

ORDER SHEET  
**IN THE HIGH COURT OF SINDH,**  
CIRCUIT COURT, HYDERABAD.

Cr.Misc.Appl.No.S- 682 of 2012

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DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing:- 29.11.2013.

Date of announcement:- .12.2013.

Mr. Amjad Ali Sahito, Advocate for applicants.  
Mr. Muhammad Hashim Leghari, Advocate for respondent No.1.  
Mr. Mushtaque Ahmed Abbasi, D.D.P.P.

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***NAIMATULLAH PHULPOTO, J:-*** Through the instant Criminal Miscellaneous Application u/s 561-A Cr.P.C, applicants/accused Mir Hassan and Malook Shah have prayed for quashment of the proceedings arising out of Crime No.58/2012 registered at Police Station Khybrani U/s 395 PPC.

2. Brief facts of the prosecution case as disclosed in the FIR lodged by complainant Imdad Hussain on 26.11.2012 at 2200 hours are as under:-

*“Complaint is that I reside at above mentioned address having my own “Zamindari”. I have obtained land in S-Mureed Forest at Chowkri No.7 on letter upon which my Otaq is situated and the lookafter of the said land is in responsibility of Fateh Muhammad alias Dildar Bhachu. On 20.11.2012 at about 3-00 a.m. my Kamdar namely Fateh Muhammad alias Dildar Bhachu through mobile phone informed that I and Hari Jan Muhammad Khoso were present in the Otaq that at about 2-00 a.m night accused every one Mir Hassan Shah s/o Ali Muhammad Shah aged about 45 years having Repeater gun in his hands, (2) Malook Shah s/o Kamil Shah by caste Syed aged 36 years having DBL gun in his hands, (3) Bachu s/o Lakhadino by caste Malani aged 55 years having SBL gun, (4) Mir Hassan s/o Naseer Khan Khoso aged 35/36 years having pistol in his hands, (5) Gulab s/o Baqar Khamlani Khoso aged 40/45 years having hatchet, (6) Bashir s/o Amb Khamlani Khoso aged 45 years having Rifle in his hands, (7) Ali Sher s/o Amb Khamlani Khoso aged 45 years having hatchet and unknown persons whose faces were opened and will be identified on seeing again arrived over there on a Tractor Trolley and they on the show of weapons robbed drums of 220-Litres of Diesel, 6 bags of Masoor-Daal, 8 bags of Fertilizer, 2 bags of DEP*

*Fertilizer, 100 feet cloth, 3 lift machines of water, 3 Iron pipes, cash Rs.10,000/- put in the tractor trolley and robbed away. On hearing such facts I alongwith my Hari Khair Muhammad Kalhoro s/o Aachar Kalhoro in the morning reached at the vardat where the foot prints of several peoples and wheal marks of the tractor were available and saw whole the situation with my own eyes. Thereafter I asked the accused persons for compensation/decision who replied that decision will be made with you, but till today no decision/compensation has been made and subsequently refused. Now being present, I make complaint that above accused on the show of weapons have robbed the above said articles viz. Diesel, Masoor Daal, Fertilizer, Lift Machines, Iron Pipes and other articles lying in my otaq situated on my lease land. I am complainant, investigation may be done.”*

3. After usual investigation, Investigation Officer submitted a summary report U/s 173 Cr.P.C. in the aforesaid crime before the Civil Judge & Judicial Magistrate, Matiari, recommending the case for disposal in ‘C’ Class. The Civil Judge & Judicial Magistrate, Matiari disagreed with the opinion of Investigation Officer and took cognizance of the case. The relevant portion of the order dated 13.12.2012 is reproduced hereunder:-

*“I have scanned the police papers. The accused party during investigation has also submitted documents of lease of the some Forest Land from Compartment No.7 leased out to the accused Bachoo Khoso and others in year 2012. The Investigation Officer in police file case diary under S. 172 Cr.P.C. dated 4.12.2012 stated that the leased Land of the complainant was taken on lease by the accused party. The record further shows that the accused were not arrested by the Investigation Officer and they are shown as Shamel-e-Taftesh and Farigh, without taking any bond to appear before the Court, on the plea of alibi hence there was no chance of the recovery of the alleged robbed property. The version of the complainant is fully supported by the PWs who are eye witnesses of the incident as alleged. The memo of the place of incident also confirms existence of the Otaq at the place of incident. As far as plea of alibi of the accused is concerned; burden lies upon the accused to prove it at trial under 119 of the Qanoon-e-Shahadat Order, 1984. I therefore do not agree with the opinion of the Investigation Officer. Prima facie case punishable under S. 394 PPC has been made out. I take cognizance of the offence. The offence is exclusively triable by the Court of Sessions. Case will be sent up after completion of the proceedings under S. 512 Cr.P.C. Issue NBW against the accused Mir Hassan Shah s/o Sayed Ali Muhammad Shah, 2. Malook Shah s/o Kamil Shah, 3. Bachoo s/o Lakhadinu, 4. Mir Hassan s/o Naseer Khan, 5. Gulab s/o Baqar, 6. Sheru s/o Amb, and 7. Ali Sher s/o Amb, all accused No.3 to 4 by caste Khoso.”*

4. Mr. Amjad Ali Sahito, learned advocate for applicants/accused contended that Civil Judge & Judicial Magistrate was not competent to hear the complainant at the

time of passing the orders on the summary report submitted by Investigation Officer. It is argued that impugned order is not speaking one and the same is not maintainable under the law and is liable to be set aside. He has also submitted that there was inordinate delay in lodging of the FIR but the same was not considered by Magistrate and the opinion of Investigation Officer was based on plea of alibi raised by applicants/accused during investigation. Lastly, he has submitted that impugned order is in utter disregard of law. In support of his contentions, learned counsel has referred to an unreported order passed by this Court in Criminal Miscellaneous Application No.S-491/2010 dated 12.12.2010.

5. Mr. Mushtaque Ahmed Abbasi, learned D.D.P.P. assisted by learned advocate for complainant argued that after receiving the report from the Investigation Officer Judicial Magistrate was fully empowered u/s 173 Cr.P.C. to disagree with the opinion of Investigation Officer and to pass the appropriate orders. It is further submitted that it was not the duty of Investigation Officer to declare the applicants/accused innocent on the basis of plea of alibi and the Investigation Officer has acted in excess of powers. Reliance has been placed on the cases reported as Federation of Pakistan through Secretary Finance, Islamabad and another v. Malik Mumtaz Hussain and 4 others (1997 SCMR 299).

6. For proper appreciation of the contentions raised by learned counsel for the parties, relevant provision is to be examined. Subsection (3) of section 173, Cr.P.C. under which the Magistrate deals with the report of Investigating Officer recommending cancellation of a case is reproduced below:-

**“Section 173 (1) .....**

**(a) .....**

**(b) .....**

**(2) .....**

**(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.**

(4) .....

(5) .....”

7. It is evident from the plain reading of the provision that on the report *submitted* by the Investigating Officer the Magistrate shall make such order as he thinks fit. Obviously, he may agree or not with the report of Investigating Officer. He may refuse to cancel the case and order further investigation or to take cognizance on the basis of that police report under section 190 Cr.P.C. Rightly reliance has been placed upon the case of Federation of Pakistan through Secretary Finance, Islamabad and another v. Malik Mumtaz Hussain and 4 others (1997 SCMR 299). However, while passing such an order he is required to examine the report judicially. In this case Civil Judge & Judicial Magistrate has examined the contents of FIR, 161 Cr.P.C. statements of PWs and entire material collected during investigation then passed the orders u/s 170 (3) Cr.P.C. Under the law, order which the Civil Judge & Judicial Magistrate passes on the report submitted by Investigation Officer u/s 173 Cr.P.C. is an administrative order, however while passing such an order, he is required to examine the report judicially and he has to act fairly, justly and honestly. Magistrate may agree or may not agree, if disagrees with police report Magistrate may take cognizance of any offence.

8. Learned Civil Judge & Judicial Magistrate felt necessary in this case to hear the complainant. In fact by hearing complainant Magistrate has acted justly and fairly because every person is entitled to fair trial and due process. Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 provides as under:-

***“10-A. Right to fair trial:- For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”***

9. Prima facie, applicants/accused have been nominated in aforesaid F.I.R with serious allegations. PWs Fateh Muhammad and Jan Muhammad have also implicated the applicants/accused in statements recorded u/s 161 Cr.P.C. Investigation has also been defined in Section 4(L) of Criminal Procedure Code, 1898. Investigation means

only collection of the evidence and no more. Determination of the guilt or innocence of the accused is an obligation vested in Courts of law which task could never be delegated to the police. I have carefully examined the reasons assigned by Civil Judge & Judicial Magistrate and do not find these reasons either perverse, fanciful or arbitrary so as to justify interference. Powers under section 561-A Cr.P.C. are of extraordinary nature and to be used consciously in exceptional circumstances when no other remedy is available. In this case other remedy is available. No case for quashment of proceedings is made out. Consequently, Criminal Miscellaneous Application is without merits, the same is dismissed. However, trial Court shall proceed with the case strictly in accordance with law.

JUDGE

Tufail