

A.F.R.
Reserved on : 06.07.2022
Delivered on : 22.07.2022

Case :- APPLICATION U/S 482 No. - 21859 of 2021

Applicant :- Sukhbir Singh

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Prakhar Saran Srivastava, Sr. Advocate

Counsel for Opposite Party :- G.A., Anurag Pathak, Harshit Pathak

Hon'ble Brij Raj Singh, J.

The present application has been preferred with prayer to allow this application and quash the orders dated 29.09.2021 and 11.10.2021 passed by Additional Chief Judicial Magistrate, Room No.1, Bareilly in Case No.1091 of 2021 (State Vs. Sukhbir & another) arising out of Case Crime No.463 of 2017, under Sections 201 and 306 I.P.C., Police Station Bhojipura, District Bareilly with further prayer to stay the entire proceeding of aforesaid case.

FACTS

2. Brief facts of the case are that F.I.R. under Section 306 I.P.C. in Case Crime No.463 of 2017, Police Station Bhojipura, District Bareilly was lodged by the informant. As per the F.I.R. it is narrated that deceased came to Shri Ram Murti Smarak Medical College on 03.09.2017 but she died in mysterious condition on 06.09.2017 in the hostel. In the F.I.R. it has been further mentioned that out of result of ragging she died in the hostel.

3. The case was investigated and during investigation name of the applicant came into light on the statement of room-mate of the deceased, namely, Nupur and Harshita who were friends of deceased Ananya and charge sheet was filed and summons were issued on 27.08.2011.

4. On the request of informant, CBCID enquiry was carried and closure report was filed on 11.02.2020 by which the applicant was exonerated.

5. The Magistrate issued notice to informant upon closure report on 07.08.2020.

6. The applicant applied for anticipatory bail by filing Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.7616 of 2020 which was allowed vide order dated 23.11.2020 and while granting anticipatory bail the Court directed the trial court to pass an order upon the contradictory reports filed by two investigating agencies within two months from the date of resumption of the regular functioning of the Court.

7. In the meantime, the informant filed protest petition against the closure report on 25.11.2020 against which reply was filed by the applicant. Since, the applicant was granted anticipatory bail, he preferred discharge application before the Magistrate on 15.12.2020. The applicant filed application for withdrawal of the application for discharge on 18.01.2021 on the ground that discharge application would not be maintainable before the Session Court for the offence under Section 306 I.P.C. and he further requested in the said application that the case may be committed under Section 209 Cr.P.C. since the case was exclusively triable by Session Court.

8. The Magistrate dismissed the closure report and proceeded on the discharge application on merit and pass the impugned order by rejecting the application for discharge.

9. In the meantime, non-bailable warrant was issued against the applicant on 11.10.2021, therefore, both orders i.e. rejecting the

discharge application dated 29.09.2021 and the order for non-bailable warrant had been challenged by the applicant by filing the present application.

10. Heard Sri Prakhar Saran Srivastava, learned counsel for the applicant, Sri Anurag Pathak, learned counsel for opposite party no.2 and learned A.G.A. for the State as well as perused the record.

SUBMISSIONS OF APPLICANT

11. Learned counsel for the applicant has made following submissions:-

Learned counsel for the applicant has submitted that the present controversy involves offence under Section 306 I.P.C. which is exclusively triable by Session Court. In view of the aforesaid fact, it is legally not sustainable to take decision on the discharge application by the Magistrate, rather the orders will have been passed by the Session Court.

Learned counsel for the applicant has invited attention of this Court towards the decisions of **Vinay Tyagi Vs. Irshad Ali alias Deepak and others, (2013) 5 SCC 762, Prateek Gupta Vs. State of U.P. and others** passed in **Application U/S 482 No.24770 of 2019** and **Umesh Yadav Vs. State of U.P. and another, 2016 ADJ Online 0012.**

Learned counsel for the applicant has submitted that as per the dictum of Vinay Tyagi (supra), it has been observed that on two contradictory reports by the same Investigating Agencies, the trial court has three options, firstly, it may accept the application of accused for discharge; secondly, it may direct that the trial court may proceed further in accordance with law; and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its

considered opinion, it is just, proper and necessary in the interest of justice to direct “further investigation” it may do so.

It has been further argued by learned counsel for the applicant that the discharge application should be entertained by trial court thus, trial court is Session Court in the present matter, whereas, the impugned order has been passed by the Magistrate who has no jurisdiction.

It has been further submitted by learned counsel for the applicant that after analysing the judgment of **Umesh Yadav, Prateek Gupta (*supra*)**, it is worth to be mentioned that the Magistrate was obliged to commit the matter to Court of Session. Since, the Magistrate had no jurisdiction to pass the order, the order is not sustainable because the Magistrate exceeded his jurisdiction while passing this order.

Learned counsel for the applicant has further submitted that the Magistrate should have commit the case to the Court of Session so that the discharge application could have been considered by the competent court i.e. Session Court.

SUBMISSIONS OF OPPOSITE PARTY NO.2

12. Sri Anurag Pathak, learned counsel for opposite party no.2 has opposed the submissions advanced by learned counsel for the applicant and has submitted that the impugned order dated 29.09.2021 has been passed for the reason that the direction was given by the High Court to pass appropriate order on the closure report as well as the charge sheet. He has further submitted that there is no infirmity or illegality in the order passed by the court below.

13. Learned A.G.A. has also supported the argument advanced by learned counsel for opposite party no.2.

FINDING

14. Before entering into the present controversy, the provision of Section 209 Cr.P.C. is relevant to be looked into, which is reads as under:-

“209. Commitment of case to Court of Session when offence is triable exclusively by it.-- When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

[(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.”

15. The said provision of Section 209 Cr.P.C. is worth to be seen wherein it is provided that offence triable by Court of Session should be committed by the Magistrate before whom the accused appears or brought before.

16. The issue in question cropped up before Hon’ble the Supreme Court in the case of **Vinay Tyagi (supra)**. Paragraph nos.42 and 61 of the said judgment are quoted below:-

“42. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the Court shall discharge an accused in compliance with the provisions of Section 227 of the Code.

61. In our considered view, the trial court has to consider the entire record, including both the Delhi Police report filed under Section 173(2) of the Code as well as the Closure Report filed by the CBI and the documents filed along with these reports. It appears, the trial court may have three options, firstly, it may accept the application of accused for discharge; secondly, it may direct that the trial may proceed further in accordance with law; and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct ‘further investigation’, it may do so.”

17. In view of the ratio decided in paragraph no.61, it is apparently clear that court has observed that the trial court has got three options: firstly, it may accept the application of accused for discharge; secondly, it may direct that the trial court may proceed further in accordance with law; and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct “further investigation” it may do so.

18. The case of **Prateek Gupta (supra)** is also relevant to be looked into, which is mere process in the present controversy, wherein, it is provided that an offence cognizable by Session Court, the Magistrate cannot prove the matter and cannot discharge the accused. Paragraph No.22 of the said judgment is quoted below:-

“22. The principle of law laid down by the Apex Court in case of Sanjay Gandhi Vs. Union of India (supra) was further followed with approval in case of Ajay Kumar Parmar (supra), in which Apex Court held that when an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It was further held that it is not permissible for Magistrate to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Court of Session has been mentioned, the Magistrate must commit the case to the Court of Session and do nothing else.”

19. In the case of **Umesh Yadav (supra)**, the court has observed that if the case is exclusively triable by Session, the Magistrate has no option but to commit the case to Court of Session and the Court of Session will proceed in accordance with law. Paragraph No.17 of the said judgment is quoted below:-

“17. On the basis of above discussion and the provisions of Code of Criminal Procedure it is clear that if the Magistrate receives a charge-sheet and take cognizance of offence, and thereafter he receives any such report under section 173(8) CrPC, in that case he has to study such report and other documents and then proceed in accordance with provisions of section 227 and 228 CrPC. In case when offence in charge-sheet appears to be one triable exclusively by the court of sessions, in such case Magistrate had no option but to commit the case to court of sessions, which will have to proceed in accordance with provisions of section 227 or 228 CrPC.”

20. In view of Section 209 Cr.P.C., there is no ambiguity that who is trial court. In the present case, since the offence is triable by Session Court, the trial court is Session Court. While, hearing the application of discharge, the Magistrate committed error by assuming the jurisdiction of Session Court. The Session Court has to apply its mind whether the applicant is liable to be discharged or whether application

is liable to be rejected. The Magisterial Court committed error by deciding the case itself.

21. The High Court while granting anticipatory bail vide order dated 23.11.2020, made observation that the trial court is expected to pass appropriate order on the closure report within two months as per the judgment of Apex Court in the case of **Vinay Tyagi (supra)**. The Magistrate overlooked the observation made by the High Court and resumed the jurisdiction of Session Court while taking decision on the application for discharge. It was incumbent upon the Magistrate to commit the case to the Court of Session but in spite of doing so he heard the application for discharge which was not in his domain. The objection taken by the applicant was not considered by the Magistrate and he passed the order ignoring the statutory provision of judgment of Supreme Court without applying its mind.

22. In view of the aforesaid factual and legal backdrop, I am of the opinion that the impugned orders dated 29.09.2021 and 11.10.2021 passed by Additional Chief Judicial Magistrate, Room No.1, Bareilly in Case No.1091 of 2021 (State Vs. Sukhbir & another) arising out of Case Crime No.463 of 2017, under Sections 201 and 306 I.P.C., Police Station Bhojipura, District Bareilly are not sustainable in the eyes of law, therefore, I set aside the order with following directions:-

(i) The Additional Chief Judicial Magistrate, Room No.1, Bareilly will commit the case within one and half month from today to the Court of Session.

(ii) The Court of Session will pass appropriate order on application for discharge of the applicant within two months from date of committal order accordance with law after affording opportunity of hearing to the parties.

23. The present application is **allowed** with the above directions.

24. It is, however, made clear that the finding recorded by this Court will not influence the court below while taking decision in the case.

Order Date :- 22.07.2022

Atul

(Brij Raj Singh, J.)