

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No. 4985-P/2016.

Shahid Khan and others

Vs.

The State and others.

JUDGMENT

Date of hearing: 21.06.2017

Petitioner: (Shahid Khan, etc) by Mr. Muhammad Farooq Afridi,
advocate.

The State and others by Mr. Rab Nawaz Khan, AAG,

SHAKEEL AHMAD, J. - Through instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have sought the following declaration:-

“On acceptance of this writ petition, the registration of criminal case/FIR with all subsequent proceedings may kindly be declared as illegal, without jurisdiction, without lawful authority, for ulterior motives and malafide. This Hon’ble Court may quash the FIR against the petitioner in the interest of justice.

Any other order deemed appropriate in the circumstances of the case may also be passed. The petitioner may be allowed to put forward any other argument/document at the time of hearing of this writ petition”.

2. Facts of the case, succinctly required for disposal of the case in hand are that on 23.11.2016, Imran Khan, Inspector of the City Patrolling, sent a murasila to the SHO, Police Station, Gulbahar Peshawar, alleging therein, that, he has received a reliable information, that, driver Shujaat Khan No.3911, Incharge of the City Patrolling Shahid Khan, No.1455/IHC alongwith other constables had taken illegal gratification from Gandamaran (smugglers) during mobile gasht, someone recorded the video film of taking illegal gratification by the above named police officials, and uploaded the same on the face book, the matter was brought to the notice of high ups, which culminated in registration of the crime report No.1433 dated 24.11.2016 against the petitioners at Police Station, Gulbahar Peshawar under section 161, 162 and 165 PPC.

3. It was contended by the learned counsel for the petitioners that the offence i.e. 161,162 and 165 PPC in which the petitioners have been charged are non-cognizable and no police officer shall investigate in non-cognizable case, without order of the Magistrate having power to try such offence. He next contended that registration of FIR against the petitioners offends section 155 (2) Cr.P.C, which is mandatory in nature, therefore, the impugned FIR is liable to be quashed. He in support of his contention relied on **YLR 2016-1279.**

4. As against that, the learned AAG submitted that the police officials are guilty of taking illegal gratification,

therefore, the case was rightly registered against them, he vehemently opposed the prayer of the petitioners.

5. We have heard the learned counsel for the petitioners and learned AAG representing the State at length and perused the record with their valuable assistance.

6. Perusal of section of law i.e. 161,162 and 165 PPC reveals that these offences are non-cognizable. Relating to the issue, information in the non-cognizable case and investigation in such cases, have been dealt with under section 155 (1), (2) and (3) Cr.P.C., which reads as under:-

155. Information in non-cognizable cases. (1) When information is given to an officer incharge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the '[Magistrate]'

(2) **Investigation into non-cognizable cases.** No police-officer shall investigate a non-cognizable case without the order of a Magistrate of first or second class having power to try such case [or send the same for trial to the Court of Session].

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (the power to arrest without warrant) as an officer incharge of a police station may exercise in a cognizable case.

7. A bare reading of the ibid section discloses that for recording of information of commission of non-cognizable offence a book is prescribed known as "Roznamcha or Station Diary" in which information relating to commission of non-cognizable offence is entered and generally police would not initiate any action, and the complainant or informant, after

having a copy of the said report is sent away, and if, the Station House Officer (SHO) deems it fit to initiate investigation then under sub-section 2 of section 155 Cr.P.C. police had to take permission of the Magistrate. Provision of sub-section 155 (2) Cr.P.C. requiring order of a Magistrate for investigation of a non-cognizable is mandatory in nature, if any arrest is to be made then it can only be made after obtaining warrant of arrest from the Magistrate as required under section 155 (3) Cr.P.C. This view finds support from the judgments in case *Irshad Begum and others vs. The State PLD 1961 W.P. Lahore 882, Hussain Bakhsh vs. The State PLD 1963 W.P. Lahore 46, Muhammad Rashid vs. The State PLD 1964 W.P. Karachi 381, Muhammad Bashir alias Doba vs. The State PLD 1988 Lahore 574 and Sabz Ali Khan & two others vs. Inspector General of Police KPK & 3 others (2016 YLR-1279)*. We respectfully follow the view expressed in the above referred judgments. It is well settled law that when the law requires a thing to be done in a particular manner, it ought to be done in that manner or not at all. *Muhammad Aslam vs. The State (1993 PCrLJ-205)* may be cited in this behalf.

8. It is easily seen that mandatory provision of law was grossly violated by the police by registering the FIR against the petitioner in a non-cognizable offence without following the prescribed procedure. The learned AAG was unable to refute the contention of the learned counsel for the

petitioners, he mainly contended that the petitioners have an adequate and alternate remedy of approaching the trial Court for acquittal under section 249-A Cr.P.C, and that the writ petition is not maintainable.

9. A bare reading of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 would reflect that every citizen and every other person for the time being in Pakistan is guaranteed as his inalienable right to enjoy the protection of law and to be treated in accordance with law, where-ever he may be and no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law. Reliance can well be placed on a landmark judgment of the Hon'ble Supreme Court of Pakistan reported in a case titled **"Federation of Pakistan and others vs. Shaukat Ali Mian and others" PLD 1999 SC-1026.**

10. Converting to the arguments of the learned Additional Advocate General that the petitioners have alternate remedy to approach the trial Court for their acquittal under section 249-A Cr.P.C. has got no force. Availability of alternate remedy would not bar the jurisdiction of the High Court to entertain a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, to redress the grievance of an aggrieved person, when the impugned order suffers from want of jurisdiction or is void ab-initio, or passed in flagrant disregard of law like the present case, the writ is competent despite availability of alternate remedy. It is

not necessary to direct the aggrieved person to first avail the remedy under section 249-A Cr.P.C. Each criminal case is to be judged on its own merit. The main consideration is to be kept in mind, that if there is no probability of accused being convicted of any offence, and if proceedings before the trial Court was allowed to continue would be an abuse of the process of the Court, wastage of time and a futile exercise. If the facts of the instant case is examined on the touch stone of above criteria, it becomes crystal clear that further proceedings in the Court would be a wastage of time. Perusal of the contents of FIR shows that the prosecution is not likely to succeed. For this view reference can be made to the observation in case titled **“Miraj Khan vs. Gul Hameed & 3 others” (2000 SCMR-122).**

11. For what has been discussed above, we hold that FIR was registered against the petitioners in violation of mandatory provision of section 155 (1), (2) and (3) Cr.P.C. Resultantly, the case FIR No.1433 dated 23.11.2016 registered at Police Station, Gulbahar Peshawar, against the petitioners under section 161,162 and 165 PPC is quashed.

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Announced.

Dated: 21.06.2017.

T.Shah