

(2006) 12 P&H CK 0089

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Miscellaneous No. 30743-M of 2005

R.K. Joshi and another

APPELLANT

Vs

State of Haryana and another

RESPONDENT

Date of Decision: Dec. 18, 2006**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 482

Citation: (2007) 2 RCR(Criminal) 47**Hon'ble Judges:** Ajai Lamba, J**Bench:** Single Bench**Advocate:** Gorakh Nath, for the Appellant; Narender Sura, A.A.G., for the Respondent**Final Decision:** Dismissed

Judgement

Ajai Lamba, J.

The legal issue raised in this petition is - Whether the accused in a warrant case instituted otherwise than on police report has an absolute right to cross-examine the prosecution witnesses examined u/s 244, Cr.P.C. ?

2. This petition has been filed u/s 482 of the Code of Criminal Procedure, 1973 (for short 'the Code') for quashing of the complaint lodged for commission of offences under the Drugs and Cosmetics Act, 1940, and the Rules made thereunder. A prayer is also for quashing the consequent and subsequent proceedings viz. Summoning order dated 16.2.1999 (Annexure P-2), order dated 25.8.2004 (Annexure P-3) by virtue of which it has been directed that the charges be framed against the petitioner and the charge-sheet dated 25.8.2004 (Annexure P-4). It is not in dispute that it is a warrant case instituted otherwise than on a police report. Reference is being made only to the documents that are necessary for adjudicating upon the issue raised in this petition.

3. Complaint dated 16.2.1999 (Annexure P-1) having been filed, the petitioner was summoned vide order dated 16.2.1999 (Annexure P-2) while dispensing with

recording of preliminary evidence as the complaint had been filed by a public servant in discharge of his public duties.

4. In pre-charge evidence, the prosecution examined Girdhari Lal Singla complainant, as PW-1, on 18.1.2000. The examination-in-chief was recorded, however, the cross-examination was deferred as the Court time was over. The statement has been placed on record as Annexure P-8. It seems that, thereafter, the other witness examined in pre-charge evidence is PW-2 Ramesh, Cashier, Civil Surgeon Office, Rohtak, whose statement has been placed on record as Annexure P-9. A perusal of the statement shows that the witness was duly cross-examined. On 8.10.2003, vide Annexure P-10, statement of Shri M.P. Gupta, Senior Drugs Inspector, Rohtak, was recorded to the effect that pre-charge evidence is closed. On 25.8.2004, on the basis of pre-charge evidence, as noticed hereinabove, the trial Court has recorded that on finding prima facie case against the accused under Sections 27(b)(ii), 27(d), 28-A of the Drugs and Cosmetics Act, the accused has been charged. The charge-sheet has been placed on record as Annexure P-4, which is also of the same date.

5. I have heard the learned counsel for the parties and perused the record.

6. Present petition has been pressed only on the ground that because PW-1 Girdhari Lal Singla has not been allowed to be cross-examined by the accused, therefore, the proceedings are vitiated and the order of charge and the charge-sheet are liable to be quashed. It has been argued on behalf of the petitioner that the witness having come to the Court and having been examined by the complainant, the accused had an absolute right to cross-examine the witness. The accused was entitled to be given an opportunity for cross-examination in terms of Section 244 of the Code. The word "evidence" as it occurs in Section 244 of the Code would mean evidence which has been tested by cross-examination. As per precedent, generally in all cases, prosecution witnesses are allowed to be cross-examined at pre-charge stage.

7. As against the above, learned counsel for the respondent-State has contended that when the case is at the stage of Section 244 of the Code, the proceedings are only at an inquiry stage. The petitioner-accused would have a right of cross-examination only after trial commences. Trial in a warrant case commences only after charge is framed and not earlier. In view of the above, the order of the Court framing charges without allowing the accused to cross-examine the witness is based on evidence and does not suffer from any infirmity. Learned counsel for the respondents has placed reliance on two judgments of the Kerala High Court i.e. [Gopalakrishnan Vs. State of Kerala](#), and Asokan L.S. v. State of Kerala, 2005 (4) RCR (Cri) 535 : 2005(3) AC 424.

No other argument has been raised.

8. Having considered the entire record in the context of the arguments of the learned counsel, it is necessary to examine the import of the relevant provisions

under Chapter XIX of the Code. Sections 244 to 246 are reproduced hereunder :-

Chapter XIX

Trial of Warrant-Case by Magistrates

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xx xx xx xx xx xx xx xx xx xx

B. - Cases instituted otherwise than on police report

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.

245. When accused shall be discharged. - (1) If, upon taking all the evidence referred to in Section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

246. Procedure where accused is not discharged. - 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.

9. Consideration of the aforementioned reproduced provisions of Section 244 of the Code shows that at the initial stage, when accused appears or is brought before a Magistrate, the Magistrate is required to hear the prosecution and 'take all such evidence as may be produced in support of the prosecution'.

10. u/s 245(2) of the Code, it is provided that if 'upon taking all the evidence referred to in Section 244, the Magistrate considers that no case to warrant conviction of accused is made out, even if evidence taken is unrebutted, the Magistrate may discharge him while recording his reasons'.

11. u/s 245(2) of the Code, it is provided that the Magistrate may discharge the accused for reasons to be recorded at any previous stage of the case also, if he considers the charge to be groundless.

12. Section 246 of the Code narrates the procedure to be adopted if the accused is not discharged u/s 245 of the Code. It specifically provides that the Magistrate has the jurisdiction to frame a charge 'when such evidence has been taken, or at any previous stage of the case.' This has been provided in the eventuality when evidence u/s 244 of the Code is being taken or is taken, the Magistrate formulates an opinion that there is ground for presuming that the accused has committed an offence triable under the Chapter which the Magistrate is competent to try and which could adequately be punished by him.

13. The purpose of taking of evidence u/s 244, Cr.P.C., as can safely be deciphered, is to enable the Magistrate to formulate an opinion as to whether to discharge the accused or frame charge against him. It further provides that the accused can be discharged (under Section 245(1) of the Code) or charged (under Section 246(1) of Code), "at any previous stage of the case" also viz. it is not imperative for the Magistrate to take the entire evidence sought to be produced by the prosecution. The opinion to charge the accused or discharge the accused can be formulated even at an earlier stage. Once the Magistrate concludes that there is sufficient evidence to charge the accused and the accused on framing of charges, refuses to plead guilty or does not plead or claims to be tried or if he is not convicted u/s 246(3) of the Code, he shall be required to state whether he wishes to cross-examine, and if so, which of the witnesses for the prosecution whose evidence has been taken. Sub-section (5) of Section 246 of the Code provides that in case the accused conveys his wish to exercise his right to cross-examine as provided under sub-section (4) of Section 246 of the Code, the witness(es) named by him shall be recalled and after cross-examination and re-examination (if any), they shall be discharged. Likewise,

sub-section (6) of Section 246 of the Code speaks of the right of the accused to cross-examine the remaining witnesses of the prosecution.

14. Having considered in detail the provisions of Sections 244 to 246 of the Code, the intention of legislature is clear to the effect that the accused has been provided with a right to cross-examine the prosecution witnesses only after charge is framed and not earlier. The reference to right of cross-examination has been made for the first time in sub-section (4) of Section 246 of the Code. The reference to taking evidence in support of the prosecution at the stage of Sections 244 to 246(1) of the Code is clearly to enable the Magistrate to formulate an opinion as to whether to charge the accused or discharge him. The object of Section 244 of the Code is to enable the Magistrate to collect material to find out whether a case has been made out against the accused.

15. Another aspect of the case is that at the stage of inquiry, when case is at Section 244 stage, the witnesses are available and there is opportunity to cross-examine. It, however, does not mean actual right to cross-examine. It follows, therefore, that even if no opportunity is given to the accused to cross-examine the witnesses during inquiry, no prejudice would be caused to him, since he gets the opportunity to cross-examine the witnesses at the trial stage. This may safely be compared with a warrant case instituted on a police report, wherein the accused gets no opportunity to cross-examine the prosecution witnesses during inquiry.

16. In Gopalakrishnan's case (supra) cited by the learned counsel for the respondents, it has been held in similar terms. Relevant portion of para-4 of the judgment reads as under :-

..... For the reasons stated above, I am of the view that the accused has no absolute right to cross-examine the prosecution witnesses u/s 244 of the Cr.P.C. No doubt Section 244 does not prohibit cross-examination before framing charge. Though the accused has no independent right of cross-examination u/s 244 of the Cr.P.C. the Magistrate may in his discretion permit cross-examination at the inquiry stage. But it cannot be said that the refusal of a Magistrate to allow an accused to cross-examine the witnesses examined u/s 244 of the Cr.P.C. is illegal and irregular...

17. Referring to the other judgment cited by the learned counsel for the State viz. Asokan's case (supra), I find that this issue was not being directly examined. The issue before the Court was whether the statement of an approver examined before the appropriate Magistrate under clause (a) of sub-section (4) of Section 306 of the Code, is relevant and admissible u/s 33 of the Evidence Act during the subsequent trial in which he is not available for examination by reason of his death in the meanwhile ?

18. In the above context, the Full Bench of Kerala High Court examined the right of accused to cross-examine the prosecution witnesses u/s 244 of the Code, while referring to Gopalarkishnan's case (supra). Reference may be made to paras 31, 32

and 33 of the judgment rendered in Asokan's case (supra), which read as under :-

31. In this connection, examination of a witness in a warrant case instituted otherwise than a police report is relevant. Section 244 of the Code of Criminal Procedure, 1973, corresponds to Section 252 of the Code of Criminal Procedure, 1898 with some changes. Section 251-A of the old Code lays down the procedure to be followed in the trial of warrant cases instituted on a police report and the procedure prescribed under Sections 252 to 259 to be followed in warrant cases instituted otherwise than on a police report. Section 252 of the old Code provides that in any case instituted otherwise than on a police report when the accused appears or is brought before the Magistrate, he shall take all such evidence as may be produced in support of the prosecution. The expression 'take all such evidence as may be produced in support of prosecution' does not mean that accused has a right to cross-examine the prosecution witnesses before framing charges. There is no statutory provision in Section 252 of the old Code conferring a right of cross-examination on the accused, though in appropriate cases the Magistrate may permit the accused to cross-examine the witness.

32. In [Emperor Vs. C.A. Mathews](#), the question arose as to whether the evidence of witness recorded before it reached the stage of Section 256 is admissible u/s 33 of the Indian Evidence Act. It was held as follows :

In a warrant case until the stage provided for in Section 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible u/s 33.

In [Rex Vs. Daya Shankar Jaitly](#), a Division Bench of the Allahabad High Court considered the question whether after the examination of a prosecution witness u/s 252 of the Code of Criminal Procedure, 1898 the accused have a right to cross-examine him. Though the question arose only incidentally in that case, it was held as 'obiter' as follows :

The fact that the right of cross-examination is not expressly mentioned in Section 252 is of no significance whatsoever.... Even though under the law the accused may not have a right of cross-examination of prosecution witnesses when they are examined u/s 252, Criminal P.C., still, where the accused is given permission to cross-examine, the accused becomes vested with the right and if he exercises the right so given, Section 33 is fully applicable and the evidence can be brought on record.

In [Banwari Lal and Another Vs. State](#), another Division Bench of the Allahabad High Court after considering the observations made in Daya Shankar Jaitly's case (supra) held as follows :-

The word "right" used in Section 33 means a right conferred by a statutory provision such as that contained in Section 138, Evidence Act and not a right accruing from

mere permission granted by the Court. If a Court permits an accused to cross-examine a witness, it is nothing but giving him an opportunity of cross-examining him and Section 33 expressly requires a right in addition to an opportunity.

33. In *Gopalakrishnan v. State of Kerala*, 2001(2) KLT 767 (supra) a learned Single Judge of this Court held that Section 244 of the Code of Criminal Procedure, 1973 held that Section 244 of the Code of Criminal Procedure, 1973 also does not confer on the accused an absolute right to cross-examine the prosecution witness, though it does not prohibit cross-examination before framing charge.....

Further, in para 34, it has been observed as under :

34. The word "evidence" means all statements which the Court permits or requires to be made before it by the witness. Sections 137 and 138 of the Evidence Act deal with examination of witnesses. The examination includes cross-examination and re-examination.....

19. Trial in a warrant case starts with the framing of charge, prior to it, the proceedings are only an inquiry. Reference in this regard may be made to para 26-A of judgment in *Ratilal Bhanji Mithani v. State of Maharashtra and others*, AIR 1979 SC 94. Para 26-A is reproduced hereunder for reference and convenience :-

26-A. Once a charge is framed, the Magistrate has no power u/s 277 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Sections 349 and 562 of the Code of 1892 (which correspond to Sections 325 and 360 of the Code of 1973).

20. Thus, considered from this view point also, the accused would have a right to cross-examine prosecution witnesses after the trial starts.

21. So far as the argument of the learned counsel for the petitioner to the effect that "evidence" would mean evidence which has been tested by cross-examination is concerned, reference may be made to the definition of "evidence" u/s 3 of the Indian Evidence Act, 1872, which reads as under :-

Evidence" - "Evidence" means and includes -

(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;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

Thus, it follows that all statements which the Court permits or requires to be made before it by witnesses in relation to facts under inquiry would be evidence. The provisions regarding the manner in which examination of witnesses is to take place and the order of examination as provided under Sections 137 and 138 in Chapter X of the Evidence Act, cannot be pressed into service to agitate that "evidence" referred to in Section 244 of the Code inheres to cross-examination also. Thus, u/s 244 of the Code, sworn statement in chief-examination, even when not tested by a cross-examination, would continue to be evidence.

22. Having considered all the aspects, I have no hesitation in holding that the accused has no absolute right to cross-examine the prosecution witnesses u/s 244 of the Code. Section 244 of the Code does not prohibit cross-examination and the Magistrate may in his discretion permit cross-examination at this inquiry stage. It cannot, however, be said that the refusal to cross-examine the witnesses u/s 244 of the Code is illegal or irregular.

23. Having held thus, the facts and circumstances of the present case may be considered in the light of the law discussed above. As noticed in earlier part of the order, PW-1 Girdhari Lal Singla was examined on 18.1.2000. After the examination-in-chief was concluded, the following has been recorded :-

Deferred as court time is over.

The record, thereafter, does not show as to whether this witness was again summoned/recalled or not. The record only shows that the only other witness Ramesh (PW-2) was examined and also cross-examined on 8.10.2003. On the same date, statement was given by Senior Drugs Inspector that pre-charge evidence is closed. Considering the material, accused/petitioner was charged vide order dated 25.8.2004.

24. The petitioner did not make any request for recalling PW-1 Girdhari Lal for cross-examination. PW-2 Ramesh was cross-examined on 8.10.2003 whereafter, the Senior Drugs Inspector gave the statement that pre-charge evidence is closed. No request was made even at that point of time for recalling PW-1 Girdhari Lal. Not only this, issue of charge was considered on 25.8.2004 i.e. much later to the closing of pre-charge evidence and yet no such request for recalling PW-1 was made. It is through this petition in April, 2005, that for the first time, this issue has been raised. The issue of cross-examining PW-1 Girdhari Lal was not raised at any juncture before the Magistrate. Therefore, the petitioner cannot now be heard to say that the order passed by the Magistrate cannot be sustained.

25. In view of the above, the petition is dismissed. The Magistrate is directed to conclude the trial within a period of 3 months from the next date of hearing.