# IN THE HIGH COURT OF SINDH AT KARACHI

27.5.15

Constitutional Petition No. 3065 of 2015

- 28 -

Salman Sarwar Abro s/o Ghulam Sarwar Abro, presently confined in judicial custody at Juvenile Prison, Karachi.

..... Petitioner

Versus

1. The Government of Sindh, through Prosecutor General Sindh, having office at Karachi.

2. The Anti-Terrorism Court No.III, Karachi.

.....Respondents

## CONSTITUTIONAL PETITION UNDER ARTICLE 199 OF CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

It is most humbly submitted as under:

The petitioner is an aggrieved person, in that he has no other efficacious remedy and being dissatisfied with the orders dated 29-04-2015, passed by Respondent No: 2, on a Private complaint No. 01/2015, prefers this constitutional petition, on consideration of following facts, circumstances and grounds.

TRUE AND CERTIFIED COPY OF THE IMPUGNED ORDER IS MARKED AS ANNEXURE P/1.

## FACTS

1. That the petitioner is law abiding citizen of the Islamic Republic of Pakistan, hence entitled to seek equal protection of law, whenever his fundamental rights are infringed. The petitioner is a young boy of eighteen years and belongs to a very respectable family.



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2. That consequent to an incident on 09-05-2014, where the petitioner was injured, and that the true facts having not being allowed to be recorded through an FIR, the Petitioner continues to face trial before Respondent No: 2, in crime no 235/14 ,U/S 302, 324, 34 P.P.C R/W S7 ATA 1997, of PS Darkshan Karachi, for the alleged murder of Suleman Mustafa Lashari.

TRUE COPY OF FIR AND CHARGE SHEET ARE ATTACHED AND MARKED AS ANNEXURE P/2

3. That, it is submitted that in the same incident, one Guard of Petitioner, namely PC Zaheer Rind, was killed and Petitioner also received firearm injury at the hands of complainant side of state case. It is submitted that a relative of the Petitioner submitted application for registration of FIR with the police station on the same night, but same was not registered. Application bearing case number 18.02.2014, for registration of FIR was filed before the learned Sessions Judge, Karachi South but same was dismissed. The order of learned Sessions Judge was challenged before Hon'ble High Court of Sindh where the order of the Sessions Judge was maintained with observations, that adequate and efficacious remedy of private complaint is available with the complainant. The order of Hon'ble High Court of Sindh was challenged before Hon'ble Supreme Court of Pakistan and same was withdrawn as not pressed on 06-02-2015 on instructions of the complainant to file private complaint before the Court The court of appropriate jurisdiction.

TRUE COPIES OF ORDERS OF THE HIGH COURT AND SUPREME COURT ARE ATTACHED RESPECTIVELY AND MARKED AS ANNEXURE P/3 & P/4.

4. That on 18-02-2015, the Petitioner filed a private complaint with Respondent No 2, as observed by this Hon'ble Court earlier, in which statement of the petitioner was reproduced verbatim as under:

*"I am student of first year in CBM College Defense Karachi I belong to it very respectable and educated family. I have got excellent educational record which. I secured A-I GRADE and obtained second position in SSC-Part II; at Hyderabad Board. I was given shield by Cadet College Petaro in appreciation. I and Suleman Mustafa Lashari were fast friends since 2010. We had common friends namely Sheikh Muhammad Hamza, Shahnawaz*



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Shah, Jam Hyder Unar, Jam Ali Korejo and Hamza Iqbal. Shahnawaz shah was joining force among us and he used to bring about conciliation among us whenever any dispute occurred. We were on regular visiting at Karachi Broast Restaurant and Delawala Food Corner Clifton. On 05-05-2014 at about 5.30 pm I was at café Clifton Karachi with Jam Ali, Zeeshan Rajput and Suleman Mustafa Lashari, meanwhile Suleman Mustafa Lashari told us a year old incident that one day he was stopped by DSP Clifton during car checking and he withhold his license, however when Suleman told the DSP that he was son of Sardar Ghulam Mustafa Lashari, DSP released him and sought applogy too. Suleman Mustafa Lashari further told that soon after that incident, Shahid Heyat, the then SSP Clifton, came to his house and met with his father Sardar Ghulam Musatafa Lashari and apologized for DSP's misbehavior with him. I suspected such incident false and showed Sindh Police facebook page on internet to all friends at my mobile which transpired that said Shahid Heyat was never posted as SSP Clifton one year ago as told by SulemanLashari. This made Suleman Mustafa Lashari a laughing stock, he got infuriated and expressing his anger against me said that police was nothing before his father. SulemanLashari continued saying that even Iqbal Mehmood, the then IG Sindh, used to come to his house to see his father. We all the friends on same night again assembled at house of Shahnawaz Shah who attempted to bring about reconciliation between Suleman Lashari and me. Though we did not hug each other, yet showed smiling faces to one another and nothing left in my heart and on the same night we all proceeded towards Delawala café too, where we were happy and even I inoited Suleman Lashari for some food on which he said, "thank you". On 06-05-2014 I along with all friends except Suleman Lashari meet at café Clifton, that meanwhile at about 8 pm Jam Haider Unar said in joking style that Suleman Lashari was behind me along with army of Baloachis in Toyota Corolla car to give me beatings. I did not take it seriously. On 07/8-05 2014 at about 11.30 pm to 12.15 am me and Jam Ali, Jam Haider Unar, Zeeshan Rajput, Shahnawaz Shah, Sheikh Hamza and Hamza Iqbal again sat at café Clifton where we were eating chicken rolls in happy mood. As we were about to leave for Delawala Café suddenly Suleman Mustafa Lashari approached there along with his four armed gunmen in Toyota Corolla car bearing registration no BBM 764. They all encircled VIGO and started beating me so also tearing my shirt. Suleman Lashari was forcing me to excuse for May 5 incident. Suleman Lashari snatched my Samsung mobile. I was rescued by Jam Haider Unar and then Suleman Lashari left café Clifton along with his gunmen. Jam Haider pushed me inside VIGO and then Lasked Jam Haider to proceed to police station directly for lodging complaint, on which Jam Haider suggested me to change shirt first. I asked Jam Haider Unar to drive VIGO because of my depressing condition. I came to my flat, changed shirt and took 5 police guards of my father and left for police station Darkshan for lodging FIR of the incident. The guards were PC Maqbool Ahmed Brohi, PC Imran Ali Araen, PC Yaseen Jamali, PC Driver Muhammad Rashid Gujar and PC Zaheer Ahmed Rind. Only PC Zaheer Rind had his official SMG with him since he was performing guard duty at the relevant time while rest were sleeping in tent; I sat at driving seat with Jam Haider and Driver PC Rashid Gujar at rear seat. I left for police station. All the 4 guards were in Dala of vehicle. Meanwhile

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*Jam Haider told me that Shahnawaz Shah had called us to his house and Jam Haider also insisted to go to Shahnawaz Shah and I agreed after little resistance. I along with Jam Haider came to house of Shahnawaz Shah where Hamza Iqbal and Sheikh Hamza avere also present as called by Shahnawaz Shah to resolve dispute. On inquiry, gate keeper told me that he was not available at his house. I realized that Shahnawaz shah was on talk with Hazrat Iqbal on his mobile and I talked to Shahnawaz Shah. Shahnawaz Shah asked me to come to SulemanLashari's house and promised to conciliate between me and SulemanLashari and restore me mobile phone and further said that we would jointly complain to the father of Suleman Lashari regarding incident of café Clifton. The house of Suleman Lashari is hardly at a distance of 5 minutes drive from the house of Shahnawaz Shah. At this Jam Haider left for his house and I proceeded towards house of Suleman Mustafa Lashari. I reached the house of SulemanLashari in about 5 minutes and I saw Suleman Lashari holding pistol and his brother Zeeshan Mustafa Lashari with repeater along with their 4 same Baloach armed guards in black Shalwar Qameez having rifles like weapons in their hands at their main gate. Shahnawaz Shah and Jam Ali were also there as I stopped my VIGO just at some feet from main gate of Lashari's house, Zeeshan Lashari, on noticing us cried and asked his armed men to kill all of us and he fired on VIGO and too Suleman Lashari and other armed men started firing on my VIGO. I saw Jam Ali ran away on his car wherens Shahnawaz Shah ran inside the house of Suleman Lashari. I fell towards side seat of VIGO to protect myself. I noticed that there was indiscriminate firing on VIGO from roof of Lashari's house also. I then felt that bullet had hit me at my back and I cried for help. I was taken to Ziauddin Hospital by PC Driver Rashid Gujjar. I went semi unconscious for about two days in ICU and when regained consciousness was told by my uncle Tariq that Suleman Lashari and PC Zaheer Rind had been murdered. When I meet my police guards they told me that Zeeshan Mustafa Lashari made fire on Zaheer Rind and he died on spot and Suleman and his armed men made firing on VIGO and they fled from vehicle to save their lives. They also told me that Suleman Lashari also fled to his house. Shahnawaz Shah and jam Ali are not giving true account of facts due to fear and pressure of their parents coen for and against either side. I can identify unknown armed persons who were making firing on my VIGO from outside the gate. I also came to know through statement of Zeeshan Mustafa Lashari before police and media that his brother-in-law Rahimuddin, servant Riazat were at roof of their house while guard Ali Ghulam Bugti was at main gate with weapons at the time of incident".*

5. That, the petitioner brought independent evidence of his friendship with deceased Suleman Mustafa Lashari and other friends in shape of Facebook chatting. On the other hand Lashari side has been denying this fact from day one and is trying to give impression that petitioner was stranger to them as well as deceased SulemanLashari as everyone could believe that one stranger must have no other intention except to kill the deceased Suleman Lashari at latter's house. Again the petitioner

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submitted evidence before the Respondent No 2, that he was called by common friends at the house of deceased Suleman Lashari and had no intention to attack Lashari side but this fact was not considered by him.

THE COPIES OF MEMO OF PRIVATE COMPLAINT ALONG WITH SUPPORTING DOCUMENTS ARE ATTACHED AND MARKED AS ANNEXURE P/5.

6. That the private complaint was entertained by the Respondent No 2 and statement of the petitioner U/S 200 Cr.P.C was recorded and an enquiry U/S 202 CR.PC was conducted by him, in which statements of the witnesses of the petitioner were recorded.

TRUE COPIES OF STATEMENTS ARE ATTACHED AND MARKED AS ANNEXURE P/6 TO P/11.

7. The learned Respondent No. 2 by his order dated 29-05-2015, said that the instant private complaint has been filed after delay of about 08 months, and common friends of the complainant have not been examined during enquiry under section 200 Cr.P.C, therefore there are no sufficient grounds which prima facie connect the proposed accused, with the alleged offence and last but not the least that there is sufficient evidence in State Case pending before him which prima facie connect the complainant and his witnesses with that offence.

## GROUNDS

1. That the impugned order is bad in law and on facts and is liable to be set aside.

2. That the learned Sessions Judge failed to follow the settled law and in refusing to allow the application and consequently, to proceed in the direct complaint has erred.

3. That as far as non examination of common friends of the complainant is concerned, firstly these friends are under immense pressure of their parents hence the refused to give statement in favor of either side which is quite evident from their statement under section 161 Cr.pc. secondly; the presence of common friends have been admitted by

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complainant of state case during his interview at TV programme SAMA KI AWAZ. Moreover, these witnesses could be called by respondent no 2 during enquiry under section 200 CrPC in the interest of justice as these common friends are out of reach of the petitioner.

4. As far as ground of non-availability of sufficient grounds is concerned, the Respondent no 2 has not given, even a single instance in his order regarding the same. Contrary to this, admittedly, petitioner sustained injuries, his guard died because of firearm injuries of complainant of state case, the VIGO of petitioner received several bullet fires and FSL report was produced with private complaint, several witness with ocular account of incident were examined and this side of case was not considered by respondent no 2..

5. That this Hon'ble Court in Criminal Miscellaneous Application No 59/2014 filed by a cousin of the petitioner, while declining request of the applicant for registration of counter FIR, had clearly observed at Para No 13 of the judgment, *"Moreover, at this stage, the lodgment of second FIR shall not serve any useful purpose but on the contrary it will be a deliberate divergence which would be fatal to meet the ends of justice. However, if the accused are not satisfied with the conclusion of the investigation conducted by the police by rejecting their version of the occurrence, they may avail the alternate and efficacious remedy of filing direct complaint".*

6. That the complainant and his guards were attacked by the accused side with indiscriminate firing after forming unlawful assembly of more than five persons with common object of killing complainant and his guards. The Hon'ble Supreme Court of Pakistan has held in an identical case, titled Tahir Mehmood Versus Muhammad Nadeem & others and reported as 1996 SCMR 1417,*"S. 337/324/34- Constitution of Pakistan (1973). Art. 185 (3)- High Court in exercise of its Constitutional jurisdiction by means of the impugned order, had restored to the court of Magistrate the Criminal Complaint filed by an accused in the police case registered under section 302/324/34,PPC putting his cross-version about the occurrence ---Said Criminal complaint had been dismissed by the courts below, but high court was of the view that complainant had made out a prima facie case for summoning the accused (petitioners)---FIR in*

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*the police case as well as the criminal complaint both revealed that both the sides had resorted to firing by lethal weapons in the occurrence and each party holding the opposite party as aggressor claimed to have fired in exercise of the right of self-defense—Complainant who had filed the criminal complaint had admittedly sustained a fire-arm injury on his leg-Trial Court which was to hear the police case as well as the complainant case was to decide as to which of the two parties had resorted to aggression---High court by restoring the criminal Complaint had provided opportunity to the both sides to place their respective case before the trial court in proper perspective and whosoever was found guilty could be punished, otherwise accused in the complaint case could not be punished—High Court before restoring the complainant's case had thoroughly examined the evidence led therein and its judgment was just and fair and in any case was not perverse or shocking so as to call for interference by Supreme Court—leave to appeal was refused in Circumstances.",* which judgment was not followed by the learned Sessions Judge, where he erred.

7. That the refusal to register the FIR against the persons being nominated and accused of the actual offence, the petitioner was left with no remedy except to file direct complainant, to seek justice for his deceased guard Zaheer Rind and his own injuries which resulted because indiscriminate firing of accused side, with sole object of killing all the persons sitting in VIGO vehicle.

8. That by virtue of Articles 4 and 10A, it is a fundamental right of the every citizen to be treated in accordance with law and of equal protection and of getting a fair trial. In refusing to allow the process of the direct complaint, the learned Sessions Judge has refused the fundamental right of the Petitioner.

9. That it is fundamental right of the complainant and his guards to have protection and benefit of law as his complaint could be adjudicated according to law on equal footings as provided under Article 25 of the Constitution of the Islamic Republic of Pakistan. The Hon'ble High Court in the case of Muhammad Nadeem Versus Additional Sessions Judge Lahore reported in PLD 1996 30 LAHORE has held:*"Cross-Cases—Trial of—Complaint filed by accused containing counter-version of the*

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*incident, on which a challan case was already pending before Sessions court, was dismissed by the Magistrate and the revision petition against that order was also dismissed by the sessions court—Both the parties claimed to have fired in the exercise of the right of private defense at the time of occurrence resulting in death of a person on the complainant side and a compound fracture of the leg of one of the accused persons—Both cross-cases containing counter version of the same incident between the same parties under the established principle of law were to be tried by one court and the impugned orders whereby the aforesaid complaint was dismissed had violated that principle—Both the courts have committed an error of law in deciding the matter and had gone outside their jurisdiction conferred on them---Impugned orders were consequently declared illegal and of no legal effect and were set aside and the complaint was restored to the court of magistrate which had sufficient prima facie evidence for summoning the accused and proceeding further in accordance with law--constitutional petition was allowed accordingly".* In this judgment, it was also been held that the object of inquiry u/s 202 Cr.P.C is different than a full dress trial, as burden of proof in such inquiry is lighter on complainant, as compared to the burden of proof on the prosecution during trial of an offence. The reliance was further placed on 1991 SCMR 1608, PLD 1984 LAH 323, PLD 1987 SC 447, PLD 1974 SC139 AND 1974 SCMR 530. The learned Sessions Judge in not considering the prevailing case law and the law on the subject has thus erred.

10. That the court while deciding the issue of cognizance on complaint, has to restrict its finding to material brought by the complainant and not the state case. In this connection reliance is placed on 2014 P.Cr.L.J. 1133 & 2012 MLD 209. The impugned order thus suffers from illegality, in that the case of the State relates to and caters for one side of the story, without looking at the other version.

11. That the order suffers from another illegality, in that where the learned court deals with the delay, it has failed to consider the fact that the delay has been properly explained. that the complainant was and continued to pursue his applications / appeals up to Hon'ble Supreme Court of Pakistan for the registration of FIR but same was withdrawn as not pressed on 06-02-2015, whereupon, the complaint was filed. Thus

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there was infact no delay on the part of the Petitioner. Notwithstanding, otherwise also the law is, by now well settled that delay by itself does not bar the filing of a criminal complaint. Reliance is placed on 2012 PCRLJ LAHORE Page 498, in which it has been held that: *"S 200-Constitution of Pakistan, Art 199--- Penal Code,-- Anti- Terrorism Act, S 7 (c)...Private complaint...Limitation—complaint of the petitioner had been dismissed by the trial court mainly on ground of delay in filing complaint--- Respondent had been unable to rebut the petitioner's contention that no limitation was provided in the criminal law for filing complaint.. petitioner has been continuously perusing case and in that respect he had also lodged an FIR and on being disappointed from police officials he resorted to filing the private complaint...petitioner has supported his complaint by recording his statement as witness, which was corroborated by the statement of other witness—trial court was not justified in dismissing the complaint"*. In this case reliance was also placed on 2010 SCMR 105. Thus dismissing the case on delay, is an error.

12. The Respondent No: 2 has passed erroneous order both on facts as well as law. He has stated at page 6 of impugned order, to which Petitioner wants to bring a counter defense case. This ground of the order is not sustainable in law and facts, as the petitioner has brought an independent version from the very beginning, from day one and not a single ground of defense of State case was ever raised by the petitioner in his complaint and statement. Further, the witness of the Petitioner deposed only to the extent of their own case. Moreover, the law is clear that while deciding complaint case judge must not keep facts of state case in his mind, however the learned judge has mainly based his findings on facts of state case as evident from his remarks at page No. 7 of impugned order. One person of petitioner side died of firearm injuries at spot and petitioner himself received bullet injuries and that too sitting in his vehicle, hence this shows that accused side was infact the aggressor and not the petitioner side.

13. That the Respondent No 2 has relied upon 2010 SCMR 1816 ZAFAR & OTHERS VERSUS UMAR HEYAT & OTHERS, that registration of private complaint would cause harassment to accused and result in abuse of process of law and wastage of precious time of court. It

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is submitted that learned judge has only cited principle of law of the above judgment and not different facts. It is agreed that false and frivolous complaints should be buried at the initial stage, but facts of above judgment are quite different and learned judge has failed to consider this aspect. For example, that private complaint was submitted when almost all the prosecution witnesses were examined by the trial court. Private complaint was filed after delay of about 7 months without any explanation. Whereas in present case not a single witness in state case has been examined so far. It is further submitted that petitioner side has been pursuing the case for registration of FIR up to Supreme Court of Pakistan, whereas in above referred case no such attempt was made by the applicant side. The learned judge has failed to distinguish the circumstances of two cases. The dismissal of private complaint has made it clear that Respondent No.2 has accepted the contents of FIR of State case as true prior to lawful adjudication.

14. That, the Respondent No 2 has not considered the principle of law, that if the Petitioner and other accused are acquitted in state case, how would the culprits of murder of PC Zaheer Rind and fire arm injuries to the Petitioner would be punished in absence of private complaint.

15. That instant complaint does not create a defense story tainted with malice but an independent and reasonable case against the accused in which admittedly, one police guard was killed and petitioner himself had sustained fire arm injury. On the other hand in challan case the postmortem report of the deceased Suleman Mustafa Lashari makes it clear that he sustained bullet from **lateral angle and not parallel** as stated in FIR and further it is highly improbable, that SMG bullet fired at distance of about ten feet bears no exit wound in human body especially at neck. Again the medical report of the Complainant/Petitioner transpires, that along with bullet some foreign bodies were recovered from his body which corroborates his statement, that he did not come out of his vehicle and consequently falsifies the version of the accused side available in challan case. Moreover, FSL report of the vehicle shows that it received several bullets both from outside and roof of house of accused side hence strengthens the version of the complainant with natural and independent evidence.

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16. That in case cognizance on this complaint is not taken, the petitioner would be seriously prejudiced and murder of PC Zaheer and his own injuries would be left unpunished and this would amount to accepting and admitting the contents of FIR No 365/14 as true and correct without adjudication.

17. That law of superior court is settled that in case of counter version cases, both versions should be adjudicated according to law fairly and honestly and such versions be kept at juxtaposition and after fair trial it is to be judged which version is correct. It has further been held from time to time with total harmony that cross-version cases should be tried by same court, at the same time and judgments in both the cases should be pronounced simultaneously. Reliance is place on ***Noor Illahi Case PLD 1966 SC 708, PLD 1981 SC 522***. Meaning thereby only this court has jurisdiction to try this complaint otherwise there is every possibility of contradictory and inconsistent judgments and more over as a rule of prudence and in order to meet the ends of justice both the cases should be given equal importance and treatment and this court will be in the best position to determine which side is the aggressor and which aggressed upon.

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## PRAYER

1. That this Hon'ble court may be pleased to set aside the impugned order and order registration of private complaint of the petitioner.

2. That this Hon'ble court may further be pleased to direct the Respondent No: 2 to try both State case and private complaint at the same time and pronounce judgments of both the cases simultaneously in order to avoid inconsistent judgments.

3. Any other relief this Hon'ble court deems fit and proper within the circumstance of the case.

Karachi;
Dated: ___ May, 2015

ADVOCATE FOR THE PETITIONER

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