

# HIGH COURT OF SINDH

## CIRCUIT COURT, HYDERABAD

**Cr. Misc. Application No. 525 of 2022**  
[Nadir & Ors versus Raza Muhammad & another]

Applicants : Through M/s Ishrat Lohar & Adnan Shakeel advocates  
Respondent/complainant: Through Mr. Mir Ahmed Mangrio advocate  
The State : Through Mr. Shahid Ahmed Shaikh A.P.G  
Date of hearing : 17.10.2022  
Date of order : 17.10.2022

### **ORDER**

**ADNAN-UL-KARIM MEMON, J.-** Through instant Cr. Misc. Application, the applicants / accused have impugned the order dated 30.07.2022, whereby the learned Magistrate took cognizance against present applicants / accused and issued NBWs against them, inter-alia on the ground that the applicants were not present at the place of incident at the relevant date and time; that investigating officer conducted fair and impartial investigation, as such summary report submitted by him under Section 169 Cr. P.C, before the learned Magistrate, ought to have been approved in terms of statements of independent persons.

2. M/s Ishrat Lohar & Adnan Shakeel learned counsel for the applicants supported the fresh investigation report, in terms of the order passed by this court, with the narration that no incident as alleged in instant FIR had taken place; however, deceased Ayaz Ali lost his life and injured received injuries in the incident of FIR No.03/2022 PS Mirzapur at the hands of main accused Muhsin Zardari and others, as the applicants were even not present at the place of incident on relevant date and time which is evident from the CDR report which shows their location far from the place of incident; that the investigation of instant FIR was assigned to present Inspector Siraj Lashari on application of complainant party and he had conducted fair and impartial investigation, and such 173 Cr.P.C report was submitted before the learned Magistrate; however, he disagreed with the opinion of I.O on the analogy that I.O collected sufficient evidence against the applicants, which is purportedly supported the version of complainant party.

3. Mr. Mir Ahmed Mangrio learned counsel for the complainant has supported the impugned order and argued that the offenses alleged against the applicants are non-bailable and the right of hearing had already been given to the applicant and since they were not in attendance before the learned Magistrate as such NBWs were issued against them.

4. I have heard learned counsel for the parties and perused the record with their assistance and the case law cited at bar.

5. Facts of the case, giving rise to the present application are that respondent / complainant lodged FIR bearing Crime No.04 of 2022 at PS Mirzapur under Section 302, 324, 337-H(ii), 147, 148 & 149 PPC with the accusation that on 12.02.2022 the applicants along with their accomplices committed murder of his relative Ayaz Bhand and also caused firearm injuries to his three other relatives. Such report of incident was given to the police, who registered the case and the investigation was carried out the result of Investigation was submitted under canceled "C" class before the Magistrate, who did not concur with the recommendation of I.O and took cognizance under Section 190 CrPC and issued NBWs against the applicants and referred the matter to Sessions Court Shaheed Benazirabad for trial. An excerpt of the order is reproduced as under:-

"For the foregoing reasons, I do not concur with the opinion and recommendation of I.O for cancellation of FIR in question under canceled "C" class, and while in the exercise of powers under section 190 CrPC, I take cognizance of the offenses and join all the accused let off by I.O. Let a criminal case be registered against all nominated accused Allah Bakhsh son of Allah Parto Bhand, Aijaz son of Khameeso Bhand, Akhtar son of Allah Bakhsh Bhand, Bakhshan son of Allah Parto Bhand, Sabir son of Sheral Bhand and Nadir son of Allah Bakhsh Bhand to face trial for offenses under section 302, 324, 337-F(i), 337-F(iii), 337-F(v), 337-F(vi), 337-H(ii), 147, 148, 149 PPC. Since the offenses alleged against the accused are non-bailable and the right of hearing has already been given to the accused, however, they are not in attendance today, as such NBWs be issued against them. Since, the alleged offenses under sections 302 and 324 PPC are exclusively sessions triable, as such let the R&Ps be sent to the Honorable Sessions Court Shaheed Benazirabad after completing legal formalities. Moreover, I.O is directed to submit the list of witnesses within seven days of this order, without fail"

6. The fundamental question which needs determination would be as to whether the learned Judicial Magistrate exercised his discretion judiciously and under the law or otherwise.

7. Mr. Mir Ahmed Mangrio learned counsel for the complainant has briefed this Court on the subject issue with the assertion that under criminal administration of justice, and Code of Criminal Procedure a criminal case is initiated on filing F.I.R. After registration of F.I.R. the police officer starts investigation for collecting evidence. After collecting evidence and completing the investigation the Investigating Officer, if he finds that there is no sufficient evidence collected against the accused then he has to release the accused as provided under section 169 of the Code. If he finds that there is sufficient evidence against the accused then he is required to submit the report within the meaning of section 170 of the Code. In both cases, the police officer is required to submit a police report or challan as provided under section 173(1) (a) of the Code in the form provided by the Provincial Government containing various columns. Per learned counsel the ratio of the provisions of 169, 170, and 173, Cr.P.C. is that whatever course the Investigating Officer adopts and it is incumbent upon him to submit a final report under Section 173, Cr. P. C. about the result of his investigation to a competent Magistrate and the said Magistrate shall, thereupon, take such action as provided under subsection (3) of section 173, Cr.P. C. or Section 190, Cr.P.C. In the present case, the learned Magistrate received investigation report submitted by the I/O under 'C' Class; however, he did not concur with the viewpoint of investigating officer and directed the applicants to be joined as accused in Crime No. 4/2022 U/S 302, 324, 337-H (ii), 147, 148, 149 PPC of PS Mirzapur, Taluka Qazi Ahmed, District Shaheed Benazirabad.

8. At this stage we asked learned counsel whether the Magistrate was competent enough to join the applicants who were let off by the Investigating Officer under Section 169 Cr.PC. Learned Counsel replied to the query and submitted that the opinion of Investigating Officer is not binding upon the Magistrate and there was sufficient incriminating material available against the applicants; therefore, learned Magistrate rightly took cognizance in terms of Section 190 Cr.PC and referred the matter to learned Sessions Court for trial.

Learned Counsel also referred to rule 24 point 7 of the Police Rules 1934 and submitted that there is a prohibition for cancellation of FIR without the orders of Magistrate; that the Magistrate can take cognizance of an offense even in case of negative report submitted by the Police that the accusation is baseless and no case is made out against the delinquents; that the Magistrate while taking cognizance under Section 190(1)(b) Cr.PC on a Police report takes cognizance of the offense and not merely of the particular person charged in the report as an offense; that so far as the defense plea taken by the applicants could be taken care of by the Trial Court to determine such facts during trial. Per learned Counsel, in the present case the prosecution witnesses have fully implicated the applicants in their statements recorded under Section 161 Cr.PC.

9. The vitality of the role of Investigating Officer cannot be denied because it is the very first person, who as per law, is authorized to dig out the truth which too without any limitations including that of version of informant /complainant. However, after registration of FIR, the Investigation Officer has the authority to determine the truthfulness or falsehood of the allegations leveled against the accused but the same is subject to affirmation of the competent Court. If the Investigation Officer concludes that the allegations contained in the FIR are incorrect, he may refer the matter under section 63 and / or 169, Cr.P.C. to the Magistrate for discharge / release of the accused. The Police Officer has also the authority to release the accused in terms of Section 169, Cr.P.C. if he concludes that there is no sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to the Magistrate. Such Officer shall, if such person is in custody, release him on executing a bond with or without sureties and direct him to appear, if and when required before the Magistrate empowered to take cognizance of the offense. It is then the Magistrate to pass such order as deemed appropriate under section 173 Cr.P.C. for discharge of such bond or otherwise as he deems fit.

10. Elaborating further, the Honorable Supreme Court has held that during the investigation conducted after registration of an FIR the investigating officer may record number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under

section 161, Cr.P.C. in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the notice of investigating officer during the investigation; during the investigation, the investigating officer is obliged to investigate the matter from all possible angles while keeping in view all the versions of incident brought to his notice and, as required by Rule 25.2(3) of the Police Rules, 1934. An investigating officer must find out the truth of the matter under investigation. His object shall be to discover the facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person; and upon conclusion of investigation the report to be submitted under section 173, Cr.P.C. based upon the facts discovered during investigation irrespective of the version of incident, advanced by the first informant or any other version brought to the notice of investigating officer by any other person.

11. From above, it is quite clear that an investigating officer is not bound to base his conclusion on the version of informant or defense but on 'facts', discovered during the investigation. Such conclusion shall be submitted in the shape of prescribed form, as required by Section 173 of the Criminal Procedure Code.

12. At this juncture, it would be relevant to refer to the provision of Section 173 of the Criminal Procedure Code, which reads as follows:

173 (1) Report of Police Officer. Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the Officer Incharge of the police station shall through the public prosecutor---

- a) forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and
- b) communicate, in such manner, as may be prescribed by the Provincial Government, the action taken by him to the person,

if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the Provincial Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the Officer Incharge of the police station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

13. Bare perusal of the above provision explicitly makes it clear that on conclusion of investigation, a police report shall be forwarded to the Magistrate so empowered to take cognizance thereon which must include all details, as directed in the above provision. It nowhere describes how the Magistrate shall deal with such report, it however, empowers the Magistrate to agree or disagree with the act of Investigating Officer in releasing an accused during investigation under Section 169, Cr.P.C. which too, to the extent of discharge of bonds.

14. It is well-settled principle of law that after taking cognizance by the trial court only three results are possible in a criminal case, firstly conviction of the accused either upon admission of guilt by him or based on the evidence led by the prosecution; secondly, the acquittal of accused either under Sections 249-A/265-K, Cr.P.C. or based on the failure of prosecution to prove its case on merits beyond reasonable doubt; and thirdly, withdrawal from prosecution by a Public Prosecutor under section 494, Cr.P.C.;

15. It is well-settled law that in cases triable exclusively by a Court of Sessions, the Magistrate's power under the Code remained intact till such time the case was formally sent by him to the Court of Sessions for trial. Besides the Magistrate's power to discharge an accused person of his bond under subsection (3) of Section 173 of the Code even in cases triable exclusively by a Court of Session remains unaffected by the amendments introduced by the Law Reforms Ordinance, 1972, and also that in such cases the power of discharge remains vested with the Magistrate and not with the

trial Court, i.e. the Court of Session. On the aforesaid proposition I am guided by the decision of honorable Supreme court in the cases of Muhammad Alam and another v. Additional Secretary to Government of NWFP Home and Tribal Affairs Department and 4 others PLD 1987 SC 103, Nasira Surriya v. Muhammad Aslam and 7 others 1990 SCMR 12, Mehar Khan v. Yaqub Khan and another 1981 SCMR 267, Habib v. The State 1983 370,

16. When confronted with the aforesaid proposition, both the parties reached a consensus for the disposal of present Cr. Misc Applications in the terms that the NBWs issued by the learned Magistrate through impugned order may be converted into BWs and the trial Court may be directed to proceed with the case under the law.

17. Learned Additional P.G did not object to the above proposition put forward by the counsel for the parties.

18. In view of the above, captioned application is disposed of in the terms that the impugned order dated 30.07.2022 is modified to the extent of taking cognizance by the Magistrate; however, NBWs issued by the Magistrate against the applicants are converted into BWs and the trial Court is directed to proceed with the case as per law. The applicant shall appear before the trial court for further proceedings to be initiated by the court having jurisdiction; in case of failure to appear the NBWs shall be revived.

**JUDGE**

Sajjad Ali Jessar