

Sb Yadav Vs. State

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Court : Delhi

Decided On : Jan-09-2012

Appellant : Sb Yadav

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + Criminal Appeal No.666/2011 % Judgment reserved on : 12th October, 2011 Judgment delivered on : 09th January, 2012 SB YADAV Appellant Through : Mr.O. P. Khadaria, Advocate versus STATE Respondent Through : Ms. Ritu Gauba, APP. CORAM: HON'BLE MR. JUSTICE SURESH KAIT SURESH KAIT, J..

1. The instant appeal is being filed under Section 341 of Code of Criminal Procedure, 1973 against the impugned order dated 26.11.2010 passed by learned Additional Sessions Judge (North-west) Rohini Courts, Delhi, whereby, learned Judge has formed an opinion that a complaint under Section 195 of the Code has to be filed against the appellant. Thereafter, file the complaint before ACMM (North-West), Rohini Courts, Delhi under Section 193/195/211 r/w Section 120 B of the Indian Penal Code against the appellant and others..

2. Brief facts of the case are that a case bearing FIR No.10/2010 was registered at P.S. Jahangir Puri, (North West) Delhi on 09.01.2010 by CRL. A. 666/2011 *Page 1 of 40* one Nitin Kumar for offences punishable under Sections 392/397/411 read with Section 34 of the Penal Code and Section 27 of the Arms Act..

3. On 09.01.2010, Constables Rajender, Sajjan and Vijender and HC Dilip Singh were on patrolling duty in the area. They heard some noise and found four boys being chased by one Nitin Kumar. They overpowered those boys namely Vikas @ Vicky, Deepak, Dilip and Ravinder @ Ravi. Nitin made a statement to HC Dilip Singh, which becomes the bedrock of the case..

4. It is alleged in the said statement that, he was robbed of his purse, containing a sum of Rs.1200/- besides visiting card, and a mobile phone at the point of knife by the said boys. Recovery of robbed articles and weapon of offence were effected from the offenders. Case was registered and investigation was taken up by ASI Umed Singh. Investigation culminated into a Charge-sheet against the offenders, referred above..

5. After the procedural rituals, Charges were framed against the accused persons to which they pleaded not guilty and claimed trial..

6. On 11.08.2010, complainant/Sh. Nitin Kumar appeared before the learned Trial Judge in the pre-lunch session and made his deposition. Since he opted not to support the case of the prosecution on all material particulars, he was cross-examined by the learned Prosecutor. Learned Judge also exercised her power under Section 165 of the Evidence Act and put various court questions to said witness. To conclude his testimony, he was further cross-examined by the accused persons. CRL. A. 666/2011 *Page 2 of 40* Testimony of Ct. Sajjan Singh was also recorded by learned Judge in pre-lunch session..

7. The learned Judge recorded in the order that on conclusion of his testimony, Nitin Kumar told her that he deposed facts at the instance of one Kuldeep Soni and no such incident, as deposed by him earlier, took place..

8. Learned Trial Judge summoned the appellant who was the then SHO, Jahangirpuri, and ACP of the area in post-lunch session. She made Nitin Kumar to sit in the court room. She delivered a lecture to the witness as to penal consequences of making a false statement before the court of law. She apparently exercised her powers under Section 311 of the Code and re-examined Nitin Kumar in post-lunch session, wherein he made all together a different story. She

directed the Commissioner of Police to get the matter probed from the Crime Branch of Delhi Police and, thereafter, submit a report in the Court..

9. In accordance with the missives, so given, enquiry was conducted and a report dated 02.11.2010 was presented before Id.Judge. Not satisfied with the report, she again commanded the authorities to enquire the matter on certain issues and in pursuance of those directions, another report dated 26.11.2010 was presented before the learned Judge. On that very date, she recorded the judgment, whereby all four accused persons were acquitted. Learned Trial Judge further directed that a complaint be filed against the appellant and others. Accordingly a complaint was filed CRL. A. 666/2011 *Page 3 of 40* before the Court of ACMM (North West), Rohini Courts, Delhi on that very date..

10. To the effect that the appellant conspired with Nitin Kumar, Dalip Singh and other police officers and committed offences punishable under Sections 193/195/211 of the Penal Code..

11. Mr.O. P. Khadaria, learned counsel has submitted that the act of learned Judge by filing a complaint for the aforesaid offences before the court of Additional CMM (North-West), Rohini, Delhi are being assailed in the present appeal on the following grounds:- (a) The learned Judge was under an obligation to record those facts underneath the said statement and to record her remarks thereon. Thus, non-observation of provisions of Section 278(2) of the Code, vitiates her subsequent steps in the matter; (b) At the time of examination of Sh. Nitin Kumar in pre-lunch session, the learned Judge had used her powers under Section 165 of the Evidence Act, when she had put various Court questions to the witness to discover or obtain proper proof of relevant facts thereof, then there was no occasion for learned Judge to again use her powers under Section 311 of the Code; (c) For exercise of powers under Section 311 of the code, she was under obligation to form an opinion to the effect that re- examination of Nitin Kumar, who was already examined on that CRL. A. 666/2011 *Page 4 of 40* very date, was essential just for decision of the case. No such opinion was formed by her. Therefore, re-examination of Nitin Kumar in post-lunch session of 11.08.2010 was beyond her jurisdiction. Thus, learned Judge committed an illegality, when she

failed to adhere to the provision of Section 311 of the code; (d) The learned Judge ordered a further probe by the Crime Branch of Delhi Police, in violation of the provisions of the Code. Chapter XVIII of the Code provides procedure for trial before Court of Sessions. There is no provision, either in Chapter XVIII or elsewhere in the Code, which may empower a Session Judge to order Crime Branch of Police to conduct an enquiry, submit its report and then use that report as an evidence and pronounce a verdict against the prosecution or the defence. (e) Learned Judge re-examined Nitin Kumar in the post-lunch session, without permitting the Prosecutor to put question to him, either in the form of re-examination or in the form of cross- examination which act, made re-examination of Nitin Kumar violative of Section 137, 138 and 154 of the Evidence Act. Therefore, his re-examination, done in post-lunch session, is violative of the provisions of the Evidence Act and makes entire subsequent steps in the trial illegal; CRL. A. 666/2011 *Page 5 of 40* (f) Re-examination of Nitin Kumar in the post-lunch session was done by the learned Judge, which as a tendency to change character of the witness, from prosecution witness to a court witness. In that situation, the learned Judge was under an obligation to accord an opportunity to the learned Prosecutor to purify his testimony by an ordeal of cross-examination. (g) The learned Judge became subjective in using the report dated 02.11.2010 while she ignored the report dated 26.11.2010 which contradicts the facts stated by Nitin Kumar during the course of his re-examination during the post-lunch session. Had the learned Judge considered the report dated 26.11.2010 it was bound to come to her knowledge that Nitin Kumar detailed wrong facts on material particulars; during the re-examination conducted in the post-lunch session. (h) HC Ramphal, who recorded the FIR had become bedrock of case, has not been made an accused. (i) Standing Order No.33 dated 09.12.1988 issued by the Commissioner of Police, Delhi, makes it incumbent on the Duty Officer to register cases promptly whenever any report regarding a cognizable offence is made. The command of law contained in Section 154 of the Code making it incumbent on officer Incharge of PS to reduce in writing by himself or under his direction every information relating to commission of cognizable offence. CRL. A. 666/2011 *Page 6 of 40* (j) The Judge relied the testimony of Nitin Kumar recorded in post-lunch session which highlights that Nitin Kumar was taken

to the PS by Kuldeep Soni and produced before a Police Officer who recorded his statement after obtaining an empty purse and a mobile phone from him. (k) Circular makes it clear that it was the duty of Inspector Subhash Chand to supervise the investigation of the case. No material has come over the record that the appellant supervised the investigation of the case at any point of time. (l) Provision of sub section (2) of Section 173 of the Code makes it incumbent on Officer Incharge of PS to forward Charge- sheet of the case to the Magistrate, empowered to take cognizance of the offence. This statutory duty nowhere enjoins a responsibility on him calling upon him to verify the correctness of the investigation or to sign the Charge-sheet as the person responsible to submit it to the court of law. (m) Report of the Crime Branch, used as a corroborative piece of evidence by the learned Judge, does not take character of ocular or documentary evidence, when it was not proved at all during the course of trial. There was vacuum of evidence to corroborate the testimony of Nitin Kumar, recorded in post-lunch session. The learned Judge committed illegality while placing reliance on those facts. CRL. A. 666/2011 *Page 7 of 40* (n) The Judge had failed to apply well established canons of appreciation of evidence viz; she has to separate the grains from the chaff, in that process, she had to visit the entire material and to assess it on touch stone of veracity. She was to form an opinion on credibility of the witness and to decide whether he is "wholly reliable" or "wholly unreliable" or "partly reliable and partly unreliable". The learned Judge had not recorded a finding that Nitin Kumar was partly reliable and partly unreliable witness. Without recording this finding, the learned Judge cannot accept a part of his testimony. When she accepted a part of his testimony, she committed an illegality;.

12. Mr. O.P. Khadaria, learned counsel appearing for the appellant submits that Nitin Kumar cannot be termed as "partly reliable and partly unreliable witness", when one proceeds to read his testimony as a whole. At one juncture he narrates a story of robbery, arrest of the accused persons and further, recovery of the robbed articles besides the weapon of offence. While at the other juncture, he took a somersault and dispelled facts relating to robbery, arrest of the accused persons and recovery of the robbed articles besides weapon of offence. Nitin Kumar has given two inconsistent stories, which demolish each other. Under these circumstances, there was no iota of fact to assert that one portion of the testimony

is reliable while other is unreliable..

13. Learned counsel further submitted that, learned Judge failed to appreciate the fact testified by HC Dalip Singh, Ct. Sajjan Kumar and CRL. A. 666/2011 *Page 8 of 40* ASI Umed Singh on well established principles of law. Testimony of a Police Officer cannot be brushed aside only on the count that he happens to be a member of the police force, his evidence is to be assessed on the same standards on which testimony of a complainant, or of an victim or an interested witness is to be assessed. Only in cases where a Police Officer is found to be inimical qua the accused or his acts are actuated with dishonesty altogether, his testimony can be discarded altogether and in cases other than those detailed above, his testimony was to be scrutinized on standards of ordinary the human behavior, natural course of events and tenets of veracity..

14. It is submitted, the Trial Judge has not assessed deposition of the aforesaid witness on standards of veracity and illegally branded them as unworthy of credence. The learned Judge acted in most illegal manner, which vitiated the entire trial..

15. Further submitted, the learned Judge failed to appreciate that there was no iota of fact to suggest that the appellant joined the conspiracy at any stage. Finding of the Trial Judge, in the Judgment dated 26.11.2010 to the effect that the appellant was a part of the conspiracy is perverse..

16. Learned counsel further submitted that learned Judge also failed to appreciate that in the report of the Crime Branch, it has been specifically pointed out that Nitin Kumar was changing his stand, hence he was an unreliable witness. The appellant neither appeared as a witness nor took any step in dealing with the case, to show his involvement in the alleged conspiracy. CRL. A. 666/2011 *Page 9 of 40*.

17. It is argued by learned counsel for appellant that learned Judge was under an obligation to conduct an enquiry as contemplated by Section 340 of the Code and to record a finding thereof as to what offences were committed and by whom. No such enquiry was conducted, nor a finding was recorded which vitiates the opinion recorded by learned Judge as well as act of filing a complaint against the appellant

and others..

18. In the instant appeal, the appellant has prayed as under:- (i) To quash/alter/modify the findings recorded by the trial court in its judgment dated 26.11.2010 to the effect that the appellant was a party to conspiracy with Nitin Kumar, HC Dalip Singh and other police officers and in furtherance of that conspiracy he committed offences punishable under Sections 193/195/211 of the Penal Code; (ii) To quash the compliant dated 26.11.2010 filed against the appellant and set aside the orders passed by the trial court in the said complaint against the appellant; (iii) To discharge the appellant from the case filed against him while using the provisions of Section 340 of the code;.

19. Learned counsel for the appellant has relied upon State of U.P. v. Mohammad Nooh AIR 1958 SC 86 wherein, it has been observed as under :- CRL. A. 666/2011 *Page 10 of 40* "11 Section 437(6) of the Cr.P.C. is an enabling provision which empowers the Court other than High Court or Court of Sessions to grant bail in those cases also in which it has no power to grant bail under various provisions of law though it has power to try the offence. The provision does not empower the Court to violate judicial propriety or to grant bail in other cases where bail has been refused by High Courts on merit. Here it is not out of place to mention that on delay in investigation also Courts have power under Section 167 (2) of the Cr. P.C. but no discretion has been allowed under Section 167(2) of the Cr.P.C. whereas Section 437 (6) of the Cr.P.C. gives discretion to the Court while granting bail due to delay in trial of the case, therefore, the Court has to exercise the judicial discretion and not to act mechanically. The provisions contained in Section 437(6) of the Cr.P.C. have no application to Court of Session or High Court as no such provisions have been embodied in Section 439 of the Cr.P.C.

12. Here in the instant case, application for grant of bail has been rejected by this Court. The offence levelled against the applicant is not only grievous but relates to fraudulent preparation of Government's documents. That apart, this Court while deciding the bail applications on merit has observed that the applicant is continuously involved in making fake documents. Learned trial Court has also recorded that the applicant due to ill-health was not produced in Court. It is well-

known fact that if accused is not present and no representation on behalf of the accused is there, recording of evidence in his absence is not permissible."

20. In another case of Dr. Sudhir Kumar Ghosh v. Prasar Bharti Broadcasting Corporation of India, 2006 CRI. L.J. 4109, wherein, it has been observed as under:- CRL. A. 666/2011 *Page 11 of 40* "12. In our opinion, the power of preliminary enquiry mentioned in Section 340 of the Code of Criminal Procedure cannot be delegated to any other person by the Judge before whom the offences mentioned in that section had been allegedly committed..

13. Moreover, it is now settled law that before a direction is given to lodge complaint under the said section, it is for that Court to arrive at the conclusion after preliminary enquiry, if any, whether the allegations have prima facie substance and whether it is expedient in the interest of justice to lodge a complaint in order to probe into the allegations and recording of such satisfaction by the Court is imperative [See *Prithvi v. State of Maharashtra* reported in MANU/SC/0740/2001 : 2002 CriLJ548 ; *B.K. Gupta v. Damodar H Bazaz* reported in MANU/SC/1150/2001 : (2001)9SCC742 ; *Phiroz Dinshaw Lam v. Union of India* reported in 1996(6) SCC 209;] and that duty could not be entrusted to the Registrar, Original Side..

14. We, therefore, find that there is an error apparent on the face of the order of the learned Single Judge in delegating such authority to the Registrar, Original Side and the lodging of a complaint on the basis of such satisfaction of the Registrar, Original Side itself vitiates the proceedings in view of Section 195(1) of the Code of Criminal Procedure. In this connection reference may be made to the decision of the Supreme Court in the case of *Randhir Singh v. State of Haryana* reported in MANU/SC/0007/2000 : 2000 CriLJ755 where the Apex Court recalled its own order of conviction passed earlier on an application under Section 340 of the Code of Criminal Procedure for non-compliance of the provisions contained in Section 195 of the Code."

17. We, therefore, set aside the order passed by the learned Single Judge only on the ground that the direction passed by His Lordship asking the Registrar of the Original Side to enquire and record satisfaction was not in conformity with the

provisions contained in Section 340 of the Code of Criminal Procedure."

21. Learned counsel for appellant has further relied upon *Shabir Hussain Bholu v. State of Maharashtra* 1963 (1) Cr.L. J. 803, wherein, it has been observed as under:- "If the Court does not form an opinion that the witness has given intentionally false evidence or intentionally fabricated false evidence no question of making a complaint can properly arise. Similarly, where the Court has formed an opinion that though the witness has intentionally given false evidence or intentionally fabricated false evidence the nature of the perjury or fabrication committed by him is not such as to make it expedient in the interests of justice to make a complaint it has a discretion not to make a complaint. But it does not follow from this that it can later on resort to Section 476 and make a complaint against the witness. For, even under Section 476 the Court must, before making a complaint, be satisfied that it was expedient in the interests of justice to make an enquiry into the offence committed by the witness. It could not be urged, that CRL. A. 666/2011 *Page 13 of 40* where the Court willfully refuses to record at the time of delivering the judgment or final order disposing of the proceedings before it that for the eradication of the evil of perjury and in the interests of justice it was expedient that the witness should be prosecuted for the offence which appears to have been committed by him it Could later resort to the provisions of Section.

476. The position must be the same where it falls to take action though it is open to it to do so. It is not as if, as the learned counsel for the respondent suggests that the Court has an option to. proceed tinder either Section 479-A or under Section 476 and that if it does not take action under Section 479- A it can do so under Section.

476. The jurisdictions of the Court to make a complaint against a person arises only from the fact that that person has given false evidence or fabricated false evidence at any stage of the proceeding disposed of by it. The conditions required to be fulfilled by the Court and the procedure to be followed by it for the purpose of exercising its jurisdiction and making a complaint are not to be equated with the conditions which give the court jurisdiction to make a complaint. From this it would follow that whereas Section 476 is a general provision dealing with the procedure

to be followed in respect of a variety of offences affecting the administration of justice in so far as certain offences falling under sSection 193 to 195 and Section 471,.

1. P. C. are concerned the Court before which that person has appeared as a witness and which disposed of the case can alone make a complaint."

22. Further, he has relied upon Amzad Ali v. Marfat Ali Biswas 1997 Cr.L. J. 4148, wherein, it has been observed as under:- "25.The appellate court on the basis of certain conduct on the part of the plaintiff petitioner drew an adverse presumption against him to the effect that the Impugned deed was a forged one and that he filed it CRL. A. 666/2011 *Page 14 of 40* knowing it to be so. The appellate court recorded the above presumption in the impugned order and directed the learned Munsif to make the complaint, as it was of the view that the learned Munsif should be directed to make the complaint. Nowhere in the impugned order itself, the appellate court of the learned Munsif, before actually making the complaint in pursuance of such direction, did expressly record any finding to the effect that it was expedient in the interest of justice that an Inquiry into the offence under section 471 should be made..

28. In K. Karurtakaran v. T.V. Eachara Warriar 1978 CriLJ339, it was held that in an Inquiry before lodging a complaint under section 340 of the new Code, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specific offence and whether it is also expedient in the interest of justice to take such action..

29. In the case of Surendra Nath Jana v. Kumeda Charon Misra reported in MANU/WB/0041/1930 : AIR1930 Cal

352. , the facts are almost similar to those of the present case. In that case, a complaint was ordered to be drawn up on appeal by the District Judge under sections 465 and 471 1PC and although the learned District Judge gave a finding that a clear prtmajacte case had been made out yet he failed to record a finding that it was expedient in the Interest of Justice that a complaint should be filed, as required under section 476 (old). K was urged before the Division Bench of our

High Court that the fact that a prima facie case had been made out coupled with the fact that the complaint had been ordered was sufficient to enable the court to infer that the opinion of the lower appellate court was that it was expedient in the interest of justice that such an inquiry should be made. But this contention was repelled by our High Court and it was held that it is not possible to say that an express statutory provision for a finding to be recorded is satisfied by inferences which may be drawn from other findings of facts arrived at by the lower appellate court. In such view of the matter, the order of the District Judge was set aside..

30. This Division Bench Judgment of our High Court was relied upon by the Rajasthan High Court in the case of Brijmohanlal v. Sohanraj reported in 1963(1) Cri. LJ 713 and it was held that the requirement of recording of a finding that it is expedient in the interest of justice that a complaint be filed under old section 476 {which corresponds to section

340. of the present Code) that an enquiry should be made into the offence is mandatory and is a pre-requisite for making of a complaint and if such a requirement is not complied with before the order of prosecution is passed, the order is vitiated and deserves to be set aside, as being in the breach of the express provisions of section 476 (old)..

31. In the case of K.K. Khanna v. M/s. Expo Enterprises India, New Delhi reported in 1984 Cri. LJ 1723. a criminal complaint for offences alleged to have been committed under section 191 read with section 193 of IPC was directed to be lodged under section 340 of the new Code. The Order for lodging the complaint was held by the Delhi High Court to have been vitiated since it was nowhere opined in the order itself or recorded as a fact that the lodging of the complaint was expedient in the interest of justice as required under section

340. . Incidentally, it may be pointed out that the Supreme Court in the case of Santokh Singh v. Izhar: 1973 CriLJ1176 , observed : "Every incorrect or false statement does not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency". CRL. A. 666/2011 Page 16 of 40

"The court orders prosecution in the larger Interest of the administration of Justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party." Relying on those observations of the Supreme Court, the Delhi High Court in K.R. Khanna's case (supra) further held: "The requirement of law was of fundamental Importance and the omission in that regard vitiates the Impugned order. Even though prosecution for perjury may be possible but section 340 of the Code does not permit complaint to be lodged in all those cases and lodging the complaint is permissible only when the court making the complaint is of the positive view that the lodging of the complaint would be expedient in the Interest of Justice"..

32. Thus, upon a plain reading of sub section (1) of section 340 of the present Code of Criminal Procedure and consideration of the decisions cited above, it is found that the law is well settled on the point that an order for lodging a complaint under section 340 without expressly recording any finding to the effect that it is expedient in the Interest of Justice that an Inquiry should be made into the offence concerned is vitiated and illegal being in breach of the express provisions of section 340(1) and is liable to be set aside. The learned counsels appearing for the opposite parties were also frank enough to concede this legal position..

33. It is thus needless to comment that the Impugned order directing making of complaint and the consequent prosecution based on that order were per se illegal and are liable to be quashed on that ground alone..

34. When the impugned order is liable to be set aside only by reason of the fact that it did not comply with the mandatory requirements of recording an express finding to the effect that it is expedient in the interest of justice to CRL. A. 666/2011 *Page 17 of 40* make a complaint under section 340(1), the question whether or not materials on record were sufficient to give rise to the satisfaction of the court below regarding the existence of a prima facie case under section 471 of IPC so as to justify lodging of a complaint does not call for any decision by this court and accordingly, 1 need not examine the impugned order so as to find out whether or not it also suffers from the infirmity in this regard..

35. I now come to the question of maintainability that was raised on behalf of the opposite parties. Sub-section (2) of section 341 Cr.PC provides that an order under sub-section (1) of the section shall be final and shall be not be subject to revision. The corresponding section 476B of the old Code did not, however, contain any such provision. In view of the express bar under sub-section (2) of section 341 of the new Code, the impugned order is not subject to revision..

36. But, in the case of Lalit Mohan Mondal v. Binayendra Chakraborty : 1982 CriLJ625 . It was held that although an order passed in appeal under section 341 Cr.PC would not be revisable by the High Court, there could be no doubt that the High Court is entitled to examine the matter under section 482 Cr.PC which expressly overrules the bar contained in section 341 of the Code..

37. The Impugned order which constitutes the very foundation of the Impugned prosecution against the petitioner being illegal and bad. It would be sheer abuse of the process of the court to allow the said order to stand or the prosecution to be proceeded with. It cannot, therefore, be said that it is not a fit and proper case for exercise of the Inherent jurisdiction of the Court under section 482 of the Cr.PC in order to prevent the abuse of the process of the Court." CRL. A. 666/2011 Page 18 of 40.

23. On the other hand, Ms.Ritu Gauba, learned APP for State has submitted that the impugned order which is in question in the instant appeal has already been challenged by Nitin Kumar in Criminal Appeal No.180/2011 titled Nitin Kumar v. State'..

24. I note, the Co-ordinate Bench of this Court vide its order dated 28.04.2011 dismissed the same, and passed the order as under (para 12 of the same is reproduced below):- "12. I do not find any force in the contentions of learned counsel for the appellant that Trial Court ought to have conducted a preliminary enquiry by issuing a show cause notice before ordering for filing of a complaint under Section 195 IPC against the appellant. M.S. Ahlawat v. State of Haryana, 2000 Supreme Court Cases (Crl.) 193, reliance whereupon has been placed by learned counsel for the appellant, was in the context of different facts and is not applicable in the facts of this case. In Pritish v. State of Maharashtra,AIR 2002 SC

236, it has been held that preliminary inquiry under Section 340 Cr.P.C. of the Court is not peremptory. Court is not required to afford any opportunity of hearing to the person against whom it might file a complaint before Magistrate for initiating prosecution proceedings."

25. Learned APP, further submitted that section 311 of Cr.P.C. has wide powers for all the cases to be tried by any court, including i.e. Magistrate upto Supreme Court, therefore, the learned Judge has rightly used the power and action has been taken against the appellant and other accused persons. CRL. A. 666/2011 Page 19 of 40.

26. For convenience Section 311 of Cr.P.C. is reproduced below :- "311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

27. Learned APP for State further argued that Chapter XII of the Code gives power to police to investigate and Section 154 of Cr.P.C. till Section 167 (i) and 2(A) of Cr. P. C. everywhere mentioned about the Incharge of the Police Station..

28. Therefore, she has submitted that in the Procedure as prescribed above, the Incharge, Station House is the Supervisor and therefore, he is liable for any of the omission and commission by any police officer of the station house..

29. Further, she submitted that under Section 168, 169, 170, 173 (2), 174(1), the SHO of the Police Station being head of the Station, supervises the work as reported to him by the subordinate officials and he further reports as per law..

30. Learned APP has relied upon a case of Jamatraj Kewalji Govani v. State of Maharashtra, MANU/SC/0063/1967, wherein it has been observed as follows :- CRL. A. 666/2011 Page 20 of 40 "16 It is not necessary to refer to the cases cited on either side. They illustrate the application of the general principle spoken to by

Avory J. in the extract from Dora Harris(5) case and the condition laid down in Reg. v. Frost(6) Dora Harris and Reg. v. Frost cases involved rebuttal of the defence evidence. In neither case was there any unexpected move by the prisoner and the evidence was therefore, wrongly admitted. It is difficult to limit the power under our Code to cases which involve something arising eximproviso which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go that far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides. Even in England where the rule in Dora Harris(5) case obtains, the powers of the Court have not been held to be wrongly exercised, when fresh evidence has been let in for a just decision. In William Sullivan(7) rebutting evidence was held to be properly called when the accused put forward a suggestion which could not have been foreseen and in John Mckenna(8) it was held that a judge had complete discretion whether a witness should be recalled and that the Court of Criminal Appeal would not interfere unless it was made to appear that injustice had been caused. In that case (like the one here) the defence had closed the case and the accused had submitted that there was no case to go to the jury.

18. The watches (among other articles) were seized by Dutta. He separated the old watches from the new and asked to see any document which would show that the watches were legitimately imported. Govani produced no document although a summons under s.

108. of the Customs Act, 1962 was served upon him. The watches were, therefore, seized. There was evidence to show that in 1963 CRL. A. 666/2011 *Page 21 of 40* 1,300 watches were seized from Govani's locker in a safe deposit vault but the prosecution then had resulted in acquittal. The Magistrate and the High Court were of opinion that these circumstances might lead to a reasonable belief in the mind of the person seizing the watches, that they were smuggled. The prosecution examined Ranade, Prevention Officer, Customs who had assisted at the search but failed to examine Dutta who seized the watches and under whose

direction the search was conducted. The question was why were the watches seized. They were obviously not seized because they were stolen property or belonged to some other person. They were seized after search on a warrant which expressed the belief that they were smuggled and after affording Govani an opportunity by notice to explain his possession. It is obvious that the just decision of the case required a finding whether they were smuggled or not. The circumstances already deposed to by Mukund Ranade and otherwise on the record clearly established that someone must have seized the watches entertaining a belief that they were smuggled. This belief obviously was entertained by Dutta. This was not a case in which the prosecution was trying to fill a gap in the prosecution case. The court was right in thinking that a just decision of the case required that the nature of the belief underlying the seizure should be before it on oath of the person making the seizure so that Govani might be required, as the policy of the Customs Act, 1962 requires, to prove his innocent possession. Govani had really no defence in view of the Control Order of 1955 and the gap of time between the promulgation of the order and the date of the seizures. He admitted this before and after Dutta's evidence. In these circumstances it cannot be said that the court had exceeded its jurisdiction in acting under the second part of s.

540. of the Code of Criminal Procedure. As Dutta's evidence was rightly taken and gone into, and as Govani had no defence beyond taking advantage of the inadvertent omission, the defence had no CRL. A. 666/2011 *Page 22 of 40* merit. The conviction was, therefore, rightly reached. The appeal fails and is dismissed."

31. Learned APP has referred to order dated 11.08.2010 which reads as under:- "PWs HC Ramphal, public witness Nitin Kumar, Ct. Sajjan Singh, Ct. Dalip and ASI Umed Singh are present. PW1 HC Rampal, PW2 Nitin Kumar and PW3 Ct. Sajjan Singh are examined. At this stage, it has been observed by this court that the complainant Nitin Kumar who has deposed before this court and is present in the court. After completing his deposition he has now orally told the court that no such incident, as stated by him, had taken place and that he has deposed at the instance of one Kuldeep Soni who had taken him to the police station. He has stated that he had testified in the court at the instance of police officers and the

said Kuldeep Soni. This court has also noted while examining the witness PW2 that his conducted is not consistent. Since the witness has now come up with a different story, therefore under these circumstances I hereby direct this witness to sit in the court and not interact with any person. This has been done to remove all traces of influence upon him. Meanwhile keeping in view what has been stated by the witness Nitin before this court it has become necessary to secure the presence of the SHO PS Jahangir Puri and the ACP before this court. Since it is already 2:00 pm and this court is yet to rise for lunch, therefore be awaited for 2:30 pm for personal appearance of the SHO/ ACP Jahangir Puri and further examination of the remaining witnesses. 2:30 pm File is taken up again. Present: Addl. PP for the State. CRL. A. 666/2011 *Page 23 of 40* All accused are in JC alongwith Sh. Shivender Vishwash and S. Nizam advocates. PW4 HC Dalip and PW5 ASI Umed Singh are present. While the above witnesses are under examination, ACP Sh. Jai Bhagwan Kaushik and Inspector S.B. Yadav SHO PS Jahangir Puri have appeared in the court. They have been apprised of what has transpired in the court and what the witness PW2 Nitin is now stating. After this court had completed the proceedings in all other cases, the file in the present case has been taken up for reexamination of PW2 Nitin in the presence of Addl. Public Prosecutor, counsels for the accused persons, the SHO and ACP Jahangir Puri which statement is recorded in vernacular (Hindi). Addl. Examination of PW2 Nitin is now completed at 5:45 pm. I have considered the statement made by PW2 Nitin who is young boy of 18 years. He has specifically deposed on oath that no incident as alleged had taken place and that he is working with a property dealer namely Bunti Bhatia and on the date of the incident he had been asked by one Kuldeep Soni who is having a office in the same area under the name of K-7 News Channel to get one old mobile phone and his purse, after which he was taken to the police station where present report had been lodged in respect of an incident which incident according to him never took place. The witness has further deposed that the mobile phone which he had given to the police in the present FIR, had been handed over to him by one Vishwajeet a resident of C-1743 Jahangir Puri whose wife Rekha is like a sister to him. IO has also been examined and in his cross-examination a specific question was put to him by the counsel for the accused that the mobile in question belonged to Rekha R/o C-1743, Jahangir Puri to which the

IO had stated that he did not know. It has also been observed from the material which has come on record that another FIR of the same police station i.e. FIR CRL. A. 666/2011 *Page 24 of 40* No. 91/10 had been registered in March 2010 wherein the same Vishwajeet R/o C-1743, Jahangir Puri who had handed over the mobile phone to the present complainant Nitin Kumar in the present case, is the complainant where the allegations made are absolutely similar. The said FIR is Ex.PW5/DX3. I have gone through the said FIR and I am shocked to observe that the allegations and narration of the incident is absolutely similar in both the FIRs. If what has been testified by the witness Nitin Kumar that the present FIR has been registered on an incident which never took place, is correct then it is a serious matter that life and liberty of four young boys has been curtailed in violations of all existing norms and prima facie an offence under the provisions of Indian Penal Code would be made out not only against Kuldeep Soni but also against all such officers of Police Station Jahangir Puri who were involved in registration and investigations of the present case in respect of an incident which did not happen. However, before jumping to any such conclusion it is only appropriate that all these aspects be got inquired into by some independent agency. It is, therefore desirable in the interest of justice that the Commissioner of Police, Delhi should not only get the matter probed at the departmental/ vigilance level but also ensure that preliminary inquiry is got conducted on the aspects highlighted by the witness Nitin with regard to falsity of allegations made against the accused persons and also on the aspect of similarity of allegations in FIR No. 10/10 PS Jahangir Puri and also FIR No. 91/10 PS Jahangir Puri and the connection of the complainants in both the cases. Needless to say it is expected that these investigations shall be conducted by an independent agency preferably by the crime branch or any competent officer whom the Commissioner of Police deems fit and appropriate under the given circumstances. The report of the inquiry should be placed before this court preferably within one month from today. It is further CRL. A. 666/2011 *Page 25 of 40* observed that the complainant Nitin Kumar is a young boy of about 18 years and his parents have expired. He has an aged grandmother and unmarried Bua at his native village. The safety and security of this witness shall be the concern of the Deputy Commissioner of Police (North- West) and it shall be ensured that none of the persons i.e. the public persons particularly Kuldeep Soni

or the officers of PS Jahangir Puri have an access to this witness till such time the proceedings are pending before this court or further orders as the case may be and it shall be ensured that this witness is produced before the court/ competent officer of the department (during inquiry) as and when so directed. At this stage, the ACP Jahangir Puri Sh. Jai Bhagwan Kaushik requests that the time given for inquiry may be reduced in view of the fact that the safety and security of the complainant Nitin Kumar has been made the concern of the District Police. I have duly considered his request in view of which the time for finalizing the inquiry is reduced to 15 days. Addl. PP seeks permission to drop PW Ct. Vijender being a witness of repetitive facts. He is permitted to do so. Prosecution evidence is closed. Case be listed for statement of accused on 27.9.2010. At this stage, Ld. counsels for the accused have pointed out that bail applications of the accused are pending disposal. Heard arguments on the bail applications. Keeping in view the depositions made by the various witnesses today the accused persons Dalip, Ravinder @ Ravi and Vikas @ Vicky all of whom are stated to be the first time offenders, are admitted to bail on furnishing personal bond of Rs.20,000/- each with one local surety of like amount each. Bail applications of all the accused persons are accordingly disposed off. CRL. A. 666/2011 *Page 26 of 40* Copy of this order alongwith copy of the statement of PW2 Nitin Kumar recording during re-examination is directed to be placed before the Commissioner of Police, Delhi; Joint Commissioner of Police (Range and Deputy Commissioner of Police (North-West). At this stage, on request of the ACP Jahangir Puri one copy of the order be given dasti to him."

32. Learned APP has fairly conceded that in the aforesaid order dated 11.08.2010 passed at 2.30 P.M., the learned Judge should have mentioned the word investigated instead of enquiry, however, the intention of the learned Judge shows that the word investigate has been used inadvertently instead of enquiry..

33. Further, it is mentioned that it is desirable and it was in the interest of justice that the Commissioner of Police, Delhi was also directed to get the matter probed on the aspects highlighted by witness Nitin Kumar with regard to false allegations made against the accused persons and also on the aspect of similarity and allegations made in FIR No.10/2010 and FIR No.91/2010 both of police station

Jahangir Puri, Delhi and the corrections of complaints in both the cases..

34. Further it is directed that these investigations shall be conducted by the independent authority preferred by the Crime Branch or any other competent authority whom the Commissioner of Police deems fit..

35. In rejoinder, Mr.O.P. Khadaria, learned counsel appearing for the appellant has argued that while dismissing the appeal of Nitin Kumar the coordinate bench of this Court has relied upon *Prithvi (supra)*. He CRL. A. 666/2011 *Page 27 of 40* submits that even in the said case it is held that on formation of an opinion, by the Court (before which proceedings were to be held) it is expedient, in the interest of justice that an inquiry should be made into the offence which appears to have been committed. It is important to notice that even when the Court forms such an opinion it is not mandatory that the Court should make a complaint. It does not mean that the Court should matter of course, make complaint, but once the Court desires to do so, then Court should make a finding to the effect that on the fact situation, it is expedient in the interest of justice that the offence should further be probed into. The purpose of preliminary inquiry even if the Court opts to conduct it is only to decide whether it is expedient, in the interest of justice to inquire into the fact which appears to have been committed..

36. Since the appeal of one of the accused persons namely Nitin Kumar has been dismissed by the coordinate bench of this Court on the issue of estoppels, he relied upon *Prithvi (supra)*. Once the Court takes recourse that a preliminary inquiry is not peremptory it has received therein that the Court may or may not make a complaint. But once the court decided to do so, then the Court should make a finding to the effect that on the fact situation, it is expedient in the interest of justice that the offence should further be probed into. No such proposition were reproduced by the Honble Judge in para under reference it is expedient in the interest of justice that the offence should further be probed into. CRL. A. 666/2011 *Page 28 of 40*.

37. Learned counsel further submits that the appeal preferred by Nitin Kumar under Section 372 Cr. P. C. was incompetent since the proviso to section only enables the victim to prefer an appeal against the order of conviction or acquittal

as the case may be. However, the appeal against acquittal lies under Section 378 Cr. P. C. only on grant of leave by High Court. No such leave was either applied or accorded by High Court. There was no occasion for the High Court to deal with said appeal on merit and it was liable to be dismissed summarily as provided under Section 384 Cr. P. C..

38. In the present controversy, conducting of inquiry was expedient in the interest of justice, as it was Ravinder @ Ravi, Vikas @ Vicky, Dilip, Sonu and Deepak who are the best witness to tell about the fabricating/giving false evidence against them. They could be examined during course of inquiry only, therefore, it is not a case where it can be said that inquiry was not peremptory..

39. Admittedly, on 09.01.2010 Constables Rajender, Sajjan and Vijender and HC Dilip Singh were on the patrolling duty in the area. They heard some noise and on approaching they found four boys being chased by Nitin Kumar. They overpowered those four boys namely Vikas @ Vicky, Deepak, Dilip and Ravinder @ Ravi. Nitin made a statement to HC Dilip Singh, which becomes bedrock of the case..

40. It is alleged in the said statement made by Nitin, he was robbed of his purse, containing a sum of Rs.1200/- besides visiting cards, and a mobile phone at the point of knife by the said four boys. Recovery of CRL. A. 666/2011 *Page 29 of 40* robbed articles and weapon of offence were affected from the offenders. Case was registered and investigated by ASI Umed Singh. Investigation culminated into a charge-sheet against the offenders, named above..

41. Learned Trial Judge summoned the appellant who was the then SHO, Jahangirpuri, and ACP of the area in post-lunch session. She made Nitin Kumar sit in the court room. She lectured the witness with regard to the penal consequences of making a false statement before the court of law. She apparently exercised her powers under Section 311 of the Code and re-examined Nitin Kumar in the post-lunch session, wherein he made a different story. She directed the Commissioner of Police to get the matter probed from the Crime Branch of Delhi Police and, thereafter, submit a report in the Court..

42. Pursuant to the said order an enquiry was conducted and a report dated 02.11.2010 was presented before Id.Judge. Not satisfied with that report, she again commanded the authorities to enquire the matter on certain issues and in pursuance of those directions, another report dated 26.11.2010 was presented before the learned Judge..

43. On the same date, she pronounced the judgment, whereby all four accused persons were acquitted. Learned Trial Judge further directed that a complaint be filed against the appellant and others. Accordingly, a complaint was filed before the Court of ACMM (North West), Rohini Courts, Delhi on that date itself. To the effect that the appellant conspired with Nitin Kumar, Dalip Singh and other police officers and CRL. A. 666/2011 *Page 30 of 40* committed offences punishable under Sections 193/195/211 of the Penal Code..

44. I note that the Trial Judge has not observed the provisions under Section 278(2) of the Code, which apparently, vitiates subsequent steps in the matter, for the reasons that at the time of examination of Nitin Kumar in pre-lunch session, the learned Judge had used powers under Section 165 of the Evidence Act, while putting various Court questions to the witness, in order to discover or to proper proof of relevant facts, ask any question, about any fact relevant or irrelevant; then there was no occasion for learned Judge to again use her powers under Section 311 of the Code..

45. For exercise of powers under Section 311 of the code, she was under obligation to form an opinion to the effect that re-examination of Nitin Kumar, who was already examined on that day itself, was essential just for decision of the case. No such opinion was formed by learned Judge, therefore, re-examination of Nitin Kumar in post-lunch session on 11.08.2010, was beyond her jurisdiction. Thus, learned Judge committed an illegality, when she failed to adhere to the provision of Section 311 of the code;.

46. Learned Judge ordered a further probe by the Crime Branch of Delhi Police, in violation of the provisions of the Code. Chapter XVIII of the Code provides procedure for trial before Court of Sessions. There is no provision, either in Chapter XVIII or elsewhere in the Code, which may empower a Session Judge to

order Crime Branch of Police to CRL. A. 666/2011 *Page 31 of 40* conduct an enquiry, submit its report and then use that report as an evidence and pronounce a verdict against the prosecution or the defence..

47. The Judge was under an obligation to accord an opportunity to the learned prosecutor to purify his testimony by an ordeal of cross- examination..

48. Thus, learned Judge became subjective in using the report dated 02.11.2010 while she ignored the report dated 26.11.2010 which contradicts the facts deposed by Nitin Kumar during his re-examination during the post-lunch session..

49. Had the Judge considered the report dated 26.11.2010, it ought to have been in her knowledge that Nitin Kumar deposed wrong facts on material particulars; during the re-examination conducted in the post- lunch session..

50. I note, HC Ramphal, who recorded the FIR had become the bedrock of case, has not been made an accused, alongwith appellant..

51. The Trial Judge has also ignored the standing Order No.33 dated 09.12.1988 issued by the Commissioner of Police, Delhi, makes it incumbent on the Duty Officer to register cases promptly whenever any report regarding a cognizable offence is made. The command of law contained in Section 154 of the Code making it incumbent upon officer Incharge of PS to reduce in writing by himself or under his direction every information relating to commission of cognizable offence. CRL. A. 666/2011 Page 32 of 40.

52. Moreso, the provision of sub section (2) of Section 173 of the Code makes it incumbent on Officer Incharge of PS to forward Charge- sheet of the case to the Magistrate, empowered to take cognizance of the offence. This statutory duty nowhere enjoins a responsibility on him calling upon him to verify the correctness of the investigation or to sign the Charge-sheet as the person responsible to submit it to the court of law..

53. The report of the Crime Branch, used as a corroborative piece of evidence by the learned Judge, does not take character of ocular or documentary evidence, when it was not proved at all during the course of trial, at any stage. There was a

vacuum of evidence to corroborate the testimony of Nitin Kumar, recorded in post-lunch session. The Judge committed illegality while placing reliance on those facts, which were deposed by Nitin Kumar in his re-examination..

54. Learned Judge has failed to apply well established principle of appreciation of evidence viz; she has to separate the grains from the chaff, in that process, she had to visit the entire material and to assess it on touch stone of veracity. She was to form an opinion on credibility of the witness and to decide whether he is "wholly reliable" or "wholly unreliable" or "partly reliable and partly unreliable". The Judge has not recorded a finding that Nitin Kumar was partly reliable and partly unreliable witness. Without recording this finding, the Judge should not have accepted a part of his testimony. When she accepted, she committed an illegality. CRL. A. 666/2011 Page 33 of 40.

55. The Judge has not recorded the findings, as discussed above..

56. At one juncture, he owns the story of robbery, arrest of accused persons and further recovery of the robbed articles besides weapon of offence. While, at the next juncture, he took a somersault and dispelled the facts relating to the robbery, arrest of accused persons and recovery of the robbed articles, besides weapon of offence. Thus, Nitin Kumar has given two inconsistent stories which completely demolished each other. Under these circumstances there is no iota of fact to assert that one portion of testimony is reliable while the other is not..

57. Learned Judge has also failed to appreciate any fragment of fact to suggest that the appellant had been conspired at any stage. The finding of learned Trial Judge in the judgment dated 26.11.2010 to the effect that the appellant was part of the conspiracy, is perverse..

58. It is on record that the appellant neither appeared as a witness nor took any step in dealing with the case to show his involvement in the alleged conspiracy. Learned Judge was under an obligation to conduct an inquiry as contemplated under Section 340 Criminal Procedure Code to record the finding as to what offences were committed and by whom..

59. I find that no such inquiry was conducted nor was a finding recorded, which vitiates the opinion recorded by learned Judge as well as act of filing a complaint against the appellant and others. CRL. A. 666/2011 Page 34 of 40.

60. The law has been settled in Mohammad Nooh (supra) that if the accused is not present in Court and if there is no representation on behalf of accused, then recording of evidence in absence is not permissible..

61. The law has been settled in Dr.Sudhir Kumar Ghosh (supra) that the power of preliminary enquiry mentioned in Section 340 of the Code cannot be delegated to any other person by the Judge before whom the offence is mentioned in view of the Section had been allegedly committed..

62. In Shabir Hussain Bholu (supra) it has been held that under Section 476 the Court must, therefore, making a complaint, be satisfied that it was expedient, in the interests of justice to make an enquiry into the offence committed by the witness. The jurisdictions of the Court to make a complaint against a person arises only from the fact that that person has given false evidence or fabricated false evidence at any stage of the proceeding disposed of by it. The conditions required to be fulfilled by the Court and the procedure to be followed by it for the purpose of exercising its jurisdiction and making a complaint are not to be equated with the conditions which give the court jurisdiction to make a complaint. From this it would follow that whereas Section 476 is a general provision dealing with the procedure to be followed in respect of a variety of offences affecting the administration of justice in so far as certain offences falling under Section 193 to 195 and Section 471 Indian Penal Code are concerned, the Court before which that person has CRL. A. 666/2011 *Page 35 of 40* appeared as a witness and which disposed of the case can alone make a complaint..

63. In K. Karurtakaran (supra) it was held that in an Inquiry before lodging a complaint under Section 340 of the new Code, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specific offence and whether it is also expedient in the interest of justice to take such action..

64. In K. K. Khanna(supra) it was held that a criminal complaint for the offence alleged to have been committed under Section 191 read with Section 193 of IPC was directed to be lodged under Section 340 of the new Code. The order for lodging the complaint was held by the Delhi High Court to have been vitiated since it was nowhere opined in the order itself or recorded as a fact that the lodging of the complaint was expedient in the Interest of a Justice as required under Section.

340. 65. In para No.32 of Amzad Ali (supra) it is held that on the point of order for lodging a complaint under Section 340 Cr. P. C. without expressly recoding any finding to the effect that it is expedient in the interest of justice that an inquiry should be made into the offence concerned is vitiated, illegal being in breach of express provisions of Section 340(1) Cr. P. C. and is liable to be set aside..

66. It has not been recorded that the statement was read over to Nitin Kumar, who disputed its correctness and facts detailed by him, in form CRL. A. 666/2011 *Page 36 of 40* of objections to correctness of the said statement, were not recorded or she appended her remarks thereunder..

67. It proceeds that case shall be opened up by the Public Prosecutor and the Judge shall form an opinion whether there are sufficient grounds for proceeding against the accused person and thereafter, frame a Charge. If the accused pleads not guilty or the Judge does not convict the accused on his plea of guilt, the Judge shall call the prosecution to examine its witnesses. On examination of the witnesses, the Judge may acquit the accused persons as provided under Section 232 of the Code. If the Judge forms an opinion that there is evidence that the accused persons had committed the offence, he shall call them to examine witnesses in support of their defence, after examining them under Section 313 of the Code. Thereafter, on hearing the arguments of the parties, the Judge may acquit or convict the accused persons for the offence..

68. Provisions of Section 137 of the Evidence Act, gives three forms of examination of a witness viz; his examination by the party who calls him (examination-in-chief) examination, by the adverse party (cross- examination) and finally examination, subsequent to cross-examination, by the party who called him (re-examination). The order of examination of a witness shall follow the above

three stages as enacted by Section 138 of the Evidence Act. On re-examination of Nitin Kumar under Section 311 of the Code, this order of examination was to be followed, which means that either he was to be cross-examined by the learned CRL. A. 666/2011 Page 37 of 40 Prosecutor, after seeking permission from the judge as contemplated by the provisions of Section 154 of the Evidence Act. As record reads, the witness was not at all examined or cross-examined or re-examined by the learned Prosecutor during the post-lunch session..

69. Though, legal position is that the character of a witness does not change, during subsequent stages of the trial, yet it has to be assumed that he became a Court witness when so examined by the learned Judge..

70. Since, no opportunity was given to the prosecutor for cross- examination; using this testimony is in violation of the established principle of law. Steps taken by learned Judge in using the testimony of Nitin Kumar recorded during post-lunch session, make the entire trial illegal and non-established..

71. This course throws light on Nitin Kumars credibility with regard to the facts of this case, keeping in view the deviating facts and the circumstances narrated by him in his re-examination. Reliance on the testimony of Nitin Kumar recorded during course of one day, the Judge astray and formed a wrong opinion whereupon concluded that the offence of conspiracy and perjury was committed by the appellant..

72. The recording the FIR was not a part of the conspiracy. This fact makes it implicit that neither Nitin Kumar nor HC Dilip Singh nor the appellant had conspired with him, thereby making it clear that the appellant was not a party to the alleged offence. CRL. A. 666/2011 Page 38 of 40.

73. Learned Judge relied the testimony of Nitin Kumar recorded in post-lunch session which highlights that Nitin Kumar was taken to the Police Station by Kuldeep Soni and produced before a Police Officer who recorded his statement after obtaining an empty purse and a mobile phone from him. As per admitted facts, HC Dilip Singh recorded statement of Nitin Kumar, attested his signatures, recorded an endorsement underneath it. Addressed the same to the Duty Officer

and got the case registered. Neither Nitin Kumar nor HC Dalip Singh briefed the facts before appellant nor do they discussed that the appellant entered in that room and joined the conspiracy or it has come in the record that the appellant instructed either HC Dalip Singh or any other Police Officer or Nitin Kumar, in the process of getting the case registered. Therefore, it is clear that there was no role of the appellant, in getting the case registered, or that there was no inference. Even the appellant had no knowledge of registration of that case, which was registered on the statement of Nitin Kumar, whereupon an endorsement was recorded by HC Dalip Singh which resulted into action by HC Ramphal..

74. The direction to the Duty Officer to register the cases himself, implicit in the aforesaid Standing Order No.33. Observing the direction of that circular, HC Ramphal registered the FIR without any order or information from the appellant which itself makes it clear that the appellant had not played any role in the matter. CRL. A. 666/2011 Page 39 of 40.

75. The charge-sheet indicates that it was prepared and signed by ASI Umed Singh in the capacity of an Investigating Officer. It was forwarded to the Magistrate, empowered to take cognizance, by the appellant as well as by ACP Jai Bhagwan. Mere act of forwarding the charge-sheet would not show conspiracy of the appellant in the crime, otherwise ACP Jai Bhagwan also would have been made as an accused in the matter..

76. Keeping the above discussion into view, I am of the considered opinion that there was no material before learned Judge against the appellant, therefore, impugned order dated 26.11.2010 is hereby set aside qua the appellant only..

77. Consequently, the appellant is discharged from the complaint filed under Section 340 of the Code..

78. Accordingly, Criminal Appeal No.666/2011 is allowed and stands disposed of..

79. No order as to costs. SURESH KAIT, J January 09, 2012 J/Mk CRL. A. 666/2011 Page 40 of 40