

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

**Quashment Petition No. 67-M/2018**

(Malak Muhammad Naeem Versus SHO P.S Banr and others)

**Present:**      *Mr. Sher Muhammad Khan, Advocate for petitioner.*  
                      *M/S Aftab Ali and Haidar Ali Khan, Advocates for private*  
                      *respondents.*  
                      *Mr. Raza Uddin Khan, A.A.G. for State.*

Date of hearing:      **07.11.2022**

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.-** Through instant petition under section 561-A, Cr.P.C, petitioner Malak Muhammad Naeem has invoked the jurisdiction of this Court for quashing of order dated 29.09.2018 rendered by learned Judicial Magistrate-I, Swat whereby case FIR No. 247 dated 15.04.2016 u/s 506, 148, 149 PPC, 15 A.A of P.S Banr, District Swat registered on the report of petitioner has been cancelled and accused respondents have been discharged.

**2.**      Brief facts of the case are that petitioner produced SMG Kalashnikov No. 25020104 with two chargers containing 44 rounds and mobile phone Nokia having Telenor SIM No. 03489305725 before police on 02.04.2016 and made a report to the effect that the accused respondents alongwith 5/6 other unknown persons were demolishing boundary wall of his ancestral property situated at Tarkashi Shaheed. When he proceeded to the spot in the company of

his relatives and tenants, the accused made their escape good, however, a young boy, he can identify him from his face, was present inside a tent set up in their land, aimed his Kalashnikov at them. They tried to snatch the Kalashnikov from the boy and during the struggle he was hit on his head by his own gun. He charged the above named accused and their companions for making interference in his land. Report of the petitioner was recorded vide DD No. 33 dated 02.04.2016. Being displeased for non-registration of FIR, petitioner filed an application u/s 22-A, Cr.P.C before the learned Justice of Peace who disposed of the same vide order dated 13.04.2016 with directions to SHO to inquire the matter in terms of section 156(3), Cr.P.C and if found sufficient material then the FIR be lodged under the relevant section(s) of law. On the following day of the above order, complainant filed another application before the learned Justice of Peace with the prayer for revising the order dated 13.04.2014 as the same was not in conformity with the verbal order of Court announced in the open Court directing the SHO to register FIR as the inquiry proceedings had already been completed. The learned Justice of Peace marked the application to SHO concerned for compliance within three days, as such, case vide FIR No. 247 dated 15.04.2016 u/s 506, 148, 149 PPC, 15 A.A was registered



against the accused respondents at P.S Banr, District Swat. The accused filed pre-arrest bail before the learned Sessions Judge, Swat which was entrusted to learned Additional Sessions Judge-VI, Swat for disposal. Ad-interim pre-arrest bail was granted to accused by the said forum vide order dated 18.04.2016 and notice was issued to petitioner and State for 20.04.2016. Thereafter, the Inquiry Officer filed an application dated 03.05.2016 for discharge of the accused u/s 169, Cr.P.C which was forwarded/recommended by SHO on 04.05.2016. Being aggrieved, the petitioner challenged the application and recommendations of the SHO before this Court through Q.P No. 40-M/2016 which was disposed of vide order dated 02.11.2017 in light of statement of learned counsel for accused and learned Assistant A.G. that let the learned trial Court may proceed with the matter in accordance with law. Lastly, Final Report was put before the learned Magistrate for cancellation/dismissal of the case FIR No. 247 dated 15.04.2016 u/s 506, 148, 149 PPC, 15 A.A of P.S Banr, District Swat lodged at the behest of petitioner which was accepted vide order dated 29.09.2018. Resultantly, the *ibid* FIR was cancelled and the accused respondents were discharged, hence, instant petition.

3.

Arguments heard and record perused.

4. First of all, Cr.Misc. No. 234-M/2019 filed by petitioner needs disposal wherein he has prayed for substitution of Respondent No.1 "SHO, Police Station Banr, District Swat" with "Judicial Magistrate-I, Swat". The application is allowed and "SHO, Police Station Banr, District Swat" mentioned at Serial No.1 in the panel of respondents be read as "Judicial Magistrate-I, Swat". Office is directed to make necessary entries to this effect in the relevant record with red ink.

5. The present case revolves around powers of Investigating Officer under section 169 of the Code of Criminal Procedure, 1898 which reads.

**169. Release of accused when evidence deficient.** If, upon an investigation under this Chapter, it appears to the officer incharge of the police-station, or to the Police-officer making the investigation that there is not sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial.

Under the above provision, the Investigating officer is only empowered to release a person in custody, on executing a bond, if he reaches to a conclusion that sufficient evidence or reasonable ground are not available to justify forwarding accused to Magistrate. It means that release of an accused would be valid only when the

prosecution evidence is deficient otherwise it is the exclusive jurisdiction of trial Court to decide the guilt or innocence of any person charged with allegation for committing an offence. The record transpires that another FIR No. 220 dated 02.04.2016 u/s 324, 427, 147, 148, 149, 452 PPC has been registered against the petitioner side at the instance of complainant Fazal Subhan (herein accused Respondent No.6) in the same police station Banr alleging that the complainant side alongwith other 19/20 unknown accused came to the spot and beat him with kicks, fists and butt of Kalashnikov thereby causing injury on his head whereafter they demolished his residential room and boundary wall. Placing both the FIRs in juxtaposition with each other, it is evident that both the parties have levelled counter allegations against each other besides they also claimed adverse title and possession of the land where the occurrence has taken place. Even the Investigating Officer has made controversial the Kalashnikov produced by petitioner at the time of lodging the report and has declared the same as case property of case FIR No. 220 lodged by accused in view whereof section 15 A.A was added in said FIR. However, copy of recommendations dated 02.07.2016 of the learned APP (annexed with Cr.Misc. No. 197-M/2019) is available on file wherein it has been opined that

section 15 A.A was wrongly inserted in FIR No.220. The said opinion has been approved by learned DPP with directions to I.O for making compliance of the directions regarding deletion of the mentioned penal section from the FIR and to res-submit the case before the Court.

6. The moot questions for resolution before this Court are whether the Investigating Officer could determine guilt or innocence of the accused and secondly, whether the impugned order of the learned Magistrate by discharging the accused and cancellation of FIR in the attending circumstances of the case was in accordance with law or otherwise. As regards the first question, job of Investigating Officer is confined only to collection of evidence which has to be placed before competent Court. Thereafter the Court has the authority and obligation to form an opinion about guilt or innocence of accused person and to adjudicate upon according to the evidence. In the present case, the Investigating Officer has straightaway declared the accused respondents as innocent by evaluating the defence evidence with the request to learned Magistrate for their discharge and cancellation of FIR. Such determination of guilt or innocence of a person by police officer investigating the case were beyond his powers because if opinion of police officer declaring an accused innocent be casually accepted

for acquittal of an accused, then such practice on behalf of Court would also justify conviction of an accused on the basis of opinion of Investigating Officer. Reliance in this regard is placed on "Muhammad Ahmad (Mahmood Ahmad) and others Vs. The State" (2010 SCMR 660)

wherein it was observed that:


**It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officers to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an accused person could be let off or acquitted only because the Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt.**

Further reliance is placed on "Muhammad Arshad and others Vs. The State and others" (PLD 2011 S.C 350) wherein the same view was reaffirmed. Thus, in light of above judgments, it was not the domain of the Investigating Officer to determine innocence of the accused respondents on the basis of defence evidence keeping in view the attending facts and circumstances of the present case.

8. Adverting to the second question with regard to legality of the impugned order, the learned Magistrate has discharged the accused respondents and cancelled the FIR by holding that the time of occurrence mentioned in both the FIRs is different though the same had been lodged regarding the same occurrence; that there is delay in lodging the report incorporated in FIR No. 247 suggesting consultation and deliberation on behalf of petitioner; that the petitioner and his associates are aggressors who have tried to possess the property by making interference and that petitioner has acted like I.O by taking into possession the material from the spot which were the case property in case FIR No. 220. Admittedly, both the parties have leveled counter allegations against each other in their respective reports. The question with regard to aggressor and aggressed upon has always been considered by superior Courts as a valid ground of further probe in bail matters, therefore, prior to recording of pro and contra evidence, the learned Magistrate has fallen in an error by holding that complainant and his associates were aggressors more particularly when the parties are in dispute regarding the land in which the occurrence had taken place. The learned Magistrate has recorded the above observations at a premature stage when determination of the points so



resolved needed verification through statements of the witnesses during the trial proceedings, thus, the learned Magistrate has recorded his findings for acquittal of the accused though his job was to weigh the evidence of both the sides through application of independent mind for reaching at a just conclusion for rejecting or accepting the request of Investigating Officer regarding discharge of the accused respondents. Thus, in the circumstances when there was a set of prosecution evidence on one side and defence evidence on the other, it was for the trial Court to weigh both sets of evidence on judicial scale to rely on one and discard the other, as such, section 169, Cr.P.C do not confer any such power upon the Investigating Officer to evaluate the defence evidence and prefer it over prosecution evidence to declare the accused innocent. Reliance is placed on "Asal Mar Din Vs. Farid Gul and 2 others" (2014 PCr.LJ 197 Peshawar) wherein it has been held that:



Investigating Officer can release an accused in his custody when sufficient evidence was lacking or there were no reasonable grounds of suspicion against accused. The said power is not identical to the power of preponderance of evidence to be exercised by the trial Court. When there is a set of prosecution evidence on one side and defence evidence on the other, the trial Court is empowered to weigh both sets of evidence on judicial scale to rely on one and discard the other. The theme of section 169, Cr.P.C. did not admit any such power of Investigating Officer to evaluate defence evidence of an accused and prefer it over the prosecution evidence to declare him innocent.

9. Admittedly, FIR No. 247 has been registered on the directions of the learned Justice of Peace whereas the accused respondents have already been released on bail. In such circumstances police could not proceed under section 169, Cr.P.C for discharge of the accused when both the parties had relied upon their respective evidence in light whereof it was the domain of trial Court to determine the guilt or innocence of both the parties in view of counter allegations after recording pro and contra evidence, therefore, the order of learned Magistrate while discharging the accused and cancelling the FIR at the very initial stage was not in accordance with law. Rel: "Hafeez Ahmad Vs. Malik M. Anwar and others" (1987 P Cr. L J 450 Lahore).

10. In light of the above discussion, this Court in exercise of its jurisdiction under section 561-A, Cr.P.C is of the opinion that not only the Investigating Officer has acted beyond his powers by determining innocence of the accused respondents through evaluation of defence evidence but the learned Magistrate has also committed an illegality by cancelling the FIR and discharging the accused while concurring with the Investigating Officer by analyzing both sets of evidence without application of judicious mind. Resultantly, instant petition is allowed and the impugned

order dated 29.09.2018 rendered by learned Judicial Magistrate-I, Swat is set aside with the directions that after completion of investigation complete challan be submitted against the accused before the Court for their trial in accordance with law.

Announced.  
Dt: 07.11.2022

  
JUDGE

Office  
10/11/2022  
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(S.B) Hon'ble Mr. Justice Muhammad Naeem Anwar