

1
**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL**

ON THE 20th OF SEPTEMBER, 2023

MISC. CRIMINAL CASE No. 40253 of 2023

BETWEEN:-

**SHIV PAL SINGH CHOUHAN S/O SHRI SURYA PRATAP
SINGH CHOUHAN, AGED ABOUT 56 YEARS, R/O 89
SHIVA ROYAL PARK E- 8 EXTENSION SOUTH SALAIYA
BHOPAL DISTRICT BHOPAL (MADHYA PRADESH)**

.....APPLICANT

(BY SHRI KUMARESH PATHAK-ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH P.S.
GORAKHPUR DISTRICT JABALPUR (MADHYA
PRADESH)**
- 2. KARUNAKAR TRIPATHI S/O LATE SHRI R.N.
TRIPATHI R/O 81/1 TULSI NAGAR BHOPAL
DISTRICT BHOPAL (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI PANKAJ TIWARI-PANEL LAWYER)

*This application coming on for admission this day, the court passed the
following:*

ORDER

This petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "Code") has been filed assailing the order dated 26.08.2023 passed by 16th Additional Sessions Judge, Jabalpur in Criminal Revision No.168/2023 (Shiv Pal Singh Chouhan vs. State of M.P. and another) whereby revision preferred against the order dated 26.04.2023 passed by Sushri Saifi Tajir Tamanna, learned JMFC, Jabalpur was challenged but same

has been dismissed on the ground that order passed by learned JMFC is interlocutory in nature.

2. The facts out of which the present petition arises, briefly stated are thus:

The petitioner along with one other is facing trial for commission of offence under Sections 409, 420, 467, 468 of IPC before learned Judicial Magistrate First Class, Jabalpur. Learned Judicial Magistrate First Class recorded the evidence of the prosecution and the defence and at the stage of final hearing passed a cryptic order dated 26.04.2023 that, in her opinion, accused are guilty of the aforesaid offences and that the accused ought to receive a punishment different in kind from, or more severe than, which the Magistrate is empowered to inflict and directed the accused persons and learned prosecutor to remain present before the Chief Judicial Magistrate.

3. Learned counsel for the petitioner has submitted that learned Judicial Magistrate without hearing the prosecution and the defence and without considering the evidence of prosecution and defence has formed an opinion that accused persons are guilty for commission of offences which is against the procedure and settled position of law. Therefore, learned counsel for the petitioner has prayed to set aside the impugned orders passed by the Courts below.

4. On the other hand, learned counsel for the State has supported the impugned orders passed by the Courts below and has prayed for dismissal of the petition.

5. Section 29 of the Code deals with sentences which the Magistrate may pass. Section 29 reads as under:

29. Sentences which Magistrate may pass.-(1) The Court of a Chief

Judicial Magistrate may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding 10[ten] thousand rupees, or of both.

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding [five] thousand rupees, or of both.

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

6. Under Section 29(2) of the Code, the Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding 10,000/- rupees, or of both. Section 29 of the Code lays down the extent of the sentences which a Chief Judicial Magistrate, a Magistrate of the First Class, and a Magistrate of the Second Class, by his original jurisdiction is competent to inflict. He cannot exceed the limit prescribed by the Section and pass a sentence which he is not authorized to pass. It would therefore be clear that if the Magistrate come to the conclusion that the petitioner was guilty of the offences under Sections 409, 420, 467, 468 of IPC, in view of the provisions contained in Section 29(2) of the Code she would not be in a position to award punishment to the petitioner.

7. Sections 322 to 325 of the Code deals with the powers of the Judicial Magistrate First Class regarding transfer of the case in certain situation to the

file of the Chief Judicial Magistrate and Session Judge for trial. Sections 322, 323 and 325 read as under:

322. Procedure in cases which Magistrate cannot dispose of.-(1) If, in the course of any inquiry into an offence or a trial before a Magistrate in any district, the evidence appears to him to warrant a presumption-

- (a) That he has no jurisdiction to try the case or commit it for trial, or
- (b) That the case is one which should be tried or committed for trial by some other Magistrate in the district, or
- (c) That the case should be tried by the Chief Judicial Magistrate,

he shall stay the proceedings and submit the case, with a brief report explaining its nature to the Chief Judicial Magistrate or to such other Magistrate, having Jurisdiction, as the Chief Judicial Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

Section 323 Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.-If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained [and thereupon the provision of Chapter XVIII shall apply to the commitment so made].

Section 325 CrPC, 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.

8. Thus, from the reading of the provisions of section 322 to 325 of the Code, it is seen that

(i) if it appears to the Magistrate from the facts disclosed in the police report and other evidence that he will not be able to inflict adequate punishment in the case and thus, the case ought to be tried by the Chief Judicial Magistrate, he is empowered to submit the case to the Chief Judicial Magistrate under Section 322 of the Code.

(ii) if the Magistrate, after closure of the evidence of both the parties, finds the accused guilty and thinks that the accused ought to receive a punishment different in kind or severe than that which he is empowered to inflict, he is empowered to submit the case to the Chief Judicial Magistrate, under Section 325 of the Code.

(iii) if on the other hand, it appears to the Magistrate at any stage of the

trial before signing the judgment that the case is one which ought to be tried by the Court of Session, he shall commit the case to the Court of Session under Section 323 of the Code.

9. It is pertinent to mention that under Section 15 of the Code, every Chief Judicial Magistrate is subordinate to Sessions Judge and every Judicial Magistrate First Class is subordinate to the Chief Judicial Magistrate. The Court of Magistrate of the first Class is empowered under Section 29 of the Code to pass a sentence of imprisonment for a term not exceeding three years or fine not exceeding ten thousand rupees, or of both. Under this Section itself, the Chief Judicial Magistrate is empowered to pass any sentence authorized by the law except the sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years.

10. Section 325 of the Code specifically deals with the cases of punishment more than what the trial Magistrate can award. When, from the records, it appears to a Magistrate that the accused may have to be given a heavier sentence than what he/she could impose, it would not be proper for the Magistrate to straightway act under Section 325 of the Code and forward the case to the Chief Judicial Magistrate without forming an opinion that the accused is guilty. The mandate of Section 325 of the Code is clear and specific. It is only when a Magistrate is of the 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 the Magistrate is empowered to inflict. There should be a case where the sentence ought to be even for more than a Chief Judicial Magistrate can award, there will be no difficulty to the Magistrate forwarding the case to the Chief Judicial

Magistrate in so far as Section 325(3) of the Code provides that Chief Judicial Magistrate can pass any order which he thinks fit but it is just possible only after hearing of the evidence for the prosecution and the defence and only then Magistrate can opine that the accused is guilty. After hearing the evidence for the prosecution and the defence, Magistrate might opine that the accused is not guilty and in that case it would be perfectly open to him to acquit the accused. Forwarding cases to the Chief Judicial Magistrate without reaching the stage where Magistrate could form an opinion of guilt, but which are likely to end in an acquittal after hearing the evidence for the prosecution and the defence under Section 325 of the Code merely because it appears to him from the nature of the allegations that, in the remote prospect of the accused being convicted he/she might not be able to award adequate sentence, would be wasting the precious time of the Court, as after all the Magistrate is quite competent to try the case and acquit the accused, if he/she so find the accused not guilty. Section 325 of the Code should be resorted to only when the Magistrate opines that accused is guilty of offence and he may have to be given a heavier sentence than what he/she could impose.

11. In the case on hand, learned JMFC, without hearing the defence and prosecution evidence and without referring the evidence on record has without any basis, by a cryptic order opined that the accused are guilty of offence. A reading of provisions makes it is clear that only after reaching the stage contemplated in Section 325(1) of the Code that the accused was guilty and deserve a more severe punishment than what he/she could have imposed, he/she should have resorted to Section 325 of the Code.

12. Adverting to the facts of the present case, it is apparent that the learned Judicial Magistrate First Class without reaching the stage contemplated

in Section 325(1) of the Code, by a cryptic order has opined that accused are guilty and deserve a more severe punishment and has ordered for forwarding the case to the Chief Judicial Magistrate which is apparently incorrect. The Magistrate cannot forward the case straightway to the Chief Judicial Magistrate if he/she is merely of the view that accused deserves a heavier sentence than what he/she should impose.

13. 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 marshaling entire evidence led before it would virtually be an exercise almost equivalent to passing of a judgment but under scheme of the Code, the Chief Judicial Magistrate is still competent to admit fresh evidence and differ with the opinion of the Magistrate.

14. In this regard, provisions of Section 248 of the Code are also relevant which reads as under:

248. Acquittal or conviction.-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) Where, in any case under this Chapter, a previous conviction is charged under the provisions of Sub-Section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused, take evidence in respect of the alleged previous conviction, and shall record a finding thereon;

Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under Sub-Section (2).

15. A perusal of Section 248 of the Code shows that the Magistrate in a case under the Chapter in which charge has been framed, acquit the accused but in case he finds him guilty, he may either proceed under Section 325 of the Code or under Section 360 of the Code 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 of the Code 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 Section 325 of the Code or for releasing him on probation under Section 360 of the Code or imposing sentence upon the accused are of the same nature and kind and different kinds of proceedings are not visualised.

16. In view of foregoing discussion and reasons mentioned hereinabove, I am of the considered view that Magistrate is only required to form an opinion by recording the same in the form of a short but speaking and reasoned order referring the evidence for prosecution and defence in brief for forming an opinion of guilt and then refer the matter to the Chief Judicial Magistrate. Even

if, a final opinion has been recorded in the form of judgment in case of more than one accused where one or more of them have been convicted for the charge, and some has been acquitted of the charge, the same shall not be binding on the Chief Judicial Magistrate to the extent of accused who have been convicted and whose case has been forwarded to it under Section 325 Cr.P.C. and shall be considered as opinion. The Chief Judicial Magistrate shall be required to pass a final judgment independently and if he come to conclusion on appreciation of evidence that a judgment of conviction is required to be passed, he shall pass the same while awarding appropriate sentence.

17. Consequently, this petition is **allowed**. The impugned order passed by learned 16th Additional Sessions Judge, Jabalpur and impugned order dated 26.04.2023 passed by learned Judicial Magistrate First Class, Jabalpur being cryptic and bereft of reasons, are set aside.

(DINESH KUMAR PALIWAL)
JUDGE