

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

Judgment Reserved on: 09th December, 2009
% *Judgment Delivered on: 11th December, 2009*

+ **CRL.M.C.642/2009**

NAWAL KISHORE Appellant
Through: Mr.Harish Khanna, Adv.

versus

THE STATE Respondent
Through: Mr. Manoj Ohri, APP for State
with SI O.P.Mandal, PS Kirti
Nagar.

**CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR**

1. Whether the Reporters of local papers 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

INDERMEET KAUR, J.

1. By way of this petition, the petitioner is seeking quashing of FIR no.395/1999 registered under Section 272/273/328 of the IPC at PS Kirti Nagar against the present petitioner.
2. Allegations in the complaint were that some persons had purchased Gulab Jamun from the Corner Sweet Shop of the petitioner at Corporation Market, Ramesh Nagar. On consumption they felt giddy and vomited. Samples were drawn by the police.
3. The public analyst vide report dated 13.9.1999 had opined the sample to be adulterated as containing mycotoxins.

4. Charge-sheet was filed on 20.12.1999 under Section 272/273 and 328 of the IPC. Since the offence under Section 328 of the IPC was triable exclusively by the Sessions Court, the matter was committed to the Additional Sessions Judge.

5. On 25.11.2000, the Additional Sessions Judge had discharged the petitioner for the offence under Section 328 of the IPC and the case was remanded back to the court of ACMM to deal with the charge-sheet for the offences under Section 272/273 of the IPC. Notice was framed under the aforesaid provisions of law i.e under Section 272/273 of the IPC.

6. On 29.11.2007, a revision petition was preferred before the court of Additional Sessions Judge against the framing of notice. The argument propounded was that since the charge-sheet had been filed for a cognizable offence as also for a non-cognizable offence but court having discharged the petitioner for a cognizable offence and the charge having been framed only for a non-cognizable offence the trial stood vitiated as the procedure under Section 155 of the Cr.PC of taking prior permission to investigate a non-cognizable offence not having been taken, the trial stood vitiated. Revision petition has been dismissed on 2.12.2008.

7. Petitioner has impugned this order by invoking the inherent powers of the High Court.

8. The short argument addressed before this court is that the charge-sheet in this case had admittedly been filed under Section

328/272/273 of the IPC i.e. for both a cognizable and a non-cognizable offence; the petitioner had however been discharged for the cognizable offence i.e. for the offence under Section 328 of the IPC and notice had been framed against him only for a non-cognizable offence i.e. for the offence under Section 272/273 of the IPC; the procedure as mandated under Section 155 of the Cr.PC i.e. prior permission not having been taken by the investigating officer to investigate a non-cognizable offence the trial in pursuance of such a charge-sheet stands vitiated; proceedings are liable to be quashed.

9. Learned counsel for the petitioner has placed reliance upon judgment of this court reported in Mam Chand & Ors. vs. State 1999 (2) JCC (Delhi) 334, Ajit Singh vs. State 39 (1989) DLT 468, Surender Kumar vs. State 1997 JCC 45 and Brahm Dutt & Ors. vs. State & Ors. 1996 JCC 183. It is submitted that in view of the clear-cut ratio laid down in the aforesaid judgments since requisite permission under Section 155 of the Cr.PC had not been taken and the petitioner having been discharged for a cognizable offence, trial for a non-cognizable offence could not now proceed. It is submitted that this protection has been afforded to the public against the high handedness of police officials who would be given a long rope to start investigation and pestering innocent persons even in non-cognizable offences, on their own, without taking prior

permission of the concerned court; such misuse of power by the police can cause undue harassment to the public.

10. Arguments have been rebutted by the learned counsel for the State. The learned counsel for the State has drawn the attention of the court to the judgment in *Dr.Kamal Kishore Kalra vs. State (NCT of Delhi)* 151 (2008) DLT 546 wherein all the aforestated judgments relied upon by the counsel for the petitioner had been dealt with and the court in the said judgment had held that where the FIR had disclosed offences both cognizable and non-cognizable but the course of the investigation had resulted in the cognizance being taken only of a non-cognizable offence and the cognizable offence having been dropped, yet the proceedings would not stand vitiated as the bar of Section 155 of the Cr.PC would not be attracted. The judgments relied upon by the petitioner had been discussed and distinguished; reliance had been placed upon the provisions of Section 2 (d) of the Cr.PC i.e. the definition of a 'complaint' and the explanation attached to it. Provisions of Section 155 (4) of the Cr.PC had also been relied upon to draw support.

11. Rival contentions of the parties have been heard and the record has been perused. The law as cited has also been appreciated.

12. In *Dr.Kamal Kishore Kalra's* case (supra) all the aforestated judgments i.e. *Mam Chand & Ors. vs. State* 1999 (2) JCC (Delhi)

334, Ajit Singh vs. State 39 (1989) DLT 468, Surender Kumar vs. State 1997 JCC 45 and Brahm Dutt & Ors. vs. State & Ors. 1996 JCC 183 have been discussed and distinguished. Before adverting to the ratio as laid down in the aforestated judgment it would be necessary to examine the contents of the present FIR.

13. The present FIR i.e. FIR no.395/1999 had been registered under Section 272/273/328 of the IPC. This was on a complaint that some persons had purchased gulab jamun/sweets from the sweet shop of the petitioner pursuant to which they had felt giddy and had started vomiting. The FIR had been registered under Section 272/273/328 of the IPC. In the course of the investigation a sample of the gulab jamun had been sent to the laboratory for examination wherein it had been opined to contain poison i.e. the presence of mycotoxins had been detected. Charge-sheet was accordingly filed. The additional Sessions Judge had however discharged the petitioner for the offence under Section 328 of the IPC. Admittedly the prima facie averments made in the complaint had disclosed the ingredients of both a cognizable as also a non-cognizable offence; cognizable offence being the offence under Section 328 of the IPC and the non-cognizable offences being the offences under Section 272/273 of the IPC.

14. Section 2 (d) of the Cr.PC defines a complaint; it inter alia reads as:

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this

Code, that some persons, whether known or unknown, has committed an offence, but does not include a police report.

Explanation. – A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

15. The explanation attached to this section clearly pre-supposes a situation that where initially a charge-sheet has been filed for both a cognizable as also a non-cognizable offence and thereafter the proceedings in the cognizable offence are dropped, the same shall be deemed to be treated as a complaint and the police officer by whom such a report is made shall be deemed to be the complainant. This is clearly so in the instant case. Proceedings for the cognizable offence having been dropped/discharged, the charge-sheet has to be treated as a complaint under Section 2 (d) of the Code and the police officer who has filed the charge-sheet has to be treated as the complainant. It was on this complaint that the cognizance under Section 272/273 of the IPC had been taken which the Magistrate was empowered to do so under Section 190 (1) (a) of the Cr.PC.

16. Sub-clause (4) of Section 155 of the Cr.PC inter alia reads as follows:

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable, notwithstanding that the other offences are non-cognizable.

The bar of Section 155 (2) of the Code is not attracted.

17. Under Section 460 of the Cr.PC there are certain category of irregularities which do not vitiate the proceedings i.e. those proceedings which are erroneously done but in good faith. Such proceedings are not liable to be set aside on the ground that the Magistrate was not empowered to do so and clause (e) of Section 460 of the Cr.PC includes the power.

(e) To take cognizance of an offence under clause (a) or clause (b) of sub section (1) of Section 190.

18. The aforestated legislative provisions clearly answer the queries of the petitioner. This court also draw support from the decision of a Coordinate Bench of this court rendered in Chaman Prakash v. State 2007 (3) JCC 1983. Para 8 inter alia reads as:

"8. I am not persuaded to accept the line of reasoning in the cases cited on behalf of the petitioner. Undoubtedly there are certain observations in those cases suggestive of the entire investigation being vitiated if the court discovering, at a later stage that no cognizable offence is made out. However each case had to be decided on the facts and attendant circumstances. In this case the court in the first instance did not accept the submission that only a non-cognizable offence was made out. Further Section 460 (2) lists out irregularities which vitiate the proceedings. A reading of this would show that if the Magistrate proceeds to make an order to investigate the offence, under Section 155 into the incident which may turn out to be one involving a non- cognizable offence, that does not by itself vitiate the proceedings. This is further strengthened by 155 (4), which provides that if two offences, one non-cognizable, and the other cognizable, are alleged, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. Such being the situation investigation and further proceedings in respect of an FIR, where eventually only non-cognizable offences can be pressed, would not vitiate the entire proceedings. There is no taint of illegality attached to the investigation. This aspect was not discussed in the judgments cited; they did not consider the impact and effect of Section 460, or Section 155 (4)."

19. This petition is without any merit; it is dismissed.

(INDERMEET KAUR)
JUDGE

11th December, 2009
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