**HIGH COURT OF JUDICATURE FOR RAJASTHAN**
**BENCH AT JAIPUR**

S.B. Criminal Miscellaneous Bail Application No. 2963/2025

Rajdev Meena S/o Dharampal Meena, Aged About 19 Years, R/o Gram Babeli Tehsil Reni Thana Rajgarh, District Alwar, Rajasthan Presently Residing At Flat No. A-406, A Block Fourth Floor, Chief Minister Housing Scheme For Teachers And Praheri, Sector 26 Pratap Nagar, Thana Pratap Nagar, Jaipur, Rajasthan. (Presently Accused Petitioner Confined In Central Jail, Jaipur).

----Petitioner

Versus

State Of Rajasthan, Through PP

----Respondent

| | | |
|---|---|---|
| For Petitioner(s) | : | Mr. Deepak Chauhan<br>Mr. Pulkit Raj |
| For Respondent(s) | : | Mr. N.S. Dhakar, PP |
| For Complainant(s) | : | Mr. Kunal Sharma<br>Mr. Vaibhav Pancholy |

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**HON'BLE MR. JUSTICE ANIL KUMAR UPMAN**
**Order**

**07/03/2025**

1. The instant bail application has been filed under Section 483 of BNSS on behalf of the petitioner, who has been arrested in connection with FIR No.741/2024 registered at Police Station Pratapnagar (Jaipur City(East)), District Jaipur City (East) (Rajasthan) for the offences punishable under Sections 64(1) of BNS and Section 3/4 of POCSO Act. Later on, police filed charge-sheet in this matter for the offences punishable under Sections 64(1) & 87 of BNS and Section 3/4 & 5j(ii)/6 of POCSO Act.

2. Learned counsel for the petitioner submits that petitioner has falsely been implicated in this case. Counsel submits that petitioner has been made accused in this case in exercise of power under Section 358 of BNSS (corresponding to Section 319 of Cr.PC) by learned trial Court. Counsel submits that in order to ensure

presence of the accused petitioner, he was called through summons, in pursuance of which, he surrendered before the learned trial Court and moved bail application but surprisingly, his bail application was dismissed contrary to the settled proposition of law. It is argued that while answering a reference question in the case of ***Manohar Lal Saini and Ors. versus The State of Rajasthan*** (D.B. Criminal Revision Petition No.382/2014, decided on 02.12.2015), it was observed as under:-

*"61. .....If the Court has taken cognizance against a person at the stage of Section 319 of the Code, summoning the accused by bailable warrant would be analogous to grant of bail. If the accused has appeared not only on the first date but also continues to appear on all subsequent dates in conformity with bail bond furnished by him and surety executed in support thereof, the court ought to refrain from sending him to jail subsequently without there being any supervening circumstance. If the court at later stage decides to send him to jail, it must conform to certain judicial norms. There must be some cogent and valid reasons requiring the court at a later stage to send the accused to the jail."*

3. Counsel submits that the co-accused Kuldeep who was initially charge-sheeted, has already been granted benefit of bail by this Court. Petitioner is in custody since 18.02.2025 and trial will take considerable time in its conclusion. Further custody of the petitioner would not serve any fruitful purpose.

4. Learned Public Prosecutor assisted by learned counsel for the complainant vehemently opposes the submissions made by counsel for the petitioner.

5. I have considered the contentions.

6. Having regard to the totality of the facts and circumstances of the case; considering the arguments advanced by learned counsel

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for both the parties, especially the fact that petitioner has been made accused in this case in exercise of powers under Section 358 of BNSS; he was called through summons so also considering the observations made by Hon'ble Division Bench while answering the reference question in case of ***Manohar Lal Saini*** (Supra); co-accused Kuldeep, against whom initially, charge sheet was filed, has already been granted benefit of bail by this Court as well as looking to the period of custody, but without commenting anything on the merits/demerits of the case, I deem it fit and proper to allow this bail application.

7. This bail application is accordingly allowed and it is directed that accused-petitioner -**Rajdev Meena S/o Dharampal Meena** shall be released on bail provided he furnishes a personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand only) together with two sureties in the sum of Rs.25,000/- (Rupees Twenty Five Thousand only) each to the satisfaction of the learned Trial Court with the stipulation that he shall appear before that Court and any court to which the matter is transferred, on all subsequent dates of hearing and as and when called upon to do so.

8. The observation made herein above is only for decision of the instant bail application and would not have any impact on the trial of the case in any manner.

9. This Court has time and again observed in many cases that the accused persons who appear before the learned trial courts in pursuance of summons or bailable warrants issued against them, are taken in custody without there being any supervening circumstances and valid reason, which in my considered opinion is

not justified as summoning an accused by bailable warrant would be similar to grant of bail and he should be released on bail unless there are some valid or exceptional reasons for denying the same. In the instant case as well, the petitioner appeared in pursuance of bailable warrants and thereafter moved a bail application before the learned trial court. However, same was dismissed and the petitioner was sent to judicial custody without there being any valid reason and contrary to the observation made by Hon'ble Division Bench in the case of Manohar Lal Saini. Such practice adopted by learned trial courts in sending the accused persons behind the bars on their appearance on summons and bailable warrants without there being any supervening circumstances and valid reasons is not in consonance with the observations passed by Hon'ble Division Bench in the case of Manohar Lal Saini (supra) and therefore, this Court feels it expedient to direct circulation of copy of order dated 02.12.2015 passed in the case of Manohar Lal Saini (supra) while answering the reference question by Hon'ble Division Bench, among all judicial officers of Rajasthan State Judiciary for reading and making compliance of the observations made therein.

10. Registrar General is to ensure strict compliance of the above directions.

(ANIL KUMAR UPMAN),J

LALIT MOHAN /28

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JAIPUR BENCH JAIPUR

S. B. CRIMINAL REVISION PETITION NO. 382/2014

1. Manohar Lal Saini S/o Sh. Goru Ram Saini
2. Dinesh Kumar Saini S/o Manohar Lal Saini
3. Umesh Kumar Saini S/o Manohar Lal Saini

all r/o Bajaj Gram (Sanwali) Sikar.

....Accused- Petitioners

Versus

The State of Rajasthan.

Non-petitioner

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S. B. Criminal Revision Petition Under Section 397 and 401 Cr.P.C. read with Section 482 Cr.P.C. and 483 Cr.P.C. in order dated 6/3/2014 passed by Sh.Shailendra Vyas, RHJS, Additional District and Sessions Judge, No.3, Sikar in Sessions Case No.127/2012 issuing bailable warrant of Rs.20,000/- against the petitioners after taking cognizance Under Section 319 Cr.P.C. but

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observing that if the accused will surrender then they will sent behind the bars.

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
D.B. Criminal Revision Petition No.382/2014

Manohar Lal Saini and Others Vs. The State of Rajasthan

Date of Order ::: 02.12.2015

Present
Hon'ble Mr. Justice Mohammad Rafiq
Hon'ble Mr. Justice Prakash Gupta

Shri A.K. Gupta, Senior Counsel, with
Ms. Chandrakala Sahu,
Shri Biri Singh Sinsinwar, Senior Counsel, with
Shri Hrendra Singh,
Shri S.C. Gupta, Shri Sanjay Sharma, Shri Vijay Punia,
Shri Dhruv Atrey, Shri Om Prakash M. Dhand and
Dr. Mithlesh Kumar, counsel for petitioners

Shri Anurag Sharma, Additional Advocate General with Shri Aniroodh Mathur, Dr. Abhinav Sharma, Shri Anil Upman, Shri Ashvin Garg, Shri Chandrabhan Gupta, Shri Sudesh Saini, Public Prosecutor, Shri R.S. Raghav, Public Prosecutor and Shri V.S. Godara, Public Prosecutor, for respondents

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//Reportable//

By the Court:-

Upon a reference made by a Single Bench of this Court, instant matter has been placed before the Division Bench for answering the referred question. Reference arises out of revision petition, which has been preferred by three petitioners, namely, Manohar Lal Saini, Dinesh Kumar Saini and Umesh Kumar Saini, challenging the order dated 06.03.2014 passed by the court of Additional District and Sessions Judge No.3, Sikar, passed on the application of the complainant filed under Section 319 of the Code of Criminal procedure (for short, 'the Code'), vide which the court has taken cognizance against them. While the charge-sheet was filed by the police against other accused for offence under Sections 143, 323, 341 and 302 IPC, the Investigating Officer kept investigation pending against three petitioners under Section 173(8) of the Code. Learned trial court, however, taking into

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consideration statement of prosecution witnesses, found that prima facie case was made out to join them as co-accused. It therefore took cognizance against them and summoned them by issue of bailable warrant in the sum of Rs.20,000/- each. Apprehending that in the event of their appearance on 09.04.2014 before the trial court, they may be sent behind the bars, the petitioners have approached this court for a direction to the trial court not to send them to jail when they appear before it after execution of the bailable warrants by the police and on furnishing bail bonds and sureties, and further to continue their bail till conclusion of the trial.

2. When the matter was listed before the Single Bench on 26.03.2014, learned Single Judge, on the request of learned counsel for petitioner, directed the Registry to place the same before Hon'ble the Chief Justice for appropriate orders. The Hon'ble Chief Justice by order dated 04.04.2014 required the Deputy Registrar (Judicial) "to lay the matter again before him with overall background, if any, necessitating judicial scrutiny by a Larger Bench, as seemed to be suggested.". The Deputy Registrar (Judicial) prepared a detailed note and submitted it before Hon'ble the Chief Justice on 18.04.2014, whereupon the matter was ordered to be laid before the Division Bench. The Division Bench, faced with the situation that no question was framed by the Single Bench, to be answered by the Larger Bench, by order dated 28.05.2014, again directed the Registry to place the revision petition before the learned Single Judge, with request to frame the question, which he proposes to be answered by the

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Larger Bench. It was thereafter that learned Single Judge, by order dated 16.10.2014, formulated the question in hindi for reference to the Larger Bench, which, when translated into english, means whether bail of an accused summoned by bailable warrant, upon his appearance before the court, can be cancelled or he should be allowed to continue on such bail till conclusion of the trial?

3. We have heard learned counsel for the parties. We have also heard learned counsel, who have appeared in response to general notice issued to the Members of the Bar, requesting them to address the court on the aforementioned question.

4. We having taken note of the factual context in which learned counsel have addressed the court, deem it appropriate to slightly recast the question, though substantially retaining its purport, for our answer, in the following terms:-

> "Whether an accused of non-bailable offence, summoned through bailable warrant by the trial court, invoking its power under Section 319 of the Code, can, in the event of his appearance before the court, be sent behind the bars or should be allowed to remain on bail till conclusion of the trial?"

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सहो. प्रतिलिपि

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5. Shri A.K. Gupta, learned Senior Counsel appearing for petitioners, has argued that Section 204 of Chapter XVI of the Code is the only provision in the Code, which provides for issue of process, and Section 205, the provision immediately figuring thereafter, empowers the Magistrate, who issues summon to accused, to dispense with his personal attendance and permit him to appear through his pleader. If accused appears in response to bailable warrant issued by the court, it cannot be said that such warrant was issued only for

the purpose of securing his appearance on a particular day or date. Learned Senior Counsel in this behalf referred to provisions contained in Chapter VI of the Code, especially Sections 70 and 71 thereof. Section 70 is related to form of warrant of arrest, its sub-section (1) provides that every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court. Sub-section (2) of Section 70 of the Code provides that every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

6. Learned Senior Counsel laid emphasis on the words "until otherwise directed" appearing in Section 71 and also in Part II of Form No.2 and submitted that only purpose of the bailable warrant even in a case involving non-bailable offence, is to secure presence and regular attendance of the accused, to face the trial. Having furnished required bail bonds and sureties, if the accused appears and continues to appear before the court on the dates fixed therein, there is no reason why the accused should again be required to separately apply for bail, as such bail bonds and sureties submitted by him, would be valid, not only for the first date of appearance but also on all future dates "until otherwise directed" by the court. Summoning of an accused in a non-bailable offence by a bailable warrant, in view of the aforesaid provisions, is a valid exercise of discretion by the trial court, after taking into consideration nature of offence vis-a-vis nature of evidence. When the discretion has been lawfully exercised by the trial

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court, bailable warrant cannot be cancelled and accused cannot be sent behind the bars.

7. Learned Senior Counsel argued that once the court has decided to summon an accused by bailable warrant, its decision to send the accused behind the bars for his appearance, would amount to reviewing its earlier order, which is barred by Section 362 Code However, the court is always at liberty to pass any other direction if it finds a substantial reason for doing so. But before doing so, the court must fully adhere to the principles of natural justice - namely - provide an opportunity of hearing to the accused and pass a reasoned order.

8. Shri A.K. Gupta, learned Senior Counsel, further argued that a Single Bench of this Court in Om Prakash Mund and Another Vs. State of Rajasthan - 2014 (3) RLW 2662 (Raj.), relying on earlier judgments of the Single Bench of this court in Roop Singh Vs. State of Rajasthan, S.B. Criminal Misc. Bail Application No.1076/2013, decided on 20.02.2013 and Income Tax Officer Central Circle-I, Jaipur Vs. Gopal Dhamani, 1988 (1) RLW 84, decided on 07.01.1987, held that purpose of issuing bailable warrant at the stage of issue of process is to procure presence of the accused before the court and that the court at that stage does not decide the question of bail and that mere issuance of bailable warrant, cannot be a reason to grant bail if the offence is of serious nature and that the accused has to separately apply for bail to the court. The judgment of the Single Bench in Om Prakash Mund, supra, was challenged before the Supreme Court by filing Petition for Special Leave to Appeal (Crl.)

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No.9220/2013. The Supreme Court granted leave in that matter and finally set aside the judgment and directed that subject to appellants surrendering before the trial court and furnishing their respective bail bonds in a sum of Rs.20,000/-, with two sureties each in the like amount, to the satisfaction of the trial court, they shall be released on bail pending disposal by the trial court. The law laid down in that judgment has thus not been approved by the Supreme Court.

9. Learned senior counsel, in support of his arguments, has also relied on judgment of this Court in Sasaram Vs. State of Rajasthan - 1990 RCC 321, Prakash Vs. State of Rajasthan - 2005 (5) W.L.C. (Raj.) 641, Charan Singh Vs. State - 2010 (1) RCC 456, Anil Sogani Vs. State - 2013 (1) Cr.L.R. 455, Gokul Meena Vs. State - 2013 (2) RCC 646, Shravan and Others Vs. State - S.B. Criminal Miscellaneous Petition No.1893/2012, decided on 22.01.2013. It is argued that in all these cases, this court has taken the view that once the accused of non-bailable offence has been summoned by bailable warrant, he 'until otherwise directed' by the court, continues to remain on bail, which approach is in conformity with judgments of the Supreme Court in Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others - AIR 2008 SC 251 (1), Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra and Another - AIR 2011 SC 3393 and Vikas v. State of Rajasthan, (2014) 3 SCC 321.

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10. Shri S.C. Gupta, learned counsel appearing as intervenor, has argued that if a Magistrate, having taken cognizance either with reference to Section 204 or even Section 319 of the Code, issues bailable

warrant, it cannot be presumed that he did so only for the purpose of securing attendance of the accused, by postponing the decision to put him on bail for a later point of time. Once the court decides to summon any accused by bailable warrant, that implies that the court intends to require him to appear before it on the given date and any date fixed thereafter in that matter till proceedings continues. Thus, summoning of an accused by bailable warrant would be as good as granting bail to him, subject to the condition of his appearance before the court, on the first date and on other dates fixed thereafter, unless otherwise directed, which can be done only for a valid reason, such as when accused does not furnish bail bonds and sureties and has not appeared on the given date or violated any other condition stipulated in the bail bond or if subsequently it comes to notice of the court that the accused is habitual offender or has tempered with evidence or intimidated the witnesses. In substance, the submission of Shri S.C. Gupta, learned counsel appearing as intervenor, is that the court can send an accused to jail, who has been in the first instance summoned by bailable warrant in a non-bailable case only if any of the parameters applicable to cancellation of bail are attracted.

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11. It is argued that accused can be summoned for appearance only after cognizance for offence has been taken against him and it is at that stage that the court has to decide whether the accused should be summoned by bailable or non-bailable warrant. If the court has summoned an accused by bailable warrant, such warrant is not issued only for the purpose of securing

his appearance but it is a conscious decision of the court. If the prosecution later wants an accused summoned by bailable warrant to be arrested, its remedy is to apply for cancellation of bail seeking his arrest but before any such order is passed by the court, the accused has right to be heard. This is because when the court has summoned an accused by bailable warrant, it cannot be assumed that the court has acted mechanically and without due application of mind. Learned counsel in this connection has relied on judgment of the Supreme Court in M/s. Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others - AIR 1998 SC 128, and argued that the Supreme Court in that case has observed that summoning an accused in criminal case is serious matter and that criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused, must reflect that he has applied his mind to the facts of the case and law applicable.

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12. It is argued that if the court, after due application of mind, decides to summon an accused by bailable warrant, sending him to jail later on would tantamount to converting such bailable warrant into non-bailable warrant. It would be highly unfair to the accused and no court should be party to such unfair play. It would prejudice the right of personal liberty of the accused as enshrined under Article 21 of the Constitution as he would thereby be deprived of the right to apply for pre-arrest bail under Section 438 of the Code and also avail remedy under Section 482 of the Code. The purpose of the court to summon an accused by whatever mode, viz., by summon, bailable warrant or even non-bailable warrant, is to make him face enquiry

or trial. Once he has in response to bailable warrant, appears and undertakes to appear on all subsequent dates, there is no justification then to send him to jail.

13. Relying on judgment of the Supreme Court in Adalat Prasad Vs. Rooplal Jindal and Others - (2004) 7 SCC 338, learned counsel argued that a court, by virtue of the bar contained in Section 362 Code, has no power to review its own order. If the Court has issued bailable warrant in the first instance, it has no power to change the same unless there arise in the meantime certain supervening circumstances to justify such deviation. While doing so, it is obligatory to serve a notice on the accused and provide him opportunity of hearing. Even in a case where negative final report submitted by the police is accepted after hearing complainant but in absence of the accused and such order is challenged further, the law requires that accused should be afforded opportunity of hearing. Same analogy should apply when an accused is summoned by bailable warrant in a warrant trial.

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14. Learned counsel argued that Section 437 of the Code is not applicable to cases where accused is summoned by bailable warrant. The word 'appears' mentioned in Section 437 Code, only applies where accused surrenders or voluntarily appears before the court. Such accused can obtain bail even in a case where cross-cases are registered by the parties and complainant of one case, can be accused in another case and may be present in the court when the cross-case is taken up. Had the intention of the legislature been to require a person, summoned by bailable warrant, to move

for bail under Section 437 Code, it would have certainly provided so.

15. Shri Vijay Poonia, learned counsel also appearing as intervenor, referring to Form No.2 appended to the Second Schedule of the Code, argued that bailable warrant is valid not only for the date fixed for first appearance of the accused but for all future dates, which is clear from the very language "until otherwise directed". This language has been directly lifted from Section 70(1) of the Code, and is therefore clear manifestation of legislative intention. Section 87 of the Code even empowers the court to issue warrant of arrest in lieu of, or in addition to, summons, but that too happens if either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that the accused has absconded or will not obey the summons; or if the accused fails to appear even after service of summon and is unable to offer any reasonable excuse for such failure. Sub-section (5) of Section 204 of the Code stipulates that nothing contained therein shall be deemed to affect the provisions of Section 87. Thus the provisions contained in Section 87 and the provisions relating to issue of process, both have to be read together.

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16. It is argued that even Section 167 of the Code does not give any power to the court to send a person, who has been summoned by bailable warrant, to judicial custody. The purpose behind all these provisions is to safeguard personal liberty of a citizen, which he cannot be deprived of, without due procedure of law. Section 438 of the Code gives such

liberty to the accused to apply for anticipatory bail. If the Court, despite having summoned the accused by bailable warrant, later sends him to jail, this valuable right of the accused would be nullified. Citing judgments of the Supreme Court in Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra and Another - AIR 2011 SC 3393 and Sundeep Kumar Bafna Vs. State of Maharashtra and Another - AIR 2014 SC 1745, learned counsel argued that the Supreme Court has been consistently maintaining that the accused should not be summoned, as far as possible, in the first instance, by non-bailable warrant. If the opposite view is upheld, it will wash out the effect and frustrate endeavour of the Supreme Court to safeguard liberty of the citizens.

17. Shri Biri Singh Sinsinwar, learned Senior Counsel, citing judgment of the Supreme Court in Novartis AG Vs. Union of India and Others - (2013) 6 SCC 1, argued that in order to ascertain intention of the legislature in providing for a particular provision, its legislative history is a useful guidance. He referred to Section 204 of earlier Code of Criminal Procedure, 1898, which pertained to issue of process referred to in Second Schedule thereof, where the power of Magistrate issuing the summon was governed by categorization of offences on the basis of their gravity. The first category included offences wherefor summon was to be issued in the first instance. Second category contained the offences where the warrant was to be issued in the first instance. Second category was (1) where fourth column of the Second Schedule provided that for every summons case, with the exception of specifically indicated offences, the Magistrate, shall

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in the first instance, issue summons; (2) for every warrant case, except for the specified offences indicated, the Magistrate shall issue warrant. Thus in the earlier Code, Magistrate or the court, issuing process was left with no discretion whatsoever as to by what mode the accused should be summoned. The 41st Law Commission in in Chapter XVII of its report submitted in 1969 recommended for removing this anomaly so as to empower the Magistrate taking cognizance of offence to even issue summons in a warrant case, rather than issuing warrant every case, for attendance of the accused, if he thinks fit,. The recommendation of Law Commission was accepted and the Second Schedule was completely omitted.

18. It is argued that at the time of issuance of process either with reference to Section 204 or Section 319 of the Code, entire material, which is sought to be used against accused is already before the court, and therefore if the court has required the accused to appear before it by issuance of summon or bailable warrant, there is no justification then for the court to send such an accused behind the bars in the event of his appearance. Learned Senior Counsel in particular submitted that at the stage of 319, there are two sets of evidence, first set of evidence is based on investigation carried out by the police itself, which has not found substantial material to proceed against accused and second set of evidence is based on statement of witnesses or the evidence brought before the court, alleging to the contrary. In such circumstances, if the court having applied its mind, decides to summon the accused by bailable warrant, it

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would be too harsh to later send such accused to jail on his appearance.

19. Shri Om Prakash M. Dhand, learned counsel appearing as intervenor, submitted that in the old Code of Criminal Procedure, an accused for the purpose of committal, even if on bail, was required to be taken into custody but now in the new Code, once bail is granted to an accused, at stage of the investigation or immediately after cognizance by the court, that bail would remain valid throughout the trial. Bail is granted only once and if the Court has decided to summon an accused while issuing process whether under Section 204 or 319 of the Code, by bailable warrant, this is a conscious decision of the Court to let him free on bail and such bail would remain valid throughout the trial. While referring to provisions of Section 71 of the Code, learned counsel argued that the word "attendance" used therein is not synonymous with the word "appears" in Section 437 of the Code. It is therefore not correct to argue that the accused would be required to apply for bail under Section 437 of the Code even when he has been summoned by bailable warrant by the court. Learned counsel, in support of his submissions, has relied on judgment of the Supreme Court in Dharam Pal and Others Vs. State of Haryana and Another, AIR 2013 SC 3018, wherein it was held that a Court of Sessions can, with the aid of Section 193 Cr.P.C., proceed to array any other person as accused, and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

20. Dr. Mithlesh Kumar, learned counsel

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appearing as intervenor, relying on judgment of the Supreme Court in Vaman Narain Ghiya vs State Of Rajasthan - (2009) 2 SCC 281, submitted that the Supreme Court in that case has laid down the law as to the meaning of "bail". Therein, the Supreme Court held that the law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice. An accused is not detained in custody with the object of punishing him on the assumption of his guilt. Learned counsel also relied on judgment of the Supreme Court in Sanjay Chandra Vs. CBI, (2012) 1 SCC 40, and argued that therein, the Supreme Court held that primary purpose of bail in a criminal case is to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon, whenever his presence is required. Learned counsel also relied on judgment of the Supreme Court in Sudeep Kumar Bafna Vs. State of Maharashtra and Another - AIR 2014 SC 1745, and argued that a person surrendering before the court shall be deemed to be in custody of the court and can be released on bail but if the court finds that he is not entitled to bail, the court is bound to pass necessary orders for his judicial or police custody. The grant or denial of bail is regulated, to a large extent, by the facts and circumstances of each particular case.

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21. Per contra, Shri Anurag Sharma, learned Additional Advocate General, submitted that the

offences defined in the Indian Penal Code and elsewhere, are broadly categorized as bailable and non-bailable offences, and also as cognizable and non-cognizable offences. Generally, the offences of grave and serious nature are cognizable and non-bailable. Trial of all offences is to be conducted in the presence of accused, is the mandate of Section 273 of the Code. This is a principal of fair play and justice. To secure presence of the accused, the courts exercise various powers given under Chapter VI of the Code, which provides for process to compel appearance. This chapter is further divided into sub-chapters A, B, C and D. Provisions contained in Chapter VI, including Sections 71 and 72 of the Code, are meant to be pressed into service to compel appearance. Section 71 of the Code stipulates that any court issuing a warrant for the arrest of any person, may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter "until otherwise directed" by the court, the officer to whom the warrant is directed, shall take such security and shall release such person from custody. Repeated use of words 'any person' and 'such person' in Section 71 of the Code indicates that the provision is meant for securing presence of not only accused but also any person which may include the witnesses, sureties etc.

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22. Learned counsel submitted that the law that emerged after decisions of the Supreme Court in Indra Mohan Goswami and Another Vs. State of Uttaranchal and Others - (2007) 12 SCC 1 and Raghuvansh Dewanchand

Bhasin Vs. State of Maharashtra and Another - AIR 2011 SC 3393, is that the court should not be harsh in issuing warrant of arrest in the first instance and should rather first adopt a lighter mode of issuing summons. Only lastly the court may adopt the method of procuring attendance by issuing warrants. The court, while issuing the warrant, on Form No.2 of Second Schedule with reference to Section 71 of the Code, has the discretion to direct the police by endorsement on the warrant that if such person executes bond with sufficient securities and attend the court at the specified time, he may be released from the custody after execution of such security. If the offence is non-bailable and accused is brought before or appears before the court through any mode of compelling his appearance, the question of granting bail to the accused will still be governed by provisions of Chapter XXXIII more particularly Sections 437 and 439 of the Code. Issuance of bailable warrants in the first instance therefore does not decide the question of bail, which shall have to be dealt with under separate provisions on separate considerations.

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23. Learned Additional Advocate General, in support of his contentions, has relied on judgments of the Supreme Court in Income Tax Officer Central Circle-I, Jaipur Vs. Gopal Dhamani, supra. There are several stages when the accused is called by the trial court to face the trial, such as by invoking provisions of Section 204 and 319 Cr.P.C. If the offences are bailable, provisions of Section 436 of the Code would be applicable for the purpose of bail. If, however, the offences are non-bailable, grant of bail would be

governed by the provisions contained by Sections 437 and 439 of the Code, as the case may be, while adhering to Section 81.

24. Learned Additional Advocate General also relied on judgment of Allahabad High Court in Vedi Ram alias Medi Ram and Others Vs. State of UP & Another - 2003 Cri.L.J. 1084, and argued that Column No.4, 5 and 6 of the First Schedule of the Code mentions about cognizable or non-cognizable offences, bailable or non-bailable offences and by what court they are triable, respectively. Many offences are cognizable as well as non-bailable and made triable by Magistrate, for example Sections 379, 380, 381, 382, 384, 385 of the IPC. Therefore, no straight jacket formula can be devised for granting bail to accused of non-bailable offences, whether triable by Magistrate or court of Sessions. It is argued that though Article 21 of the Constitution guarantees personal liberty of an individual, which cannot be curtailed without following due process of law but at the same time, the person on whom the accusation is well founded, can also not be set at liberty without passing through the parameters of granting bail under the provisions of Sections 437 and 439 Cr.P.C.

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25. The very fact that Form No.2 in Second Schedule, with reference to Section 71 of the Code, indicates that the accused shall attend before the court on the given date and to continue so to attend "until otherwise directed" by the court makes it clear that the Court retains the discretion to even send him to jail. It is not mandatory for the court to release such accused on bail without his applying for grant of

bail and considering such application on the applicable parameters. It is therefore that the accused of non-bailable offence, who has been summoned by bailable warrant, while appearing before the court, should simultaneously apply for regular bail.

26. It is argued that the format of bail bond for attendance before Officer-in-Charge of Police Station or a court during investigation or trial of an accused, as given in Form No.45 of the Second Schedule of the Code, is entirely different than the Form No.2 of Second Schedule, and thus Form No.2 refers to Section 70 and 71 of the Code, whereas Form No.45 refers to Sections 436, 436-A, 437, 437-A, 438(3) and 441 of the Code. This thus clearly indicates that an accused, even if summoned by bailable warrant, has to necessarily apply to obtain regular bail. Generally, Form No.3 of Second Schedule is meant for bond and bail-bond after arrest under a warrant.

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27. Learned Additional Advocate General further submitted that Section 437 of the Code is applicable not only in cases where a person accused of commission of non-bailable offence is arrested or detained by a police officer but also applies to a situation where such accused "appears" or "is brought before a Court". An application under Section 439 of the Code for grant of bail pending trial can be maintained even when accused appears before the court in response to summon or bailable warrant for his appearance and while so appearing, he would be deemed in custody of the court under the provisions of Chapter XXXIII of the Code. Summoning an accused by summons or bailable warrant even in a case involving non-bailable offence is merely

a mode of securing presence of accused in the first instance, which is a one time exercise. Once the accused appears before the court in response to summons or bailable warrant, thereafter it is discretion of the court whether or not to release him on bail or to send him in jail. He, while so appearing, therefore, should simultaneously apply for bail.

28. Shri Abhinav Sharma, learned counsel appearing as intervenor, argued that the reference has to be negatived as the issuance of process at the state of Section 319 of the Code is merely a mode of summoning the accused against whom there is sufficient material available to secure his conviction and thus the summoning by way of summons/bailable warrants/non-bailable warrants remains only a mode of securing the presence of the person so summoned. Learned counsel argued that since the reference is defective and incomplete, it is not required to be answered. This also because the reference does not proceed on difference of opinion between two Benches of this court. It is also not clear from the terms of the reference as to precisely in what context the answer is sought from the Larger Bench; whether provisions contained in Sections 190, 204, 209 or 319 of the Code? It is only to be presumed that since this matter arises out of proceeding under Section 319 of Cr.P.C., accordingly it has to be answered in that term only.

29. Contention of learned counsel is that issuance of process to secure presence of an accused under the Code is merely a mode of securing the presence and it has no other business with the application of mind by the court concerned towards

granting or rejecting bail as that involves a different degree of involvement of mind by the court concerned under the Code. Once "any person" as provided under Section 319 receives a summon or warrant, he has reasons to learn, whether he is being summoned to stand trial with other accused for a bailable offence or non-bailable offence and he may chose his course accordingly. "Any person", who has been served with a process of court in whatever nature, even if it is a summons, has a right to move for anticipatory bail under Section 438 of the Code. But the fact that he has been summoned by a summon or a bailable warrant, would not justify that he should be at all cost in a non-bailable offence enlarged on bail. The person, who is summoned under Section 319 by way of a process, once comes before the court on the date given in the summon or bailable warrant, it cannot be said that he is on bail. A summon or warrant is issued for a particular date. Once the "person" so summoned or warranted appears before the requisitioning court, it outlives its purpose, Form No.2 of Second Schedule may be referred at this stage to see that it is a mere limited time notice in fact to secure presence on a particular date before a court and nothing else. Use of word "bail" in the endorsement under Section 71 in Form No.2 does not mean that the "bail" stood granted forever as it is followed immediately with the words "to attend before me", which makes it abundantly clear that it is only to allow him movements from his place to the requisitioning court. Such appearance is eventually a "surrender" before the court as the person so appearing offers himself to the jurisdiction of the

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requisitioning court and submits to its order by physical presence thus the court takes the person in its "custody" for further orders to be passed immediately the moment the accused is before it. Learned counsel in this connection has relied on judgment of the Supreme Court in Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others - 1980 CriLJ 426 (1).

30. Shri Abhinav Sharma further argued that once the summoned person appears before the court, pursuant to the summons or warrant means that "the law has taken control of the person" and he is not on bail and his personal liberty is subject to such further orders as will be made by the court to whose jurisdiction he has submitted. It thereafter lies within the discretion of the court concerned before whom in pursuance of the summon or warrant the person so called has surrendered to decide the fate of the accused present before court, vis-a-vis his personal liberty, on the basis of material on record. Learned counsel argued that the fact also remains that the court concerned in both the cases of Section 319 and Section 204 of the Code, must before passing the order relating to the liberty of the summoned persons, keep in mind the basic difference between two stages of summoning and should act accordingly.

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31. Shri Chandrabhan Gupta, learned counsel, submitted that if an accused is summoned by bailable warrant in a bailable offence, he may be allowed to continue on bail till trial is complete, but if he has been summoned by bailable warrant in a bailable offence, he will have to apply for bail and the

provisions relating to the bail contained in Chapter XXXIII including those of Sections 437 and 439 of the Code, would be applicable.

32. Shri Anil Upman, learned counsel, argued that even if an accused of non-bailable offence is summoned by bailable warrant, it does not mean that he has been granted bail. Sending him to jail in the event of his appearance, does not tantamount to cancellation of his bail. It is argued that Sections 70(2) and 71 of the Code are not meant to apply to only accused but they may apply to any person, which may include not only the accused but also the witnesses etc. Sub-section (2) of Section 70 of the Code provides that every such warrant shall remain in force until it is cancelled by the Court, which issued it, or until it is executed. Once the accused appears before the court, bailable warrant when issued for summoning the accused to appear before a court on a particular date, stands executed. Thereafter, the accused has to separately apply for bail under the relevant Rules. It is because issuance of bailable warrant is only one of the modes for securing presence of an accused before the court, the other two being summons and non-bailable warrant. Section 71 of the Court does not contain the provisions for grant of bail, which are separately listed in Chapter XXXIII of the Code. If however, the Court of Sessions, invoking Section 319 of the Code, summons an accused to join trial, then the court of Sessions alone is competent to grant bail and Magistrate may not be competent to grant such bail.

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33. We have given our earnest consideration to rival submissions and respectfully studied the cited

precedents.

34. Before proceeding to examine the referred question, we shall first of all deal with the objection that since the reference is not based on the conflict of opinion between two Benches of this court and does not mention the provision as to in what context the referred question is to be answered, the reference need not be answered. There are indeed conflicting views expressed by different single benches, which have been cited before us. We shall discuss about these judgments at the appropriate place hereinafter. That should not therefore detain us any further. However, it is true that when reference was in the first instance laid before the Division Bench, it was of the opinion that no question has been framed by learned Single Judge, which is to be answered by the Larger Bench and therefore the Division Bench directed the Registry to place the revision petition before learned Single Judge with request to frame question, which he proposes to be answered by the Larger Bench. Learned Single Judge this time framed the question 'whether bail of an accused summoned by bailable warrant upon his appearance before the court, can be cancelled or he shall be allowed to continue on such bail till conclusion of the trial?' Although it is true that referred question does not make mention of the relevant provisions of the Code. Nevertheless, this can be understood with reference to provisions of the Code as to when, an accused summoned by bailable warrant, is sought to be sent behind the bars, particularly in the facts of the case that the accused of non-bailable offence summoned by bailable warrant, apprehending that in the event of his

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appearance before the court he may be sent to jail, has approached this court. We have therefore slightly recast the referred question in the contextual facts 'whether an accused of non-bailable offence, who has been summoned through bailable warrant by the trial court, can, in the event of his appearance before the court, be sent behind the bars or shall be allowed to remain on bail till conclusion of the trial?'

35. We are in this regard cognizant of Rule 59 of the Rules of the High Court of Judicature for Rajasthan, 1952, which stipulates that the Chief Justice may constitute a Bench of two or more Judges to decide a case or any question or questions of law formulated by a Bench hearing a case. In the latter event, the decision of such Bench on the question or questions so formulated, shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question or questions and dispose of the case after deciding the remaining questions, if any, arising therein. What we have to therefore do is to merely answer the reference and sent the matter back to the Single Bench, which then shall decide the same on merits.

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36. In so far as reformulation of the referred question is concerned, we, in doing so, draw support from recent judgment of the Supreme Court in State of Punjab Vs. Salil Sabhlok and Others - (2013) 5 SCC 1. Under challenge before the Supreme Court in that case was Full Bench decision of the Punjab and Haryana High Court. A writ petition was filed before the High Court for a mandamus to State Government to frame regulations governing the conditions of service and appointment of

Chairman/ Members of Public Service Commission, as envisaged in Article 319 of the Constitution. Division Bench of the High Court held that even though Article 316 does not prescribe any particular procedure for appointment of Chairman of the Public Service Commission, but having regard to the purpose and nature of the appointment, it cannot be assumed that the power of appointment need not be regulated by any procedure and further observed that the question is whether the procedure adopted was valid or not?, and these questions need to be considered by a Bench of three-Judges and accordingly referred the matter. When the matter was laid before the Bench of three-Judges, it formulated four questions for answer and finally it answered the reference. The State of Punjab challenged the judgment before the Supreme Court. One of the arguments raised before the Supreme Court was that a Court, to which a reference is made, cannot adjudicate upon an issue, which is not referred to it and the Full Bench of the High Court in this case has gone beyond the order of reference passed by the Division Bench. The two-Judge Bench of the Supreme Court, though by separate but concurring judgments, on consideration of the relevant Rules of the High Court, repelled the contention and held that notwithstanding the law that a larger Bench should decide only the questions referred to it, if a subsidiary question logically and unavoidably arises, the larger Bench cannot be dogmatic and refuse to answer it. A common sense approach should be taken on such occasions, observed the Supreme Court while rejecting the argument that the Full Bench overstepped its jurisdiction in reformulating the

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questions referred to it, and further held that questions no.3 and 4 formulated by the Full Bench, merely articulate and focus on the issues that were not quite attractively phrased by the Division Bench.

37. Adverting now to the merits of the case, we may begin with analyzing the judgments cited at the bar in support of the argument that earlier also the question, which is being debated before us, came up before a Single Bench of this Court, in Income Tax Officer Central Circle-I, Jaipur Vs. Gopal Dhamani, supra. Therein, apart from offence of forgery, another alleged offence was for evasion of tax under Section 276(c) of the Income Tax Act. Under challenge before this court was the order granting bail to two accused under Section 439 Cr.P.C. Argument of the Income Tax Department before this court was that simply because bailable warrant was issued for summoning the accused, they should not have been granted bail by Sessions Judge as the offence of which they were charged were non-bailable. In those facts, it was observed by the Single Bench that issuance of the bailable warrant cannot be the sole premise for granting bail, if the offence is of serious nature. Contrarily, another Single Bench of this Court in Sasaram, supra, held that if the Magistrate, after taking cognizance against an accused issued bailable warrant, though he could have issued non-bailable warrant also, and if the accused appears in the court, he is expected to immediately release him on bail and it would not be proper exercise of discretion to send him to jail. Though a conflict of opinion is apparent in them, but both these matters did not arise out of the proceedings under Section 319 of

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the Code.

38. In Charan Singh, supra, a Single Bench of this court, while taking note of the law laid down by the Supreme Court in Inder Mohan Goswami, supra, held that when a process is issued under Section 319 of the Code, after impleading a person as an accused along with others already facing trial, the purpose is to secure their appearance before the court and that they should be present during trial, on all dates of hearing thereafter. However, in a recent judgment in Om Prakash Mund, supra, a Single Bench of this Court when faced with this question, held that the life of such warrant comes to an end on its cancellation or even on execution. If at the time of execution of the bailable warrant, the required security is given, the accused is bound to appear before the court on the date and time fixed in the warrant itself. Such security is taken from the accused only for the purpose of his attendance before the court at the time specified in the warrant itself. It was held that Chapter-VI of the Code provides only for the method/mode in which presence of an accused can be procured before a court to face trial or otherwise. It deals with process to compel appearance of an accused and provides that the court may in its discretion either issue summons or warrant of arrest. The warrant may be either bailable or non-bailable, depending upon the discretion of the court. The court, in its discretion, can even issue bailable warrant in a non-bailable case, but grant of bail to an accused does not depend upon the nature or mode of the process issued for his appearance before the court. Merely because he was in the first instance summoned by

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bailable warrant to secure his attendance, he thereby per se is not entitled to bail. When aforesaid judgment in Om Prakash Mund was challenged by filing Special Leave Petition, the Supreme Court granted leave and set aside the judgment with direction that subject to appellants' surrendering before the trial court and furnishing their respective bail bonds and sureties to its satisfaction, they shall be released on bail. We find it difficult to countenance the submission that this order of the Supreme Court should not be taken as reversal of the view taken by the Single Judge. In any case, this cannot be taken as approval of the view in the judgment under challenge. But we do not for that reason consider our task accomplished. We shall rather give our own reasons in support of the view, which we propose to take on the question referred for our answer.

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39. What is being canvassed before us to answer the reference in negative is that summoning the accused by issuance of bailable warrant or non-bailable warrant is only a mode of procuring attendance of the accused in the court and that this has got nothing to do with grant of bail. While process against accused may be issued with reference to provisions of Section 190 read with Section 204 and 319 of the Code, by issuing summon, bailable warrant or even non-bailable warrant, as per the provisions contained in Chapter VI of the Code but the prayer for grant of bail has to be dealt with only in accordance with the provisions contained in Chapter XXXIII, especially Sections 437, 438 and 439 of the Code. Issuance of bailable warrant does not tantamount to granting bail and such warrant outlives

its purpose on its execution.

40. When we examine the provisions contained in Chapter VI of the Code starting from Section 61 to Section 90 of the Code, we find that these provisions have been incorporated in the Code to provide for issuance of process so as to compel appearance of any person, who may be summoned to appear before the court and such person need not necessarily be an accused alone. The 'person' here may also include witness, police official or government servant etc. In particular Part B of Chapter VI of the Code supra, contain provisions from Section 70 to Section 81, under the caption "warrant of arrest". Section 70 of the Code provides that every warrant of arrest issued by a court under this Code shall be in writing, signed by the presiding officer of such court and shall bear the seal of the court, and every such warrant shall remain in force until, it is cancelled by the court or executed. Section 71 provides that any court, issuing a warrant for the arrest of any person, may in its discretion, direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed, shall take such security and shall release such person from custody.

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41. A conjoint reading of Section 70 and 71, supra, clearly shows that warrant referred to therein is not a bailable warrant but is described only as warrant of arrest. Not only these two provisions, but also in provisions subsequent thereto, i.e. Sections

72, 73, 75, 76 and 77, it is mentioned only as warrant of arrest. Form No.2 containing proforma of warrant of arrest has been given in Second Schedule to the Code. The first part of Form No.2 refers to Section 70 of the Code and provides for a proforma of absolute warrant of arrest, whereas second part of Form No.2 refers to Section 71 of the Code, and is based on what is specifically provided in Section 71 that "any court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody." Phraseology "until otherwise directed" has thus been directly lifted from Section 71 and incorporated as such, in second part of Form No.2. When we analyze the Form No.2 in its entirety by simultaneous reading of Sections 70 and 71 of the Code, we find that a discretion has been vested with the court issuing the warrant of arrest to decide whether to issue bailable warrant for appearance. If the summoned person furnishes bail bonds along-with one or two sureties, in the indicated sum, to attend the proceedings before the court on the given date and to continue so to attend until otherwise directed by the court, the officer charged with the duty to execute such warrant has no discretion except to release him.

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42. We may observe at the cost of repetition that despite the fact that a court trying a warrant case in a non-bailable offence, has the competence to

summon an accused by non-bailable warrant, and if it still decides to summon him by bailable warrant, that would mean that the court on the merits of that case has taken such a conscious decision and has not purposely summoned the accused by non-bailable warrant. This is also evident on interpretation of Section 71 of the Code. The latter part of sub-section (1) of Section 71, which has been incorporated in Form No.2 of warrant of arrest, also signifies the exercise of such discretion by the court in favour of summoning the accused, not by arresting him, and producing the accused after taking him/her in physical custody, but rather making him to submit to symbolic custody of the court, with the undertaking to attend the proceedings before it on the given date and also to continue so to attend until otherwise directed. Provisions of Section 71 of the Code read in juxta position with Section 441 would show that both provide for furnishing bond; with or without sureties, requiring the accused to attend the court at the time and place mentioned in the bond and continue to so attend, until otherwise directed by the court.

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43. Even when we read Section 88 of the Code, it gives similar power to the court and provides that if a person, for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance, in such Court or any other Court, to which the case may be transferred for trial. In case of failure, Section 89 provides that such officer may issue a warrant directing that such

person be arrested and produced before him. Reading of these two provisions together also makes the legislative intent clear that it has, as far as possible, tried to safeguard the personal liberty of a citizen. So long as he abides by the law and in response to summons or warrant, presents himself in the court and furnishes the bond with or without surety/sureties, to attend the court and to continue so to attend the court proceedings, he shall not be taken into custody.

44. In State of U.P. Vs. Poosu and Another - (1976) 3 SCC 1, the Supreme Court observed that Civilized countries have recognized that liberty is the most precious of all the human rights. Article 21 of the Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. Issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. Just as liberty is precious for an individual, so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State, it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. It was further observed by

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their Lordships that whether in the circumstances of the case, attendance of accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the court.

45. In Inder Mohan Goswami, supra, one of the questions that came up for consideration before the Supreme Court was as to how and when warrants should be issued by the Court? Their Lordships noticed that in many cases bailable and non-bailable warrants are issued casually and mechanically without properly comprehending the nature of controversy involved and without exhausting the available remedies, non-bailable warrants are issued. The Supreme Court has enumerated some of such situations when the court may issue non-bailable warrants to summon an accused, namely, (1) where it is reasonable to believe that the person will not voluntarily appear in court; (2) the police authorities are unable to find the person to serve him with a summon; or (3) it is considered that the person could harm someone if not placed into custody immediately. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications, which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive. In regard to criminal

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complaint cases, their Lordships observed that in the first instance, the court should invariably direct serving of the summons along with copy of complaint. If the accused seem to be avoiding the summons, the court, in the second instance, should issue bailable-warrant, and only in third instance, when the court is satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, the Supreme Court observed that the court at the first and second instance should refrain from issuing non-bailable warrants.

46. The Supreme Court in a recent case in Raghuvansh Dewanchand Bhasin, supra, while concurring with the law enunciated in Inder Mohan Goswami, supra, and guidelines laid down therein, observed that these are only broad guidelines and not rigid rules of universal application. Facts and behavioral patterns are bound to differ from case to case. Since discretion in this behalf is entrusted with the court, it is not advisable to lay down immutable formula on the basis whereof discretion could be exercised. It is for the court concerned to assess the situation and exercise discretion judiciously, dispassionately and without prejudice. In the facts of that case, their Lordships regretted to note that having regard to nature of the complaint against the appellant and his stature in the community and the fact that admittedly the appellant was regularly attending the court proceedings, it was not a fit case where non-bailable warrant should have been issued for procuring his presence, particularly

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when earlier non-bailable warrant was cancelled on the appellant putting appearance before the court. It was held that the attendance of the appellant could have been secured by issuing summons or at best, by a bailable warrant. The Supreme Court in this case analyzed the provisions of Sections 70 and 71 and also Form No.2 of the Second Schedule to the Code and observed that neither Section 70 nor Section 71, appearing in Chapter VI of the Code, enumerating the processes to compel appearance, as also Form No.2 uses the expression like "non-bailable". Section 70 merely speaks of form of warrant of arrest, and ordains that it will remain in force until it is cancelled. Similarly, Section 71 talks of discretionary power of Court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under Section 70 of the Code. What is material is that there is power vested in the court to issue warrant and that power should be exercised judiciously depending upon facts and circumstances of each case, held the Supreme Court.

47. It is thus evident that a range of choice has been given to the court when it summons a person, who is accused of committing non-bailable offence, by issuing warrant to appear before it. Whether or not to issue absolute warrant of arrest, which in practice is called non-bailable warrant, on first part of the proforma of Form No.2 supra, or to issue a bailable warrant, on second part of that proforma, which is referred to as bailable warrant, lies in the discretion of the court.

48. Unlike at the stage of issue of process

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under Section 204 of the Code, there is no impediment for the Court taking cognizance against a person, who appears to have committed offence, with reference to Section 319 of the Code, to also decide the question of his bail, while issuing process at that very stage. There may be the question of competence of the Magistrate issuing process against a person in cases involving non-bailable offence, punishable with life imprisonment or death penalty because he in that situation is by virtue of the bar contained in Section 437 of the Code, may not be empowered to grant bail except to those who fall in the first proviso to Section 437(1) - viz - if such person is under the age of sixteen years or is a woman or is sick or infirm. But there can be no such impediment for the Courts of competent jurisdiction, which is seized with the trial of the case, be it summary trial or warrant case trial. If such court issues process against a person by recourse to Section 319 of the Code, it can as well decide the question of his bail. In any case, his appearance in response to bailable warrant cannot be a factor against him. In fact, whatever material may be relied by the prosecution, to persuade the court to send such person to jail when he in response to bailable warrant appears before the court, would already be there before the court even in his absence.

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49. Contention that issuing such process at the stage of Section 319 of the Code, and deciding to summon such accused by bailable warrant, requiring him to furnish bail bonds and surety/sureties to appear before it on a particular date and to continue so to attend until otherwise directed, is merely intended to

secure his presence before that court as one time purpose and by doing so, the Court despite making that choice in favour of issuing of bailable warrant, postpones the decision of granting bail to him at a later point of time, belies the very scheme of the Code. No doubt, the provisions of Chapter VI of the Code contains the procedure relating to issuance of process to compel appearance of a person, but if the court has, after due application of mind, finds a case involving non-bailable offence, not fit enough to issue non-bailable warrant and instead summons the accused by bailable warrant, such decision of the court cannot be said to have been taken unmindful of the merits of the case or at any rate, without application of mind. Invariably, fact situation of a particular case would play a pivotal role in obtaining discretion of the court for making that choice, such as; when the police has, after investigation, proposed negative final report, but the witnesses in the court have alleged involvement of the accused and that main role has been ascribed to other accused against whom police has proposed to file charge-sheet and some other accused, who are assigned peripheral role, are sought to be added later on, or that the accused has cooperated with the investigating agency and nothing substantial could be found against him during investigation or that the prosecution witnesses have improved upon their original version or any other reason of the like nature. If the court, in such circumstances, on due application of mind, has taken a conscious decision to issue bailable warrant, it cannot be said that bailable warrant has been issued to the accused to only secure his

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attendance on a particular date and outlives its purpose the day the accused appears before the court. The accused has in such an eventuality by submission of bail bond and surety/sureties has undertaken to appear before the court on the first date and has also undertaken to continue to so attend until otherwise directed by the court. In deciding to issue bailable warrant, the court also intended such bail bond and sureties to be valid not only for the first date but also for his appearance on all future dates in the proceedings before it till the matter remains pending, unless, of course, it directs otherwise.

50. The Supreme Court in M/s. Pepsi Foods Ltd., supra, observed that summoning an accused in a criminal case is serious matter and criminal law cannot be set in motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both, oral and documentary, in support thereof, would be sufficient for the complainant to succeed in bringing charge home to the accused. Their Lordships observed that it is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find

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out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. These weighty observations the Supreme Court fully applies to the stage of adding an accused by recourse of Section 319 of the Code.

51. We may at this stage usefully refer to judgment of the Supreme Court in S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others - (1990) 1 SCC 328, in which petitioner was taken into custody for preventive detention despite order of the High Court not to take him in such custody and was released after four days. The petitioner therein then filed a miscellaneous petition in the pending writ petition together with additional affidavit seeking a direction to respondents to refrain from making an order detaining him under provisions of the said Act. A Division Bench of the High Court, on reference by learned Single Judge, heard the writ petition inter-alia held that since the order of detention was made even before writ petition was filed, the prayer made in writ petition had become infructuous, and that there were no extraordinary or special reasons to depart from normal rule, namely, that in such a case the petitioner should first surrender and move for a writ of habeas corpus, and accordingly dismissed the writ petition. In those facts, their Lordships of the Supreme Court, in Para 14 of the judgment, observed that the right to life and personal liberty has been guaranteed as a fundamental right. When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty

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imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law.

52. We are cognizant that in the present case we are dealing with a criminal case and the aforesaid case, where petitioner before the Supreme Court was arrested pursuant to order of preventive detention and was asked to surrender and then to apply for writ of habeas corpus under Article 226 of the Constitution, but the analogy of aforesaid judgment would apply to the present case as well, because if a court decides to issue non-bailable warrant while issuing the process against a person sought to be arrayed as an accused, such person knows his position well and is free to avail all remedies available to him including by applying for anticipatory bail under Section 438 of the Code or invoking inherent jurisdiction of this Court under Section 482 of the Code. And if such accused person having acted on solemn understanding given by the court in summoning him by issue of bailable warrant appearing before the court, he cannot be taken by surprise. He having submitted to jurisdiction of that court by furnishing bail bonds and sureties and attending the proceedings before the court not only on the first date but also on subsequent dates, cannot be put behind the bars and then asked to again apply for regular bail under Section 439 of the Code. That would tantamount to curtailing the above referred to legal remedies available to that person.

53. Much has been argued before us about the

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maintainability of bail application under Section 437 of the Code, when accused summoned by bailable warrant "appears before the Court", because the word "appears" is also included in sub-section (1) of Section 437 of the Code alongside the word "arrested" or "detained" or "brought before a court", but that is not the question we are called upon to decide. There can be no quarrel with proposition of law laid down by the Supreme Court in Sundeep Kumar Bafna, supra, reiterating the view, earlier expressed by the Supreme Court speaking through Hon'ble Justice V.R. Krishnaiyer in Niranjan Singh, supra, that if a person in custody, surrenders before the police or appropriate court and submits to its jurisdiction, he is deemed to be in custody of the court, but here in the instant case what we are called upon to decide is whether at all an accused of non-bailable offence, summoned through bailable warrant by recourse to Section 319 of the Code, can be sent to jail and then required to again apply for regular bail.

54. Legislative history has been considered to be a safe guide for ascertaining intention of the legislature when it decides to make a change from previous law while enacting the new law. While in Criminal Procedure Code, 1898, accused was required to be taken into consideration at the time of committal of the case to the court of Sessions, but the new Code has done away with such requirement and simplified the procedure of committal. But what is relevant to notice for our purpose is the fact that the bail bonds and sureties submitted by an accused earlier than committal of the case of the court of Sessions hold good even thereafter throughout the trial, unless to the contrary

is ordered by the court thereafter, which it can always legitimately do for any valid and justified reason. Chapter XVII of the 41st Law Commission Report submitted in 1969 has been cited before us to bring home the point that earlier Code restricted the discretion with regard to issue of process and rigidly provided that issuance of process would be governed by categorization of offences on the basis of their gravity. While the first category was for summons cases of those offences where summons have to be issued in the first instance and second category pertain to the offences where warrant was to be issued, thus left the Magistrate with no discretion whatsoever as to by what mode he should summon the accused but now in the new Code Section 204 is flexible in making that choice inasmuch as the Magistrate has been empowered to issue mere summons to the accused while issuing process to him in non-bailable offence, let alone bailable warrant.

55. In the instant case, we are concerned with the stage of Section 319 of the Code where cognizance has been taken against an accused against whom prima facie case worth filing charge-sheet was not found to have been made out during investigation. Trial court on the basis of the statements of the prosecution witnesses or material otherwise available on record, found it justified to take cognizance against them and summon them through bailable warrant. There are thus two sets of evidence against such accused, one set of evidence on which the police did not find the case worth filing charge-sheet against such accused and, another set of evidence adduced before the court and relied by it to join them as accused, to be tried

together with those against whom charge-sheet was originally filed. In the fitness of things, therefore, unless the court finds that the evidence adduced before it is grave enough to warrant police remand of the accused so as to seek more evidence, the court, in view of the above, should generally summon such accused either by summons or through bailable warrant, to appear before it, and for that purpose, require them to submit bail bonds and sureties, to continue to appear throughout the trial. Once such bail bonds and sureties are submitted by the accused, he would be deemed to be in symbolic custody of the court to face the trial.

56. During course of argument before us, reference was made to the practice prevalent in the subordinate courts in the State of Rajasthan that while many of the courts are allowing the accused of non-bailable offences summoned through bailable warrants to continue on bail on the basis of bail bonds and sureties submitted in response thereto, throughout the trial. Some courts are requiring them to execute fresh bail bonds and sureties, and in some small proportion of cases, they are made to go behind the bars, thus requiring them to again apply for regular bail, but in cases where bailable warrants are issued in bailable offences, the bail bonds and sureties submitted by the accused remain valid for the entire duration of trial. There appears to be no reason why uniform approach should not be taken in all such cases, in that if the court has taken a decision to summon an accused through bailable warrant and if the accused in response thereto has put in appearance by submitting to the jurisdiction of the court and furnished bail bond and

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sureties, validity of such bail bonds and sureties should be co-terminus with conclusion of trial unless of course otherwise directed by the court for any valid reason. Mere fact that bail bonds to be submitted at the time of grant of bail under Section 436, 437, 438 and 439 of the Code is separately provided on Form No.45 of the Second Schedule to the Code would not make any difference to this position because that bond would be required to be submitted when bail is granted with reference to any of these provisions. Here, we are reminded of the words of Hon'ble Justice V.R. Krishna Iyer in Sushil Kumar Sen Vs. State of Bihar - (1975) 1 SCC 774 that "the processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable." And the Supreme Court in Shreenath and Another Vs. Rajesh and Others - (1998) 4 SCC 543 observed that "in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed." It neither appeals to reason nor logic to insist upon the court of competent jurisdiction to duplicate the same process again, which has, at the stage of Section 319 of the Code, purposely issued bailable warrant, to again decide the question of bail only because bail bond was earlier submitted on a different format - viz - on second part of Form No.2. We

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see no inhibition in the Code to continue the same bond for rest of the trial because requirement of law at that stage as per Section 70 read with 71 is to submit bond on that proforma, whereas later stage of grant of bail with reference to Section 436 to 439 would require submission of bail bond on From No.45.

57. We find ample support to the view that we propose to take, from a recent judgment of the Supreme Court in Vikas, supra, a judgment whereby the judgment of this court was reversed. In that case too, the charge-sheet was filed against another accused and not against appellant Vikas. During the course of trial, however, complainant filed an application under Section 319 of the Code. The trial court, placing reliance on the evidence produced in the course of trial, held that there was prima facie evidence against the appellant, for which he can be tried along-with other accused and therefore took cognizance against him and summoned him through non-bailable warrant. The appellant, feeling aggrieved thereby, filed an application before trial court for converting non-bailable warrant into bailable warrant. The trial court rejected the application. The appellant approached this court by filing a petition under Section 482 of the Code, which confirmed the order passed by the trial court. In those facts, it was held by their Lordships that the court should exercise judicial discretion on a consideration of the totality of the facts and circumstances of a given case and in a manner where proper procedures are followed that are fundamental to the right of fair trial of the accused. Section 319 of the Code demands more circumspection by the Trial Court while exercising its powers since it confers an extraordinary

power and should be used by the court very sparingly thereby ensuring that principles of rule of law and basic tenets of criminal law jurisprudence are not vitiated. Reiterating the ratio of judgment of the Supreme Court in Inder Mohan Goswami, supra, their Lordships in Para 16 to 18 of the report, observed as under:-

> "16. To appreciate the present case, it is pertinent to discuss the meaning of 'bailable offences' and 'non-bailable offences' and the circumstances in which a non-bailable warrant can be issued.
> 17. In the legislative history for the purposes of bail, the term 'bailable' and 'non-bailable' are mostly used to formally distinguish one of the two classes of cases, viz. 'bailable' offences in which bail may be claimed as a right in every case whereas the question of grant of bail in non- bailable offences to such a person is left by the legislature in the court's discretion to be exercised on a consideration of the totality of the facts and circumstances of a given case. The discretion has, of course, to be a judicial one informed by tradition methodized by analogy, disciplined by system and sub-ordinated to the primordial necessity of order in social life. Another such instance of judicial discretion is the issue of non-bailable warrant in a complaint case under an application of Section 319 of the Cr.P.C. The power under Section 319 of the Cr.P.C being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. The conditions for the issuance of non-bailable warrant are reiterated in Inder Mohan Goswami - (2007) 12 SCC 1 and in State of U.P. vs. Poosu and Another - (1976) 3 SCC 1, wherein it is mentioned that:
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> > "53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result."
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> This could be when firstly it is reasonable to believe that the person will not voluntarily appear in court; or secondly that the police authorities are unable to find the person to serve him with a summon and thirdly if it is considered that the person could harm someone if not placed into custody immediately. In the absence of the aforesaid reasons, the issue of non-bailable warrant a fortiori to the application under Section 319 of the Cr.P.C. would extinguish the very purpose of existence of procedural laws which preserve and protect the right of an accused in a trial of a case.
> 18. The court in all circumstances in complaint cases at the first instance should first prefer issuing summons or bailable warrant failing which a non-bailable warrant should be issued."

58. Even sub-section (2) of Section 319 provides that where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case

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may require, for the purpose aforesaid. Sub-Section (2) of Section 319 of the Code makes it clear that it is entirely within the discretion of the Court to either issue warrant of arrest or bailable warrant or even a summon, to secure attendance of such person, who has newly been joined as an accused. The Court is therefore fully empowered to even issue arrest warrant in an appropriate case to secure attendance of newly joined accused before it. What thus flows from interpretation of sub-Section (2), supra, is that summoning an accused by arrest warrant is not a rule and that it should be done by the Court only in deserving cases after exercising its discretion in a judicious manner. Although no straight jacket formula can be applied for exercise of such discretion, but it goes without saying that the facts and circumstances of each case will govern exercise of such judicial discretion considering the facts situation in entirety, such as gravity of offence, nature of offence against accused, the conduct of accused, the manner in which the occurrence has taken place. The other factors to be taken into consideration are - character of evidence, circumstances peculiar to the accused, reasonable possibility of accused not presenting himself during trial, nature and gravity of accusation, severity point out in the event of punishment, danger of accused absconding or fleeing if let on bail, character, behaviour, status and standing of accused, likelihood of accused repeating the offence, etc.

59. If the Court, by taking cognizance against a person at the stage of invocation of power under Section 319 of the Code, decides to join him as an accused, such person cannot approach the court to recall the order but he certainly has the remedy of challenging that order before

this Court invoking provisions of Section 482 of the Court. He also has the remedy to apply for anticipatory bail under Section 438 of the Code. Though the court having issued bailable warrant, would not be, in the event of appearance of the accused, without any new development in between, justified in reconsidering its decision on the same material and sending the accused behind the bars, but at the same time we must hasten to add that the court is not powerless, if any intervening circumstances justify sending the accused behind the bars, despite being summoned by bailable warrant and it may do so on its own or at the instance of prosecution/complainant. We may, by way of illustration, narrate few such circumstances, namely, (i) the accused, in response to the bailable warrant so issued, has failed to attend the proceedings of the court on given date and time or (ii) has violated any condition of the bail bond or (iii) that the court later on comes to know that he was a habitual offender and has abused the liberty of bail by repeatedly committing offence(s) or (iv) that he has intimidated the witnesses or tempered with evidence, or (v) there is likelihood of his feeling from justice, and so on and so forth. We are therefore not inclined to uphold the argument that it would attract the bar of Section 362 of the Code. And we may reiterate here again that if the court has taken a conscious decision to summon an accused by bailable warrant to appear before it on a particular date and to continue do so to attend until otherwise directed, and if the accused, having undertaken so by furnishing bail bond and surety/sureties, has appeared on such date and continues to appear on future dates, the court, without there being any supervening circumstance and valid reason, would not be justified in sending him behind

the bars just because it at later point of time changes its opinion and takes another view of the matter on the same material.

60. Even in a case where negative final report submitted by the police in a case registered on the basis of complaint or FIR, is accepted by the Court, the accused acquires some semblance of right to be heard if the order accepting such final report is challenged any further, which cannot be annulled without providing opportunity of hearing to him. The right of an accused, who has been summoned by bailable warrant, if not at the same level, can on that analogy at least be cited to support the contention that he has a right to be heard before he is ordered to be sent behind the bars. If therefore a newly added accused under Section 319 of the Code is in the first instance summoned by bailable warrant, he acquires a right of substantial nature to know the reasons from the court in its order if later he is sought to be sent behind the bars, and also the right to be heard by the court before passing such order. If contrary view is approved, this will stultify the right of personal liberty guaranteed to a citizen, who is presumed to be an innocent until proven guilty and would cause grave prejudice to him. Liberty of a citizen is of paramount importance and constitutional guarantee, which cannot be incised. Doing so would also frustrate the law so developed by catena of judgments delivered by the Supreme Court to zealously safeguard the personal liberty of citizens of the country and to see that they are not subjected to unnecessary harassment. When we say that every administrative action should be informed of fair play, we must also observe that the courts should also follow the same principle in their functioning where

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राजस्थान उच्च न्यायालय पीठ,
जोधपुर

reasonable amount of certainty as also consistency should always be exhibited in their functioning.

61. We for afore-discussed reasons cannot countenance the submission that even when the accused appears before the court in response to bailable warrant, he has to separately apply to avail the benefit of bail. Broadly speaking, more or less, considerations, which also apply for cancellation of bail already granted, should govern the decision of the Court if it decides to send such accused to jail. If the Court has taken cognizance against a person at the stage of Section 319 of the Code, summoning the accused by bailable warrant would be analogous to grant of bail. If the accused has appeared not only on the first date but also continues to appear on all subsequent dates in conformity with bail bond furnished by him and surety executed in support thereof, the court ought to refrain from sending him to jail subsequently without there being any supervening circumstance. If the court at later stage decides to send him to jail, it must conform to certain judicial norms. There must be some cogent and valid reasons requiring the court at a later stage to send the accused to the jail.

62. We accordingly answer the reference. Let the Revision Petition be listed before the Single Bench for its decision on merits.

(Prakash Gupta) J. (Mohammad Rafiq) J.

//Jaiman//