

CRM-M-33239-2014

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-33239-2014
Date of Decision:26.05.2015

Vishal Aggarwal

... Petitioner(s)

Versus

State of Haryana

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

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

Present: Mr. Robin Dutt, Advocate,
for the petitioner.

Mr. Anil Mehta, DAG, Haryana.

Ms. Saumya Ahluwalia, Advocate for
Mr. P.S.Ahluwalia, Advocate for
the complainant.

Paramjeet Singh, J.

Instant petition has been filed under Section 482 of the Code of Criminal Procedure (in short, 'the Code') for quashing of order dated 09.04.2014 (Annexure P-8) passed by the Judicial Magistrate Ist Class, Yamunanagar at Jagadhri whereby application under Section 319 of the Code moved by the prosecution for summoning the petitioner as additional accused has been allowed and the petitioner has been summoned as additional accused to face trial along with co-accused and

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order dated 04.09.2014 (Annexure P-9) passed by the Additional Sessions Judge, Yamunanagar at Jagadhri whereby revision preferred by the petitioner has been dismissed.

Brief facts of the case are to the effect that complainant-Rajan Aggarwal moved an application that he is resident of Mustafabad and owns ancestral property in Anaj Mandi, Mustafabad. On 27.06.2007, all the accused persons started filling earth on the said land and when resisted, then they inflicted injuries to him. On the application moved by complainant Rajan Aggarwal, DDR No 19 dated 29.06.2007 was entered in the daily diary register. The petitioner party also got registered FIR No.122 dated 29.06.2007, under Sections 323/325/506/34 of the Indian Penal Code (in short, 'IPC') against complainant party in DDR at Police Station Chhapar. Investigation was set into motion in the FIR and DDR version.

During investigation, the petitioner was found innocent by the police. On 27.04.2008, the police submitted report under Section 173 of the Code against accused Rishi Pal and Manju Aggarwal while petitioner was kept in column No.2. On 09.05.2008, the police also filed application (Annexure P-3) for discharge of the petitioner from custody. Consequently, vide order dated 28.05.2009 (Annexure P-5), the petitioner was discharged by the Court of Judicial Magistrate Ist Class, Jagadhri observing that in future if any evidence comes on record, the police may proceed against the petitioner as per law. It is also pertinent

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to mention that the petitioner remained on pre-arrest bail, thereafter, was released on regular bail. Charges against accused-Rishi Pal and his wife-Manju were framed under Sections 323/324/506/34 IPC.

After examination-in-chief of PW5 complainant-Rajan Aggarwal, the prosecution filed application (Annexure P-7) under section 319 of the Code for summoning of the petitioner as an additional accused to face trial along with already arrayed accused. The said application was allowed vide impugned order dated 09.04.2014 (Annexure P-8). Feeling aggrieved, the petitioner filed revision which has been dismissed vide impugned order dated 04.09.2014 (Annexure P-9). Hence, this petition.

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

Learned counsel for the petitioner vehemently contended that the petitioner was discharged by the court on the application of the prosecution after issuing/serving notice to the complainant. Learned counsel further contended that once the petitioner was discharged, he cannot be summoned without taking into consideration the provisions of Section 300 (5) read with Section 398 of the Code. Learned counsel further contended that in the present case, summoning under Section 319 of the Code is barred under the provisions of Section 362 of the Code. Learned counsel further contended that discharge is a judicial order and cannot be reviewed. Learned counsel further contended that discharge

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of the petitioner amounts to acquittal, therefore, summoning of the petitioner as additional accused is bad in law. There is complete misreading of judgment rendered by the Hon'ble Supreme Court in *Hardeep Singh vs. State of Punjab* 2014 (1) RCR (Criminal) 623. The impugned orders are not sustainable in the eyes of law.

Per contra, learned counsel for the State and learned counsel for complainant vehemently contended that discharge of the petitioner on the application of police official is not an order of the Court, rather it is an administrative order of the Court. Even in the order dated 28.05.2009 (Annexure P-5), it has been mentioned that petitioner-Vishal Aggarwal can be summoned if evidence comes against him. Learned counsel further contended that Section 300 (5) of the Code is not applicable in the present case as all the offences are not triable as summons case. If the discharge is under Section 258 of the Code, only then the provisions of Section 300(5) of the Code will apply. Learned counsel further contended that the petitioner has been rightly summoned after the submission of report under Section 173 of the Code. The petitioner could have been discharged under Section 239 of the Code, as one of the offences is triable as warrant case. The Magistrate on the basis of perusal of police report and documents sent therewith had come to the conclusion that charges levelled against the petitioner are not groundless.

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I have given thoughtful consideration to the rival contentions of learned counsel for the parties.

Before examining the contentions of learned counsel for the parties, it would be appropriate to reproduce the relevant provisions. Sections 2 (h), 4, 59, 169, 170, 173, 239, 258, 300, 319, 362 and 398 of the Code and Rule 24.7 of Punjab Police Rules, 1934 (as applicable in Haryana) read as under:

“2 Definitions – In this Code, unless the context otherwise requires, -

(h) “investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf;

4. Trial of offences under the Indian Penal Code and other laws - (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

59. Discharge of person apprehended - No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

169. Release of accused when evidence deficient – *If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is no sufficient, evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.*

170. Cases to be sent to Magistrate when evidence is sufficient - *(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed*

(2) When the officer in charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear

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before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused

(3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

173. Report of police officer on completion of investigation -

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

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(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in

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the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request
(7) *Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).*

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

239. When accused shall be discharged - *If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.*

258. Power to stop proceedings in certain cases. - *In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous*

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sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

300. Person once convicted or acquitted not to be tried for same offence. *(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under subsection (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.*

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence

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constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.

Explanation—The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

319. Power to proceed against other persons appearing to be guilty of offence. *(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

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(4) Where the Court proceeds against any person under sub-section (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

362. Court not to alter judgment - *Save as otherwise provided by this Code or by any other law for the time being in force, no Court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.*

398. Power to order inquiry. *On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (4) of section 204, or into the case of any person accused of an offence who has been discharged:*

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.”

Rule 24.7 of the Punjab Police Rules, 1934 (as applicable in

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Haryana) (in short, 'PP Rules') reads as under:

“24.7 Cancellation of cases. *Unless the investigation of a case is transferred to another police station or district, no first information report can be cancelled without the orders of a Magistrate of the 1st class.*

When information or other intelligence is recorded under section 154, Criminal Procedure Code, and, after investigation is found to be maliciously false or false owing to mistake of law or fact or to be non-cognizable or matter for a civil suit, the Superintendent shall send the first information report and any other papers on record in the case with the final report to a Magistrate having jurisdiction and being a Magistrate of the first class, for orders of cancellation. On receipt of such an order the officer in charge of the police station shall cancel the first information report by drawing a red line across the page noting the name of the Magistrate cancelling the case with number and date of order. He shall then return the original order to the Superintendent's office to be filed with the record of the case.”

Now, I proceed to examine the spirit behind these provisions.

Section 2(h) of the Code:

The purpose of investigation as defined under Section 2(h) of the Code is collection of evidence by the police or by any other person (other than a Magistrate) who is authorized by a Magistrate in this behalf. Section 2(h) of the Code does not bar further investigation of case after submission of report under Section 173 of the Code. However, the fact remains that ultimately, the case has to be decided on the basis of

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evidence recorded before the trial Court. Further perusal of section reveals that definition of investigation does not talk of opinion of the police officer or authorized person, it only authorizes them to collect evidence. Therefore, opinion of the police officer is neither relevant nor admissible in evidence.

Section 59 of the Code:

A bare reading of Section 59 of the Code reveals that it authorizes the investigating officer to discharge/release an arrested person from his custody on execution of personal bond regarding his appearance before investigating officer (police officer) or Magistrate whenever required. The second part of the said section makes it clear that the arrested person can be discharged by the investigating officer during investigation either on bail or under a special order of discharge passed by the Magistrate. Once the custody is entrusted to the investigating officer under the order of the Court, then the investigating officer has no power to discharge and for that purpose, he has to move an appropriate application before the Magistrate for discharge of the person apprehended/arrested. On such an application, if special order of discharge is passed, only then person arrested would be discharged. The simpliciter discharge by investigating officer under Section 59 of the Code is applicable only if the person arrested joins the investigation before him, then the investigating officer is not required to seek permission of the Magistrate for discharge of the arrested person. In

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such circumstances, the investigating officer is to discharge arrested person on his own bond, or on bail. A special order of the Magistrate is required for discharge of the arrested person when custody is entrusted to the investigating officer by the Magistrate.

Section 59 of the Code stipulates that a Magistrate is competent to discharge the arrested person when he is taken into custody in any case triable by the Magistrate, Court of Session or any Special Court. This section empowers the Magistrate to discharge the arrested person irrespective of the fact whether or not he himself is competent to try him in case of submission of final report against him.

Section 169 of the Code

Perusal of Section 169 of the Code reveals that after completion of investigation and submission of final report under Section 173 of the Code, Magistrate has power to discharge the accused by passing a specific order under Section 169 of the Code on finding that accused is innocent and the officer in charge of police station has formed an opinion that evidence against the accused is insufficient.

The wisdom behind Section 169 of the Code is that in case of insufficient evidence, officer in charge of the police station may release a person for the time being on bail with or without surety if the person is in custody. In the present case, initially, the petitioner was released on pre-arrest bail and thereafter got regular bail from the Court. When the application for discharge was moved, the petitioner was not in

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custody, however, he was on bail. Although, the petitioner was not in custody, he was initially granted pre-arrest bail and later on released on regular bail. The basic object of grant of pre-arrest bail is that in the event of arrest, a person shall be released on bail. Manifestly, there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that order of granting of pre-arrest bail becomes operative. The object sought to be achieved under Section 438 of the Code is that the moment a person is arrested, if he has obtained an order from Sessions Court, High Court or Supreme Court, he would be released immediately without having to undergo the rigour of jail. It means, the petitioner in this case was in deemed custody and his discharge was by the special order as per the provisions of the Code.

Section 170 of the Code:

Section 170 of the Code stipulates that if sufficient evidence has been collected against the accused, then police report is required to be submitted under Section 173 of the Code, by the officer in- charge of the police station before the Magistrate for taking cognizance or passing further appropriate orders.

Rule 24.7 of PP Rules

Rule 24.7 of the PP Rules makes a provision for cancellation of case during the course of investigation under the order of Illaqa Magistrate. The accused who claims to be innocent could seek relief without going through the entire length of trial. The power to discharge

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under the provisions of the Code is discretionary, but such discretion must be exercised by the Illaqa Magistrate justly and fairly, not mechanically and without application of independent mind to the facts of the case. Blind-folded acceptance of recommendations of police would amount to perversity of reasons and adoption of procedure that offends letter and spirit of law relating to discharge. Only in such circumstances, this court can interfere.

In the present case, police report under Section 173 of the Code was submitted by the Incharge, Police Station. Along with it, an application for discharge of the petitioner was moved by the police on the ground that during investigation, he has been found innocent, meaning thereby evidence against him on record was not sufficient on the strength of which he could be sent to face trial. It would be a futile exercise and wastage of time of Court. He was discharged vide order dated 28.05.2009 (Annexure P-5) by the Magistrate with the observations that if in future any evidence comes against him, the police may proceed against him as per law. It appears that the petitioner has been discharged under Section 169 of the Code. The net result of discharge under the aforesaid provision is that the discharge of the petitioner does not amount to smothering of the investigation qua him, cancellation of case against him, termination of the prosecution or his acquittal.

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Effect of Section 173 of the Code:

The presentation of report under Section 173 of the Code against an accused showing him in column No.2 only meant that according to police investigation, he is found innocent, therefore, he is required to be discharged under Section 169 of the Code. It does not mean that the said person cannot be summoned to stand trial.

The crux of provisions of Sections 59, 169 and 170 of the Code is that whatsoever course the investigating officer adopts i.e. whether he acts under Sections 59, 169 or 170 of the Code, it is incumbent upon him to submit a final report under Section 173 of the Code with regard to the result of his investigation to a competent Magistrate. The said Magistrate shall, thereafter, take action as he may consider appropriate under Section 169 or under Section 190, specially under Section 190 (1)(b) of the Code, as the case may be.

The Magistrate has power to pass the order of discharge by recording reasons. The further detention of the accused is to be as per provisions of Section 167 of the Code. The investigating officer could not discharge the arrested person/accused under Section 59 or 169 of the Code for all times to come. He could release the accused upon his executing bond with or without surety but could not discharge him as he was detained by the investigating officer with the permission of the Magistrate. The words in Section 169 of the Code '*release him on his executing a bond, with or without sureties*' could not be expounded as

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having authorized or empowered investigating officer to discharge the accused. In fact, it was a temporary release which has to be confirmed by an order of discharge by the Magistrate. The action of the investigating officer in releasing the petitioner under Section 169 of the Code was subject to confirmation by an order of the Magistrate as provided in Section 173 of the Code. In other words, once a person has been apprehended but found innocent, he can be set free during investigation by obtaining discharge order from the Court. The discharge of the petitioner under Section 59 or 169 of the Code would not amount to his acquittal. The order of discharge could be recalled by the Magistrate subsequently and the petitioner could be summoned by the trial Court to face trial. It is also made clear that the investigating officer has discretionary power under Section 169 of the Code to release the accused on bail bonds during the course of investigation before submission of final report, such interim relief has been made permissible under law to the person found innocent during the investigation which, however, would have to stand the test of judicial scrutiny to be made by the trial Court at a proper stage. In such circumstances, course to be adopted by the investigating officer is that at the conclusion of the investigation, he should place the name of the petitioner, discharged under Section 59 or 169, in column No.2 of the challan with his remarks. Thereafter, the trial Court has power to form its opinion on the basis of material on record. The power of the investigating officer before

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submission of challan is derived from Section 59 and 169 of the Code at the preliminary stage of investigation and the trial Court cannot interfere at such stage as that would be premature.

The sum and substance of the above referred provisions is that investigation according to Section 2(h) of the Code is only meant for collection of evidence and not anything more. The determination of guilt or innocence of the accused is an obligation cast on the Courts of law which task could never be permitted to be delegated to the police officer investigating a case. Sections 59 and 169 of the Code prohibit discharge of an arrested person/accused in actual or deemed custody, except under a special order of the Court. Rule 24.7 of the PP Rules also prohibits cancellation of FIR without order of the Magistrate. The marginal note to Section 173 of the Code reads "*Report of police officer on completion of investigation*", it is clear from it that provisions of Section 173 come into operation only after material collected by the investigating officer during investigation and result of the same has been reported to the Magistrate competent to take cognizance under Section 190 of the Code. Thereafter, Magistrate has to decide whether the accused deserves or does not deserve to be tried. The wording of Section 190 of the Code is crystal clear that the Magistrate is fully empowered to deal with the police report and thereafter either accept or reject it. This exercise conducted by Magistrate under Section 190 of the Code does not determine the guilt or innocence of the accused but the

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Magistrate only assesses evidence on record in a summary manner and thereafter makes up his mind whether or not to discharge the accused. A Magistrate while concurring in cancellation of a case is required to act judicially to examine the report submitted under Section 173 of the Code.

It is pertinent to mention that under the Code, a Magistrate is entrusted with diverse duties and in discharging various types of duties, does not always function as a court or conduct judicial proceedings. Some of his powers and duties under the Code are administrative, executive and ministerial in nature. He discharges these duties not as a court but as a *persona designata*. Mere mentioning of name or designation of a Magistrate in the order is not decisive of the question whether the function is judicial or administrative because '*judges often administer and administrators often judge*'.

The terms 'discharge' and 'cancellation' are not synonymous. Both have different connotation. When the case is cancelled by the competent court, the FIR ceases to exist but where the accused is discharged, FIR remains intact and the discharge order only relates to the particular accused. It needs to be further clarified here that the petitioner named in the FIR was declared innocent by the investigating officer in his report under Section 173 of the Code and thereafter he was discharged vide order dated 28.05.2009 (Annexure P-5) on the application of the investigating officer.

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Section 319 of the Code:

The power of Court under Section 319 of the Code operates in different perspective. After presentation of report under Section 173 of the Code containing statements under Section 161 of the Code and the documentary evidence which are yet to be translated into evidence, the power under Section 319 of the Code is only exercised on the basis of evidence actually brought on record. While performing judicial function at the trial, the Court is not bound by the conclusions of investigating officer nor it is considered based on the evidence collected by the police. It is always based on the evidence recorded in Court. A witness may add a new name and incorporate more details or name a person as accused who did not figure at all during investigation. It is for the trial Court to adjudicate whether reliance can be placed on the evidence/deposition made in Court, to form an opinion of a *prima facie* complexity. Hence, Section 319 of the Code operates on altogether different field. The power has been given in recognition of primacy of the judicial acts of the Court in the matter of trial even vis-a-vis, accused who are not challaned or charge-sheeted by the police. Further, the power underlines the principle that the fate of trial has to be decided by the Court on the basis of evidence recorded in the Court. Fair trial envisages the evaluation of evidence adduced in Court in the course of trial.

In the present case, the petitioner has been shown in column No.2 and co-accused have been challaned to face the trial. The

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prosecution examined PW5 – complainant-Rajan Aggarwal in examination-in-chief, thereafter the prosecution moved application under Section 319 of the Code. Keeping in view the ratio of law laid down in *Hardeep Singh's case (supra)*, the petitioner has been summoned under Section 319 of the Code. The contention of learned counsel for the petitioner that Section 300(5) read with Section 398 of the Code will apply in the case of petitioner, is misconceived and devoid of merit because the case against the petitioner was not of summons case and the petitioner is also not entitled to the benefit of Section 362 of the Code. Since the case is warrant case, the petitioner could have been only discharged under Section 239 of the Code. So far as the applicability of Section 398 of the Code is concerned, the same is not applicable in the present case as the petitioner has been summoned after the commencement of trial against the co-accused and recording of statement of complainant (PW5). The discharge of an accused in a criminal case tried as warrant case would not amount to acquittal and would not mean that prosecution against the accused has been smothered or has come to an end. The discharge of an accused only pertains to his custody which is no longer required. It is true that the petitioner having been found innocent by the investigating officer, was discharged from the case by the Magistrate and the said order was not assailed by the complainant or the State in appropriate proceedings and it attained finality. It is true that trial Court cannot summon an accused who had

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been discharged unless trial of co-accused commences. In the present case, the petitioner has been summoned after the commencement of trial of co-accused and recording of evidence of complainant which is, prima facie, basis for summoning the petitioner to face trial along with co-accused.

In view of above, there is no illegality or perversity in the impugned orders.

Instant petition is devoid of merit and dismissed.

26.05.2015
parveen kumar

(Paramjeet Singh)
Judge