

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**  
 Crl. Misc. Application No.S-31 of 2023

Date	Order with signature of Judge
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1. For orders on MA No.251/2023
2. For order on Office Objections at flag "A"
3. For orders on MA No.252/2023
4. For hearing of main case
5. For orders on MA No.253/2023

**16-01-2023**

Mr. Muhammad Nasir Malik, Advocate for Applicants

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**ORDER**

**ZAFAR AHMED RAJPUT, J.-** Through instant Crl. Misc. Application, filed under section 561-A, Cr.P.C., applicants (1) Muhammad Ilyas, (2) Muhammad Siddiq and (3) Kamran have impugned the order, dated 07.01.2023, whereby the learned Judicial Magistrate-II, Rohri took the cognizance against them, who were let off by the Investigation Officer by placing their names in Column No.2 of the report submitted under section 173, Cr.P.C in Crime No.117/2023, registered at P.S. Kandhra, District Sukkur, under sections 302, 201, 34, P.P.C.

**2.** Heard the learned counsel for the applicants and perused the material available on record.

**3.** It may be observed that two types of accused are placed in Column No. 2 of the Challan, firstly those who are not sent up for trial either for lack of sufficient evidence on record to connect them with the commission of alleged offence or being found to be innocent by the I.O. and shown in 'blue ink', leaving to Court to see whether they are to be summoned for trial or not or those who could not be apprehended by the police during investigation and are shown as absconders in 'red ink.

**4.** Judicial Magistrates have been conferred with powers under section 190, Cr.P.C. to take cognizance of offence upon receiving the

complaint of facts which constitute offence {under section 190 (1) (a) *ibid*}; upon report in writing of such facts made by any police officer {under section 190 (1) (b) *ibid*}; and upon information received from any person other than a police officer or upon his own knowledge or suspicion {under section 190 (1) (c) *ibid*}; that such offence has been committed. It is well-settled law that a report submitted by the I.O. under section 173, Cr.P.C. is not binding on the Judicial Magistrate who, therefore, notwithstanding the recommendation of the I.O. regarding not sending up the accused for trial, cancellation of case and discharge of the accused from the case, may proceed to take cognizance as provided in section 193, Cr.P.C. and summon the accused person to join the trial. In this regard, reference may be made to the case of *Falak Sher v. The State* (PLD 1967 SC 425) wherein the scope of section 173, Cr.P.C. came up for consideration before Honourable Supreme Court of Pakistan and following observations were made:-

*“Under subsection (1), when the investigation is completed the police officer is required to forward to the Magistrate a report in the prescribed form. Under sub-section (3) when it appears from the report forwarded under section (1), that the accused has been released on the bond the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. It is clear that under sub-section (3) a Magistrate may agree or may not agree with the police report. It, however, does not say what step the Magistrate should take if he disagrees with the police report. If the Magistrate wants to start a proceeding against the accused, he must act under section 190 of the Code of Criminal Procedure.*

*Section 190 provide that a Magistrate ‘may take cognizance of any offence (a) upon a complaint, (b) upon a police report, or (c) upon information received by him.*

*Now, the question is, if he disagrees with the report, can he take action under clause (b) against those whose names have been placed under column 2 of the Challan. As already pointed out, the Magistrate is not bound by the report submitted by the Police under section 173. When the said report is received by the Magistrate, the Magistrate on the report*

*itself may not agree with the conclusions reached by the Investigating Officer. There is nothing in section 190 to prevent a Magistrate from taking cognizance of the case under clause (b) in spite of the police report.”*

**5.** In the light of the above-stated legal position, it appears in the case in hand that the applicants are nominated in the F.I.R. with specific role. It is case of the prosecution that the accused persons committed murder of Mst. Naziran and sharing their common intention caused disappearance of evidence of alleged murder by washing the crime scene. However, the Investigation Officer let them off in final Challan on the basis of defence witnesses and plea of *alibi*.

**6.** Plea of absence of accused from the place of occurrence at the time of commission of offence is “*plea of alibi*”; it is in fact plea of defence. Plea of *alibi* is the weakest type of plea and cannot be given any weight unless same is proved at trial from very cogent, convincing and plausible evidence. Burden to prove plea of *alibi* is on the accused which is to be proved in accordance with law at trial; however, the statements of defense witnesses recorded under section 161, Cr.P.C. in support of plea of *alibi* are not relevant and admissible for inferring innocence of the accused at investigation stage, as deciding plea of *alibi* at investigation stage would amount to pre-trial verdict, which jurisdiction is not vested with the investigation officer/agency.

**7.** In view of above facts and discussion, the impugned order does not suffer from any illegality or infirmity to call for any interference by this Court under its inherent jurisdiction. Consequently, this Criminal Misc. Application having no substance is dismissed in *limine*, along with listed applications.

JUDGE