

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.REV.P. 672/2009**

Decided on 13.09.2010

IN THE MATTER OF :

JAGDISH & ANR. Petitioners
Through: Mr. Vikas Arora, Advocate

versus

STATE & ANR. Respondents
Through: Mr. M.N. Dudeja, APP for the State.
None for respondent No.2/complainant.

CORAM

* **HON'BLE MS.JUSTICE HIMA KOHLI**

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| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J. (Oral)

1. The matter was passed over on the first call as none was present on behalf of respondent No.2/complainant despite service. Same is the position even on the second call.

2. The petitioners are aggrieved by an order dated 31.08.2009 passed by the learned Additional Sessions Judge in SC No.01/09, initiated on the basis of a FIR lodged by respondent No.2 under Sections 452/323/506/34 IPC, registered with Police Station: Kalyan Puri.

3. Briefly stated, the facts of the case are that the petitioners, who are the immediate neighbours of respondent No.2, lodged a complaint on 01.08.2004 against respondent No.2 and the members of his family stating

inter alia that they had physically assaulted the petitioners and their family members, who sustained injuries. Based on the aforesaid complaint, FIR No.375/2004 was registered at Police Station: Kalyan Puri under Sections 323/308/34 IPC. After the investigation, a charge-sheet was filed by the police and the matter was committed to the court of sessions vide order dated 21.03.2006. Charges were framed against respondent No.2 and the trial commenced. Counsel for the petitioners states that the testimony of the witnesses has been recorded and the matter is at the stage of arguments.

4. It is claimed by the petitioners that in the meantime, respondent No.2 filed a complaint against the petitioners, based on the same incident, leveling allegations against them of having used unparliamentary language against him and the members of his family and physically assaulting them. Alongwith the complaint (Annexure C), respondent No.2 filed an application under Section 156(3) of the Cr.PC, praying *inter alia* for registration of a FIR against the petitioners. After recording the evidence of the complainant and hearing the parties, vide order dated 04.05.2006, the learned Metropolitan Magistrate issued summons against the petitioners and their sons, for the offence punishable under Sections 452/323/506/34 IPC.

5. In the meantime, respondent No.2 moved an application before the learned District Judge for hearing both the cases together, i.e., the case based on the FIR lodged on the complaint of the petitioners and his own complaint case. Vide order dated 13.01.2009, the learned District Judge transferred the complaint case of respondent No.2 bearing No.151/2004 pending before the Metropolitan Magistrate, to the court of the learned

Additional Sessions Judge where, the case on the basis of the FIR of the petitioners was already pending. Thereafter, the order dated 31.08.2009, came to be passed whereunder, the learned Additional Sessions Judge, after hearing the arguments on the point of charge, arrived at the conclusion that a *prima facie* case was made out against the petitioners under Sections 482/323/506/34 IPC and charges were served upon the petitioners. Aggrieved by the said order, the present petition is filed.

6. Counsel for the petitioners submits that while passing the impugned order dated 31.08.2009, the learned Additional Sessions Judge failed to follow the procedure as prescribed under Section 244 of the Cr.PC, which requires the evidence of the prosecution to be recorded before proceeding with the matter and framing charges, if any. He states that in the absence of recording any pre-charge evidence, grave injustice has been done to the petitioners, who have been deprived of an opportunity to cross-examine the witnesses of the prosecution at that stage. He submits that serious prejudice has been caused to the petitioners by the non-compliance of the prescribed procedure for recording the pre-charge evidence of the respondent No.2/complainant in the complaint case. In support of his submission, he relies on the decision of the Supreme Court in the case of Ajoy Kumar Ghose vs. State of Jharkhand & Anr. reported as **2009 AIR (SC) 2282** followed by a Single Judge of this Court in the case of Dhano vs. State and Anr. reported as **2009(1) JCC 145.**

7. Chapter XIX of the Cr.PC deals with trial of warrant cases by Magistrates. Under Section 238 Cr.PC., when, in any warrant case instituted on a police report, the accused appears or is brought before the Magistrate,

the Magistrate has to satisfy himself that he has been supplied the necessary documents like police report, FIR, statements recorded under sub-Section (3) of Section 161 Cr.PC. of all the witnesses proposed to be examined by the prosecution, as also the confessional statements recorded under Section 164 Cr.PC and any other documents, which have been forwarded by the prosecuting agency to the Court. After considering the police report and the documents under Section 173 Cr.PC. and making such examination of the accused, if the Magistrate considers the charge against the accused to be groundless, he is required to discharge the accused and record his reasons for doing so. At this stage, the prosecution is not required to lead any evidence. But if the Magistrate is of the opinion that there is a ground for presuming that the accused has committed an offence triable under the Chapter XIX, a charge is required to be framed against the accused under Section 240 Cr.PC and the trial then proceeds for recording the evidence.

8. However, in a warrant case instituted otherwise than on police report under Section 244 Cr.PC, when the accused appears or is brought before the Magistrate, the Magistrate is required to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Sub-section(2) of Section 244 empowers the Magistrate, on the application of the prosecution, to issue a summons to any of its witnesses directing him to attend/produce any documents etc. The aforesaid evidence is evidence before charge. If upon taking all the evidence referred to in Section 244, the Magistrate considers that no case has been made out against the accused, which would warrant his conviction, Section 245 requires the Magistrate to discharge him after recording reasons

therefor. Further, when such evidence has been taken, or at any previous stage of the case, if the Magistrate forms an opinion that there is a ground for presuming that the accused has committed an offence triable under the Chapter, he is required to frame a charge in writing under Section 246(1).

9. Thereafter, the complainant gets a second opportunity to lead evidence in support of the charge, as observed by the Supreme Court in the case of Ajoy Kumar Ghose(supra). While in the case of warrant trial on the basis of police report, the prosecution has only one opportunity to lead evidence which stage comes after the charge is framed, in the case of warrant trial instituted otherwise than on a police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the charge is framed.

10. The present case is a warrant trial instituted otherwise than on a police report. Therefore, an opportunity had to be granted to the prosecution to lead evidence under Section 244(1) Cr.PC or to summon its witnesses under Section 244(2) Cr.PC. Apparently, this did not happen. Instead, upon the District Judge transferring the complaint case of the respondent No.2 pending before the learned MM, to the Court of the learned ASJ where the case based on the FIR of the petitioner was already pending, without recording any pre-charge evidence, parties were called upon to address arguments on the point of charge and charge was served upon the petitioner. The object of Section 244 is to enable the Magistrate to consider evidence brought in support of the prosecution and after analyzing the same, if he forms an opinion that the evidence remains unrebutted, he shall proceed to frame charges against the accused under Section 246(1) Cr.PC.,

but in the absence of any discernible incriminating material revealed in the evidence, the Magistrate is required to discharge the accused under Section 245(1) Cr.PC.

11. After distilling the provisions of Section 238, 239, 244, 245 and 245 of Cr.PC, in the case of Ajay Kumar Ghose (supra), the Supreme Court observed as below:

“22...The language of the Section clearly suggests that it is on the basis of the evidence offered by the complainant at the stage of Section 244(1) Cr.P.C., that the charge is to be framed, if the Magistrate is of the opinion that there is any ground for presuming that the accused has committed an offence triable under this Chapter. Therefore, ordinarily, when the evidence is offered under Section 244 Cr.P.C. by the prosecution, the Magistrate has to consider the same, and if he is convinced, the Magistrate can frame the charge. Now here, there is, however one grey area. Section 246(1) Cr.P.C. is very peculiarly worded. The said grey area is on account of phrase “or at any previous stage of the case”. The question is as to whether, even before any evidence is led under Section 244 Cr.P.C., can the Magistrate straightway proceed to frame a charge. The debate on this question is not new, though there is no authoritative pronouncement of this Court, on that issue. There are cases, where the High Courts have specifically taken a view that the phrase does not empower the Magistrate to frame any charge in the absence of any evidence, whatsoever. It must be, at this stage, borne in mind that the word used in Section 246 Cr.P.C. is “evidence”, so also, in Section 244 Cr.P.C., the word used is “evidence”. **Therefore, ordinarily, the scheme of the Section 246 Cr.P.C. is that, it is only on the basis of any evidence that the Magistrate has to decide as to whether there is a ground to presume that the accused has committed an offence triable under this Chapter.**” (emphasis added)

12. After making the aforesaid observations, the Supreme Court carefully examined the following judgments:

(i) In re.M.Srihari Rao **AIR 1964 AP 226.**

(ii) T.K.Appu Nair Vs. Earnest & Ors. **AIR 1967 Madras 262**

(iii) Abdul Nabi Vs. Gulam Murthuza and Anr. **1968 Crl.Law Journal 303**

(iv) Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. **1971 (3) SCC 239**

(v) Sambhaji S/o Naga Koli Vs. State of Maharashtra **1979 Crl.Law Journal 390**

(vi) P.Ugender Rao & Ors. Vs. J.Sampoorna & Ors. **1990 Crl.Law Journal 762**

13. After perusing the aforesaid judgments and examining the decisions taken therein, the Supreme Court arrived at the conclusion that that some evidence would have to be there for framing the charge in so far as Section 246(1) Cr.PC is concerned, and held as below:-

“26. There is only one judgment of the Andhra Pradesh High Court in Verendra Vs. Aashraya Makers reported in 1999 Criminal Law Journal 4206, which has taken the view that the Magistrate can frame the charge even without any evidence having been taken under Section 244 Cr.P.C. **We do not think that it is a correct expression of law, as the right of the accused to cross-examine the witnesses at the stage of Section 244(1) Cr.P.C. would be completely lost, if the view is taken that even without the evidence, a charge can be framed under Section 246(1) Cr.P.C. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C.** The accused can show, by way of the cross-examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. **While interpreting this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored.** Unfortunately, the earlier cases of the same Court, which we have referred to above, were brought to the notice of the Learned Judge. Again, the Learned Judge has not considered the true impact of the clause “at any previous

stage of the case”, which could only mean that even with a single witness, the Magistrate could proceed to frame the charge.” (emphasis added).

14. Framing of charge ought to be based on relevant material, which could have been examined only at the time when the prosecution is called upon to lead evidence. In the present case, there was absolutely nothing before the learned ASJ except for the bare complaint, to consider the framing of charge. In fact, no such occasion arose for production of evidence, as after the complaint case of the respondent No.2 was directed by the District Judge to be forwarded to the learned Additional Sessions Judge to be heard alongwith the case on the basis of the FIR lodged by the petitioners, the learned Additional Sessions Judge straightway proceeded to hear arguments on the point of charge and arrived at the conclusion that a *prima facie* case was made out against the petitioners.

15. Considering the fact the trial court in a warrant trial case instituted otherwise than on a police report, is empowered to record pre-charge evidence under Section 244 of the Cr.PC, after summoning the accused persons, the petitioners cannot be deprived of their right to cross-examine such witnesses when such an opportunity is granted to them, to enable them demolish the case of the complainant, if possible. The material, on the basis of which the trial court could have analysed the charges levelled by the complainant against the petitioners so as to decide as to whether a case has been made out for proceeding against them, is completely lacking. Absence of such an opportunity to the petitioners has certainly prejudiced their case.

16. In these circumstances, it has to be held that failure to follow the prescribed procedure as laid down in Section 244 Cr.PC, is itself sufficient to set aside the order dated 31.08.2009, impugned by the petitioners herein. Ordered accordingly. The trial court shall hold an enquiry under Section 244 of the Cr.PC for pre-charge evidence, and only after analyzing the evidence brought on the record and deciding the nature of the offence, if any, under the relevant Sections, the learned Additional Sessions Judge shall conclude as to whether or not any offence is made out against the petitioners, in terms of Sections 245 & 246 of the Cr.PC.

17. The petition is allowed. As it is stated that the next date of hearing before the learned Additional Sessions Judge is 20.09.2010, the parties are directed to appear before the learned Additional Sessions Judge on the date fixed.

18. A copy of this order be forwarded directly to the trial court for perusal and compliance, along with the records.

SEPTEMBER 13, 2010
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(HIMA KOHLI)
JUDGE