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**(1977) 04 KL CK 0005**  
**In the High Court Of Kerala**

Kochu Mohammed and Others

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

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**Date of Decision :** 15-04-1977

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 190, 192, 200, 202, 207  
Penal Code, 1860 (IPC) — Section 34, 364, 395, 398, 450

**Citation :** (1977) CriLJ 1867

**Hon'ble Judges :** Kumari P. Janaki Amma, J

**Bench :** Single Bench

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## Judgement

Kumari P. Janaki Amma, J.—Accused 1 to 3 in a case initiated on a private complaint by the Judicial Second Class Magistrate, Cochin and pending trial before the Assistant Sessions Judge, Cochin are the petitioners.

2. The complaint was filed at 5-15 P.M. on 19-4-1976 with a schedule of witnesses. The complainant was directed to appear and to produce the witnesses in the schedule also at 11 A.M. on 20-4-1976. On 20-4-1976 the sworn statement of the complainant was taken. No witnesses were present. The court registered the case as P.E. 7 of 1976, directed summons to be issued to all the accused and posted the case to 11-5-1976. On the application of the accused the case was adjourned to 25-5-1976. On that day copies of the documents were furnished to the accused. The case was adjourned for hearing and further steps to 28-5-1976, on that day counsel for the complainant and the accused were heard. Since the offences taken cognizance of were exclusively triable by the Court of Session, the Magistrate committed the case to the Court of Session. The Assistant Sessions Judge, Cochin framed charges u/s 450 read with Section 34 of the I. P. C. and Section 364 read with Sections 511 and 34 of the I.P.C. The present petition filed u/s 482 of the I. P. C, is to quash the order of committal.

3. The petitioners would contend that the order of committal is illegal because the mandatory provisions contained in Section 202 and Section 208 of the Cri P. C. have not been followed. According to the petitioners, the Magistrate having

directed the complainant to produce the witnesses should have insisted on their examination and should have dismissed the complaint on the complainant's omission to produce the witnesses. The further case of the petitioners is that the proviso to Section 202(2) of the Criminal P. C. lays down a special procedure in respect of offences triable exclusively by a Court of Session and the order of committal In violation of the said procedure is illegal.

4. For appreciating the reasoning it is necessary to extract Section 202 of the Cr.P.C.

202. Postponement of issue of process.--

(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 :

Provided that no such direction for investigation shall be made.--

(a) Where It appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session : or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) 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.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that Investigation all the powers conferred by this Code on an officer-in-charge of a police station except the power to arrest without warrant.

The petitioners would contend that in view of the fact that the offences in the case were exclusively triable by the Court of Session, the Magistrate before ordering committal should have called upon the complainant to produce all the witnesses and should have examined them as directed in the proviso to Section 202(2), Sri V. K. Hamza the learned Counsel for the petitioners placed reliance on the ruling *Paranjothi Udyar and Others Vs. State and Others*, . Therein on a complaint presented on 5-2-1974 the case was taken to file u/s 395 read with Section 398 of the Indian Penal Code by the District Magistrate after recording the sworn statement of the complainant, Since the case was exclusively triable by a court of Session, the District Magistrate transferred it to Judicial Second Class Magistrate, Karakudi for conducting the preliminary enquiry. That court

issued summons to the accused. While the case stood posted for examination of witnesses for the complainant the new Code of Criminal Procedure came into force. The court without examining the witnesses committed the accused to stand their trial in the Court of Session. The order of committal was challenged for the non-compliance of proviso to Section 202(2) of the new Code. The objection was upheld. The learned Judge of the Madras High Court who disposed of the case observed 602 of Cri. L.J.).

In cases Instituted on a police report, the accused will have the benefit of obtaining copies of the statements of witnesses recorded by the police. In cases instituted other than on police report, the Legislature in its wisdom has thought of providing the same facility and benefit to the accused and, therefore the examination of the witnesses by the Magistrate in a case exclusively triable by a Court of Session was made obligatory, so that the accused may have the copies of such statement, and other documents, if any, mentioned in Clause (ii) and (iii) of Section 208 furnished to him and have the benefit of preparing his defence as an accused In a police case will have.

5. While the above interpretation of the proviso will no doubt put the accused in a better position during trial, the scheme of the Act and the language of Section 202 put considerable difficulty in interpreting the proviso in the above manner. Reference may be made here to Sections 190 and 200. Section 190(a) empowers the court to take cognizance of an offence upon receiving a complaint of facts which constitute such offence. Section 200 directs that the Magistrate taking cognizance of an offence on complaint should examine upon oath the complainant and the witnesses present if any. Section 202(1) enables the Magistrate if he thinks fit to postpone the issue of process against the accused and either enquire the case himself or direct (subject to the exceptions mentioned in the proviso) an investigation to be made by a police officer or such other persons as he thinks fit. From the very language, it is clear that it is entirely left to the discretion of the court to decide whether there should be an enquiry. What is mentioned in Section 202(2) is that in an enquiry u/s 202(1) the Magistrate may, if he thinks fit, take evidence. The deduction that follows is that where the Magistrate does not conduct an enquiry u/s 202(1) he need not examine witnesses. Since Section 202(2) begins with the words "in an enquiry under Sub-section (1) the proviso to Sub-section (2) can have application only to cases where the Magistrate conducts an enquiry. It is true that Section 208 like its counterpart, Section 207, directs that the Magistrate should furnish to the accused a copy of each of the statements recorded u/s 200 or 202 of persons examined by him. The provision only means that if there are witnesses examined u/s 200 or 202, the copies of their statements should be given. Section 209 which deals with commitment lays down a common procedure for cases instituted on a police report or otherwise. Thus an analysis of the provisions contained in Chapters XV and XVI shows that it is not obligatory to examine witnesses either at the pre cognition stage or at the pre commitment stage.

6. It is true that in the absence of examination of witnesses at some stage prior to commitment, the accused in a private complaint gets no occasion to know in advance what the witnesses would be going to say, whereas in a police case, they would be having the statements of witnesses recorded during investigation. This hardship can be avoided only if Magistrates use their discretion and examine all the important witnesses either u/s 202 or u/s 200. Omission will not however make the proceedings either irregular or illegal. As has been observed in *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, .

in proceedings u/s 202 the accused has got absolutely no locus stand and is not entitled to be heard on the question whether process should be issued against him or not.

7. From the foregoing reasoning it is clear the Magistrate need examine witnesses only in cases where he uses his discretion, postpones the issue of process and decides to have an enquiry u/s 202(1) and not in other cases.

8. It is then argued that in the instant case the Magistrate having directed the complainant to produce her witnesses decided to launch an enquiry and it is not open to the court to retract therefrom subsequently. The reference is apparently to the direction given by the court to the complainant on 19-4-76, the date of presentation of the complaint to appear and produce her witnesses on 20-4-1976. The argument overlooks the fact that Chapter XV of the Code of Criminal Procedure contemplates two stages wherein the Magistrate can record evidence of witnesses-first, the stage of taking cognizance and second at the post cognizance stage, before the issue of process. The direction to produce witnesses was made in this case before the sworn statement of the complainant was taken and the complaint was admitted to file. It is not necessary to examine witnesses named in the complaint for taking cognizance of an offence and once the Magistrate takes cognizance of an offence after taking the sworn statement of the complainant, the order is not liable to be attacked on the ground that the witnesses mentioned in the complaint were not examined. The Magistrate, after taking cognizance of the offence as provided in Section 200, did not consider it necessary that he should postpone the issue of process and conduct an enquiry. Hence there was no occasion for him to examine witnesses as directed in the proviso to Section 202(2).

The Criminal Miscellaneous petition Is therefore without merits. It is accordingly dismissed.