C** are exclusive and altogether different. The explanation attached with **Section 435** of the **Cr.P.C** explicitly mention that **all Magistrates shall be deemed to be inferior to the Sessions Judge for the purpose of this Section**. Therefore, an aggrieved party against the order of a Magistrate has to bring his/her grievance first before the Court of Sessions Judge. I am also conscious of the use of word "**The High Court**" in **Section 435** of the **Cr.P.C**. In my humble view, too, it does confer concurrent jurisdiction on the High Court and the Sessions Court to call for record of any proceeding before any inferior criminal

Court. But such concurrent power does not mean that an aggrieved party despite being aggrieved by an order passed by the Magistrate, who **shall be deemed to be inferior to the Sessions Judge for the purpose of sub-section 1 of Section 435 of the Cr.P.C** can directly approach the High Court as an option available to him/her. There is difference between the authority which “may” be exercised by the Court itself to call for and examine the record of any proceeding before any inferior Court and a challenge by any party to an order passed by an inferior Court adversely affecting his right. The use of term “inferior Court” and then explanation declaring “All Magistrates shall be deemed to be inferior to the Sessions Judge” clearly refer to the hierarchy of judiciary. If we look at the **schedule-II** showing TABULAR STATEMENT OF OFFENCES in Code of Criminal Procedure, we find in column 8 that there are several offence which are triable by the courts of Sessions Judge or Magistrate of the First Class. In all such cases when offences are triable by both the Sessions Judge or the Magistrate, the challan is always submitted before the Magistrate on the principle that the case is to be instituted in the court of lowest grade competent to try it. The aggrieved party merely on the ground that High Court has concurrent jurisdiction is not supposed to directly approach the High Court for two reasons; firstly, the rule of propriety is that if a case is triable by two Courts it should be filed/instituted in the Court of lowest grade competent to try the same. Secondly, an order passed by the District and Sessions Judge under **Section 435** of the Cr.P.C in Revision can be examined by the High Court in its inherent powers under **Section 561-A** of the **Cr.P.C**. In case of direct Revision before the High Court against an order by a Magistrate, the remedy against the order would be before the Hon'ble Supreme Court. In case the Revision is not filed before

the District and Sessions Judge against the order passed by the Magistrate which is inferior criminal Court to the Sessions Judge, the other side shall be aggrieved not only by adverse order but the other side would lose a forum of appeal/Revision before approaching the Hon'ble Supreme Court. Therefore, it may even violate the principle of fair trial under **Article 10-A** of the Constitution of Islamic Republic of Pakistan. In the case in hand since order has been passed under **Section 203** of the **Cr.P.C** whereby direct complaint has been dismissed by the Court of Judicial Magistrate without framing a charge and trial, it cannot be treated as acquittal of the accused/ Respondents No.1 and 2. At this stage the order under **Section 203** of the Cr.P.C being an order passed by a Court inferior to the Court of Sessions Judge, the propriety demands it should first be examined by the Sessions Judge for the purpose of satisfying itself to the correctness, legality or propriety of the said order passed by the Magistrate who is covered by the explanation given at the bottom of **Section 435** of the **Cr.P.C**. Therefore, even the office should have raised an objection on the question of maintainability of this Criminal Revision before this Court without exhausting the remedy available to the applicant.

8. In view of the above facts and also for the reason that there is no limitation for filing Criminal Revision application against the order of Magistrate before District & Sessions Judge and particularly in this very case since the office of the High Court has not raised any objection, therefore, the office is directed to send the proceedings to the District & Sessions Judge (South) Karachi for a just and fair decision on the grievance of the applicant against Respondent No.1 and 2. However, since a considerable time has already been

consumed here, the learned District & Sessions Judge on receiving this CrI. Revision application shall decide the same expeditiously.

9. This Cr. Revision Application is disposed of and the office is directed to keep record/photocopies of this proceedings.

JUDGE

Karachi

Dated: 12.04.2019

Ayaz Gul