

Form No: HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

Writ Petition No.36921 of 2022

Sheikh Nadeem Anwar **Versus** Learned Illaqa Magistrate, etc.

Sr. No. of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.
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<u>11.11.2024</u>	Mr. Muhammad Ishnaq Sahou, Advocate for the petitioner. Mr. Imran Abbas Sahi, Assistant Advocate General with Adnan, SI. Mr. Muhammad Ahsan Bhoon, Advocate for respondent No.11.
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This writ petition assails order dated 11.06.2022 whereby case cancellation report submitted by the police in case FIR bearing No.386 dated 14.04.2021 registered under section 406 PPC at Police Station Badami Bagh, Lahore, stood agreed by the learned Magistrate.

2. Learned counsel for the petitioner contends that case cancellation report was prepared on 26.05.2021 which was agreed by the learned Magistrate on 11.06.2022 but before that investigation stood changed on 22.07.2021, wherein accused was held guilty. Further states that even 3rd change of investigation on 14.09.2021 contains a case diary No.33 dated 12.10.2021 reflecting involvement of accused for commission of offence. Further states that accused being agent of complainant though was primarily responsible for offence under section 406-PPC but police had sought a legal opinion for applicability of section 409 PPC which the District Public Prosecutor, Lahore furnished vide letter dated 16.02.2022. According to learned counsel for the petitioner, District Public Prosecutor instead of commenting upon applicability of section 409 PPC has exaggerated that after second change of investigation, no element of criminal breach of trust was surfaced rather matter between the parties was found of business transactions, which took place in Dubai and civil suits

are also pending before the civil Court, therefore, case was rightly recommended for cancellation. Such opinion of District Public Prosecutor was further assailed before Prosecutor General, Punjab who by his opinion declared the act of District Public Prosecutor without any legal justification. Now it was stance of learned counsel for the petitioner that it was incumbent upon the Magistrate to consider the opinion of Prosecutor General, Punjab before agreeing with the case cancellation report because it was a case attracting an offence under section 409-PPC.

3. On the other hand, learned counsel for respondent states that case cancellation report was prepared on 26.05.2021 because first investigator has recommended the case for cancellation but same could not be filed before the Magistrate due to frequent change of investigation and finally it was filed on 25.04.2022 because by then in all three investigations, result remained the same that no offence was committed. The claim of involvement of accused/respondent in commission of offence by virtue of case diary No.33 dated 12.10.2021 was responded by learned counsel for the respondent with the argument that it was only a preliminary impression which finally stood diluted at the end of investigation by exoneration of accused/respondent. Such fact was conceded by learned Assistant Advocate General in attendance after perusal of police file. According to him, learned Magistrate in the impugned order has discussed all such facts including those spurred out even during 2nd & 3rd investigation while agreeing with the police report which does not call for any interference.

4. Heard. Record perused.

5. It is prerogative of Investigating Officer to recommend the case for cancellation on any of the grounds mentioned in Rule 24.7 of Police Rules 1934 i.e., case false and frivolous owing to mistake of law or mistake of facts, matter of civil dispute, or non-cognizable case. Case cancellation Report is identified in law as “final report” as per Rule 25.57 of Polic Rules 1934 and is regarded as report under section 173 of Cr.P.C. As per section 9

(4) of the Punjab Criminal Prosecution Service (Constitution, Function and Powers) Act, 2006 (the CPS Act 2006), such report shall be sent through Prosecutor; it is as under;

(4) A police report under section 173 of the Code including a report of cancellation of the first information report or a request for discharge of a suspect or an accused shall be submitted to a Court through the Prosecutor appointed under this Act.

Concerned Prosecutor after scrutiny of such report or request shall file it before the Court and also submit his case review as per section 9 (7) of the CPS Act 2006; which is referred as under;

(7) The Prosecutor shall submit, in writing, to the Magistrate or the Court, the result of his assessment as to the available evidence and applicability of offences against all or any of the accused as per facts and circumstances of the case and the Magistrate or the Court shall give due consideration to such submission.

As per Code of Conduct for prosecutors issued under section 17 of Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, concerned prosecutor is required to apply evidential and public interest tests on report submitted under section 173 Cr.P.C. in order to evaluate the evidence and applicability of offences against the accused. As highlighted above case cancellation report is a report under section 173 Cr.P.C., therefore, such tests shall also be applied on it, but only when if the prosecutor does not concur with the police opinion so as to recommend the Court that sufficient material is available to proceed with the case. However, if the prosecutor is in agreement with case cancellation report, he is not obliged to apply evidential test or the public interest test because case assessment report is written to show the availability of evidence and applicability of offence against any or all the accused.

6. Similarly, while agreeing with the police opinion, Magistrate functions in administrative capacity and is not expected to give reasons for such agreement as mentioned in Rule 2, Chapter 11-D Volume-III of High Court Rules & Orders which is reproduced as under;

2. Duty of Magistrate to satisfy himself before passing order. -
When a Magistrate agrees with a Police report that the F.I.R./case should be cancelled, he acts in an administrative and not in a judicial capacity and the order he makes is not a judicial order.

Such an order is not a revisable order and, therefore, the Magistrate is not required to give reasons for his order.

but in this case, learned Magistrate after considering all the facts and circumstances passed the order which is perfectly in accordance with second para of Rule-2 above which is referred as under;

“Though, Magistrates should exercise this discretion freely in making such order after satisfying themselves as to the grounds on which it is sought to be made, yet they should not treat the matter as one of ordinary routine.”

Contention of learned counsel for the petitioner that opinion of Prosecutor General, Punjab should have been considered, by the Magistrate cannot be honoured in the sense that such opinion of Prosecutor General, Punjab is not binding on the Court because it is an opinion in his administrative capacity and not as concerned Prosecutor under section 9 (7) of the CPS Act 2006.

7. It is the official duty of Prosecutor General, Punjab to give legal opinion on criminal matters to any of the department of the government as mentioned in Government of the Punjab Rules of Business 2011. Rule 3 deals with allocation of business and as per sub-rule (3) the business of the Government shall be distributed amongst several Departments in the manner indicated in the Second Schedule which outlined the functions of Public Prosecution Department as under;

PUBLIC PROSECUTION DEPARTMENT

1. Legislation, policy formulation and planning for Public Prosecution Service.
2. [Monitoring and evaluation] of the working and the service delivery of Public Prosecution service.
3. Advice to other administrative departments as a regulatory function for implementation of policy, on the subject, in:
 - (a) Cases of criminal proceedings against government or any civil servant for an act or omission in his official duty, and
 - (b) Cases relating to criminal litigation.
- 3a. Consultation by other administrative departments in framing legislative and administrative policies relating to the collection of evidence, prosecution or sentencing.

3b. Legal aid in criminal matters.]

4. [* * * * *]

5. Grant of sanction for filing appeals against acquittals/petitions for enhancement of sentence/Writ Petitions in criminal misc. matters/petitions for cancellation of bails and criminal petitions for leave to appeal in the appellate courts.
6. Engagement of private prosecutor and determination of his fees, in rare and special criminal cases where no suitable departmental prosecutor is available.
7. Budget, accounts and audit matters.
8. Purchase of stores and capital goods for the department.
9. Service matters except those entrusted to Services and General Administration Department.
10. Administration of the 'Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006' and the rules framed thereunder.
11. Matters incidental and ancillary to the above subjects.
12. Training, research and mentoring for Professional development of Public Prosecutors.

Para-3 above indicates that Public Prosecution Department shall advice to other administrative departments as a **regulatory function** for implementation of policy, on the subject, in cases relating to criminal litigation and Prosecutor General being head of service as per section 6 of the CPS Act 2006 as principal law officer is responsible to give such opinion on criminal matters on behalf of Public Prosecution Department. Thus, rendering an opinion by Prosecutor General is his regulatory function which opinion is not binding on any Court; however, pursuant to section 9 (7) of the CPS Act 2006 when any Prosecutor including Prosecutor General, Punjab submit his opinion in the form of assessment report to the Court concerned while applying the evidential and public interest tests, then as per section 9 (7) of the CPS Act 2006, the Magistrate or the Court shall give due consideration to such submission.

8. The words “due consideration to such submission” have strong connotation that Court cannot simply ignore it rather while disagreeing with such opinion, shall give the reasons. Thus, an administrative opinion or opinion in official capacity does not bind the Court to give reasons for disagreement rather it is

regulated by the discretion of Court to consider or not to consider it; and in this case the Magistrate has thought it appropriate not to consider it which cannot be termed as an illegality. Order dated 11.06.2022 passed by learned Magistrate by all four corners is perfect which does not call for any interference by this Court. Even otherwise, petitioner has not been non-suited rather has an alternate efficacious remedy as held by the Supreme Court of Pakistan in case reported as “BAHADUR AND ANOTHER Vs THE STATE AND ANOTHER” (PLD 1985 Supreme Court 62) that a Magistrate who has agreed with the case cancellation report, can also entertain a private complaint on the similar facts.

9. Resultantly, titled petition fails and the same is, therefore, dismissed.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Approved For Reporting:

Judge

Signed on.....

*M. Azhar **