

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : Crl. Rev. No.64-2017

Rizwan Shabbir Kiyani

Vs.

The State etc.

Petitioner by : Raja Rizwan Abbasi, Advocate
Mr. Wajid Hussain Mughal, Advocate
Respondents by : Mr. Sarfraz Ali Khan, State Counsel with
Muhamad Akram, IO/SI.
Mr. Muhammad Asif Tanoli, Advocate for
accused.
Date of decision : 12.06.2017

AAMER FAROOQ J. The instant Criminal Revision is directed against orders dated 18.05.2017 as well as 23.05.2017 passed by Judicial Magistrate (1st) Class (West), Islamabad and Sessions Judge (West), Islamabad respectively.

2. The facts, leading to the filing of instant petition, are that a FIR (FIR No.52-2017) dated 01.03.2017 was lodged at P.S. Margalla, Islamabad under sections 394/511 PPC. In the referred FIR, certain persons were nominated as accused. The police investigated the matter and after that, filed report under section 173 Cr.P.C. before respondent No.4 i.e. Judicial Magistrate, 1st Class (West), Islamabad/Area Magistrate, P.S. Margalla, Islamabad. Supplementary police report was submitted in the FIR adding offence under section 337(A)(iii) PPC before learned Judicial

Magistrate. The referred court, on 18.05.2017, observed that since the offences are not triable by Judicial Magistrate, 1st Class, therefore the matter be placed before the Session Judge (West), Islamabad for appropriate orders. On 23.05.2017, the learned Sessions Judge, Islamabad entrusted the matter to the learned Magistrate, Section 30, P.S. Margalla, Islamabad.

3. Learned counsels for the petitioner, *inter alia*, submitted that the procedure adopted by the learned Judicial Magistrate, 1st Class, Islamabad-West/respondent No.4 as well as the Sessions Judge/respondent No.2 is not in accordance with law and is contrary to the provisions of Section 190 (2) as well as 193 Cr.P.C. In this behalf, it was contended that reference could only be made to the Sessions Judge concerned, if the offence is exclusively triable by the Sessions Court whereas in the instant case, the offences are triable by the Session Court or Judicial Magistrate, 1st Class; that if at the time of passing sentence, if the Magistrate concerned is of the opinion that the sentence, he wishes to award to the accused, is beyond jurisdiction only then, the matter shall be referred to the Session Court for the said purpose. In the alternative, it was argued that even if, the Magistrate at the inception is of the opinion that the matter is beyond jurisdiction, then he may return the report under section 173 Cr.P.C. for filing of the same before the court of competent jurisdiction, but cannot

send reference as was done in the instant case. In support of their contentions, learned counsels placed reliance on cases reported as 'Wasaya and Others Vs. Sikandar Hayat and Others' (2012 SCMR 193), 'Mohsin Ali Vs. Additional Sessions Judge, Faisalabad and Another' (PLD 2013 Lahore 12) & Rao Fahd Ali Khan Vs. The State & Another' (2014 P.Cr.LJ 1071).

4. Learned counsel for the accused entered appearance and submitted that offence is to be tried by Judicial Magistrate, Section 30 and Judicial Magistrate, 1st Class, is not competent. It was further contended that the instant petition is just a dilating tactic on behalf of petitioner to delay the adjudication of the trial and hearing of the bail petition filed by the accused. In support of their contentions, learned counsel placed reliance on cases reported as PLD 2017 Lahore 106 & PLD 2013 Lahore 12.

5. Schedule-II to the Code of Criminal Procedure, 1898 provides the table of offences provided in Pakistan Penal Code and *inter alia* the Court by which the same are to be tried. In this behalf, offences under Sections 337(A)(iii) and 394 PPC are to be tried by court of Session or Magistrate, 1st Class and Section 511 PPC by the court which the offence attempted is triable. Hence, in the instant case, the offence are triable by the court of session or the Magistrate, 1st Class. Under Section 190 (1) of Code of Criminal Procedure, 1898 (Cr.P.C.), all Magistrates of the 1st Class or any

other Magistrate specially empowered by the Provincial Government on the recommendation of the High Court, may take cognizance of an offence, upon receiving a complaint of facts, which constitute such offence; upon a report in writing of such facts made by any police officer; upon recommendation received from any person other than police officer or upon his knowledge of suspicion with such offence has been committed, which he may try or send to the court of Session for trial. Under subsection (2) of Section 190 Cr.P.C. the Magistrate, taking cognizance under subsection (1) of an offence triable exclusively by a court of Session, shall without recording any evidence, send the case to the court of session for trial. Under section 190 Cr.P.C., the report under section 173 Cr.P.C. is to be filed by the police before the concerned Magistrate and if he is of the opinion that such offence is committed, he may try the offence or send to the court of Session for trial. Where a Magistrate takes cognizance of a case exclusively triable by a court of Session, he shall without recording any evidence, send the case to the Court of Session for trial.

6. In the instant case, the offences in question are triable either by court of Session or Magistrate of 1st Class/. Since the offences are not exclusively triable by the Court of Session therefore the matter should not have been referred under section 190(2) Cr.P.C.

Similarly, under section 193 Cr.P.C., the Court of Session is not to take cognizance of any offence as the court of original jurisdiction unless the case has been sent to it under section 190(2) Cr.P.C. by a Magistrate duly empowered in this behalf. The power/jurisdiction of the court of Magistrate to pass sentence is provided in Section 32 Cr.P.C. and in this behalf, the court of Magistrate 1st Class may pass sentence of imprisonment for a trial not exceeding three years, however, under section 30 ibid, the Provincial Government may confer upon any Magistrate of the 1st Class with power to try as a Magistrate of offences not punishable with death. The maximum sentence attracted, in the instant case, is 10-years which is beyond the jurisdiction/competence of the Judicial Magistrate of 1st Class in light of Section 32 Cr.P.C.

7. The procedure, which is adopted in such like cases, came under consideration before the Hon'ble Supreme Court of Pakistan in case reported as 'Wasaya and Others Vs. Sikandar Hayat and Others' (2012 SCMR 193) and it was observed that in terms of Section 30 Cr.P.C., a Magistrate 1st Class is empowered to try all offences except those punishable with death. The matter was further lucidly discussed in case reported as 'Mohsin Ali Vs. Additional Sessions Judge, Faisalabad and Another' (PLD 2013 Lahore 12) and it was observed as follows:-

“8. Now the question left for determination is whether offence under section 367, P.P.C. is triable by the Court of Session or by a Magistrate 1st Class having the powers under section 30 of Cr.P.C. The answer to this question is contained in the cases of Allah Wasaya and Noor Hussain (supra). It was observed by the Hon'ble Supreme Court in both precedent cases that the quantum of punishment does not itself take away the powers of taking cognizance or trying a case which should have been done under section 187 of the Sea Customs Act itself. It is further observed that the limit on the power of awarding punishment does not affect the competence of a 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 powers. In the case of Allah Wasaya (supra), it was observed by the apex Court that in terms of section 30 of Cr.P.C. a Magistrate of 1st Class could try all offences except those punishable with death. In this case the offence charged against the culprits was under section 336, P.P.C., which was triable by Court of Session as per 2nd Schedule of Code (supra). These judgments make 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 (supra) clearly manifests that the Magistrate of 1st Class may try all the offences the punishment of which does not involve sentence of death. In this respect it is further observed that 2nd Schedule of the Code, according to section 28(3) governs the cases triable by the Courts of different kind. This section cannot be read in isolation to section 30, which contains non obstante clause making an exception that a Magistrate can try all offences not punishable with death. This provision of the section 30 Cr.P.C excludes applicability of section 28 in clear terms by making an exception to it in respect of Courts mentioned in the column 8 of 2nd Schedule. Accordingly, a Magistrate 1st Class with powers under section 30 Cr.P.C. has the jurisdiction to try all those offences, which are not punishable with death. In view of this legal position, one can say safely that the order passed by the Judicial Magistrate on 4-11-2010 by sending Reference to learned Sessions Judge for entrusting the case to the Court of Session as offence under section 367, P.P.C. not triable by it, is an illegal exercise of jurisdiction by the Court concerned. Further the learned Sessions Judge had exercised its jurisdiction mechanically by entrusting the trial of the case to the Court of Addl. Session Judge without examining the fact that a Magistrate section 30 may try all the offences except those involving death sentence.”

Similarly, in case reported as ‘Noor Hussain Vs. The State’ (PLD

1996 Supreme Court 88), it was observed as follows: -

“Section 187 of the Sea Customs Act provides that all offences under the Sea Customs Act, except those cognizable under section 182, may be tried summarily by a Magistrate, provides that the Schedule thereto, so far as they concern special goods, they shall be tried by a Court having powers not inferior to those of a Magistrate of the First Class. It will be observed from this that the quantum of the punishment does not by itself take away the power of taking cognizance of or trying a case, which could have been done under section 187 of the Sea Customs Act itself. The limit on the powers of awarding punishment does not affect the competent of a Court to try the 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 powers. In the present case, the sentence imposed, as already stated, was of the duration of two years which was well within the powers of a Magistrate of the First Class in accordance with the Third Schedule to the Criminal Procedure Code”

In view of the above judgments mere fact that quantum of punishment is beyond the powers of a Magistrate is not enough to take away the jurisdiction of the court to try the offence. In the Second Schedule to Cr.P.C, the offences in question are triable by Judicial Magistrate, 1st Class or Court of Session therefore the Judicial Magistrate, 1st Class does have the jurisdiction in the matter. The fact that the sentence prescribed for the offences in question is beyond the competence of the Judicial Magistrate, 1st Class would not take away his jurisdiction. Even otherwise, if a court is of the opinion that the matter is beyond jurisdiction/competence, reference cannot be send to the Session Court under section 190 Cr.P.C rather report under section 173 Cr.P.C. is to be returned for filing of the same before the court of competent jurisdiction. Reference in this regard is placed on case

reported as Rao Fahd Ali Khan Vs. The State & Another' (2014 P.Cr.LJ 1071). In case reported as *Hassan versus The State and another* (PLD 2017 Lahore 106) the Honourable Lahore High Court observed as follows:

10. Undoubtedly, an Assistant Sessions Judge is a judicial officer, who for all purposes, exercises powers which vest in Magistrate Section-30 of the Code. Meaning thereby that a Magistrate Section-30 can rightly be termed as an Assistant Sessions Judge. In this way, a Magistrate Section-30 is not competent to impose sentence to an accused beyond 07 years' imprisonment.

11. From the above mentioned discussion, it is evident that competency of the learned Trial Court, being Magistrate Section 30 was to award maximum sentence of 07 years' R.I. In this way, as provided under Section 439(3) of the Code, the learned revisional court was not competent to enhance the sentence, beyond jurisdiction of the learned Trial Court.

8. In view of above, instant Criminal Revision is allowed. The impugned orders dated 18.05.2017 as well as 23.05.2017 are set aside. Consequently, the report under section 173 Cr.P.C. shall be deemed to be pending before Judicial Magistrate, 1st Class, P.S. Margalla Islamabad, who shall act in accordance with law and observations made hereinabove.

(AAMER FAROOQ)
Judge

Zawar