

“REPORTABLE”

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*** HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.Rev.(P). 853/2005 and Crl.M.A.11752/2005

Date of decision: 27.05.2008

SMT. DHANO PETITIONER
! Through : Mr. Subhash C. Bhuttan, Adv.
Mr. Purvesh Buttan,
Mr. Himanshu Buttan,
Advocate.

Versus

\$ STATE & ANR. RESPONDENTS
^ Through : Mr. O.P. Saxena, APP for the
State.
Respondent No.2 in person.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J. (Oral)

1. In this revision petition the petitioner has challenged the order of the learned Additional Sessions Judge, Delhi dated 2.09.2005 whereby it ordered framing of charge under Sections 308/323/506/34 of the

Indian Penal Code (IPC) and framed charges vide order dated 6.09.2005 in a complaint case titled 'Mange Ram Vs. Smt. Dhano' which was committed before the court of Sessions by the learned Metropolitan Magistrate.

2. Complainant Shri Mange Ram filed a complaint against the present petitioner and her husband Shri Hardayal Singh (who has since expired), regarding a dispute over a piece of land which was taken by the father-in-law of the Petitioner from the father of the complainant for purposes of cultivation. This complaint pertains to Police Station Kanjhawla. Since after the death of his father, the complainant wanted the land back from the father-in-law of the present Petitioner which resulted into a dispute inter se the parties and on 2.-06.1990 at about 4.15 P.M., the petitioner allegedly hurled three/four brick-bats at the house of the complainant and one of the brickbat hit the son of the complainant thereby causing injuries on his person, whereas other two brickbats hit the door of the house and did not cause any injury. Besides, there are various other allegations contained in the complaint.

3. A kalandra under Section 107/150 Criminal Procedure Code (Cr.P.C.) was also prepared for apprehension of breach of peace against the Petitioner and her husband Shri Hardayal Singh. The said proceedings were lapsed/dropped after expiry of six months.

4. Thereafter, the complainant filed impugned complaint under Sections 308/323/506 IPC before the Metropolitan Magistrate. After recording evidence under Section 202 Cr.P.C. and after considering the evidence adduced on the record, the learned Metropolitan Magistrate ordered summoning of the Petitioner for an offence under Sections 323/506 IPC.

5. This order was challenged by the complainant in a revision petition filed before the court of Sessions Judge alleging that offence under Section 308 IPC was also made out. This revision petition was allowed by Shri R.S.Arya, Additional Sessions Judge, who directed the Metropolitan Magistrate to summon accused under Section 308 IPC as well and Petitioner and her husband were accordingly summoned under Section

308/323/506/34 IPC. After the petitioners put in appearance on receipt of summons in the court of learned Metropolitan Magistrate, the learned Magistrate committed the case for trial to the Sessions court as offence under Section 308 IPC is triable by the court of Sessions only.

6. On committal of the case, learned ASJ asked the complainant to produce evidence before charge and he proceeded with the recording of pre-charge evidence of the complainant. The power of and the procedure adopted by the learned ASJ in proceeding with the recording of pre-charge evidence is under challenge before this court in the present revision petition.

7. I have heard Mr. Subhash C. Bhuttan, learned counsel for the Petitioner Mr. O.P Saxena, learned APP for the State and respondent in person and have also perused the record.

8. The relevant part of the order dated 02.09.2005 passed by the learned ASJ reads as follows:-

“ While the matter was pending before my Ld. Predecessor, this

matter was being taken up for recording the pre-charge evidence. Having noted that there is no scope for the Sessions Court to record pre-charge evidence, it was felt that the matter is to be taken up to hear on charge on the available material by an order dated 22.08.05. Accordingly, the matter was heard on the question of framing of charge. Ld. Counsel Sh. Tyagi, submits that with the allegations, found on record coupled with the oral testimony available by way of pre-summoning evidence and the documents got marked, the prima facie offences U/s 308/323/506 r.w.s. 34 of IPC are made out against the surviving accused also.

I have given careful thought to the submission on either side. It is to be seen that there has been specific allegations in the complaint and in the oral testimony, however, they may contradict with each other and with the documentary testimony available on record. Furthermore, the aspect of double jeopardy is still a matter of evidence which the complainant has to establish during the course of trial. Suffice it to say that having a coordinate court held that the accused be summoned for the offence U/s. 308 and further considering the material available on record, the contention of the Ld. Counsel for the defence is only a matter of probable defence, which the accused can establish either on her own or by destroying the say of prosecution during the trial. Hence, I find prima-facie offences U/s. 308/323/506 r.w.s. 34 of IPC against

the present accused Smt. Dhanno.
Let the charges be framed
accordingly.”

9. Thus it is clear that neither the Metropolitan Magistrate nor the learned ASJ to whom case was committed for trial adopted proper procedure while conducting the proceedings in the complaint case.

10. Under Section 244 Cr.P.C. it is the Magistrate who has the power to record pre-charge evidence after summoning of the accused persons in a warrant trial case and while doing so he should also allow cross examination of the witnesses to be conducted on behalf of the accused. It is only on analysis of the evidence recorded before charge that the Magistrate can take cognizance of an offence if it is so made out from the evidence. In this case, the learned Magistrate after considering the evidence of the complainant summoned the accused/Petitioner and her husband (since deceased) under Sections 323/506/34 IPC. It was the revisional court of learned ASJ who observed that offence under Section 308 IPC is also made out and the petitioner be summoned for an offence under Section 308 IPC.

11. After summoning the Petitioner for offences under Section 308/323/506/34 IPC the Magistrate committed an error in committing the case for trial to the Sessions Court instead of proceeding with the recording of pre-charge evidence and giving an opportunity to the Petitioner to cross examine the witnesses of the complainant. Without following the procedure as laid down under Section 244 Cr.P.C. and without coming to a proper conclusion after holding inquiry, if an offence under Section 308 IPC was made out, he committed the case to the court of Sessions for trial.

12. The learned Sessions Court committed a grave error when it proceeded with the recording of pre-charge evidence.

13. Under Section 226 and 227 of the Cr.P.C. when the accused appears or is brought before the court in pursuance of a commitment of the case under Section 209 Cr.P.C., the prosecutor would open his case by describing the charge brought against the accused and upon consideration of the record of the case and the documents submitted and after hearing the submissions

of the accused and the prosecution, the court could discharge the accused if it did not find sufficient ground for proceeding against the accused.

14. Under Section 228 of the Cr.P.C. if after such consideration and hearing, the Judge was of the opinion that there was a ground for presuming that the accused had committed an offence which was not exclusively triable by the Court of Sessions, he might frame charge against the accused and transfer the case for trial to the Chief Judicial Magistrate and direct the accused to appear before the Chief Judicial Magistrate on a date fixed and in case the offence was exclusively triable by a court of Sessions, he would frame in writing a charge against the accused. Even, these provisions have not been adhered to by the learned ASJ when he framed charges against the Petitioner on 6.09.2005 in pursuance of his impugned order dated 2.09.2005.

15. Hence, in my view since the procedure has not been properly followed and complied with by the Metropolitan Magistrate and the Additional Sessions Judge in recording the pre-charge evidence a gross

irregularity has been committed by the court of Sessions while adopting the procedure laid down in Section 244 Cr.P.C. Hence, petition is allowed. The order dated 2.09.2005 being illegal is hereby set aside.

16. Consequently, the charge framed in pursuance of the said order is also hereby quashed. The learned ASJ is directed to send back the file to the concerned Magistrate for holding an inquiry under Section 244 Cr.P.C. for pre-charge evidence and then after assessment of the evidence decide nature of offence, if any, and the sections covering the said offences are made out. It is only after the assessment of the evidence if the Magistrate feels prima facie offence under Section 308 IPC is made out then he shall commit the case to the court of sessions for trial.

17. Attested copy of the order be sent to the concerned trial court for compliance.

**ARUNA SURESH
(JUDGE)**

**May 27, 2008
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