

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

Present:-

**Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Abdul Mobin Lakho.**

C.P. No.D-2038 of 2016

Mohammad Hashim & others

Versus

Province of Sindh & others

**For date of hearing
& order**

: 19.01.2022

Mr. Wazeer Hussain Khoso, advocate for petitioners
Mr. Hakim Ali Sheikh, Addl: A.G Sindh
Mr. Ali Haider Saleem, Addl. P.G. Sindh

ORDER

Muhammad Iqbal Kalhoro, J:- Against petitioners an FIR Crime No.53/2016, u/s 506/2, 324, 447, 504, 114, 34 PPC, was lodged at Police Station Mehar, District Dadu by one Sarfraz Ahmed, claiming to be Clerk/Munchi of Advocate Ali Anwar Sahar on 17.03.2016 alleging that about a month ago, he along with two witnesses namely Nisar and Hammad by caste Sahar went to agriculture land of his senior/advocate bearing Survey Nos.506 and 593 in the morning, where petitioners, who are father and sons *inter se* were present. He asked them about reason of their presence over there, which infuriated them and on the instigation of petitioners, Muhammad Hashim, his son Abdul Razzaq Shaikh armed with a pistol fired upon him but it did not hit him. Thereafter petitioner Abdul Ghaffar armed with a lathi/club caused a blow to a witness.

2. This FIR was registered only after an application u/s 22-A and B Cr.P.C before the learned Sessions Judge & Justice of Peace Dadu was allowed. Neither the date and time of the incident is mentioned nor name of the witness, who had received a lathi blow or the locale of the injury is disclosed. After FIR, the investigation was undertaken by the Investigating officer, he found no evidence, hence, recommended disposal of the case under 'B' class. When such report was submitted before the Magistrate concerned, he passed the impugned order dated 01.04.2016 declining the recommendation, taking cognizance of the offence, and issuing BWs

against the petitioners on the ground that report was not binding on the Court and version of the complainant was supported by the PWs.

3. Learned defence counsel has argued that petitioners are highly educated people. Petitioner No.1 Muhammad Hashim (since expired) was 78 year old age at the time of incident was suffering from dementia and was bedridden. Petitioner No.2 is also a Medical Officer and was posted at Kidney Centre, Karachi at the relevant time. Petitioner No.3 is Engineer by profession and was posted as such in Sui Southern Gas Company (SSGC), Hyderabad. None of the petitioner was present at the spot and no such evidence was found against them. In fact, petitioner No.1 Muhammad Hashim had purchased some agriculture land in late 70s from father of Advocate Ali Anwar Sahar, which he subsequently sold out to some other party. But since from that land bypass road for Mehar City was constructed, the price of land soared up manifolds, which fuelled Ali Anwar Sahar to file a civil suit against the petitioners seeking declaration and possession of the said land. But when he failed to achieve any result, he started threatening the petitioners to book them in frivolous cases. Subsequently, since his civil suit was apparently not maintainable, he withdrew it himself and has not filed any fresh suit against the petitioners since. Learned Magistrate in the impugned order has not given any reason to disagree with recommendation and as to what material prompted him to take cognizance of the offence. As no medical evidence of the blow received by PW Hammad was available nor any weapon was recovered from the petitioners no any empty from the place of incident to support story of FIR or to establish allegations leveled against the petitioners even *prima facie*.

4. Learned Additional A.G Sindh and learned Additional P.G. Sindh both have not supported the impugned order citing above facts and grounds.

5. We have considered submissions of the parties and perused material available on record. In the impugned order learned Magistrate has not given any reason for disagreeing with the report of the I.O. disposing of the case, or referred to material affecting his opinion in favour of taking cognizance of the offence. There is no cavil to the proposition that in respect of a negative report of investigation by I.O., the Magistrate has power to disagree with him and take cognizance of the offence. But in order to

justify the same, the Magistrate has to give reasons and refer to the material, which he thinks, is contrary to the report submitted by the I.O. and warranting, therefore, cognizance of the offence. While disagree with the negative report, he is required to base his opinion on evidence pointing out to the material dislodging *prima facie* view of the I.O. But in the case no exercise of the kind has been undertaken by learned Magistrate.

6. Further, neither the medical evidence was available, nor recovery of any weapon from petitioners or empty from the place of incident was effected to support the story and convince the Magistrate to take cognizance of the offence. Presence of the complainant and witnesses at the spot at 10:30 a.m. was also not without a suspicion as neither he nor witnesses have given any reason for their visit to the land not belonging to them or how they happened to know name of petitioners. The witnesses are said to be by caste Sahar and relative of the senior/Advocate of the complainant. The complainant did not report the matter to the police within time and through an application before learned Justice of Peace, he brought the incident in the notice of the police, but only after one month of the incident without even disclosing the name of witness, who received a lathi blow. The delay in reporting the matter and story narrated in FIR raises suspicion over authenticity of the story. It is also surprising to see that although no one was present to call the petitioners out, yet they did not repeat fire upon the complainant is yet another element inducing doubt into story and secondly the very applicability of Section 324 PPC into such facts and circumstances becomes questionable. The cases with a dent in the story as visible as one cited hereinabove are not likely to end in conviction of the accused. Filing of a civil suit by senior of the complainant against the petitioners over the land purchased from his father in the 70's also speaks volume about motive behind FIR and calls into question very authenticity of entire episode. Since in the investigation, no material has been collected to justify taking cognizance of the offence and no reason has been given by learned Magistrate to disagree with the report of the I.O., the impugned order is not sustainable in law and is set aside. Consequently, we accept the report.

7. However learned Additional A.G. Sindh and learned Additional P.G. Sindh both have submitted that the case may be disposed of under 'C' class

and not 'B' class as it will otherwise result into proceeding u/s 182 Cr. P.C. against the complainant. We, see no reason to decline their request when it has not been opposed by the learned defence counsel. Accordingly this petition is allowed. The impugned order dated 01.04.2016 is set aside and the case is disposed of under 'C' class.

Petition stands disposed of in above terms.

JUDGE

JUDGE

Rafiq/P.A.