

In the High Court of Punjab and Haryana at Chandigarh

248

CRM-M No. 18968 of 2015
Date of decision: 12.8.2015

Harmesh Singh

.....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Jaswinder Singh , Advocate,
for Mr.J.S.Chahal, Advocate,
for the petitioner.

Mr.Varun Sharma, AAG, Punjab

- 1. Whether Reporters of local papers may be allowed to see the judgment ?*
- 2. To be referred to the Reporters or not ?*
- 3. Whether the judgment should be reported in the Digest?*

RAJ MOHAN SINGH, J.

1. This petition has been filed under Section 482 Cr.P.C. for quashing of orders dated 18.3.2015 passed by Additional Sessions Judge, Gurdaspur (Annexures P-12 and P-13), whereby charge under Sections 308, 326, 34 IPC has been framed and also for quashing of order dated 23.2.2015 passed by Additional Sessions Judge, Gurdaspur (Annexure P-10), whereby application under Section 318 Cr.P.C. filed by the petitioner has been dismissed. Trial of the case is sought to be stayed under Sections 328 and 329 Cr.P.C. till the petitioner becomes person of sound mind.

2. Learned counsel for the petitioner contends that the petitioner is accused of cross- case which is a counter blast to the version of the petitioner. During course of investigation, petitioner was found to be innocent. He has only been summoned under Section 319 Cr.P.C. vide order dated 9.4.2013. Learned counsel further contends that the petitioner cannot understand the proceedings of the Court as his brain is dead and he is in vegetative stage.

3. Occurrence took place on 23.8.2011. Petitioner received serious head injury and went in coma and is still bed ridden. Petitioner cannot walk, speak or do his routine activities. The certification to this effect has been done by K.D.Hospital, Amritsar (A unit of K.D.Ganesh Hospital Pvt.Ltd.). Petitioner was hospitalised with head injury-SDH with Post Operative Hydrocephalus on 23.8.2011 and is still under treatment.

4. By virtue of the ailment of the petitioner he cannot appear in the Court. Medical board declared the petitioner to be 100% disabled as per Disability Certificate dated 9.8.2012 issued by the authority.

5. Prior to summoning of the petitioner under Section 319 Cr.P.C., he was granted pre-arrest bail. Since he is totally bed ridden, he could not appear before the Court on 2.7.2014 and had also filed application for exemption through his brother.

6. Trial Court cancelled the anticipatory bail of the petitioner on 2.7.2014 and thereafter, petitioner filed CRM-M No.27349 of 2014, in which, he was granted pre-arrest bail by this Court.

7. Petitioner filed application under Section 318 Cr.P.C. seeking necessary compliance in terms thereof, which was dismissed by the Additional Sessions Judge, Gurdaspur vide order dated 23.2.2015 on the ground that there is nothing on record that the petitioner is of un-sound mind. The medical record of the petitioner produced on record shows that his brain is 100% dead meaning thereby that he is unable to understand the Court proceedings due to injuries to the brain.

8. Section 318 Cr.P.C. reads as under:-

“318. Procedure where accused does not understand proceedings

- If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

9. In terms of Section 318 Cr.P.C., proceedings qua the petitioner are to be forwarded to the High Court, if during the

proceedings, trial Court comes to the conclusion that it is a fit case of conviction and not otherwise. Moreover, as per case of the petitioner himself, the factum of aggression amongst both the parties is yet to be determined during trial. Therefore, prayer of the petitioner in terms of Section 318 Cr.P.C. was ordered to be dismissed on the ground that the trial Court is not competent to pass any findings on the state of mind of petitioner as the same is to be done by the High Court at the appropriate stage.

10. The aforesaid order dated 23.2.2015 passed by the trial Court was challenged by the petitioner in this Court in CRM-M No. 7984 of 2015. This Court by order dated 1.4.2015 considered exemption from personal appearance of the petitioner before the trial Court. Petition was ordered to be disposed of with a direction to the trial Court to exempt the personal appearance of the petitioner after imposing certain conditions as deemed appropriate by it.

11. Thereafter, trial Court proceeded to frame charges against the petitioner under Sections 308, 326, 34 IPC vide order dated 18.3.2015. After framing of charge under Section 308 Cr.P.C., petitioner filed CRM-M No. 18265 of 2015 in this Court for grant of anticipatory bail and the same was ordered to be disposed of with liberty to the petitioner to file appropriate petition seeking appropriate relief.

12. Contention of learned counsel for the petitioner is that

earlier trial Court took cognizance and charges were framed on 14.1.2013. At that time, there was no charge under Section 308 IPC as the offence under Section 308 IPC was not made out. That order was never assailed in any form till date. Subsequently, petitioner was summoned under Section 319 Cr.P.C. by the Court of Additional Sessions Judge only for the offences under Sections 325, 323, 326, 34 IPC and not for the offence under Section 308 IPC. Since the said order for not summoning the petitioner under Section 308 IPC was never assailed by the prosecution, therefore, charge under Section 308 IPC is claimed to be not attracted at this juncture.

13. Impugned orders i.e. Annexures P-10, P-12 and P-13 are being assailed in the present petition on the ground that petitioner was found to be innocent and has been summoned with the aid of Section 319 Cr.P.C. Secondly, the petitioner is 100% disabled in relation to his part of body and is in coma from the date of occurrence and he is unable to walk, speak or do his daily activities. Thirdly, there is no opinion of the doctor that the injury in question is dangerous to life. Petitioner cannot be charged under Section 308 IPC as the offence was deleted by the Deputy Superintendent of Police and entry was made in the case diary. Challan was not presented under the said offences and there is no opinion of the doctor vis-a-vis the injury being dangerous to life so as to attract culpability under Section 308

IPC. Charges were framed on 14.1.2013. No charge was framed under Section 308 IPC at the relevant time as offence in question was not made out. That order was never assailed in any form and therefore, the framing of charge under Section 308 IPC at this stage is totally illegal even the petitioner was summoned under Section 319 Cr.P.C. only for the offences under Sections 325/ 323/ 326/ 34 IPC and not under Section 308 IPC. Therefore, on this premise also, the charge under Section 308 IPC is claimed to be illegal.

14. In the instant case, petitioner has assailed orders Annexure P-12 and P-13 i.e. chargesheet and order of charge and order Annexure P-10 passed by Additional Sessions Judge, Gurdaspur by which application under Section 318 Cr.P.C. was dismissed. Petitioner seeks acquittal in DDR No.12 dated 1.9.2011 under Sections 326, 325, 34 IPC out of which FIR No. 68 dated 24.8.2011 was registered in Police Station Dera Baba Nanak District Gurdaspur under Sections 326, 325, 34 IPC.

15. It is relevant to highlight here that the order dated 23.2.2015 was assailed in CRM-M No.7984 of 2015. During the course of arguments, learned counsel appearing on behalf of the petitioner made a statement before the Court that his client shall be satisfied if personal appearance of the petitioner before the trial Court is exempted during the trial of the case.

Accordingly, the prayer was accepted vide order dated 1.4.2015

passed by this Court.

16. In view of aforesaid, no indulgence can be granted for the relief of quashing the order dated 23.2.2015 passed by the Additional Sessions Judge. Even otherwise, there is difference between disability under Sections 328 and 329 Cr.P.C. as well as disability incurred after the incident.

17. Sections 328 and 329 Cr.P.C. read as under:-

“328. Procedure in case of accused being lunatic.-(1)

When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness and shall reduce the examination to writing.

(IA) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of-

- (a) head of psychiatry unit in the nearest government hospital; and*
- (b) a faculty member in psychiatry in the nearest medical college;)*

(2) Pending such examination and inquiry, the Magistrate may deal with such person in accordance with the provisions of section 330.

(3) If such Magistrate is informed that the person referred to in subsection (1A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, If he finds that no prima facie case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate finds that a prima

facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under section 330.

(4) If such Magistrate is informed that the person referred to in sub-section (1A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under section 330.

329: Procedure in case of person of unsound mind

tried before Court.-(1) *If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.*

(1A) If during trial, that Magistrate or Court of Sessions, finds the accused to be of unsound mind, he or it shall

refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of-

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

(2) If such Magistrate or Court is informed that the person referred to in sub-section (IA) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused

and deal with him in the manner provided under section 330:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with Section 330.”

18. Section 328 provides procedure for inquiry by Magistrate in respect of the fact of unsoundness of mind. Section 329 Cr.P.C., on the other hand, provides for procedure in case of person of unsound mind tried before the Court. This Section makes it clear that in a trial before Magistrate or Court of Sessions, if the accused appears to be of unsound mind and consequently incapable of making his defence then the Court shall at the first instance try the fact of such unsoundness of mind and incapacity of accused and if the Court is satisfied then it shall record finding to that effect and shall postpone further proceedings of the trial. This Section is similar to Section 328 Cr.P.C. with a difference that latter relates to an inquiry before a

Magistrate, while this Section relates to trial before Magistrate or Court of Sessions. However, both the Sections relate to unsoundness of mind at the time of inquiry or trial and not at the time of commission of offence, The distinction has to be drawn between incapacity of the accused at the time of commission of act charged with and incapacity at the time of trial. Incapacity at the time of commission of offence is to be dealt under Section 84 IPC, which is a substantive provision, whereas, provisions in terms of Sections 328 and 329 Cr.P.C. affects the procedure and postpone the trial. Therefore, connected provisions in terms of Sections 328 and 329 Cr.P.C. are apparently not applicable to the present case. Even this Court at the time of issuance of notice of motion on 3.6.2015, has observed that provisions in terms of Sections 328 and 329 Cr.P.C. are not attracted to the facts of this case.

19. So far as applicability of Section 318 Cr.P.C. is concerned, the same apparently requires that if the accused though not of unsound mind, cannot be made to understand proceedings, the Court may proceed with the inquiry or trial and in case of a Court other than a High Court if such proceedings result in a conviction then proceedings shall be forwarded to the High Court with a report of circumstances of the case. Thereafter, the High Court shall pass appropriate order. The requirement of Section 318 Cr.P.C. cannot entitle the petitioner

to seek any such relief on the alleged ground of unsoundness of mind. Moreover, the said application was dismissed on 23.2.2015 and the petitioner felt contended with the grant of personal exemption when said order was assailed before the High Court in CRM-M No. 7984 of 2015.

20. So far as charge under Section 308 IPC is concerned, it is a settled principle of law that charge can be altered at any stage and for which no bar of review can apply nor estoppel can be pleaded.

21. Learned counsel relied upon decision dated 3.12.2008 passed in CRM-M No. 33238 of 2004, titled **Dimple @ Dimpu @ Gurcharan vs. State of Punjab**. The aforesaid case primarily relates to applicability of Sections 328 and 329 Cr.P.C. and has nothing to do with the controversy involved in the present case.

22. In view of aforesaid, no interference in the present case is called for. Accordingly, this petition is dismissed.

(RAJ MOHAN SINGH)
JUDGE

August 12, 2015
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