

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Miscellaneous Application No. 352 of 2021

Date

Order with signature of Judge

1. For order on office objections
2. For hearing of main case

06.11.2023

Mr. Riaz Ahmed Phulpoto advocate for the applicant
Mr. Shaikh Jawed Mir advocate for respondent No.4
Mr. Muntazir Mehdi, Additional PG

Through this Criminal Miscellaneous Application under Section 561-A Cr. P.C., the applicant Mst. Khalida has assailed the legality of the order dated 19.05.2021 passed by the learned XIth Judicial Magistrate (South) Karachi in Criminal Case No.Nil of 2021 (*State v Mushtaq Fateh Masih*) whereby, he approved the report submitted by the Investigating Officer under 'C' Class, arising out of FIR No. 419 of 2020, registered for offenses under Sections 365/506/511/337-A(i)/354/ and 34 PPC at P.S Mehmoodabad Karachi.

2. Brief facts of the case are that the applicant Mst. Khalida had lodged an FIR bearing No.419 of 2020 against respondent No.4 at P.S Mehmoodabad Karachi with the narration that her husband Raheel Ayaz had borrowed Rs.500,000/- (Rupees five lacs) from respondent No.4; that her husband was running his business at Tando Adam; that during the period of Corona Virus her husband could not give the said amount to the respondent No.4; that on 19.12.2020 at about 815 hours; the respondent along with his accomplices forcibly took her husband downstairs where they physically assaulted and beaten him in presence of PW Shaleen Sultan and Kashif the driver of the applicant; that the respondent No.4 along with his accomplices tried to kidnap her husband and due to physical scuffling and in assault whereof, her husband fell down and due to shock and torture his stool went out and thereafter the respondent No.4 escaped their good from the scene; that thereafter driver of the applicant took the injured to hospital along with her daughter where her husband was admitted in Emergency Ward of Cardio and during treatment passed away; such report of the incident was given to P.S Mehmoodabad Karachi, who registered the subject F.I.R. After investigation, the Investigating Officer submitted the report under Section 173 Cr.P.C. before learned Judicial Magistrate No.XI Karachi South, for approval under 'C' Class, and the same was approved vide order dated 19.05.2021.

3. Mr. Riaz Ahmed Phulpoto, learned counsel for the applicant argued that the impugned order does suffer from many illegalities as well as infirmities and, hence, is liable to be set aside. He while referring to relevant paras of the impugned order, submits that the Judicial Magistrate had relied upon the statements of the independent witnesses who were neighbors of the parties, however, they were not eyewitnesses nor named in the FIR as witnesses. Therefore, their testimonies cannot be relied upon to discard the version of the complainant particularly when respondent No. 4 has committed a heinous offense that resulted in the death of an innocent/husband of the complainant. He further submits that besides Section 302 PPC, Sections 365 PPC read with Section 511 & 354 PPC have been added, yet the evidence collected by the police in respect of the applied section, Magistrate has not responded or discussed their application or insertion, hence, he submits that by granting this application, impugned order may be set aside and the case may be remanded with directions to Magistrate concerned to take cognizance of the crime and submits that the sections, as applied in this case, are exclusively triable by the Court of Sessions. In support of his contention, he places reliance upon cases of Yousuf Ali Khan Ghouri Versus The State through IX J.M. and 2 others (2018 YLR 1976), Saeen Bux Versus Civil Judge and Judicial Magistrate Matiari and 9 others (2010 PCL 1060) and Pakistan Institute of Labour Education and Research and another Versus Province of Sindh through Chief Secretary, Karachi and 4 others (2017 YLR Note 343).

4. Mr. Shaikh Jawed Mir, advocate for respondent No.4 has contended that the incident occurred on 19.12.2019, whereas, the FIR was registered on 21.12.2019, however, no plausible explanation has been furnished for such an inordinate delay. He added that the investigating officer submitted the Final Report U/S 173 Cr. PC. in the 'C' Class due to lack of evidence. He referred to the 161 Cr. PC Statement dated 22.12.2020 of Sohail Amroz (brother deceased), and submitted that no such incident had taken place. Per learned counsel, the inquest report dated 22.12.2020 is also silent to any kind of torture marks on the body of the deceased Sikandar Azam, besides Medico-Legal Officer, JPMC, Karachi, in his report bearing ML No.347 categorically mentions, that "No surface injuries noted." He also pointed out that the medical certificate of cause of death bearing ML No.11347/2020 dated 22.12.2020 reflects the words "during fight" and these words were added by the complainant by use of pressure. He further submitted that the complainant in her application dated 09.04.2021 had alleged that the accused persons were carrying a lethal weapon and hit the deceased with butt blows of the pistol

the same was/is not mentioned in the FIR or complainant's 161 & 162 Cr.PC statement or 161 Cr.PC statement of her son namely Shaleen or 161 Cr.PC statement of her driver namely Kashif. He added that no medical examination of Shaleen and Kashif was conducted though it was alleged that they were also beaten by the accused persons. He next argued that the independent private witnesses of the neighborhood namely Shahzaib, Taj Uddin, Hamza, and independent private witness deputed at NICVD namely Muhammad Yousuf and Muhammad Ahmed Khan, did not support the complainant's story. He submitted that according to a NICVD, the cloths of Raheel Ayaz (deceased) were handed over to his son on the spot in the emergency department in the presence of ER Coordinator, which was not produced in evidence; that the grave was identified by Sharjeel Feroz (Son) and Sylvester Sarfaraz (brother) for postmortem exhumation purposes; that the Postmortem (Exhumation) Report dated 02.02.2021 reflects that the cause of death was reserved for want of chemical examiner report and treatment report and the chemical examination report dated 15.03.2021 was/is negative; that the Death Certificate issued by the Medical Board states, that "the exact cause of death, could not be ascertained". Per learned counsel, the Investigation Officer has reached the right conclusion that the case was/is of no evidence and the learned Magistrate has rightly approved the "C" class report of the Investigation Officer. While rebutting the assertion of the learned counsel for the applicant, he submitted that issuance of directions as suggested to the subordinate Courts to follow a particular course of action in criminal matters is not the domain of this Court as every Judge is independent and autonomous within his/her allocated sphere of jurisdiction and such direction would amount to interference in their independence which is not permissible under the law. He added that the Appellate Court indeed can uphold, modify, or set aside the judgment of the lower fora. He lastly prayed for dismissal of the instant Criminal Miscellaneous Application.

5. Mr. Muntazir Mehdi, Additional P.G. has submitted that the complainant must be given fair opportunity to prove her case by adducing the evidence as this is a murder case, which requires evidence and cannot be disposed of under C Class. Per learned APG, a single assailant can commit the offense under Section 302(b), P.P.C. but if the number of assailants is more than one and the offense is committed in furtherance of common intention then the provision of section 34, P.P.C. would certainly attract. The Trial Court has to render a definite finding qua the applicability of Section 34, P.P.C. or Sections 365, 506, 511, 337-A (i), 354 P.P.C. based on contents of FIR, statements under Sections 161

Cr.P.C., and other attending documents collected by the Investigating Officer during the investigation, at the time of applying judicial mind while handing down the order on Police Report.

6. I have heard learned counsel for the parties and have perused the material available on record.

7. The applicant/complainant Mst. Khalida has raised her voice of concern that the Investigating officer has destroyed the murder case of her husband and with malafide intention recommended the case for cancel Class which was approved by the learned Magistrate without referring the matter to the learned Sessions Court for appropriate order as the offense of Section 302 PPC was/is triable by Sessions Judge. I have noticed that the complainant lodged the FIR No.419 of 2020 against respondent No.4 at P.S Mehmoodabad Karachi with the accusation that he in connivance with his accomplices caused the death of her husband Raheel Ayaz. After investigation, the Investigation Officer submitted the report under Section 173 Cr.P.C before learned Judicial Magistrate No.XI Karachi South for approval under the 'C' Class, and the same was approved vide order dated 19.05.2021. It appears from the record that the deceased Raheel Ayaz was brought to NICVD on 19.12.2020 with a complaint of Cardiac Arrest. Later on during treatment, he passed away on 22.12.2020 at JPMC. The Chief Technical Officer Dr. Faiz Ali Mangi of the Health Department Government of Sindh states that there were three different Medical Certificates of Cause of death of the deceased issued by the Medical Officer(s) of JPMC and all of them bear no date. In the first certificate condition No.(c) shows Hypoxic Brain Injury. In the second an addition has been made after Hypoxic Brain Injury (DURING FIGHT) has been added. In the third, the signature of the Medical Officer is different from the other two certificates. It is ironic that when the MLO has not noted any injury and further that Hypoxic Brain Injury has no relevance with any fight then how the medical officer could make any such suggestion? As such he referred the matter to the Special Medical Board (already constituted) to examine the above-said three Medical Certificates of Cause of Death by the medical officer(s) of JPMC for a final opinion as to how three certificates were issued and whether the finding "During Fight" was an act of manipulation and fabrication. The Cause of Death has also been determined by the Medical Board as noted above.

8. learned counsel for the applicant at this stage has submitted that the evidence in such circumstances is required to be seen by the trial Court which is only possible if evidence of the Medico-Legal Officer and/or Incharge Special Medical Board is recorded on the issue of cause of death of deceased and injuries caused to him at the time of incident at the hands

of private respondent. Besides the version put forward by the complainant and her witnesses as well as respondent No.4 in his interrogation report needs to be thrashed out by the trial Court whether the deceased died due to natural death or otherwise, which factum requires evidence. He added that the learned Magistrate had failed to dilate upon all the factums in his order while approving the case under 'C' Class.

9. Before attending to the merits of the case it is deemed appropriate to first discuss the difference between the role of the Investigating Officer and that of the Magistrate in investigation and the outcome thereof, which is germane to the case.

10. Foremost, there are three classes provided for disposal of a State Case namely (i) A-Class, (ii) B-Class and (iii) C-Class and the report of investigation under Section 173 of Cr.P.C. has to be filed either in the form of a charge-sheet if the accused is sent for trial or in the form of a Final Report, in other cases. As per practice/usage, the Class "A", "B" and "C" are defined as:- CLASS 'A': FIR is true, but the accused is untraceable, therefore, Magistrate can dispose of the case till the appearance/arrest of the accused; CLASS 'B': FIR is maliciously false and after passing summary orders by directing the SHO to initiate proceedings for an offense punishable under Section 182, P.P.C. against the complainant/ person, who gives information, which he knows or believes to be false; and CLASS 'C': FIR can be disposed of being a non-cognizable offense.

11. Going ahead on the subject issue, primarily, every investigation is conducted with reference to Chapter XIV of the Criminal Procedure Code as well as the relevant Police Rules. 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 too, without any limitations including that of the version of the informant / complainant. However, after registration of the 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, Cr.P.C. to the Magistrate for discharge 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 the 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. On the subject issue the authoritative view of the Supreme Court, given in the case of *Mst. Sughran Bibi v. The State* (PLD 2018 SC 595), is clear in its terms and needs no further deliberation on my part.

12. In principle upon conclusion of the investigation the report to be submitted under section 173, Cr.P.C. is to be based upon the facts discovered during the investigation irrespective of the version of the incident, advanced by the first informant or any other version brought to the notice of the investigating officer by any other person.

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

14. A bare perusal of the above provision explicitly makes it clear that after every 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. However, it is nowhere described as to how the Magistrate shall deal with such report, it empowers the Magistrate to agree or disagree with the act of Investigating Officer in releasing an accused during investigation under section 173, Cr.P.C.

15. The Supreme Court in the case of *Bahadur v. State* PLD 1985 SC 62 wherein it has authoritatively been laid down that a Magistrate in canceling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all state powers, there is no lis before him, there is no duty to hear the parties, there is no decision given, no finality or irrevocability attaching to the order. It was ruled that the party is left free to institute a complaint on the same facts and the same Magistrate does not even after passing such an order render himself functus officio. On the contrary, he is quite competent to entertain and deal with such a complaint on material presented to him. After such assessment, the Supreme Court concluded that these peculiarities establish beyond doubt that in so concurring with a report submitted under section 173, Cr.P.C. he does not function as a criminal court. The

Supreme Court has expressed the view that some of the powers of the Magistrate are administrative, executive, or ministerial and he discharges these duties not as a court but as a 'personal designate'. This view was further followed in the case of *Arif Ali Khan v. State* **1993 SCMR 187**, *Muhammad Sharif v. State* **1997 SCMR 304**, and *Hussain Ahmed v. Irshad Bibi* **1997 SCMR 1503**.

16. Ratio decidendi in all the above cases appears to be that since the Magistrate while concurring with a police report submitted under section 173, Cr.P.C. does not act as a Criminal Court inferior to the Court of Session and the High Court, his order cannot be revised and modified under the provisions of sections 435, 439, Cr.P.C. but in that case it is amenable to the inherent jurisdiction of the High Court under section 561-A, Cr.P.C. provided the order amounts to abuse of process of Court. However, it is made clear that the discharge of an accused by a Magistrate is not legally possible after taking cognizance of the case. It may also be added here 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 the accused either under sections 249-A/265-K, Cr.P.C. or based on the failure of the prosecution to prove its case on merits beyond a reasonable doubt; and thirdly, withdrawal from prosecution by a Public Prosecutor under section 494, Cr.P.C. However in the present case, the final report under "C" Class submitted by the Investigation Officer, has been approved by the learned Magistrate vide order dated 19.05.2021.

17. The entire case of the applicant depends upon the medical evidence of whether the offense under Section 337-A(i) PPC was/is made out or otherwise. In this regard Medico Legal Certificate issued by the MLO of deceased Raheel Ayaz shows that "No surface injury noted" and as per the Special Medical Board report, the cause of death of the deceased is Cardiopulmonary arrest. As per record the Raheel Ayaz was admitted to Ward No.6 JPMC Karachi on 22.12.2020 and he passed away on 22.12.2022 at about 9.25 p.m. The approximate interval between onset and death was 48 minutes. Upon examination, the Medico-Legal Officer found no surface injury. Because of the findings of the Special Medical Board, the offense under Section 337-A(i), PPC was found by the Investigating Officer missing which factum was conquered by the learned Magistrate. So far as Section 354, 365, and 511 PPC is concerned the Investigating Officer found the factum of the kidnapping of the deceased missing on the premise that no independent witness deposed that the deceased was earlier kidnapped or any attempt was made at the hands of a private respondent.

In absence of this material the Investigating Officer recommended the case as 'C' Class, which was approved by the learned Magistrate due to lack of evidence.

18. I have also gone through the impugned Order passed by the learned Judicial Magistrate. Though the learned Judicial Magistrate has attempted to dilate upon the substance submitted by the Investigation Officer and passed the order on the analogy put forth by the Investigation Officer, at the same time he applied his judicial mind to the ingredients of the offenses and rightly opined that no offenses under 365/506/511/337-A(i)/354/ and 34 PPC were/are made out from the evidence so collected by the Police during the investigation as the law confers upon the Court powers to secure the ends of justice.

19. Since the parties have leveled allegations and counter-allegations against each other on the issue of the alleged murder of deceased Raheel Ayaz, therefore, judicial propriety demands that the aggrieved party may take resort of appropriate remedy under the law where she would be at liberty to bring the material to prove her case as in the present case investigation officer recommended the case under C Class and the learned Magistrate has concurred with him, however, the complainant is still insisting for remand of the case to the Magistrate to hear the complainant. Once the Magistrate has formed his point of view based on the evidence collected by the Investigation officer, this Court cannot substitute its view as no material has been shown to this Court to take a contrary view. However, it is open for the complainant to file a Direct Complaint and if filed the same shall be decided on its own merits.

20. In view of the above the order dated 19.05.2021 passed by the learned XI-Judicial Magistrate Karachi South in Criminal Case No. Nil of 2021 (*State v Mushtaq Fateh Masih*) is sustained; resultantly, the Criminal Miscellaneous Application is dismissed, leaving the applicant at liberty to avail the remedy, if any, before the competent forum. However, it is made clear that same, if availed shall be decided strictly in accordance with law.

JUDGE