

(1983) 10 BOM CK 0049
In the Bombay High Court
Case No : Criminal Reference No. 1 of 1983

Hausabai Tukaram Wable

APPELLANT

Vs

Waman Kondaji Ghogare

RESPONDENT

Date of Decision : 13-10-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 190, 192, 200
Penal Code, 1860 (IPC) — Section 307, 323, 336, 34, 342

Citation : (1984) 86 BOMLR 163 : (1984) MhLj 168

Hon'ble Judges : S.J. Deshpande, J;Gadgil, J

Bench : Division Bench

Judgement

S.J. Deshpande, J.—This is a reference made by the learned Extra Assistant and Additional Sessions Judge, Ahmednagar, arising out of a criminal case which was committed to him by the Judicial Magistrate, First Class, Shrirampur, by his order dated April 2, 1983. The facts giving rise to this reference may be stated briefly as follows:

The complainant Hausabai was in possession of a field Gat No. 285 of Mouje Loni Kd. She was at the material time present in the field. It is alleged that accused Nos. 1 to 13 committed trespass and also indulged in the act of taking away some properties. It was also alleged that the accused caused simple hurts to her, to her grand-children and to her daughter-in-law, who were also present in the field. She alleged that she has seen the incident. The incident relates to acts which give rise to the offences under Sections 395, 323 and 447 read with Section 34 of the Indian Penal Code. Alleging that accused Nos, 1 to 13 have committed these acts, the complainant filed a complaint before the Learned Judicial Magistrate, First Class, Shrirampur.

2. This complaint was filed before the learned Judicial Magistrate, F.C., Shrirampur, on January 19, 1982. On the same day, the learned Magistrate examined the complainant and issued process as follows:

Issue process u/s 395, 323, 447 r.w. 34 of the I.P.C. against all the accused

returnable on February 12, 1982.

It appears that some other miscellaneous applications were given for issue of search warrant and other minor reliefs, with which we are not concerned. Suffice it to say, for our purpose that the learned Magistrate issued process on the strength of the sworn statement of the complainant which he recorded" u/s 200 of the Criminal Procedure Code.

3. It must be mentioned here that the alleged facts in the complaint give rise to the offences under Sections 395, 323 and 447 read with Section 34 of the Indian Penal Code. Offence u/s 395 is exclusively triable by the Court of Sessions, while offences under, Sections 323 and 447 read with Section 34 are triable by the Magistrate.

4. The learned Magistrate, after issuing the process as ; stated above, committed the said case to the Court of Sessions by his order dated January 21, 1983. When the case reached the Sessions Court, on the strength of the committal order passed by the learned Magistrate, it was numbered as Sessions Case No. 12 of 1983. The learned Extra Additional Sessions Judge, Ahmednagar, perused the record and found that the learned Magistrate has entertained the case on a private complaint u/s 202 of the Criminal Procedure only on the strength of the statement of the complainant and all other witnesses were not examined. He thought that the case was exclusively triable by the Court of Sessions. He, therefore, heard the parties on the nature of the order of commitment passed by the learned Magistrate.

5. The learned Extra Additional Sessions Judge, after examining the record and hearing the parties found that the learned Magistrate has committed an error in issuing process in a case which was exclusively triable by the Court of Sessions only on the strength of the statement of the complainant. He however, found it difficult to quash the commitment. He-felt hampered that there is no jurisdiction in him to quash the said commitment, as in his opinion, order of commitment was not correct. It must be observed that in para 3 of his order, the learned Extra Additional Sessions Judge says that

No doubt, the sworn statement of the complainant does make out a case of dacoity as well as of causing simple hurts to the victim. However, in my view the commitment was illegal.

He thought that the commitment was illegal because all the witnesses of the complainant were not examined. He also observed that u/s 202 and proviso to that section, it was compulsory for the Magistrate to examine all the witnesses as the case was triable exclusively by the Court of Sessions.

6. Having found the order of commitment illegal in the manner stated above, the learned Extra Additional Sessions Judge made a reference to the High Court on the following points:

(i) Whether a commitment, made by the Judicial Magistrate, F.C., of a case to

Court of Sessions on private complaint is legal when .he does not examine on oath all the witness listed in the complaint?

(ii) When a Judicial Magistrate, F.C. commits a case to the Court of Session, instituted on a private complaint without following provisions of Section 202 of the Criminal Procedure Code, can Sessions Court quash the commitment and send the proceeding back for enquiry according to law?

(iii) If this Court has no power to quash the commitment made by the learned Magistrate without following the provisions of Section 202(2) Cri. P. C. how the matter is to be dealt with further?

Framing these questions for decision, the learned Extra Additional Sessions Judge has made this reference to the High Court u/s 395(2) of the Criminal Procedure Code, by his order dated April 2, 1983.

7. This reference was placed before us for hearing and we do. not think it necessary to mention what preceded before the reference came before us. When this reference came up before us, Shri Shah, the learned Counsel for the Accused urged the following points. Shri Shah drew our attention to the provisions of Section 202 of the Criminal Procedure Code and also provisions of Sections 200 and 203 of the Criminal Procedure Code. He contended that the learned Magistrate in this case has passed the committal order as the case was triable by (he Court of Session. The learned Magistrate issued the process. He was quite competent to act u/s 209 of the Criminal Procedure Code and no infirmity can be found in his order.

8. Shri Shah contended that the reasoning of the learned Sessions Judge, while making reference, that proviso to Sub-section (2)..of Section 202 is attracted in every case, when the complaint relates to a case triable by the Court of Session and it is necessary for the Magistrate to examine the complainant and all his witnesses as required by the proviso, is not correct. In this case, Shri Shah contended that the learned Magistrate has issued the process on the same day when he examined the complainant. This was a private complaint which was made to the learned Magistrate u/s 200 which falls in Chapter 15 of the Criminal Procedure Code. This Chapter governs the procedure for complaints and their disposal. The Learned Magistrate after examining the complainant as required by Section 200, was justified in issuing the process u/s 204 of the Criminal Procedure Code straight away and as the case was triable by the Court of Session, he has passed the order of committal u/s 209 of the Criminal Procedure Code.

9. Shri Shah also urged before us that the procedure adopted by the learned Magistrate in this case is quite proper. He referred us to the provisions of Section 208 of the Criminal Procedure Code which provide that the Magistrate issuing process u/s 204, is required to furnish copies of the statements to the accused, if he commits the case to the Court of Session as required by Section 208 of the Criminal Procedure Code, Shri Shah invited our attention to Sub-section (1) of

Section 208 which reads as follows:

The statement recorded u/s 200 or Section 202, of all persons examined by the Magistrate.

The other Sub-sections (2) and (3) are not relevant. Elaborating his contention, Shri Shah contended that Section 208 provides, copy of the statement recorded u/s 200 or Section 202 is to be supplied: It indicates that it is not necessary, that in every case, which is triable by the Court of Session, the procedure provided by Section 202(2) of the Criminal Procedure Code is to be adopted. His contention was that the statement recorded under Sub-section (1) covers both situations, i.e., recording of statement u/s 200 as well as investigation and inquiry as provided by Section 202. In a given case, if the Magistrate after examining the complainant as required by Section 200, issues process, the Magistrate in such a case can supply copy of that statement and this statement can have reference only to the examination of the complainant made by the Magistrate u/s 200 of the Criminal Procedure Code. In short, any statement recorded by the Magistrate in the course of the examination of the complainant as required by Section 200 will be available for supplying to the accused u/s 208 of the Criminal Procedure Code.

10. Shri Shah then invited our attention to a judgment of the Division Bench of Kerala High Court in the case of Sulaiman v. Eachara Warriar [1978] Ker L.J. 424.

11. The contention of Shri Shah finds support from the reasoning of the judgment of the Kerala High Court. The Kerala High Court has observed

There is nothing in the Code prohibiting a Magistrate after taking cognizance of an offence and examination by him of the complainant and the witnesses present, if any, u/s 200 from straightaway issuing process under Section 204. The question then is whether the proviso to Section 202(2) stands in the way of doing that. That proviso is one to Section 202(2). Section 202(2) is specific that what is contained therein is applicable only to the inquiry referred to in Section 202(1).

The Kerala High Court has further observed : -

...That shows that it is open for him not to postpone the issue of process u/s 204 of the Code also. If he does not think fit to postpone the issue of process against the accused it is open for him to straightaway issue process u/s 204 after examination of the persons contemplated by Section 200 of the Code. The choice is solely with the Magistrate. It is a matter entirely in his discretion. No fetter should be placed on that discretion.

12. We are in agreement with the reasoning of the Kerala High Court in the above judgment. In answer to this contention raised by the learned Counsel for the accused, the complainant's learned advocate did not have anything to say. On the contrary, he supported the contention of Shri Shah. However, the learned advocate for the complainant raised another point in regard to the inadequacy of

the material with which we will deal later.

13. The learned public prosecutor for the State contends that the view of the Kerala High Court runs contrary to the view taken by this Court in two judgments. He invited our attention to the judgment delivered by this Court in the case of Shyamkant Wamanrao Pawar and others Vs. State of Maharashtra and others, The Division Bench of this Court construed proviso to Section 202. In para 4 of the said judgment it was observed as follows : -

In the aforesaid decision i.e. Laxmanlal v. Judicial Magistrate, First Class, Khamgaon, Satara the Division, Bench of this Court has taken a view that the proviso to Section 202(2) makes it obligatory on the Magistrate in the case of offence which is triable exclusively by the Court of Sessions that he must call upon the Complainant to produce all his witnesses and examine them on oath. Section 202(2) proviso is introduced for the first time in the new Code of Criminal Procedure and it applies to a case which is exclusively triable by the Sessions Court, and when the prosecution is instituted on the basis of private complaint In case of private case, obviously there being no earlier investigation by the police, the statements of witnesses u/s 161 and/or 162 of the Code of Criminal Procedure are not available. Therefore, it appears that in its wisdom Legislature has made this wholesome provision. That said provision is mandatory is further clear from the provision of Section 208 of the Code of Criminal Procedure. Therefore, having regard to these various provisions of the Code of Criminal Procedure this Court took the view in Laxmanlal v. Judicial Magistrate, First Class that it was obligatory on the part of the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath and if this is not done, then obviously the order passed issuing the process is patently in violation of the mandatory requirements of the proviso to Section 202(2) of the Criminal Procedure Code.

These observations are found on pages 1389 and 1390 of the said case. We have examined the facts and circumstances of the said case with the help of both the Counsel. The judgment is perhaps based on the earlier judgment of this Court which was delivered in Laxmanlal Govindlal Dalwade v. Judicial Magistrate, First Class, Khamgaon (1975) Spl. C.A. 1535 of 1974 and 1536 of 1974 decided on January 7, 1975 by Bombay High Court (Unrep.). Before we go to the judgment of these Special Civil Applications, it will be useful to refer to a few facts which are mentioned in the first paragraph of the judgment in Shymkant v. State of Maharashtra referred to above. They are as follows :

14. This was a private complaint which related to offences under ss. 336, 342, 323, 504, 506 read with, Section 34 of the Indian Penal Code. In this case, it appears that the learned Magistrate has postponed the issue of process as he has examined the two witnesses and complainant on the earlier occasion. The interval, shows, though there are no full facts given, that the Magistrate must have postponed the issue of process. In that context the learned Judges stated :

It further appears from the record that after the complainant and 2 other witnesses were examined, the learned Judicial Magistrate, First Class, vide his order dated 8th January 1979 directed issuing of process against all the accused persons for the aforesaid offences.

15. Section 202 deals with postponement of issue of process. Once the Magistrate makes up his mind and postpones the issue of process, either by conducting examination of the complainant or asking him to produce all his witnesses, Section 202 comes into operation. In our opinion, the judgment cannot be of any assistance to the Government, as we do not think that in that case, it cannot be definitely said that the Magistrate had not postponed the issue of process.

16. The judgment of the Division Bench of this Court in Special Civil Applications Nos. 1535 and 1536 of 1974 is at page 18 of the paper book. This judgment relates to two complaints, which were brought before the High Court after passing of the committal order in identical situation. There were two Criminal Cases viz. Criminal Case No. 604 of 1974 and Criminal Case No. 806 of 1974. Both the cases were filed before the learned Magistrate, Khamgaon. It appears that the Magistrate had recorded the statement of the complainant in Criminal Case No. 604 of 1974 on May 24, 1974 and again on June 21, 1974. It also further appears that in Criminal Case No. 806 of 1974, the Magistrate had recorded the statement of the complainant on May 24, 1974 and finally issued process on June 21, 1974 even in respect of the offences under Sections 307 and 395 of the Indian Penal Code, which were triable exclusively by the Court of Sessions. The Division Bench of this Court took the view as follows:

That it did not appear from the record that the Court had called upon the complainant to produce his witnesses, and according to the learned Magistrate, the mandatory provision of law had not been followed.

The Division Bench then observed : -

Now, it is obvious that no process could have been issued to the accused in respect of the offences which are exclusively triable by the Court of Session unless the complainant was called upon to produce his witnesses and to examine them on oath as is provided in the proviso to Sub-section (2) of Section 202 of the Code of Criminal Procedure.

Then Section 202 is extracted. The Division Bench further observed :

It is no doubt true that Sub-section (2) gives a discretion to the Magistrate to examine witnesses on oath in the inquiry contemplated by Sub-section (1) which is restricted to the offences which the Magistrate is authorised to take cognizance of. But the proviso to Sub-section (2) makes it obligatory on the Magistrate in the case of an offence which is triable exclusively by the Court of Session in respect of which a complaint has been made that he shall call upon the complainant to produce all his witnesses and examine them on oath. The two

orders issuing process in respect of offences such as the offence punishable u/s 395 of the Indian Penal Code in Criminal Case No. 807 of 1974 and the offences punishable under sections 307 and 395 of the Indian Penal Code in Criminal Case No. 806 of 1974 are patently in violation of the mandatory requirements of the proviso to Sub-section (2) of Section 202 of the Code of Criminal Procedure, 1973. The orders passed on June 21, 1974 impugned in both the petitions are, therefore, liable to be quashed.

17. The learned public prosecutor relied on this judgment to show that the view of this Court seems to be that in a case triable exclusively by the Court of Session in a private complaint filed by the complainant before a Magistrate, it would be mandatory for the Magistrate to follow the procedure laid down in Section 202 Sub-section (2) of the Criminal Procedure Code. We are unable to accept the said contention. In our opinion, the facts of the said case do not warrant any such conclusion, that in the said case which was examined by the Division Bench in these Special Civil Applications, had similar facts of issuing process immediately, on the contrary, it appears that the complainant was examined on some other earlier date and there was further examination of the complainant on further dates which at least, indicates that the learned Magistrate in the case, which was dealt with by the Division Bench, had postponed the issue of process. As stated above, if once the Magistrate postpones the issue of process, provisions of Section 202(2) of the Code will at once be attracted. In our view, both these judgments of this Court do show that the learned Judges were dealing with the case where the Magistrate had postponed the issue of process and then refused to follow and employ the procedure provided by Section 202 of the Criminal Procedure Code. Although the facts in the judgment do not show at what stage the Magistrate must have postponed the issue of process, we have no doubt in our mind that the learned Judges of this Court proceeded on the basis that the learned Magistrate had not issued the process after examining the complainant, and in fact he has postponed the same, and if he has postponed the same, it is not possible to say that the ratio of these decisions is wrong. In our view, these judgments are distinguishable on facts which we have stated above and do not lay down a proposition which was tried to be expounded by the learned public prosecutor before us. The interpretation of the judgments which we have given above, shows that in a case instituted on a private complaint, if the Magistrate postpones the issue of process, then he is bound to employ the procedure as provided in Section 202(1) of the Criminal Procedure Code. In the present case, the Magistrate had issued process u/s 204 of the Code. Therefore, these two judgments will not have any bearing on the issue which we have to answer in this Reference.

18. Coming to the merits of the controversy, it would be desirable to understand the scheme of the Code to find out the true merits of the sections which are attracted in case of such complaints. Chapter 15 of the Criminal Procedure Code deals with the complaints. Section 4(1) of the Code deals with the trial of offences under the Indian Penal Code and other laws. Section 4(1) provides as

follows:

4(1) - All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained;

The other things are not necessary for our purpose. Bearing in mind these provisions and reading the same along with this chapter, one has to conclude that these provisions are clear and they are conclusive. If a statute lays down a specific procedure to be followed in certain manner, then that procedure alone should be followed. The Code of Criminal Procedure must be construed according to the ordinary principle, so as to give effect to the plain meaning of the language used. No doubt, in the case of ambiguity that meaning must be preferred which is more in accord with justice and convenience, but in general the words used which can be read in their context must prevail. Keeping in mind this view of interpretation, on the provisions of "Chapter 15 of the Criminal Procedure Code, it will be apparent that. Sections 200 and 202 of the Criminal Procedure Code deal with different situations. The object of the procedure prescribed by Chapter 15 of the Criminal Procedure Code which is entitled "Complaints to Magistrate" is a separation of unfounded cases from substantial cases at the outset and then prevent innocent persons from being brought before the Court subject to annoyance and frivolous charges. Section 200 provides that the Magistrate should act on the contents of the complaint and sworn testimony of the complainant. Section 202 is enabling provision. In that view of the matter, in every case, it will not be necessary for the Magistrate to take recourse to Section 202 of the Criminal Procedure Code.

19. Section 200 of the Criminal Procedure Code empowers the Magistrate to take cognizance of an offence disclosed by the complaint filed before him; He has power to initiate proceedings upon receiving the complaint. We are concerned in this case with receiving of private complaints of which the Magistrate can take cognizance u/s 190(1)(a) of the Criminal Procedure Code. Section 190 of the Code provides clauses (a), (b) and (c). We are not concerned with other Clauses (b), (c) mentioned in the section. When a private complaint is lodged certain formalities have to be gone into. Section 200 provides "that the Magistrate will examine the complainant on oath and at that stage, the Magistrate makes up his mind after reading the complaint and going through the statement of the complainant which is reduced into writing, whether he should issue process or not. It is at this stage that the Magistrate has to consider whether examination of the complainant and the sworn statement of the complainant before him constitute sufficient material for proceeding with the case. In other words, whether it is sufficient to issue process in such case. The Magistrate may adopt any of these three Ways:

- (i) He may issue process at once u/s 204(1) of the Criminal Procedure Code;
- (ii) He may postpone the issue of process and may direct inquiry or investigation

as provided by Section 202(1) of the Code; or

(iii) He may dismiss the complaint u/s 203 of the Code as provided in the Chapter.

20. In the present case, the Magistrate on examining the complainant has found that there was sufficient ground to issue process. He has straightaway issued the process. In our opinion, such a course on the part of the Magistrate in issuing process is proper and there is no legal impediment in his way to issue process immediately. In the instant case, the learned Magistrate had issued process on the same day when he examined the complainant and the provisions of Section 204 of the Criminal Procedure Code are attracted, because, it must be held that in the opinion of the Magistrate, he has taken cognizance of the offence and he has found that there is sufficient ground for proceeding, It can be said that the proceedings have been duly commenced before the Magistrate as provided by Section 204 of the Code in this case.

21. If we examine the scheme of Chapters 15 and 16 of the Code, especially provisions of Sections 202, 203 and 204, it will be noticed that similar words have been used saying that "whether there is sufficient ground for proceeding". The expression "sufficient ground to proceed" in the context of this Chapter means a prima facie case to issue process on the basis of the accusation which finds place in the given complaint. The scheme of the Code appears to be that there must be accusation which must give some ground for proceeding. The second stage is that of charge and the third is of trial. If this main principle is remembered, the use of the words "sufficient ground for proceeding" in Sections 202, 203 and 204 of the Code, give a clear indication that the main conclusion which is to be reached at this stage is restricted to ascertain whether there is a prima facie ground to issue process or not. The expression "sufficient ground" contemplates a prima facie case as distinguished from the case for conviction (kindly see *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, At that stage of issue of process, the accused has no locus standi to appear on the question of issue of process. It is however, open for the Magistrate to take inherent probabilities appearing ex-facie in the complaint or in the evidence and he can in such a case take recourse to Section 203 if he finds that the complaint otherwise contains or suffers from fundamental defects, such as want of sanction or any other defect. In short, the Magistrate has to satisfy himself whether a prima facie case appears or -not at the stage of issuing of process.

22. The object of Section 202 of the Criminal Procedure Code and the provisions in this Chapter came up for consideration before the Supreme Court in its three judgments which we may refer:

(i) *Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another*,

(ii) *Chandra Deo Singh Vs. Prokash Chandra Bose and Another*, , and

(iii) *Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another*,

We are referring to these cases only to show that the object of inquiry and

investigation as provided by Section 202 or examination of the complainant as provided by Section 200 of the Criminal Procedure Code, is the same. The object underlying these provisions is to find out whether there is a prima facie case for issuing process or not. This was pointed out by the Supreme Court as long back as in *Chandra Deo Singh v. Prakash Chandra Bose* (supra), The Supreme Court in the said case was dealing with the old Criminal Procedure Code i.e. Chapter 16 (now Chapter 15 of the New Code). There is no substantial change excepting re-numbering of the sections in this Chapter, which contains Sections 200 to 203. It is the discretion of the Magistrate to find out at that stage from the complaint after examining the complainant, whether the alleged facts will have to be inquired into or he may put any question to the complainant or his witnesses if they are present. The scope for inquiry is very limited. The Supreme Court has observed in Head-Note "B" as follows:

For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not Whether there is sufficient ground for conviction.

The same view has been taken by the Supreme Court in the case of *Dr. S.S. Khanna v. Chief Secretary, Patna* (supra), which we have referred to above. The Supreme Court has observed as follows (at p. 597, para. 8):

An enquiry u/s 202 of the Code is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after process is issued to the accused. The said proceedings are not strictly proceedings between the complainant and the accused. A person against whom a complaint is filed does not become an accused unless it is decided to issue process against him. Even if he participates in the proceedings u/s 202 of the Code, he does so not as an accused but as a member of the public. The object of the enquiry u/s 202 is the ascertainment of the fact whether the complaint has any valid foundation calling for the issue of process to the person complained against or whether it is a baseless one on which no action need be taken. The section does not require any adjudication to be made about the guilt or otherwise of the person against whom-the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings u/s 202 of the Code.

While dealing with these provisions, the Supreme Court has approved its earlier view in its judgments referred to above.

23. Bearing in mind the principles laid down by the Supreme Court, we , shall refer to the provisions of the Criminal Procedure Code as contained in Section 200. That section reads as follows:

200. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses, present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

Under Chapter 15 of the Criminal Procedure Code, the Magistrate is empowered to take cognizance of an offence. It is well settled that the Magistrate does not take cognizance of an offender. As far as taking of cognizance is concerned, there is no distinction between the offender and offence. If cognizance is taken, the Magistrate has to examine the complainant u/s 200 and his witnesses present, "if any". The emphasis of the section seems to be on two things: (i) that the complainant must be examined and (ii) If witnesses are present, they also must be examined. The words "if any" show that if the witnesses are not present, it is not obligatory on the Magistrate to compel the complainant at that stage to produce his witnesses. On examination of the complainant, he may issue the process under suitable sections of the Indian Penal Code, if prima facie, it appears to him that there is sufficient material to proceed with the complaint. The object of the said examination u/s 200 of the complainant and his witnesses is to find out whether there is prima facie case or accusation made against a person, which is sufficient to proceed. The words "sufficient ground" are used in Sections 202 and 203 as stated above, are sufficient to show that there must be something to proceed in order to call the accused by issuing process to answer. The satisfaction of the prima facie case at that stage, must be based on the reasonable degree of credit to issue process. It is not for the purpose of conviction, but it is only to call the accused to answer the accusation made out in the complaint.

24. Plain reading of Section 200 will show that it provides for examination of the complainant on oath and witnesses present, if any. The words "if any" are of some significance. The material before the Magistrate consists of the complaint and the examination of the complainant and substance of such examination being reduced to writing. On the basis of this material, the Magistrate has to consider whether to proceed with the case or not, that means he has only to consider whether there is a prima facie case or not to issue the process. If the Magistrate prima facie finds that the allegations made in the complaint and supported by the sworn statement of the complainant, are sufficient to -proceed, he is competent to issue process immediately. However, in case of doubt and hesitancy, it is open for the Magistrate. to adopt the procedure provided by Section 202 if he does not make up his mind to issue process, on examination of the complainant as provided by Section 200,

25. Section 202(1) deals with postponement of the issue of process. That section reads as follows:

202(1)-Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a 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.

As stated above, the section is an enabling section. The wording of the section

shows that any Magistrate on receipt of a complaint of offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may if he thinks fit postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he may think fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

26. Relying on Sub-section (2) of Section 202, it was contended that in regard to an offence complained of, triable exclusively by the Court of Session, it is incumbent on the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath. Sub-section (2) of Section 202 reads as follows:

In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath; Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

27. This section in two parts Words of Section 202(1) clearly show that the Magistrate is vested with a discretion which is a judicial discretion whether to issue process or not. If he postpones the issue of process, it is also a judicial discretion. Because, at that stage, he wants some more confidence and wishes to remove his hesitancy about the truth of the allegations on the basis of the material before him.

28. The words used in Sub-section (1) "if he thinks fit" are significant to show the intention of the legislature. This phraseology is usually employed by the legislature to show that the authority concerned has got a discretion in the circumstances of the case. In the context of the satisfaction of the prima facie case, in regard to the issue of process, this discretion is fully vested with the Magistrate to consider the propriety of issue of process or postponing the same. If it appears to him that in a given case, he must postpone the issue of process, he is quite competent to do so. The provisions of Section 202 are attracted in case the Magistrate decides to postpone the issue of process. In our opinion, when the Magistrate postpones the issue of process, at that stage, provisions of that section contained in the proviso are attracted. Taking of cognizance and issuing of process may be simultaneous acts. Unless the Magistrate takes cognizance he cannot issue process. Once the Magistrate postpones the issue of process, the provisions of Section 202 start operating. In our opinion, the purpose of any investigation or inquiry as provided by Section 202 is again limited to find out whether there is sufficient ground for proceeding in the case. The consideration for issue of process and for inquiry and report as provided by Section 202 may not be identical, but are of similar nature to find out whether there is sufficient ground for proceeding. In our opinion, it is open for the Magistrate to examine the complainant and not to issue process immediately. He may also choose to examine some other witnesses if they are present or he may call for inquiry or report if he postpones the issue of process.

29. It requires to be noticed at this stage that Section 203 in this Chapter provides for dismissal of the complaint. Section 203 reads as follows:

203. If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

The section authorises the Magistrate to dismiss the complaint if he finds that there is no ground to proceed with it. He can dismiss the complaint without issuing the process. He can also examine at that stage some merits of the evidence, which he has recorded in addition to the statements of the complainant. The discretion given by this section is of course a judicial discretion. The Magistrate should record briefly the reasons for dismissal of the complaint. In any case, it is open for the Magistrate to dismiss the complaint if he finds that the statement of the complainant and material before him is untrustworthy and otherwise not sufficient to proceed. This section also provides that the material collected by adopting procedure u/s 202 such as the result of the inquiry or the statements of the witnesses and the complainant, is also available for the Magistrate for considering while taking decision in regard to dismissal of the complaint or proceeding with the complaint. Section 203 requires the Magistrate to consider two things, the statement of the complainant on oath or his witnesses if any and the result of the inquiry or investigation if any u/s 202. On considering those two things if the Magistrate finds that, there is no sufficient ground for proceeding, he has been given power to dismiss the complaint. However, the legislature has provided safeguard by providing that in such case the Magistrate, when he dismisses -the complaint, he will briefly record his reasons for doing so. The grounds for dismissal of complaint include consideration of the statement of the complainant and .his witnesses if any. In a given case, the Magistrate may consider it insufficient and without directing inquiry, as provided by Section 202, he is competent to .dismiss the complaint if he finds, on the basis of the statement of the complainant and his witnesses that there is no sufficient ground to proceed. The satisfaction in regard to the truth of the allegations is dependent on these two factors. Section 203 authorises the Magistrate to consider one or both the factors, which further shows that authority of the Magistrate to dismiss the complaint depends on the consideration of the material either collected by way of examination of the complainant and his witnesses or as a result of the inquiry or investigation provided by Section 202, if he is satisfied prima facie about the truth of the allegations made in the complaint. If he is not satisfied about the truth of the allegations he can dismiss the complaint saying that there is no sufficient ground for proceeding, as provided by Section 203.

30. Mr. Shah in this connection, has relied on certain other authorities of the High Courts, but we do not think it necessary to refer to the same. As we have

examined the provisions of Sections 200, 202 and 203 of the Code, we are of the view that if the Magistrate after examining the complainant does not issue process, in that contingency only, the provisions of Section 202 will be attracted.

31. In the present case, the committal order passed by the Magistrate is quite proper and legal. No infirmity can be found in the procedure employed by him. This was a case as disclosed by the complainant, triable by the Court of Session. The only course open to the Magistrate in such a case is to commit the case to the Sessions Court.

32. It would be desirable here to indicate the changes made by the New Criminal Procedure Code in the procedure to be adopted by the Magistrate and that change is borne out by the amendments made to the present Code. It must be observed that the legislature has thought it fit to abolish the procedure of preliminary inquiries, which was available under the old Code and now the trial of case is governed by Chapter 18 of the Criminal Procedure Code.

33. Section 209 of the Criminal Procedure Code empowers the Magistrate in a case instituted on a police report or otherwise when the accused appears or is brought before him and it appears to the Magistrate that the offence is triable exclusively by the Court of Session/to commit the case to the Court of Sessions. The Magistrate before committing the case to the Court of Session, under this provision, is required to follow the provisions of Sections 207 and 208 of the Code. If the case is instituted on police report he should comply with Section 207. If the case is instituted on a private complaint, he should comply with Section 208. Section 208 provides that the Magistrate will supply copies of the statements recorded by him u/s 200 or Section 202 of the Code to the accused. We have already observed that the Magistrate has passed the order of committal u/s 209. In a case instituted on private complaint, what is required to be seen is that he has complied with the provisions of Sections 207 and 208 of the Code, as the case may be. Once the case is committed to the Court of Sessions for trial, it will commence before the Sessions Court after commitment.

34. In the present case, as we have observed above, the learned Magistrate has examined the complainant on the same day i.e. on January 19, 1982 also issued process on the same day. There was no occasion for him to employ the procedure u/s 202 of the Criminal Procedure Code. Action of the Magistrate is quite justified. It will have to be found out in such case whether the Magistrate has issued process or he has postponed the issue of process. If the Magistrate has recorded the statement of the complainant and has postponed the issue of process, it will be possible to say that the Magistrate has employed the procedure laid down in Section 202. In any event, this is a factual aspect which should be examined in each case before the Court. The mental frame of the Magistrate will have to be ascertained from the record of each case which is presented before the Court. In this case, we are satisfied that the Magistrate had examined the complainant u/s 200 and on the same day he has issued process u/s 204 of the Code. So, there was no occasion for the Magistrate to employ the

procedure laid down in Section 202.

35. Before we conclude this judgment, we wish to take a note of the apprehension expressed by the learned Counsel for the complainant, as stated above in para 12 of this judgment. He submitted that because of the failure of the Magistrate to examine the witnesses, there will be some difficulty in framing the charge before the Sessions Judge and the prosecution may be under disability on account of that failure and it is likely that the Sessions Judge will not be able to go on with the trial. In our opinion, such a question does not arise before us for our consideration, However, we are clear that in a particular case, if, on the material before the learned Sessions Judge, any submissions are made either by the prosecution or by the accused for supporting charge u/s 226 or discharge as provided by Section 227 of Chapter 18 of the Code, it will be open for the learned Sessions Judge to consider the same on its own merits. In this case, such a contingency has not arisen and we do not propose to deal with that situation. We may observe that such a situation will be very rare having regard to the general procedure provided by Criminal Procedure Code in Chapter 15 dealing with complaints.

36. In this view of the matter, our answer to point No. 1 of the Reference is as follows:

That the proviso to Sub-section (2) of Section 202 of the Criminal Procedure Code comes into play when the Magistrate, postpones the issue of process and holds inquiry.

In this case the learned Magistrate has not postponed the issue of process and hence, issue of process and the consequent commitment without examining all the witnesses is quite legal and proper.

In view of our answer to point No. 1, points Nos. 2 and 3 do not survive.

37. In the result, the Reference is answered accordingly and the case is sent to the Sessions Court. Reference answered.