

**State of Uttar Pradesh Vs. Jitendra Kumar Singh and ors.**

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**Court :** Allahabad

**Decided On :** May-19-1987

**Reported in :** 1987CriLJ1768

**Judge :** B.L. Yadav, J.

**Appellant :** State of Uttar Pradesh

**Respondent :** Jitendra Kumar Singh and ors.

**Judgement :**

B.L. Yadav, J.

1. The State of U.P. has filed the present revision under section 397/401 of the Criminal Procedure Code, 1973 (for short the Code) against the order dated 15/16-11-1984 15/16-11-1984 passed by Munsif Magistrate, Tehri Garhwal under section 239 of the Code in a warrant case by which the opposite parties have been discharged for the offence under Sections 409,420,468,471,34 and 109 of the Penal Code.

2. Brief account of the events leading to the present application is that in a warrant case under Sections 409,420, IPC. etc. triable by a Magistrate under Chapter XIX (Nineteen) by chance on behalf of the State nobody was present and even though a number of material existed on the record, the order of discharge was passed.

3. Shri Harihar. Prasad Tripathi, the learned Counsel for the State urged that the impugned order of discharge under Section 239 was erroneous, inasmuch as it

was obligatory on the part of the Magistrate to have considered the police report and other documents, sent under Section 173, and only after such considerations and making such examination, if any, of the accused and after giving prosecution an opportunity of being heard, if it appears that the charges against the accused were groundless, in other words if there was no material or admissible evidence for presuming that the accused have committed an offence, only in that event an order of discharge could be passed. The learned Magistrate has not passed the order consistent with the provisions of Sections 239 & 240 of the Code. Reliance was placed on *R. S. Nayak v. A. R. Antulay*, *Superintendent and Remembrancer of Legal Affairs v. Anil Kumar* and *State of Bihar v. Ramesh Singh*.

4. learned Counsel for the opposite parties urged that under section 239 of the Code the impugned order has been passed after perusing relevant records. No ground has been made out for interference in the revisional jurisdiction of this Court.

5. Having heard the learned Counsel for the parties the point for determination is as to whether the impugned order of discharge passed under section 239 was correct or not. It is better to have statutory provision of section 239 of the Code :

Section 239. When accused shall be discharged- 'If, upon considering the police report and the document, 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.

Section 239 may be read with Section 240. A bare reading of Section 239 indicates that it was obligatory on the part of the Magistrate to consider the police report and other documents sent under Section 173 and after hearing the parties, if the charge appears to be groundless or without any basis, only thereafter the order of discharge could be passed. Section 240 enacts as to when the charges shall be framed, it provides that if upon such consideration i.e. as indicated in Section 239 and examination of the accused and hearing the accused and prosecution, the Magistrate is of the opinion that there is ground for framing a

charge for an offence under this chapter, he shall frame charges.

6. In the instant case it appears that the learned Magistrate was swayed away with the consideration that nobody represented the State including the official entrusted with the work of supervising the State litigation or any Advocate including the District Govt. Counsel (Criminal) or penal lawyer appeared for the State. Under Section 239 the Magistrate was bound to consider police report and the documents under Section 173 and hear the parties. What is to be highlighted is that the Legislature has made the consideration of the police report and documents furnished under Section 173 a condition precedent. What is the meaning to be assigned to word 'consider'. This word 'consider' is not a defined word under the Code. According to Black's Law Dictionary the word 'consider' means to fix the mind on with a view to careful examination. In *Ram Chander v. Union of India*, , their Lordships of the Supreme Court held that the word 'consider' means due application of mind. In the instant case by the statutory provision of Section 239, the Magistrate was required to fix his mind on the police papers and other documents with a view to carefully examine the same but he did not apply his mind at all. In other words without applying his mind and without carefully examining the police report and the documents sent with it under section 173 and without affording to the prosecution an opportunity of being heard, the impugned order has been passed. I have perused the relevant record and papers. There are sufficient documents and evidence indicating that prima facie charges were made against the opposite parties but those documents and evidence have neither been referred nor considered.

7. In *R. S. Nayak v. A.R. Antulay* (Supra) after considering the scope of the provisions of sections 227, 239 and 245 (1) it has been held under para 44 page 2071 that broadly speaking in spite of the difference in the language of these sections legal position is that if trial court is satisfied that prima facie case is made out against the accused, the charge has to be framed.

8. This can be viewed from another angle. The words employed by the Legislature to express its intention under Section 239 are that if the Magistrate considers the charge to be groundless, he can pass an order of discharge. For an order of

discharge under Section 227, the Judge has to consider whether there is not sufficient ground for proceeding. In order to appreciate the ambit of an order of discharge in a warrant case triable by a Magistrate sections 239 and 240 must be read together. In view of the principles explained in *Superintendent & Remembrance of Legal Affairs v. Anil Kumar (Supra)* and *R. S. Nayak v. A. R. Antulay (Supra)* and reading sections 239 and 240 together, it is manifest that the learned Magistrate did not apply his mind at all to the police report and other documents sent with it under section 173 nor he afforded any opportunity to the prosecution for being heard, nor he considered the scope of passing an order of discharge in a warrant case triable by Magistrate. It appears that the Magistrate was not aware about the legislative wisdom enshrined under section 239 by using the word 'consider' and 'groundless'. According to Black's Law Dictionary the word 'ground' connotes, foundation or basis, in criminal cases it means basis for charging criminal defendant or foundation for admissibility of evidence and word 'groundless' connotes no basis or foundation in evidence. The impugned order has been passed arbitrarily without considering the legislative mandate under Sections 239 and 240 of the Code. The impugned order of the Magistrate cannot be, accordingly, sustained.

9. In the result the revision succeeds and is allowed, the impugned order of discharge dated 15/16 Nov. 1984 is quashed and the learned Magistrate is directed to register the case to its original number and decide the question in respect of discharge in accordance with law and after carefully examining police report and other documents sent with it under section 173 and after affording sufficient opportunity of being heard to the prosecution and accused.

10. Before parting with the case I would be failing in my duty if I do not say a few words about the manner in which this case has been conducted in court below on behalf of the State. In a welfare democratic society like ours, every individual of the State is supposed to be interested in a criminal litigation conducted by the State. Every citizen has a right to ask a question as to why the State Govt should entrust the sacred duty of supervising important criminal litigation to the careless officials. Similarly the conduct of the District Govt. Counsel (Criminal) or the Penal Lawyer is also amenable to public criticism. In this case the conduct of the official

doing pairavi on behalf of the State and that lawyer appears to be far from satisfactory. Under the circumstances the Govt. may, if it thinks proper, call for an explanation from the official and the counsel and take suitable action. It is further not too late to evolve a new procedure by setting up a separate litigation Department or Cell in the State service. The minimum qualification must be LL.B. for such recruitment. These officers must have a separate service rules but with special provisions for strict action against lapses on their part. A copy of this order must be sent to the Legal Remembrancer and the Chief Secretary State of U.P. within a month.

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