JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P No. 4305 of 2021

Muhammad Nadeem

Versus

The State & Others

Date of Hearing	:	07.06.2022.
Petitioner by	:	Sardar Shabbir Hussain, Advocate
Respondent by	:	Babar Hussain Abbasi, Advocate
State Counsel	:	Hammad Saeed Dar, State Counsel. Azmat Bhatti, S.I.

ARBAB MUHAMMAD TAHIR, J. Through the instant writ petition, petitioner *(Muhammad Nadeem*) impugns the order dated 28.10.2021, passed by the learned Judicial Magistrate Section-30 Islamabad East, whereby while disagreeing with the cancellation report submitted by the police in FIR No. 495 dated 14.10.2019, under Section 406 PPC, P.S. Koral, Islambad, the case was accepted for regular hearing under Section 420-PPC and pursuant thereto, notices were ordered to be issued to the petitioner/accused.

2. Precisely, the relevant facts are that respondent No. 2/complainant (*Faisal Naseer*) got registered the subject FIR against the petitioner on the allegation that the former in order to sell two plots, obtained Rs. 1000,000/- but neither transferred the plots in his name nor returned the amount and that on inquiry, the particulars/details of the said two plots were found bogus and thus petitioner had committed fraud and criminal breach of trust.

3. After the registration of the subject FIR, police conducted investigation and also obtained legal opinion from the prosecution

branch whereby it was opined that the matter is of civil nature while non-compliance of sale agreement does not constitute offence under section 406 PPC. On the basis of said legal opinion, a cancellation report was submitted before the learned Judicial Magistrate Section-30, Islamabad East who partly disagreed with the same in terms noted in Para No. 1 above, hence instant writ petition.

4. Learned counsel for the petitioner argued that under the law, the learned Judicial Magistrate is vested with authority only to agree or disagree with the recommendations of the police; that direction to proceed with the cancellation report under Section 420 PPC is against the law on the subject; that the impugned order is a non-speaking order; that power to add or delete any penal provision is vested with the investigating agency; that prior to commencement of the trial, the learned Judicial Magistrate had no jurisdiction to add or alter any section of law and that it was purely a civil dispute which had been converted into criminal, therefore, impugned order is liable to be set-aside. Learned counsel placed reliance upon case law reported as ***PLJ 2007 SC 31, 2000 SCMR 122, 2017 P Cr. LJ 133, 2012 P Cr. LJ 1335, 2021 P Cr. LJ 242, 2017 P Cr. LJ 440 & 2020 P Cr. LJ 130.***

5. On the other hand, learned State Counsel assisted by leaned counsel for complainant/respondent No.2 repelled the above submission. It was argued that opinion expressed by the police in cancellation report retains no biding effect; that the Magistrate is competent to apply his conscious mind to the facts and material placed on record; that under the law there is no embargo upon the Magistrate to apply his independent mind to the material available before him and to form his opinion about the matter. Learned counsel relied upon case law reported as ***2021 P Cr. LJ 1216 & 2012 P Cr. LJ 1451.***

6. Heard, record perused.

7. It is a settled principle that the Magistrate while dealing with the cancellation report though not acting in his judicial capacity, but still he is required to judicially examine the report under Section 173 Cr.P.C pending before him for his decision/ approval to cancel or not cancel the FIR. Reliance is placed upon case of ***Bahadur & another v. The State & another*** **(PLD 1986 SC 62)**.

8. The principle laid down by this Court in the case of ***Atif Muhammad Khan v. The State through SHO P.S. Lohi Bher, Islamabad and two others (2020 P Cr. LJ 130)*** guides to observe that Magistrate before whom report under section 173 Cr.P.C is filed could either agree with the same or disagree. In the later situation, the opinion should base on cogent grounds but should not amount to interference in the investigation of the matter. The Magistrate while doing so has to render a reasoned and speaking order.

9. On perusal of the impugned order, it reveals that the learned Judicial Magistrate while appreciating the record observed that offence under Section 406 PPC is not made out against the accused/petitioner, however the alleged facts mentioned in the FIR, *prima facie*, constitutes offence under Section 420 PPC. On this assessment, the learned Judicial Magistrate disagreed with the cancellation report to the extent that no offence is made out under Section 406 PPC in the case and consequently summoned the petitioner/accused under Section 420 PPC. The contents of FIR and that of cancellation report lend support to the opinion expressed by the learned Judicial Magistrate vide impugned order for the reasons that besides alleging criminal breach of trust, respondent No.2 also leveled allegations of fraud and forgery at the hands of petitioner, who as per the Investigating Officer admitted to have signed one receipt.

10. As a matter of fact there was no direction to submit report under Section 173 Cr.P.C afresh by adding or deleting any offence, as the learned counsel argued, rather the Judicial Magistrate on examination of the material collected by the prosecution and the

contents of FIR, had passed the impugned order to proceed against the petitioner/accused under Section 420 PPC as the allegation contained in the FIR *prima facie* constitute offence under section 420 PPC.

11. The learned Judicial Magistrate only after examination of record placed before him partly disagreed with the report and in clear terms tentatively observed application of section 420 PPC, hence it cannot be said that the impugned order suffers from any illegality or jurisdictional defect. In addition, the learned Judicial Magistrate has not directed the police to submit the challan in any particular way by adding or deleting any section of law, rather decided to proceed with the report under section 420 PPC. The petitioner, on the other hand, retains more than one alternate remedy to seek acquittal at any stage of the case, therefore, any interference at this stage would amount to halt the proceedings at its inception which is, of course, against the spirit of natural justice.

12. In view of above, the impugned order, in the attending circumstances of the case, appears to be just and does not call for any interference. Consequently, instant appeal fails and accordingly **dismissed**.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in open Court on 10.06.2022

JUDGE

//*Kamran*//