

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**(JUDICIAL DEPARTMENT)**

**W.P No.994 of 2018**

Raja Azhar  
Vs  
Raziq Ali Raja & others

Petitioner By: Mr. Qaiser Imam Ch., Advocate.  
Respondent No.1 By: Mr. Muhammad Umer Raja,  
Advocate  
State by: Mr. Zohaib Hassan Gondal, State  
Counsel with Ghous-Assistant Sub-  
Inspector.

Date of Hearing: 11.09.2020

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**Ghulam Azam Qambrani, J:** Through this petition, the petitioner, Raja Azhar, has invoked the jurisdiction of this Court filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer:-

*“Under the circumstances enunciated above, it is humbly prayed that the impugned order may kindly be set aside and F.I.R No.421/16 dated 24.11.2016 may kindly be cancelled more so, petitioner be discharged from the case in the best interest of justice.*

*Any other relief which this Honorable Court may deem fit may kindly be granted.”*

2. Briefly stated facts of the case are that F.I.R No.421 dated 24.11.2016 was lodged under Sections 506(ii), 148 & 149 PPC at Police Station Bhara Kahu, Islamabad, on the complaint of respondent No.1 against the petitioner and others stating therein that his watchman namely Faryal informed him that on 22.10.2016 at about 06.00 p.m. accused persons namely Muhammad Azhar, Tariq, Novaiz, Adeel, Aftab, Mumtaz and Riaz nominated in the F.I.R along with some unknown persons came at the land of the

complainant and attempted to take possession of the land belonging to the complainant. The accused persons also threatened the watchman of the complainant for dire consequences and also made aerial firing.

3. After registration of F.I.R, investigation was conducted by the police and during the course of investigation five empties of 12-bore gun and 12 empties of .30 bore pistol were taken into possession by the police vide recovery memo. Discharge report was prepared and placed before the learned Judicial Magistrate, Islamabad, on the basis of the affidavits sworn by some private persons in favour of the accused/ petitioner, which was disagreed by the learned Judicial Magistrate, vide order dated 13.02.2018 with the direction for submission of report under Section 173 Cr.P.C., hence this petition.

4. Learned counsel for the petitioner has contended that the impugned order is against the law, facts and circumstances of the case and the same is not sustainable in the eyes of law for the reason that the learned Judicial Magistrate travelled beyond his jurisdiction while passing the impugned order by directing the Investigation Officer for submission of report under Section 173 Cr.P.C. as such, he has committed illegality which act seriously prejudices the petitioner; that the petitioner is totally innocent and has falsely been implicated in the instant case; that the instant F.I.R is a result of sheer malafide on the part of the complainant just to humiliate him; that no cogent and convincing evidence was produced by the prosecution during the inquiry; that the impugned order is illegal, unlawful and arbitrary. Lastly, urged for setting aside of the impugned order.

5. Conversely, learned counsel for the respondent No.1 opposed the contentions of learned counsel for the petitioner contending that the petitioner has alternate remedy of filing application under Section 249-A Cr.P.C before the learned trial Court. Further contended that two F.I.Rs were registered by the

parties against each other; that there is evidence against the petitioner with regard to commission of the alleged offence and that the impugned order has been passed after application of mind and examination of record. Learned State Counsel does not support the impugned order.

6. I have heard the arguments of learned counsel for the parties and have perused the material available on record.

7. Perusal of the record reveals that on the application of complainant/ respondent No.1 the impugned F.I.R was registered with the Police Station Bhara Kahu, Islamabad. The record further reveals that during the course of investigation five empties of 12-bore gun and 12-empties of .30 bore pistol were taken into possession by the police vide recovery memo. All the material available on record is enough to believe the prosecution version. The record further reveals that after completion of investigation, the Investigation Officer submitted discharge report only on the basis of the affidavits of some persons, which was disagreed by the learned Judicial Magistrate vide impugned order dated 13.02.2018.

8. So far as the impugned order with regard to direction for submission of report under section 173 Cr.P.C is concerned, although the investigation of a criminal case falls within the exclusive domain of the police, but the above discussion leads this Court 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. In spite of being an administrative order, it must be a judicious order. Even if the Judicial Magistrate is not competent to take cognizance of the offence, he must apply his mind and thus pass a speaking order,

which 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.

9. The Hon'ble Supreme Court of Pakistan in case reported as "Safdar Ali v. Zafar Iqbal and others" (2002 SCMR 63) has held as under:-

"It is well-entrenched legal principle that "when a Magistrate takes cognizance under section 190(1)(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, Lal 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."

10. 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 well reasoned and based on cogent grounds and the law.

11. In the instant case, learned Judicial Magistrate after examination of the record placed before him disagreed with the report and in very clear terms pointed out the discrepancies in the investigation holding that there are two versions before the police, it is not their mandate to determine which version is correct or otherwise and such determination can only be made by the Court, hence the impugned order is based upon the material available on record. Moreover, the learned Judicial Magistrate did not direct prosecution 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.

12. Keeping in view the above facts and circumstances of the case, and the principles laid down by the Hon'ble Supreme Court of Pakistan in the case supra, I am not inclined to interfere in the impugned order passed by the learned Judicial Magistrate. Resultantly, the instant petition having no force, is hereby **dismissed**.

~~Ghulam Azam Qambrani~~  
**Judge**

Announced in open Court on this 17<sup>th</sup> day of September, 2020

~~Judge~~

S.Akhtar