

*Judgment Sheet*  
**IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH**  
**JUDICIAL DEPARTMENT**

*Writ Petition No. 510-A/2019*

**JUDGMENT**

Date of hearing.....**02.02.2021**.....

Petitioner (Sardar Attique ur Rehman) By M/S Kiran Ayub Tanoli and Tipu Muhammad Sultan, Advocates.

Respondents (The State & 05 others)

Respondents No.1 & 3 By Sardar Muhammad Asif, Assistant Advocate General.

Respondents No.4 to 6 By Mr. Hamid Faraz Abbasi, Advocate.

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**SHAKEEL AHMAD, J.-** This constitutional petition seeks annulment of order dated 21.01.2019 of the learned Judicial Magistrate-III, Balakot, whereby on the police report crime No.167 dated 10.09.2018 under sections 380/109/34 of police station, Kaghan District Mansehra registered against the respondents No.4 to 6 was cancelled.

2. The fact of the case, in brief, are that on 10.09.2018 crime No.167 was recorded on the report of the petitioner / complainant Sardar Attique ur Rehman at police station, Kaghan District Mansehra against the respondents No.4 to 6 for committing theft of six LED's and cash amount of Rs.90,000/-. Thereafter the respondents No.4 was arrested

by the local police 18.09.2018, while the respondents No.5 & 6 were granted pre-arrest bail by the learned Additional District Judge, Balakot, vide order dated 23.10.2018. On 21.01.2019 the local police submitted report before the learned Judicial Magistrate for cancellation of FIR, which was allowed, hence, this petition.

3. We have heard arguments of learned counsel for the parties and perused the record with their valuable assistance.

4. The learned counsel for the petitioner / complainant has raised two-fold objections before us, firstly that while canceling the case the learned Magistrate simply agreed with the opinion of the police and failed to record his own reasons, and secondly that before passing the impugned order the petitioner / complainant was not given the right of audience.

5. It appears from the record that a criminal case had been registered against the respondents No. 4 to 6. During investigation, the investigating officer of the instant case on 27.09.2018, issued a notice to the complainant / petitioner to provide him the record of the visitors of the hotel within three days from the date of receipt of notice, enabling him to make progress in the case. This notice was not served upon the petitioner, whereafter, the police statedly made a report under section 173 Cr.P.C to the Magistrate that there was no sufficient evidence against the accused as a result of the

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investigation, and requested to cancel the case / crime report. The learned Magistrate while agreeing with the report of the police cancelled the case / crime report vide order dated 21.01.2019.

6. On the legal plane, we are clear in our mind that the power conferred on the Magistrate under section 173(3) Cr.P.C is not an arbitrary power and must proceed on relevant principles akin to those enunciated by the Supreme Court of Pakistan in **Mir Hassan Vs Tariq Saeed and 02 others PLD 1977 SC 451** and **Shibli Vs The State PLD 1981 SC 617**. If these criteria are taken into consideration in the facts of the present case, it is observed that the learned Judicial Magistrate simply agreed with the opinion of the police officer and failed to record his own reasons for agreeing with the police. We, therefore, emphasize that while exercising power under section 173 (3) Cr.P.C, the learned Magistrate are not to act as pawns in the hands of the police and pass mechanical orders without application of their conscious mind to the facts and material placed before them because the opinion expressed by the police is not binding upon them. In this context reference may be made to the case reported as **Abdul Ghaffar and 02 others Vs Ishtiaq Ahmad Judicial Magistrate-I, Tank and 02 others (2012 P.Cr.L.J 1451)**. The learned Magistrate must be made to realize that the power to cancel a police case is of wide

amplitude which has the effect of bringing a halt the criminal prosecution which otherwise would entail a detailed process. Such a power, therefore, by its very nature, cannot be designed to be exercised on mere ipse dixit of the police otherwise, the very purpose for conferring this power on the Magistrate on responsible level in supervisory capacity would stand defeated. In the case reported as **Bahader and another Vs The State and another (PLD 1985 S.C 62)**, it was held that a Magistrate cancelling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly. The party is left free to institute a complaint on the same fact and the Magistrate does not even after passing such an order renders himself functus officio. This view was followed in **Arif Ali Khan's case (1993 SCMR 187)** and **Muhammad Sharif and 08 others Vs The State and another (1997 SCMR 304)** which was also referred in the case reference **Hussain Ahmad Vs Mst. Irshad Bibi and others (1997 SCMR 1503)**. On competently instituted proceedings, where it appears clear to the courts that those has been an attempt at stifling the prosecution in its infancy in the absence of conscious application of mind or on consideration other than public policy, preventing abuse of process of law, and to secure the ends of justice or if it for ulterior purposes, they would not hesitate to interfere in fit cases an compel observance of law. In either cases affecting

criminal prosecution, whether administrative or judicial in character, must flow for full application of mind of the learned Magistrate to the facts of a given case and the decision must be based on considering of purpose of law advancing the interest of justice.

7. Now turning to the second objection of the learned counsel for the petitioner. It is observed that one of the basic concept of Sharia in the administration of justice (adl) is the hearing of both the parties by the Qazi or Judge passing the order. This is known as the principles of natural justice which includes the principles:-

- (i) That a man cannot be a Judge of his own cause.
- (ii) That no party is to be condemned unheard.
- (iii) That the party must in good time know the precise case he is to meet; and
- (iv) That a party is entitled to know why a matter has been decided against him.

8. If, in any action, any one of the principles enumerated above are not followed that action must be struck down. The principle of 'audi alteram partem' i.e. a person cannot be condemned unheard is a time honoured principle. Therefore, where an order to the prejudice of a party is made without hearing him, for instance a privilege granted to a person, is withdrawn without giving a show

cause notice, the order being bad in law, is to be ignored and laid to rest.

9. Principles of natural justice are well recognized by Holy Quran. For instance, on refusal of Satan (Iblis) to bow down to Adam on the command of Almighty **ALLAH**, he was punished for his rebellious arrogance and jealous disobedience only after he was asked to explain his conduct. The Holy Quran has also laid down the procedure which **ALLAH** has ordained to be adopted on the day of judgment to requite the virtuous and to punish the recalcitrant. It is provided that full accounting of one's virtue or vices will be carried on. Since **ALLAH** has made it a rule to get every action of a person recorded in his record of actions (Amalnama) a copy of his record shall be given to everyone in his right hand if his virtues override or weigh more than his vices and in his left hand or from his back side, if otherwise. In the way a show cause notice is given, he will be confronted with the wrongs and sins committed by him in his stay in this world, then evidence of his hands or other parts of the body as well as other evidence shall be taken before sentencing him to hell. Two of the qualities of **ALLAH** are that he is all knowing and aware of everything. He has full knowledge of the virtues and misconduct of every human being. He is also Just. He can, therefore, requite a person for his good deeds or send him to hell for his wrong doings on the basis of his

own knowledge. But obviously he has laid down such a consummate procedure in order to satisfy the principle that no one would be condemned unheard and justice should not only be done, but should be manifestly done to the satisfaction of all including who is later condemned.

10. **ALLAH** did not destroy any people / nation except after forewarning through His Prophet. Hazrat Nooh (P.B.U.H) administered warning to his nation in clear language (7.59, 11, 25). I fear for you the chastisement of the grievous day. He warned them till they themselves asked for punishment (11.32) "O. Nooh! Thou hast disputed with us and multiplied disputation with us; now bring upon us that wherewith thou threatenest us, if thou art of the truth ones."

11. Hazrat Hudd was sent as an apostie on Aad. Hazrat Saleh was sent to Thamood, Hazrat Lut was also sent as an apostie of ALLAH. Hazrat Shoaib was sent to the people of Madyan. Each of them warned his nation of chastisement, but retribution was sent to destroy them, when they asked for it. This is the story of warnings going unheeded and of mocking and challenging invocations being made for award of retribution.

12. The people of pharagh received several warnings in the form of draught, diminution of fruits, blood, locusts, vermits, frogs and blood but, they were arrogant and when the terror fell on them they cried; O Moses! Pray for us unto

the lord, because He hath a covenant with them. If you remove the terror from us we verily will trust and will let the children of Israel go with them (7:134) but each time they broke their promise and were ultimately drowned.

13. These cases furnish best examples of the same two principles discussed in the preceding paras.

14. It is by now settled that in all proceedings by whatsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting "the person or property or other right of the parties concerned" this rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement is to be implied into it as the minimum requirement of fairness. In this behalf reference may be made to the cases reported as ***Chief Commissioner Karachi Vs Mrs. Dina Sohrab Katrak (PLD 1959 SC (Peshawar) 45), Faridoon Limited Vs Government of Pakistan (PLD 1961 SC 537) and Abdur Rehman Vs Collector and Deputy Commissioner Bahawalnagar and others (PLD 1964 SC 461).***

15. The result is that this writ petition is admitted and allowed and the impugned order dated 21.01.2019 of the learned Judicial Magistrate-III, Balakot is laid to eternal place and case is remanded back to him to pass a speaking order



either way by recording his own reasons on the report of the police, but, after providing an opportunity of hearing to the petitioner / complainant. The Additional Registrar of this court is directed to send the copy of this judgment to the learned Sessions Judges of the Province of Khyber Pakhtunkhwa for onward circulation to the judges.

**Announced.**  
02.02.2021.  
Aftab PS/\*



**CHIEF JUSTICE**



**JUDGE**

Hon'ble Mr. Justice Qaiser Rashid Khan, CJ  
Hon'ble Mr. Justice Shakeel Ahmad