

CASE NO. : CRL. MISC. NO.708-Q-2016

Vs.

Petitioners by : Mr. Sher Afzal Khan, Advocate
Respondents by : Mr. Yasir Barkat, State Counsel with Tanveer & Tahir Khan Niazi, SHOs
Date of hearing : 19.01.2017

2. The facts, in brief, are that on the complaint of Azhar Mahmood, SI of P.S. Aabpara, Islamabad, the above mentioned FIR was lodged according to which, he was patrolling on 27.05.2014 near Aabpara Chowk, Islamabad, where he came across a Banner put on at the prominent place on the Road and contained a statement, against Judge of the Hon'ble Supreme Court namely Mr. Justice Jawad S. Khawaja (as he then was), Mr. Shakil-ur-Rehman and his sister. During the course of investigation, the petitioners were implicated. On conclusion of the investigation, report under section 173 Cr.P.C. was filed before learned trial court and the copies of the relevant documents were provided to the petitioners under section 265 (2) (B) Cr.P.C. The petitioners raised objections that there is insufficient material on record and that the Sessions Court cannot hold a trial of non-cognizable offences as Section 505(ii) PPC is not attracted, hence the petitioners were liable to discharge under

section 265(d) Cr.P.C. The referred objections were dismissed by the learned trial court vide impugned order dated 21.07.2016.

3. Learned counsel for the petitioners, *inter alia*, contended that initially, FIR was lodged for offences under sections 501/504/505(ii) PPC. It was contended that Section 505(ii) PPC is cognizable, whereas other two offences are non-cognizable. It was further contended that the petitioners applied for bail before this Court in which it was observed that Section 505 (ii) PPC is not attracted (Crl. Misc. No.442-B-2014) and said fact was conceded by the learned Deputy Attorney General, appearing on behalf of the State. It was also contended that since Sections 501 & 504 PPC are non-cognizable, therefore permission of the Magistrate was required before proceeding with the investigation in the matter as provided in Section 155(2) Cr.P.C.; that since no permission was sought, hence entire proceedings from investigation onwards, are without lawful authority and are liable to quashed. In this behalf, reliance was placed on cases reported as ‘Muhammad Rashid Vs. The State’ (PLD 1964 (W.P.) Karachi 391), ‘Muhammad Waheed and 3-Others Vs. SHO Police Station City Mansehra and 2-Others’ (2011 MLD 613), ‘Hussain Javeri Vs. The State’ (1983 P. Cr. LJ 102), ‘Naseem Sarwar Vs. SHO Police Station, Aabpra, Islamabad (2011 MLD 847), ‘Habibullah and 37-Others Vs. The State (2005 YLR 2721) & ‘Chief Eshtesab Commissioner, Chief Ehtesab Commissioner’s Secretariat, Islamabad Vs. Aftab Ahmad Khan Sherpao, Ex-Chief Minister, NWFP, Peshawar & Others’ (PLD 2005 Supreme Court 408).

4. Learned State Counsel, *inter alia*, contended that since the report under section 173 Cr.P.C. has been submitted therefore deletion of cognizable offences does not create a bar in framing of charge by the learned trial court.

5. Arguments on behalf of learned counsels for the parties have been heard and the documents placed on record have been examined with their able assistance.

6. The above mentioned FIR was lodged for alleged offences under sections 501/504/505(ii) PPC. The petitioners were not named in the FIR however were implicated subsequently and were made accused in report under section 173 Cr.P.C. This Court, while hearing bail petition of few of accused/petitioners (Crl. Misc. No.442-B-2014), *inter alia*, observed that Section 505(ii) PPC is not attracted which was conceded by the learned Deputy Attorney General, appearing for the State. Even, the learned trial court, while passing the impugned order, has observed that referred offence is not attracted in the facts and circumstances of the case. In support of his contentions, the learned counsel placed reliance on number of judgments. In case reported as ‘Naseem Sarwar Vs. SHO Police Station, Aabpara, Islamabad (2011 MLD 847), has lucidly dealt with the relevant provisions of law and the course to be followed by the police officials. In this behalf, it was observed as follows:-

“6. Leaving aside the allegations of the petitioner, the legal position is that when a complaint is filed in the Police Station and the SHO finds that a cognizable offence has taken place, then he is bound to register a case under section 154 Cr.P.C. and to initiate the investigation there-after. If the SHO comes to the conclusion that no cognizable offence has taken place, then in that case neither the case can be registered nor investigation can be initiated. In non-cognizable case, the SHO is bound to approach the concerned Magistrate. Under section 155(2) Cr.P.C., no Police Officer can investigate a non-cognizable case without the order, of a Magistrate. In the instant case, the SHO on receiving the complaint of the petitioner was to determine as to whether any cognizable offence has taken place or not. If in his opinion, no cognizable offence had taken place, then he could not initiate the investigation without the leave of the Magistrate. As such the investigation, if any, conducted by the SHO is illegal and of no effect. The SHO concerned had not acted in accordance with law and the proceedings initiated under section 182 PPC against the petitioner being violative of sections 154 and 155 of Cr.P.C. are unlawful, void and of no legal effect”

7. Similarly in case titled ‘Muhammad Rashid Vs. The State’ (PLD 1964 (W.P.) Karachi 391), the Hon’ble Sindh High Court observed as follows: -

“Offences under sections 3 and 8 of West Pakistan Suppression of Prostitution Ordinance, 1961, are non-cognizable offences and though under section 13 of the

Ordinance, a Gazetted police officer or a police officer not below the rank of a Sub-Inspector could, no doubt, effect the arrest of the offender, when the offence is committed in his view, but this power of arrest in law, cannot make the offences under sections 3 and 8 of the Ordinance cognizable. Where, therefore, the police investigated into the case and challaned the accused on information received without sanction of the Magistrate under section 155(2), Criminal Procedure Code, 1898, it was held that the proceedings in the case were illegal and required to be quashed under section 561-A of the Code”

8. In case titled as ‘Muhammad Waheed and 3-Others Vs. SHO Police Station City Mansehra and 2-Others’ (2011 MLD 613), the Hon’ble Peshawar High Court held that report submitted by SHO had shown that no offence under section 420 PPC was *prima facie* established against the petitioners and the petitioners could be proceeded against under section 468/471 PPC which are non-cognizable offences hence an entry should have been made in Roznamcha or Station Diary.

9. Similar view was taken in case titled ‘Hussain Javeri Vs. The State’ (1983 P. Cr. LJ 102), whereby it was observed that the petitioner was charged with a non-cognizable offence under section 4 of Prohibition Ordinance without complying with provisions of Section 155(2) Cr.P.C. therefore cognizance taken by the trial Magistrate on the police report was held to be without lawful authority and warranted to abuse of process of court proceedings.

10. The Hon’ble Sindh High Court, in case reported as ‘Habibullah and 37- Others Vs. The State (2005 YLR 2721), observed that the object of section 561-A Cr.P.C., whereby inherent powers were conferred upon and High Court was to do real and substantial justice and to prevent the abuse of process of the court, it was observed that powers of High Court were very wide to secure ends of justice.

11. Finally, the Hon’ble Supreme Court of Pakistan in a case reported as ‘Chief Ehtesab Commissioner’s Secretariat, Islamabad Vs. Aftab Ahmad Khan Sherpao, Ex-Chief Minister, NWFP, Peshawar & Others’ (PLD 2005 Supreme

Court 408), held that where there was insufficient evidence, no offence or case is made out and the learned trial court has rightly discharged the accused.

12. The above judgments relied upon by the learned counsel for the petitioners are of no avail to him, as the Hon'ble Supreme Court of Pakistan in case reported as 'Altaf Hussain Vs. Abdul Samad & 3-Others' (2000 SCMR 1945), held otherwise. The August Apex Court, in the referred judgment, held as follows: -

"12. In State V. Bashir (PLD 1997 SC 408) a Full Bench dealing with the power of CIA Police, Karachi to investigate a cognizable offence expressed the view that subsection (2) of Section 156, Cr.P.C. expressly provides that 'no proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate'. Ajmal Khan, J. (as his lordship then was) speaking for the Bench held that the violation of section 156(1) of the Cr.P.C. may not vitiate trial if no serious prejudice has been caused to the accused person resulting in miscarriage of justice in view of above subsection (2) of Section 156, Cr.P.C., but it does not mean that the CIA personnel should knowingly violate the above provision of the Cr.P.C. On the contrary, they are legally duty bound to ensure the supremacy of law'. Earlier, in Sadan Vs. State (PLD 1965 Baghdad-ul-Jadid 12) a Division Bench of the erstwhile West Pakistan High Court expressed a similar view with regard to the effect of investigation of a non-cognizable offence by a police officer without the permission of a Magistrate. This view was reiterated in Muhammad Aslam Vs. State (1980 P.Cr.LJ 742), by the Lahore High Court. In Muhammad Ashiq V. Martial Law Administrator, Zone 'C', 1980 P.Cr. LJ 97, a Division Bench of the Sindh High Court dealing with the power of the Court to take cognizance of a police report in terms of section 190, Cr.P.C. and the restriction on the investigation of offences contemplated by section 155(2), Cr.P.C. went to the extent of holding that if cognizable offence is in fact taken on a police report, even then the same may be vitiated on account of infraction of any provisions relating to investigation, the result of the trial which follows it, cannot be set aside unless the illegality in the investigation could be shown to have resulted in grave miscarriage of justice. High Court further observed that it is well-settled that an illegality committed in the course of investigation does not affect the competence and jurisdiction of the Court for trial. (See 1980 P.Cr. LJ 97). Same view was taken by Full Bench of Madras High Court in Public Prosecutor Vs. Ratnavelu Chetty (ILR 49 Madras 525).

13. A resume of the aforesaid facts and case-law leads to the conclusion that generally speaking police officers are not competent to investigate an offence which is non-cognizable and requires permission from a competent Magistrate before the commencement of investigation. However, if through bona fide error or misconception of facts and law a police officer has undertaken investigation of a crime in which he is not authorized to arrest an accused without a warrant from a Magistrate and a case is taken to a Court competent to try it in terms of section 190 (1) (a) and (b), Cr.P.C. cognizance taken may not be altogether bad in law and vitiated unless the trial has caused serious prejudice to the accused resulting in miscarriage of justice. It may be fully understood that there is no blanket for the acts committed dishonestly or mala fide by police officers who inherently are otherwise not empowered to submit reports for trial

in non-cognizable offences and Court should not normally encourage the acts of police agencies without proper scrutiny. Yet in appropriate cases, if a Court otherwise competent has taken cognizance of an offence and proceeded with the trial of the accused, the same may not be vitiated in the absence of any miscarriage of justice or grave prejudice to the accused. Indeed, on the one hand police officers are duty bound to ensure the rule of law whereas on the other hand Courts can exercise jurisdiction only subject to law and the assumption of jurisdiction which otherwise is barred can hardly be justified on the plea of bona fide cognizance of a case or lack of prejudice to the accused”

13. In the instant case, admittedly Section 505(ii) PPC is not attracted and no permission was obtained from the Magistrate before investigation of the matter however no miscarriage of justice has taken place.

14. For the aforesaid reasons, the impugned order and the proceedings before the trial court do not suffer from any legal or jurisdictional infirmity; consequently the instant petition is hereby dismissed. In case, the petitioners feel that there is insufficient material or no evidence against them; they can file appropriate application before the trial court.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 17.04.2017

JUDGE

Approved For Reporting

Zawar

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