Form No: HCJD/C-121

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Writ Petition No.2650 of 2015

Atif Muhammad Khan

Versus

The State through Station House Officer (SHO) Police Station Lohi Bher, Islamabad and 02 others.

Writ Petition No.2495 of 2015

Ehmer Iqbal and another

Versus

The State and 02 others

Petitioners By	:	Mr. Ahmed Bashir, Advocate.
Respondents By	:	Sheikh Azfar Amin, Advocate. Ch. Zaheer Farooq, Learned State Counsel.
Date of Decision	:	02.10.2019

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AAMER FAROOQ, J. - This order shall decide the instant Writ Petition as well as Writ Petition No.2495 of 2015, as common questions of law and facts are involved.

2. The petitioners were accused persons in case F.I.R. No.240/2013, dated 29.11.2013, under Sections 365-A, 511, 420, 468, 506(ii), 120-B, 116 P.P.C., Police Station Lohi Bher, Islamabad. The matter was duly investigated by the Police Authorities and cancellation report consisting discharge of the petitioners was filed before respondent No.3. The learned Judicial Magistrate (East), Islamabad did not agree with the report, vide order dated 29.05.2015

and directed the concerned SHO to submit report under Section 173 Cr.P.C in the proper form.

3. Learned counsel for the petitioners, *inter-alia*, contended that the only Section now under the F.I.R is 506 (ii) P.P.C. and even that is not made out from the facts and circumstances of the case. It was further contended that the order passed by respondent No.3 is without lawful authority as he had no jurisdiction to interfere with the discharge report. Reliance was placed on cases reported *as "Muhammad Farooq Qureshi Vs. Judicial Magistrate Section 30 and 2 others"* ***(2010 P Cr. L J 261)***, *"Muhammad Ashraf alias Bhuller Vs. The State"* ***(2008 YLR 1462)***, *"Muhammad Nasir Cheema Vs. Mazhar Javaid and others"* ***(PLD 2007 SC 31)***, *"Mst. Eram and 4 others Vs. Muhammad Adnan Choudhry and another"* ***(2010 YLR 1580)***, and *"Muhammad Ismail Tariq Vs. The State and 3 others"* ***(2005 P Cr. L J 1187)***.

4. Learned counsel for respondent No.2, *inter-alia*, contended that respondent No.3 has exercised jurisdiction in a proper manner inasmuch as he was not to act mechanically and agree with the Investigating Officer rather the impugned order has been passed after application of mind and examination of record.

5. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

6. As noted above, the petitioners are aggrieved of the impugned order, whereby the learned *Illaqa* Magistrate did not agree with the Investigating Officer regarding the cancellation of F.I.R. The petitioners have primarily relied upon the judgment of the Hon'ble Lahore High Court reported as *"Muhammad Farooq Qureshi Vs. Judicial Magistrate Section 30 and 2 others"* ***(2010 P Cr. L J 261)***, wherein, it was observed as follows:-

> ***"It may be observed that investigation of a criminal case and the resultant arrival by the police at a conclusion regarding the guilt or innocence of***

the accused lay within the domain and prerogative of the police over which no other authority had any control. Judicial Magistrate while disagreeing with the discharge report had travelled beyond the jurisdiction in directing the police to submit the challan against the accused, which indicates that learned Judicial Magistrate has pre-judged the case, which can cause prejudice to the accused. He was not supposed to direct arrest of the accused or submission of the challan or recording of evidence. Matter should be left to the investigating agency to submit report under section 173, Cr.P.C. It will be opened for the investigation officer to record his own opinion regarding the guilt or innocence of the petitioner in his report under section 173, Cr.P.C. and if the final opinion of the investigating officer is that petitioners are guilty, then he shall be at liberty to submit the challan accordingly."

7. In *"Muhammad Nasir Cheema Vs. Mazhar Javaid and others"* ***(PLD 2007 SC 31)*** the august Apex Court observed on the issue in question in the following manner:-

"6. The only provision relating to the subject which is available in the Code of Criminal Procedure is section 173 which commands expeditious conclusion of the investigations and further ordains that on conclusion of every investigation, the concerned S.H.O. shall submit a report of the result thereof in the prescribed manner to the Magistrate competent to take cognizance under section 190, Cr.P.C. No power vests with any Court including a High Court to override the said legal command and to direct the S.H.O. either not to submit the said report (mentioned as challan in the Police Rules and also in the impugned order) or to submit the said report in a particular manner i.e. against only such persons as the Court desires or only with respect to such offences as the Court wishes."

8. However, in *"Muhammad Ismail Tariq Vs. The State and 3 others"* ***(2005 P Cr. L J 1187)***, the Hon'ble Lahore High Court observed as follows:-

"2. There is no doubt that opinion of Investigation Officer or the police is not binding on the Court, the Court decides on the basis of evidence produced before him. However, the opinion of a Police Officer/Investigation Officer has its value and importance particularly, when it is supported by sufficient and unbiased material. The Police Officer/Investigation Officer forms opinion after visiting place of

occurrence. He inspects scene of occurrence immediately after the occurrence and records statements of those persons who saw the occurrence. He gets opportunity to examine other circumstantial evidence. He also gets opportunity to effect recoveries, etc. Therefore, if a police officer/Investigating Officer performs his functions honestly and efficiently, he forms his opinion on basis of material which is not available to any other person. Therefore, despite the fact that his opinion A is not binding still it has a lot of relevancy and becomes a basis for important decision. Similarly, when a police officer/Investigating Officer recommends cancellation of an F.I.R., he reaches to this conclusion after a thorough/complete investigation. In the absence of any mala fide, bias, etc., the cancellation report should be given a due consideration. It should only be rejected when there are reasons to believe that the cancellation report has been prepared under any extraneous influence or on the basis of bias, prejudice, etc. For further guidance, Altaf Hussain v. State PLD 2002 Lah. 216, may be referred."

9. In *"Muhammad Ashraf alias Bhuller Vs. The State"* ***(2008 YLR 1462)***, the Hon'ble Lahore High Court observed as follows:-

"7. On perusal of report under section 173, Cr.P.C. I have found that the Investigating Officer concluded that so many persons appeared before him in defence of the accused and they stated that Muhammad Shafique deceased had died his natural death and accused-petitioner Ashraf was found innocent and recommended to be placed in Column No.2 of challan, but thereafter the District Public Prosecutor gave a note at the end of the report under section 173, Cr.P.C. to place the name of petitioner-accused in Column No.3, which, in my considered view, falls out of the purview of duties assigned to the District Public Prosecutor. As no legal sanctity is attached to the opinion of District Public Prosecutor qua the guilt of an accused and it is always the Court, which is to charge the accused under the relevant provisions of law keeping in view the evidence available on record regarding the crime alleged and not the District Public Prosecutor. Reference can be had to PLD 1954 Sindh-256. Even no Court can order to the Investigating Officer to submit challan while placing the name of the accused in Column Nos.2, 3 and 4, rather the Court can direct the Investigating Officer only to submit final report after completing investigation. Reference can be had to 1983 SCMR 370."

10. The Hon'ble Sindh High Court in case reported as *"Mst. Eram and 4 others Vs. Muhammad Adnan Choudhry and another"* ***(2010 YLR 1580)*** observed as follows:-

> ***"In Muhammad Daiem's case (supra), it has been held that while reaching conclusion the Magistrate is required to judicially examine documents and report submitted under section 173, Cr.P.C. It was held that it should not be disposed of in a slipshod manner, simply by saying that he has gone through the entire record. It was further observed that Magistrate being Judicial Magistrate is required to express himself and should explain his opinion.***
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> ***The above discussion leads me to the conclusion that a Magistrate while exercising his powers under section 173, Cr.P.C. does not act in a mechanical manner. His order must show his application of mind, his opinion must be supported by reasons and his conclusion must be laced with evidence that judicial mind has been applied. Though he is required to apply his judicial mind but the order passed by him is not a judicial order, it is an administrative order. Inspite of being an administrative order it must be a judicious order. This brings up to the answer of the question. Even if the Magistrate is not competent to take cognizance of the offence he must apply his mind and thus pass a speaking order. Further this speaking order shall have only effect of recommendation and thereafter the matter should be sent to the Court competent to take cognizance, who can pass final order either concurring with the Judicial Magistrate or disagreeing with the Judicial Magistrate."***

11. Finally the Hon'ble Supreme Court of Pakistan in case reported as *"Safdar Ali Vs. Zafar Iqbal and others"* ***(2002 SCMR 63)*** observed as follows:-

> ***"8. It is well-entrenched legal principle that "when a Magistrate takes cognizance under section 190(l)(b) on a police report he takes cognizance of the offence and not merely of a particular person charged in the report as an offender. He can, therefore, issue process against other persons who also appear to him on the basis of the report and other material placed before him when he has taken cognizance of the case, to be concerned in the commission of the offence when he does so he does not act under clause (c), therefore, section 191 is not applicable." (Mehrab v. Emperor (F. B.) 26 Cr.LJ 181, Lai Bihari Singh v. Emperor 31 Cr.LJ 55). On the***

> ***touchstone of criterion as discussed hereinabove we are of the considered view that the order passed by learned Ilaqa Magistrate dated 8-11-1997 is neither perverse nor capricious but on the other hand it has been passed after having an in-depth scrutiny of the entire record and thus, it cannot be termed as non-speaking as held by the learned High Court in the impugned judgment and being unexceptionable it hardly calls for any interference. We are inclined to convert this petition into appeal and accordingly while allowing the same the impugned order, dated 11-5-2001 is hereby. set aside being violative of the relevant provisions of law and consequently order, dated 8-11-1997 is restored. The learned trial Court is directed to proceed with the case in accordance with law."***

12. The upshot of the above case law is that a Magistrate before whom report under Section 173 Cr.P.C is filed can either agree with the same or disagree. The disagreement has to be based on the cogent ground but should not amount to interference in the investigation of the matter. The conclusion reached by the Investigating Officer, if is discrepant on the face of record and seems to be based in violation of law or the facts and circumstances of the case can be interfered with; however, the Magistrate while doing so and disagreeing with the report has to do the same through a reasoned and speaking order. The Magistrate while scrutinizing the report filed by the Investigating Officer though does not act as a Judicial Officer but does so in administrative capacity but the order passed should have the attributes of the judicial order inasmuch as the same should be reasoned based on cogent grounds and the law.

13. In view of the referred position, I am not inclined to agree with the reasoning in decision of *"Muhammad Farooq Qureshi Vs. Judicial Magistrate Section 30 and 2 others"* ***(2010 P Cr. L J 261)***, which does not take into account the correct position of law. The decisions including *"Safdar Ali Vs. Zafar Iqbal and others"* ***(2002 SCMR 63)*** supra as well as *"Mst. Eram and 4 others Vs. Muhammad Adnan Choudhry and another"* ***(2010 YLR 1580)***, and *"Muhammad Ismail Tariq Vs. The State and 3 others"* ***(2005 P Cr. L J 1187)***, depict the correct position.

14. In the instant case, respondent No.3 only after examination of the record placed before him disagreed with the report and in very clear terms pointed out the discrepancies in the investigation; hence the order passed is a speaking one based on record. Moreover, respondent No.3 did not direct respondent No.1 to present the challan in any particular way rather the direction was to comply with the mandate of law as provided in Section 173 Cr.P.C. The impugned order is well reasoned and is in consonance with the mandate of law, hence does not call for interference.

15. For the above reasons, the instant petitions are without merit and are accordingly **dismissed**.

(AAMER FAROOQ)
JUDGE

M.ZaheerJanjua/.