

# IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D-4266 of 2013

Present:

*Mr. Justice Ahmed Ali M. Sheikh &  
Mr. Justice Syed Muhammad Farooq Shah.*

Petitioner through : Mr. Muhammad Vawda, Advocate  
The State through : Mr. Rafiq Rajori, A.A.G.Sindh and  
Mr. Ali Haidar Saleem, APG, Sindh a/w  
SSP Investigation South. Faizullah Karejo  
& IO/ASI Shahid Taj PS Darakhshan.  
Respondent No. 4 through : Mr. Aamir Mansoor Qureshi, Advocate  
Date of hearing : 22<sup>nd</sup> October, 2014

## ORDER

Syed Muhammad Farooq Shah, J: By invoking the constitutional jurisdiction of this Court, the Petitioners have prayed to set-aside the administrative order dated 26.02.2013 passed by learned XIVth Judicial Magistrate at Karachi (South), on final report under Section 173 Cr.P.C in case Crime No. 261/2013 in the following manner:-

*"Heard I.O. Learned Counsel for the parties perused police papers as well as report in hand. Since the report of DNA is still not yet received by the I.O.*

*I agree with the opinion of I.O. and DPP, South, Karachi. The report in hand is approved under 'A' class as recommended by DSP Investigation".*

2. Fair opportunity of hearing was afforded by both sides while advancing the arguments in detail. We have also carefully scanned the record.
3. Story of prosecution case in nutshell is that on 21.05.2013, first informant namely Ashiq Hussain recorded his statement at Police Station, Darkashan, Karachi which is reproduced herein below in verbatim:-

*"I reside at above mentioned address and do work of Tanker manufacturing. Five months ago, I got employed my daughter Zonera aged about 13 years in the bungalow of Sohail Naseer located at No. 78/A, Street No. 16, Khayaban-e-Sehar, Phase-6, DHA, Karachi through one woman named Bajl Amina, my daughter used to do work of house as well as cleaning etc. On 19.04.2013 at 7:00 p.m, Sohail's wife phoned to my wife that; "your daughter is not*



feeling well, you may come at Agha Khan Hospital," upon which, we went at Agha Khan Hospital, where, Sohail and others were not present; then we went at Ziauddin Hospital, Clifton Campus, where, it was enquired, then, it came to know that girl named Zonera is present here, we witnessed that Zonera was in unconscious condition, Sohail Naseer, his wife and his family members were there. Sohail and his wife told us that Zonera has taken poison, we remained together with daughter at Hospital, next day, Hospital administration discharged her. After that, we took Zonera at our house, where, Zonera narrated my wife at home that; on 19.04.2013 at 4:00 p.m., on Friday, Sohail Naseer and his wife were not present at home that Ibrahim S/o Sohail Naseer asked water, as soon as I having taken water went in his room that he caught me hold and he forcibly committed Zina with me, and after that, he went away out by issuing threats that don't narrate this matter with any one, after that, I drunk phenol then due to indisposition she was shifted to Ziauddin Hospital. Now, I do report that my complaint is against Ibrahim s/o Sohail Naseer, who has forcibly committed Zina with my daughter Zonera. Action may be taken. On such statement of case complainant, SI Muhammad Shakir registered case by the orders of Hon'ble Sindh High Court in petition No. S-500/2013. Investigation of case was assigned to me the ASI by the direction of SIO".

4. The legal submissions raised by learned counsel for the respondent No. 4 touching the non-maintainability of this petition on the ground of lacking Constitutional jurisdiction of this Court is not tenable, as in the present case very crucial legal questions are involved, therefore, no legal sanctity is attached with the submissions of learned counsel, more particularly in view the legal atrocities of the case.

5. A perusal of police papers reveals that investigation of the case was carried out by ASI Shahid Taj. Usual investigation reveals that Investigating Officer got conducted medical checkup of victim Mst. Zonera daughter of Aashique Hussain through lady MLO from Jinnah Hospital, in which it was certified that girl is not virgin. He recorded the statement of witnesses under Section 161 Cr.P.C; clothes of victim were recovered and duly sealed; he obtained slides for chemical analysis, DNA test and recovered clothes were deposited in the office of chemical examiner; a letter was issued regarding CCTV footage of Ziauddin Hospital. He could not succeed to get record the statement of victim under Section 161 Cr.P.C., however, he has recorded the statement of proposed culprit, who was on bail granted by the Court. In his statement the accused has vehemently denied the allegations leveled against him by victim. He has also got



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medical analysis of aforesaid accused and obtained slides were deposited with the chemical examiner. The Investigating Officer recorded the statements of other witnesses under Section 161 Cr.P.C. DNA test analysis report was awaited. After approval of his higher officers, the I.O has submitted the final report of the said case in 'A-Class' and reported about non-availability of sufficient evidence. Contents of charge sheet reveals that in the last line of final report under Section 173 Cr.P.C, the investigation Officer has made a prayer that on receipt of DNA test report, charge sheet as per law would be submitted. It shall advantageous to mention here that endorsement of the Prosecutor made on the said final report shows that I.O. was required to continue investigation and make sincere efforts for detection of case as the offence is serious and heinous in nature.

6. Crucial points involved in the instant petition, which require determination are that:-

- a) As to whether medical, circumstantial, expert or ocular evidence including the evidence of victim could be thrown away, more particularly, without receipt of awaited DNA Test report from the Institute of Bio Medical and Genetic Engineering (IBGE) at Islamabad?
- b) AS to whether the Magistrate can approve the final report under 'A' Class being "untraced" or due to Insufficient evidence, without examining the genuineness or otherwise of material evidence including DNA Test?
- c) By taking cognizance, the concerned Magistrate is legally bound to accept the final report ipso facto presented by the Investigating Officer, without thoroughly examining the material brought before him and without passing reasonable and speaking order or not?
- d) As to whether the time under section 344 Cr.P.C. can be enlarged for want of certain documents by treating the report under section 173 Cr.P.C. to be an "Interim Challan".

7. Astonishingly, the final report was approved by the concerned Magistrate under 'A' class without DNA Test report. Only on this score, the administrative order may be termed as non-speaking order, passed without applying judicial mind as the Judicial Magistrate is supposed to act judicially, fairly, justly and honestly by passing appropriate order on a report under Section 173 Cr.P.C. Keeping in view legal atrocities



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involved in the instant matter we would like to dilate upon hereinbelow the procedure relating to acceptance of challan/charge sheet/final report under section 173 Cr.P.C

8. A perusal of case papers transpire that either medical or chemical reports/certificates have been obtained by using the influence upon concerned or the same have been managed one as in the prevailing circumstances, one can tactfully manage such documents and medical certificate may or may not establish the ocular testimony deposed by the victim on oath before the Court, therefore, the evidentiary value of such documents can be evaluated by the trial court during final verdict, more particularly, in a case under penal clause like *Zina*, trial Court after recording the ocular testimony of victim and other prosecution witnesses may evolve the evidence as expectedly a girl may hardly level allegations of *Zina* committed upon her by a person with whom she was having no animosity of whatsoever kind or nature. It is a dilemma of our society that withholding of true evidence in Courts is one of the worst maladies which a nation may suffer from, though provision of Sections 195, 250, 476 & 480 of Criminal Procedure Code and Section 182 PPC are not outlined against the person who gives false evidence or withhold true evidence. It need not to emphasize that the Courts of our country are not only doing justice between the parties but also carry out the mandate of Allah! The Almighty. Few instances quoted from divine book Al-Quran at different places, translated in English language by Pickthel are reproduced as under:-



1. *"And cover not truth with falsehood-Nor conceal the Truth, when you know" (2/42)*
2. *"And thus We have made you an exalted nation so that you may bear witness to the people at large and the Messenger may be a witness to you" (2/283)*
3. *"Conceal not evidence; For whoever conceals it his heart is tainted with sin-And Allah knows, all that you do" (2/283)*
4. *"O'ye who believe: Stand out firmly for justice, as witnesses to Allah; even as against yourself or your parents or your kin; and whether it be (against) rich or poor for Allah can best protect both" (4/135)*
5. *"Whenever you speak, speak justly even if a near relative is concerned; and fulfill the Covenant of Allah; thus doth He commands you; That you may remember" (6/153)*

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9. Hopefully the Courts of law, including magisterial courts, must not overlook cases of perjury and they must take action in accordance with law. It need not to remind to all Presiding Officers/Judges/Magistrates of subordinate Courts that they are not only doing justice between the parties but also carrying out the mandate of Allah' The Almighty.

10. Points (c) & (d) being interconnected to each other are taken together. Recently, we have discussed and determined the aforementioned points c) & d) in detail in Constitution Petition No. D-2445 of 2014, which could be a complete answer of mentioned points in discussion. For ready reference and guidance of learned Judges including Magistrates of subordinate Courts, paragraph Nos. 7 and 8 of the said Constitution Petition are reproduced herein below:-

"7. Under the Code of Criminal Procedure, the Investigation Officer is not debarred for reinvestigating and submitting a fresh report in supersession of his earlier one, either on his initiation or on direction of superior police officials but the facts of the instant case are quite distinguishable as admittedly, the challan has been submitted under "A" class of police rules as in the rules of Sindh Police the FIRs which needed to be cancelled were classified "A", "B", "C" and non-cognizable. Rule 24.7 and 25.5 of police rules applies with the cancellation of FIR. Lateron, in place of 'A' of Sindh Rules the word 'untraced' was substituted, in place of 'B' the word 'cancelled (false)' was substituted, so also in case of 'C', the word cancelled has been used and 'Non-cognizable' word spoke of the cases which were initially registered as cognizable but on investigation, the same were found to be of non-cognizable nature. Usually, the police for the purpose of proper understanding denotes the three classes as 'A', 'B' and 'C'. Any aggrieved person by the order of magistrate not agreeing with the police recommendations under Section 190(1)(b) Cr.P.C may approach this Court. A judicial magistrate in cancelling a registered criminal case is required to act judicially, fairly, justly and honestly. Under the criminal procedural law the complainant is left free to institute a complaint on the same facts and the same magistrate after passing appropriate order on a report under Section 173 Cr.P.C or under any other provision may not render himself *functus officio* as he is quite competent to deal with the complaint as required under Section 200 Cr.P.C. The investigation agency which includes all competent and authorized police officers may submit the report before the competent magisterial court of law with recommendation for cancellation of FIR on the ground that it is false, founded on a mistake of fact or law, related to a dispute of Civil nature or untraceable, the magistrate has to pass an speaking order on such report. For the sake of guidance of magisterial courts, we would like to reproduce hereunder the observation recorded earlier by this Bench in the case of *Rao Muhammad Shakir and Istikhar Ahmed v/s Ghulam Farooq* in CPs No. 622 and 691 of 2014, by placing reliance on the citations of the Hon'ble Supreme Court of Pakistan :-



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acceptance of first and final report, the police may conduct the fresh investigation of the case, if the first investigation is found unsatisfactory with sound and plausible reasons, to say that the same police officers or his superior cannot revive the investigation already done, the additional discovery in shape of evidence and on conclusion of investigation into the crime by the Police officer another investigation may be begun by the police on further information received. Record transpires that undeniable and undisputedly on submission of charge sheet, no specific prejudice caused to the accused persons has shown such as that the result of investigation is arbitrary, capricious, whimsical or dishonesty and that the investigation agency has not conducted the investigation in a manner to bring the truth on the surface to save the innocent person from the agony of trial and if at all, the investigation can only be intervened to save fundamental and legal rights of the parties or where malafide and excess of jurisdiction exists. In the instant case, the Petitioners could not succeed to demonstrate before us that the investigation was neither transparent nor independent and suffers from any illegality or irregularity or the investigation is being conducted with malafide or without jurisdiction. Even otherwise, this Court under the exercise of the Constitutional jurisdiction under Article 199 of the Constitution cannot direct the police to change the course of investigation to discover the truth or otherwise to transfer the investigation. The Hon'ble Supreme Court in *Brig. (Rtd) Imtiaz Ahmed v/s Government of Pakistan through Secretary Interior Division, Islamabad and 2 others* (1994 SCMR 2142) has held as under:-

"Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. There is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without acquiring any authority from the Judicial Authorities and it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Court to intervene in an appropriate case."

Similarly views were expressed by the Supreme Court in *Malik Shaukat Ali Dogar and 12 others v. Ghulam Qasim Khan Khakwani and others* PLD 1994 SC 281 in the following words:-

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In the case of *M. S w/s. Saifullah Khan Niazi* (1982 SCMR 17), law laid down by the Apex Court is that "It is not possible either for High Court or Supreme Court to start a parallel inquiry into the matter at such stage when the case already submitted to the trial Court, all relevant evidence yet to be examined and held that "the High Court was, therefore, right in not interfering with such a case and this petition for leave to appeal to challenge this order of the High Court is entirely misconceived. In the case of *Shehnaz Begum v/s Hon'ble Judge of High Court Sindh and Baluchistan* reported as 1971 Supreme Court page 677 and in the case of *Wahid Muhammad v/s Haq Nawaz* 1971 SC 717, it was held that during the course of investigation, police has complete domain over the case in a cognizable offence and even High Court has no power to interfere with such investigation.



8. Under the prevailing legal aspect of the case in hand, we would deem it fit and appropriate to make necessary clarification that the police charge sheet corresponds of the complaint on which criminal proceedings were initiated and preliminary stages of investigation were over, therefore, upon its' receipt the magistrate could take cognizance of the offence by passing judicial order. Undoubtedly, even after filing the charge sheet there can be further investigation into the case by the police, more particularly, where the investigation agency could not collect sufficient evidence to establish commission of offence by the accused. The submission of a report under section 173 Cr.P.C does not preclude further investigation in a crime by the investigation agency, supplementary report can be submitted by the investigation agency to the magistrate notwithstanding that the magistrate has taken cognizance of the offence upon the police report. The practice of not accepting the charge sheet with or without the direction of further, fresh or reinvestigation to inquire the commission of offence can only be on the basis that there has not been a proper investigation and no other basis. There is no cavil to the proposition that the magistrate is not bound to accept the final report *ipso facto* as presented by the investigation agency if the magistrate arrived at the conclusion after thoroughly examining the matter with reasonable and speaking order that on what material the court is forming such opinion. However, the perusal of record of instant case reveals that the concerned police or prosecution

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department did not seek enlargement of time under Section 344 Cr.P.C, which provides that adjournment should be granted only when court finds it expedient in the larger interest of justice with reasons to be recorded. It is expected that if the said provision is followed, it will help in curbing delays in disposal of cases. Of course, frequent extension of time mostly sought on flimsy grounds contribute the hardship, inconvenience and expenses to the concerned parties, who sacrifices their times feels inconvenience rather frustration and unhappiness if the time is enlarged for uncertain period, more particularly, by such conduct of Court, they are required to suffer the agony of delaying tactics of investigation agency, which also amounts to provide an opportunity to the opposite party to won over the witnesses or to threatened them not to depose truth, therefore, unnecessary adjournments creating hurdles in judicial system may shake confidence of litigant public, which should be avoided at all costs, more particularly, such adjournments give scope for grievance. Indeed, the magisterial court is the kingpin in the hierarchical system of administration of justice and must have strength to put an end to injustice while performing the sacred duties. The judicial wisdom and dignity, intellectual integrity, knowledge, judicial restraint and functions are few aspects through which the Court may function successfully by inspiring confidence of all. The congenial atmosphere in Court may be maintained in a graceful and dignified manner so that indulgence to one party at the expense of justice may not be caused. Suffice it to say that the impugned order has been passed hurriedly in a non-judicial manner, more particularly, without issuing any specific direction, though it is settled law that the magistrate when received final report from police, recommending cancellation of FIR, under whatever class, he should verify/peruse the evidence collected by the concerned police and if he is of the opinion that the FIR merits to be cancelled, he should pass an speaking order giving reasons for accepting the recommendations of the police. No doubt it is an administrative order yet it should be judicious, fair and reasonable. Reliance may conveniently be placed on: *Sarfraz Hussain v/s. The State*, 2009 YLR-1614, *Muhammad Hassan vs. The State*, 2009-YLR-1479, *Muhammad Arshad Afridi vs. The State*, 2010-YLR-1357, 1994-MLD-1659, 1997-SCMR-299 *Syed Paryal Shah vs. Behram Ali*, 2012-P. Cr. LJ-189 and *Zafarullah vs. The State*, PLD-2012-Sindh-406.



11. From perusal of record it appears that on submission of final report under section 173 Cr.P.C, the impugned order has been passed in a casual or routine manner without issuing any sort of directions such as, enlargement of time for receipt of DNA report, directives of further investigation of the case as undisputedly the concerned Magistrate has to deal with charge sheet by bestowing upon his judicial consideration and to pass a speaking order as to whether the time for submission of final challan/report was enlarged under section 344 Cr.P.C. or not, in view of the assertion or grounds made in the charge sheet. It is settled principal of law that Criminal Procedure Code does not debar the Investigating Officer to re-investigate the matter or to conduct further investigation in supersession of earlier one in appropriate cases. It is clear that under subsection (3) of section 173 Cr.P.C. a Magistrate may agree or may not agree

*[Signature]*



with the police report. In case the Magistrate wants to start the proceedings against the accused, he must act under section 190 of the Code of Criminal Procedure, which stipulates that a magistrate may take cognizance of an offence upon a police report, upon a complaint or upon information received by him and if he disagree with the report submitted by the police under section 173 Cr.P.C, he may not agree with the conclusion by passing speaking order. Unfortunately, thorough examination of material including statements of prosecution witnesses, medical and circumstantial evidence have not been discussed or considered by the Id. Magistrate while passing the impugned order, more particularly, he did not advert to the awaited DNA Test Report. Resultantly, the precise impugned order on a final report under section 173 Cr.P.C. is not tenable in law, is hereby set aside.

12. The petition is disposed of in the manner indicated above with directions to the concerned Sessions judge to transfer/assign the instant matter to some other Judicial Magistrate for passing appropriate and speaking order. (The Registrar of this Court is directed to circulate this order to all Judges/Judicial Magistrates of subordinate Courts of this province for their guidance and compliance).



HIGH COURT OF SINDH AT KARACHI

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Sd/- S.M. Farooq Chaudhary  
 Sd/- Ahmed Al-Munir  
 JUDGE  
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