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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 15.05.2019

+ CRL.REV.P. 625/2016 & CrI.M.A.14670-71/2016 & 14673/2016

THE STATE (NCT OF DELHI)

..... Petitioner

versus

SURESH GAUTAM & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Hirein Sharma, Addl. PP for the
State with ASI Parveen Kumar, P.S.Anand Parbat.

For the Respondent : Ms.Padma Priya, Adv. for R-1 & 2.
Mr.Kundan Kumar, Adv. for R-3.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. State has filed the subject revision petition seeking quashing of order dated 04.01.2016 passed by the Court of Additional Sessions Judge rejecting the application filed by the State under Section 244 Cr.P.C. seeking remit of the matter to the Court of MM for recording pre charge evidence.

2. A complaint was filed by the respondent No.3 alleging that respondent Nos.1 & 2 had committed an offence under Section 307/323/324/452/506/120-B/34 IPC. After recording of the pre summoning evidence, respondent Nos.1 & 2 were directed to be

summoned by order dated 12.08.2013.

3. By order dated 12.11.2013 case was committed to the Court of Sessions. On 08.01.2014 charges was framed against respondent Nos.1 & 2 under Section 454/34 IPC and Section 307/34 IPC.

4. Subject application was filed by the prosecution contending that after the respondent Nos.1 & 2 were summoned no pre charge evidence was recorded and as such it was prayed that the matter be remitted to the Court of the MM for recording pre charge evidence. Since the application was dismissed by the impugned order, State has preferred subject revision petition.

5. Section 244 Cr.P.C 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.”

6. Under Section 244 Cr.P.C., in any warrant case instituted other than on a police report, if the accused appears or is brought before the Magistrate, the Magistrate has to hear the prosecution and take such

evidence as may be produced in support of the prosecution. If upon taking of evidence referred to in Section 244 Cr.P.C., the Magistrate considers that no case is made out against the accused, then under Section 245 Cr.P.C., the Magistrate is empowered to discharge the accused. If after taking such evidence into account the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable by him, which such Magistrate is competent to try and adequately punished by him, he is to proceed further to frame a charge.

7. A coordinate Bench of this Court in *Dhano vs. State*, 2009 (1) JCC 145 has held that it is the Magistrate who has the power to record pre charge evidence after summoning the accused in a warrant triable case and also to permit cross examination of the witnesses to be committed on behalf of the accused. *Dhano vs. State (Supra)* was followed by another coordinate bench in *Azad Singh Dagar vs The State & ors*, 2015 SCC online Del 10984.

8. The Supreme Court in *Sunil Mehta and Anr vs. State of Gujarat & Anr*, (2013) 9 SCC 209 has held that trial of an accused under Chapter XIX and evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage (i.e. pre summoning stage). There is a qualitative difference between the approach that the Court adopts and the evidence adduced, at the stage of taking cognizance and summoning the accused and that recorded at the trial.

9. The Supreme Court held that there is nothing in the provisions 244, 245 or 246 or any other provision of the Code to suggest that the evidence which the Magistrate may have recorded at the stage of taking cognizance and issuing of process tantamount to evidence that can be used by the Magistrate for the purposes of framing of charges against the accused person under Section 246 thereof.

10. Supreme Court has further held that the whole approach underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him but also to defend himself by cross examining the witnesses with a view to showing that the witness is either unreliable or a statement made by him does not have any evidentiary value. Further it is held that the right of cross examination granted to an accused under Section 244 to 246 even before framing of charge does not prejudice the complainant or result in any failure of justice; while denial of such right is bound to prejudice the accused in his defence and an opportunity to show that he should not be made to suffer the rigors of a trial.

11. In the present case, by impugned order, the Sessions Court while rejecting the application filed by the State, has in fact noticed that no pre charge evidence has been recorded by the Metropolitan Magistrate before committing the case to sessions. The only reason given for dismissal of the application is that since charges have already been framed by the predecessor court, the successor Court

would have no power to review the order.

12. Clearly the reasoning given by the Sessions Court is not sustainable and the manner in which the charge has been framed by the MM prior to committal is contrary to the law laid down by the Court in *Sunil Mehta (Supra)*. No pre-charge evidence has been recorded in this case and reliance has been placed solely on the pre-summoning evidence for the purposes of framing of charge.

13. In view of the above, the impugned order dated 04.01.2016, order of committal dated 12.11.2013 and the order on charge and consequent charge framed on 08.01.2014 are clearly not sustainable and are accordingly set aside.

14. The matter is remitted to the Court of MM and shall be commenced from the stage of recording of pre charge evidence. The matter shall be placed before the Chief Metropolitan Magistrate, Central District, Tis Hazari Courts on 28.05.2019 for assignment to the concerned Court of Metropolitan Magistrate. Parties shall appear before the Court of CMM on the said date.

15. Petition is allowed in the above terms.

16. Order *dasti* under signatures of the Court Master.

MAY 15, 2019/ rk

SANJEEV SACHDEVA, J