

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Case : Crl R No. 56/2024

Reserved on: 06.03.2025

Pronounced on: 18.03.2025

Johar Mehmood
S/o Late Mehmood Ahmed Ganie
R/o H. No. 21, Sector 01 Pamposh Colony,
Janipur, Jammu-1,
At present lodged in District Jail Amphalla, Jammu.
(Person with unsound mind)

Through his Mother Rashida Begum
W/O Late Mehmood Ahmed Ganai
R /o Village Mohalla Haveli Tehsil Bhaderwah,
District Doda

...Petitioner(s)

Through: Mr. Ajay Awasthi, Advocate with
Mr. N. D. Qazi, Advocate

VERSUS

1.U.T. of Jammu and Kashmir
Through Principal Secretary to Govt.
Home Department, Civil Secretariat,
Jammu (J&K).

2. The SHO Police Station, Janipur
Jammu (J&K)

3. In-Charge SIT constituted
In FIR No.27 /2023 PS Janipur,
Jammu (I&K).

...Respondent(s)

Through: Mr. Pawan Dev Singh, Dy.AG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE.

JUDGMENT

18.03.2025

1. The petitioner through the medium of the present petition has challenged order dated 22.10.2024 passed by the learned Principal Sessions Judge, Jammu whereby the application of the petitioner under Section 329 of the Cr.P.C has been dismissed.

2. I have heard learned counsel for the parties and perused record of the case.

3. It appears that a charge sheet arising out of FIR No.27/2023 for offences under Section 302 IPC is pending against the petitioner before the Court of learned Principal Sessions Judge, Jammu. It seems that an application under Section 328 of the Cr.P.C was made by the petitioner before the Court of learned JMJC (City Judge), Jammu seeking an enquiry into the status of his mental health, as according to the petitioner, he was incapable of making his defence on account of unsoundness of his mind. The said application came to be dismissed by the learned Magistrate vide order dated 12.08.2024 by observing that the challan at the relevant time had been committed to the Court of learned Principal Sessions Judge, Jammu, as such, the learned Magistrate did not have jurisdiction to consider the said application.

4. The aforesaid order came to be challenged by the petitioner before this Court by way of a petition under Section 482 Cr.P.C which was registered as CRM(M) No. 686/2024. The said petition was disposed of by this Court in terms of order dated 30.08.2024 and it was observed that power to hold an enquiry in terms of Section 329 of the Cr.P.C is vested with the Magistrate or the Court of Sessions and in the present case without taking recourse of said remedy the petitioner could not have approached the High Court.

5. It seems that pursuant to the aforesaid order of this Court, the petitioner moved an application under Section 329 of the Cr.P.C before the learned Principal Sessions Judge, Jammu. By virtue of the impugned order the said application has been rejected by the learned Sessions Judge on two grounds, one that trial in the case is yet to commence and as such, power under Section 329 of the Cr.P.C cannot be exercised by the Court at this stage and secondly that on

the basis of the material on record and the background circumstances, the petitioner appears to be trying to escape the proceedings under law with a view to delay the trial.

6. In the instant petition, it has been submitted that the petitioner is under psychiatric treatment since the year 2012 and he has been diagnosed with “Obsession with delusional intent” by the doctor. It has been further submitted that upon re-examination of the petitioner at SKIMS on August 31, 2023 he was diagnosed with psychotic and depressive features and was advised to undergo further psycho diagnostic assessment and follow up. It has also been submitted that on September 4, 2023 the petitioner underwent surgery for Ileostomy at SKIMS and was discharged on September 14, 2023. It has been submitted that on October 3, 2023 he was examined at Government Psychiatric Diseases Hospital Srinagar where after he was arrested on October 14, 2023. The petitioner has placed on record the medical prescriptions issued by the various doctors/hospitals to press home the contention that he is not in such a mental condition as would render him capable of making his defence. It has been claimed that at least for ascertaining whether or not the petitioner is in such a mental condition as would render him incapable of making his defence, a trial is required to be undertaken in terms of Section 329 of the Cr.P.C.

7. In order to determine the merits of the contentions raised by the petitioner in the present petition, it would be apt to notice the provisions contained in Section 329 of the Cr.P.C, which is relevant to the context. The same reads as under:-

“329. Procedure in case of person of unsound mind tried before Court.

(1)If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such

person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

[(1-A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be, report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of-

(a) head of psychiatry unit in the nearest Government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

[2] If such Magistrate or Court is informed that the person referred to in sub-Section (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Section 330:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused. (3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with Section 330. [Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 26 (b), for sub-Section (2) Prior to its substitution, sub-Section (2) read as under : - [(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate of Court].]

8. A perusal of the provisions contained in Section 329 of the Cr.P.C as quoted above would reveal that the same come into play once trial of the case

commences. Sub-section (1) & (2) operate at different stages of the trial. Sub-section (1) comes into play prior to the conclusion of the prosecution evidence. This is clear from the use of expression “if at the time incapable to making his defence”. Thus, if at this stage the Court comes to the conclusion that owing to unsoundness of an accused he/she is incapable to defend himself/herself in a trial and the Court is satisfied that the said fact is based on medical or other evidence produced before it, the Court has to record a finding to this effect and postpone further proceedings in the case.

9. So far as sub-section (2) of Section 329 of the Cr.P.C is concerned, it operates at a stage after the prosecution evidence has been closed and the stage of entering the defence of the accused sets in. This is clear from the use of expression “unsoundness mind rendering the accused incapable of entering his defence”. If at this stage accused is found incapable of entering his defence because of his unsoundness of his mind, the Court has to examine the record of evidence, hear the counsel for the accused, whereafter the accused may be discharged, if the Court finds that no case is made out against the accused instead of postponing the trial. However, if on examining the record of evidence, the Court finds that a prima facie case is made out against the accused regarding whom a finding of unsoundness of his mind is arrived at, then in that eventuality the Court has to postpone the trial.

10. It also needs to be noticed that the trial of a case commences upon framing of the charges. Therefore, Section 329 of the Cr.P.C would come into play only after the framing of the charges and not prior to that.

11. In the present case, admittedly the charges are yet to be framed, therefore, the learned trial Court is right in holding the application as pre-mature.

However, so far as the observations of the learned trial Court regarding the contentions of the petitioner on merits are concerned, this Court purposely refrains from making any comment on the same, because the matter needs to be re-examined by the learned trial Court afresh, once trial of the case commences. Therefore, without committing upon the merits of the case lest it may prejudice the case of the parties, it would be appropriate to remand the application of the petitioner to the trial Court for passing fresh orders on the same after the trial of the case commences.

12. For what has been discussed hereinabove, the instant petition is disposed of with a request to the learned trial Court to consider the application of the petitioner afresh after the trial of the case commences. The learned trial Court shall, however, decide the application without getting influenced by its observations made on merits of the case in the impugned order.

13. The instant petition is disposed of in the above said terms.

14. A copy of this order be forwarded to the learned trial Court for information.

(Sanjay Dhar)
Judge

JAMMU
18 .03.2025
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Whether order is reportable: Yes