

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Misc. Application No. S-633 of 2024

Applicant: **Applicant**, Khair Muhammad through his counsel, Mr. Shabir Ali Bozdar, Advocate.

Respondent: The State, through Mr. Sardar Ali Shah, APG.

Date of hearing: **30-01-2025**

Date of decision: **13-02-2025**

ORDER

RIAZAT ALI SAHAR, J- Through this Criminal Miscellaneous Application, the applicant assailed the impugned order dated 18.10.2024 passed on the report under Section 173 Cr.P.C, by 1st Civil Judge & Judicial Magistrate, Moro, which pertains to FIR No. 09/2024, registered at Police Station Fareed Dero, for offences punishable under Sections 302, 324, 147, 148, and 337-H(ii) PPC, whereby the Investigating Officer let off the applicant/accused in “**C-class**”, but learned Magistrate did not agree with the proposal of I.O and took cognizance under section 190 Cr.P.C against him. Being aggrieved by and dissatisfied with the impugned order, the applicant has approached this Honourable Court by way of the present Criminal Miscellaneous Application under Section 561-A Cr.P.C.

2. The case of the prosecution, in brief, is that on 13.06.2024, the complainant, along with his companions, including his brother Ali Gul, aged approximately forty years, Ali Asghar, and Ali Gulam, was returning from their agricultural land when they encountered the accused near the garden of Agib Khan Jatoi at approximately 8:00 p.m. The accused included Gulzar, armed with a 0.44 bore rifle, Dildar, armed with a gun, both sons of Arbab, Arbab, armed with a

K.K., Javed, armed with a pistol, both sons of Allan, Rajib, son of Gul Hassan, armed with a K.K., Bakhshal, son of Muhammad Siddique, armed with a K.K., Ageel, son of Bakhshal, armed with a pistol, all by caste Mashoori and residents of Old Jatoi, Khair Muhammad, son of Haji Khan Koreejo [applicant], armed with a K.K., resident of village Sehra, Taluka Moro, along with three unidentified persons, armed with pistols, who can be identified upon sight (if seen). It is alleged that accused Gulzar instigated the attack by declaring that since the complainant and his companions were unwilling to hand over the disputed land, they would not be spared and would be murdered. Thereafter, Gulzar fired straight at Ali Gul with his rifle, striking him on the upper chest near the nipple. Khair Muhammad Koreejo fired his K.K. at Ali Gul, inflicting a gunshot wound to the side of his neck. Arbab Ali fired with his K.K., hitting Ali Gul on the right side of his chest. Bakhshal also fired with his K.K., injuring Ali Gul's right leg. Ageel discharged his pistol, striking Ali Gul on the right elbow, while Dildar fired his gun, wounding Ali Gul's right hand. Meanwhile, Rajab fired with his K.K. at Ali Asghar, causing a gunshot injury to his back. As a result of the attack, both victims collapsed to the ground. The complainant and his companions sought cover behind nearby palm trees while the accused continued aerial firing before fleeing the scene. Thereafter, the complainant approached the victims and found Ali Gul and Ali Asghar lying injured on the ground. He immediately informed the police, arranged transportation, and proceeded towards Moro Hospital. However, Ali Gul succumbed to his injuries en route and passed away.

3. It is, *inter alia*, contended by the learned counsel for the applicant that the applicant is innocent and has falsely and maliciously been implicated in the present case at the behest of the police. The learned counsel submits that the applicant, being an advocate by profession, has been embroiled in this matter with mala fide intent, solely due to his professional association as legal counsel for the co-accused persons and their relatives. The learned counsel further contended that during the course of investigation, the

applicant was found innocent by the police and was placed his name in Column No. 2 of the police report under Section 173 Cr.P.C. (*Challan*), as he had successfully invoked the plea of *alibi* through statements of local witnesses. However, despite such findings, the learned Magistrate did not concur with the police report. Moreover, it is asserted that the alleged motive behind the incident is not attributable to the applicant but pertains solely to co-accused Gulzar, arising out of a dispute over landed property. It is further argued that the complainant has a history of criminal litigation, with multiple cases registered against him at various police stations, and has longstanding enmities with different communities. Therefore, the learned counsel submits that the applicant has been maliciously implicated in the present case purely as a reprisal for his professional engagement as an advocate representing the co-accused.

4. The learned Additional Prosecutor General vehemently opposes the grant of such relief to the applicant, asserting that his role in the alleged offence cannot be disregarded at this stage. It is emphasised that the presence of the applicant at the time of the commission of the offence could not be conclusively determined through evidence led during the trial. Therefore, the prosecution maintains that the applicant's plea of *alibi* and claims of false implication require deeper scrutiny and cannot be a ground for exoneration at this stage.

5. Having heard the learned counsels and after perusing the record available before me, I proceed to determine the matter accordingly.

Scope of Section 190 Cr.P.C

6. It is of paramount importance to comprehensively expound upon the provisions enshrined in Section 190 Cr.P.C., as this section delineates the circumstances under which a Magistrate may assume cognisance of an offence. The said provision, being fundamental to the administration of criminal justice, confers upon the Magistrate the jurisdiction to take cognisance through three distinct modes:

190. Cognizance of offences by Magistrates. (1) All Magistrates of the first class, or any other Magistrate specially empowered by the Provincial Government on the recommendation of the High Court, may take cognizance of any offence__

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion

Explanation:

(a) upon receiving a formal complaint containing facts which, on the face of it, constitute an offence;

(b) upon receipt of a police report submitted under Section 173 of the Cr.P.C., which is the culmination of an investigation conducted by law enforcement authorities; and

(c) upon obtaining information from any other credible source or upon the Magistrate's own personal knowledge of the commission of an offence. This provision ensures that the Magistrate is not merely a passive adjudicator but an active guardian of justice, empowered to initiate proceedings upon obtaining credible information from any source or even upon personal knowledge. Such discretion is crucial in circumstances where law enforcement agencies fail to act due to negligence, corruption, or external influence. Thus, this *suo motu* power serves as a **check on law enforcement inertia**, ensuring that crimes do not go unpunished merely due to procedural lapses or inaction by investigating agencies.

7. It is imperative to underscore that the jurisdiction of the Magistrate is not constrained by the conclusions drawn in the police report. The Magistrate is neither bound by nor obligated to adopt the opinion rendered by the investigating officer, as the latter's assessment is merely recommendatory in nature and does not hold binding force. (**Javed Khan & Others v. The State & Others**¹)

¹ **2019 P Cr. L J 1756; Para. 6** "Now question for determination before us is that if the magistrate disagrees with the report of police, can he take action under Clause (b) against those whose names have been recommended for discharge and to be placed in

Rather, the Magistrate is duty-bound to exercise independent judicial discretion, guided by sound reasoning and an objective appraisal of the material placed before him, in order to ascertain whether a prima facie case is made out against the accused.

8. It is held in **Muhammad Ahmad v. The State**² as under:

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt."

9. This principle is firmly entrenched in established jurisprudence and has been consistently reaffirmed by superior courts. In **Khalid Hussain v. Asif Iqbal**³, it was unequivocally held that a Magistrate is vested with wide-ranging powers to take cognizance of an offence, independent of the findings and recommendations contained in the police report, provided that there exist reasonable grounds to do so. This decision underscores the judicial independence conferred upon the Magistrate, ensuring that justice is not rendered subservient to the conclusions drawn by the investigating agency. Similarly, in **Bilal**

column No.2. It is well-settled that a report submitted by the police officer under section 173, Cr.P.C., is not binding on the court. The court, therefore, notwithstanding the recommendation of the I.O regarding cancellation of the case and discharge of the accused from case, may decline to cancel the case and proceed to take cognizance of the matter as provided under section 190, Cr.P.C."

² 2010 SCMR 660.

³ 2021 P Cr. L J 242 [Sindh]; **Para 8:** "Judicial Magistrate has been conferred with wide powers to take cognizance of an offence not only when he receives information about the commission of offence from a third person but also where he has knowledge or even suspicion that the offence has been committed."

Para 9: "There is no embargo on the Magistrate's power to entertain a private complaint. Even on receiving a police report, the Magistrate is not bound to accept its findings and retains discretion to proceed otherwise."

*Ahmed v. The State*⁴ the court clarified that a Magistrate does not function as a mere rubber stamp of the police; rather, he possesses the inherent discretion to proceed with a case even in instances where the police recommend its closure.

10. The judicial mind of the Magistrate must, therefore, remain unfettered, and his adjudication must be predicated upon a fair and impartial assessment of all available material, rather than an unquestioning acceptance of the investigating officer's report. The same principle was reaffirmed in *Naeem Akhtar v. Judicial Magistrate*⁵, wherein the court explicitly held that the opinion of the police carries no binding effect upon the courts, thereby reiterating the doctrine that judicial determinations must remain independent of executive influence. Furthermore, in *Soomar v. Civil Judge and Judicial Magistrate*⁶, it was once again held that a Magistrate retains the authority to take cognisance of an offence even in cases where the investigating officer submits a negative report. The ruling reaffirmed the settled position that the Magistrate is not bound by the findings of the police and must exercise his judicial discretion in accordance with law, ensuring that the sanctity of the legal process is preserved.

11. This well-established judicial approach is in consonance with the maxim *judex non potest injuriam sibi datum reprobare*—a judge cannot disown an injury done to himself—signifying that a Magistrate cannot abdicate his judicial responsibility merely because

⁴ 2021 P Cr. L J 261 [Balochistan]; **Para 6:** "The Magistrate is empowered to agree or disagree with the act of the Investigating Officer in releasing an accused during investigation under S. 173, Cr.P.C."

Para 10: "Magistrate does not function as a rubber stamp for the police report but must exercise judicial discretion independently."

⁵ 2018 M L D 1173 [Sindh]; **Para 2:** "Opinion of police was of no binding effect upon the courts; Magistrate could competently agree or disagree with opinion of police while exercising administrative jurisdiction on a report submitted before him within meaning of S. 173, Cr.P.C."

⁶ 2020 P Cr. L J 835 [Sindh]; **Para 6:** "Where prosecution witnesses have fully implicated the accused in their statements recorded under S. 161, Cr.P.C., Magistrate cannot discharge the accused on the basis of police opinion."

Para 7: "Magistrate can take cognisance of an offence even if the report submitted by the Investigating Officer is negative and narrates that accusation is baseless and no case is made out against the accused."

an investigative agency has reached a particular conclusion. It is incumbent upon the Magistrate to ensure that justice prevails through an independent and reasoned application of legal principles, thereby upholding the rule of law.

Plea of Alibi: Scope and Evaluation

12. The plea of *alibi* serves as a defensive mechanism whereby an accused contends that he was at a location other than the scene of the alleged crime at the material time. However, it is well established in jurisprudence that such a plea does not constitute a primary defence but rather requires independent corroboration through unimpeachable and cogent evidence. In *Abdul Rashid v. The State*⁷, it was explicitly held that an accused invoking the plea of *alibi* bears the onus of substantiating it with evidence of unquestionable credibility. The burden is stringent, as the plea must be established conclusively, eliminating any reasonable doubt as to its veracity (*Faiz Bakhsh alias Faizu v. The State*⁸).

13. A weak plea of *alibi*, devoid of cogent and convincing corroboration, is liable to be discarded, as it does not satisfy the evidentiary threshold required for exoneration. This principle was

⁷ 1989 SCMR 144; *Accused raising plea of alibi on the ground that after sunset it was not possible for him to have travelled 30 miles by bus or 15 miles by katcha road within one or one and a half hours and reached place of occurrence. No evidence existed as to how the accused travelled. Travelling of 15 miles or 30 miles by bus or other transport and reaching the spot before sunset was quite possible. Evidence of independent eye-witnesses was duly believed by Trial Court as well as High Court against accused. Presence of accused at scene of offence and his participation in the incident, held, could not be doubted in circumstances."*

⁸ 1989 SCMR 977; *The stand taken by the accused that at the relevant time he was undergoing medical treatment had been fully supported by a doctor who appeared as a defence witness. He was a qualified doctor and was an absolutely independent witness. At the trial he recognised accused and in very categorical terms deposed that on the day of occurrence the accused had come to him and remained in his clinic for about five hours as a case of appendicitis. He also authenticated the certificate issued by him to the accused. No question was put to him to create any doubt about the medical treatment that he had given to the accused or that the medical certificate issued to him was fabricated. There is nothing on the record that he was in any way connected with or had acquaintance with the accused and that he had falsely deposed in favour of the accused."*

further reiterated in *Muhammad Ayub v. The State*⁹, wherein it was emphasised that the burden of proving an *alibi* rests squarely upon the accused, and such a plea must be substantiated by solid and reliable evidence rather than mere assertions. The doctrine of *onus probandi*—the burden of proof—applies in this context, making it incumbent upon the accused to produce irrefutable proof of his absence from the crime scene.

14. At the stage of cognisance, the assessment of an *alibi* is necessarily confined to a prima facie examination, as a detailed and comprehensive evaluation of such a defence falls within the exclusive domain of the trial court. The courts are duty-bound to assess whether the plea has any prima facie merit but cannot conduct an in-depth inquiry at the cognisance stage. Furthermore, in *Kifayatullah v. The State*¹⁰, it was observed that when an accused attempts to fabricate an *alibi* through post facto documentation or other means, such a defence must be scrutinised with the highest degree of caution. This aligns with the maxim *falsus in uno, falsus in omnibus*—false in one thing, false in everything—highlighting the necessity of ensuring that a plea of *alibi* is not contrived or manufactured to mislead the court. The principle underscores the judiciary's obligation to prevent the misuse of *alibi* as a mere tool of exculpation, thereby ensuring that justice is not obstructed by spurious defences.

Application of the Law to the Present Case

15. In the instant case, the learned Magistrate has exercised his jurisdiction in a lawful and judicious manner under Section 190 of the Code of Criminal Procedure (Cr.P.C.). The contention that the applicant was placed in Column No. 2 of the police report does not *ipso facto* entitle him to exoneration, as the Magistrate retains the

⁹ P L D 1964 (W.P.) Peshawar 288; *Burden of proof on person taking such plea.- Evidence Act (I of 1872), Ss. 11, 103 & 106.*"

¹⁰ PLD 1975 Peshawar 131; *Accused, after issue of search warrants and proclamation, getting certificate of presence in another district from a Government official and such official certifying accused's presence before him on day of occurrence—Accused's conduct, held, indicative of his knowledge of his involvement in case and an effort to procure evidence for his alibi.*"

discretion to evaluate the material independently, uninfluenced by the conclusions drawn by the investigating officer. It is a well-settled principle that the Magistrate is not bound by the opinion of the police and must apply his own judicial reasoning in determining whether sufficient grounds exist for proceeding against an accused.

16. Upon a careful perusal of the record, the Magistrate has rightly concluded that a prima facie case is made out against the applicant, warranting further proceedings. The mere assertion of *alibi*, particularly when it is premised on statements of local persons rather than unimpeachable evidence such as travel records, official logs, or documentary proof, is manifestly insufficient to nullify the cognisance taken by the Magistrate. An *alibi* plea, unless supported by irrefutable and cogent evidence, does not per se exonerate an accused at the pre-trial stage. The principle of ***semper necessitas probandi incumbit ei qui agit***—the necessity of proof always lies with the one who asserts—applies with full force, placing the burden upon the accused to establish his plea conclusively.

17. Furthermore, this Court finds that the order passed by the learned Magistrate does not suffer from any legal infirmity, misreading of evidence, or non-application of judicial mind. The exercise of discretion by the Magistrate is consistent with settled legal principles and withstands judicial scrutiny. The accused shall have ample opportunity to substantiate his defence during the trial, where he may produce concrete and admissible evidence in support of his plea. At the present stage, however, the plea of *alibi*, being weak and resting solely on oral assertions, cannot override the prima facie case established through the FIR and the accompanying material.

18. It is a fundamental principle of criminal jurisprudence that the assessment of an *alibi* must be subject to strict scrutiny, particularly when raised at the pre-trial stage. As held in ***Kifayatullah v. The State***, a belatedly raised *alibi* or one based on manufactured evidence must be approached with caution. The Magistrate, in the present case, has acted in consonance with this well-established judicial approach,

ensuring that justice is not thwarted by a premature and unsubstantiated claim of *alibi*.

19. In light of the aforementioned legal principles and judicial precedents, this Court finds that the learned Magistrate was fully justified in taking cognisance of the matter under Section 190 Cr.P.C. The plea of alibi, in the absence of unimpeachable evidence, does not provide a valid ground for quashing the proceedings with regard to the applicant at this stage. However, the aforementioned findings shall not prejudice the due course of trial proceedings. The applicant remains entitled to invoke the plea of alibi with unimpeachable evidence, both during trial and at the bail stage, as a defence, where the evidence shall be tested on its merits. Accordingly, this Criminal Miscellaneous Application stands **dismissed**.

J U D G E

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