

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Misc: Appln: No.S-66 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. *For orders on O/objection at flag-A.*
2. *For hearing of main case.*
3. *For hearing of M.A. No. 622/23.*

08.09.2023

Mr. Sikandar Ali Junejo, Advocate for applicants.
Syed Sardar Ali Shah, Addl.P.G, for the State.

ORDER

Through instant Criminal Miscellaneous Application, the applicants/accused, Mst Sughar and 5 others, have challenged the order dated 16.01.2023, passed by the learned Civil Judge and Judicial Magistrate-1, Pano Akil, whereby he disapproved the report submitted under S. 173, Cr.P.C. in C-Class by Investigating Officer, in FIR No.13/2022 Police Station, Dadloi, under 'C' class, and took the cognizance.

2. The facts in a nutshell are that complainant Mst. Sughar W/o Jamaluddin Bullo, on 23.03.2022 at 2230 hours, lodged FIR at the Police station, Dadloi, stating that accused Badshah alias Wahur and others had levelled allegation of "Karap" against her husband, namely Jamaluddin, thereby he was threatened. On 16.03.2022, she, along with her mother-in-law, namely Mst Tahira, Muhammad Punhal, Ali Sher and other family members, were available in their houses. At about 5:00 p.m., on hearing a noise, they came out from their house. They saw and identified the accused, namely Badshah alias Wahur S/o Kajlo, 2. Pinyal S/o Mirza, 3. Islam S/o Muhammad Bux, 4. Muhammad Bux S/o Dur Muhammad, 5. Elahi Bux S/o Aagro, 6. Ghulam Murtaza @ Kajlo S/o Ellahi Bux, 7. Abdul Qadir S/o Pinyal, 8. Dur Muhammad S/o Moula Dad @ Moula Bux, by caste Bullo, who had clubs in their hands and they were causing damage

to the Wheat Crop of the complainant party. Subsequently, on the instigation of the accused Muhammad Bux, the accused Badshah, also known as Wahur, caused a club blow to Mst. Tahira on her head, resulting in her screaming and collapsing into the ground. Pinyal, the accused individual, caused a brick blow upon her chest. Accused Islam caused a club blow on her shoulder. Other accused threw bricks at the complainant party, but they rescued themselves by running to their house. They raised cries that garnered the attention of nearby residents. Accused Muhammad Bux and Abdul Qadir took out pistols from the fold of their shalwar and made aerial firing. Then, all accused decamped from the place of the incident. The complaint saw that Mst. Tahira had injuries on her head, chest, face, and both arms. Additionally, there was visible bleeding from these injuries. The complainant party shifted the injured to Taluka Hospital Pano Akil; after obtaining a letter for treatment from P.S., she was referred to Civil Hospital Sukkur, where she died during treatment. Consequently, they shifted her dead body to Taluka Hospital Pano Akil, where her post-mortem was conducted, and after burial, an FIR was lodged, hence this case.

3 . After concluding the investigation, the Investigating Officer (I.O) recommended that the case under 'C' Cancels Class. However, the learned Magistrate disagreed with the report submitted by the I.O. under Section 173 of the Criminal Procedure Code (Cr.P.C), and took cognizance of the matter under Section 190 of the Cr.P.C. As a result, the applicants/accused have filed a Misc. Application under Section 561-A of the Cr.P.C.

4. Learned Counsel for the applicants/accused contended that the impugned order passed by the learned Magistrate was against the law. He further contended that the learned Magistrate passed the impugned order in a hasty and slipshod manner without applying his judicious mind. He lastly submits that the learned Magistrate did not consider the material available on record and straightaway took cognizance in the matter. He, therefore, prayed for setting aside of the impugned order.

5. While controverting the above submissions, the learned Additional Prosecutor General vehemently contended that the parties are at daggers drawn on the issue of Karap, [hour killing]; hence, the alleged offence was committed by the applicants and other accused. He, however, supported the impugned order. He further contended that the investigating officer had not properly investigated the case and submitted the summary report under C class, and the learned Magistrate has rightly taken cognizance, he relied upon the case of *Raja Khushbakhtur Rahman and another v. The State (1985 SCMR 1314)*. Hence, the instant application is liable to be dismissed.

6. I have heard the learned Counsels for the parties and have examined the material available on record.

7. Per the contents of FIR, the complainant was available in her house where the accused individuals had lathis in their hands, were standing in the crop and were damaging the same on restraining by the complainant party; they, in anger, caused lathi and bricks blow to Mst. Tahira sustained injuries and died in the hospital. However, during the course of the investigation, three distinct versions of the incident came on screen. The first version was presented by the complainant, whereas the second version was propounded by Mst. Raziq Dini, daughter of the deceased, and the 3rd one were put forth by the independent witnesses. In all these versions, it is admitted position that the deceased Mst. Tahira had been murdered, and as per the post-mortem report, the injuries sustained by her were anti-mortem in nature. The veracity of the versions can only be ascertained after leading evidence; therefore, the instant case cannot be disposed of summarily, as proposed by the investigation officer.

8. It is the settled principle of law that the Magistrate can take cognizance in the matter even in case of a negative report submitted before him by the investigating officer. In this respect reliance can be placed in the case of *Falak Sher and another v. The State (PLD 1967 SC 425)* wherein it is held as:

"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". Further reliance can be placed in the case of Safdar Ali v. Zafar Iqbal and others (2002 SCMR 63).

9. The Magistrate may disagree with the opinion of the investigation officer and take cognizance if sufficient evidence is presented. In the present case, adequate ocular testimony is available on the record in the shape of 161 statements and the postmortem report of the deceased. Even otherwise, CFM shows that the case has been sent up to the Court of Session, and the charge has been framed. Once the Magistrate has referred the case to the Court of Session under the provisions of Section 190(2) of the Code, he is considered functus officio. Subsequently, it shall be the Court of Session either to take cognizance (*Section 193, Cr.P.C.*) into the matter or otherwise. Nevertheless, it is undeniable from a legal standpoint that once a charge is framed in accordance with the provisions of Section 242 or Section 265-D of the Code of Criminal Procedure, the importance of the order passed on a police report shall stand superseded wherein the trial Courts, after examining all material, find the case to be tried further. In order to provide clarity, the relevant section 265-D is reproduced under :-

"265-D. When charge is to be framed. If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceeding with the trial of the accused it shall frame in writing a charge against the accused."

10 . The procedural law provides that the framing of a charge serves as the initiation of a trial. The act of framing charges is a judicial action rather than an administrative order, but the order issued by a Magistrate based on a police report is of an administrative nature. The judicial order shall prevail over an administrative order. In such eventuality, challenging the

order of the Magistrate, who has already taken cognizance of the police report, becomes infructuous. If the aggrieved (accused) continues claiming the innocence, they may competently resort to a course provided by Section 249-A and 265-K, Cr.P.C.

11. In view of the above discussion, I am of the opinion that the impugned order dated 16.01.2023 passed by learned I-Civil Judge/Judicial Magistrate, Pano Akil, is based upon sound reasons and is speaking one; therefore, instant Criminal Miscellaneous Application being devoid of merits is dismissed along with the listed application.

J U D G E

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