

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. **CRR-993-2011 (O&M)**

DATE OF DECISION: SEPTEMBER 2, 2019

NEERAJ GUPTA ...PETITIONER

VERSUS

PARDEEP KUMAR BANSAL AND OTHERS ...RESPONDENTS

2. **CRM-M-26058 of 2011**

NARINDER BANSAL ...PETITIONER

VERSUS

U.T., CHANDIGARH AND ANOTHER ...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ.

PRESENT: MR. ANKUR MITTAL, ADVOCATE
FOR THE PETITIONER IN CRR-993-2011 AND
FOR RESPONDENT NO.2 IN CRM-M-26058-2011.

MS. ISHA GOYAL, ADVOCATE
FOR THE PETITIONER IN CRM-M-26058-2011 AND
FOR RESPONDENTS NO.2 IN CRR-993-2011.

MR. J.S. TOOR, ADDL.P.P., U.T., CHANDIGARH.

MANOJ BAJAJ, J.

The above mentioned CRR No.993 of 2011 and CRM-M-26058 of 2011 have been filed by complainant Neeraj Gupta and accused Narinder Bansal, respectively to challenge the impugned order dated 5.4.2011 whereby the Addl. Sessions Judge, Chandigarh proceeded to frame charge against accused Narinder Banal for the offence punishable under Section 302 IPC and at the same time the co-accused Pardeep Kumar and Gurmail Singh were discharged. The complainant has challenged the discharge of

respondents No.1 and 3. In the Crl. Misc. petition, besides challenging the order framing charges, accused Narinder Bansal has prayed for quashing of the complaint No.2516 dated 9.2.2008 (Annexure P-1) and the summoning order dated 8.12.2009 (Annexure P-2). The prosecution launched by Neeraj Gupta arises from a complaint case.

The brief facts leading to the present petitions are noticed from CRR No.993 of 2011. Complainant Neeraj Gupta brought a criminal complaint (Annexure P-1) against the accused persons, namely, Pardeep Kumar, Narinder Bansal and Gurmail Singh, wherein a prayer was made to refer the complaint under Section 156(3) Cr.P.C. to the SHO, P.S. Sector 34, Chandigarh for registration of FIR against the accused and for investigation. According to the complainant, the accused had committed an offence punishable under Sections 302/34/506/120-B IPC.

It was alleged in the complaint that the father of the complainant (Sh. Lal Chand Gupta) was actively assisting the complainant in his photoframe business in the name of M/s Gift 34, Booth No.150, Sector 34-C, Chandigarh. The accused persons were also carrying on their business activities at the same market. Accused No.1, namely, Pardeep Kumar Bansal was the President of the Market Association, Sector 34-C, Chandigarh for the last 10 years who was requested by the father of the complainant to call for a meeting of Market Association to disclose the financial records and other affairs of the Association, which annoyed the accused persons. According to the complainant, on 2.6.2006, accused-respondent No.3 Gurmail Singh in conspiracy with accused-respondents

No.1 and 2 had a quarrel with the father of the complainant and raised his hand to beat him. The matter was reported to the Chairman of the Market Association and the accused-respondents felt sorry for the same and also gave a written undertaking to that effect. However, they continued harassing, torturing, abusing and humiliating the complainant and his father. It was narrated that the complainant had disclosed the accused persons about his father who was a patient of hypertension and upon provocation, his blood pressure rises abnormally. Thereafter, on 12.4.2007, when the complainant and his father were present at their shop, at about 11.00 a.m., accused-respondent No.2 Narinder Bansal made ugly gestures and passed filthy remarks against the father of the complainant which was objected to by the complainant and his father and accused-respondent No.2 started hurling abuses to both of them. Accused-respondents No.1 and 3 also joined him and used filthy language. Thereafter, the accused-respondents came towards the shop of the complainant and caught hold of the complainant and shouted that they will teach a lesson to him and his father. The accused-respondents slapped the complainant and provoked father of the complainant. However, the father of the complainant tried to pacify them and to stop fighting. Then accused-respondent No.2 gave a violent push to the father of the complainant with an intention to harm and kill and he fell down and became unconscious. The father of the complainant was rushed to Mukat Hospital, Sector 34, Chandigarh wherein he was declared 'brought dead'. According to the complainant, the accused had intentionally and knowingly provoked the father of the complainant by using abusive

language with an intention to kill him.

On these broad allegations, a complaint was filed before the Court of Judicial Magistrate 1st Class, Chandigarh for registration of FIR.

The trial Court upon receipt of the complaint dated 9.2.2018 refused to entertain the prayer made by the complainant for exercising the jurisdiction under Section 156(3) Cr.P.C. and instead proceeded to adopt the procedure contained under Section 200 Cr.P.C., vide its order dated 19.2.2008. Pursuant to the said order, the complainant adduced pre-summoning evidence by examining three witnesses, i.e. complainant Neeraj Gupta (CW1), Rajwant Singh (CW2) and Dr. Rajwinder Singh (CW3) in support of the complaint. After considering the pre-summoning evidence, the trial Court proceeded to summon all the accused persons vide order dated 8.12.2009 (Annexure P-6) for commission of the offence punishable under Section 302 read with Section 34 IPC. After appearance of the accused, the Judicial Magistrate 1st Class, Chandigarh vide order dated 3.5.2016 committed the case to the Court of Sessions for trial. Thereafter, on 5.4.2011, Addl. Sessions Judge, Chandigarh after examining the pre-summoning evidence and the contents of the complaint proceeded to discharge two accused persons, namely, Pardeep Kumar and Gurmail Singh, i.e. respondents No.1 and 3, respectively. Also, through the same order the trial Court framed charges against respondent No.2, namely, Narinder Bansal. This is how both the sides have filed their respective petitions before this Court.

Notice of motion in the revision petition was issued on 3.5.2011

and thereafter on 8.8.2013, Union Territory, Chandigarh was impleaded as respondent No.4. During the course of hearing, learned counsel for the parties were directed to produce pre-charge evidence adduced by the complainant and in response, it was apprised that no pre-charge evidence was adduced by the complainant after appearance of the accused. This naturally gave rise to a question regarding the validity and correctness of the procedure adopted by the Addl. Sessions Judge, Chandigarh while framing the charges and discharging the other accused through the impugned order. Apart from it, even Committal proceedings were rendered defective. However, the said Committal order passed by the Magistrate has not been placed on record by any of the parties. It was stated by learned counsel for the parties that the trial Court has taken into consideration the pre-summoning evidence alone while framing the charges.

A perusal of the impugned order reveals that the trial Court proceeded to frame the charges without even hearing the Public Prosecutor for U.T., Chandigarh. Chapter XVIII of Code of Criminal Procedure contemplates the procedure of trial before the Court of Sessions and the opening Section 225 Cr.P.C. makes it mandatory that the trial is to be conducted by the Public Prosecutor. Not only this, the case for the prosecution is to be opened by the Public Prosecutor as laid down in Section 226 of Cr.P.C. Both these Sections are extracted below:-

“225. Trial to be conducted by Public Prosecutor.

In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

226. Opening case for prosecution.

When the accused appears or is brought before the Court in pursuance of a commitment of the case under Section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

There is no dispute between the parties regarding the above omission committed by the Court of Sessions as it without hearing the Public Prosecutor not only proceeded to take cognizance under Section 193 Cr.P.C., but further completed the exercise of discharge and framing the charge under Sections 227 Cr.P.C. and 228 Cr.P.C. At this stage, Ms. Isha Goyal, learned counsel appearing on behalf of respondents No.1 to 3 in CRR-993-2011, who are petitioners in connected CRM-M-26058 of 2011 conceded that the impugned order dated 5.4.2011 is bad in law and not sustainable. Similar is the stand of Mr. J.S. Toor, Addl.P.P., Chandigarh who fairly stated that the Addl. Sessions Judge, Chandigarh committed a serious error in law by passing the impugned order dated 5.4.2011 without there being any pre-charge evidence and also without hearing the Public Prosecutor . It was prayed by both of them that the matter deserves to be remanded back to the Court for adopting correct procedure of law. No other argument was raised on behalf of Pardeep Kumar and Gurmail Singh (petitioners) in CRM-M-26058 of 2011 muchless pressing the prayer for quashing the complaint (Annexure P-1) and summoning order (Annexure P-2).

At this stage, Mr. Ankur Mittal, learned counsel for the

complainant insisted that the prosecution case is not based upon the police report and therefore, the procedure is entirely different for prosecution of accused in a complaint case. According to him, the order passed by the Addl.Sessions Judge, Chandigarh is correct. Mr. Ankur Mittal, Advocate contends that after presentation of the complaint under Chapter XV of Cr.P.C. for prosecution of the accused and when accused have appeared, the only requirement is to supply them the copies of the statements recorded by the Magistrate under Section 200 Cr.P.C. or under Section 202 Cr.P.C. He submits that there is no mention of recording any pre-charge evidence and therefore, after completion of the formalities under Section 208 Cr.P.C., the case has to be committed to the Court of Sessions under Section 209 Cr.P.C.

Mr. Ankur Mittal, Advocate further contended that the requirement of examining of witnesses on behalf of the complainant before Committal was mandatory as per the provisions of the Criminal Procedure Code, 1898 (Old Code), however, after amendment in the Code of Criminal Procedure, the said requirement was given up. He submits that under the new provisions, there is no requirement of law for recording the pre-charge evidence before passing the Committal order. According to him, as per Chapter XVII of Cr.P.C. regarding trial before the Court of Sessions, the trial Court has to either discharge the accused or frame the charge as the case may be after examining the complaint and the pre-summoning evidence.

Mr. Ankur Mittal, was confronted with the provisions of Section 244 Cr.P.C. as contained in Part B of Chapter XIX, i.e. Trial of Warrant Case by Magistrate (case instituted otherwise than the police report)

which reads as under:-

“ 244. Evidence for prosecution

(1) When, in any warrant- case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.”

Mr. Mittal, vehemently contended that this procedure is applicable to trial before the Magistrate and pertains to the offences which are triable by Magistrate. According to him, the case in hand is punishable under Section 302 IPC and therefore, Magistrate has no option, but to commit the case to the Sessions Court for trial.

After hearing learned counsel for the revisionist, this Court deems it appropriate to examine the procedure as laid down in the Criminal Procedure Code for trial before the Court of Sessions before examining the merits of the arguments.

To begin with, Section 193 Cr.P.C. lays down a pre-condition for taking cognizance by the Court of Sessions in respect of the offences (punishable under IPC) triable by it, i.e. upon Committal of the case by the Magistrate. After the Committal Order is passed by the Magistrate, the procedure for trial before the Sessions Court is common to a case based either upon a police report or upon a private complaint. As noticed above, the trial before the Court of Sessions starts with the stage of Section 225 Cr.P.C. which authorizes only the Public Prosecutor to conduct trial on

behalf of the prosecution. Therefore, the trial before the Court of Sessions is to be conducted by the Public Prosecutor.

The trial before a Magistrate in warrants case has two modes: A) Cases instituted on a police report; B) where it is otherwise than on a police report. Sections 238 to 242 Cr.P.C. are applicable to a warrant trial based on a police report and Section 244 Cr.P.C. onwards deal with the trial based upon complaint. As per the provisions as contained in Part B of Chapter XIX of Code of Criminal Procedure, there is no requirement that in a complaint case, the prosecution is to be conducted by the Public Prosecutor. It is clear that the Legislature has drawn a distinction between the nature of offences, i.e. triable by a Magistrate and offences triable by the Sessions Court. Since the offences triable by the Sessions Court are serious, therefore, the responsibility was placed upon the Public Prosecutor to conduct the cases.

Sections 207 and 208 Cr.P.C. respectively make it mandatory for the Magistrate to complete the formalities before Committing the case to the Sessions Court. There are two different provisions for framing of charges by a Magistrate, i.e. under Section 240 Cr.P.C. when the case is based upon police report and Section 246 Cr.P.C. when the case is founded on a complaint.

A careful analysis of Section 244 Cr.P.C. makes it clear that Magistrate has to hear prosecution and take all evidence as may be produced after appearance of accused. It nowhere lays down or suggests that this exercise is only confined to the offences which are triable by Magistrate

only. It needs to be noticed that the expression 'Prosecution' as appearing in Section 244 Cr.P.C. relates to complainant and therefore, it is obligatory upon the complainant to bring all his evidence in support of the complaint. At this stage, the accused also gets a valuable right to cross-examine the prosecution witnesses. It is this evidence which is considered by the Magistrate either at the stage of discharging the accused under Section 245 Cr.P.C. or framing of charges under Section 246 Cr.P.C., as the case may be. But, where the offences are triable by Sessions Court, the case has to be Committed after complying with Section 208 Cr.P.C.

During the course of argument, learned counsel was unable to point out as to why Section 246 Cr.P.C. was inserted separately, if according to him, Section 244 Cr.P.C. relates to the trial of offences by the Magistrate alone. The requirement of Section 246 Cr.P.C. could have been added in the said Section, i.e. Section 244 Cr.P.C. It is also not disputed by Mr. Ankur Mittal, Advocate that the procedure for trial before the Court of Sessions is common whereas, before the Magistrate, it is different considering the two modes of the prosecution.

Further, the argument of Mr. Mittal that old Code provided recording of evidence by Magistrate before Committing the case to Sessions Court, however, after amendment it is not required, is also misplaced and misconceived. No doubt the vintage Code contemplated recording of evidence before Committing a case to the Court of Sessions, but the said procedure was in the nature of a preliminary inquiry in respect of cases exclusively triable by the Court of Sessions. The Amendment Act, 1978 has

abolished the said exercise with an aim to expedite the trial. The new Code carries abundant signs of profound changes in the procedure for Committal of a case triable by Sessions Court. It may be noticed here that Section 244 Cr.P.C. corresponds to Section 252 of the Old Code and therefore, the requirement of pre-charge evidence was always mandatory.

Once the Legislature has provided a specific procedure for recording the pre-charge evidence before framing of charges in a Magisterial trial, it does not appear to prudence that the said requirement was not essential for an offence triable by the Sessions Court, if the case is based upon the complaint. It may be again added here that if the offence is serious, there has to be sufficient material in the shape of some evidence which is to be examined by the Magistrate before passing the Committal Order, the same has to be other than the pre-summoning evidence. Time and again, this Court as well as the Hon'ble Supreme Court have held that the Magistrate while passing the Committal Order is not to act as a mouthpiece of the prosecution, but is supposed to examine the material carefully to arrive at such a conclusion. In cases based upon the police report, the entire evidence collected by the police after investigation is contained in Final report under Section 173(2) Cr.P.C. whereupon an opinion is formed by the Magistrate for Commitment and likewise in the other cases, the Court has to examine pre-charge evidence before passing the Committal Order. The issue regarding recording of pre-charge evidence was dealt with by the Hon'ble Supreme Court in *Ajoy Kumar Ghose vs. State of Jharkhand & Anr., 2009 (14)SCC 115*, wherein the following observations

were made:-

“14. However, in a warrant trial instituted otherwise than on a police report, when the accused appears or is brought before the Magistrate under Section 244(1) Criminal Procedure Code, the Magistrate has to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. In this, the Magistrate may issue summons to the witnesses also under 244(2) Criminal Procedure Code on the application by prosecution. All this evidence is evidence before charge. It is after all this, evidence is taken, then the Magistrate has to consider under 245(1) Criminal Procedure Code, whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge him. On the other hand, if he is satisfied about the prima facie case against the accused, the Magistrate would frame a charge under 246(1) Criminal Procedure Code. The complainant then gets the second opportunity to lead evidence in support of the charge unlike a warrant trial on police report, where there is only one opportunity. In the warrant trial instituted otherwise than the police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the charge. Of course, under 245(2) Criminal Procedure Code, a Magistrate can discharge the accused at any previous stage of the case, if he finds the charge to be groundless.

15. Essentially, the applicable Sections are Section 244 and 245 Criminal Procedure Code, since this is a warrant trial instituted otherwise than on police report. There had to be an opportunity for the prosecution to lead evidence under Section 244(1) Criminal Procedure Code or to summon its witnesses

under Section 244(2) Cr.P.C. This did not happen and instead, the accused proceeded to file an application under Section 245 (2) Criminal Procedure Code, on the ground that the charge was groundless.

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21. *However, the real difficulty arises in the Trial Court's proceeding to frame the charge under Section 246 Criminal Procedure Code. It is obvious that at that stage of framing a charge in this case, no material, whatsoever, was available with the Trial Court, excepting the complaint, which was also not supported by any statement on oath, by the complainant or any of his witnesses, which ordinarily are recorded at the stage of Section 200 Criminal Procedure Code. In this case, since the complaint was by the Court, no such statement came to be recorded, of the complainant or any of his witnesses present. Here also, the Trial Court has committed no mistake. Again, the Trial Court has also not made any mistake in issuing the process, if the Trial Court felt that there was a ground for proceeding. The real question, which comes, however, is as to how after rejecting the application made by the accused under Section 245(2) Criminal Procedure Code, the Trial Court straightaway proceeded to frame the charge.*

22. *The charge is framed under Section 246(1) Criminal Procedure Code, which runs as under:-*

"246(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused."

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) Criminal Procedure Code, 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 Criminal Procedure Code 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) Criminal Procedure Code 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 Criminal Procedure Code, can the Magistrate straightaway 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 Criminal Procedure Code is "evidence", so also, in Section 244 Criminal Procedure Code, 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."

Further, the Hon'ble Supreme Court relied upon the abovesaid judgement and made the following observations in **Sunil Mehta & another vs. State of Gujarat & another, 2013(3) SCC (Cri) 881**, which are extracted

below:-

“15. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Criminal Procedure Code is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognized and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof.

16. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

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*22. In **Harinarayan G. Bajaj vs. State of Maharashtra & Ors., 2010(1) R.C.R. (Criminal) 631: 2010(1) Recent Apex Judgements (R.A.J.) 170: (2010) 11 SCC 520**, this Court reiterated the legal position stated in Ajoy Kumar Ghose (supra) and held that the right of an accused to cross-examine witnesses produced by the prosecution before framing of a charge against him was a valuable right. It was only through cross-examination that the accused could show to the Court that there was no need for a trial against him and that the denial of the right of cross-examination under Section 244 would amount to denial of an opportunity to the accused to*

show to the Magistrate that the allegations made against him were groundless and that there was no reason for framing a charge against him. The following passages are in this regard apposite:

“18. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244,. then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him.

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20. Therefore, the situation is clear that under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319 Cr.P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence.”

In view of the above discussion, this Court does not find any merit in the argument of learned counsel for the complainant and the same is rejected. It is clear that the evidence as contemplated under Section 244 Cr.P.C. was not recorded by the Magistrate. Therefore, this Court has no hesitation in holding that the impugned order dated 5.4.2011, passed by the Addl. Sessions Judge, Chandigarh suffers from grave illegality and impropriety and the same is accordingly set aside. Also, in the absence of

pre-charge evidence, the Committal of the case by the Judicial Magistrate 1st Class, Chandigarh was equally improper.

In view of the above, the parties are directed to appear before the Judicial Magistrate 1st Class, Chandigarh on 20.9.2019, who shall proceed with the complaint in accordance with law from the stage of recording the pre-charge evidence as contemplated under Section 244 Cr.P.C. In the meantime, the Addl. Sessions Judge, Chandigarh shall send the record of the case back to the Court of Judicial Magistrate 1st Class, Chandigarh.

With above observation, both the petitions are disposed off.

September 2, 2019
Gulati

(MANOJ BAJAJ)
JUDGE

Whether Reportable : Yes/No

Whether Speaking/Reasoned : Yes/No