

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

Cr. Misc. Application. No. S-766 of 2018

Khalid Hussain & others Applicants

V/s

Asif Iqbal & Others Respondents

Date of hearing:-08.03.2019

Mr. Muhammad Jamil Ahmed advocate for the applicants.
Mr. Mazhar Ali Laghari advocate for the respondent No.1.
Mr. Shahid Ahmed Shaikh, Deputy Prosecutor General Sindh.

ORDER

ADNAN-UL-KARIM MEMON,J- Basically, the Applicants are aggrieved by the order dated 08.10.2018 passed by learned Civil Judge & Judicial Magistrate-III, Sanghar, on Report submitted by Station House Officer/ Investigating Officer under Section 173 Cr.P.C. in Crime No.58 of 2018 registered at Police Station Mangli, whereby he has taken cognizance of offences under section 342, 337-V, 377-A(i), 337-F(i), 147, 148 and 149 PPC registered against Applicants No.1 to 4, who were not sent up for trial by the Investigating Officer and their names were placed in Column No.II of the report, besides he took cognizance of offence under Section 365-A PPC against Applicants No.5, 6 and 7, which powers of law was neither mentioned in the F.I.R nor applied by the Investigating Officer in his final report. The learned 1st Additional Sessions Judge, Sanghar vide order dated 10.11.2018 dismissed the Revision Application No.21 of 2018 of the Applicants on the premise that the Administrative order of Magistrate is not amenable to revisional jurisdiction under section 435 & 439-A Cr.P.C. The Applicants being aggrieved by and dissatisfied with the aforesaid orders have filed the instant Criminal Miscellaneous Application on 13.11.2018.

2. Mr. Muhammad Jamil Ahmed learned counsel for the Applicants contended that the order of learned Magistrate is beyond the scope of Section 190 Cr.P.C thus is liable to be set-aside. Counsel further contended that after registration of FIR, the investigating officer started investigation and submitted report under Section 173 Cr.P.C by placing the names of Applicants No.1 to 4 in column No.II. As per report of Investigating Officer (I.O) no incident as alleged in the F.I.R had taken place, therefore, report of I.O was based upon facts and circumstances which were ignored by learned trial Court while passing the order dated 08.10.2018. Counsel further contended that learned trial Court has passed the impugned order without applying its judicial mind and the same is defective one which is liable to be set-aside.

3. In rebuttal, learned Deputy Prosecutor General, Sindh assisted by learned counsel for respondent No.1 contended that the above named Applicants are nominated in the crime with specific role of offences under Sections 342, 337-V, 377, 377-A(i), F(i), 148 and 149 PPC. He further contended that I.O has submitted interim report under Section 173 Cr.P.C before Judicial Magistrate III, Sanghar, who erroneously added Section 365-A PPC that may be deleted on the premise that the ingredients of offence under section 365-A are not made out and no material in this respect was collected during the course of investigation. However, learned Judicial Magistrate by his order dated 08.10.2018 accepted interim report and has rightly held that prima facie a case is made out against all accused persons including those whose names have been placed in column II of the charge sheet, which is without exception and does not call for any interference by this court.

4. I have heard learned counsel for the Applicants, DPG for the State as well as learned counsel for the respondent No.1 and perused the material placed on record.

5. The principal question which arises for determination in the instant Criminal Miscellaneous Application is whether the learned Magistrate by virtue of powers conferred upon him under the Code of Criminal Procedure (Cr.P.C.) is empowered to add or delete sections of PPC in the charge sheet or take cognizance of the offence(s) and order for registration of case, after the same was submitted by the police on completion of investigation based upon first information report (F.I.R) registered under Section 154 Cr.P.C.

6. In order to resolve the controversy in its true perspective, it may be relevant to give the background of case as stated in the FIR. In the FIR it has been stated by the complainant that he is zamindar; on 17.9.2018 accused Khalid Hussain Jat, Muhammad Ishaque Chandio, Muhammad Ashraf Malak and Muhammad Afzal Jat came in black colour car and took away his brother Muhammad Irfan Jat, and after severe maltreatment and violence committed sodomy and left him at Jamali Chowki from where the passersby took him to civil hospital and after taking letter from police his treatment was started. Such FIR was registered under Section, 342, 337-V, 377, 377(a) (i), F (i), 148 and 149 PPC against accused person accordingly.

7. From, the pleadings of the parties and arguments extended thereon, the following pivotal Questions arise in the present proceedings;-

- i) Whether from the ingredients of F.I.R an offence under section 365-A PPC is made out or not?
- ii) Whether the learned Magistrate has rightly taken cognizance of the offence under section 365-A PPC?

8. I have noticed that Judicial Magistrate has been conferred with wide powers to take cognizance of an offence not only when he receives information about the commission of offence from a third person but also where he has knowledge or even suspicion that the offence has been committed.

9. Elaborating further on the aforesaid proposition, in my view there is no embargo on the powers of the Magistrate to entertain a private complaint as envisaged under section 4(h) Cr.P.C. and when on receiving complaint the Magistrate applies his mind for the purpose of proceeding under Section 200 Cr.P.C. (Examination of complainant) and the succeeding sections in the Cr.P.C., the Magistrate is said to have taken cognizance of the offence within the meaning of Section 190 of the Cr.P.C (Cognizance of offences by Magistrates); that the Magistrate can even take cognizance of the offence on information received by a 3rd party and thus there are no fetter or embargo on the powers of the Magistrate when he thinks it proper to include more sections on the basis of private complaint lodged for conducting the trial of the accused and it is open to the Magistrate to take cognizance of the offence under Section 190 (1) (c) Cr.P.C on the ground that after having due regard to the Final report under section 173 Cr.P.C (Report of police-officer) and the police records placed before him if he has reason to suspect that an offence has been committed, it is open to the Magistrate to take cognizance of the offence under Section 190 (1) (c) Cr.P.C.

10. While analyzing the controversy raised in the present Application, it is obvious that the entire dispute revolves around the procedural dispute. It appears that there is distinction between a case lodged by way of private complaint before the Magistrate commonly referred to as complaint case under Section 190 Cr.P.C. and a case registered on the basis of a first information report (F.I.R) under Section 154 of the Cr.P.C. before the police. The learned Magistrate has clearly overlooked the aforesaid distinction in the procedure.

11. In the present scenario it is necessary to have a look at Section 190(1) of the Cr.P.C. which contains the provision for cognizance of offences by the Magistrate and it provides three ways by which such cognizance can be taken which are reproduced hereunder:-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) upon a police report in writing of such facts—that is, facts constituting the offence—made by any police officer;

(c) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed.

12. An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a private complaint of facts which constitutes such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again when a Magistrate takes cognizance of any offence, upon a police report in writing of such facts made by any police officer it is a case instituted in the Magistrate's court on a police report (F.I.R). The scheme underlying Cr.P.C. clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to the court.

13. The instant matter arises out of a case which is based on a police report as the FIR was lodged at Police Station Mangli under Section 154 Cr.P.C. and, therefore, the investigation was conducted by the police authorities in terms of procedure prescribed in the Cr.P.C. and thereafter report was submitted. At this stage, the Judicial Magistrate after submission of report appears to have taken cognizance for the aforesaid offences by adding Section 365-A PPC and registered a case against the Applicants, completely missing that if it was a complaint case lodged by the complainant before the Magistrate under Section 190 (a) of the Cr.P.C., obviously the Magistrate had full authority and jurisdiction to conduct enquiry into the matter and if at any stage of enquiry, the Magistrate

thinks it appropriate that other additional sections also were fit to be included, he would not be precluded from adding them after which the process of cognizance would be taken by the Magistrate and then the matter would be committed for trial before the appropriate Court. But it was obligatory for him to have a glance whether the ingredients of the offence under section 365-A PPC were made out or not before taking cognizance, which factor is missed by him for the reasons best known to him.

14. Crux of the above discussion is that if a case is registered by the police based on the FIR registered at Police Station under Section 154 Cr.P.C. and not by way of private complaint under Section 190 (a) of the Cr.P.C. before the Magistrate, obviously the magisterial enquiry cannot be held in regard to the FIR which had been registered as it is the investigating agency of the police which alone is legally entitled to conduct the investigation and, thereafter, submit report under section 173 Cr.P.C. or charge sheet under Section 170 Cr.P.C , unless of course a complaint before the Magistrate is also lodged where the procedure prescribed for complaint cases would be applicable. It is further clarified that in a police case, however after submission of the report, the matter goes to the Magistrate for forming an opinion as to whether it is fit case for taking cognizance and committing the matter for trial in a case which is lodged before the police by way of FIR and the Magistrate cannot exclude or include any section of PPC into the charge-sheet or take cognizance of the offence other than triable by him, after investigation has been completed and charge-sheet has been submitted by the police, however it is made clear that if he is not satisfied with the investigation report, he can order for further investigation on that aspect of the case, which the prosecution has left or if he finds sufficient material to take direct cognizance of the matter.

15. In the light of forgoing, My view is that the Magistrate in a case which is based on a police report cannot add or subtract sections of PPC at the time of

taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 221 of the Cr.P.C (Charge to state offence) or under section 227 of the Cr.P.C (Court may alter charge) as the case may be which means that after submission of the charge-sheet it will be open for the prosecution to contend before the trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections of PPC which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section of PPC can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the charge-sheet or Investigation Report. The Cr.P.C. has clearly engrafted the two channels defining the powers of the Magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation and there is absolutely no ambiguity in regard to these procedures.

16. The instant case is based on the FIR, the correct stage for addition or subtraction of Sections of PPC will have to be determined at the time of framing of charge. But the learned Magistrate in the impugned order has not assigned reasons for adding section 365-A PPC and has made a casual opinion. The basic ingredients of the offence under section 365-A PPC are missing and he had no powers under the law to add such sections without material. My view is supported by the decision rendered by the Honourable Supreme Court in the case of Muhammad Ajmal and others v. The State and others (2018 SCMR 141) the Honourable Supreme Court has held at paragraphs 21 & 22 as under:-

“It may also be pointed out that the successor Additional Sessions Judge while passing the impugned order dated 23.4.2015 has fallen

into patent error, holding that the earlier judgment of the Additional Sessions Judge, Bahawalpur has not debarred the Magistrate to add section of law i.e. section 302 PPC because the then Additional Sessions Judge had rightly held that the Magistrate may exercise powers after holding the trial and recording evidence. The mode and manner adopted by the Magistrate examining the senior medical officer on the point of cause of death of the deceased, is completely alien to the Law of Evidence and Code of Criminal Procedure.”

17. As a consequence of aforesaid analysis, I do not approve the order of learned Magistrate who permitted addition of Section 365-A PPC in the case. I, therefore, dispose of this Criminal Miscellaneous Application by observing and clarifying the order of the learned Magistrate to the extent that the learned trial Court shall be at liberty to raise all questions relating to additions of the Sections on the basis of FIR and material collected during investigation at the time of framing of charge by the Trial Court.

18. In the light of the above, the impugned order dated 08.10.2018 is set aside to the extent of addition of section 365-A PPC.

19. These are the reasons of my short order dated 8.3.2019.

JUDGE