

**IN THE HIGH COURT OF PUNJAB AND HARYANA
 AT CHANDIGARH**

(I) CRM-M-31067-2018 (O&M)
 Date of Decision : 19.11.2018

Karnail Kaur and another Petitioners
 Versus
 State of Haryana Respondent

(II) CRM-M-32179-2018 (O&M)

Balkar SinghPetitioner
 Versus
 State of HaryanaRespondent

(III) CRM-M-33866-2018 (O&M)

Balinder @ Balwinder Singh @ BaljinderPetitioner
 Versus
 State of HaryanaRespondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Rajinder Goyal, Advocate for the petitioner (s),
 in CRM-M-33866-2018 and in CRM-M-31067-2018.

Ms. Kanwal S. Walia, Advocate,
 for the petitioner in CRM-M-32179-2018.

Mr. Sandeep Vashisht, Deputy Advocate General, Haryana.

Mr. Arnav Kumar Sood, Advocate for the complainant.

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GURVINDER SINGH GILL, J.

1. This judgment shall dispose of the following three petitions as all are directed against the same order dated 16.7.2018 (Annexure P-8) passed by learned Additional Sessions Judge, Kaithal:-

1. CRM-M-31067 of 2018
2. CRM-M-32179 of 2018
3. CRM-M-33866 of 2018

2. The facts leading to passing of the impugned order may briefly be noticed as follows:-

- (i) The four petitioners namely Karnail Kaur, Jarnail Singh, Balkar Singh and Balinder @ Balwinder Singh @ Baljinder alongwith one Tek Chand were being tried by the Court of Sub Divisional Judicial Magistrate, Guhla for offences under sections 420, 467, 468 and 471 read with section 120-B of IPC. While Tek Chand was acquitted vide judgement dated 5.7.2018(Annexure P-1), the remaining accused i.e. the petitioners were found guilty. The petitioners were forwarded to the Court of Chief Judicial Magistrate, vide order dated 9.7.2018(Annexure P-2), in terms of provisions of Section 325 Cr.PC, as the trial Court opined that the accused deserve a punishment higher than the one that trial Court could inflict.
- (ii) The accused/petitioners upon being referred to the Court of CJM, moved an application to CJM for sending back/remanding their case to the trial Court or to transfer the case to any other Magistrate for further proceedings mainly on the ground that the learned Sub Divisional Judicial Magistrate had virtually passed a judgment of conviction and that the same was not merely an order of referral and that the same was against the spirit of Section 325 Cr.PC, as Section 325 Cr.PC requires formation of an opinion only by the trial Court to the effect that a higher dose of punishment would be required in the case.
- (iii) The aforesaid application was however dismissed by the learned CJM vide order dated 13.07.2018(Annexure P-4).
- (iv) The accused challenged the aforesaid order dated 13.07.2018 passed by CJM and also order dated 09.07.2018 passed by

learned SDJM by way of filing a revision petition in the Court of Sessions. However, the learned Court of Additional Sessions Judge, upheld both the aforesaid orders vide its order dated 16.07.2018 which has been impugned by way of filing the present petition.

3. The petitioners while assailing the impugned order dated 16.07.2018 have submitted that for the purpose of forwarding the accused to the Court of CJM under provisions of Section 325 Cr.P.C., the Magistrate is required only to form an opinion to the effect that the case is such where a higher dose of sentence is required, and that passing of a judgment by the referral Magistrate does not fall within the scheme of the Section.
4. It has further been submitted that the very fact that the co-accused was acquitted vide the same very judgement in which the petitioners have been found guilty clearly shows that infact a full fledged judgment has been passed while forwarding the accused to CJM which is contrary to the spirit of the section 325 Cr.P.C.
5. It has also been submitted that since the scheme of the code envisages that the CJM is fully competent to recall the witnesses already examined as well as to take fresh evidence and thereafter pass a judgment without being bound by the opinion of the referral Magistrate and infact is competent to pass a judgment contrary to the opinion of the referral Magistrate, therefore, in case a full-fledged judgment is passed by the Magistrate then it would virtually mean that the CJM is sitting in appeal, which was never the intent of the Code.

6. The learned counsel further submitted that provisions of section 325 Cr.P.C. have to be interpreted harmoniously with provisions of section 248 and 374 of Cr.P.C. so that the scheme of the Code is not disturbed and the Magistrate in exercise of powers of 325 Cr.P.C. forms just an opinion and does not over step to pass a full-fledged judgement.
7. The learned State counsel, while refuting the contentions made on behalf of petitioners, has submitted that while the powers of CJM are unfettered when matter is referred to him in terms of Section 325 Cr.P.C., the Magistrate while forwarding the accused in terms of Section 325 Cr.P.C. is not to simply act as a post office but has to apply mind and appreciate all the material facts of the case and which can only be done after marshalling the entire evidence led by before it and any such opinion formed has to be by way of a well reasoned speaking order and it would be a misnomer to term such an opinion as a judgment.
8. Before proceeding to consider the rival submissions addressed before this Court, it is apposite to refer to provisions of the section 325 Cr.P.C., which read as follows:

“325. Procedure when Magistrate cannot pass sentence sufficiently severe-

- (1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be

required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

- (2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub-section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.
- (3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

9. The use of words *“and the Magistrate considers it necessary to proceed under sub-section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty”* in sub-Section (2) of Section 325 Cr.P.C., shows that even if the Magistrate thinks that out of the accused found guilty only one deserves punishment higher than what he is competent to inflict, all those accused found guilty will have to be forwarded to CJM. The section, being conspicuously silent as regards the accused who are found not guilty, goes to show that the intent of the Code was never to divest the powers of the Magistrate to pass judgement of acquittal in respect of some of the co-accused regarding whom the Magistrate was of the opinion that such of th accused deserved acquittal. In other words, it is implicit in the language of section 325(2) Cr.P.C. that Magistrate is

competent to segregate the case and choose to refer only those accused to CJM regarding whom he is of the opinion that they are guilty while proceeding ahead to pass appropriate order/judgment in respect of the other co-accused found not guilty.

10. Having held so, the next question before this Court is as to whether the Magistrate having passed a full fledged judgement acquitting one of the co-accused while holding the petitioners guilty, the same can be said to be merely an opinion of guilt qua the petitioners and as to whether fresh appraisal of the case by CJM pursuant to passing of such judgement by Magistrate would not virtually amount to the CJM sitting in appeal over the judgement of Magistrate which is against the basic structure of the Code wherein it is the Court of Sessions which is the Appellate Authority.
11. I have considered the aforesaid submission. The intent of the code by inserting Section 325 of Cr.P.C. was certainly not to make CJM an appellate authority, but was only to ensure that in cases where a higher dose of sentence is to be imposed, the matter be dealt with by a more experienced officer of the rank of CJM rather than a Magistrate who at times may just be a fresher. Under the scheme of the Code, as per section 325 Cr.P.C., the CJM has been vested with vast powers in the matter so as to admit fresh evidence and even differ with the opinion of the referral Magistrate. The powers of the Chief Judicial Magistrate, upon such reference came to be examined in 1998(3) PLJR 787 State of Bihar Vs. Gita Nand Jha, wherein a matter had been referred to Division Bench specifically to consider the question as to whether the CJM to whom a case had been referred to under provisions of

Section 325 Cr.P.C. by the Magistrate who had formed an opinion that a higher dose of sentence was warranted, could acquit the accused so forwarded. The Division Bench of Patna High answered the question in positive holding therein as follows:-

“14. Thus, it is held that if the Magistrate trying the case after considering the evidence on record and hearing the parties comes to the conclusion that the accused is guilty of an offence charged with and he deserves punishment which is beyond his jurisdiction then he has to record his opinion of guilt and refer the matter to the Chief Judicial Magistrate who on receipt of record will dispose of the matter finally either on the basis of material referred to him or will take further evidence as envisaged under Section 325(3) of the Code. At the time of final disposal of the matter he is neither controlled nor guided by the finding of guilt arrived at by the referral Magistrate. He has to form his own opinion independently on the evidence, on the record and to render the judgment in accordance with law. After appreciation of evidence and hearing the parties he may take a view or express an opinion different from that of the referral Magistrate and render a judgment in accordance with law which may be either judgment of conviction and sentence or acquittal.”

12. It goes without saying that the Magistrate while forwarding the accused to Chief Judicial Magistrate, when it forms an opinion that higher dose of sentence is required, is not merely to act as a post office but has to fully appreciate the facts of the case in context of the evidence led before it and it is only thereafter that a Magistrate can effectively opine that the case is such where a higher dose of sentence would be justified. Although such an

exercise of marshalling entire evidence led before it would virtually be an exercise almost equivalent to passing of a judgment but under scheme of the Code, the CJM is still competent to admit fresh evidence and differ with opinion of the Magistrate and despite the same it cannot be said that he sits in appeal over judgement of Magistrate as the exercise of referring while forming opinion although akin to passing judgement, is infact an opinion only.

13. Now coming back to facts of the present case, a perusal of judgement/order dated 5.7.2018 (Annexure P-1), passed before passing of the referral order dated 9.7.2018(Annexure P-2) does show that it has been drafted in the nature and style of a judgment. So much so one of the co-accused has been acquitted vide said order/judgment. While referring to provisions of section 325 of Cr.P.C., as discussed above there is certainly no doubt that the Magistrate was fully competent to acquit a co-accused while forwarding remaining accused to CJM in case Magistrate was of the opinion that severer sentence is required to be imposed on co-accused found guilty.
14. A somewhat similar situation arose in a case reported as 1994(54) DLT 454 Ved Prakash vs. State (C.B.I.), wherein the accused while being acquitted of some of the charges had been convicted in respect of the remaining charges and had been forwarded to the CJM since the Magistrate opined that higher dose of sentence is required to be inflicted. The accused challenged the said order/judgment before the Court of Sessions which was dismissed while holding that the order of conviction was “simply an opinion” about the guilt of the accused and did not “amount to an order of conviction”. The said

order of Sessions Judge was challenged by way of filing a revision petition before Delhi High Court which was dismissed while holding as follows :-

“12. What, then, is the correct position? The perusal of section 325 would go to show that whenever a Magistrate is of opinion after hearing the evidence for the prosecution and the accused, that the accused is guilty, he may send up the records under two circumstances namely; (1) the punishment to be inflicted must be different in kind from that which he is empowered to inflict, and (2) the punishment must be more severe than that which he can inflict. Certainly, in no other circumstance can he send up the records under Sub-section (1) of section 325. After the submission of the record, the case would be a continuation of the original trial and the Chief Metropolitan Magistrate would be under the same obligation to hear arguments and to write a judgment as in any ordinary case tried entirely by him. It is not sufficient for the Chief Metropolitan Magistrate to accept the opinion recorded by the Magistrate making the reference. He is rather required to form his own independent judgment and write it according to the provisions of section 354 of the Code. It is just possible, upon hearing of the evidence of the prosecution and the accused, that the Chief Metropolitan Magistrate may opine that the accused is not guilty in which case it would be open to him to acquit the accused.

13. It was last contended that the learned Magistrate had acquitted the petitioner of one charge by the same order “and that this in itself was sufficient to show that it was a “judgment” within the meaning of section 354 of the Code. I must confess I am at a loss to understand how it helps the petitioner in building up his case. Under sub-section (1) of section 325 the proceedings can be submitted by a Magistrate only with regard to that offence of which, in his opinion, the accused is guilty of. He cannot forward the case relating to an offence of which, in his opinion, the accused is not guilty and, obviously, with regard to that offence there has to be a judgment of acquittal.”

15. The only difference in the above referred case is that while in the said case the accused had been acquitted in respect of one of the charges only and had been convicted in respect of remaining charges whereas in the present case

one of the co-accused has been acquitted in toto while remaining have been convicted. As already discussed above, since it was well within the jurisdiction of the referral Magistrate to acquit some of the co-accused and to forward the remaining accused who according to him deserved a higher dose of sentence, therefore, such an opinion can well be formed during the course of judgment of acquittal of the remaining co-accused as in the present case. In such an eventuality where some other co-accused are being acquitted by the referral Magistrate, then it would be a meaningless repetitive exercise for the Magistrate to pass another identical speaking order regarding guilt of the co-accused when the entire matter has already been dealt with by him after thrashing the entire evidence. The process of evaluation of evidence having been undertaken by the Magistrate while acquitting the co-accused would itself include the process of formation of opinion regarding guilt of the other co-accused. Thus, in such an eventuality, the judgment itself would have to be treated as an opinion qua the accused who are forwarded by the Magistrate to the Chief Judicial Magistrate in terms of Section 325 Cr.P.C. The Chief Judicial Magistrate would then be required to appreciate the evidence recorded by the Magistrate and if required take further evidence including recalling of witnesses and reach at its independent conclusion regarding guilt or innocence of the accused or regarding need for imposition of a severer sentence.

16. As regards submission made on behalf of petitioner with reference to provisions of section 248 and 374 of Cr.P.C., a perusal of section 248 Cr.P.C.

rather shows that the Magistrate has proceeded in tune with provisions of section 325 Cr.P.C. and 248 Cr.P.C. Section 248 Cr.P.C reads as under:

“248. Acquittal or conviction. -

- (1) If, in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.
- (2) Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of Section 325 or Section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.
- (3) x x x

17. A perusal of section 248 Cr.P.C. shows that the Magistrate may either acquit the accused but in case he finds him guilty, he may either proceed under section 325 Cr.P.C. or under section 360 Cr.P.C. and in case he does not chose either of the said two options, he shall proceed to hear the accused on quantum of sentence and impose sentence according to law. In other words, provisions under section 325 Cr.P.C. would come into play after a finding regarding guilt has been recorded. It further becomes evident that the proceedings before passing any order for resorting to 325 Cr.P.C or for releasing him on probation u/s 360 Cr.P.C. or imposing sentence upon the accused are of the same nature and kind and different kinds of proceedings are not visualised. This is what the Magistrate has done in the present case wherein while aquitting one of the accused he has recorded a finding regarding guilt of the other accused.

18. Section 374 pertains to provisions regarding filing of appeal against conviction. The relevant provisions read as under:

374. Appeals from convictions. -

- (1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.
- (2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years [has been passed against him or against any other person convicted at the same trial], may appeal to the High Court.
- (3) Save as otherwise provided in sub-section (2), any person, -
 - (a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or
 - (b) sentenced under Section 325, or
 - (c) in respect of whom an order has been made or a sentence has been passed under Section 360 by any Magistrate, may appeal to the Court of Session.
- (4) x x x

19. A perusal of aforesaid provisions simply indicates that an appeal in respect of case referred in terms of provisions of Section 325 Cr.P.C would only be maintainable upon his being sentenced in exercise of provisions of section 325 Cr.P.C and not prior to such sentencing. In other words no appeal would be maintainable against opinion or finding of the referral Magistrate regarding guilt of the accused and it is only after the CJM, in exercise of powers under 325 Cr.P.C., sentences him that an appeal would be maintainable.

20. As an upshot of discussion made above, I do not find any infirmity in order dated 9.7.2018(Annexure P-2) passed by learned Magistrate for forwarding

the accused to CJM in terms of section 325 Cr.P.C. and as affirmed by learned Additional Sessions Judge in his order dated 16.7.2018 (Annexure P-8) and the same are hereby affirmed. The order dated 13.7.2018 (Annexure P-4) is also upheld.

21. It is thus ordered that:

- (i) the impugned judgment dated 5.7.2018 (Annexure P-1) so far as the same pertains to forwarding the accused to the Court of CJM shall be treated to be an opinion of the Magistrate qua the petitioners even though the same has been drafted in the form and style of a judgment.
- (ii) the CJM to whom the petitioners have been forwarded would be fully competent to admit fresh evidence or to recall any of the witnesses if deemed necessary and thereafter pass a judgment as deemed appropriate without being influenced or bound by the opinion of the Magistrate and would also be well within its jurisdiction to acquit the petitioners in case the facts and circumstances warrant so.
- (iii) the interim directions regarding release of the petitioners on bail shall, however, continue till the matter is finally disposed of by the learned CJM. However in case of violation of any of the terms and condition of the bail bonds, the CJM will be competent to take necessary steps in accordance with law.

22. The petitions stand dismissed with the aforesaid clarifications.

19.11.2018
pankaj

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No