

Supreme Court of India

Ajoy Kumar Ghose vs State Of Jharkhand & Anr on 18 March, 2009

Author: V.S.Sirpurkar

Bench: Tarun Chatterjee, V.S. Sirpurkar

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"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.485 OF 2009
(Arising out of SLP (CRL.) No.5196 of 2006)

AJOY KUMAR GHOSE

.... APPELLANT

Versus

STATE OF JHARKHAND & ANR.

.... RESPONDENTS

JUDGMENT

V.S.SIRPURKAR, J.

1. Leave granted.

2. A judgment passed by the High Court of Jharkand, Ranchi, dismissing the writ petition and confirming the order of the Trial Court, refusing to discharge the accused-appellant, is in challenge here.

3. The appellant Ajoy Kumar Ghosh, along with some others, is facing prosecution for the offences under Sections 177, 181, 182, 192, 196, 199, 209, 466, 468, 471 and 474 of the Indian Penal Code (hereinafter referred to as `IPC' for short), before the Chief Judicial Magistrate, Ranchi. These charges are based on an official complaint filed by the Registrar General, Patna High Court against these accused persons including the present appellant, who, at the relevant time was Director, Indian School of Mines, Dhanbad. In the said complaint it is, inter alia, contended:

(i) That one Shri M.S. Chhabra, who was the Assistant Professor in the Indian School of Mines, Dhanbad, was proceeded against for misconduct and accordingly punishment of compulsory retirement was imposed on him.

(ii) Indian School of Mines, Dhanbad, a registered Society, is a deemed university governed by the Rules & Regulations and bye-laws of the School. In the matter of classification and method of appointment and terms and conditions of service for

academic staff, Rules are framed with the approval of the Central Government. Rule 4 of the Rules & Regulations prescribes the constitution of General Council. The classification and method of appointment are governed by the bye-laws. Selection to the post of Assistant Professor is governed by Clause 38(b), while suspension and penalties are governed by Clauses 10 and 11 of the said bye-laws. Appeal is provided against the same under Rule 12. It is further stated in the complaint that the Council is defined under Clause 2(b) of the said bye-laws and means a General Council constituted under Rule 4 of the Rules & Regulations.

(iii) That Shri M.S.Chhabra, after being found guilty, was awarded the punishment of compulsory retirement and he preferred an appeal to the General Council against the imposed penalty, which appeal was disallowed. Shri M.S.Chhabra, therefore, filed CWJC No.678/92(R) for quashing the said order. However, even that was disposed of by the High Court with a direction to the General Council of the School to give personal hearing to the appellant/petitioner and to dispose of the appeal thereafter. Against this order of the High Court, the Chairman, Director-in-Charge and Acting Registrar, namely, Shri B.K. Rao, Shri A.K. Ghosh and Shri M. Ramakrishna, respectively, preferred an appeal in Supreme Court, which directed expeditious decision within three months after the fresh appeal was filed by Shri M.S. Chhabra. However, since the appeal was not disposed of, Shri M.S.Chhabra filed another writ petition which was registered as CWJC No.2932/92(R) and alleged therein that on 31.03.1989, no Head of the Department was the member of the General Council and without observing the procedure of amendment to the Rules as laid down under Section 23, mischievous efforts had been made by the Chairman, Director and the Registrar for getting new sets of Rules registered under the Societies Registration Act. He further alleged that services of one Shri A.K. Singh, Estate-cum-Security Officer were availed of for liaison work and thus the amendment was without the resolution of the General Council and without the approval of the Government of India, in which Heads of Department as member of the General council were included and that resolution of the General Council for revised Memorandum of Association and Rules & Regulations were made to appear as if they were registered with the Inspector General of Registration, Patna on 18.06.1992. He further stated that the Chairman, Director and the Registrar, by indulging in the case maliciously, were acting under utter violation of procedure laid down under Section 23 of the Societies Registration Act.

(iv) That the counter affidavit had been filed to this writ petition by Shri M. Ramakrishna, S/o Shri M. Subbarao on behalf of the respondents in his alleged capacity of Acting Registrar. In para 37 of the said counter affidavit, the contention made by Shri M.S.Chhabra in paras 69 to 77 of the writ petition were denied and it was asserted that in view of the subsequent amendments made in the Rules & Regulations of the School, which were ratified by the Inspector General of Registration, the necessary amendments were made in the Rules & Regulations of the School and that was prior to the sitting of the General Council meeting dated 11.06.1992. A certificate to that effect was obtained from the office of the Inspector General of Registration, Patna, Bihar and the letter issued by the Inspector General, Registration was enclosed as Annexure-A to the counter affidavit. The said letter dated 09.06.1992 was allegedly issued by one Shri Vikas Prasad, Assistant Inspector General of Registration, Patna, Bihar.

(v) That Shri M. Ramakrishna had, in his counter affidavit stated that the contents of para 37, which have been quoted above, were based on information derived from the records of the case.

(vi) That the Writ Application was disallowed by the Division Bench of the Patna High Court by its judgment and order dated 05.04.1994, against which a special leave petition came to be filed before Supreme Court wherein the Court went into the issue raised by the appellant/petitioner with regard to the genuineness of the letter dated 09.06.1992, purported to have been written by Shri Vikas Prasad and enclosed as Annexure- A with the counter affidavit filed by Prof. M. Ramakrishna.

(vii) That a notice was sent to one Shri Vikram Prasad, Assistant Inspector General of Registration, who, however, filed an affidavit disclosing that the said letter was a forged document. Therefore, Supreme Court had directed to take action under the provisions of Section 340 of the Criminal Procedure Code with respect to that letter.

(viii) That in compliance of the order of Supreme Court, the complaint was being filed, for which first a notice was issued under Section 340, Cr.P.C. by Patna High Court and during the course of inquiry, it was found:

(a) That the letter bearing No.1206 dated 09.06.1992 was forged and fabricated and was never issued from the office of the Inspector General of Registration.

(b) That the said letter which was produced in the Court and used in the writ petition CWJC No.2932/92 (R) in the counter affidavit dated 21.01.1993 was filed by Shri M. Ramakrishna.

(c) Shri S.K. Das, Section Officer in the Office of the Inspector General of Registration was found to have delivered that letter to Shri A.K. Singh, Estate-cum- Security Officer.

(d) That Shri A.N. Tripathi, who was the Assistant Registrar (Establishment) of the School at the relevant time, was dealing with the writ and was acquainted with the facts and circumstances of the case.

(e) Shri A.K. Ghosh, the present petitioner was, at the relevant time Director of the School and in that capacity he was found to be fully involved and in the know of all concerned material.

(f) Shri Vikram Prasad, Assistant Inspector General of Registration, had filed an affidavit in the Supreme Court as also in the High Court to the effect that the letter was not issued by him, but till the last date of inquiry, he did not take a clear stand that the signature bearing a letter was not his signature.

(ix) That all the accused persons were guilty of using a fabricated and forged letter in the Court of law with active connivance and conspiracy on their part.

4. Cognizance was taken on the basis of this complaint by an order dated 20.08.1999 and summons were ordered to be issued by the CJM, Ranchi.

5. There are some events which took place before the cognizance was taken, for example, on 06.03.1998, Shri M.S. Chhabra had handed over an application which was purportedly an application under Section 340 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C." for short) The High Court accepted that application on the same day and directed that a notice be issued to the respondents including the present appellant by the Registry for their appearance before the Court on 02.04.1998. This order was challenged by the Indian School of Mines and some other persons including the present appellant by way of a Special Leave Petition in this Court whereupon this Court disposed it of as being premature. It was observed that the petitioners, instead of giving reply to the notice in the High Court, had rushed through a Special Leave Petition and, therefore, this Court did not find it a fit case to interfere.

6. The appellant thereafter filed reply to the show cause notice issued by the Patna High Court under Section 340 Cr.P.C. on 12.04.1999 wherein the appellant denied that he had any knowledge about the aforementioned document dated 09.06.1992. The Division Bench of the High Court at Patna, by its order dated 16.07.1999 straightaway discharged the Chairman of the Governing Council, Shri B.K. Rao and two other members of the Governing Council, viz., Shri B.B. Dhar and Shri K. Paul. However, the Court directed filing of complaint against the appellant who was also a member of the Governing Council, since he happened to be the Acting Director of the Indian School of Mines, Dhanbad, at the relevant time. The High Court, however, included in the array of accused, Shri Vikram Prasad, Assistant Inspector General of Registration, Bihar who was a signatory to the letter dated 09.06.1992.

7. As has been stated earlier, the complaint came to be filed by the Registrar of Patna High Court on 09.08.1999 wherein cognizance was taken by CJM, Ranchi. The appellant thereafter filed Special Leave Petition No.16037/1999 before this court against the order dated 16.07.1999 passed by the Patna High Court, wherein three other persons were discharged while complaint was directed to be filed against some others, including the appellant. This Court issued notice on 19.11.1999. However, on 17.04.2001, this court dismissed the aforesaid Special Leave Petition but permitted the appellant to raise all contentions in the Trial Court including the right to plead for discharge and also granted anticipatory bail to him. The order passed by this Court is as under:

"We permit the petitioners to raise all their contentions in the trial court including the right to plea for discharge. If petitioner would appear and apply for bail before the trial Court they shall be released on bail on executing a bond for such sum as may be fixed by that court with or without sureties. Accordingly, special leave petitions are dismissed."

8. The appellant accordingly appeared before the CJM, Ranchi on 11.07.2005 and obtained bail. Thereafter, he moved an application for discharge on the same date. However, the Trial Court dismissed the discharge application in limine and proceeded to frame charges against the petitioner. The petitioner, therefore, filed a Writ Petition (Crl.) No.315/2005, challenging the order dismissing

discharge application and the order framing charge, before the High Court of Jharkhand at Ranchi which was dismissed on 03/07.07.2006, necessitating the filing of present Special Leave Petition.

9. In the impugned order, the High court quoted the judgment passed by the Patna High Court dated 16.07.1999 and observed that the letter dated 09.06.1992 was found to be forged and fabricated in the inquiry instituted by the Department and, therefore, offence under Section 195(1)

(b) Cr.P.C. appeared to have been committed in respect of that letter. The High Court came to the conclusion that since the Division Bench of the Patna High Court, by its earlier elaborate judgment, had clearly found, on the basis of evidence on record, that the appellant was well aware of filing of such counter affidavit in which a forged letter was used before the Court on behalf of Indian School of Mines, it could not be said that the allegations against the appellant were based on mere suspicion. It further recorded a finding that documentary evidence was sufficient to frame charge against the appellant. It is this judgment of the Patna High Court, which has fallen for our consideration.

10. Shri Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellant firstly urged that there was no material whatsoever against the appellant who, at the relevant time, was the Acting Director of the Indian School of Mines, Dhanbad. He referred to the earlier order passed by this Court and pointed out that this Court had given the liberty to the appellant to file the discharge application and it was in terms of that order that the application was filed. The further argument of Shri Ranjit Kumar is that neither the Trial Court nor the High Court had considered the questions raised in the discharge application. He pointed out on merits that it was not the appellant who authored the aforementioned letter dated 09.06.1992, nor had the appellant sworn or filed the affidavit before the High Court, of which the alleged letter was part, since that affidavit was sworn by Shri M. Ramakrishna. He argued that the appellant had not even taken any advantage from the letter dated 09.06.1992. He further argued that in spite of the order of this Court, specifically granting liberty to the appellant to file a discharge application, the Division Bench of the Patna High Court did not go into the aspect of discharge at all. Learned Senior Counsel, by way of his legal submissions, urged that at the time when the inquiry under Section 340 Cr.P.C. was ordered in relation to the alleged forgery of the letter dated 09.06.1992, the provisions of law with reference to the forgery of document contemplated under Section 195(1) (b) Cr.P.C. and related Sections did not make a distinction between forgery being committed outside the Court and while the document was custodia legis. The learned counsel heavily relied upon a decision of this Court reported as Iqbal Singh Marwah & Anr. V. Meenakshi Marwah & Anr. [2005 (4) SCC 370] wherein this Court had held that proceeding under Section 340 read with Section 195 Cr.P.C. could only be initiated if the forgery was committed during the time when the documents were custodia legis and not when the forgery was committed outside the Court i.e. before the document had been produced or given in evidence in a proceeding in any Court. He, therefore, urged that there could not be any initiation of proceedings under Section 340 Cr.P.C. much less for the offences under Section 195 Cr.P.C. and the other allied offences because, admittedly, the forgery was not committed in respect of the document dated 09.06.1992 when the letter was custodia legis. Learned counsel also invited our attention to the earlier order passed by the High Court wherein three other accused were discharged, who were similarly circumstanced as the appellant herein.

11. As against this, it was urged on behalf of respondent No.2 that the High Court was correct in rejecting the petition of the petitioner/appellant and in refusing discharge from the prosecution. Learned counsel urged that there was enough material with the complainant and it was clear that the appellant was aware of the aforementioned forgery and he was party to the conspiracy of using forged letter.

12. There can be no doubt that in the present case, this Court had specifically granted liberty to the appellant to file a discharge application. We have quoted that order of this Court in para 7 of this judgment. Accordingly, the appellant filed a discharge application in the Trial Court, where the trial was pending, contending therein that there was no material available even for framing the charge. It was specifically pleaded in the said application that the said discharge was being sought for under sub- Section (2) of Section 245 Cr.P.C.

13. The essential difference of procedure in the trial of warrant case on the basis of a police report and that instituted otherwise than on the police report, is particularly marked in Sections 238 and 239 Cr.P.C. on one side and Sections 244 and 245 Cr.P.C., on the other. Under Section 238, when in a 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.P.C. of all the witnesses proposed to be examined by the prosecution, as also the confessions and statements recorded under Section 164 and any other documents, which have been forwarded by the prosecuting agency to the Court. After that, comes the stage of discharge, for which it is provided in Section 239 Cr.P.C. that the Magistrate has to consider the police report and the documents sent with it under Section 173 Cr.P.C. and if necessary, has to examine the accused and has to hear the prosecution of the accused, and if on such examination and hearing, the Magistrate considers the charge to be groundless, he would discharge the accused and record his reasons for so doing. The prosecution at that stage is not required to lead evidence. If, on examination of aforementioned documents, he comes to the prima facie conclusion that there is a ground for proceeding with the trial, he proceeds to frame the charge. For framing the charge, he does not have to pass a separate order. It is then that the charge is framed under Section 240 Cr.P.C. and the trial proceeds for recording the evidence. Thus, in such trial prosecution has only one opportunity to lead evidence and that too comes only after the charge is framed.

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) Cr.P.C., 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 Section 244(2) Cr.P.C. 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 Section 245(1) Cr.P.C., 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 Section 246(1) Cr.P.C. 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 Section 245(2) Cr.P.C., 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 Cr.P.C., 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) Cr.P.C. 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) Cr.P.C., on the ground that the charge was groundless.

16. Now, there is a clear difference in Sections 245(1) and 245(2) of the Cr.P.C. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) Cr.P.C.

17. The situation under Section 245(2) Cr.P.C. is, however, different. There, under sub-Section (2), the Magistrate has the power of discharging the accused at any previous stage of the case, i.e., even before such evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244 Cr.P.C. The words appearing in Section 245(2) Cr.P.C. "at any previous stage of the case", clearly bring out this position. It will be better to see what is that "previous stage".

18. The previous stage would obviously be before the evidence of the prosecution under Section 244(1) Cr.P.C. is completed or any stage prior to that. Such stages would be under Section 200 Cr.P.C. to Section 204 Cr.P.C. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a Court has made the complaint or further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 Cr.P.C. Under Section 201 Cr.P.C., if the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper Court or direct the complainant to a proper Court. Section 202 Cr.P.C. deals with the postponement of issue of process. Under sub-Section (1), he may direct the investigation to be made by the Police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 202(1)(a) Cr.P.C., the Magistrate cannot give such a direction for such an investigation, where he finds that offence complained of is triable exclusively by the Court of sessions. Under Section 202(1)(b) Cr.P.C., no such direction can be given, where the complaint has been made by the Court. Under Section 203 Cr.P.C., the Magistrate, after recording the statements on oath of the complainant and of the witnesses or the result of the inquiry or investigation ordered under Section 202 Cr.P.C., can dismiss the complaint if he finds that there is no sufficient ground for proceeding.

On the other hand, if he comes to the conclusion that there is sufficient ground for proceeding, he can issue the process under Section 204 Cr.P.C. He can issue summons for the attendance of the accused and in a warrant-case, he may issue a warrant, or if he thinks fit, a summons, for securing the attendance of the accused. Sub-Sections (2), (3), (4) and (5) of Section 204 Cr.P.C. are not relevant for our purpose. It is in fact here, that the previous stage referred to under Section 245 Cr.P.C. normally comes to an end, because the next stage is only the appearance of the accused before the Magistrate in a warrant- case under Section 244 Cr.P.C. Under Section 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) Cr.P.C., where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) Cr.P.C., and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him. The situation under Section 245(2) Cr.P.C., however, is different, as has already been pointed out earlier. The Magistrate thereunder, has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 Cr.P.C. and till the completion of the evidence of prosecution under Section 244 Cr.P.C. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 Cr.P.C., makes an application for discharge.

19. In the present case, the Magistrate did not dismiss the complaint under Section 203 Cr.P.C. However, since this was a complaint made by the Court, there was no question of examining complainant or any of his witnesses under Section 200 Cr.P.C. Further, there was no question of even issuing any direction for investigation under Section 202 Cr.P.C., since the complaint was made by the Court. This is clear from the wordings of Section 202(1) Cr.P.C. It is as under:-

"202(1)

Provided that no such direction for investigation shall be made-

(a) x x x x x

(b) where the complain has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200."

We have already pointed out that since this was a complaint made by the Court, therefore, there would be no question of there being any examination of complainant or his witnesses on oath. As has already been stated earlier, the Magistrate simply issued the process under Section 204 Cr.P.C. When the accused appeared in pursuance to the summons sent to him, under Section 244 Cr.P.C., the defence came out with an application. There can be no difficulty that the discharge application was perfectly in order at that stage. Therefore, what was available before the Magistrate besides this discharge application was, a bare complaint. There was absolutely nothing beyond the complaint available, for the Magistrate to consider the framing of charge. The Magistrate could, undoubtedly,

have proceeded under Section 245(2) Cr.P.C., on the basis of discharge application and discharge him. However, he would have been required to give reasons for discharging at that stage, when no evidence or no material, whatsoever, was available with him, excepting a bare complaint.

20. The Magistrate, in this case, not only dismissed the application, but also proceeded to frame the charge, which order was also in challenge in the Writ Petition filed before the Division Bench. We have now to see as to whether the Magistrate was justified in dismissing the discharge application and then straightaway to frame a charge under Section 246(1) Cr.P.C. If under Section 245(2) Cr.P.C., there could be a discharge at any previous stage which we have discussed about, there is a necessary sequel, an application could also be made at that stage. The Magistrate has the power to discharge the accused under Section 245(2) Cr.P.C. at any previous stage, i.e., before the evidence is recorded under Section 244(1) Cr.P.C., which seems to be the established law, particularly in view of the decision in Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. reported in 1971 (3) SCC 239, as also the subsequent decision of the Bombay High Court in Luis de Piedade Lobo Vs. Mahadev reported in 1984 Criminal Law Journal 513. The same decision was followed by Kerala High Court in Manmohan Malhotra Vs. P.M. Abdul Salam & Anr. reported in 1994 Criminal Law Journal 1555 and Hon'ble Justice K.T. Thomas, as the Learned Judge there was, accepted the proposition that the Magistrate has the power under Section 245(2) Cr.P.C. to discharge the accused at any previous stage. The Hon'ble Judge relied on a decision of Madras High Court in Mohammed Sheriff Vs. Abdul Karim reported in AIR1928 Madras 129, as also the judgment of Himachal Pradesh High Court in Gopal Chauhan Vs. Smt. Satya reported in 1979 Criminal Law Journal 446. We are convinced that under Section 245(2) Cr.P.C., the Magistrate can discharge the accused at any previous stage, i.e., even before any evidence is recorded under Section 244(1) Cr.P.C. In that view, the accused could have made the application. It is obvious that the application has been rejected by the Magistrate. So far, there is no difficulty.

21. However, the real difficulty arises in the Trial Court's proceeding to frame the charge under Section 246 Cr.P.C. 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 Cr.P.C. 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) Cr.P.C., the Trial Court straightaway proceeded to frame the charge.

22. The charge is framed under Section 246(1) Cr.P.C., 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) 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 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 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.

23. Before we approach this question, we must note that while Section 245(2) Cr.P.C. speaks about the discharge of the accused on the ground that the charge is groundless, Section 246(1) operates in entirely different sphere. An order under Section 245(2) Cr.P.C. results in discharge of the accused, whereas, an order under Section 246 Cr.P.C. creates a situation for the accused to face a full-fledged trial. Therefore, the two Sections would have to be interpreted in slightly different manner, keeping in mind the different spheres, in which they operate. The words "or at any previous stage of the case" appearing in Section 246 Cr.P.C. would include Section 245 also, where the accused has not been discharged under Section 245 Cr.P.C., while the similar term in Section 246(2) can include the stage even before any evidence is recorded. It cannot, therefore, be held that the words "at any previous stage of the case" as appearing in Section 245 Cr.P.C., would have to be given the same meaning when those words appear in Section 246 Cr.P.C.

24. The Bombay High Court, in a decision in Sambhaji Nagu Vs. State of Maharashtra reported in 1979 Criminal Law Journal 390, has considered the matter. While interpreting the words "at any previous stage" under Section 246(1) Cr.P.C., the Learned Single Judge in that case, came to the conclusion that the phraseology only suggested that the Magistrate can frame charge, even before "all" the evidence is completed under Section 244 Cr.P.C. Section 244 Cr.P.C. specifically mandates that as soon as the accused appears or is brought before the Court, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Further, Section 245 Cr.P.C. also mandates that if upon taking all the evidence referred to in Section 244 Cr.P.C., 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. 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 Vs. Gulam Murthuza reported in 1968 Criminal Law Journal 303. The similar view seems to have been taken in T.K. Appu Nair Vs. Earnest reported in AIR 1967 Madras 262 and in re. M. Srihari Rao reported in AIR 1964 Andhra Pradesh 226. The similar view has been expressed in P. Ugender Rao & Ors. Vs. J. Sampoorna & Ors. reported in 1990 Criminal Law Journal 762, where it has been expressed that previous stage is a stage, after recording some evidence. It is neither a stage before recording any evidence at all nor a stage after recording the entire evidence, but is in between. The interpretation, thus, placed on words "at any previous stage of the case", occurring in Section 246(1) Cr.P.C. also appears to be more in consonance with the order of the Sections numbered in the Code and also with the heading given to Section 246 Cr.P.C., viz., "Procedure where accused is not discharged". The very heading of the Section even indicates that it would come into play only after the matter is examined in the light of Section 245 Cr.P.C. and the accused is not discharged thereunder. Therefore, it is incumbent upon the Magistrate to examine the matter for purposes of considering the question whether the accused could be discharged under Section 245 Cr.P.C. and it is only when he finds it otherwise, he could have resort to Section 246 Cr.P.C.

25. The Learned Single Judge in this ruling has also noted another ruling by the same High Court in Abdul Nabi Vs. Gulam Murthuza reported in 1968 Criminal Law Journal 303 (cited supra). We, therefore, find that consistently, the view taken by the High Court is that there would have to be some evidence before the charge is framed. In the last mentioned case of P. Ugender Rao & Ors. Vs. J. Sampoorna & Ors. reported in 1990 Criminal Law Journal 762, there is one incorrect observation in respect of a decision of this Court in Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. reported in 1971 (3) SCC 239 (cited supra) to the effect that the Magistrate cannot discharge the accused before recording any evidence, whatsoever, under Section 244 Cr.P.C. We have not been able to find out such an expression in the aforementioned case of Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. (cited supra). That was a case under old Section 253(2), which is *pari materia* to the present Section 245(1). On the other hand, the Court has very specifically stated therein that Section 253(2) gives ample jurisdiction to the Magistrate to discharge the accused in the circumstances mentioned therein and the order of discharge can be passed at any previous stage of the case. It is further stated in Para 13 that sub-Section (1) under those circumstances will not operate as a bar to the exercise of jurisdiction by the Magistrate under sub-Section (2). Since we have found error in the above mentioned judgment, we have mentioned so. However, the ruling in Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. (cited supra) also supports our earlier finding that the Magistrate has the power to discharge the accused, even before any evidence is recorded and thus, an application for discharge at that stage is perfectly justifiable. However, insofar as Section 246(1) Cr.P.C. is concerned, we are of the clear opinion that some evidence would have to be there for framing the charge.

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 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.

27. Now, coming to the facts of this case, it is clear that the opportunity to the accused to cross-examine the witnesses is lost, as the Trial Court has straightaway proceeded to frame the charge. In that view, we would have to quash the order, framing the charge. It is accordingly, quashed. The matter will now go back before the Trial Court, where the prosecution may offer the witnesses under Section 244(1) Cr.P.C. and the opportunity to cross-examine, would be offered to the accused. It is only thereafter, that the Trial Court would proceed to decide as to whether the charge is to be framed or not. The charge framed in this case is clearly premature, in view of the reasons given by us. The order framing the charge would, therefore, have to be set aside.

28. We are not expressing anything on merits, particularly because we have directed the evidence of the prosecution to be led under Section 244 (1) Cr.P.C. Any expressions on our part are likely to cause prejudice to the prosecution, as the case may be, accused. We are, therefore, leaving the matter at this.

29. Accordingly, the appeal is disposed of with the direction that the matter shall now go back to the Trial Court and the Trial Court shall proceed to examine all the witnesses offered by the prosecution and it is only after the evidence of those witnesses is recorded, that the Trial Court would proceed to decide as to whether the charge is to be framed or not. The appeal, thus, succeeds partly.

.....J. [Tarun Chatterjee]J. [V.S. Sirpurkar]
New Delhi March 18, 2009