

HIGH COURT OF AZAD JAMMU & KASHMIR
[Shariat Appellate Bench]

Revision petition No.49/2021.
Date of institution 18.05.2021.
Date of decision 17.02.2022

Muhammad Najeeb S/o Sardar Khan, Jatt by caste, R/o Sokasan,
Tehsil & District Bhimber.

...Petitioner

VERSUS

1. Sami Ullah S/o Muhammad Shabbir, Jatt by caste, R/o Sokasan, Tehsil & District Bhimber;
2. The State through Additional Advocate General having his office at Mirpur.

CRIMINAL REVISION PETITION

Before:- ***Justice Mian Arif Hussain, J.***

PRESENT:

Ch. Khuram Saif Ali, advocate for the petitioner.

Raja Sohail Shamim, advocate for respondent no.1.

ORDER:

Through the captioned revision petition, the validity of order passed by learned Sessions Judge Bhimber, dated 21.04.2021, has been challenged, whereby, order dated 13.02.2021, passed by Judicial Magistrate 1st Class Bhimber regarding grant of bail was concurred with.

Facts necessary for disposal of the instant revision petition are that Muhammad Najeeb, the petitioner herein moved an application before Choki Officer Bhimber Dheri Wattan, alleging therein that his son namely Muhammad

Ahsan 13 years old, told him that on 30.12.2020, when he, after saying his Assar prayer at 4:30 pm was going to bring vegetable, as he reached below the narrow street, then Samiullah S/o Muhammad Bashir alongwith two other co-accused caught him and took him to desolate place and attempted to commit an unnatural offence with him but upon hue and cry, the accused Samiullah fled away from the scene of occurrence.

Upon the said complaint, FIR No.10/2021, in the offences under Section 377/A(3) Azad Penal Code (APC) was got registered. The accused-respondent Samiullah was taken into custody. After necessary investigation challan of the case under Section 173 Cr. P. C was submitted, thereafter, the accused-respondent Samiullah moved an application for his bail after arrest in the Court of Judicial Magistrate 1st Class Bhimber on 10.02.2021, which was allowed. Said order of the Court was assailed before Sessions Judge Bhimber. Learned Sessions Judge Bhimber, while concurring with the findings of Judicial Magistrate 1st Class Bhimber, dismissed the application moved on behalf of petitioner herein, hence, the instant revision petition.

Learned counsel for the petitioner after narrating the facts of the case at some length contended that offence is of heinous nature which was committed with a minor but the learned Courts below without dilating upon the nature of offence have wrongly declared the matter of further inquiry. It was argued that solitary statement of the victim was sufficient one to adjudge the veracity of the allegation as the minor cannot tell a lie regarding commission of offence of such nature. It was argued that delay in lodging the FIR has sufficiently been narrated which in view of the nature of offence could be taken as plausible reason. He further maintained that learned Judicial Magistrate as well as Sessions Judge passed the impugned orders in a hasty manner, resultantly, the material facts of the case were skipped over. It was urged that Judicial Magistrate, in view of the jurisdiction was not competent to adjudicate upon the matter hence, this sole ground is sufficient to recall the impugned orders. Learned advocate further argued that though the question of jurisdiction has not been raised before the Courts below, however, it is an admitted proposition of law that there is no estoppel against the question of law,

therefore, impugned orders regarding concession of bail may graciously be recalled.

Conversely, learned counsel representing the accused-respondent vehemently argued that in view of penalty proposed under Section 377/A(3) APC, Judicial Magistrate vested with the powers under Section 30 Cr. P. C, is very much competent to adjudicate upon the matter. It was argued that said question of want of jurisdiction has not been raised before the Courts below, so, at this stage, the same cannot be agitated. It was maintained that the matter was reported after a delay of 15 days and no plausible reason has been assigned, moreover, no incriminating material including medical report supports the prosecution story, therefore, in view of the available material the judicial magistrate has rightly allowed the bail which was concurred with by the learned Sessions Judge Bhimber, so, the revision petition in hand being devoid of substance may be dismissed.

Heard. Record perused.

Through the instant criminal revision petition, the vires of the orders of learned Judicial Magistrate dated 13.02.2021 and learned Sessions Judge Bhimber dated 21.04.2021 respectively have been challenged. In the revision petition,

though, the question of want of jurisdiction of the Court seized with the bail application has not been raised, however, the learned counsel for the complainant-petitioner herein, during his arguments has strenuously agitated the said question of jurisdiction. So, it deems appropriate that the matter of jurisdiction be attended first.

In Azad Jammu & Kashmir, through criminal Law (3rd amendment) Act, 2020 amendments in “The Azad Penal Code 1860 (Act XIV of 1860) and in the Code of Criminal Procedure 1898 (Act V of 1898) have been introduced, through which in The Azad Penal Code” 1860, after Section 377, new Section 377-A has been added as:-

“377-A. Rape or Unnatural offence with minor:- (1) Whoever commits rape or unnatural offence with a minor shall be punished with death, or imprisonment for life, or castration alongwith imprisonment which may extend to ten years and fine, which may extend to five million rupees but shall not be less than two million rupees:

Provided that for the purposes of this Section, minor shall be a person of either sex, who has not attained the age of eighteen years.

(2) Surgical castration shall be performed on the convict by an authorized surgeon and where the surgeon is of the opinion that surgical castration may cause death of the convict, the chemical castration of permanent nature shall be performed.

(3) Whoever attempts to commit an offence under sub-section(1) shall be punished with imprisonment which may extend to ten years but

shall not be less than five years or fine which may extend to 2 million rupees but shall not be less than one million or with both. ”

From the said amendment, it depicts that new section 377-A, is consisted of three sub-sections. Sub-section (1) provides penalty of death or imprisonment for life or castration alongwith imprisonment which may extend to ten years and fine, and sub-section (2) deals with the process of castration, whereas, sub-section (3) provides penalty of imprisonment extending to ten years alongwith restriction that said penalty shall not be less than five years or fine which may be extended to two million rupees but shall not be less than one million or with both.

Through the said amendment, schedule II Act, V of 1898, has also been amended as:-

Amendment of Schedule II, Act V of 1898:- In the Code of Criminal Procedure, 1898 (Act V of 1898):-

(a) In Schedule II in column 1, after Section 377 and the corresponding entries relating thereto in columns, 1,2,3,4,5,6,7 and 8, the following shall be inserted, namely:-

1	2	3	4	5	6	7	8
377/A	Unnatural offence	May arrest without warrant	Warrant	Not bailable	Not compoundable	i)With death or imprisonment for life, or castration along with imprisonment which may extend to ten years and fine, which may extend to five million rupees but shall not be less than two million rupees. ii) imprisonment for ten years but not less than five years or fine which may extend to two million rupees but not less than one million or with both.	Court of Sessions

The learned counsel for the petitioner while inviting the attention of the Court to the relevant Column of schedule-II dealing with the jurisdiction has tried to strengthen his argument regarding lack of jurisdiction.

Through the said amendment, a new Section 377-A in Azad Penal Code has been introduced and new tabular statement regarding said offence, in Schedule II has also been provided and in Column 8 “which deals with the matter that which of the Court is competent to try the offence” the words “Court of Sessions” have been inserted.

The question is as to whether, keeping in view the penalty provided for commission of offence under Section 377 A (3), the Judicial Magistrate vested with the powers under Section 30 Cr. P. C, is competent to try or deal with the bail petition or not?

In order to determine the said question resort to Chapter III of Cr. P. C, which deals with the powers of Courts will be helpful. The said chapter provides description of offences cognizable by different Courts. Relevant sections dealing with the proposition are reproduced as under:-

“28. Offences under Penal Code. Subject to the other provisions of this Code any offence under the Penal Code may be tried.

(a) by the High Court; or

(b) by the Courts of Sessions; or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.”

29. Offences under other laws. (1) *Subject to the other provisions of this Code, any offence under any other law shall when any Court is mentioned in this behalf in such law, be tried by such Court.*

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offences shown in the eight column of the second schedule to be triable.

“30. Offences not punishable with death. *Notwithstanding anything contained in sections 28 and 29, the Provincial Government may invest any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.”*

From the bare reading of the Section 30, it reflects that any Magistrate is authorized to try any case except those in which sentence of death is provided, however, Section 34 Cr. P. C puts embargo and restricts the powers to award penalty beyond seven years. The said section reads as under:-

“34. Higher powers of certain Magistrate:- *The Court of a Magistrate specially empowered under Section 30, may pass any sentence authorized by law, except a sentence of death or imprisonment for term exceeding seven years.”*

From the above, it can be inferred that any Magistrate vested with the power under Section 30 Cr. P. C is competent to try all offences except the offence for which death penalty is provided and keeping in view the embargo put under Section 34 Cr. P. C, such Magistrate can award the punishment up to seven years, meaning thereby, that there is no limitation to try any of the offence except for which death penalty is provided and the limitation provided only regulates the punishment. In support of said point of view following judgments may be referred:-

In a case titled "*Mohsin Ali Vs. Additional Sessions Judge & another (PLD 2013 Lah, 12)*" while dealing with the proposition of entrustment of the case from Magistrate to the Additional Sessions Judge under the order of Sessions Judge regarding offences under Section 377 PPC, it has been observed as:-

"In view of the schedule II, the said offence has been shown triable by the Court of Sessions but this question that whether the said offence is triable by the Court of Sessions or by Magistrate, the answer has been contained in the case of Allah Wasaya and Noor Hussain wherein it has been observed by the Hon'ble Supreme Court that the quantum of punishment does not itself take away the power of taking

cognizance or trying a case which should have been done under Section 187 of the Sea Customs Act itself. It is observed that the limit of the powers of awarding punishment does not affect the competence of Court to try a case. The Magistrate is duly competent to try the case but all that he cannot do is to impose a sentence which is in excess of his power.

In the said case law the Hon'ble Court has further observed as:-

“judgments made one thing clear that mere quantum of punishment is not enough to take away the jurisdiction of the Court to try the offence. In this connection Section 30 of the Code clearly manifests that the Magistrate 1st Class may try all the offences the punishment of which does not involve sentence of death.”

In a case titled “*Zulfiqar Ali vs. The State [1993 Pcr. L. J (S. C) AJK 932]*,” while dealing with the proposition as to whether the offences under Section 419, 420, 467, 468 and 471 are triable by Magistrate 1st Class vested with the power under Section 30 Cr. P. C or be tried by the Special Judge Anticorruption, it is observed as:-

“challan of the case was submitted in the offences quoted hereinabove before the Magistrate 1st Class with Section 30, powers in territorial jurisdiction, the alleged offences were committed by the respondent. In these circumstances it is observed that the learned Additional Sub-Judge/Magistrate 1st

Class with Section 30 powers has jurisdiction to try the case. Therefore, the case is remanded to the said Court to proceed with the trial of the case in accordance with law.”

Though, in the said case law, the proposition was different one from the proposition in hand, however, a guideline in terms of powers of Magistrate regarding the trial of offence under Section 467 APC, may be inferred, in view of the proposition that though the said offence in the light of schedule II has been shown triable by the Court of Sessions but in the judgment of Hon’ble apex Court, Magistrate 1st Class has been declared competent to try the said offence.

In a case titled “*Allah Wasaya & others vs. Sikandar Hayat & others [2012 SCMR 193]*” It is observed as:-

“So far as, the contention that the Magistrate under Section 30 cannot try the offence under Section 336 PPC is concerned, the learned High Court adverted to this respect and held that in terms of Section 30 Cr. P. C, Magistrate 1st Class empowered under Section 30 Cr. P. C can try all the offences except those punishable with death. The aforementioned observation/findings have not been found by us to be against the law declared.”

In a case titled “*Syed Azhar Hussain Shah and others vs the State & others*” (2019 SCMR 537), it has been observed as:-

“According to the Second Schedule to the Code of Criminal Procedure, 1898 an offence under Section 324, P. P. C. is triable by a Court of Session and the said Schedule had been appended to the Code by virtue of the provisions of section 28 of that Code whereas section 30 of the said Code clearly provided that notwithstanding anything contained in sections 28 and 29 of the Code the Provincial Government may invest any Magistrate of the first class with power to try as a Magistrate of offences not punishable with death. In the case in hand the trial of the appellant was conducted by Magistrate invested with such power under Section 30 of the Code and, thus, there was no jurisdictional infirmity vis-à-vis the authority of the concerned Magistrate to try the appellant for offences under Sections 324, 334 and 336, P. P. C. It may be true that section 34 of the Code provides that the Court of a Magistrate specially empowered under section 30 of the Code may pass any sentence authorized by the law except the sentence of death or imprisonment for a term exceeding seven years but that limitation on the sentence to be passed by a Magistrate only regulates the punishment and not the jurisdiction.”

In Azad Jammu & Kashmir for trial of offences affecting Human Body Enumerated in chapter XVI of APC and offences under Hadood laws etc., special Courts known as Tehsil Criminal Courts, consisting of two members

Judicial Magistrate and Tehsil Qazi and District Criminal Courts consisting of Sessions Judge and District Qazi have been constituted in terms of Islami Tazirati Qawaneen Act. So, in view of said different composition of Courts in Azad Jammu & Kashmir regarding the trial of offences under Section 324, 334 and 336 APC, the case law referred supra (2019 SCMR 537) does not directly attract in determining the question of powers of judicial magistrate, however, it is an admitted position that the trial of offences under Sections 324, 334 and 336 APC is conducted by the Tehsil Criminal Court comprising of Judicial Magistrate and Tehsil Qazi, therefore, keeping In view the similitude in terms of powers of a Judicial Magistrate in Pakistan and Tehsil Criminal Court in Azad Jammu & Kashmir, the said case law is validly helpful in the proposition in hand.

In view of above discussion it is observed that though according to schedule II, a number of offences has been shown triable by the Courts of Sessions but admittedly, said offences are being tried by the Judicial Magistrate in terms of Section 30 read with Section 34 Cr. P.C, so, by concluding the discussion, it is held that the Judicial Magistrate equipped with the power of Section 30 Cr. P. C can try all offences

except the offences for which sentence of death is provided and may pass any sentence of imprisonment up to seven years.

Now I advert to the case in hand and try to find out as to whether in view of the penalty provided for the offence under Section 377 A(3) APC, Judicial Magistrate Bhimber was competent to entertain the bail petition of the accused-respondent or not?

Admittedly, the case against the accused-respondent was got registered under Section 377 A(3) APC for which maximum penalty of ten years imprisonment has been provided alongwith the condition that this penalty shall not be less than five years, meaning thereby, that penalty of ten years imprisonment is not as absolute penalty. So, in the matter in hand it can be observed that Judicial Magistrate Bhimber vested with the power under Section 34 Cr. P. C was validly competent to entertain the bail application.

So far as, the question of concession of bail on merits is concerned, admittedly the accused-respondent was arrested and was investigated for a considerable time and after submission of challan before the Court, he applied for bail. Keeping in view the delay in lodging FIR, non-availability of incriminating material,

learned Judicial Magistrate allowed the bail application filed on behalf of the accused-respondent which was upheld by the Sessions Judge.

In view of the overall circumstances of the case, the impugned orders regarding concession of bail appear not to be suffered from any legal infirmity, moreover, no ground for cancellation of bail has been agitated in the revision petition, whereas, under law once the bail is granted by a Court of competent jurisdiction the same cannot be recalled until and unless it is proved that the accused is misusing the concession of bail or tempering the prosecution evidence or threatening the witnesses. In this regard reliance may be placed on a case law titled Tariq Bashir & others vs. the State [PLD 1995 SC 34].

The epitome of the above discussion is that the impugned orders do not warrant any interference by this Court. Resultantly, the instant revision petition being devoid of substance stands dismissed.

Circuit Mirpur,
17.02.2022(MN)

-Sd-
JUDGE

Note: Judgment is written and duly signed. The office is directed to intimate the parties or their counsel in accordance with law.

-Sd-
JUDGE