

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CrI.M.C. No. 458/2009**

Date or Order: 11th January 2010

SARABJEET & ORS. Petitioners
! Through: Mr. Rajat Wadhwa, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Pawan Bahl, APP.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **V.K. JAIN, J. (Oral)**

1. This is a petition under Section 482 of the Code of Criminal Procedure for quashing the order dated 19th January 2007, whereby cognizance was taken and subsequent order dated 24th July 2007 whereby notice envisaged under Section 251 of the Code of Criminal Procedure was given to the petitioner for the offence punishable under Sections 323 and 325 of IPC read with Section 34 thereof.

2. A perusal of the order dated 24th July 2007 would show that the learned Metropolitan Magistrate passed a speaking order stating therein that prima facie case is made out for the offence under Sections 323/325/34 of IPC. Thus, the learned Metropolitan Magistrate prima facie took the view that not only the offence under Section 323 but also offence under Section 325 of the IPC was made out against the petitioner. Despite that, he chose to frame a notice under Section 251 of the Code of Criminal Procedure, instead of framing charge against him.

3. The offence under Section 325 of the Code of Criminal Procedure, being punishable with imprisonment upto 7 years and fine, is a Warrant Trial Case, though the offence under Section 323 is a Summons Trial Case. The procedure for trial of Warrant Cases, by Magistrate, has been prescribed in Chapter XIX of the Code of Criminal Procedure. Section 238 of the Code provides that when, in any Warrant Case, instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207, which requires copies of documents, statements, charge sheet, etc. to be supplied to the accused. Section 239 of the Code

provides that if on considering the police report and the document sent with it under Section 173 of the Code, and examining the accused, if the Magistrate thinks necessary, and after giving opportunity of hearing to the prosecution as well as to the accused the Magistrate considers the charge against the accused to be groundless, he shall discharge him, after recording his reasons for discharging him. If, however, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX, he shall accordingly frame charge against the accused. Thus, in a Warrant Trial Case it is mandatory for the learned Magistrate to hear not only the prosecution, but also the accused before he decides whether to discharge or to charge him.

4. On the other hand, the procedure for trial of Summons Cases, which has been prescribed in Chapter XX of the Code provides, in Section 251, that when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him and shall be asked if he pleads guilty or has any defence to make and it is not necessary to frame a formal charge. Unlike Section 239 of the

Code, Chapter XX does not envisage discharge of the accused at this stage. Therefore, if a Warrant Case is tried on a Summons Case, the accused would be deprived of an opportunity to seek discharge under Section 239 of the Code on the ground that there are no reasonable grounds to charge him for the offence complained of.

5. Section 259 of the Code provides that when in the course of the trial of a Summons Case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of Warrant Cases, he may proceed to rehear the case in the manner prescribed for trial of Warrant Cases. Thus, it is permissible for the Magistrate to try an accused in a Summons Case in accordance with the procedure prescribed for trial of Warrant Cases, but there is no provision in the Code for trying a Warrant Case as a Summons Case.

6. In ***Pulukuri Kotayya vs. Emperor***, AIR (34) 1947 Privy Council 67, the Privy Council, inter alia, observed as under:-

“When a trial is conducted in a manner different from that prescribed by the Code, as in 28 IA 2575, the trial is bad, and no

question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S.537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in 5 Rang 536, where failure to comply with S. 360, Criminal P.C., was held to be cured by Ss. 535 and 537."

7. In ***Public Prosecutor (AP) vs. Vaijnath & Anr.***, 1971 Crl. L.J. 205, Andhra Pradesh High Court held that when a Warrant Case is tried as a Summon Case it amounts to an illegality and not an irregularity curable under section 537 of the Code of Civil Procedure, 1898. In ***Dilip Kulkarni and ors. vs. Bahadurmal Chowdary and Sons and Anr.***, 2005(2) ALD (Cri) 171, Andhra Pradesh High Court, inter alia, held as under:-

"Thus, it is obvious that the Code enables the Judicial Magistrate of First Class to convert a summary case either into a summons case and a summons case into a warrant case, but not vice versa. The only requirement for such conversion is that in the course of trial it should appear to the Court in the interests of justice that such conversion is needed. But if the

Magistrate conducts trial in a warrant case adopting summons procedure or a summons case by following the summary procedure, the trial is certainly vitiated.”

8. Though the learned Magistrate has applied his mind to the merit of the allegations made against the petitioner, the fact remains that even if he had formed an opinion different from the one taken by him, he was precluded in law from discharging him, as he chose to adopt to procedure prescribed for the trial of a Summons Case. There is no good reason for not trying the petitioner in accordance with the prescribed procedure, when he has come to this Court, at the earliest opportunity.

9. Since, the learned Metropolitan Magistrate could not have frame notice under Section 251 of the Code of Criminal Procedure in a warrant case and could not have adopted the prescribed procedure for trial of summons case, the impugned order dated 24th July 2009 and the notice framed against the petitioner on that date cannot be sustained and are hereby set aside. The learned Metropolitan Magistrate shall pass a fresh order envisaged under Section 239/240 of the Code of Criminal Procedure after hearing the petitioner and shall then proceed in

accordance with the procedure prescribed in the Code of Criminal Procedure, depending upon the view taken by him.

The petitioner is directed to appear before the learned Metropolitan Magistrate on next date of hearing fixed in the trial court for that purpose.

**V.K. JAIN
(JUDGE)**

JANUARY 11, 2010

Ag/RS