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IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Misc. Application No. D-179 of 2018

Date of hearing	Order with signature of Judge
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For hearing of main case.

Before:

Mr. Justice Salahuddin Panhwar &
Mr. Justice Adnan Iqbal Chaudhry.

29-06-2018

Mr. A. R. Faruq Pirzada Advocate for applicant.

Mr. Abdul Rehman Kolachi, Deputy Prosecutor General a/w Muhammad Aijaz Bhatti, DSP/I.O of crime No. 20 of 2018 of P.S, Mehar-Dadu.

Mr. Qurban Ali Malano Advocate files Vakalatnama on behalf of respondent No.3.

ORDER

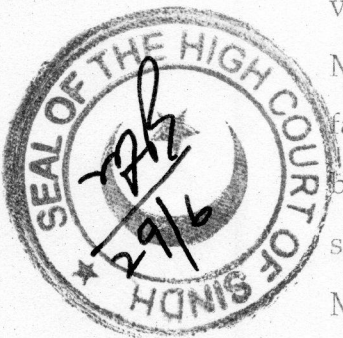
Salahuddin Panhwar, J. Through this Crl. Misc. Application, applicant has challenged the impugned order dated 24.02.2018, passed by learned Judge, ATC Naushehro Feroze, whereby he accepted the recommendations of I.O, who let off accused Sardar Ahmed Khan under section 497 CrPC and accused Burhan Chandio under section 169 CrPC by placing their names in column No.2 of the charge-sheet, submitted in crime No. 20 of 2018 of P.S, Mehar-Dadu for offences under sections 302, 504, 114, 109, 148, 149 PPC r/w section 6/7 ATA, 1997.

2. Facts of prosecution case, as set out in the FIR, are that complainant Pervaiz Ahmed (applicant) lodged FIR alleging therein that Mukhtiar Ahmed is his brother, whereas Karamullah Khan Chandio is his father, who was Chairman of U.C Baledi. One Sardar Khan Chandio son of Shabir Ahmed since long used to issue threats to his brother Mukhtiar Ahmed Khan Tamandar in respect of his collusion against him with the help of other Tumandars. He asked him to stop or to face consequences along with Tamandar Council and other family members. Such threats were conveyed through different people at different times. On 17.01.2018 in the morning, complainant along with his father Karamullah Khan, brothers Mukhtiar



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road leading from police station towards Fareedabad, when at 09-00 a.m, two vehicles viz. one white Corolla Car No. BFZ-428 and another white Land Cruiser came and stopped, out of which six armed persons identified as 1. Ali Gohar Chandio with KK, 2. Ghulam Murtaza Chandio with repeater, 3. Sikandar Chandio with repeater, 4. Zulfiqar Chandio with repeater, 5. Ghulam Qadir alias Qadu Chandio with repeater and one accused Burhan Chandio was sitting in Land Cruiser and retracted down glass window of the car and instigated other accused that these people insptie of many warnings tried to insurrect against Sardar Khan therefore teach them a lesson and make example for others and kill them, on such instigation of Burhan Khan and at the instance of Sardar Khan, other accused opened fires and created terror among the people and accused Ghulam Qadir alias Qadu made fire of his repeater upon father Karamullah which hit him on his belly, his father grappled accused Ghulam Qadir during which other accused, namely, Ali Gohar with KK and Ghulam Murtaza with repeater fired in order to rescue Ghulam Qadir and one KK fire hit father Karamullah on right side of chest and other KK and repeater fire hit Qadu and both of them fell down, thereafter accused Murtaza fired with his repeater with intention to murder upon brother Mukhtiar Ahmed which hit him on left side of chest and accused Ali Gohar fired with his KK which also hit Mukhtiar Ahmed on his face and he fell down while screaming, thereafter accused Sikandar fired directly with his repeater with intention to murder upon his brother Qabil Hussain which hit him on his right side buttock who also fell down while screaming. Thereafter, all accused fired indiscriminately and raised slogans that whoever will revolt against Sardar he will also meet the same fate and went away in their vehicles towards western side. Then complainant party saw brother Mukhtiar Ahmed who sustained firearm injuries on his face and chest and father Karamullah sustained firearm injuries on his belly and chest and brother Qabil Hussain sustained firearm injuries on his buttock whom they shifted to Taluka Hospital, Mehar where father Karamullah and brother Mukhthiar Ahmed succumbed to injuries and brother Qabil Hussain was referred to Larkana by doctors. After proceedings at hospital, complainant party buried the dead bodies and in the evening received information



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spread panic and terror and fired indiscriminately at the instance of Sardar Khan and on the instigation of Burhan Khan and have murdered Mukhtiar, Qabil Hussain and Karamullah and terrorized common men who shut their shops and ran away.

3. Learned counsel appearing on behalf of applicant/complainant contends that Investigating Officer has not properly conducted investigation and he was in league with respondents No.2&3, as such he let off them by placing their names in column No.2 of the charge-sheet and such recommendations were accepted by the trial court by impugned order without appreciating material available on record judiciously. He next contends that the PWs have fully supported the version of complainant recorded in the FIR. He prayed for setting aside the impugned order and taking of cognizance of the matter.

4. Learned DPG for the State while adopting the arguments advanced by learned counsel for applicant did not support the impugned order.

5. This Crl. Misc. Application was presented on 02.03.2018. Notices were issued and on the next date i.e. 28.03.2018, Mr Athar Abbas Solangi Advocate filed Vakalatnama on behalf of respondents No.2&3. On 12.04.2018, learned APG sought time due to non-availability of police papers. On 03.05.2018, learned counsel for respondents filed reply, however, on 17.05.2018, counsel for applicant was not available but by order dated 26.06.2018 directions were issued with regard to arrest of absconding accused, protection of complainant witnesses and their families as well matter was adjourned with intimation notice to learned counsel for respondents. On 28.06.2018, associate of learned counsel for respondents sought time on the plea that his senior is not well and contended that he will argue this matter today, hence this matter was adjourned for today.

Today, Mr. Qurban Ali Malano Advocate files Vakalatnama on behalf of respondent No.3 alongwith Mr. Asif Abdul Razazaq Soomro Advocate and further seeks time as well as he submits application of Mr. Asif Abdul Razaque Soomro Advocate that due to death of his maternal uncle he is unable to proceed with the case, however, Mr. Malano represented other accused in Crl. Transfer Application No. D- 54 of 2018.



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6. The conduct, displayed by the respondent and counsel, is not worth appreciating because a right of hearing is never meant to prejudice the purpose of the Court (s) i.e to ensure '*fair & speedy justice*'. A right of hearing cannot be exploited so as to frustrate the authority of the Court (s) to regulate hearing of the matters fixed before it. In case of "Engineers Study Forum (Registered) & another v. Federation of Pakistan and others 2016 SCMR 1961, it was observed as:-

"4. ... The Court is not bound to give indefinite hearing to the counsel appearing for a party before it nor the counsel can claim privilege of hearing him by the Court to his heartfelt satisfaction. It is the function of Court to regulate hearing of the matters fixed before it and at the same time to ensure that it has given adequate time to the counsel for hearing in a given case. What is adequate time for hearing of a given case, it is not for the counsel appearing for a party before the Court to decide rather it is more a function of the Court. There is no concept in the Court of law of allowing a counsel for a party to hear infinitum or to his heartfelt satisfaction nor any rule in this regard was cited before us. It is true that while hearing a case before it, the Court has to keep into consideration well enshrined and celebrated principle of *Audi Alteram Partem* (no man should be condemned unheard) and the Court was well informed of this principle while hearing a matter before it.

7. When it appears to the Court that such right is being exploited thereby turning an *opportunity of hearing* into '*more injustice*' then Courts can competently proceed further on basis of available materials, however, we partly heard Mr. Malano, but he seeks time and insists to argue before another Bench.

8. Admittedly, this is a case of heinous in nature, three innocent persons were murdered in front of their house. Allegations against the respondents/accused are that one accused was annoyed with social activities of deceased persons. Being Sardar, he on many times issued threats of dire consequences to the deceased persons. Even such news was published in newspapers prior to this incident. However, during investigation, I.O placed names of Sardar Khan Chandio and Burhan in column-II of the charge-sheet on the plea of alibi, such report was submitted



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Court but the respondent *despite* number of opportunities has failed to argue the matter rather enjoying the *privilege* (discharge); legality or *otherwise* thereof is under determination hence attempting to delay the matter. Worth to add that matter relates to a case of *schedule offence* (ATA) which, per the *Act* requires to be decided *speedily*. In other words, such *practice* was / is also an attempt to defeat said object of the *Act* even which is not worth appreciating.

9. I.O present in court emphasizes copy of Challan showing therein that co-accused were having connection with respondent No.2/accused Sardar Khan Chandio. Even mobile was secured and message description is shown in the Challan. On query, I.O contends that as per his opinion accused Sardar Khan Chandio is accused, therefore, he has placed his name in column-II of the charge-sheet and as per his training persons named in column-II of the Challan are also accused and it was upon the trial court to examine this aspect. We are unable to understand such *contention* of the I.O. If during course of an *investigation*, the I.O finds one, *having connection with crime* or *co-accused* (leading to establish abetment/conspiracy) so the I.O views him to be an '**accused**' then legally such person should not be placed in '**column-II**' of the challan (charge-sheet). Every column of the challan (charge-sheet) has its own *meaning* and *purpose* which must have a *reasonable justification*. Such conduct of the I.O is not worth appreciating rather raises a serious question towards its *claimed 'training'*. Without prejudice to this, we would say that *ipsi dixit* of the police in law has no binding effect upon the Courts hence the Courts while dealing with police report (charge sheet) must never be influenced with opinion of the I.O but their *opinion* must be based on **legal and lawful reasoning** while keeping the settled principles of law into view. Reference can be made to the case of Muhammad Akbar V/S The State (1972 SCMR 335), wherein it was held as follows:



"Even on the first report alleged to have been submitted under section 173, Cr.P.C., the Magistrate could, irrespective of the opinion of the Investigating Officer to the contrary, take cognizance, if upon the materials before him he found that a *prima facie* case was made out against the accused person. After all the police is not the final arbiter of a complaint lodged with it. It is the Court that finally determine upon the police report whether it should take

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As well as in case of Falak Sher V/S The State (PLD 1967 SC 425), it was observed as follows:

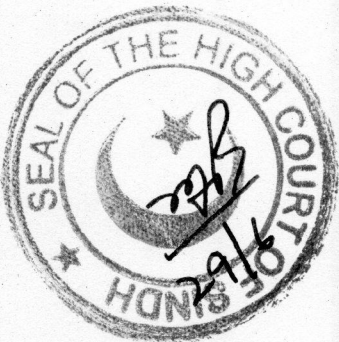
"Now, the question is, if he disagrees with the report, can he take action under clause (b) against those whose names have been placed under column 2 of the challan. As already pointed out, the Magistrate is not bound by the report submitted by the police under section 173. When the said report is received 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 under clause (b) in spite of the police report."

10. Having said so, it would be conducive to refer impugned order of trial court which is that:

"Heard Investigation Officer in person, learned APG for the State and perused police papers, which shows that the allegations against accused Sardar Ahmed Chandio are that he has abetted co-accused for commission of the offence but the complainant and witnesses have not disclosed date, time and place of abetment. The contents of FIR shows that accused Burhan was present at the place of incident in his car and he instigated other accused persons for commission of the offence. I.O has recorded statements of independent persons from place of incident who were shop keepers and hotel owner, they in their statements have not stated a single word regarding presence of accused Burhan and abetting/instigating other accused persons for commission of offence. I.O has also recorded the statement of one Mumtaz Ali Chandio where accused Burhan has stayed night in between 16th and 17th January, 2018 at his otaq at Qasimabad. I.O has also collected CDR of cell phone of accused Burhan, which shows his presence at Qasimabad Hyderabad at the time of innocent.

In view of above stated facts and circumstances I.O has let off accused Sardar Ahmed Khan under section 497 Cr.P.C and accused Burhan Chandio under section 169 Cr.P.C and placed their names in column No.2 of challan-sheet while he recommended for taking cognizance against accused Sikandar Chandio, Ali Gohar Chandio, Ghulam Murtaza Chandio and Zulfiqar Ali Chandio. The recommendation of I.O is accepted".

11. Since allegations against respondent/accused Burhan Chandio is that he was available at the site and instigated other accused persons to commit murder and on his instigation, three innocent persons lost their lives. There is no denial that all the material witnesses have supported such plea. In investigation, connection of co-accused persons with

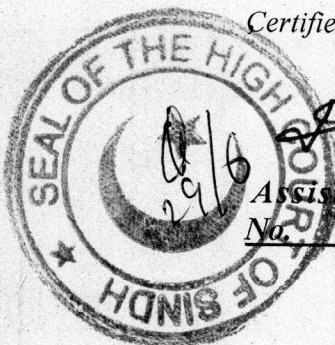


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investigation and pre-trial verdict cannot be announced. It needs not be mentioned, being a well-established principle of law, that taking of cognizance *even* by a competent court of law never turns the accused *guilty* but the accused continues enjoying 'presumption of innocent until otherwise found guilty after due trial'. Even during trial, plea of alibi cannot earn an acquittal for the simple reason that this *purely* falls within meaning of a *specific plea* which the accused would be required to establish as per Article-121 of the Qanun-e-Shahadat Order, 1984. In short, *legally* accused cannot claim an acquittal or *discharge* during investigation or at the stage of trial but it at the most could be considered as a *circumstance*, never sufficient for acquittal but for *further inquiry*. CDR *alone* would never be sufficient to doubt the presence of one at a particular place because a *mobile phone* is not part of the body but can well be parted and left at any place. Thus, such report would also loose its value if the *defence* does not establish that it (*mobile phone*) was *in fact* with him at relevant date, time and place. This *again* would require evidence. Trial court's order reflects that same is completely against the norms of criminal administration of justice nor glaring legal positions have been appreciated. Learned trial judge has failed to examine copy of Challan wherein conversation of respondent/accused Sardar Khan Chandio with co-accused persons is visible, hence we are of the view that this is a case wherein accused are required to be joined. Reference can be made to the case of Sher Muhammad Unar v. The State (PLD 2012 SC 179).

12. Accordingly, instant Crl. Misc. Application stands allowed and impugned order dated 24.02.2018 is **set aside** Respondents No.2&3/accused are directed to be joined as accused in the trial.



Certified to be true copy.

Assistant Registrar

No. 18283/HCSS/-2018, Sukkur dated. 29.06.2018

Sd/- Sallahuddin Panhwar
Judge
Sd/-Adnan Iqbal Chaudhry
Judge

01. Copy forwarded to the learned Anti-Terrorism Court N/Feroze for information and compliance as per order

02. Copy forwarded to the Investigation Officer Police Station A-Section Mehar. (In Crime No. 20/2018)