

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Criminal Revision No. 76/2018

Gul Zaman

Versus

The State, etc.

Petitioner by: Mr. Muhammad Sadiq Khan, Advocate.

Respondents by: Barrister Ayesha Siddique Khan, State Counsel.
Mr. Tariq M. Khan Marwat, Advocate.
Muhammad Khan & Ibrar, S.Is.

Date of Decision: 17.12.2019.

MOHSIN AKHTAR KAYANI, J. Through this criminal revision, the petitioner has called in question the order dated 13.07.2018, passed by learned Additional Sessions Judge (West), Islamabad, whereby respondents No.2, 3 & 4 namely Muhammad Irfan, Muhammad Asad and Tehmina Irfan, accused in case FIR No.102, dated 09.03.2018, U/S 302, 34 PPC, P.S. Tarnol, Islamabad were discharged from the said case in terms of Section 265-D Cr.P.C.

2. Learned counsel for the petitioner contends that respondents No.2 to 4 were involved in commission of murder of deceased Imdad ul Haq on 08/09.03.2018 in a brutal manner with the help of fourth accused Saeedullah (P.O), and the I.O after conclusion of evidence submitted the challan U/S 173 Cr.P.C. before the Court but learned trial Court discharged the accused without any basis; that minimum requirement to discharge the accused U/S 265-D Cr.P.C. is when from the perusal of police report, complaint, and other documents as well as from the statements of witnesses recorded U/S 161

Cr.P.C., no offence is made out; that learned trial Court has ignored the record of the case and assumed all those facts which require thorough probe and determination during the course of trial at pre-trial stage; that the legality and admissibility of evidence has been appreciated by the trial Court on the basis of assumption and prosecution was not allowed to produce the evidence which is mandatory requirement in terms of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

3. Conversely, learned counsel for respondents No.2 to 4 contends that all three respondents were nominated by the I.O but no direct evidence was available against them rather the I.O linked the respondents/accused persons with the crime of murder of Imdad ul Haq by way of CDR only which is a corroborative piece of evidence having no nexus with the direct evidence. Similarly it has been argued that principal accused Saeedullah is absconder and all other respondents who were made accused in this case have been involved due to relationship with Saeedullah and as such learned trial Court has rightly discharged the accused persons as no material substance is available to connect the respondents with the alleged crime.

4. Learned State Counsel contends that challan has been submitted in the Court, whereby investigation report reveals that deceased Imdad ul Haq was murdered with planning of Tehmina Irfan/respondent No.4 who called the deceased by way of SMS on a particular place where Saeedullah has committed murder of deceased and as such respondents are in league with each other for the murder of deceased; that as per report deceased Imdad ul Haq was in relationship with Tehmina Irfan prior to the said occurrence and on this issue, there was a family dispute among the parties, however, the deceased was forced to shift from Islamabad to his native village but he again

came back to town after 4/5 years; that respondent No.4 Tehmina Irfan was linked with the deceased which has been proved through CDR and respondent No.2/Irfan is her husband and Muhammad Asad/respondent No.3 is the brother of Tehmina Irfan who all have direct motive against the deceased to restore their honour; that learned trial Court has passed the order while appreciating evidence without giving due opportunity of hearing to the petitioner/complainant of this case.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner Gul Zaman/complainant of case FIR No.102, dated 09.03.2018, U/S 302, 34 PPC, P.S. Tarnol, Islamabad, got lodged the complaint with the allegations that his brother Imdad ul Haq, aged about 22 years, teacher in a private school was found murdered in the cricket ground of Dhoke Paracha. The I.O during the course of investigation, obtained call data record (CDR) of deceased's mobile phone and identified two suspicious mobile numbers and started investigation and came to the conclusion that Tehmina Irfan/respondent No.4 was using Sim No.0337-9210966, which was confirmed on the statements of Benish as well as Muhammad Rizwan Ali, was used by Tehmina and she sent SMS to deceased on the fateful night, where-after his dead body was recovered. I.O arrested respondent No.3 brother of Tehmina and discovered that murder was committed by one Saeedullah, (the brother in law of accused Asad and Tehmina), who is Afghan national.

7. The investigation report reveals that Tehmina has some relationship with deceased and due to said relationship family of Tehmina has grudge against the deceased.

8. The deceased was assaulted by family members of Tehmina 4/5 years back due to which he was sent to his native village by his parents and family members, however, he again came back in recent past and joined as private school teacher and having contact with Tehmina again.

9. The I.O has submitted the investigation report on the following grounds:-

- (a) Deceased Imdad ul Haq was murdered due to relationship with Tehmina/respondent No.4.
- (b) Tehmina sent SMS to deceased Imdad ul Haq on the fateful night where-after he was murdered in cricket ground of Dhoke Paracha.
- (c) Asad (brother of Tehmina/respondent No.4) during the course of investigation admitted that murder was committed by Saeedullah on the planning and motivation of Tehmina and Asad.
- (d) Saeedullah (Afghan National), brother in law of Tehmina and Asad accused, who committed murder and fled away to Afghanistan and presently absconder.
- (e) I.O has collected CDR of deceased comprising of 113 pages.

10. The above referred details were appreciated by the learned trial Court when challan has been submitted, however, learned trial Court has discharged all three accused mainly on the ground that statement of one accused against the other co-accused in police custody could not be considered as extra judicial confession, neither can the same be used against the co-accused in terms of Article 38 of the Qanun-e-Shahadat Order, 1984. The other important reason for passing of the impugned order is the status of CDR of suspicious cellular phone number which was allegedly under the use of Tehmina Irfan, no ownership proof or record was established by the I.O to establish the link between the deceased and Tehmina Irfan. As such the I.O has declared the third accused Irfan (husband of Tehmina) as innocent and his name was placed in column No.2 of the challan U/S 173 Cr.P.C.

11. Learned trial Court at the stage of framing of charge passed the impugned order, therefore, it is necessary to go through the relevant provision of law as to what are the requirements which are essential for framing of charge in terms of Section 265-D Cr.P.C.

12. Section 265-C Cr.P.C. provides the concept of supply of copies of statements and documents to the accused comprising of 'A' first information report, 'B' police report, 'C' statement of witnesses recorded U/S 161 Cr.P.C. & 164 Cr.P.C., 'D' Inspection note recorded by the I.O on his first visit of place of occurrence, 'E' recovery details. These documents when handed over to the accused persons with object to make him understand the *prima-facie* evidence and incriminating material and for his preparation to answer when the charge is framed.

13. Learned trial Court while considering the entire record including the above mentioned documents mentioned in Section 265-C Cr.P.C., if comes to the conclusion that "there is a ground for proceeding with the trial of accused, it shall frame in writing a charge against the accused" otherwise, there is no need to frame the charge and accused persons have to be discharged.

14. While considering the requirement of Section 265-D Cr.P.C. alongwith Chapter XIX of the relevant provision Section 221 to 240 Cr.P.C. have to be considered that the charge has to be framed in a specific manner with each and every detail so that an accused person cannot wriggle out from his criminal liability. Trial Court is under responsibility to keep the relevant law on the subject in mind coupled with Section 265-C Cr.P.C. at the time of formulating the charge so as to avoid future agony and injustice to the parties. Reliance is placed upon 2017 YR 1567 (Zeeshan Vs. Jahangir).

15. In this case learned trial Court while exercising the powers U/S 265-D Cr.P.C. examined the record before framing of charge, perused all the

documents placed by the prosecution, there was no ground to proceed further with the trial of accused and such scrutiny was carried out before framing the charge against the accused persons. It is trite law that powers conferred U/S 265-D Cr.P.C. were to be exercised sparingly. Whereas ordinarily and in normal course of nature, the prosecution should be allowed to produce their evidence, however, in appropriate cases when the facts alleged by the prosecution, did not constitute or commission of an offence, was prima-face not established, the court, could not and should not desist to discharge an accused U/S 265-D Cr.P.C. The framing of charge, was not an automatic process and the trial Court was not supposed to act like a Post Office, just to stamp on the *ipse dixit* of Police and if the material on record was not sufficient, the Court could discharge the accused U/S 265-D Cr.P.C. Reliance is placed upon 2017 MLD 916 (State Vs. Shukoor Jan) and 2016 P.Cr.L.J 672 (Sajid Javed Vs. Additional Sessions Judge-West, Islamabad).

16. After application of the above referred facts alongwith law discussed above, this Court is of the view that deceased was murdered by one Saeedullah as per police report, although this aspect is yet to be investigated, whereas there is no direct evidence against accused Asad as well as Tehmina Irfan regarding the murder of deceased rather they are only linked with the hideous crime of murder of Imdad ul Haq to the extent of abetment and conspiracy, whereas there is no role of accused Irfan in this case, who was declared innocent by the police and placed his name in column No.2 of the challan U/S 173 Cr.P.C. However, at this stage when the principle accused Saeedullah absconder is not arrested, nor he has been investigated, therefore, offence of conspiracy is yet to be established which could only be possible if principal accused Saeedullah would be arrested in future, therefore, while considering the detailed order passed by learned Additional Sessions Judge,

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Islamabad, it has been observed that no illegality has been committed, nor jurisdiction vested in the learned trial Court has been exercised against the law and the order impugned is based upon valid reasons. Hence, instant criminal revision is not maintainable and the same is hereby **dismissed**. However, when police arrest absconder accused Saeedullah, and if any incriminating material or evidence comes on record against present accused persons who have been discharged, the prosecution may again proceed under the law in the light of any new evidence. The police is also not restricted from further investigation of the alleged crime of murder.

(MOHSIN AKHTAR KAYANI)
JUDGE

Zahid