

# **IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

## **Criminal Transfer Application No. S – 103 of 2021**

**(Akhtiar Ali Solangi v. Qamar-ud-Din and others)**

Date of hearing: **01-04-2022**

Date of Decision: **01-04-2022**

Mr. Shabbir Ali Bozdar, Advocate for the Applicant.  
Mr. Muhammad Qayyum Arain, Advocate for the Respondent No.6.  
Mr. Zulfiqar Ali Jatoi, Additional P.G for the State.

### **ORDER**

**Muhammad Junaid Ghaffar, J.** – Through this Criminal Transfer Application, the Applicant seeks transfer of Crime No.50 of 2021, registered at P.S, Kandiaro under Sections 337-A (i), 337-A (iv), 337-A (v), 337-F(i), 147, 148, 149 & 504 PPC, presently pending before the Court of 1<sup>st</sup> Civil Judge and Judicial Magistrate, Kandiaro.

**2.** Learned Counsel for the Applicant has contended that the present case is pending trial before the Court of 1<sup>st</sup> Civil Judge & Judicial Magistrate (MTMC), Kandiaro, whereas, a counter-case of the same incident bearing Sessions Case No.366 of 2021 arising out of Crime No.38 of 2021 is pending before the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze and propriety demands that both these cases be heard and decided by the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze. He submits that a First Class Magistrate can only award punishment up to a maximum of three years; whereas, in terms of Section 337-A (v) PPC, the punishment is 10-years; hence if after evidence, he comes to a conclusion that such punishment has to be awarded, then the case would be liable to be transferred to the Court of Sessions. In view of such position, he has prayed for grant of this Transfer Application.

**3.** On the other hand, Counsel for the Respondent No.6 has opposed this Transfer Application and submits that the Magistrate can award punishment for more than three years and in support, he has relied upon cases reported as **Allah Wasaya and others v. Sikandar Hayat and others (2012 SCMR 193)** and **The State v. Ghulam Qadir and others (PLD 1964 (W.P) Peshawar 53)**.

**4.** Learned Additional P.G for the State has conceded to the fact that if ultimately after the trial, punishment for more than three years is to be awarded, then the Magistrate has no jurisdiction and the case would then be required to be sent to the Sessions Court by following the procedure, as provided under Sections 346 and 347 Cr.P.C.

**5.** I have heard both learned Counsel as well as learned Additional P.G for the State and perused the record.

**6.** It appears that the Applicant before filing this Criminal Transfer Application, had also filed a Transfer Application before concerned Sessions Judge, who has been pleased to dismiss the same vide order dated 06.11.2021 in the following terms:

“Heard learned counsel for applicant.

In this transfer application, applicant Akhter Ali is complainant in crime No.50 of 2021 Police Station Kandiaro and such Crl. Case No.104 of 2021 is pending on the file of learned 1<sup>st</sup> Judicial Magistrate, Kandiaro while the counter FIR lodged by one Zulfiqar bearing crime No.38 of 2021 PS Kandiaro under section 302 PPC is pending on the file of learned 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze.

Although time of incident in both above mentioned FIRs is same but since the FIR bearing crime No.50 of 2021 is the case of Magistrate trial and if the case is transferred to the learned 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze then right of appeal of the accused persons shall be deprived, therefore, prayer of the applicant that Crl. Case No.104 of 2021 pending on the file of learned 1<sup>st</sup> Judicial Magistrate Kandiaro be transferred to the court of learned 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze where counter case is pending, is not warranted by law, therefore, instant transfer application is dismissed in limine”.

**7.** On perusal of aforesaid order, though there appears to be justification in refusing transfer of the case from the Court of Magistrate to the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze, as it may deprive an aggrieved party from one forum of Appeal and to that extent there cannot be any cavil. However, at the same time, it needs to be appreciated that the present case bearing Crime No.50 of 2021 has alleged various offences including an offence under Section 337-A (v) PPC which provides for punishment which may extend to ten<sup>1</sup> years, whereas, in terms of section 32 of the Criminal Procedure Code, a First Class Magistrate may pass sentence of imprisonment for a term not

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<sup>1</sup> It may be noted that sentence of this offence as shown in the Schedule of Act II of 197 is fourteen years.

exceeding [three years]<sup>2</sup>. Insofar as awarding punishment by a Firs Class Magistrate in respect of the present offences in the FIR is concerned, it would be advantageous to refer to the relevant part of Schedule-II of the Criminal Procedure Code, 1898, which provides the description of the Courts who shall try such offences.

Sec.	Offences	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Pakistan Penal Code	By what Court triable
337A	(i) Shajjah-i-Khafifah	Shall not arrest without warrant	Summons	Bailable	Not Compoundable	Daman, and imprisonment of either description for two years	Magistrate of the first class
	(v) Shajjah-i-ammah	May arrest without warrant	Warrant	Not bailable	Not compoundable	Arsh, and imprisonment of either description for [Fourteen] <sup>3</sup> years. (But 10 years in the text)	Court of Session or Magistrate of the 1st class
337F	(i) Damiyah	Shall not arrest without warrant	Summons	Bailable	Not Compoundable	Daman, and imprisonment of either description for one year	Magistrate of the first class

**8.** Perusal of the aforesaid Schedule reflects that though all these offences as alleged in this case may be tried by the Magistrate as well as Court of Sessions. However, insofar as Section 337A(v)<sup>4</sup> PPC is concerned, the punishment is for a term **which may extend** to [ten] years [or fourteen years as the case may be]; but in any case it is not a fixed punishment of ten years as contended by the Applicants Counsel. In that case if the Magistrate comes to a conclusion on the basis of evidence that a punishment of up to three years is to be awarded, then definitely he can award such punishment on his own. However, if the Magistrate comes to a conclusion that the case has been proved, and a higher punishment of more than three years is to be awarded, then he will not be competent to award such punishment. For such cases, the procedure has been provided in Sections 346 and 347 of the Criminal Procedure Code, and the same reads as under:

**“346. Procedure of Magistrate In cases which he cannot dispose of:** (1) If, in the course of an inquiry or trial before a Magistrate in any district, the

<sup>2</sup> including such solitary confinement as is authorized by law; Fine not exceeding [forty five thousand] rupess [arsh daman] whipping

<sup>3</sup> Act II of 1997, but ten years in the Text. Legislature to remove the disparity.

<sup>4</sup> ... shall be liable to *arsh* which shall be one-third of the *diyat* and may also be punished with imprisonment of either description for a term **which may extend** to [ten] years as ta'zir.

evidence appears to him to warrant a presumption that the case is one which should be tried or sent for trial to the Court of Session or the High Court, by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to the Sessions Judge or to such other Magistrate, having jurisdiction, as the Sessions Judge, directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or send the case for trial to the Court of Session or the High Court.

**347. Procedure when after commencement of trial, Magistrate finds case should be tried by Court of Session or High Court:** (1) If, in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, he shall send the case to the Court of Session or High Court, for trial.

9. From perusal of the aforesaid provision of section 346 *ibid*, it appears that if a Magistrate has any evidence which warrants a presumption that the case is one which should be tried by the Court of Sessions or the High Court, or by some other Magistrate in such district, he shall stay the proceedings and submit case with a brief report explaining its nature to the Sessions Judge or such other Magistrate having jurisdiction as the Sessions Judge directs. Section 347 *ibid* further provides that if in a trial before a Magistrate before signing any judgment, it appears to him that the case is one which ought to be tried by the Court of Sessions or the High Court, he shall send the case to the Court of Sessions or High Court for trial. Therefore, as to depriving a forum of appeal to an aggrieved person and the consequent dismissal of the Transfer Application by the Sessions Judge, Naushehro Feroze on this analogy does not appear to be applicable in present facts and circumstances of the case in hand. The reason being, if after completion of evidence or during the trial, the Magistrate comes to a conclusion that a punishment of more than three years has to be awarded under Section 337-A (v) PPC, then admittedly he cannot award the said punishment and will have to take recourse to Sections 346 and 347 Cr.P.C and as a consequence thereof, the matter will then be sent to the Court of Sessions. To that extent, there appears to be a valid ground made out on behalf of the Applicant for transfer of the case.

10. Nonetheless, it is also an admitted position that the present case as well as the case registered on behalf of the Respondents as complainant bearing Crime No.38 of 2021 (Sessions case No.336 of 2021) is a counter-case initiated pursuant to the same incident. The said case is now pending before the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro

Feroze and per settled law, propriety demands that such cases be decided by one Court to avoid conflicting Judgments. In that case, the appropriate Court would be the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze, which is higher in hierarchy and can also try the cases triable by the Magistrate including case under Section 337-A (v) PPC. No doubt the rule is not absolute and there could be cases in which the circumstances do not warrant that the said procedure must be followed, but the rule of propriety which is the basis of the general practice mentioned above is founded on sound principle because if two cross-cases about the same incident between the same parties are tried by different Courts there can be a serious possibility of a conflict in judgments resulting in two different Courts giving two diametrically opposite findings about the same incident<sup>5</sup>. I may also observe that propriety demands that whenever the facts or circumstances permit, cross cases, giving two different versions of the same incident and have two different sets of accused, should be tried by the same Court together as if the two cases giving different versions of same incident are not tried together, there would be serious likelihood of conflict in Judgment<sup>6</sup>. This settled proposition of law is fully attracted in this case even if other arguments raised on behalf of the Applicant are for the time being ignored.

**11.** In view of hereinabove facts and circumstances of this case, it appears that the Applicant has made out a case for transfer of case. Accordingly, this Criminal Transfer Application is allowed. Criminal Case No. 104 of 2021(old) New Sessions Case No.110 of 2021(Re-State V Qamaruddin and others), arising out of Crime No.50 of 2021, registered at P.S, Kandiaro under Sections 337-A (i), 337-A (iv), 337-A (v), 337-F(i), 147, 148, 149 & 504 PPC is hereby withdrawn from the Court of 1<sup>st</sup> Civil Judge & Judicial Magistrate (MTMC), Kandiaro and entrusted to the Court of 1<sup>st</sup> Additional Sessions Judge, Naushehro Feroze before whom the case emanating from the same incident (Crime No.38 of 2021 PS Kandiaro under section 302 PPC) is already pending, for disposal in accordance with law. Let copy of this order be issued to all concerned.

**J U D G E**

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<sup>5</sup> PLD 1981 SC 522 (Abdul Rahman Bajwa v Sultan & Others)

<sup>6</sup> 2018 PCr.L.J. 443 (Anwar Ali v The State)

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