JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

W.P No. 879-M/2019

(Zahid Khan____ ***Versus***___ The State and others)

Present: ***Mr. Sardar Gul Muhammad Khan Katana, Advocate for petitioner.***

Mr. Razauddin Khan, A.A.G. for State.

Mr. Afsar Ali, Advocate for respondent No.2.

Date of hearing: **11.10.2022**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through this single judgment, we intend to decide instant petition W.P No. 879-M/2019 as well as connected W.P No. 1121-M/2021, as identical questions of law and facts are involved in both these petitions.

2. Complainant Zahid Khan, who is petitioner in instant petition, has averred that on his report FIR No. 286 dated 05.05.2019 had been registered u/s 302 PPC, 15 A.A at P.S Shah Dherai, District Swat against accused Dawood (respondent No.2) and his co-accused Nazir (petitioner in the connected petition) on the charge of committing murder of his brother Wahid Khan. After completion of investigation, complete challan was submitted before the learned Judicial Magistrate, Tehsil Kabal

wherein accused Dawood was placed in Column No.2 while accused Nazir was placed in Column No.3. Since, the offence of murder was triable by Court of Session, therefore, the learned Judicial Magistrate sent the case to learned Additional Sessions Judge (trial Court) in terms of section 190(2), Cr.P.C. The accused were summoned and copies of the case were provided to them in accordance with section 265-C, Cr.P.C. On 17.07.2019, the learned trial Court discharged accused Dawood on the ground that prosecution had put his name in Column No.2. Being aggrieved of the said order, petitioner/complainant has filed instant petition before this Court with the prayer for setting aside order dated 17.07.2019 with further directions for restoration of the FIR against accused Dawood for his trial for the murder of deceased in accordance with law.

3. Accused Nazir has filed the connected W.P No. 1121-M/2021 wherein he has averred that this Court has requisitioned original record of the case from the trial Court due to which the trial Court is unable to proceed with the trial. He has prayed this Court that on acceptance of his writ petition, he be

discharged and acquitted of the charge leveled against him. He has also prayed that the judicial remand by learned trial Court u/s 344, Cr.P.C and his arrest vide card of arrest u/s 62, Cr.P.C. may be declared as null and void.

4. We have heard the arguments of learned counsel for the parties including learned A.A.G. representing the State and perused the record with their able assistance.

5. Perusal of the record would reveal that the Investigating Officer has put the name of respondent Dawood in column No.2 of challan in view whereof the learned trial Court has discharged him vide order dated 17.07.2019 which is reproduced as under:

> APP برائے سرکار حاضر۔ ملزم نظیر زیر حراست جبکہ ملزم داود بر ضمانت حاضر۔ وکلاء فریقین حاضر ہیں۔
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> مسل پر موجود چالان مکمل کے مطابق، ملزم داود کا نام چالان فارم کے خانہ نمبر 2 میں ڈالا گیا ہے اور جس ملزم کو نامزد کیا جا کر اُس کا نام خانہ نمبر 2 میں ڈالا جائے تو استغاثہ اُس ملزم کے خلاف مقدمہ چلانا نہیں چاہتے۔ لہٰذا فی الحال ملزم داود کو بوجہ اندراج خانہ نمبر 2 مقدمہ ہٰذا سے ڈسچارج کیا جاتا ہے۔ ملزم نظیر پر فرد جرم عائد کیا گیا۔ ملزم صحت جرم سے انکاری اور مقدمہ چلانے کا خواہاں ہے۔ نوٹس بنام مستغیث و پرائیویٹ گواہان مورخہ 30.07.2019 کیلئے جاری ہو۔

The moot question for resolution before this Court is whether the Court is bound to agree with the

opinion of Investigating Officer regarding innocence of an accused shown in column No.2 of the final report u/s 173, Cr.P.C? The second question is whether an accused could be discharged when the trial Court has already taken cognizance of the criminal case? There is no denial of the fact that complainant has charged accused Dawood on the basis of telephonic information, however, the admitted position is that he has directly been nominated in the FIR, therefore, his exoneration from the charge by the learned trial Court at the very initial stage of the trial does not appear to be a just and fair conclusion. No doubt, officer-in-charge of police station or Investigating Officer is empowered under sections 63 and 169, Cr.P.C to report innocence of an accused already nominated, however, such opinion of police officer has no binding effect on Court. The Court may examine the material on record to ascertain availability or otherwise of reasonable grounds for proceeding with trial of accused placed in column No.2 of the challan. Reliance in this regard is placed on ***"Haji Inayat-ul-Haq Vs. Said Muhammad Khan and others"*** **(1988 SCMR 1743)** wherein it was observed that:

High Court could go into this aspect of the matter because the material could clearly be examined by it and the opinion of the police officer directing that the accused be placed in Column No.2 did not stand in the way of making such an evaluation.

6. Section 265-D, Cr.P.C confers the power upon the Court to form its opinion that there is ground to proceed with trial of the accused. The *ibid* provision is reproduced below for ready reference.

> **265-D. When charge is to be framed:** If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceeding with the trial of the accused it shall frame in writing a charge against the accused.

Bare reading of the above provision reflects that the Court, in light of the police report and other material, may form an opinion to proceed with the trial of accused. In other words, the trial Court may or may not agree with the observations of Investigating Officer. It appears that in the present case, the learned trial Court, without going through the record, has straightaway discharged accused Dawood on the sole ground that I.O had mentioned his name in column No.2 of the challan. An accused could not be discharged in such a mechanical manner to defeat the ends of justice. The Hon'ble Supreme

Court, while dilating upon an identical issue in the case of ***"Waqar-ul-Haq alias Nithoo and another Vs. The State"*** **(1988 SCMR 1428)** observed that:

> **The point involved in this case is that three persons have been accused of the offence out of which one Muhammad Rafiq was placed in column No.3 whereas the present petitioners were placed in column No.2. The accused person whose name appears in column No.2 of the challan can be summoned by the trial Court directly to stand the trial and it is not necessary that first some evidence should be recorded. In the present case the challan against the petitioners had not been cancelled by placing them in column No.2. It only meant that according to the police investigation they were found innocent, and therefore, they were discharged under section 63 of the Cr.P.C. However, it does not mean that they could not be summoned to stand trial by the Sessions Court.**

7. The record reflects that SHO had submitted complete challan u/s 173, Cr.P.C before the Judicial Magistrate Kabal, who while taking cognizance of the matter under section 190(1), Cr.P.C forwarded the same to learned Additional Sessions Judge, Swat at Kabal for trial of the accused u/s 302 PPC and 15 A.A. Admittedly, the Judicial Magistrate had taken cognizance of the case in terms of sub-section (1) of section 190, Cr.P.C. Since, the offence was triable by Court of Session, therefore, the case was forwarded to learned Additional Sessions Judge, Swat at Kabal in terms of section

190(2), Cr.P.C. The law is settled that discharge of an accused or cancellation of case by a Magistrate are not legally possible after cognizance of the case has been taken by the trial Court. The question whether the case could be cancelled under section 173, Cr.P.C. after the Court had taken cognizance, has been resolved by Hon'ble Supreme Court in the case of ***"Muhammad Alam and another Vs. Additional Secretary to Government of N.W.F. P, Home & Tribal Affairs Department and 4 Others"*** **(P L D 1987 Supreme Court 103)** by observing that:

> **Chapter XVII of Cr.P.C. deals with "the commencement of proceedings before the Courts". Section 204 therein deals with the issuance of process by the Court on taking of cognizance. After taking the cognizance and even before the issuance of the process, the normal procedure under the Code or the Regulation, as the case may be, would be followed. The police report would not relieve the Court of its obligation to continue the proceedings until their proper termination under the relevant law. The cancellation of case under section 173 is not permissible after the cognizance has been taken. But it could have been done before that stage. It was so held in the Full Bench case of Lahore High Court, Wazir v. The State (P L D 1962 (W. P.) Lah. 405), which we feel is correct approach in so far as this point of cancellation, before cognizance, is concerned.**

After taking cognizance of the matter by trial Court, culmination thereof is possible only in three ways firstly; conviction of the accused upon his

plead guilty or on the basis of evidence, secondly; his acquittal either u/s section 249-A or 265-K, Cr.P.C or when the prosecution fails to prove his guilt through evidence and thirdly withdrawal from prosecution by a Public Prosecutor in terms of section 494, Cr.P.C. The above view is emerging from the judgment of High Court of Baluchistan in the case of ***"Bilal Ahmed and 2 others Vs. The State"*** **(2021 PCr.LJ 261)** in the following words:

> **It is well settled principle of law that discharge of an accused by a Magistrate is not legally possible after taking cognizance of the case. It may be added here that after taking cognizance by the trial court only three results are possible in a criminal case, firstly conviction of the accused either upon admission of guilt by him or on the basis of the evidence led by the prosecution; secondly, acquittal of the accused either under sections 249-A/265-K, Cr.P.C. or on the basis of failure of the prosecution to prove its case on merits beyond reasonable doubt; and thirdly, withdrawal from prosecution by a Public Prosecutor under section 494, Cr.P.C.**

In light of the afore-referred dicta, the learned trial Court, while discharging accused Dawood without adhering to material available on record, has fallen in error by concurring with the opinion of Investigating Officer qua discharge of the said accused on the sole ground that his name was mentioned in column No.2 of the challan.

8. Adverting to the prayer of accused petitioner Nazir in the connected W.P No. 1121-M/2021 with regard to his acquittal/discharge, not only the I.O has put his name in column No.3 of the challan for his trial on the charge of murder and 15 A.A but formal charge has also been framed against him besides sufficient evidence has been collected against him during the course of investigation, therefore, in light of our detailed discussion in the preceding paras, there is no force in his contention. His other grievance was that the original record has been requisitioned by this Court in connection with writ petition of the complainant due to which the trial Court has stopped the trial proceedings initiated against him. Original record has already been sent back to the trial Court as reflected from order sheet dated 31.05.2022 of this Court in W.P No. 879-M/2019, therefore, his above grievance has already been redressed.

9. In light of the above discussion, instant petition i.e., W.P No. 879-M/2019 is allowed, the order dated 17.07.2019 of the learned trial Court is set aside with directions that the learned trial Court shall proceed with trial of accused Dawood in

accordance with law. The connected W.P No. 1121-M/2021, having no substance, is accordingly dismissed.

Announced.
Dt: 11.10.2022

JUDGE

JUDGE

Office 13/10/2022