

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

W.P No. 663-M/2016

*Khurshid Khan s/o Jan Muhammad r/o Agra, Tehsil
Batkhela, District Malakand.*

(Petitioners)

Versus

*Mst. Asia d/o Sher Zaman r/o Agra Tehsil Batkhela, District
Malakand and 03 others.*

(Respondents)

Present:

Muhammad Raziq, Advocate for petitioner.

*Muhammad Rahim Shah, Assistant A.G. for
State.*

*Hafiz Ashfaq Ahmad, Advocate for respondent
No.1.*

Date of hearing: **08.11.2017**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Through this Constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner seeks the jurisdiction of this Court for the quashment of F.I.R No. 13 dated 27.10.2016 registered against him under Sections 376/457 PPC at Levy Post Agra pursuant to the order dated 22.10.2016 of the learned Additional Sessions Judge/Justice of Peace, Malakand at Batkhela whereby application under Section 22-A, Cr.P.C filed by Respondent No.1 was

accepted and the post commander concerned was directed to register F.I.R against the petitioner.

2. Brief facts of the case are that Respondent No.1 filed an application on 14.10.2016 under Section 22-A, Cr.P.C before the learned Sessions Judge/Justice of Peace, Malakand at Batkhela for registration of F.I.R against the petitioner. She stated in the application that she is residing in a separate room in the house of her brother Saeed-ur-Rehman, who is abroad and there is no male in the house except her and Mst. Nasrat, wife of her brother. She alleged that on 19.09.2016 at 1:00 hours when she was present in her room, the petitioner entered her house by scaling over the wall and straightaway came inside her room and thereafter committed rape on her as she is crippled and could not move freely, however, she made hue and cry on which her sister-in-law came there, locked the door from outside and went to Levy Post for lodging a report. Thereafter the levy officials came to her house, opened the door and took

away the petitioner after arresting him. Respondent No.1 further alleged that due to threats and fear of the Post Commander, not only she and her sister-in-law did not charge the petitioner rather lodged report against her brother Abdur-Rehman under Section 107/151, Cr.P.C.

3. The learned Justice of Peace after procuring report of the concerned Post Commander in the matter, accepted the application of Respondent No.1 vide order dated 22.10.2016 and directed the Post Commander, Levy Post Agra for registration of F.I.R against the petitioner under Sections 376/457 PPC consequent upon which the above referred F.I.R was registered against the petitioner, for quashment whereof he has filed this petition by invoking the Constitutional jurisdiction of this Court.

4. Learned counsel for the petitioner, *inter alia*, contended that Respondent No.1 has concealed the real facts in her application which she filed before the learned Court below with a delay of almost

one month without giving any explanation in this regard. He further contended that in fact on 16.09.2016 at 2100 hours sister-in-law of Respondent namely Mst. Nusrat Begum telephonically informed the local levy officials regarding presence of a stranger inside the room of Respondent No.1, her husband's sister whereafter the levy officials came to their house and found the petitioner inside the house who duly explained that Respondent No.1 had made a phone call to his father Jan Muhammad who sent the petitioner for her treatment as she was ill. He further contended that statements recorded by Respondent No.1 and Mst. Nasrat, her sister-in-law, are available on record wherein they have categorically stated that the petitioner had come to their house for treatment of Respondent No.1 and that they do not charge him for trespass or theft, hence, the complainant has changed her previous version that by itself has disbelieved her stance which can be considered as a reasonable ground for quashment of the F.I.R under the

Constitutional jurisdiction. Learned counsel referred to Madd Repot No. 5 dated 20.09.2016 and contended that vide the said report Respondent No.1 sought protection of levy officials against her bother Abdur Rehman and cousin Ahmad Sher etc as there was a threat to her life. Learned counsel maintained that at that time too Respondent No.1 did not charge the petitioner but later on after due consultation and deliberation made a concocted story and charged the petitioner under Sections 376/457 PPC with collusion and mala fide. He also argued that the medical report does not support the offence of Zina and the entire police record is silent regarding the alleged offences which shows that the petitioner has been charged in a false case, therefore, the F.I.R be quashed in the interest of justice under the Constitutional jurisdiction. Learned counsel concluded that the learned Justice of Peace has acted beyond his jurisdiction by administrating oath while exercising executive powers, as such, the impugned order suffers from illegality.

5. As against that learned A.A.G. assisted by learned counsel for Respondent No.1 repelled the arguments of learned counsel for the petitioner and contended that petitioner has committed a heinous offence by committing rape on a crippled and helpless girl, therefore, registration of the F.I.R is not an illegality. Further contended that the burden is on the complainant to prove the guilt of petitioner through evidence and the same opportunity will also be available to petitioner to rebut the allegations in accordance with law, hence, quashment of the F.I.R at this stage will cause miscarriage of justice to Respondent No.1. They submitted that this writ petition be dismissed and the Post Commander concerned be directed to proceed with the investigation.

6. Arguments heard and record perused.

7. We agree to the submission of learned counsel for the petitioner to the extent only that the learned Justice of Peace acts in executive capacity and he cannot record

statements on oath while seized of an application under Section 22-A, Cr.P.C. The judgment i.e 2012 PCr.LJ 776 (Lahore) referred by learned counsel for petitioner is relevant to this extent but at the same time we are conscious of the fact that while entertaining such applications the Justice of Peace is under the statutory duty to order for registration of the F.I.R without getting into the depth of the information and if in his opinion prima facie a cognizable offence is spelt out from the contents of the application, he is left with no choice but to order the registration of the F.I.R. Subsequently, during the course of investigation the charge appears to be false the complainant can be proceeded under Sections 182/211 P.P.C etc. Wisdom in this regard is derived from the judgment in the case titled "Muhammad Bashir V/s. Station House Officer, Okara Cantt. and others" (PLD 2007 Supreme Court 593) wherein the august Supreme Court held that:-

"40. Therefore, in our opinion, the only jurisdiction which could be exercised by an Ex-officio Justice of the Peace under section 22-A(6), Cr.P.C. was to

**DB: Mr. Justice Ishtiaq Ibrahim
Mr. Justice Muhammad Nasir Mahfooz**

Tajamul/PS*

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examine whether the information disclosed by the applicant did or did not constitute a cognizable offence and if it did then to direct the concerned S.H.O. to record an F.I.R. without going into the veracity of the information in question, and no more. Offering any other interpretation to the provisions in question would be doing violence to the entire scheme of the Cr.P.C. which could not be permitted”.

In light of the above principles laid down by the Hon'ble apex Court and keeping in view the allegation leveled against the petitioner leading to a cognizable offence, the justice of peace has rightly ordered for registration of the F.I.R.

8. The points raised by learned counsel for the petitioner in the Constitutional petition before this Court amounts to appraisal of evidence which is not the duty of this Court when seized of a Constitutional petition under Article 199 of the Constitution of Pakistan. We will refrain to discuss the merits of the case as that would damage the case of either side during the course of investigation as well as at trial. Reliance is placed on “Col. Shah Sadiq V/s.

Muhammad Ashiq and others” (2006 SCMR

276) wherein it has been observed that:-

“Constitutional jurisdiction of High Court--Scope--- If, prima facie, an offence had been committed, ordinary course of trial before the Court should not be allowed to be deflected by resorting to constitutional jurisdiction of High Court---High Court had no jurisdiction to quash F.I.R by appreciation of documents produced by the parties without providing chance to cross-examine or confronting the documents in question--- High Court would err in law to short circuit the normal procedure of law as provided under Criminal Procedure Code 1898”.


9. No doubt, the High Court has got the jurisdiction to quash F.I.R under Article 199 of the Constitution but that is to be exercised in extraordinary circumstances and with utmost care and caution, such as when no offence is made out on the face of the record and does not require appraisal of evidence or other circumstances of similar nature. Similarly, this Court cannot investigate the disputed questions of facts while exercising constitutional jurisdiction. Reliance is placed on “Dr. Sher Afgan Khan Niazi V/s. Ali S. Habib and others” (2011 SCMR 1813) wherein it is held that:-

“It is incumbent upon party seeking constitutional remedy to show that such party had a clear legal right and that such right is so clear as not to admit of a reasonable doubt or controversy. High Court will not go into disputed question of fact in constitutional jurisdiction. This is more so when it is supported by attending circumstances and relevant record. Constitutional jurisdiction of High Court cannot converted into that of an Appellate Court. Disputed question of fact cannot be entertained or allowed to be re-agitated in writ jurisdiction, when the relevant law provides other forums for the purpose. It follows that finding of fact recorded by Appellate Court below on appraisal of evidence cannot be disturbed in writ jurisdiction. In Constitutional jurisdiction, Court does not go into a question involving minute details nor can it decide facts of which no foundation is laid, unless it is shown that such controversy is devoid of supporting record or perverse”.

The august Supreme Court in another case titled “Brig. (Rtd.) Imtiaz Ahmad V/s. Government through Secretary, Interior Division, Islamabad and 2 others” (1994 SCMR 2145) while laying down certain principles with regard to the effect of investigation and fairness held that:-

“14. The starting point of the examination of the legal questions canvassed by the petitioner's counsel must be the important fact that the stage at which the petitioner thought it proper to invoke the High Court's jurisdiction under Article 199 of the Constitution was the stage of registration of criminal cases against him. The effect of the registration of a

case is to set in train an investigation by the police in accordance with law. As was said in "Norwest Holst Ltd. v. Department of Trade and others (1978) 3 All ER 280 at 290):



"In every investigation ----there are --- by and large three different phases. First of all, the administrative phase; next, the, judicial phase; and, finally, the executive phase when the orders of the Court or the Tribunal are, if necessary, executed or promulgated. Quite plainly fairness to the suspect demands that he should be given a chance of stating his case before the final period: the execution. Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over. But on the other side, and the other side are entitled to fairness just as the suspect is, fairness to the inquirer demands that during the administrative period he should be able to investigate without having at every stage to inquire from the suspect what his side of the matter may be. Of course it may be difficult to find out the particular point at which the administrative phase ends and the judicial phase begins

To quote a passage from Lord Reid's speech in "Wiseman.v. Borneman" (1971) AC 297., at 308):--

"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

10. In addition to above discussion, the petitioner has got alternative remedy under the law firstly; he can approach the hierarchy of concerned police/levy department for holding a fair investigation and secondly; after commencement of trial he can invoke the jurisdiction of the Court under Sections 249-A or 265-K, Cr.P.C as the case may be.

11. In view of the above discussion, we find no merits in this Constitutional petition and the same is dismissed, however, we direct the Investigating Agency to complete the investigation at the earliest with impartiality. C.M No. 112-M/2016 is also dismissed being infructuous.

Announced
08.11.2017


JUDGE


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