

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

1. **W.P. No. 718-M/2019**
- &
2. **Cr.R. No.105-M/2019**

**CONSOLIDATED**  
**JUDGMENT**

Date of hearing: **11.11.2019**

**Petitioner:- (Karim-ul-Hasan) by M/S Muhammad Saeed Khan Shangla and Syed Abdul Haq, Advocates.**

**Respondents (The State through A.A.G. & others) by Mr. Wilayat Ali Khan, A.A.G and M/S Hazrat Rehman and Muhammad Ikram Khan, Advocates.**

**WIQAR AHMAD, J.-** Our this order is directed to dispose of W.P. No. 718-M of 2019 filed by the petitioner against the respondents under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as "***Constitution***") as well as connected Criminal Revision No.105-M of 2019 filed by the complainant/petitioner Mohammad Shoaib against respondents under section 39 of the Criminal Procedure Code 1898 (hereinafter referred to as "***Code***").


2. Muhammad Sohaib lodged a report to Imran Khan SHO PS Talash, at emergency ward of Shamshi Khan hospital Talash, alleging therein that he along with his brothers namely Muhammad Iqbal, Said Abdullah and Bahadar Zaib and other nephews had been cutting wheat crop standing in their lands known as "*Khwar Patai*", when the accused namely Habib-ul-Hassan alias Malik and Said Hassan both sons of Said Karam appeared duly armed with firearms and started firing at them. Brother of the complainant namely Bahadar Zaib was stated to have received an injury as a result of the firing made by Habib-ul-Hassan while rest of the complainant-party escaped un-hurt. The accused were stated to have escaped from the place of occurrence. A dispute over some landed property was stated to be the motive for the commission of the alleged offence and both the accused were accordingly charged by the complainant in his first report. FIR No.47 dated 23.05.2019 was registered under sections 302,324,34 PPC at police station Talash District Lower Dir against

the two accused namely Habib-ul-Hassan and Said Hassan sons of Said Karam.

3. Investigation in the case was in progress that the complainant filed an application under section 22-A of the Code before the learned Sessions Judge in the capacity of Justice of Peace for issuance of direction to the Investigating Officer for substituting the name of "*Said Hassan*" with "*Karim Hassan*" in the record of the criminal case. Comments of the SHO concerned were called by the learned Justice of Peace, which were accordingly submitted. Vide order dated 01.06.2019 of the learned Justice of Peace, the application of the complainant was accepted and directions were issued to the Investigating Officer for making the necessary correction of names as prayed for by the complainant in his application filed under section 22-A of the Code. Feeling aggrieved from the said order the petitioner has invoked the constitutional jurisdiction of this Court, through the instant petition, brought for the grant of the following relief;

*“ It is, therefore, prayed that on acceptance of this petition, the impugned order dated 01.06.2019 be declared unlawful, void-ab-initio, lack backing of law be set aside.”*

Likewise, the complainant/petitioner Mohammad Shoaib has filed the connected criminal revision against subsequent order of the learned trial Court dated 12.10.2019, whereby the learned Court framed charge against one of accused namely Habib-ul-Hassan and left the other accused Karim-ul-Hassan , due to existence of an ad-interim injunctive of this Court. He has prayed for following relief;



*“ It is therefore most humbly prayed that on acceptance of the criminal revision the impugned order dated 12.10.2019 may kindly be set aside and trial Court be directed to proceed with case on merits by framing charge against both the accused.*

*Any other remedy deemed appropriate and just in circumstances of the case may also be granted in favour of petitioner.*

4. Learned counsel for the petitioner submitted during the course of his arguments that Said Hassan and Karim Hassan were two brothers. Said Hassan was stated to have been living in Saudi Arabia at the time of occurrence, who was wrongly alleged to have committed the offence and the FIR was registered. The complainant came to know about the said fact subsequently and then contrived the device for

substitution of the accused by way of filing the application under section 22-A of the Code for correction of the name. He further added that the learned Justice of Peace while allowing the application could not realize that the application had been filed with *malafide* intention and substitution of the name of accused was sought in order to save the case of the prosecution from collapsing altogether.

5. Learned counsel for the complainant/petitioner of the connected criminal revision submitted in rebuttal that in-fact it was a result of a clerical mistake that the word "**Said**" was used instead of "**Karim**" in the FIR and that the complainant had repeatedly requested the local police for making the necessary correction but same had not been accepted, therefore the complainant felt compelled to avail the remedy under section 22-A of the Code. He further added that the order had been passed by the forum below according to law and did not suffer from any illegality. The learned Astt: A.G. also supported the private counsel for the complainant.

6. We have heard arguments of learned counsel for the parties and perused the record.

7. Perusal of record reveals that the investigation in the case has been completed and complete challan has also been submitted before the trial Court. The trial Court has also taken cognizance of the matter and the case was fixed for framing of charge on 12.10.2019, when charge could not be framed against one of the accused namely Karim-ul-Hassan due to an interim order passed in the instant proceedings but charge was framed against the other co-accused namely Habib-ul-Hassan on 12.10.2019 by the Court of learned Sessions Judge Dir Lower at Timergara.

8. The net effect of the filing of the application under section 22-A of the Code and order of the learned Justice of Peace, is no more than the fact that the complainant has come up with a second version which has been made part of the record of the investigation and complete challan has been submitted in the Court according to the second version of the complainant. The trial Court has taken cognizance of the matter and

the case is under trial. The burden of proof, without any doubt, lies on the complainant and the prosecution to prove not only the commission of offence but the fact that it was a *bonafide* mistake on their part to have named Said Hassan instead of Karim Hassan in their first report, as well as the other pieces of evidences gathered during the process of investigation. It would have much preferable option that the Investigating Officer would have been directed to record statement of the complainant and then proceeded with the investigation accordingly, but it has not been done. Complete *challan* has been submitted and now the case has landed in the learned trial Court and in the midst of the process of trial. This Court, in such a situation is feeling handicapped for the following reasons;

- a. It cannot resolve at this stage the factual controversy whether the accused Said Hassan had been named in the first report by the complainant due to an innocent mistake on his part or substitution of name was sought due to *malafide* intention of bolstering the case of prosecution unnaturally after finding that one of the accused named by them had been living abroad at the time of occurrence;
- b. The setting aside of the order of the learned Justice of Peace and issuance of fresh instructions to the Investigating Agency

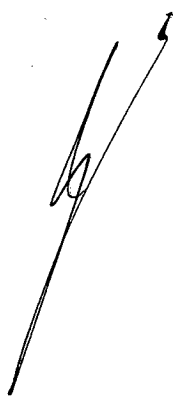
shall amount to interference in the process of investigation, which has been held by the Hon'ble Supreme Court of Pakistan, in successive judgments to be out of the permissible exercise of powers vested in this Court by Article 199 of the Constitution.

Regarding the first issue, it has already been settled by the Hon'ble Apex Court that a High Court cannot resolve factual controversies in exercise of powers under Article 199 of the Constitution. In the case of "Amir Jamal v/s Malik Zahoor-ul-Haq and others" reported as "2011 SCMR 1023", the Hon'ble Supreme Court of Pakistan held that the scope of Article 199 was dependent on the questions which are devoid of factual controversy. In the case of "Fida Hussain and another v/s Mst. Saiga and others" reported as "2011 SCMR 1990", the Hon'ble Apex Court held that the High Court was not to resolve the disputed question of facts in exercise of constitutional jurisdiction under Article 199 of the Constitution. This Court is partly avoiding to resolve the factual controversy because of the settled principle of law, as discussed above but mainly, due to the vacuum which is existing at the



moment in the case in hand, in absence of evidence before it. The learned trial Court would therefore be in much better position to resolve the said controversy after recording of evidence.

9. As far as second aspect of the case in hand is concerned, any affirmative order from this Court would require getting the investigation of the case topsy-turvy. By doing that, this Court would be intruding in the spare of investigation which course is not appropriate for this Court.



The Hon'ble Apex Court has repeatedly held that the High Court shall not exercise its writ jurisdiction for causing interference in the police investigation. In the case of "Shahnaz Begum v/s The Hon'ble Judges of the High Court of Sind and Baluchistan" reported as "PLD 1971 Supreme Court 677", the Hon'ble Apex Court held as follows;

*"So far as the Constitution of 1962 is concerned the powers of the High Courts are such as have been described under the provisions of Article 98 of the Constitution. They are those which have been conferred on them by the Constitution itself or by any law and apart from them they have no other powers, because, Article 130 of the same Constitution provided that "no Court shall have any jurisdiction that is not conferred on it by this Constitution or by or under the law." Under this Constitution, a High Court has been given the power of judicial review of executive actions by Article 98 in certain specified circumstances but*

*even in such a case the High Court cannot move suo motu for, it is specifically provided in each of the sub clauses (a), (b) and (c) of clause (2) of Article 98 that only "on the application of an aggrieved party or of any person," the High Court may make the orders or issue the directions therein specified. It is clear, therefore, that under Article 98, there is no scope for any suo motu action by the High Court. The High Court has also no power of supervision or control over investigating agencies for the power of superintendence which is given by Article 102 of the Constitution is only in respect of "all other Courts that are subordinate to it." This position, as already, pointed out, is not also disputed by the learned Advocate- General for the Province of Sind."*

In the case of "Brig. (Retd.) Imtiaz

Ahmad v/s Govt: of Pakistan through Secretary

Interior Division & others" reported as "1994

SCMR 2142", the Hon'ble Apex Court after an

extensive survey of the existing case law and

examination of relevant jurisprudential principles

held as follows;

*"This Court held, therefore, "that the continued control over the investigation exercised by the Court as in this case was prejudicial to the accused and detrimental to the fairness of the procedure apart from being without jurisdiction".*

*18. The significance of the above-quoted observations lies in the fact that one of the declarations sought by the petitioner was to direct the Government "to place all incriminating material before the High Court to enable it to exercise judicial review to ensure that the criminal proceedings are not- being initiated for reasons and proposes extraneous to statute". In other words what the petitioner wanted the High Court to do was to assume the role of Investigator. This could obviously not be done, for the authority to register and investigate a criminal case in law vests in the police and not in Court. We must hold, therefore, that the learned judges in the High Court were eminently justified is not assuming that role."*

In the case of "Ghulam Sarwar Zardari v/s Piyar Ali alias Piyaro and another"

reported as "2010 SCMR 624", the Hon'ble Apex Court held that if investigation was not in bad faith and out of personal motives either to hurt the accused or to benefit oneself or in colourable exercise of powers not authorized by law, under which an action is taken then it comes within the scope of *malafide*, and in such a case corrective measures may be taken by the High Courts. In the said case also the matter has not been left open ended but the limits of exercise of powers by the High Court in respect of investigation has been defined clearly in the following terms;

*Investigation can be corrected and necessary orders can be passed, if aggrieved party alleges and proves one or other of the following conditions:---*

*(1) Investigation initiated beyond jurisdiction of investigating agencies;*

*(2) Investigation initiated with mala fide intention;*

*(i) in bad faith out of personal motives either to hurt the person against whom action is taken or to benefit oneself;*

*(ii) in colourable exercise of powers;*

*(iii) not authorized by law under which action is taken;*

*(iv) action taken in fraud of law; and*

*(v) abuse of process of law.*

*Where application against investigation does not show any of the above mentioned facts alleged and proved, then High Court under constitutional jurisdiction has no jurisdiction to interfere with investigation or pass any order.*

The case in hand does not even fall in any of the categories mentioned therein. The complainant or the accused have not attributed any *malafide* to the Investigating Agency, nor has any such *malafide* visible in the case. It was the complainant who had admittedly named the accused Said Hassan which he wanted to be replaced with the accused namely Karim Hassan. The Investigating Agency has nowhere been attributed any *malafide* nor has want of their jurisdiction been pleaded or asserted by any of the party at any stage. The effect of setting aside of the order of learned Justice of Peace, at this stage, would no doubt necessitate the ordering of retracing the steps taken in the investigation of the case, which according to the law settled by the Hon'ble Apex Court, cannot be deemed appropriate in the circumstances of the case in hand.

10. The strong factual controversy mentioned above has been existing in the case in hand and that also arises out of investigation of the case, this Court, therefore do not feel inclined to

interfere in the said affair and leave it entirely to the determination of the learned trial Court. The learned trial Court will be in much better position to resolve the instant controversy along with the other matters involved in the case at the time of giving its final verdict, as by then it will have the benefit of the evidence recorded in the case, as well as various pleas raised by the parties during the course of trial.

11. For what has been discussed above, the constitutional petition No. 718-M of 2019 is hereby dismissed.

12. Criminal Revision No. 105-M of 2019 is also disposed of in terms that since the interim order due to which charge could not be framed against the accused namely Karim-ul-Hassan, has vanished with the dismissal of the writ petition, therefore the learned trial Court shall frame charge against the accused and shall proceed according to law.

**ANNOUNCED**  
**Dt: 11.11.2019**

  
**JUDGE**

  
**JUDGE**

Office  
20/11/2019