

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

CRM-M-54223 of 2021

Date of decision :-19.01.2022

Jaiky

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr.Manoj Pundir, Advocatefor the petitioner.

Ms. Deepshikha Chauhan, AAG, Haryana
for the respondent-State.

SUVIR SEHGAL, J.

Heard through video conferencing.

Vide the instant petition filed under Section 482 of the Code of Criminal Procedure, 1973 (for short “the Code”) read with Section 330 of the Code, the petitioner being mentally handicapped, has sought setting aside of the order dated 22.11.2021, Annexure P-9, passed by the learned Additional Sessions Judge, Yamuna Nagar at Jagadhri and his release from custody in FIR No.254 dated 08.11.2021 lodged under Section 506 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 at Police Station Women, District Yamuna Nagar.

FIR, Annexure P-1, has been registered on the complaint of the mother of a five years old victim on the allegation that Jaiky, present petitioner, who is a neighbour, took her daughter on the pretext of playing with her. After a long duration, her daughter, who was crying and scared,

was brought back home by a neighbour, Raj Rani. The complainant noticed blood on the pant of the victim and discovered that blood was oozing out of her private part. On inquiry, her daughter told her that Jaiky removed her clothes and had inserted something in her private part and she was in pain. She also disclosed that Jaiky threatened her that in case she narrated the incident to anyone, he will kill her. Jaiky, who is stated to be 22 years of age, was arrested on 09.11.2021.

Counsel for the petitioner has referred to the certificate dated 16.05.2018, Annexure P-3, issued by the Office of Civil Surgeon, Yamuna Nagar, for persons with mental retardation to submit that the petitioner has a disability of 90% and an IQ of 20-24%. He has also referred to the Concession Certificate of the same date, Annexure P-4, to contend that because of his intellectual disability, the petitioner is not in a position to take care of himself and has been advised not to travel without the assistance of an escort. He submits that an application under Section 330 of the Code along with an undertaking of the father/guardian of the petitioner was submitted before the trial Court on 09.11.2021, Annexure P-5 and P-6, respectively, and the same has been rejected vide impugned order, Annexure P-9, despite the fact that the medical report (opinion) submitted by the Senior Medical Officer, Civil Hospital, Yamuna Nagar, shows that the petitioner has a mental disability, which is supported by the medical status report of the Medical Officer of District Jail, Yamuna Nagar, Annexure P-8. Counsel contends that the provision as laid down under Section 330 of the Code is mandatory and the Court is bound to release the retarded accused on bail.

Per Contra, learned State counsel has supported the order

passed by the trial Court and argued that considering the nature of

accusation, gravity of offence and the severity of crime allegedly committed by the petitioner, he does not deserve to be released.

I have considered the rival submissions of the counsel for the parties, perused the impugned order as well as the material placed on the record by the counsel for the petitioner.

At the outset, it deserves to be noticed that on a query by the Court regarding the maintainability of the instant petition, counsel for the petitioner has referred to a judgment of the Allahabad High Court in **Kanhaiya vs. State of U.P., 2018 (8) ADJ 400** and has submitted that the remedy available to the petitioner after the dismissal of the application under Section 330 of the Code is to invoke the supervisory jurisdiction of a superior Court. In particular he has made a reference to the observations of the Allahabad High Court in para 64, which are reproduced hereunder:-

“64. This Court in view what has been said hereinbefore is of opinion that the jurisdiction under Section 330, under Chapter XXV of the Code is generically different from that under Section 439. The scope, content, purpose and the object of bail contemplated under Sections 439 and 330 are generically different and mutually exclusive. The remedy of an accused of unsound mind is to make an application under Section 330 to the Court entitled by law in the first instance to entertain the same on merits, be it the Magistrate or the Court, the Court invariably and almost certainly being the Sessions Judge in context of Section 330 of the Code. In the event of failure in the Court of first instance whether it be the Magistrate or the Sessions Judge, the remedy to an accused of unsound mind whose application under Section 330 of the Code has failed

would be to invoke the supervisory jurisdiction of Superior Courts under Sections 397, 397/401, 482 of the Code or if so advised, under Article 227 of the Constitution, but not by way of an application invoking jurisdiction under Section 439 of the Code. Thus, no application under Section 439 of the Code would be maintainable in the case of an accused of unsound mind whose application under Section 330 has been rejected by the Magistrate or the Court in the first instance.”

Before examining the legality of the impugned order, it deserves to be noticed that Chapter XXV of the Code deals with procedure to be followed in cases where the accused is found to be of unsound mind. Section 330, *ibid*, which forms a part of this chapter, is reproduced hereunder:-

“ 330. Release of person of unsound mind pending investigation or trial- (1) 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, 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.”

As is evident from the above provision, the essential requirement laid down therein, is a finding under Section 328 or 329 of the Code that the accused is:- (i) a person of an unsound mind and (ii) incapable of entering defence or unable to understand the Court proceedings on account of unsoundness of mind or mental retardation. Therefore, a finding has to precede before Section 330 of the Code comes into play and such a finding has to be given on the basis of an inquiry by the Magistrate or Court under Sections 328 or 329, after ascertaining unsoundness or mental retardation of the accused on the basis of evidence, including medical evidence. The provisions as contained in Chapter XXV of the Code are mandatory and non-adherence can vitiate the trial. Once an application has been moved under Section 330 of the Code claiming insanity of the accused, which is supported by some medical certificate regarding the unsoundness of mind of the accused, it is the bounden duty of the Court or the Magistrate to follow the procedure as laid down in Section 328 or Section 329 of the Code, as the case may be.

An examination of the impugned order shows that this procedure has not been followed; rather the Court has merely relied upon a medical opinion and a status report issued by the Medical Officer of the Jail, which does not comply with the statutory requirement. Even the medical opinion shows that the petitioner has been reported to be “suffering from severe mental retardation” and the Medical Officer, District Jail, Yamuna Nagar,

Annexure P-8, has stated that though a Civil Surgeon has been approached to constitute a medical board, but it has not been done. So it is apparent that the Court did not have the benefit of opinion of any medical expert or specialist. Consequently, the impugned order passed by the learned Additional Sessions Judge, Yamuna Nagar, cannot be sustained.

Ergo, in view of the above discussion, this revision is allowed. Impugned order dated 22.11.2021, Annexure P-9, passed by the trial Court is set aside and the matter is remitted to the trial Court with a direction to decide the application in the light of the provision of Section 330 Cr.P.C. in accordance with law.

19 .01.2022
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(SUVIR SEHGAL)
JUDGE

Whether Speaking/reasoned : Yes/No
Whether Reportable : Yes/No