

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRM No. M-35977 of 2015 (O&M)
Date of Decision: 02.03.2017

Ram Niwas

--Petitioner

Versus

State of Haryana

--Respondent

CORAM:- HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA.

Present:- Mr. R.N. Lohan, Advocate for the petitioner.

Mr. C.S. Bakshi, Addl. A.G., Haryana.

TEJINDER SINGH DHINDSA.J

Petitioner along with co-accused is facing trial in case FIR No. 45 dated 11.01.2009 under Sections 420, 467, 468, 471, 120-B IPC and Sections 7, 13, 49, 88 of Prevention of Corruption Act, registered at Police Station, City Jind.

In brief, FIR was registered after an information was received regarding discrepancies in the registration of vehicles by the office of R.T.A, Safidon.

An application was moved by Smt. Sunita i.e. wife of the petitioner under Section 328 Cr.P.C for holding an inquiry and postponement of trial proceedings on the ground that her husband/accused Ram Niwas is suffering from a psychiatry problem and as such is unable to set up his defence.

The instant petition filed under Section 482 Cr.P.C is directed against the order dated 05.10.2015 (Annexure P-3) passed by learned Additional Sessions Judge, Jind, whereby the application moved under Section 328 Cr.P.C has been dismissed.

To appreciate the short controversy raised in the instant petition, it would be appropriate to reproduce here under Sections 328, 329 and 330 Cr.P.C contained in Chapter XXV:-

“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.

(1A) 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 sub-section (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 dealt 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, the 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 (1A) 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 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.

(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.

330. Release of lunatic pending investigation or trial.

(1) Whenever a person is found, under section 328 or section 329, to be incapable of entering defence by a reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987(14 of 1987).

(3) Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall, keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

Provided that-

(a) If on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under section 328 or section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

(b) If the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.”

Section 328 Cr.P.C provides for the procedure for inquiry by a Magistrate in regard to the fact of unsoundness of mind. A Magistrate, if, he has reasons to believe that the person before him is of unsound mind and consequently incapable of making his defence, then, he is enjoined to inquire into 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. The Civil Surgeon or the concerned Medical Officer is thereafter to be examined as a witness. Pending such inquiry, the Magistrate may deal with such a person in accordance with the provisions of Section 330 Cr.P.C, which envisages release of a lunatic pending investigation or trial. If the Magistrate is of the opinion that the

person is of unsound mind, he is to record his finding to that effect and then postpone the proceedings in the case.

Section 329 Cr.P.C provides for procedure in case of person of unsound mind being tried before the court. This provision makes it clear that in a trial before the Magistrate or Court of Sessions, if, the accused appears of unsound mind and consequently incapable of making his defence, then, the Court shall, in the first instance, try the fact of such unsoundness of mind and incapacity and if satisfied in this regard, shall record a finding to that effect and shall postpone further proceedings. Section 329 Cr.P.C is similar to Section 328 Cr.P.C and the only difference being that the later relates to an inquiry before a Magistrate while Section 329 Cr.P.C relates to trial before a Magistrate or the Court of Sessions. In any case both the sections relate to unsoundness of mind at the time of inquiry or trial and not at the time of commission of offence.

In the facts of the present case the FIR was registered on 11.01.2009. The accused persons including Ram Niwas petitioner were arrested on 03.10.2013. The final investigation report under Section 173 Cr.P.C was furnished by the prosecution in November, 2013. The application under Section 328 Cr.P.C has been moved at the instance of the wife of the petitioner namely Smt. Sunita on 25.09.2015 stating clearly that her husband is suffering from psychiatry medical problem since a number of days and he is getting treatment from PGIMS, Rohtak since 19.06.2015 from the Psychiatry Department. The application was supported by a certificate issued by the Medical Board and which had assessed a 71% to 99% medical disability of the accused.

Perusal of the impugned order would reveal that the application under Section 328 Cr.P.C moved on behalf of the accused/petitioner has been dismissed on the reasoning that to claim benefit of defence of insanity an applicant would have to prove that his cognitive faculties were so impaired in relation to the time when the alleged offence was committed.

In the considered of this Court the impugned order cannot sustain as the Trial Court has overlooked a vital aspect of the matter. The petitioner was not seeking the defence of Section 84 IPC for exoneration from criminal liability but was wanting postponement of further proceedings in the trial under Section 328 Cr.P.C. The distinction between incapacity at the time of doing the act charged and incapacity during the course of trial is well formulated. Incapacity at the time of commission of offence is dealt under Section 84 I.P.C. Section 84 I.P.C is a substantive provision which excuses the offence, whereas Sections 328 and 329 Cr.P.C effect the procedure and postpone the trial. Condition essential for applicability of such provisions is that it must appear to the court that the accused brought before it is of unsound mind. If, it does so appear, then, the fact has to be tried and decided before calling upon the accused to stand trial for the offence charged. These provisions are mandatory and ought to be strictly complied with. The issue of insanity is to be considered only where accused appears to be incapable of making his defence due to mental infirmity. The Trial Court cannot act on its own opinion. There must be before the competent court a statement of Medical Officer, who must be examined. Where the court decides that the accused is of unsound mind and consequently incapable of making his defence the trial is to be postponed.

While passing the impugned order, the court has erred in deciding the application moved by the wife of petitioner on the premise that defence of Section 84 I.P.C has been sought. Rather the application was under Section 328 Cr.P.C and supported by a certificate issued by the Medical Superintendent, Pt. B.D. Sharma P.G.I.M.S., Rohtak assessing his disability to be between 71% to 99% and from the Department of Psychiatry.

For the reasons recorded above, the present petition is allowed. Order dated 5.10.2015 (Annexure P-3), is set aside. The matter is remanded back to the Trial Court for deciding the application moved by the wife of petitioner afresh and in terms of the mandate contained in Chapter XXV of the Code of Criminal Procedure and as per Sections 328, 329 and 330 Cr.P.C. An order afresh be passed within a period of two months from the date of receipt of a certified copy of this order. Trial proceedings qua accused Ram Niwas shall be kept in abeyance till the date of passing of the order afresh and would thereafter be subject to the outcome of such order.

Petition is allowed in the aforesaid terms.

(TEJINDER SINGH DHINDSA)
JUDGE

02.03.2017

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Whether speaking/reasoned: Yes
Whether Reportable: Yes