PRESENTED
30-3-2012
REGISTRAR

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr.Misc.Application No. 160 of 2012

Shah Muhammad S/O Nabi Bakhsh, by caste Bharo, R/O Village Sawiri, Khambhra, Taluka Ubauro, District Ghotki.....Applicant/ Complainant

VERSUS

1) SHO/Incharge Investigating Officer, Police Station Khambhra, District Ghotki.

2) Orangzaib S/O Muhiyuddin.

3) Muhammad Aslam S/O Muhiyuddin.

4) Azam S/O Muhiyuddin.

5) Karam Ali S/O Jam Badal.

All four by caste Indhar, R/O near Bhung, Taluka Sadiqabad, District Rahimyar Khan.

6) Allah Wafayo S/O Mehar Indhar, R/O Village Badaruddin Indhar, Taluka Ubauro, District Ghotki.

7) Sawali S/O Ahmed Indhar, R/O Village Dadan Indhar, Taluka Ubauro, District Ghotki.

8) The IInd Civil Judge and Judicial Magistrate, Ubauro, District Ghotki.

9) Dr.Liaquat Ali Bhutto, Senior Medical Officer, Taluka Hospital Ubauro, District Ghotki.

10) ASI Bakhshan Khan Dahar, P.S. Khambhra.

11) The State.....Respondents

SEAL OF THE HIGH COURT OF SINDH

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Crime No.354 of 2011. U/S 302. 452. 147. 148. 149. 337-H(ii), A(i), L(ii) PPC. Police Station Khambhra.

APPLICATION UNDER SECTION 561-A Cr.P.C.

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Cr. Misc. A. No. S-160 of 2012

Date	Order with signature of Judge

For hearing of main case

Date of hearing 27.04.2018
Date of Order 01.06.2018

Mr. Abdul Baqi Jan Kakar Advocate for applicant
Mr. Shamsuddin Kobhar Advocate for respondents
Mr. Sardar Ali Shah Rizvi DPG

IRSHAD ALI SHAH J; The applicant by way of instant Cr. Misc. Application u/s 561-A Cr.PC has impugned an order dated 31.01.2012 of Learned 2nd Civil Judge & Judicial Magistrate Ubauro, whereby he has accepted the report of the police for disposal of FIR Crime No.354/2011 u/s 302, 452, 337-H2, 337-A(i)1 337-L(i), 147, 148, 149 PPC of PS Ubauro under "B" class.

2. The facts in brief necessary for disposal of instant Cr. Misc. Application are that applicant Shah Muhammad lodged an FIR with PS Ubauro alleging therein that the private respondents after having formed an unlawful assembly and in prosecution of their common object being armed with deadly weapons by committing trespass in his house committed death of his father Nabi Bux by causing him butt injuries then made aerial firing to create harassment and tehn went away after causing injuries to Mst. Nazul, Mst. Zahooran, Mst. Izat, Mst. Begi, Mst. Sawai, Mst. Ameeran, Mst. Allah Rakhi and Ali Hassan. On conclusion of investigation, police submitted its report before learned trial Magistrate for cancellation of said FIR under "B" class. It was cancelled accordingly by learned trial Magistrate by way of impugned order, as stated above.

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3. It is contended by Learned counsel for applicant that Learned Magistrate ought not to have accepted the police report for cancellation of FIR of the applicant under "B" class as it was based, on dishonest investigation. By contending so, he sought for reversal of impugned order with direction to learned Trial Magistrate to take cognizance of the offence in accordance with law. In support of his contention he relied upon case of **Bakhsh Ali vs. The State**, which is reported at **2013 YLR 1948**, 2. Case of **Safdar Ali vs. Zafar Iqbal and others**, which is reported at **2002 SCMR 63**, 3. Case of **Hayatullah Khan and another vs. Muhammad Khan and others**, which is reported at **2011 SCMR 1354** and 4. Case of **Luqman Ali vs. Hazaro and another**, which is reported at **2010 SCMR 611**.

4. Learned counsel for the private respondents has sought for dismissal of instant Cr. Misc. Application by contending that there was dispute between parties over possession of the house, deceased Nabi Bux was old and infirm person, he died of his ailment and the applicant in order to settle his dispute with private respondents involved them in false case which was rightly recommended to be cancelled by the police. In support of his contention he relied upon case of **Muhammad Sharif and 8 others vs. The State**, which is reported at **1997 SCMR 304**, 2. Case of **Mst. Amna Bibi vs. The State & 5 others**, which is reported at **2008 P.Cr. L J 956**, 3. Case of **Syeda Afshan vs. Syed Farukh Ali & 3 others**, which is reported at **PLD 2013 Sindh 423** and 4. Case of **Nazimuddin vs. 2nd Civil Judge and 7 others**, which is reported at **2017 P.Cr.LJ Note 26**.

5. Learned DPG has supported the impugned order.

6. I have considered the above arguments and perused the record.

7. What perusal of the impugned order has made me to say is that every Magistrate must always keep in mind that the criterion for examining the

material for taking cognizance or otherwise is not the similar to that evaluation of evidence. In former, the *prima facie* commission of **offence** is se while in later the *guilt or innocence* of **sent up** accused is determined. In forme should never be examined with reference to **benefit of doubt** nor a *dee* analysis is permissible while in *later* there is no *limitation* in diving deep an every single *reasonable* doubt is sufficient for acquittal. Such difference is fo simple reason that an act of taking cognizance is only indicative of fact that the Court thinks it better to determine the question of *guilt* or *innocence* after trial. Such exercise is always to be made independently without being influenced with police opinion as the same is *legally* of no legal consequences. It does not declare one guilty nor causes any prejudice to status of an accused as **innocent** which he enjoys till determination after trial. In the case of ***Hakim Ali v. The State, which is reported at*** **PLD 2006 Karachi 302** it was held that:

> 'In view of the afore-cited decision of the Honourable Supreme Court, it would be seen that the Magistrate while exercising jurisdiction under section 190 of the Cr.P.C does so in an administrative capacity and does not function in a judicial one since he is only to apply his mind to the material present before him and thereafter decide whether he should take cognizance or not. If he decides to do so in a case triable by him then he should pass a speaking order after a fair assessment of such materials and then proceed to try the case himself. If he accepts the police report or otherwise discharge the accused where he does not agree with the same. Similarly he should send the case to the Sessions Court if it is a Session case upon acceptance of the police report and again discharge the accused if he does not agree with the same. However, it is to be noted that the exercise to be conducted by the Magistrate under section 190 Cr.PC is not a judicial one, as held by the Honourable Supreme court in Hussain Ahmed vs. Irshad Bibi (supra), **he cannot determine the guilt or innocence of the accused** but only has to assess the evidence on the record in a **summary fashion** and thereafter make up his mind whether or not to discharge the accused'

8. The Magistrate may competently order for disposal of the case under any of the classes i.e **class-A to C,** but such view must not be result of any deep analysis of fact nor effects of law. In the case of ***Muhammad Ahmed v. The State, which is reported at*** **2010 SCMR 660** it stood clarified that;

> "It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused

> persons was the exclusive domain of only the Courts of law established for the purpose and the sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such like impressions of the Investigating Officers to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an accused person could be let off or acquitted only because the Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt. It may be added that the provisions of sections 155, 156, 157 and 174 of the Criminal Procedure Code permit a police officer only to investigate a case. 'Investigation' stands defined by the provisions of section 4(1)(l) of the said Code in the following terms:-
>
> "investigation includes all the proceedings under this Code for the Collection of Evidence conducted by a police officer....(emphasis and underlining has been supplied)

9. This then clearly indicates that the job of the Investigating Officer is only to collect evidence and to place the same before the competent Court of law. Therefore, whatever expertise, if at all, could be claimed by an Investigating Officer, would be vis-à-vis his field of operation, namely, collection of evidence. In the last hundred years since the Code of Criminal Procedure had been in existence in its present form, not once had it been authoritatively declared that an Investigating Officer was an expert in the matter of determining the guilt or innocence of accused persons whose opinion was admissible for the purpose, under the law of evidence. The prohibition contained in section 161, Cr.P.C. and in section 172 of Cr.PC regarding in-admissibility of the statements recorded by an Investigating Officer under the said section (161) or the case diaries prepared by him under the said section (172), would further clarify the said proposition. Reference may also be made to case of **Haji Muhammad Hanif v. The State**, which is reported at **PLD 1991 Lahore 214**, wherein it is held that;

> 38. We are also pained to notice that the learned trial Judge had also, persistently, allowed 'Hearsay' evidence to come on record which again shows ignorance of the said learned trial judge of the legal provisions regulating the subject and the lack of control of the learned Presiding Officer over the proceedings being conducted by him.

10. While reverting to merits of the case, it is made clear that mere delay in lodgment of the FIR has never been taken as **fatal** or sufficient enough for determining the fate of **offence (allegation).** It (delay) does demand an explanation which *too* to see whether prosecution has derived any undue

advantage through delay or otherwise?. Reliance in that respect, if needed can be placed upon case of ***Muhammad Nadeem alias Deemi v. The Stat, which is reported at*** **2011 SCMR 872** wherein it is observed as:-

> 6. So far as the F.I.R is concerned, it was, no doubt, delayed by 17 hours; yet seen in the light of attending circumstances of the case, the delay stands explained. **It is an established principle of law and practice that in criminal cases the delay, by itself, in lodging the F.I.R. is not material.** The factors to be considered by the Courts are firstly that such delay stands reasonably explained and secondly, that the prosecution has not derived any undue advantage through the delay involved. ..

11. In the instant case, the allegation was of trespass and assault in consequence whereof not only deceased Nabi Bux but eight more person (male and female) allegedly had received injuries. It is a matter of record that deceased Nabi Bux was found sustaining two injuries on his person which were found by the Medical Officer to be ***ante-mortem*** in nature. However, according to Medical Officer the said deceased died of "hepatic coma" in consequence of "cirrhotic liver failure". There has been nothing in post mortem report of the said deceased or in record which may suggest that said two injuries to the said deceased were self-suffered or self inflicted. It may also be added here that an act or omission which in ordinary course is not likely to result in death but if does will be an offence.

12. Further, the learned Magistrate in the impugned order while referring to injuries on persons of the injured females had observed that;

> "The learned counsel for the accused person submitted statement along with news papers of the day of incident in which news was published about the incident in News paper Daily KAWISH Hyderabad dated 4.10.2011 which contains that the police of PS Khambra raided the house of complainant party and during that raid deceased Nabi Bux Bharo was expired due to shock and police also caused lathi blows to the women of complainant party. This news was further corroborate by another news paper daily KOSHISH Hyderabad dated 4.10.2011. Both the news published in newspapers were not challenged rather confirmed by police and even by the complainant. The learned counsel for the complainant and complainant is present in this court and they have stated that they have not challenged the same news which was published in the news papers."

13. Strange, how the learned Magistrate can give weight to a news clipping over direct evidence, when it is also established by now that a news clipping has got no legal value unless the author thereof is examined. In the case of ***Asfandyar & another v. Kamran & another, which is reported at*** **2016 SCMR 2084** it is observed that;

> *"No doubt the trial Court, under section 164 of the Order, 1984, may allow to produce the said footage of C.C.T.V but it is incumbent upon the defence to prove the same in accordance with the provisions of the Order, 1984. The defence had ample opportunity to produce in his defence, the concerned person who had prepared the said footage from the C.C.T.V system in order to prove the same. In that eventuality, the adverse party would be given an opportunity to cross-examine the said witness regarding the genuineness or otherwise of the said document. Any document brought on record could not be treated as proved until the same is proved strictly in accordance with the provisions contained in the Order, 1984. While discussing these aspects of the case, the High Court restricted the admissibility only to the extent of Article 79 of the order, 1984 whereas there are certain other provisions / Articles in the Order, 1984 for proving the documents which are procured through the modern devices and techniques. Mere producing any footage of C.C.T.V as a piece of evidence in the Court is not sufficient to be relied upon unless and until the same is proved to be genuine. In order to prove the genuineness of such footage it is incumbent upon the defence or prosecution to examine the person who prepared such footage from the C.C.T.V system.*

14. Thus, it is clear that it was never a case which could have been disposed under **B-class.** It is reaffirmed that cognizance is taken against an **offence** and not necessarily against a **particular person.** Thus, normally a case of like nature would not warrant its disposal under **B-class** because injuries sustained by injured allegedly during course of incident were sufficient to indicate happening of the **offence** tentatively. It is also added that even after lodgment of FIR and after taking of cognizance, the right to file a direct complaint does not come to an end, if the complainant feels and justifies so. Availability of such *course* would never be an excuse for a Magistrate to perform his duty under section 190 of the Code within settled parameters as well as commandments of the law.

15. In cases of ***Mst. Amna Bibi (supra)***, 2) **Syeda Afshan (supra)** and 3) **Nazimuddin (supra)**, which were relied upon by the learned counsel for the private respondents, matters were one of deficiency of evidence therefore,

sending up of the accused for trial was found not advisable. In case of ***Muhammad Sharif (supra)*** the facts were somewhat different. It was the case of elopement of sui-juris male and female. Order of the Magistrate discharging accused was quashed by Hon'able Lahore High Court on the basis of production of Nikahnama. In that context the order of the Hon'able Lahore High Court was reversed by Hon'able Supreme Court of Pakistan by making an observation that the High Court was misled and has fallen in error to interfere with the order of the police investigation before submission of challan. The instant case is not of elopement of the female with the male and nothing has been brought before this Court by either of the party which may be said to be an act on their part to mislead this Court.

16. In consequence to what has been discussed above, it is concluded safely that the impugned order is not sustainable at law, same *prima facie* appears to be result of considering / appreciating things in a manner which *legally* cannot be permitted to be considered / appreciated at the time of exercising jurisdiction under section 190 of the Criminal Procedure Code. Accordingly, it (impugned order) is set-aside. The matter is remanded back to learned Magistrate with direction to pass fresh and *appropriate* order as per law after hearing all the concerned.

17. The instant Cr. Misc. Application is disposed of in the above terms.

Sd/-1/6
IRSHAD ALI SHAH,
JUDGE.

SEAL OF THE HIGH COURT

CERTIFIED TO BE TRUE COPY

TYPED BY

Rafi

COMPARED BY

READ BY

01/10/18

ASSISTANT REGISTRAR.