

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Cr. Misc.Appl. No.1097 of 2024

18.12.2024

Mr. Aamir Mansoob Qureshi, advocate for applicant.
Mr. Raj Ali Wahid Kunwar, Advocate for respondent No.4.
Ms. Seema Zaidi, Addl.P.G.

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ORDER

MUHAMMAD IQBAL KALHORO J:- Applicant's who is an accused in Crime no.536 of 2024 under section 319, 34 read with section 302 PPC of P.S. Shahrah-e-Faisal Karachi has impugned an order dated 07.08.2024, passed by the learned XVth Judicial Magistrate, Karachi, East, taking cognizance of the offences on the report under section 173 Cr.P.C. submitted by the investigating officer of the case.

2. As per brief facts, which are based on a statement of complainant Mst.Khadeja Naz, applicant and sister-in-law Arjumdzaman by locking her minor son namely Hussain aged 3/4 years in the car deliberately on 15.06.2024 murdered him. Learned defence counsel has argued that the case is made out at the most under section 319 or 322 PPC and not under section 302 PPC. The first investigating officer had submitted the report under the aforesaid section but then investigation officer was changed under the influence of complainant and another police official took over the investigation and added section 302 PPC in the final report; that section 302 PPC was added in the case on 161 Cr.P.C. statement of the complainant which was recorded on 28.06.2024 after almost 13 days of the incident; that there is no evidence that complainant's son who was real nephew of the applicant was murdered by him and that there was any enmity between the parties to presume so. It was an accident which happened due to negligence.

3. His arguments have been rebutted by the learned counsel of complainant, who has drawn my attention to the impugned order, wherein while referring to the investigation it has been observed about Mst. Arjumdzaman sister-in-law of the complainant that she had alighted from the car alongwith her children and then she after some time went back to the car, opened the back door and took off her luggage but she did not take out Hussain who was sitting on the back seat of the car, which shows a deliberate attempt on her part to leave behind minor son of complainant to die. Learned Addl.P.G. has also supported the impugned order.

4. I have considered submissions of the parties and perused material available on record. As per statement of mother of complainant, she was married to one Yawar Al Zaman and would live with him in a joint family system in the one and same house. On 15.06.2024 her brother-in-law Khaleeq uz Zaman took her son aged about 3/4 years in the car for bringing her sister-in-law from Sachal Goth Scheme 33 Karachi. After half an hour he came back along with her sister-in-law and her three children. When she did not find her son with them she enquired about him and the children in the house told her that he was playing with the children on the ground floor. However, after some time when his brother-in-law Khaleeq uz Zaman for going to gym opened the door of the car, he found his minor son in a deteriorated condition. Hue and cries were raised and he was taken to Agha Khan Hospital by his father and others for treatment but he could not survive and died on 16.06.2024. Initially the FIR was registered under section 319 PPC but subsequently on the basis of a statement of complainant and on analyzing CCTV footage of the incident, section 302 PPC was added by the I.O. and the report was submitted before the Magistrate concerned, who by impugned order has accepted the same.

5. It is a settled proposition of law that on a positive report under section 173 Cr.P.C. by the I.O. referring the accused to a trial under particular provisions of law, the Magistrate has no jurisdiction to disagree with the I.O. by either disposing of the case and/or altering or deleting a particular section. The Magistrates' power to disagree with the opinion of the I.O. is confined to only negative reports disposing of the case under any class or deleting a particular section from the case. In such cases only, the Magistrate by going through the material can form his opinion disagreeing with the conclusion of the I.O. and take cognizance of the offences against the accused by either accepting the challan against the accused or restoring the deleted provisions.

6. The ratio laid down in 1972 SCMR 516, 1983 SCMR 370 (Para-8) SBLR 2010 Sindh 306 and 2015 YLR 2312 postulates that the Magistrate has no power to dispose of the case recommended for a trial by the I.O. on the basis of investigation. In this case also it is not the Magistrate who has added any section in the challan but he while agreeing with the report of the I.O. has proceeded to accept the same. The arguments of the learned defence counsel that the section 302 PPC has been added in the final report under the direction of the Magistrate is not born out of any record. Not only in the final report but in the interim challan as well Section 302 PPC was included by the I.O. The question whether the provision of section 302 PPC is attracted in the present facts and circumstances of the case can only be replied after recording of evidence and not at this stage. I do not therefore, find any illegality in

the impugned order and dismiss this application. However, before the trial court after recording of evidence of the case, it would be within reach of applicant to file a fresh application for altering the charge, if from the evidence section 302 PPC is not made out, which, if filed, shall be decided on its own merits.

7. The observations made herein above are tentative in nature and would not prejudice case of either party at trial.

8. This Cr. Misc. Application is disposed of.

J U D G E

Hafiz