

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Miscellaneous Application No.S-243 of 2021

DATE

ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order

17.10.2022

Mr. Aijaz Hussain Jatoi, advocate for applicant
Mr. Mashooque Ali Mahar, advocate for private respondents
Mr. Shahid Ahmed Shaikh, Additional P.G Sindh

ORDER

The applicant has called in question the order dated 22.04.2021, whereby the learned Magistrate deleted sub-section (A) of Section 354 PPC from the FIR bearing No.05 of 2021 on the premise that no offense under section Section 354-A PPC was made out from the report submitted by the Investigating Officer.

2. The case of applicant is that on account of family dispute respondent/accused party being annoyed attacked upon the complainant party caused them injuries; such FIR No.04 of 2021 was lodged at P.S Chachar. After registration of FIR, the accused party again entered the house of complainant tore the clothes of her mother; therefore, another FIR No.05 of 2021 was lodged under Section 148, 149, 506(2), 354(A), 337-A(ii) & F-(i) PPC at PS Chachar. After registration of subsequent FIR I.O carried out the investigation and submitted report under Section 173 Cr. P.C before the Magistrate concerned, who passed the impugned order dated 22.04.2021 deleting sub-section(A) of Section 354 PPC.

3. Mr. Aijaz Hussain Jatoi learned counsel for the applicant/complainant argued that Section 354-A PPC is exclusively triable by the Court of Sessions and learned Magistrate was only required to forward the same to the competent Court without recording any findings; that learned Magistrate without jurisdiction deleted sub-section A of Section 354 PPC. He prayed for setting aside the impugned order to the extent of deletion of sub-section A of Section 354 PPC; that learned trial court was / is not competent even to require the police to submit report under Section 173 Cr.P.C. in a particular manner and order for adding and deleting Sections of PPC; that the trial court is neither bound by the opinion of police regarding applicability of penal provision and at the time of indicting the accused it is bound to go through the entire record, apply its judicial mind and frame charge against him for all those offenses which appear to be made out from the evidence collected by the police; that under Section 227 Cr.P.C. the court is competent to amend the charge at any time before judgment is pronounced and before that no power lies with the trial court to delete and add the section of PPC

in charge sheet; that after submission of report under Section 173 Cr.P.C./Challan the Magistrate taking cognizance of the offense or the court taking cognizance of the case can take cognizance of any offense disclosed by the material available on record of investigation even if the police have not invoked the relevant penal provision. Even at the time of framing of charge, the trial court can frame charge in respect of an offense disclosed by the record even if the same finds no mention in the report submitted under Section 173 Cr.P.C./Challan. With so many opportunities being available with the Magistrate and the trial Court regarding rectification of mistake, deliberate or otherwise, committed by the police in this connection it would be unwise for the Magistrate to interfere with such a matter at an inappropriate and premature stage.

4. Mr. Mashooque Ali Mahar learned counsel for private respondents/accused argued that the story is concocted by the complainant just to harass and pressurize the accused party to bow before their illegal demands; that admittedly there is family litigation between the parties, as such complainant party is lodging false FIRs against the accused party just to keep them under pressure; that the story narrated in FIR is false so also the ingredients of sub-section A of Section 354 PPC are missing; that the courts are obligated to diligently go through the record and carefully examine the nature of allegations to determine what legal provisions are attracted to the facts of the case. If the court mechanically accepts the prosecution version it may cause miscarriage of justice; that overall incharge of criminal case is the Area Magistrate who even during investigation gets many opportunities to go through the record of the investigation conducted by the police in an appropriate case and at an appropriate stage he can require the I.O to consider addition or deletion of any penal provision; that the Magistrate can direct to add, delete or substitute any section mentioned in the FIR if the circumstances warrant; so he did in the present case, which action is not called for at this stage.

5. Mr. Shahid Ahmed Shaikh learned Addl.PG also supported the version of counsel for private respondents and submitted that taking cognizance of a case by a Magistrate is not synonymous with the commencement of trial in a case. Taking cognizance of a case by the Court is the first step, which may or may not culminate in the trial of accused. The trial in a criminal case, therefore, does not commence with the taking of cognizance of the case by the court and there are other steps. Therefore let the trial court frame charge and commence trial and if it finds an alteration of charge by adding or deleting the sections, he is empowered under the law; therefore the complainant has to wait for appropriate stage and at this stage could not insist for acceptance of opinion of police in which section 354-A was added in the charge sheet, which was later on deleted by the order of learned Magistrate as he found the ingredient of sub-section (A) of section 354 missing, thus his decision could not be called into question at this stage.

6. I have heard learned counsel for the parties and perused the record with their assistance.

7. The principal question which arises for determination in the instant Criminal Miscellaneous Application is whether the Magistrate is empowered to add or delete Sections of P.P.C. in charge sheet. On the aforesaid proposition, there is clear decision rendered by 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 a 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 the cause of death of the deceased is completely alien to the Law of Evidence and Code of Criminal Procedure.”

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

9. Primarily, the functions of Magistrate and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of police, by compelling them to change their opinion to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding the formation of opinion by the police which is the final stage in the investigation has been provided in section 190(1)(C) Cr.P.C. When a report forwarded by the police to a Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offense appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offense and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offense appears to have been committed. When such report is placed before the Magistrate he has again the option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offense and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of police report under Section

173(2) a Magistrate is entitled to take cognizance of an offense under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of witnesses examined by the police during investigation and take cognizance of the offense complained of and order issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offense only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case if he thinks fit in exercise of powers under Section 190(1)(b) and issue process to the accused.

10. I may add here that the expressions charge-sheet or final report are not used in the Code, but it is understood in Police Rules / Manuals containing the Rules and the Regulations to be a report by the police filed under Section 170 of the Code, described as charge-sheet. In case of reports sent under Section 169, i.e., where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report, or summary.

11. The instant case is based upon 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 by the trial court, which has not yet been done. The learned Magistrate in the impugned order has assigned reasons for deleting sub-section A of section 354 PPC and has passed the judicial order.

12. Prima-facie the opinion of the learned Magistrate is based on the reasoning that the basic ingredients of offense under section sub-section (A) of section 354 PPC was/is missing in the present case, as a consequence, he ordered deletion of sub-section (A) of section 354 PPC in the aforesaid case. An excerpt whereof is reproduced as under:-

“ From the perusal of FIR and statements under Section 161 Cr.P.C. of P.Ws there appears no applicability of S. 354-A PPC, hence, the same is deleted while the challan is accepted under Section 354, 506/2, 337-A(ii), 147, 148, 149 PPC. Registered the case. Issue P.O of accused M. Achar. Issue NBWs against the absconding accused and notice to accused who are on bail.”

13. In view of the above I, therefore, dispose of this Criminal Miscellaneous Application along with pending application(s), with direction to the trial court to proceed with the matter, frame charge and if he finds no sufficient material available to approve the addition of sub-section (A) of section 354 PPC, he shall proceed with the matter and culminate the Criminal proceedings in its logical conclusion within a reasonable time.

JUDGE