

(1957) 09 BOM CK 0058

In the Bombay High Court

Case No : Criminal Revision Application No. 834 of 1957

Dattatraya Dulaji Chadigaonkar

APPELLANT

Vs

Wadilal Panchal

RESPONDENT

Date of Decision : 13-09-1957

Acts Referred:

Bombay Police Act, 1951 — Section 27

Evidence Act, 1872 — Section 105

Penal Code, 1860 (IPC) — Section 109, 302, 341, 342, 363

Citation : (1958) 60 BOMLR 107

Hon'ble Judges : Shelat, J; Miabhoy, J

Bench : Division Bench

Judgement

Shelat, J.—This is an application in revision against the order passed by the learned Presidency Magistrate, IV Court, Girgaum, whereby he dismissed u/s 203 of the Criminal Procedure Code the complaint filed by the petitioner on October 31, 1956. The application raises points of interest in regard to the scope of the powers of Magistrates under Chap. XVI of the Criminal Procedure Code.

2. Before we go to the several contentions raised on behalf of the parties in somewhat elaborate arguments, it would be expedient to set out a few facts relevant for the purposes of this judgment.

3. It is a well-known fact that, in the evening of June 3, 1956, a public meeting was held at Chowpaty which was to be addressed by the Prime Minister of India. It is equally a well-known fact that considerable disturbance was caused at that meeting as a result whereof that meeting had to be dispersed. Consequently large crowds began to wander about in various localities around Chowpaty including the area around Charni Road Station. It is the case of the petitioner that at about 8 p.m. that day, his younger brother, Sitaram Ghadigaonkar, was crossing the road from the up side of Charni Road Railway platform near a building called Laud Mansion. At that time there was a large crowd on that road and members of that crowd were stopping vehicles passing by that road. One

taxi, which had come from the side of Opera House and was attempting to go towards Churchgate was already stopped. Sitaram was accompanied at this time by Shashikant Kamtekar and one Nandkumar Ganpat Vagal. While they were trying to cross the road or had in fact crossed the road, these three persons heard revolver shots and on looking back they found that a Bhayya was injured by one of these shots and was lying on the footpath opposite Charni Road Station. It is the case of the petitioner that thereupon Sitaram and his friends went up to that Bhayya in order to give him aid. At this stage one more shot was fired by one of the occupants in the blue car which was on the left side of the road at that time near the taxi which had been stopped by the crowd and was trying to overtake that taxi from the left side in order to go towards Churchgate. According to the petitioner, this blue car, which was attempting to go towards Churchgate, was near the footpath on the left side when the shots were fired. The last shot that was so fired struck Sitaram as a result of which he died almost instantaneously and before he could be removed to a hospital.

4. The petitioner thereafter made inquiry with the Commissioner of Police, Bombay, if he had any intention of taking steps against the respondent who, according to the petitioner, had fired the shot which killed his brother.

5. It would seem that the respondent had gone to Gamdevi Police Station that night when he informed the police that while he was returning from the meeting at Chowpaty and was proceeding from the side of Opera House towards Churchgate in the car belonging to Mr. K.K. Shah, an advocate of this Court, that car was surrounded by a mob of 200 or 300 persons who were rowdy in the extreme, that a taxi had already been stopped by that mob, that their car also was stopped, that one of the occupants of their car was manhandled by the crowd, that some of the persons in that crowd also handled him roughly with the result that his shirt was torn and he was deprived of his papers and cash of Rs. 35, that these persons then tried to drag him out of the car and that he in fact sustained some injuries upon his neck. The officer at Gamdevi Police Station sent him to Nair Hospital for examination. He was treated there but it is said that although the medical authorities asked him to stay in the hospital the respondent declined.

6. The version of Shashikant Kamtekar, Nandkumar Vagal, Prabhakar Dhole and Subodh Janardhan, who claimed to be eye-witnesses of the incident that took place near Laud Mansion was that Shashikant and Nandkumar had gone that afternoon to the residence of Sitaram. Apart from the meeting at Chowpaty, another meeting was held at Shivaji Park at Dadar by the organizers of Samyukta Maharashtra Samiti. Shashikant, Nandkumar and the deceased Sitaram decided to go to that meeting at Dadar, but when they reached Dadar, they felt that it might rain and therefore Sitaram and his two companions left Dadar before the meeting came to an end. That was at about 7-15 p.m. The deceased, however, did not return to his house from the meeting but came along with them because he wanted to ascertain the roll number of his brother

Dattatraya who had appeared for the S.S.C. Examination. The three of them came out on Queen's Road and were proceeding towards Kelewadi by crossing the Queen's Road. Even these witnesses said that at this time there were crowds all along the Queen's Road and the members thereof were stopping cars, taxis and other vehicles. When they reached the footpath on the other side of Charni Road Station, suddenly they heard the noise of brakes of a motor car. Just then, a blue coloured car came from the direction of the Opera House and was about to overtake the taxi that had been stopped when they heard shots being fired from the blue car. Three shots were fired at that stage by someone from that blue car. On hearing these three shots, the three of them, including the deceased, retreated to the extreme end of the footpath and there they saw a Bhayya lying injured by a bullet. The three of them, therefore, went up to the Bhayya and attempted to lift him up. At that juncture, according to Shashikant, he heard another shot fired from that blue car and this shot hit Sitaram in his chest on the left side. Sitaram collapsed on that footpath. They removed Sitaram to the G.T. Hospital in a taxi, but before they could reach the hospital, he expired.

7. As against the version of these witnesses, the version put forward on behalf of the respondent was that after the conclusion of the meeting at Chowpaty, the respondent, one Ratilal Sanghvi, one Vinay K. Shah and K.K. Shah left Chowpaty in the car of K.K. Shah bearing No. BMU 9684 in order to return home. But the crowd that had gathered on the road had become unruly as it had been dispersed earlier by the police by using force. With a view to avoid this crowd. K.K. Shah directed his driver to proceed towards Kemp's Corner and then to Grant Road. The car came on the Queen's Road via Lamington Road, Tribhuvan Road and Charni Road. When they came on the Queen's Road, they found that a B.E.S.T. Bus was being burnt by a riotous crowd, a taxi had also been stopped and stones were being pelted. This riotous crowd also stopped the car of K.K. Shah and surrounded it. They also threw stones at the car and caused damage to it. They were shouting "Maro, maro". Some of them attempted to drag Ratilal Sanghvi out of the car. Some caught the respondent by his neck and by his hair and attempted to drag him out of the car. The respondent sustained injuries upon his neck as a result of this attack upon him. Injuries were also caused to Ratilal Sanghvi. At that stage the respondent took out his revolver and shot at the assailants. Thereafter the car was driven away and they reached home. The case of the respondent, as stated by the learned Magistrate in his order, was that "if Wadilal Panchal (the respondent) had not opened fire at their assailants, the assailants would have killed all of them and destroyed the car". It is clear, therefore, that the versions of the four witnesses, viz. Sashikant Kamtekar, Nandkumar Vagal, Prabnakar Dhole and Subodh Janardhan is entirely different from the one given by the respondent and the other occupants of that car.

8. On July 3, 1956, the petitioner addressed a letter through his advocate to the Commissioner of Police asking if the respondent had been arrested. On July 13, 1956, the Commissioner of Police, replied stating that inquiries made did not reveal any offence having been committed by the respondent and no action had,

therefore, been taken by the police. The petitioner thereafter filed his complaint on October 31, 1956, before the learned Presidency Magistrate, IVth Court, Girgaum, and the learned Magistrate examined him on that day. In the complaint, the petitioner averred that when the said car approached the entrance of Charni Road Station and Kelewadi Lane, the respondent fired three shots in quick succession from a revolver, one of which hit the deceased Sitaram fatally. In para. 8 of the complaint he submitted that the act of the respondent amounted to murder punishable u/s 302 of the Penal Code and prayed that the learned Magistrate should order a warrant to issue against the respondent and to deal with him according to law. The case in the complaint, therefore, clearly was that the respondent was guilty of the offence of murder and that he had to file the complaint because the Commissioner of Police had informed him that no action was proposed to be taken against the respondent by the police.

9. The learned Magistrate thereafter made an order for inquiry u/s 202 of the Criminal Procedure Code. Aggrieved by that order the petitioner filed an application in revision to this Court stating that the order of inquiry was improper and wrong. On November 25, 1956, that revision application was summarily rejected. In the meantime, the police sent their report to the learned Magistrate and upon receipt thereof the learned Magistrate sent a notice to the petitioner to appear before him. At that time the petitioner's advocate told the learned Magistrate that as the revision application was pending in the High Court, the petitioner and his witnesses had not gone to the police to give their statements but now that that application had been disposed of by the High Court, they were prepared to go to the police and give their statements. On January 17, 1957, the learned Magistrate made a further order asking the police to make further inquiry. It was in the course of this further inquiry that the police recorded the statement of witnesses produced before them by the petitioner as also the respondent and other persons including those who were the occupants of that car. The police sent a second report to the learned Magistrate whereupon the learned Magistrate issued a notice to the petitioner. After hearing the arguments on both the sides the learned Magistrate passed the order on April 30, 1957, dismissing the petition u/s 203 of the Criminal Procedure Code.

10. The learned Magistrate after dealing with the statements of witnesses, which were annexed to the police reports, observed as follows:

It is clear that the eye-witnesses Shashikant Ramchandra Kamtekar, Prabhakar Sadashiv Dhole, Subodh Janardhan Geedh and Nandkumar Ganpat Wagal have given false statements as regards what happened. The surrounding circumstances and the statements of all the occupants of the car including the statement of Shri K.K. Shah clearly establish that the shot which killed the deceased was fired by the accused in selfdefence. Moreover the evidence of the police surgeon conclusively establishes that the story of the complainant's witnesses is false and the deceased was very near the car when the shot was fired at him.

Upon these findings the learned Magistrate came to the conclusion that

no offence is disclosed to have been committed in this case. In my judgment there is no sufficient ground for proceeding in this case. I accept the police report. I dismiss this complaint u/s 203 of the Criminal Procedure Code.

From the order made by the learned Magistrate, it is fairly clear that he came to this conclusion on two grounds, first, that by reason of the statements of Shashikant Ramchandra Kamtekar and the three others being contrary to the evidence given by the Police Surgeon, Bombay, at the inquest proceedings, their version was false. In other words, he disbelieved the story that the deceased had gone to the footpath to the injured Bhayya to give him assistance and was hit by the bullet at that stage. Secondly, upon the strength of the statements made before the police by K.K. Shah and others including the respondent he came to the conclusion that the bullet shot that caused the death of Sitaram was fired by the respondent in exercise of his right of private defence.

11. As we have already stated, we had had the benefit of elaborate arguments from the bar. In substance, however, the whole controversy centers round the question as to the scope of the powers of Magistrates under Chap. XVI of the Code.

12. Mr. Sule, on behalf of the petitioner, mainly concentrated upon two contentions, first, as regards the powers of Magistrates u/s 203 and, secondly, the position of the respondent by virtue of the rule as to presumption u/s 105 of the Evidence Act. On the first question the contention of Mr. Sule was that the learned Magistrate was not entitled to dismiss his complaint without taking evidence of the complainant and his witnesses. His contention was that his prayer to the learned Magistrate was for the issue of process against the respondent and then to deal with his complaint in accordance with law. He urged that it was mandatory u/s 203 for a Magistrate to examine the complainant and his witnesses before he could dismiss his complaint. He also urged that upon a proper construction of Sections 200, 202 and 203, it was incumbent upon the Magistrate to examine the witnesses of the complainant twice (1) at the stage when the complaint is filed and (2) when the Magistrate decides to dismiss it. In support of his contention Mr. Sule relied upon ground (a) of his petition and said that his grievance was that the learned Magistrate erred in law in dismissing the complaint without taking any evidence and relying solely upon the report of the police. But then Mr. Sule was fair enough to concede that the statement made in ground (a) of his petition was not factually correct, because, the learned Magistrate did, in fact, examine the complainant u/s 200. Mr. Sule, however, changed his ground and said that mere examination of the complainant was not enough, and that inasmuch as the complainant had set out the names of witnesses whom he proposed to examine, the learned Magistrate was bound to examine those witnesses. He even went to the extent of saying that even though the petitioner had not told the learned Magistrate that he wished to examine his witnesses, and there was in fact nothing on record to show that these witnesses

were present, as mentioned in Section 200, Section 203 casts upon the learned Magistrate the duty to call upon the complainant to examine his witnesses and then on consideration of such evidence only he could dismiss his complaint.

13. Now, the question involved in these contentions is of some interest, and, therefore, it becomes necessary for us to examine these sections to ascertain the scope of the powers and duties of a Magistrate. In fairness to the learned Magistrate, it must be said that he not only examined the complainant at the very initial stage as required by Section 200 but gave the complainant opportunities at two stages at least to be heard when he received the two police reports. It is clear from the record, and it is conceded, that no application at any stage was made by the complainant or on his behalf that he wished or that he should be permitted to examine his witnesses. But then Mr. Sule's argument was that even if the complainant did not apply, it was the duty of the learned Magistrate to have himself called upon the complainant to examine himself and his witnesses and then in the light of that evidence as also the result of the inquiry, the learned Magistrate could have dismissed his complaint if he then found that there was no sufficient ground for proceeding. That failure, Mr. Sule urged, vitiated the order of dismissal

14. Now, Sections 200 to 203 form a Chapter in themselves under the heading "of complaints to Magistrates". This Chapter lays down the procedure to deal with the complaints lodged by private persons. Section 200 provides that a Magistrate, taking cognizance of an offence on complaint, shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and signed by the complainant and the witnesses and also by the Magistrate. Clause (b) of the proviso to Section 200, however, says that where the Magistrate is a Presidency Magistrate, such examination may be upon oath or not as the Magistrate in each case thinks fit. Secondly where the complaint is made in writing, such examination need not be in writing, and thirdly the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require the complaint to be reduced to writing. It is clear from this clause that the examination of the complainant and his witnesses need not be on oath, need not even be reduced to writing where the complaint is in writing. Equally it is clear that the words "such examination" in this part of the proviso means the examination of the complainant and witnesses who are present, if any, referred to in the first part of Section 200. Now, it is clear that the object of this examination u/s 200 is to see that the members of the public are not unnecessarily harassed by false and frivolous accusations. To avoid this mischief, the Magistrate, before he issues a process and summons a person accused of an offence, should satisfy himself of the truth or falsehood of the complaint and then see if the matter in the complaint requires inquiry by a Court of law. Section 200, however, talks about examination of the complainant and the witnesses who are present at the time when the complainant lodges his complaint. As we have already observed, the learned Magistrate in this case did examine the complainant as even Mr. Sule conceded.

There is nothing on record to show that the complainant had kept any of his witnesses present or that he had said then that he desired that they should be examined or that the learned Magistrate failed to permit the complainant to examine his witnesses. As we have already said, the learned Magistrate did give opportunities to the complainant to be heard and at no stage the complainant asked the learned Magistrate to take evidence of his witnesses. We do not find in Section 200 any duty cast upon the Magistrate to call upon the complainant suo motu to examine his witnesses as Mr. Sule urged.

15. Section 202 appears to us to contain yet another check to prevent false and vexatious complaints being filed. That section makes it clear that a Magistrate is not bound to issue process immediately a complaint is filed before him, but where he has doubts about the truth of the complaint, it gives him power to postpone the issue of process if he thinks fit, no doubt, for reasons to be recorded in writing and either to inquire into the case himself or direct an inquiry to be made by a police officer or even by such other person as the Magistrate thinks fit "for the purpose of ascertaining the truth or falsehood of the complaint." It is obvious, therefore, that the inquiry ordered by the learned Magistrate in this case was u/s 202 and, therefore, was one for the purpose of ascertaining the truth or falsehood of the complaint filed by the petitioner.

16. Since there was some controversy as to what constitutes a "complaint", we would refer to the definition of the word "complaint" set out in the Code. Section 4(h) defines "complaint" as meaning,

the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer.

As we have already pointed out, the petitioner in this case expressly averred that it was the respondent who caused the death of the deceased Sitaram and prayed for the issue of a warrant against the respondent.

17. For this purpose, that is to say, for the purpose of ascertaining the truth or falsehood of the complaint, Clause (2A) of Section 202 enables a Magistrate to take evidence of witnesses on oath while he is making the inquiry into the complaint. A Magistrate, therefore, would be justified in postponing the issue of the process when he feels doubt about the truth of the complaint before him and in ordering an inquiry by a police officer and can at that stage himself examine witnesses on oath and then decide whether or not to issue the process. As the learned Assistant Government Pleader pointed out, these sections appear to contemplate examination of witnesses both on oath as, for instance, u/s 200 and Clause (2A) of Section 202 and also without oath so far as Presidency Magistrates are concerned under Clause (b) of Section 200. Now, it may conceivably be argued that for ascertaining the truth or falsehood of the complaint u/s 202, the witnesses whom a Magistrate may examine on oath might be witnesses from both sides. There are no restrictions in Section 202 on the

power of a Magistrate to examine witnesses.

18. Section 203 then provides that the Magistrate may dismiss a complaint if, after considering the statement on oath, if any, of the complainant and the witnesses and the result of the investigation or inquiry, if any, u/s 202, he finds that there is no sufficient ground for proceeding. In a case where he dismisses his complaint, he has to record briefly the reasons for his so doing.

19. Mr. Sule urged that Section 202 requires that before the Magistrate dismisses the complaint he is bound to examine witnesses on oath; he has to consider evidence of the complainant and his witnesses along with the result of the inquiry ordered by him, and then only he can dismiss the complaint. But there again we do not find anything in Section 203 which would seem to cast any duty upon the Magistrate to examine witnesses on his own. Not only this section, unlike Section 200, does not provide for any such examination, but the word "if any" occurring therein negatives the contention urged by Mr. Sule. The words "if any" in Section 203 obviously go with the words previously occurring in the section, that is, with the words "the statement on oath", and the words "statement on oath of the complainant and the witnesses" can only refer to such statement taken either u/s 200 or Section 202, for Section 203 does not provide for any examination either of the complainant or witnesses. Under Clause (b) of Section 200, however, a distinction is made between a Magistrate in the mofussil and a Presidency Magistrate, and it is clear that the examination of a complainant need not be upon oath and need not even be reduced to writing where the complaint is in writing. Having regard to Clause (b) of Section 200, the statement upon oath would appear to be the one taken under Clause (2A) of Section 202 and, therefore, when Section 203 provides that a Magistrate may dismiss a complaint "after considering the statement on oath, if any, of the complainant and the witnesses", these words must mean the statement on oath, if any, taken by the Magistrate either at the initial stage u/s 200 or the one taken by him under Clause (2A) of Section 202.

20. It seems to us to be clear, therefore, that under these provisions the procedure to be followed in the case of a Presidency Magistrate is that u/s 200 he has to examine the complainant and witnesses if present; such examination may be on oath or not as he thinks fit in each case, and where the complaint is in writing, it need not even be reduced to writing. Having done that if he finds that he should issue process, he may do so without any more. If he has doubt, he may require an inquiry to be made by the police or by such other person as he thinks fit, and at that stage if he desires to be still more certain, he has the power to examine witnesses on oath. But that again, as we have already pointed out, is a matter for his discretion, Clause (2A) of Section 202 being only an enabling clause. Then comes the last stage u/s 203 and that is that if there are any statements on oath of the complainant and witnesses, the Magistrate must consider them along with the result of the inquiry and then only he may dismiss the complaint if he finds that there is no sufficient ground to proceed.

21. Section 203 undoubtedly confers wide powers on a Magistrate. The discretion given to him has, nonetheless, to be exercised judicially, and although he has a power to order an inquiry, it is he who has to judicially decide whether to proceed or not. He cannot surrender his judgment to the police, and the report made to him by the police at best is meant only to assist him in finding out the truth or otherwise of the complaint.

22. Mr. Sule relied upon the decision in *Radha Kishun Sao Vs. S.K. Misra and Another*, . There, the facts were that on October 17, 1947, the petitioner filed a complaint against one S.K. Misra, Assistant District Supply Officer of Dinapur and his peon, alleging assault, criminal trespass etc. against the petitioner, his son and certain other persons. On that day the petitioner was examined on oath by the Sub-Divisional Magistrate. The Sub-Divisional Magistrate then ordered an inquiry into the complaint to be made by a Magistrate exercising first class powers at Dinapur. A local inquiry was held on October 25 by that Magistrate and after examining witnesses, that Magistrate submitted his report on November 5 for issue of process. The Sub-Divisional Magistrate then passed an order for obtaining sanction of the Government for the prosecution of the accused persons thinking that such sanction was necessary u/s 197 of the Code. The record of the case then went up to the District Magistrate who held that no such sanction was necessary but observed that although an accused had no locus standi till the cognizance of the offence is taken by the Magistrate, he (the District Magistrate) could not see how even a prima facie case could be said to have been made out till the person complained against was given an opportunity to give his version of the incident. When the Sub-Divisional Magistrate received the record with these observations of the District Magistrate, he ordered that he would hold fresh inquiry on the spot at Paliganj where the incident was said to have occurred and further ordered that both the parties should be present. This order was challenged and Mr. Justice Das held that the accused had no right to be heard at the stage when the complaint is under consideration. Whether a prima facie case has been made out or not does not depend upon whether the accused has been heard or not; it depends on the kind of evidence which is given by the complainant in support of his complaint and he depreciated in express terms the notion of turning such an inquiry into a full-dress trial.

At p. 39 of the report the learned Judge observes: "All that I need say is that the absence of the accused persons at the time when Mr. Sarkar held the enquiry cannot be accepted as a good ground for directing a fresh enquiry by the learned Sub-Divisional Magistrate himself in violation of the provisions of Section 202, Criminal P.C. Assuming that the accused person makes certain statements in his defence, I do not see how the learned Sub-Divisional Magistrate can hold that the witnesses who support the petition of complaint should be disbelieved, unless the learned Sub-Divisional Magistrate is prepared to convert his enquiry into a full-dress trial. If the accused person is not to be permitted to cross-examine the witnesses who support the petition of complaint, their evidence cannot be thrown out merely on the statements of the accused. Their evidence can be thrown out

only if the enquiry is converted into a trial; but that is a practice which has been condemned by this Court on more than one occasion.

This decision has obviously no relevance to the contention raised by Mr. Sule as regards the duty of a Magistrate to take evidence and we do not see how he can brine to his aid this decision except to the extent of showing that the enquiry under Chap. XVI is an inquiry restricted to the complaint and no more and that such an inquiry should not be converted into a full-dress preliminary trial. We have, however, cited these observations as they throw useful light on the second question raised by Mr. Sule.

23. The next case relied upon by Mr. Sule was of H.J.E. Maccarthy Vs. Lord Shannen, where Devadoss J. observed with reference to Section 202 that it would be open to a Magistrate to hold a preliminary enquiry u/s 202 of the Code, but in holding such enquiry, if evidence, which is opposed to the complainant's allegations, is brought before him, he should give opportunity to the complainant to explain or to meet such evidence. He held on this ground that since no such procedure had been followed, he would set aside the order of the District Magistrate dismissing the complaint. Mr. Sule argued, relying upon this decision, that after the learned Magistrate received the report from the police, he should have, u/s 202, given an opportunity to the complainant to challenge the report and to meet the data upon which the report was grounded. With respect to the learned Judge, who decided that case, Section 202 nowhere provides for the procedure laid down in that decision; nor does it provide for a right to a complainant to challenge the report or its correctness. If the observations in this case were to be accepted, it would mean that the accused and his witnesses would have to go into the witness-box to support the report and submit to a cross-examination or, in any event, the complainant would have to be allowed to lead further evidence by way of counter evidence against that report. That, in our view, is not warranted by the terms of Section 202. But in a later case in Nalliappa Pillai v. Palaniandi Ambalam AIR[1949] Mad. 232 Mr. Justice Govinda Menon dissented from the view taken by Devadoss J. in MacCarthy's case and held that all that the Magistrate has to do u/s 203 is to consider the statement on oath, if any, of the complainant as well as the result of the investigation or enquiry ordered by him u/s 202 before he dismisses the complaint. Nowhere is it stated that a Magistrate who has referred a complaint for enquiry should, after receipt of the police report, give an opportunity to the complainant to adduce evidence to show that the report of the police was wrong or incorrect. With respect, we agree with these observations made by Govinda Menon J. in this case. Giving permission to challenge the report or to adduce counter evidence is not only not warranted by Sections 202 and 203 but would negative the very purpose of those sections. The report, as we have already pointed out, is essential for enabling a Magistrate to decide judicially whether he should proceed further or not. But Section 203 nowhere lays down any duty to examine or permit to be examined any witnesses at that stage. In these circumstances, we do not find any justification in the contentions of Mr. Sule.

24. Mr. Sule next relied upon the decision in *Fazlar Rahaman v. Abidar Rahaman* 23 C. W.N. 392 . There an information of murder was lodged with the police, and the Sub-Divisional Magistrate before whom the police report was placed, on a perusal of the police papers but without any examination of the complainant or any of his witnesses, refused process on the ground that the case was one in which no jury would convict. *Fletcher and Walmsley JJ.* held that it was the duty of the Magistrate to examine the complainant and the witnesses he wished to produce, and the order made was liable to be set aside as improper. This decision again can have no application to the facts before us, for the learned Magistrate did examine the complainant and did give opportunities on two occasions to the petitioner to examine witnesses if he so desired. It is not even Mr. Sule's grievance that the petitioner produced at any stage his witnesses and the learned Magistrate declined to examine them. On this question, therefore, we do not find any substance in the contentions of Mr. Sule.

25. But the next point that is raised by Mr. Sule is of wider importance. That point is that the fact that the deceased Sitaram died as a result of the shot fired by the respondent in this case is indisputable. That fact has been so stated by the learned Magistrate himself in his order of which we have already cited an extract. As we have pointed out, the learned Magistrate, for the purpose of arriving at his conclusion that the version of the witnesses produced by the petitioner before the police was false, relied upon the evidence given by the Police Surgeon, Bombay, at the inquest proceedings and the opinion he expressed at that time. That opinion was that the injury which he found upon the person of the deceased was a gun shot entry ?" in diameter with charring around on the left side of front of chest in the 5th intercostal space ?" below and ?" medial to the left nipple. His opinion was that by reason of the signs of charring, the bullet must have been fired from a distance of 2" to 18". It was from this opinion that the learned Magistrate concluded that the version given by Shashikant Kamtekar and other witnesses produced by the petitioner could not be true. Now, we do not think it proper at this stage to indulge in making any comment on the merits or otherwise of the various statements made by witnesses or upon the observations made by the learned Magistrate thereupon or their effect upon the version of the complainant. That question is certainly not within the purview of this enquiry before us. But then it is fairly clear from the order made by the learned Magistrate that the shot that caused the death of the deceased Sitaram was the one fired by the respondent though the case of the respondent was that he did so in exercise of his right of private defence. The statement, made by the respondent before the police in the inquiry u/s 202, was in fact to that effect and the learned Magistrate has accepted the version of the respondent, disbelieving the version of the complainant and his witnesses that the deceased Sitaram was not near the car when the shot that caused his death was fired.

26. Mr. Sule's argument on this aspect of the case is two-fold, first, that the learned Magistrate was not entitled to consider the evidence of the Police

Surgeon which was taken not in these proceedings but in the inquest proceedings and, therefore, that evidence was an extraneous matter which the Magistrate was not entitled to take into consideration; and secondly, that the fact of the death of Sitaram not being in dispute and the case of the respondent being under an exception, as to the right of private defence, all that the learned Magistrate was concerned with was to see whether the complaint as to the causing of the death of the deceased by the respondent revealed a prima facie case or not, and since the facts do not seem to be in dispute, it was obvious that there was a prima facie case which called for judicial inquiry, and that that being so, the complaint could not be dismissed u/s 203.

27. Mr. Somjee's contention, on the other hand, was that this was not quite a correct position and what the learned Magistrate had to see was whether the complaint, that is to say, the matters before the Magistrate, were such that he could come to a decision that there was no sufficient ground revealed to proceed.

28. We might dispose of the first contention of Mr. Sule as regards the consideration by the learned Magistrate of the testimony of Dr. H.S. Mehta, for that in our view, can be done briefly. Section 203 in clear terms says that the Magistrate has to consider "the result of the investigation or inquiry, if any, u/s 202". Obviously, the result of the inquiry ordered by the Magistrate was the report made by the police to him which included the evidence given by the Police Surgeon in the inquest proceedings. Therefore, it cannot be said that the learned Magistrate was not entitled to consider the contents of that report and the data contained therein. In that view that evidence cannot be called an extraneous matter which the learned Magistrate could not consider. Assuming that the contention of Mr. Sule is correct, there is nothing in the statements of the complainant's witnesses to show as to what was the distance between the car and the deceased. Nonetheless, the question still remains whether it would be safe to conclude that the version of the witnesses on behalf of the petitioner was necessarily false merely by reason of the opinion given by an expert.

29. On the second question, our attention was drawn to certain decisions of this Court and it was argued that there was a conflict of opinion between the views expressed in the decision in *Emperor Vs. J.A. Finan*, and a subsequent decision in *Tulsidas Amanmal Karani Vs. S.F. Billimoria*, . The first case to which our attention was drawn to is the case of *Emperor Vs. Dhondu Bapu Gujar*, . There was a complaint charging defamation against 46 persons and the applicant. The complainant alleged that the applicant and those 46 persons had sent an application to the Assistant Collector alleging therein that he was addicted to gambling and that he was a drunkard and, therefore, as a result of that application he was not appointed a Patil. The Magistrate, without recording any evidence at all, dismissed the complaint on the ground that the accused, in making the application to the official superior of the complainant, were protected by exception 8 to Section 499 of the Penal Code. No reasons also were given for the order of dismissal. *Fawcett and Patkar JJ.* held that a complaint charging

defamation cannot be dismissed by the Magistrate u/s 203 of the Code, without taking any evidence, on the ground that the accused was protected by exception 8 to Section 499 of the Penal Code since Section 105 of the Indian Evidence Act placed the burden of proving the exception upon the accused. Mr. Justice Patkar, who delivered the judgment, observes (p. 715):

...Under Section 105 of the Indian Evidence Act, the burden will be on the accused to show that they made these allegations in good faith, and the Magistrate, therefore, ought to have taken the whole evidence and then passed a proper order. If the Magistrate in this case had taken evidence on behalf of the prosecution and on behalf of the accused, and passed a proper order for discharge, the order of the District Magistrate ordering a further enquiry without giving reasons might have stood on a different footing.

Mr. Somjee urged that these observations that the order dismissing the complaint u/s 203 was bad because no evidence was taken are somewhat difficult to understand. His submission was that under Chap. XVI an accused would have no locus standi in an inquiry held by the Magistrate at that stage. That argument, in our view, does not seem to be based on a correct reading of that decision. The question then is, what is actually meant by stating that evidence ought to have been taken before the order of dismissal was passed u/s 203, unless it is meant that since the case of the accused was one under exception, viz. exception 8 to Section 499 of the Penal Code, by virtue of Section 105 of the Indian Evidence Act until the exception was proved by evidence, a complaint as to defamation could not be dismissed u/s 203. The same view was reiterated in *Emperor v. Finan*. The facts there were that on October 26, 1930, the complainant Gulabbai, a girl of 14 years, went with the national flag in her hand to take part in the national flag salutation ceremony which had been fixed by the Bombay Provincial Congress Committee. That meeting was dispersed by the Police with a lathi charge, and the police forcibly snatched away the flag from the complainant's hand. The complainant and 13 other women were taken into custody for defying the order of the Commissioner of Police and then were taken by the accused in the police motor van to Vikroli jungle and there were set free. On December 8, 1930, the complainant filed a complaint against the respondent charging him with offences under Sections 363 and 342 of the Penal Code. The trying Magistrate issued a notice to the accused and decided to hold an inquiry u/s 202 of the Code. On December 12, 1930, the Commissioner of Police wrote a letter to the Magistrate saying that he had ordered the accused to deal with the complainant and others in the manner that the accused had done. At the inquiry the complainant was examined on oath when she gave her version of the events as they had occurred. The accused admitted the correctness of the statement made by the complainant but pleaded that he was acting under the orders of the Commissioner of Police, and that as he had acted in good faith, he was protected by the exceptions contained in Sections 76 and 79 of the Penal Code. Upon these facts it was held by Patkar J. that since the burden of proving the exception was upon the accused, the Magistrate ought to have investigated the complaint and

found out whether the allegation of the accused that he was protected by Sections 76 and 79 of the Penal Code was made out by legal evidence before him. It was also held that the unproved letter of the Commissioner written to the Magistrate was no legal evidence. Murphy J. also observed that it was a clear condition of the holding of an inquiry by a Magistrate, that he shall do so if in doubt as to the truth or falsehood of the complaint, as appears from the end of Sub-section (1) before the first proviso. He also observed that the section is intended to protect the public from the harassment of reckless accusation; but once the truth of the facts alleged is admitted, the inquiry u/s 202 must clearly be at an end, and the proceedings then must be transformed into a trial. Further on he adds (p. 1192):

This is what has happened here. The facts alleged were admitted, and an exception was pleaded. It was then the duty of the Magistrate to proceed with the case as at a trial, and decide the plea of the exception on the merits, the burden being on the accused to show that he acted under a bona fide mistake of fact, thinking that the Commissioner of Police's order was one of deportation, a power which the Commissioner of Police has, under the City of Bombay Police Act, in certain circumstances,? But the learned Magistrate discharged the accused when the facts were admitted on the bare plea of the exception, and here I think that he was in error.

30. Mr. Sule's contention was that the decision in these two cases were authorities for the proposition that once the facts alleged in a complaint are admitted, as in the case before us, but an exception is pleaded by way of defence by an accused, it would be incumbent upon the Magistrate to issue process and convert the complaint into a trial. It is clear that that was exactly what Mr. Justice Murphy said in *Emperor v. Finan*. The Magistrate in those circumstances, therefore, cannot dismiss the complaint u/s 203.

31. Mr. Somjee's contention, on the other hand, was that the decision in *Finan*'s case did not represent the correct position in law as there could be no legal evidence as mentioned in the observations of Mr. Justice Patkar in an inquiry under Sections 202 and 203 at the instance of the accused. He argued that if such evidence is allowed to be adduced on behalf of the accused, the inquiry would cease to be an inquiry into the truth or falsehood of the complaint and would be converted into a full-dress trial, a procedure deprecated in several cases. In our view, that again is not the correct reading of the decision in *Finan*'s case. What the learned Judges were faced in that case with was that the Magistrate had dismissed the complaint on a bare plea of the accused of good faith, relying upon a letter, which remained unproved, written by the Commissioner of Police to the Magistrate. It seems to us that the only thing that was laid down in *Finan*'s case was that that letter, unproved as it was, was no evidence upon which the Magistrate could act, that even the order purporting to have been passed u/s 27 of the Bombay Police Act by the Commissioner of Police was not produced in Court and, therefore, the Magistrate could not hold upon the data

before him that an exception had been proved. It was, in these circumstances that Mr. Justice Murhpy at p. 1192 observed:

...It was then the duty of the Magistrate to proceed with the case as at a trial,?

32. Mr. Somjee relied upon the case of *Tulsidas v. Billimoria* decided by Baker and Broomfield JJ. His argument was that that being a later decision upon the same question as is before us, we should accept the views expressed there in preference to the views expressed in *Emperor v. Dhondu* and *Emperor v. Finan*. It was said that the views in *Tulsidas'* case were at variance and in fact in conflict with those in the earlier cases and, therefore, this petition although filed in revision had to be referred to a Division Bench. The facts in *Tulsidas'* case were that one Bhagvandas obtained a decree for rent against the son of one Bharmal in the Small Causes Court, Bombay. In execution of the decree, Bharmal was arrested while he was living with his friend Tulsidas (an attorney). On a mistake being pointed out, Bharmal was released by the Registrar of the Small Causes Court. Bharmal then filed a complaint against Bhagvandas and the bailiff for offences under Sections 109 and 341 of the Penal Code. Bhagvandas applied to the Small Causes Court for substituting Bharmal's name as defendant in the decree that he had obtained. At the hearing, S.B. Billimoria was engaged as counsel for Bhagvandas and was instructed by another advocate, H.N. Shah. On instructions received from his client, Billimoria stated.

Bharmal who is an insolvent is put up by the attorney (viz. Tulsidas) who is also an insolvent.

Bharmal's counsel called upon Billimoria there and then to withdraw the statement which Billimoria refused to do. Next day a solicitor's letter was sent to Billimoria pointing out that the statement made by him about Tulsidas was incorrect. Billimoria replied that he had not stated that Bharmal was put up by Tulsidas, and that as regards Tulsidas' insolvency he had instructions to say so from his client. A complaint of defamation was filed by Tulsidas against Billimoria. The trying Magistrate issued a notice to Billimoria and after a long inquiry discharged the notice and dismissed the complaint. Mr. Justice Broomfield, who delivered the judgment in that case, observes that the statements made by Billimoria were undoubtedly of defamatory character and, therefore, the question was whether the case was covered by exception 9 to Section 499 of the Penal Code. The learned Judge there discussed the position of members of the Bar in India, and relying upon certain decisions of this Court came to the conclusion that when an advocate is charged with defamation in respect of words spoken or written while performing his duty as an advocate, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of express malice and cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose. There was in that case a finding by the trying Magistrate to the effect that there was no evidence to show that Billimoria did not make that statement under instructions from his clients. The Magistrate had also held upon the evidence before him that Billimoria's

statement in his reply to the complainant's letter remained unchallenged and uncontroverted. He also found that there was no evidence to show that Billimoria was actuated by express malice or that he took an unfair advantage of his position. It is clear from the facts cited in the judgment that the case was decided upon the fact of there being a presumption in favour of Billimoria and on the ground that the burden of proof by reason of that presumption lay upon the complainant. That burden was to establish that there was express malice in the accused. There being no evidence as to express malice disclosed in the complaint, it was held that the order of dismissal passed by the learned Magistrate was correct. There was, therefore, in our opinion, no case of an exception being pleaded as and by way of defence and, therefore, Section 105 of the Evidence Act did not come into play.

33. Mr. Somjee, however, urged that Tulsidas' case was a clear authority laying down that in an inquiry under Sections 202 and 203 a Magistrate can go into the question of defence, that he can rely upon the report made to him by the police and can come to the conclusion from that report that there was a valid defence and upon that can also come to a conclusion that there was no sufficient ground to proceed. He, therefore, argued that the word "complaint" as used in Chap. XVI of the Criminal Procedure Code should be read in the light of its definition in Section 4(h) of the Code and also Section 96 of the Penal Code. It appears to us that the answer to these contentions depends on the question as to what was actually held in Tulsidas' case. For that purpose Mr. Somjee relied upon certain observations made by Mr. Justice Broomfield at p. 913 of the report, and particularly, the passage where Mr. Justice Broomfield observes with reference to certain decisions of this Court that a pleader who was convicted of defamation was ultimately acquitted on the ground that in the absence of express malice which was not to be presumed, the accused as a pleader was protected by exception 9 to Section 499. But these observations were made in order to show that a complainant must, in view of the presumption in favour of an advocate, establish express malice. In our view, the portion of the judgment, which is the crucial part of the judgment, is to be found in the passage following the one relied upon by Mr. Somjee where Mr. Justice Broomfield refers to the finding of fact by the learned Magistrate that the complaint did not disclose express malice. That was accepted as a correct finding by Mr. Justice Broomfield and, therefore, the dismissal was upheld. With respect, we do not find anywhere in this judgment any observations which could be said to mean any dissent from or conflict with the decision in Finan's case.

34. The question as to the powers of a Magistrate u/s 203 of the Code arose again in Narayan Keshav Gangal v. The State of Bombay (1952) Criminal Revision Application No. 1316 of 1951. That was, of course, not a case where an exception had been pleaded by a person accused of the offence nor was it a case where the facts constituting an offence were either admitted or indisputable. It was a case where the brother of the applicant was done to death, on February 23, 1948, and where a private complaint was filed by that brother and which was

dismissed by the Magistrate u/s 203. Although the facts in that case are not identical to the facts before us, we feel that certain observations made in that decision can be quoted with usefulness. Dealing with the order of dismissal u/s 203, the learned Chief Justice observes:

The offence charged is a very serious offence and the complainant comes to the Court and says that he has three or four witnesses who are material witnesses and can depose to the commission of the offence. It may be that the police investigation does not support the case of the complainant. But I do not think that in a case like this the Magistrate should refuse either to issue process or to permit the complainant to lead evidence which is in his possession.

Further on he observes:

But even assuming that the Magistrate could have made an order of dismissal u/s 203, the question is whether this was a proper order to be made on the materials before him. It is difficult to understand how the Magistrate could possibly say that there was not sufficient ground for proceeding with the complaint. When there are four material witnesses who can depose to the commission of the offence, it is difficult to sustain the action of the Magistrate who refuses to hear that evidence and takes shelter behind police investigation. When evidence is available it is necessary that there should be a judicial verdict and not merely the verdict of the police.

In the case before us, as many as four witnesses on behalf of the complainant gave their statements before the police and laid before them a certain version which, no doubt, was disbelieved by the learned Magistrate upon the ground that it was in conflict with the testimony of Dr. Mehta in the inquest proceedings. As against that version, there were statements made before the police by certain persons laying the version of the respondent. In view of that conflict of versions between these two sets of witnesses, who had given their statements, we would adopt the language of the learned Chief Justice and say that here is a case where it would not be proper for the learned Magistrate to dismiss the complaint u/s 203. It cannot, in our opinion, be said that this is not a case where there ought not to be a judicial trial and a judicial verdict.

35. Reference was also made to the case *In Re: Virbhan Bhagaji*, , where the question arose as to the legality of notice proceedings, a practice prevailing in the Magistrates' Courts in Bombay for a considerable time. While holding that it was doubtful whether these proceedings were desirable, Mr. Justice Fawcett held that they were not illegal. Mr. Somjee relied upon some of the observations to be found at p. 644 of the report where Mr. Justice Fawcett has said:

...The words "the case" are very wide, and if the Magistrate considers that the accused should be given an opportunity of being heard, there is nothing in the provisions of the section itself which to my mind debars him from doing so. I think, on the other hand, that there are indications to the contrary.

From these observations Mr. Somjee argued that they indeed show that a Magistrate can consider the report of the police to find out an exception and dismiss a complaint if he finds that there is a case of an exception. We do not think that Virbhan's case is an authority for that proposition. All that is held there is that the terms of Section 202 are so wide that a Magistrate, if he so desires, can give an opportunity to a person accused of the offence to be heard before issuing the process, and that there was nothing in Section 202 to debar him from doing so. But surely the decision in Virbhan's case is not one where an exception had been pleaded as was in Finan's case. We might usefully mention here that both the cases, viz. Finan's case and Tulsidas' case, were cases where notice proceedings were taken. The words "legal evidence" mentioned in those two decisions would seem to mean evidence taken in those proceedings where there was examination-in-chief, cross-examination etc. and even a statement of the person accused of the offence was taken. But the case before us is not one of that kind. Admittedly there was no legal evidence, as mentioned in Finan's case before the learned Magistrate in the present case.

36. It is clear from these decisions that where there is evidence that an offence has been committed or where the facts making out a prima facie case against a person accused of an offence are admitted but an exception is pleaded, there must be legal evidence before the Magistrate establishing such an exception before the complaint can be dismissed u/s 203. The burden to establish such an exception is clearly upon the accused and that lie can discharge either by adducing evidence or relying upon data in the prosecution case itself. As was observed by Patkar J., an inquiry u/s 203 is not intended to substitute a trial. Chapter XVI is primarily meant to prevent unnecessary harassment to the members of the public by persons filing false and frivolous complaints. The power there conferred upon the Magistrate is to investigate whether the complaint before him shows or not a ground to proceed. But that question would not arise where facts making out a prima facie case are not in dispute or are indisputable. Section 105 of the Evidence Act clearly lays down that the Court shall presume the absence of circumstances constituting an exception unless such absence is disproved by the accused. We do not agree, however, with Mr. Sule that in all cases where an exception is pleaded Section 203 would not apply. As an absolute proposition it is difficult to accept. Where, for instance, a complaint itself discloses circumstances constituting an exception, a Magistrate might be entitled to hold that no sufficient ground was disclosed in the complaint to proceed. But that by no means is the position before us. An instance of that kind is furnished in the case of Gulab Khan v. Ghulam Md. Khan AIR[1927] Lah. 30. There one Karam Khan instituted a complaint against a Subedar and two other persons charging them with the murder of his son Gulab Khan. The complaint was sent to the Sub-Divisional Officer for disposal. Acting u/s 202 of the Criminal Procedure Code, the Sub-Divisional Officer proceeded to examine three witnesses tendered by Karam Khan though in the absence of the three persons accused of the offence. Having done this, the Sub-Divisional Officer proceeded to record what

he called a "verdict" in which he discussed the circumstances under which Gulab Khan met his death and found that the Subedar acted in the exercise of his right of private defence when he killed him. Upon these facts it was urged before us on behalf of the respondent that this was an authority for the proposition that a Magistrate acting u/s 203 can, upon the report made to him by the police under an inquiry ordered by him u/s 202, come to the conclusion that an exception was established. That this is not so is clearly indicated by the order passed by the Sub-Divisional Officer in the Lahore case where he holds that Gulab Khan was not killed when he was asleep as the prosecution witnesses deposed to, but that he was killed when he made preparation to assault and kill the Subedar and that the Subedar was justified in killing Gulab Khan and therefore the Subedar committed no offence. It may be observed that in this case the Sub-Divisional Officer came to that conclusion, upon the evidence which was tendered by the complainant himself. As we have already observed, if there is a complaint, which itself discloses a complete defence under anyone of the exceptions, it might be a case where a Magistrate would be justified in dismissing such a complaint finding that there was no sufficient ground to proceed with the case. Now, in the case before us, causing of the death of Sitaram being indisputable, if it was found as the petitioner alleges that it was the shot fired by the respondent that caused the death of Sitaram, the accused would have to establish the necessary ingredients of the right of private defence as laid down in Section 96 and onwards of the Penal Code. We do not find anything in any of the sections in Chap. XVI to show that such an exception can be held to be established from the mere report of the police. That, in our view, is contrary to the provisions of Section 105 of the Indian Evidence Act which are mandatory provisions. There is nothing in Section 202 or Section 203 of the Criminal Procedure Code which abrogates the rule as to the presumption laid down in Section 105 of the Evidence Act and the mode of proof of exception laid down in imperative language in that section.

37. In these circumstances and for the reasons aforesaid, we find that this was not a case in which it was proper for the learned Magistrate to dismiss, the complaint u/s 203, there being no evidence before the learned Magistrate as and by way of proof to establish the exception of the right of private defence pleaded by the respondent.

38. The result, therefore, is that we set aside the order of dismissal passed by the learned Presidency Magistrate and make the rule absolute. We direct the learned Chief Presidency Magistrate that he should ask some other learned Presidency Magistrate to deal with this case, who should issue legal process and deal with the case in accordance with law.