

ORDER SHEET
**IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD**

Criminal Miscellaneous Application No.S-244 of 2021

Applicant: Gul Muhammad through Mr. Aijaz A. Awan, Advocate.

Respondents No.1to5: Through Mr. Ashfaque Ahmed Solangi, Advocate.

Respondents No.6&7: The State through Ms. Sana Memon, Assistant Prosecutor General Sindh.

Date of hearing: 11.02.2022.

Date of order: 18.03.2022.

ORDER

Omar Sial, J.: On 29.06.2020, Gul Muhammad registered FIR No. 26 of 2020 at the Chachar police station for the murder of his sister Waziran. In the FIR, Gul Muhammad alleged that it was (i) Ali Buksh, (ii) Karim Buksh and (iii) Ghulam Qadir who were responsible for the murder of Waziran. While the investigation was ongoing the investigating officer submitted an interim report under section 173 Cr.P.C. on 17.07.2020 against the three accused named above. This interim report was accepted by the learned Magistrate who ordered that the case be registered and an offence under section 302 P.P.C. being triable exclusively by the Court of Session, the R&Ps be sent there for further proceedings. The final report under section 173 Cr.P.C. was delayed and therefore, on 24.12.2020 the interim report was treated as a final report and the R & P(s) of the case were sent to the Court of Session. The learned Sessions Judge sent the case to the learned Additional Sessions Judge for its disposal according to law. The learned Additional Sessions Judge on 09.01.2021 set aside the Order of the learned Magistrate passed on 24.12.2020 (in which he had treated the interim report as the final report) and returned the R&P(s) to the learned Magistrate for passing a fresh order. The learned Magistrate however did not pass a fresh order on the ground that the police papers were not available. Hence, on 19.01.2021 the R&P(s) of the case was sent back to the

learned Sessions Judge. Once again on 27.01.2021, the learned Additional Sessions Judge sent back the R&P(s) to the learned Magistrate. On 24.02.2021, the investigating officer submitted a final report which showed that apart from the three accused namely Ali Bukhsh, Karim Bukhsh and Ghulam Qadir, five other persons namely (i) Manzoor, (ii) Manthar, (iii) Idrees, (iv) Abdul Hakeem and (v) Rasheedan were also shown as accused on bail.

2. The five additional accused had been included in the case after further investigation had been conducted and on the basis of statements under sections 162 Cr.P.C. of the prosecution witnesses who had earlier recorded their section 161 Cr.P.C statements. The learned Magistrate through his Order dated 24.02.2021 was of the view that the section 162 Cr.P.C statements had been recorded with a delay and that they were improvements on what those witnesses had recorded earlier. Therefore, the complainant party had attempted to loop in more people due to their *"ill will and to achieve nefarious designs through illegal and foul means."* He was also of the view that the subsequent statements recorded by the prosecution witnesses were *"based upon malafide intention and ulterior motives on the part of the complainant party."* The learned Magistrate therefore took cognizance only against Ali Bukhsh Karim Bukhsh and Ghulam Qadir. While the remaining five accused(s) were released. As all five were on bail, their bail bonds were cancelled and sureties discharged. The R&P(s) were then sent to the learned Additional Sessions Judge. It is this Order dated 24.02.2021 which has been impugned in these proceedings.

3. The learned counsel for the applicant/complainant submitted that the learned Magistrate erred by ordering the release of the five accused as an offence under section 302 P.P.C. was triable exclusively by the Court of Session and therefore, the learned Magistrate after having received the section 173 Cr.P.C. report was required to forward the same to the Court of Session without discussing any evidence and hence, the impugned order to the extent of releasing the five accused(s) was *coram non judice*. He further argued that the learned Magistrate was not empowered to decline taking cognizance against some of the accused while denying it in respect of others. The learned Assistant



Prosecutor General also supported the argument for the learned counsel for the applicant.

4. The learned counsel for the five accused person(s) who had been released argued that the five had rightly been released as they were not involved in the murder of Waziran. He, however, did not address the legal aspect whether the learned Magistrate was empowered to release some of the accused while taking cognizance against others in a case which was admittedly triable exclusively by the Court of Sessions.

5. I have heard the learned counsels and the learned A.P.G. My observations and findings are as follows:


A magistrate is empowered by section 190 Cr.P.C. To take cognizance of any offence triable by him or by a Court of Session. However, this section further elaborates that a Magistrate taking cognizance of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial. In the present case as there is a charge of murder, the offence has to be tried by a Court of Session (column 8 of schedule II Cr.P.C.). While taking cognizance, a magistrate takes cognizance of the offence committed and not of particular persons. He takes cognizance of the case as a whole not only against some of the accused found by the police to be involved in the commission of the offence complained of. Reference may also be made to *Khushbakhtur Rehman vs The State* (1985 SCMR 1314), *Mehar Khan vs Yaqub Khan* (1981 SCMR 267), *Muhammad Nasir Cheema vs Mazhar Jawed* (PLD 2007 SC 31), *Naseer and others vs Khuda Baksh and others* (2011 SCMR 1430). An investigating agency cannot be directed to submit a report in a particular manner, for any particular offence not for others or against particular persons. In the case in hand, the investigating agency after a thorough investigation by a senior officer had concluded that eight persons were found involved in the murder reported. In my view it was not open to the learned Magistrate to analyze the evidence which the police had gathered, to give his opinion on it and reach a conclusion that the five additional accused should not be included in the case and that they should be discharged. It was not appropriate for the learned Magistrate to also make the observations which he did on the evidence gathered by the police. He should have sent up the challan to the Court of Session that would have shown that the five additional accused were on bail. It was then open to the parties

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to pursue the various legal remedies available to them if they thought that the charge against them was groundless or that there was no possibility of a conviction.

6. In view of the above the impugned order is modified to the extent that the learned Magistrate shall forward the challan with the names of the five additional accused to the learned Court of Session who will then proceed in accordance with law.

Criminal miscellaneous application stands disposed of in the above terms.

 18/3/22

JUDGE