Sunil Mehta & Anr vs State Of Gujarat & Anr on 20 February, 2013

Equivalent citations: AIRONLINE 2013 SC 381

Author: T.S. Thakur

Bench: Sudhansu Jyoti Mukhopadhaya, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 327 OF 2013
(Arising out of S.L.P. (Crl.) No.374 of 2012)

Sunil Mehta & Anr. …Appellants

Versus

State of Gujarat & Anr. …Respondents

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.

2. The short question that falls for our determination in this appeal is whether depositions of the complainant and his witnesses recorded under Chapter XV of the Code of Criminal Procedure, 1973 before cognizance is taken by the Magistrate would constitute evidence for the Magistrate to frame charges against the accused under Part B of Chapter XIX of the said Code. The question arises in the following backdrop:

3. A complaint alleging commission of offences punishable under Sections 406, 420 and 114 read with Section 34 of the Indian Penal Code, 1860 was filed by respondent No.2-Company before the Chief Judicial Magistrate, Gandhi Nagar, Gujarat. The Magistrate upon examination of the complaint directed an enquiry in terms of Section 156(3) of the Cr.P.C. by the jurisdictional police station. The report received from the police suggested that the dispute between the parties was of a civil nature in which criminal proceedings were out of place. The Chief Judicial Magistrate was not, however, satisfied with the police enquiry and the conclusion, and hence conducted an enquiry in terms of Section 202 of the Cr.P.C. and issued process against the appellants for offences punishable

under Sections 406 read with 114 IPC.

4. Aggrieved, the appellants unsuccessfully questioned the summoning order before the High Court in Criminal Misc. Application No.10173 of 2010. Inevitably the matter came up before the trial Court under Section 244 of the Cr.P.C. where the accused appeared pursuant to the summons issued by the Court. Instead of adducing evidence in support of the prosecution as mandated by Section 244, the complainant filed a pursis (memo) stating that he did not wish to lead any additional evidence and that the evidence submitted along with the complaint may be considered as evidence for purposes of framing of the charge. The Magistrate took the pursis on record and fixed the case for arguments on framing of charges. The appellants' case is that written submissions filed by them before the Magistrate raised a specific contention that no charge could be framed against them as the complainant had not led any evidence in terms of Section 244 of the Code and that the depositions recorded before the Magistrate under Section 202 of the Cr.P.C. could not be considered as evidence for the purposes of framing of charges. The Magistrate, however, brushed aside that contention and framed charges against the appellants under Sections 406 and 420 read with Section 34 of the IPC.

5. Aggrieved by the order passed by the Magistrate, the appellants preferred Criminal Revision Application No.56 of 2011 before the Sessions Judge at Gandhi Nagar who allowed the same by his order dated 18th July, 2011 primarily on the ground that non-compliance with the provisions of Section 245(2) of the Cr.P.C. rendered the order passed by the Magistrate unsustainable. The Sessions Judge accordingly remitted the matter back to the trial Court with a direction to proceed in accordance with the provisions of Sections 244 to 247 of the Code keeping in view the decision of this Court in Ajoy Kumar Ghose v. State of Jharkhand and Anr. (2009) 14 SCC 115.

6. Undeterred by the revisional order the respondent-company filed Special Criminal Application No.1917 of 2011 before the High Court of Gujarat at Ahmedabad which application has been allowed by the High Court in terms of the order impugned before us. The High Court observed:

> “In the facts of the case, it is not that the witnesses of the complainant have not been examined, therefore, the evidence has been recorded. Therefore, at that stage the opportunity was available with the accused as provided under law to cross examine the witnesses, however, it is not availed of by exercising the right of cross examination. It cannot be said that the procedure, as required, is not followed. Therefore, the observation made by the learned Sessions Judge relying on this judgment are misconceived.”

7. It is difficult to appreciate the logic underlying the above observations. It appears that the High Court considered the deposition of this complainant and his witnesses recorded before the appearance of the accused under Section 202 of the Cr.P.C. to be ‘evidence’ for purposes of framing of charges against the appellants. Not only that, the High Court by some involved process of reasoning held that the accused persons had an opportunity to cross-examine the witnesses when the said depositions were recorded. The High Court was, in our opinion, in error on both counts. We say so for reasons that are not far to seek. Chapter XV of the Code of Criminal Procedure, 1973 deals

with complaints made to Magistrates. Section 200 which appears in the said Chapter inter alia provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and signed by the complainant and the witnesses, as also the Magistrate. An exception to that general rule is, however, made in terms of the proviso to Section 200 in cases where the complaint is made by a public servant acting or purporting to act in the discharge of his official duties, or where a Court has made the complaint, or the Magistrate makes over the case for enquiry or trial by another Magistrate under Section 192 of the Cr.P.C.

8. Section 201 deals with the procedure which a Magistrate not competent to take cognizance of the case is required to follow. Section 202 empowers the Magistrate to postpone the issue of process against the accused either to inquire into the case himself or direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section (2) of Section 202 empowers the Magistrate to take evidence of witnesses on oath in an inquiry under sub-section (1) thereof. Section 203, which is the only other provision appearing in Chapter XV, empowers the Magistrate to dismiss the complaint if he is of the opinion that no sufficient ground for proceeding with the same is made out.

9. There is no gainsaying that a Magistrate while taking cognizance of an offence under Section 200, whether such cognizance is on the basis of the statement of the complainant and the witnesses present or on the basis of an inquiry or investigation in terms of Section 202, is not required to notify the accused to show cause why cognizance should not be taken and process issued against him or to provide an opportunity to him to cross- examine the complainant or his witnesses at that stage.

10. In contra distinction, Chapter XIX of the Code regulates trial of warrant cases by Magistrates. While Part A of that Chapter deals with cases instituted on a police report, Part B deals with cases instituted otherwise than on a police report. Section 244 that appears in Part B of Chapter XIX requires the Magistrate to “proceed to hear the prosecution” and “take all such evidence as may be produced in support of the prosecution” once the accused appears or is brought before him. Section 245 empowers the Magistrate to discharge the accused upon taking all the evidence referred to in Section 244, if he considers that no case against the accused has been made out which if unrebutted would warrant his conviction. Sub-section (2) of Section 245 empowers the Magistrate to discharge an accused even “at any previous stage” if for reasons to be recorded by such Magistrate the charges are considered to be “groundless”. In cases where the accused is not discharged, the Magistrate is required to follow the procedure under Section 246 of the Code. That provision may at this stage be extracted:

> “246. Procedure where accused is not discharged -
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> (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.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-

examination (if any), they shall also be discharged."

11. A simple reading of the above would show that the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and adequately punish.

12. Sections 244 to 246 leave no manner of doubt that once the accused appears or is brought before the Magistrate the prosecution has to be heard and all such evidence as is brought in support of its case recorded. The power to discharge is also under Section 245 exercisable only upon taking all of the evidence that is referred to in Section 244, so also the power to frame charges in terms of Section 246 has to be exercised on the basis of the evidence recorded under Section 244. The expression "when such evidence has been taken" appearing in Section 246 is significant and refers to the evidence that the prosecution is required to produce in terms of Section 244(1) of the Code. There is nothing either in the provisions of Sections 244, 245 and 246 or any other provision of the Code for that matter to even remotely suggest that evidence which the Magistrate may have recorded at the stage of taking of cognizance and issuing of process against the accused under Chapter XV tantamounts to evidence that can be used by the Magistrate for purposes of framing of charges against the accused persons under Section 246 thereof without the same being produced under Section 244 of the Code. The scheme of the two Chapters is totally different. While Chapter XV deals with the filing of complaints, examination of the complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the

evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. All that may be said is that evidence that was adduced before a Magistrate at the stage of taking cognizance and summoning of the accused may often be the same as is adduced before the Court once the accused appears pursuant to the summons. There is, however, 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. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

13. Mr. U.U. Lalit, learned senior counsel appearing for the respondent- complainant strenuously argued that Section 244 does not envisage, leave alone provide for in specific terms, cross-examination of witnesses produced by the prosecution by the accused. He submitted that since the provision of Section 244 did not recognise any such right of an accused before framing of charges, it did not make any difference whether the Court was evaluating evidence adduced at the stage of cognizance and summoning of the accused or that adduced after he had appeared before the Magistrate under Section 244. He particularly drew our attention to sub-section (4) to Section 246 which requires the Magistrate to ask the accused whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. It was contended by Mr. Lalit that the provision of sub-section (4) to Section 246 provides for cross- examination by the accused only after charges have been framed and not before. There is, in our opinion, no merit in that contention which needs to be noticed only to be rejected. We say so for reasons more than one. In the first place, the expression "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution" appearing in Section 244 refers to evidence within the meaning of Section 3 of the Indian Evidence Act, 1872. Section 3 reads as under:

> 3. Interpretation clause -
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> In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:— xx xx xx "Evidence".—"Evidence" means and includes—
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> 1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
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> 2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

14. We may also refer to Chapter X of the Evidence Act which deals with examination of witnesses. Section 137 appearing in that Chapter defines the expressions examination-in-chief, cross and re-examination while Section 138 stipulates the order of examinations and reads as under:

> "138. Order of examinations.- Witnesses shall be first examined- in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination- in-chief.

Direction of re-examination.- The re-examination shall be directed to the explanation of matters referred to in cross- examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

15. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. 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 recognised 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.

17. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object 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 that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-

examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most

valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

18. Thirdly, because the right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage.

19. We are supported in the view taken by us by the decision of this Court in Ajoy Kumar Ghose (supra). That was a case where the trial Court had framed charges against the accused without the prosecution having any evidence whatsoever in terms of Section 244 of the Cr.P.C. This Court held that the procedure adopted by the trial Court was not correct because the language of Section 246(1) Cr.P.C. itself sufficiently indicated that charges have to be framed against the accused on the basis of some evidence offered by the complainant at the stage of Section 244(1). This Court observed:

> "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."

20. This Court further clarified that the expression "or at any previous stage of the case" appearing in Section 246(1) did not imply that a Magistrate can frame charges against an accused even before any evidence was led under Section 24. This Court approved the decision of the High Court of Bombay in Sambhaji Nagu Koli v. State of Maharashtra 1979 Cri LJ 390 (Bom), where the High Court has explained the purport of the expression "at any previous stage of the case". The said expression, declared this Court, only meant that the Magistrate could frame a charge against the accused even before all the evidence which the prosecution proposed to adduce under Section 244(1) was recorded and nothing more. This Court observed:

> "44. In Section 246 Cr.P.C. also, the phraseology is "if, when such evidence has been taken", meaning thereby, a clear reference is made to Section 244 Cr.P.C. The Bombay High Court came to the conclusion that the phraseology would, at the most, mean that the Magistrate may prefer to frame a charge, even before all the evidence is completed. The Bombay High Court, after considering the phraseology, came to the conclusion that the typical clause did not permit the Magistrate to frame a charge, unless there was some evidence on record. For this, the Learned Single Judge in that matter relied on the ruling in Abdul Nabi v. Gulam Murthuza Khan 1968 Cri LJ 303

(AP)."

21. More importantly, this Court recognised the right of cross-

examination as a salutary right to be exercised by the accused when witnesses are offered by the prosecution at the stage of Section 244(1) of the Code and observed:

> "51. 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."

> 22. In Harinarayan G. Bajaj v. State of Maharashtra & Ors. (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."

23. In the light of what we have said above, we have no hesitation in holding that the High Court fell in palpable error in interfering with the order passed by the Revisional Court of Sessions Judge, Gandhi Nagar. The High Court was particularly in error in holding that the appellant had an opportunity to cross-examine the witnesses or that he had not availed of the said opportunity when the witnesses were examined at the stage of proceedings under Chapter XV of the Code. The High Court, it is obvious, has failed to approach the issue from the correct perspective while passing the impugned order.

24. In the result we allow this appeal with costs assessed at Rs.50,000/- , set aside the order passed by the High Court and restore that passed by the Sessions Judge. The costs shall be deposited by respondent No.2-company in the SCBA Lawyers' Welfare Fund within two weeks of the pronouncement of this order.

……..J. (T.S. THAKUR) ……..J. (SUDHANSU JYOTI MUKHOPADHAYA) New Delhi February 20, 2013