HCJD/C-121

JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No. 801 of 2011.

Muhammad Rizwan.

VERSUS

The State, etc.

Petitioner by	:	**Barrister M. Saad Buttar and Mr Riffat Hussain Malik, Advocates.**
Respondents by	:	**Mr Muhammad Ilyas Siddiqui, Advocate.** **Ms Hadiya Aziz, State Counsel.** **Mr Raees, ASI.**
Date of Hearing	:	**11-03-2016.**

ATHAR MINALLAH, J:- Through this consolidated order, the instant petition alongwith W.P. No. 1518 of 2012 (Muhammad Rizwan versus Mian Muhammad Naeem, etc) shall be decided.

2. The facts, in brief, are that the petitioner and the respondent No.4 were carrying on business by the name of Dynamic Engineering Services pursuant to registered partnership agreement dated 14.11.2005. The respondent No.4 filed a complaint against the petitioner under section 154 of the Criminal Procedure Code, 1898 (hereinafter

referred to as the ***"Cr.P.C"***). Pursuant to the said complaint FIR No. 92 dated 26.02.2011 was registered at Police Station Kohsar, Islamabad (hereinafter referred to as the ***"FIR"***). The petitioner was arrested on 12.03.2011. However, the petitioner was later extended the concession of bail. The petitioner, therefore, filed Writ Petition No. 801 of 2011, wherein it has been prayed that the FIR be quashed. Admittedly, the report under Section 173 of Cr.P.C. has been submitted. The petitioner filed an application under Section 249-A of Cr.P.C. The respondent No.4, however filed a private complaint alleging acts and omissions constituting offences under sections 420/467/468 and 471 of the Pakistan Penal Code (hereinafter referred to as the ***"PPC"***). The respondent No.4 filed an application for consolidation / transfer of the proceedings relating to the private complaint and the FIR but the same was dismissed by the learned Sessions Judge, Islamabad vide order dated 29.11.2011. The respondent No.4 filed a Criminal Misc. No. 207-M of 2011 before this Court. The petition was allowed vide order dated 22.12.2011 and the relevant paragraph is as follows.-

> *"It is not disputed that a process is not yet issued in the complaint-case. It would therefore, be appropriate to observe that the learned Judicial Magistrate dealing the complaint of the petitioner shall first determine as to whether there is sufficient ground for proceeding in the said case, whereafter both the cases are to be heard and*

disposed of by the one and the same Court and in the mode and manners prescribed for the trial of such cases.

In view of the above, the petition in hand is accepted and it is directed that the complaint-case be transferred to the Court of Mr. Naeem Shaukat learned Judicial Magistrate Islamabad provided the complaint-case is considered fit for trial by the Court of Mr. Kashif Qayyum learned Judicial Magistrate, Islamabad."

3. Pursuant to the above order dated 22.12.2011, passed by this Court, the learned Judicial Magistrate, Islamabad passed order dated 17.01.2012 and held that a prima facie case was made out and ordered that attendance of the accused be procured through summons. Malik Naeem Shaukat, learned Judicial Magistrate, Islamabad, to whom the complaint case was transferred vide order dated 12.03.2012 also ordered that the process be issued. Order dated 17.01.2012 passed by the learned Judicial Magistrate, Islamabad was assailed by the petitioner through Criminal Revision No.13 of 2013 and the same was dismissed by the learned Additional Sessions Judge, Islamabad vide order dated 14.05.2012.

4. The learned counsel appearing on behalf of the petitioner has contended that; order dated 17.01.2012 is nullity in the eyes of law as it was passed without proper

inquiry by the learned Judicial Magistrate; the petitioner has been declared innocent in the criminal case registered as FIR No. 92 of 2011; the respondent No.4 has admitted his signatures on the agreement dated 11.04.2007; the learned Additional Sessions Judge vide order dated 14.05.2012 has given findings relating to the facts of the case which are yet to be proved; the civil litigation relating to the same matter is also pending and, therefore, it has to be given preference and in such circumstances it is the duty of the Court trying a criminal case or a private complaint to act with circumspection and exercise power with utmost care and caution before it is persuaded to employ its process for compelling attendance. Reliance has been placed on *"Badruddin versus Mehr Ahmad Raza, Additional Sessions Judge, Jhang and 06 others" [PLD 1993 S.C. 399].* In case of failure to comply with the procedure prescribed under Section 200 of Cr.P.C. would render the proceeding as illegal. Reliance has been placed on *"Lt. Col. (Retd.) Tariq Latif versus Mst. Jamila Sultana and another" [2006 P.Cr.L.J. 476], "Jamot Ghulam Muhammad and 03 others versus The State and another" [1972 P.Cr.L.J. 1130].* Suit for declaration and permanent injunction filed by the respondent No.4 is pending in the Court of learned Senior Civil Judge, Islamabad.

5. The learned counsel appearing on behalf of the respondent No.4 on the other hand has argued that; the learned Judicial Magistrate had formed an opinion after taking into consideration the contents of the complaint and relevant documents including the inquiry conducted by the

police, therefore, order dated 17.01.2012 does not suffer from any illegality; order dated 17.01.2012 was passed pursuant to the directions of this Court vide order dated 22.12.2011; order dated 14.05.2012 passed by the learned Additional Sessions Judge, Islamabad affirmed the opinion formed by the learned Judicial Magistrate; no misreading or non-reading has been pointed out nor any illegality has been committed.

6. The learned counsels have been heard and the record perused with their able assistance.

7. It was inquired from the learned counsels as to whether the report under Section 173 of the Cr.P.C. has been submitted in the learned trial Court in case of the FIR. The learned counsels have answered in the affirmative. By now it is settled law that a High Court while exercising jurisdiction under Article 199 of the Constitution exercises restraint in quashing FIR when a report under Section 173 of Cr.P.C. has been submitted and the learned trial Court has taken cognizance.

8. The scope of the powers to be exercised by this Court under Article 199 of the Constitution by way of quashment of a criminal case needs to be considered. In this regard, the principles and law, as enunciated and laid down by the august Supreme Court, are well settled by now and may be summarized as follows.-

i) The High Court is not vested with the power to quash an FIR under Section 561-A of Cr.P.C. on the grounds of *malafide* or disclosing a civil liability.

ii) Resort to the provisions of Section 561-A of Cr.P.C. or Article 199 of the Constitution for quashing a criminal case is an extraordinary remedy, which can only be granted in exceptional circumstances.

iii) As a general rule powers under Article 199 of the Constitution cannot be substituted for the trial, nor can any deviation be made from the normal course of law.

iv) The consideration to be kept in view for quashment of a criminal case is whether the continuance of the proceedings before the trial Court would be a futile exercise, wastage of time and abuse of the process of the Court, and whether an offence on the admitted facts is made out or not.

v) The exercise of powers and jurisdiction under Article 199 of the Constitution is discretionary in nature; however, the same are to be exercised in good faith,

fairly, justly and reasonably, having regard to all relevant circumstances.

vi) While considering quashment of a criminal case in exercise of powers vested under Article 199 of the Constitution, the High Court is required to take into consideration the various alternate remedies available to a petitioner before a trial Court, *inter alia*, under Sections 249-A and 265-K of Cr.P.C.

vii) Besides the above, the other alternate remedies available under the law have been enumerated by the august Supreme Court in the case of *'Col. Shah Sadiq Vs. Muhammad Ashiq and others'* [2006 SCMR 276] as follows.-

a. To appear before the Investigating Officer to prove their innocence.

b. To approach the competent higher authorities of the Investigation Officer having powers vide section 551 of Cr.P.C.

c. After completion of the investigation, the Investigation Officer has to submit the case to the concerned Magistrate, and the concerned Magistrate has the

power to discharge them under section 63 of the Cr.P.C. in case of their innocence.

d. In case he finds the respondents innocent, he would refuse to take cognizance of the matter.

e. Rule 24.7 of the Police Rules of 1934 makes a provision for cancellation of cases during the course of investigation under the orders of the concerned Magistrate.

f. There are then remedies which are available to the accused person who claims to be innocent and who can seek relief without going through the entire length of investigation.

viii) A criminal case registered cannot be quashed after the trial Court has taken cognizance of a case, as the law has provided an aggrieved person with efficacious remedies for seeking a premature acquittal, if there is no probability of conviction or a case is not made out.

ix) Prior to exercising jurisdiction under Article 199 of the Constitution, the High Court has to be satisfied that the trial Court has neither passed an order nor any process issued.

x) Courts exercise utmost restraint in interfering with or quashing investigations already in progress, pursuant to statutory powers vested in the police or other authorities. Courts do not interfere in the matters within the power and jurisdiction of the police, particularly when the law imposes on them the duty to inquire or investigate.

9. The above principles of law have been enunciated and laid down in the cases of *'Director General, Anti Corruption Establishment, Lahore and others Vs. Muhammad Akram Khan and others'* [PLD 2013 SC 401], *'Rehmat Ali and others Vs. Ahmad Din and others'* [1991 SCMR 185], *'Miraj Khan Vs. Gul Ahmed and 3 others'* [2000 SCMR 122], *'Muhammad Mansha Vs. Station House Officer, Police Station City, Chiniot, District Jhang and others'* [PLD 2006 SC 598] *'Col. Shah Sadiq Vs. Muhammad Ashiq and others'* [2006 SCMR 276], *'Emperor v. Kh. Nazir Ahmad'* [AIR 1945 PC 18] & *'Shahnaz Begum Vs. The Hon'ble Judges of the High Court of Sind and Baluchistan and another'* [PLD 1971 SC 677].

10. In the light of the above, this Court is not inclined to entertain W.P. No. 801 of 2011, as the report under section 173 of Cr.P.C. has been submitted in the learned trial Court. The appropriate course for the petitioner to follow is to avail various adequate remedies available

under the law. The W.P. No. 801 of 2011 (Muhammad Rizwan versus The State, etc) is, therefore, accordingly ***dismissed.***

W.P. No. 1518 of 2012.

11. The petition challenges orders passed in proceedings relating to the private complaint filed by the respondent No.4. The petitioner invoked the jurisdiction of this Court under Article 199 of the Constitution by filing W.P. No. 1518 of 2012 and has impugned orders dated 17.01.2012 and 12.03.2012 passed by the respective learned Judicial Magistrates and order dated 14.05.2012 passed by the learned Additional Sessions Judge, whereby Criminal Revision against order dated 17.01.2012 was dismissed. It is not denied that order dated 17.01.2012 was passed in pursuance of the directions of this Court vide order dated 22.12.2011 passed in Criminal Misc. No. 201-M of 2011. The complainant had appeared before the learned Judicial Magistrate and the latter after examining the record had formed an "opinion" and has passed a well reasoned order dated 17.01.2012. Order dated 12.03.2012 was passed merely in pursuance of order dated 17.01.2012. The criminal revision was also dismissed by the learned Additional Sessions Judge through a speaking order dated 14.05.2012.

12. The august Supreme Court in the case titled *"Reham Dad versus Syed Mazhar Hussain Shah and others" [2015 SCMR 56],* has observed and held that process is to

be issued to the accused when the Court taking cognizance of the offence is of the "opinion" that there is sufficient grounds for proceeding. It has been further held that such opinion is not to be equated with the existence of reasonable grounds. The principles and law enunciated by the august Supreme Court in the said case of Syed Mazhar Hussain Shah supra were elaborately examined in the case of *"Sarwar and others versus The State and others" [2014 SCMR 1762]*. The correct legal position has been summarized as follows.-

> *"(i) A process is issued to an accused person under section 204, Cr.P.C. when the Court taking cognizance of the offence is of the 'opinion' that there is 'sufficient ground' for 'proceeding' against the accused person and an opinion of a Court about availability of sufficient ground for proceeding against an accused person cannot be equated with appearance of 'reasonable grounds' to the Court for 'believing' that he 'has been guilty' of an offence within the contemplation of subsection (1) of section 497, Cr.P.C. Due to these differences in the words used in section 204 and section 497, Cr.P.C. the intent of the legislature becomes apparent that the provisions of section 91, Cr.P.C. and section 497,*

Cr.P.C. are meant to cater for different situations.

(ii) If the Court issuing process against an accused person decides to issue summons for appearance of the accused person before it then the intention of the Court is not to put the accused person under any restraint at that stage and if the accused person appears before the Court in response to the summons issued for his appearance then the Court may require him to execute a bond, with or without sureties, so as to ensure his future appearance before the Court as and when required.

(iii) If in response to the summons issued for his appearance the accused person appears before the Court but fails to submit the requisite bond for his future appearance to the satisfaction of the Court or to provide the required sureties then the accused person may be committed by the Court to custody till he submits the requisite bond or provides the required sureties.

We may add that

(iv) If the process issued by a Court against an accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, then the accused person may be under some kind or form of restraint and, therefore, he may apply for his pre-arrest bail if he so chooses which may or may not be granted by the Court depending upon the circumstances of the case but even in such a case upon appearance of the accused person before the Court he may, in the discretion of the Court, be required by the Court to execute a bond for his future appearance, with or without sureties, obviating the requirement of bail."

13. The above principles and law have been reaffirmed in [PLD 2016 S.C. 55] "Muhammad Farooq vs. Ahmed Jagirani and others" and the relevant portion is as follows.-

"In complaint case, trial Court is not required to examine material minutely and or in depth, but has merely to see that prima facie case has been made out to proceed further with

the matter for issuance of process or summons; the High Court in exercise of inherent jurisdiction cannot strangulate the trial by overstretching its jurisdiction under section 561-A, Cr.PC (see Noor Muhammad case, supra) and embark upon to examine adequacy and or inadequacy of evidence, which stage will only reach after charge is framed and complainant is given an opportunity to prove his case beyond reasonable doubt."

14. In the context of the instant petition, reference may also be made to the law laid down by the august Supreme Court in [PLD 2016 SC 70] "Niaz Ahmed vs. Hasrat Mahmood and others" wherein it has been held:-

"The law is equally settled on the point that where the same party lodging the FIR also institutes a private complaint containing the same allegations against the same set of accused persons then the trial court is to hold a trial in the complaint case first and in the meanwhile Challan case is to be kept dormant awaiting the fate of the trial in the complaint case."

15. It is obvious from the above declared law that the process is issued to an accused when the Court taking cognizance of the offence is of the 'opinion' that there are sufficient grounds for proceeding against the accused and the same cannot be equated with appearance of reasonable grounds for believing that the accused is guilty of an offence. The test, therefore, is an 'opinion' based on sufficient grounds for proceeding against the accused. The Court is not required to examine the material minutely and has to see whether a prima facie case is made out. The High Court while exercising jurisdiction under section 561-A of Cr.P.C. or Article 199 of the Constitution cannot embark upon to examine adequacy or inadequacy of the evidence. Moreover, when the same party lodging an FIR has also instituted a private complaint containing the same allegations against the same set of accused persons then the proper course for a trial Court to follow is to hold a trial in the complaint case first while keeping the Challan case dormant awaiting the fate of the trial in the complaint case.

16. Perusal of orders dated 17.01.2012 and 14.05.2012 unambiguously shows that the learned Judicial Magistrate had formed an "opinion" based on sufficient grounds. The learned Magistrate has recorded reasons for forming "opinion" and sufficient grounds in respect thereof have been mentioned. The arguments raised by the learned counsel for the petitioner are not relevant in the context of the opinion formed by the learned Judicial Magistrate. It is obvious from the impugned order dated 17.01.2012 that the learned Court had acted with circumspection and had

exercised power with utmost care and caution before passing an order for the process to be issued. No legal infirmity has been pointed out so as to require interference with the concurrent findings. However, it may be noted that remedies are available to the petitioner and, therefore, it would be appropriate for latter to avail the same, if so advised.

17. For what has been stated above, the Writ Petition No. 1518 of 2012 is also without merit and is accordingly ***dismissed***.

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

*Asad K/**