

(1983) 01 MAD CK 0005
In the Madras High Court
Case No : Criminal R.C. 163 of 1981

M. Govindaraja Pillai

APPELLANT

Vs

Thangavelu Pillai (deceased) and Others

RESPONDENT

Date of Decision : 08-01-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 395(2)

Citation : (1983) LW(Cri) 23

Hon'ble Judges : Ratnavel Pandian, J

Bench : Single Bench

Advocate : The Public Prosecutor, for the Appellant; M.V. Raghupathy, for the Respondent

Judgement

Ratnavel Pandian, J.—This revision comes before this Court by way of reference made by the learned Sessions Judge of East Thanjavur

under S. 395 (2) of the CrI.P.C., to this Court for the decision of the following question of law, viz., whether all the witnesses cited in a case triable

exclusively by the Court of Session, instituted on a private complaint, should be examined by the committing Court, as contemplated under the

proviso to S. 202 (2) of the Code and if so, to quash the committal order passed by the learned Judicial Second Class Magistrate, Tiruvarur in

P.R C. 8/80 on his file, in which only four witnesses out of 9 cited have been examined.

2. The matter in question no doubt raises a very interesting and important question of law in respect of which there is a cleavage of judicial opinion

among the various High Courts. Ss. 200 to 203 of Chapter XV of the CrI.P.C., 1973, under the heading ""Complaints to Magistrates,"" deal with

the examination of the complainant and the procedure to be followed by the

Magistrates while taking cognizance of the cases and also the dismissal of the complaint if there is no sufficient ground for further proceeding. S. 200 casts a mandatory duty on a Magistrate taking cognizance of an offence on a complaint, to examine the complainant and the witnesses present, if any, upon oath and to reduce the substance of such examination in writing and get the same signed by the concerned persons.

3. There are two provisos under that section. The first proviso reads that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court that made the complaint; or (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under S.192. The second proviso to the section reads that if the Magistrate makes over the case to another Magistrate under S. 192 after examining the complainant and the witnesses, the Magistrate to whom the case has been made over need not re-examine them. We are not concerned with S. 201 in this case as that section deals only with the procedure to be followed by a Magistrate not competent to take cognizance of the case.

4. S. 202, which is an important provision to be examined for answering this reference, deals with the procedure to be adopted where the Magistrate, after postponing the issue of process for the purpose of deciding whether or not there is sufficient ground for proceeding in all the cases inclusive of a case triable exclusively by a Court of Session. There is a proviso to S. 202(2). I shall reproduce Sub-Ss. (1) and (2) of S. 202(1) with the provisos, for a proper understanding of the import of the section, which I shall deal with exhaustively after referring to various decisions rendered by various High Courts on the matter.

202. Postponement of issue of process.½(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 under 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,½

(a) where it appears to the 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

under S. 200.

(2) In an inquiry under Sub-S. (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)

S.203 of the Code gives a wide power to the Magistrate to dismiss a complaint without issuing process after considering the statements of the

complainant and the witnesses and the result of the inquiry or investigation, if any, under S.202. If the Court is of the opinion that there is no

sufficient ground for proceeding, and for passing such an order of the dismissal, the Magistrate has to record the reasons in brief. Only if the

Magistrate is of the opinion that there is sufficient ground for further proceeding, he can issue process to the accused as provided under S.204.

5. A combined reading of Ss.200 to 204 of the Code would show that there is no legal obligation on the part of a Magistrate taking cognizance of

an offence, to resort to the procedure laid down in S.202 before dismissing a complaint or issuing process to the accused after taking cognizance

of the offence complained of. But, the Magistrate is given a discretionary power to resort to S.202 either to make an inquiry or to direct an

investigation, as envisaged in sub-S.(1) of that section, if he thinks fit to do so, after postponing the issue of process, but subject to the embargo

provided under that sub-section. Under sub-S.(2) of S.202, a Magistrate, in an inquiry under sub.S(1) of that section, is given a discretionary

power to take evidence of the witnesses on oath. The proviso to sub-S.(2) of S.202, which is important, enacts 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.

6. There is divergence of opinion with regard to the interpretation of the proviso

to S.202 (2), causing some difficulty to subordinate Courts in adopting a uniform procedure in taking cognizance of offences exclusively triable by the Court of Session, that is to say, whether it is necessary or desirable for a court taking cognizance of such offences to resort to an inquiry as contemplated under the said proviso and whether in such an inquiry the Court should call upon the complainant to produce all his witnesses and examine them on oath or whether it would be sufficient if some of the witnesses whom the complainant intends to examine before the committing Court are alone examined.

7. Now, I shall refer to the various decisions rendered on this point. Krishnaswamy Reddy, J., in *Paranjothi Udyar and Others Vs. State and Others*, has held as follows:

In cases instituted on a police report the accused will have the benefit of obtaining the copies of the statements of witnesses recorded by the police.

In cases instituted other than on a 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 statements and other documents, if any, mentioned in Cl.(ii) and (iii) of S.208 furnished to him and have

the benefit of preparing his defence as an accused in a police case will have.

8. A similar question arose before me in *P.R. Murugaiyan v. Jayaveera Pandia Nadar* 1976 L.W. Crl. 199. In that case, it was observed that if the

Magistrate, in cases triable exclusively by the Court of Session, has resorted to S.202, he shall call upon the complainant to produce all his

witnesses and examine them on oath as contemplated under the proviso to sub-S.(2) of S.202 so as to find out whether there is sufficient ground

for proceeding and that, if there is no sufficient material for proceeding, he can dismiss the complaint without issuing process under S.204,

Crl.P.C. In other words, the Magistrate can apply S.200 and straightway dismiss the complaint under S.203 or, if he thinks, fit to postpone the

issue of process against the accused and to make an enquiry into the case himself, he has to follow the procedure laid down under S.202 before he

resorts to S.203. This observation was made having regard to the object of the proviso which according to me, is introduced by the Parliament

partly for the benefit of the accused to know the nature of the evidence which the prosecution proposes to rely upon against him so as to enable

him to prepare his defence after the copies of such documents are furnished to him under S.208 and partly, to enable the Court to control the

proceedings and decide whether or not there is sufficient ground for further proceeding. After having so observed, I have expressed my view as

follows:

However, I am of the view that it is always desirable in cases instituted on complaints that] while the Magistrate takes cognizance of offences

triable exclusively by the Court of Session, he should follow the procedure laid down under S.202 of the Code, which serves the purpose of a

preliminary enquiry, as that alone would be a sufficient safeguard to the accused before the court resorts to S.204, and as the Court, being the legal

custodian and guardian of the rights of the citizens, has a primary obligation to protect them from vindictive and vexatious prosecution.

9. In *Boya Lakshmanna Vs. Boyachinna Narasappa and Another*, the Andhra Pradesh High Court has observed that where, after recording the

sworn statement of the complainant under S.200, CrI.P.C. the Magistrate did not consider it necessary to postpone the issue of process, the case

passed the stage of S.202, CrI.P.C., and there can be no question of the Magistrate being required to follow the proviso to Sub-S.(2) of S.202,

CrI.P.C.

10. The Kerala High Court in *Kochu Mohammed and Others Vs. State of Kerala and Another*, has held that the proviso to S.202(2) could have

application only to cases where the Magistrate conducted an inquiry under S.202(1) and not to other cases and therefore, omission to examine

witnesses before committing the case to the Sessions Court did not render the order of committal irregular or illegal. The above observation was

made on the facts therein which can be briefly stated as follows : The Magistrate therein took cognizance of the case under S.200, CrI.P.C., after

taking the sworn statement of the complainant and straightway issued process to the accused under S.204 and committed the accused without

resorting to an inquiry under S.202.

11. A Division Bench of the Kerala High Court in *Sulaiman v. Eachara Warriar* 1978 M.L.J. (sic), has made the following observation:

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, under S.200, from straightway issuing process under S.204. The question then is whether the proviso to S.202(2) stands in the way of doing that.....S.202(2) is specific that what is contained therein is applicable only to the inquiry referred to in S.202(1). In S.202(1) what is provided is that if the Magistrate thinks that postponement of the issue of process against an accused under S.204 is necessary for deciding whether there is sufficient ground for proceeding he "may" either inquire into the case himself or direct investigation to be made by a police officer. Mark the word "may" here. That shows that it is open to him not to postpone the issue of process under S.204 of the Code also. If he does not think fit to postpone the issue of process against the accused it is open to him to straightway issue process under S.204 after examination of the persons contemplated by S.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. To tell the Magistrate that it is always desirable that in private complaints involving offences triable exclusively by the Court of Session he should follow the provisions of the proviso to S.202 (2) is to interfere with that discretion and that is not warranted by S. 202 (1)....If he (Magistrate) thinks that postponement of issue of process is necessary for finding out whether there is sufficient ground for proceeding he has to inquire into the case himself. And if he does that the proviso S.202 (2) is immediately attracted. That proviso makes it obligatory on his part to call upon the complainant to produce all his witnesses and then to examine them on oath. But such a procedure is not contemplated if the Magistrate thinks after complying with the provisions of S.200 that it is not necessary to postpone the issue of process against the accused for the purpose of finding out whether there is sufficient ground for proceeding. The gist of the above ruling is that where a Magistrate follows the procedure laid down under S.200, takes cognizance of the case and straightway issues process against the accused under S.204, he need not resort to the proviso to S.202 (2), but that proviso would be attracted only when the Magistrate chooses to resort to hold an inquiry under S.202(1) by postponing the issue of process against the accused.

12. Poti, J. (of the Kerala High Court), doubting the correctness of the above Division Bench decision Kaimala Bhargavi Amma Vs.

Kundumadathil Ravindran Nair and Others, referred similar cases to a Full Bench. A Full Bench of the Kerala High Court in Bhargavi Amma v.

Ravindran Nair CrI.M.P. 1700 of 1977, dated 27th February, 1978, on such reference, examined the decision of the Division Bench in Kaimala

Bhargavi Amma Vs. Kundumadathil Ravindran Nair and Others, and, agreeing with the view expressed by the two single Judges of that High

Court (Balagangadharan Nair, J., in CrI.M.P.502 of 1975 and Khalid, J., in CrI.M.P. 766 of 1976) held that after issuing process, the Magistrate

cannot, under the present Code, hold an inquiry as contemplated by S.202 of the Code, and that once process is issued, the Magistrate can only

where it appears to him that the offence is triable exclusively by the Court of Session, commit the case to the Court of Session. During the course

of discussion of the case, the Full Bench observed that½

the jurisdiction under S.202 of the Code is a discretionary one to be exercised by the Magistrate depending upon the facts and circumstances of

each case and so, no rule of general application with reference to any class of complaints, for example, complaints involving offences exclusively

triable by a Court of Session, as regards even the desirability of the Magistrate holding an inquiry into the case himself or directing an investigation

into it by a police officer or other officer can be laid down.

They have further held as follows:

On a plain reading of the proviso that occurs after sub-S. (2) of the S.202, it does not control and govern sub-S.(1) of S.202, for it does not

require the Magistrate to inquire into the case himself when it appears to him that the offence complained of is triable exclusively by the Court of

Session, but only requires him to call upon the complainant to produce all his witnesses and examine them on oath when it appears to him as

aforesaid, in an inquiry into the case himself. If he holds an inquiry into the case himself, Sub-S. (2) confers on him a further discretion to take

evidence of witnesses on oath, and the proviso makes it obligatory on him to call upon the complainant to produce all witnesses and examine them

on oath in such a case.

13. Paul, J. while disposing of Rajarathinam v. Anumhanarayanan and others

Crl.M.P. 1700 of 1977, dated 27th February, 1978 has viewed thus:

Therefore, only if it appears to the Magistrate that an offence exclusively triable by the Court of Session is disclosed that the Magistrate is bound to

hold an enquiry under S.202.

Sathar Sayeed, J., while disposing of Doraiswami Padayachi and others v. Arumugha Padayachi Crl.M.P. 7809 of 1976 quashed the proceedings

in a sessions case, holding that the non-application of the proviso to the sub-S. (2) of S.202 in an inquiry held under S.202 (1) is illegal.

15. In Mokkasami v. Revenue Divisional Officer Sivaganga 1978 L.W. Crl. 135 a contention was raised before Natarajan, J. that as the

committing Magistrate did not examine anyone of the witnesses on oath by resorting to S. 202(1) Crl.P.C., the committal proceedings were

invalid. The contention was rejected by the learned judge holding that the legislature has enjoined a Magistrate to follow procedure prescribed in

S.202 (2) for a two fold purpose, viz., (1) that the Magistrate should satisfy himself beyond doubt that the offence complained of is triable

exclusively by the Court of Session, and (2) that the accused should not be taken by surprise at the sessions trial by the examination of witnesses

who had not been examined by the Magistrate on oath before passing the committal order. However, having regard to the facts of the case therein,

viz., that the complaint was tiled by a public servant, viz., the Revenue Divisional Officer, who had held an inquiry under the Police Standing

Orders, and that all the statements recorded by the Revenue Divisional Officer had been perused by the Magistrate and copies had been made

available to the accused, the learned Judge held that the first proviso to S.200 Crl.P.C. was attracted to the facts of the case and the question of

the examination of the witnesses by resorting to S.202 (2) did not arise and consequently the committal could not be said to be illegal.

16. In my view, the order passed by Natarajan J., dismissing the revision petition therein cannot be said to be in any way conflicting with the view

taken in Paranjothi Udayar v. State 1975 M.L.J. Crl. 629 = 1975 L.W. Crl. 229 and Murugaiyan v. Jayaveera Pandia Nadar 1976 L.W. Crl.

199. In fact the examination of the witnesses by resorting to S.202 (2) is only discretionary and non-exercise of that discretionary power cannot

amount to an illegality. Therefore, the committal in that case by the Magistrate

after taking cognizance of the offence under S.200 and straightway issuing process under S.204 was a valid order, as held by Natarajan, J. in that case. However, it is to be noted that Natarajan, J., has emphasized the importance of the purpose for which S.202 (2) is enacted, stating that unlike a charge-sheet laid by the police, where the statement of witnesses recorded during inquest or under S.161 (3) CrI.P.C., would be made available to the accused free of cost, the statements of witnesses to be examined in a case filed by a private complainant cannot be made available to the accused unless the complainant and his witnesses are first examined by the committal Court and that it is therefore to safeguard the interest of the accused that the Magistrate is enjoined to examine the witnesses on oath and record their statements under S.202 (2).

17. The view I have expressed in *Murugaiyan v. Jayaveera Pandia Nadar* 1976 L.W. CrI. 199, is that it is always desirable for the Magistrate

taking cognizance of an offence triable exclusively by the Court of Session, in a case instituted on a private complaint, to resort to an inquiry under

S.202 (2) of the Code, which serves the purpose of a preliminary inquiry and also safeguards the interest of the accused, so that vindictive and

vexatious prosecutions could be avoided even though the Magistrate is not statutorily obliged to do so. Thus it can be seen that the view expressed

by Natarajan, J., in *Mokkusami's Case* 1978 L.W. CrI. 135 is in consonance with the principle underlying *Paranjothi Udnyar's Case* 1975 M.L.J.

CrI. 629 = 1975 L.W. CrI. 229 and *Murugaiyan's Case* 1976 L.W. CrI. 199.

18. A Division Bench of the Andhra Pradesh High Court in *Ramachander Rag v. Boina Ramchander* 1980 M.L.J. CrI. (sic) has also stressed the

importance of the inquiry under the proviso to S.202 (2), observing that the said section ""is also intended to give a fair and reasonable opportunity

to the accused to get adequate information about the charge against him to prepare his defence....This provision is of great importance not only to

the complainant but also to the accused....Though the accused would not have the right of cross-examination at the stage before the Magistrate, he

has a right to cross-examine the witnesses at the stage of sessions trial with reference to the earlier statements before Magistrate.

19. In this connection, I feel that it would be worthwhile to compare S.202 of the new Code and S.202 of the old Code., the latter of which

contemplated of committal proceeding. S.202 (1) of the old Code covered all the cases inclusive of cases exclusively triable by a court of Session instituted on a complaint or transferred to him under S.192. There was no separate provision under the old Code similar or analogous to the proviso to S.202 (2) which has been newly introduced in the present Code. Under the old Code also, the Magistrate could even without resorting to an inquiry or directing an investigation as contemplated under Sub.S. (1), take cognizance of the case under S.203 and then straightway issue process under S.204 if, in his opinion, there was sufficient ground for further proceeding. However, a discretion was given to the Magistrate under S.202 (1) of the old Code to postpone the issue of process and then either to make an inquiry himself or direct an inquiry or investigation into the case by any Magistrate subordinate to him or by a police Officer or such other person as he thought fit, in all the categories of Cases inclusive of the Cases exclusively triable by a court of Session, notwithstanding the fact that there was also a separate committal inquiry before the accused was committed to take his trial before a Court of Session. But that discretion was subject to two main conditions, viz., that the Magistrate, for exercising such a discretionary power, should record his reasons therefor in writing and that the object of the inquiry or investigation was for the purpose of ascertaining the truth or falsehood of the complaint. In the present Code, the reasons need not be recorded and the inquiry or investigation is only for the purpose of deciding whether or not there is sufficient ground for proceeding. I think it is not necessary to make mention of all the changes that have been brought about in the present S.202, except saying that the important proviso to S.202 (2) is newly introduced. I am loath to load this judgment with all the citations with reference to the invocation on the inquiry under S.202 (1) of the Old Code, but I shall limit myself citing only some of the decisions on this aspect.

20. The Rangoon High Court in *S.D. Vardon v. R. Hearseya* 36 (1935) Cri.L.J. 75 has expressed its view as follows:

The person making a complaint need not himself have personal knowledge of the facts constituting the offence, but before issuing process on such allegations the Magistrate should satisfy himself on proper materials that a case for issue of process has been made out. It was clearly desirable in

the present case that the Magistrate should have acted under S.202 CrI.P.C.

Having observed thus, the learned Judge set aside the order of the Magistrate directing issue of summons and directed the Magistrate to make a

preliminary inquiry under S.202 (of the old Code 1898) which is provided for a committal inquiry). See also *Thakur prasad Singh v. The Emperor*

10 Cal. W.N. 1090.

21. The observations of the Supreme Court in *Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another*, may usefully be quoted:

The inquiry (under S.202 (i) is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is

evidence in support of the complaint so as to justify the issue of process and commencement of the proceedings against the person concerned.

(The underlining is mine).

22. Approving the above observation, the Supreme Court in *Chandra Deo Singh Vs. Prokash Chandra Bose and Another*, has analysed the scope

and object of an inquiry contemplated under S.202 (1) in the following words:

No doubt, one of the objects behind the provisions of S.202, CrI.P.C., is to enable the Magistrate to scrutinise carefully the allegations made in the

complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is

also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the

bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused

person, but also with a view to bring to book a person or persons against whom grave allegations are made.... A number of decisions were cited at

the bar in which the question of the scope of the enquiry under S.202 has been considered. Amongst those decisions are; *Paramanand*

Brahmachari v. Emperor A.I R. 1930 Pat. 30, *Radha Kishun Sao Vs. S.K. Misra and Another*, *Ramkisto Sahu Vs. The State of Bihar*, *Emperor*

v. J.A. Finan AIR 1931 Bom. 524 and *Baidya Nath Singh v. Muspratt* ILR 14 Cal. 141. In all these cases it has been held that the object of the

provisions of S.202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any

hesitation that he may have felt upon the mere perusal of the complaint and the

consideration of the complainant's evidence on oath The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction.

Finally the Supreme Court has concluded therein as follows :

No doubt, as stated in Sub-S.(1) of S.202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the

Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which

would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons

examined at the instance of the complainant.

23. When S.202 of the new Code is examined in juxtaposition with S.202 (1) of the old Code, bearing in mind the principles laid down in the

above decisions, it would be clear that the proviso to S. 202 (2) has been newly introduced not only for the purpose of safeguarding the interests

of the accused but also to remove from the mind of the Magistrate any hesitation that he may have felt upon the mere perusal of the complaint and

the consideration of the complainant's statement made on oath and the evidence of the witnesses, if any, examined under S.200, and to avoid

frivolous complaints.

24. In view of the above discussion, I hold that the action of the Magistrate choosing the course of resorting to an inquiry under S.202 is always

discretionary. No hard and fast rule can be laid down giving any guideline as to the circumstances warranting the desirability of adopting such a

course. At any rate, the view expressed in Murugaiyan's case 1976 L.W. CrL. 199, is not in any way intended to fetter the discretionary power

vested with the Magistrate or to interfere with his power to dismiss a complaint under S. 203 straightaway after complying with the provisions of

S.200 and without resorting to S. 202 I would like to re-emphasize the view taken in Murugaiyan's case 1976 L.W. CrL. 199, stating that if such a

course is adopted, it would partly be for the benefit of the accused and enable him to know the nature of the evidence which the complainant

proposes to adduce against him and partly for the benefit of the Court enabling it to control the proceedings and decide whether or not there is

sufficient ground for further proceeding. In addition to this, I would like to point out that if an inquiry contemplated under S.202 is adopted by the committing Magistrate, the witnesses, who may be examined before the Court of Session after a considerable length of time from the time of the trial, may not make embellishments over the earlier version so as to suit their convenience, because in such a situation they will be contradicted by their earlier statements before the committing Magistrate. This course would also avoid many difficulties and inconveniences that would be caused to the accused at the time of the trial and also prevent to some extent the institution of frivolous and vexatious prosecutions out of spite and vindictiveness.

25. The above view as to the desirability of the Magistrate holding an inquiry under S.202(1) receives support from the principles underlying the various statutory provisions of the Code which I shall presently enumerate : (1) S.202 (1) covers all the cases instituted before a Magistrate on private complaints and also cases that are made over to him under S.192, inclusive of the cases triable exclusively by the Court of Session. This provision lays down three alternative modes of inquiry, viz., (1) making an inquiry himself, (ii) directing an investigation to be made by a police officer, and (iii) directing an investigation by such other person as the Magistrate thinks fit. Proviso (a) to S.202 (1) bars any direction for investigation envisaged under the second and third modes of inquiry mentioned above, but permits an inquiry by the Magistrate himself under the first mode of inquiry, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session. So a reading of s.202 (1) in conjunction with proviso (a) makes it clear that the Magistrate taking cognizance of an offence triable exclusively by the Court of Session can make only an inquiry by himself without availing the assistance of a police officer or any other person, though he can get such an assistance of investigation in all other cases. Therefore, it is always advisable to resort to an inquiry under S.202, the proviso to sub-S.(2) of which section makes it obligatory that the complainant shall be called upon to produce all his witnesses for examination on oath so that the committing Magistrate may have sufficient material to issue process to the accused and proceed further or to have some material for briefly recording his

reasons for the dismissal of the complaint, when there is no sufficient ground for further proceeding Reference can be made in this connection to the

judgment rendered by the Supreme Court in Kewal Krishan Vs. Suraj Bhan and Another, wherein the following observation has been made:

At the stage of Ss.202 and 204, CrI.P.C., in a case exclusively triable by a Court of Session, all that the Magistrate has to do is to see whether on

a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Ss.200 and 202 CrI.P.C., there is prima facie

evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is sufficient ground for proceeding

against the accused. ...at the stage of Ss.202/204. If there is prima facie evidence in support of the allegations in the complaint relating to a case

exclusively triable by the Court of Session, that will be sufficient ground for issuing process to the accused and committing them for trial to the

Court of Session.

As pointed out by the Supreme Court in the same judgment, though the Magistrate is not to weigh the evidence meticulously as if he were the trial

court, he must have prima facie evidence that will be sufficient for issuing process to the accused. Such a collection of evidence can be had either

by the examination of the complainant and his witnesses, if any, under S.200 or in addition to it, by the examination of the witnesses under S.202.

When the materials are collected both under S.200 and under S.202, those materials would enable the Court without any reservation in its mind,

either to issue process straightway under S.204 and commit the case or to dismiss the complaint under S.203.

The Law Commission of India in its forty-first report, while stating that the object of S.202 is for the purpose of ascertaining the truth or falsehood

of the complaint, has expressed its view as follows:

Para 16.2....

Every day experience of the Courts shows that many complaints are ill-founded, and it is necessary therefore, that they should at the very start be

carefully considered and those which are not on their face convincing, should be subjected to further scrutiny so that only in substantial cases

should the court summon the accused person.

Para. 16.11.

We are recommending in a subsequent chapter (Chapter 18 of the report) the abolition of Commitment inquiries. This necessitates certain

amendments in the procedure to be followed in an inquiry into complaints where the offence complained of is one triable exclusively by Court of

Session. We recommend that the Magistrate who takes cognizance of such an offence on complaint must himself make an inquiry into the

complaint, and call upon the complainant to produce all his witnesses and examine them on oath. Further, in such cases the Magistrate should not

direct an investigation by a police officer or other person. For this purpose, we propose two amendments to S. 202 in the form of another proviso

to Sub-S.(1) and a proviso to Sub-S.(2).

These recommendations of the Law Commission also fortify my view that in view of the abolition of the committal inquiry under the new Code, it is

desirable for the Magistrate to hold an inquiry under S.202, CrI.P.C. in cases triable exclusively by the Court of Session, though such a course is

not mandatory.

(2) Under S.208, after the issue of process, in a case triable exclusively by the Court of Session instituted other than on a police report the

Magistrate should, without, delay, furnish to the accused free of cost a copy of each of the following, viz., (i) The statements recorded under.

S.200 or under S. 202 of all persons examined by the Magistrate, (ii) the statements and confessions, if any, recorded under S.161 or S.164 and

(iii) any documents produced before the Magistrate, on which the prosecution proposes to rely. This section is complementary to S.207 and has

been newly introduced for enabling the accused to have sufficient information about the nature of the indictable offences levelled against him. The

Objects and Reasons in respect of this newly introduced S.208, mentioned by the Law Commission in its 41st report, read as follows:

Where the Magistrate Issues process under S.204 on complaint, and the offence is triable exclusively by the Court of Session, the Magistrate

should grant to the accused copies of the statements of all persons examined by the Magistrate, and other material on Which the prosecution relies

in order that the accused may get adequate information about the charge against him and prepare for his defence. This is all the more necessary

since commitment proceedings are to be abolished.(vide para 17-10).

The above recommendation of the Law Commission indicates that the new provision under S.208 was introduced with the object of enabling the

accused to get adequate information about the charge to be levelled against him and to see that he is not kept in darkness without having any

material on the basis of which the prosecution proposes to rely upon till the witnesses are examined for the first time at the time of the trial.

Therefore, the only mode by which the accused could be put on notice of the materials against him is by the Court furnishing the copies of the state

merits necessarily recorded under S.200 and desirably recorded under S.202, Cr.P.C

(3) A new section viz., S.227 is now introduced in the new Code in Chapter XVIII dealing with "Trial Before a Court of Session" and that

provision empowers the Court to discharge the accused for the reasons to be recorded, if the trial Judge is not convinced, on a consideration of all

the documents submitted before him (the document referred to in S.208), which will include the statements of the complainant and the witnesses

examined under Ss. 200 and 202 that there are sufficient grounds for proceeding against the accused. Under S. 228, which is also a new provision

introduced in the Code, if the trial Judge is of the opinion that there is ground for presuming that the accused has committed an offence which is

(a) is not exclusively triable by the Court of session, he may frame a charge against the accused and, by order, transfer the case for trial to Chief

Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of cases

instituted on a police report:

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused. Therefore, as pointed out by the Supreme Court in

State of Bihar v. Ramesh Singh AIR 1977 S.C. 2013 = 1976 L.W. (Cr.) 13 (S.C.) (S.N.) though the trial Court, at the stage of framing the

charges, need not meticulously judge the truth or veracity and effect of the evidence produced by the complainant, nevertheless, there must be

prima facie evidence in support of the allegations made by the complainant relating to the case exclusively triable by the Court of Session so that

the trial Judge may examine and satisfy himself whether there is no sufficient ground for framing any charge, and if so discharge the accused under

S. 227, or whether there is no ground for framing a charge for an offence exclusively triable by the Court of Session but there is sufficient ground

only for framing a charge for an offence other than the one triable by a Court of Sessions, so that he could frame a charge against the accused and

transfer the case for trial to the Chief Judicial Magistrate, or whether there is ground for presuming that the accused has committed an offence

exclusively triable by a Court of Session, so that a charge could be framed for such a Sessions trial. The Supreme Court in *State of Karnataka v.*

L. Muniswamy 1977 S.C.C. CrI. 404 = 1977 L.W. (CrI.) 39 (S.C.)(S.N.) reiterated its observation made in *Century Spinning and Manufacturing*

Co. Ltd. and Others Vs. State of Maharashtra, while construing the power and jurisdiction of the Court at the stage of framing of charges, as

follows:

...

the order framing a charge affects a person's liberty substantially and therefore it is the duty of the Court to consider judicially whether the material

warrants the framing of the charge. It cannot blindly accept the decision of the prosecution that the accused be asked to face a trial.

Hence, it follows that the Sessions Judge, while framing the charge, should have some material so that he could not either under S.227, which is a

benevolent provision newly introduced to save the accused from any harassment, or under S.228 (1) (a) or (b) so that the trial Court need not

unnecessarily waste its time by trying all the cases as sessions cases, and similarly the accused also need not undergo the ordeal of a sessions trial

in all cases. Needless to say that the application of Ss.227 and 228 and would come into operation only on committal of the proceedings by the

Magistrate on it appearing to him that the offence is triable exclusively triable by the Court of Sessions, on the materials available before him,

collected under S.200, and the evidence, if any, recorded under S.202. In this connection, it may be noted that the committing Magistrate is not

empowered to frame the charge. It is only after the committal, the Sessions Judge exercises his powers under S.227 or under S.228, that is to say,

he once again considers the record of the case and the documents submitted therewith and hears the submissions of the accused and the

prosecution and finally either passes an order of discharge or frames a charge for

an offence other than the one triable by the Court of Session or for an offence triable by the Court of Session. What the Sessions Judge is statutorily obliged to do Under Ss.227 and 228 is to make a fresh and second consideration of the materials notwithstanding the fact that it appeared to the committing Magistrate that the materials placed before him were sufficient to warrant a trial by the Court of Sessions. No doubt, as pointed out by the Supreme Court in *Kewal Krishan Vs. Suraj Bhan* and Another, the standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. However, unless there is sufficient material available at the time of the framing of the charge, the Sessions Court will not be in a position to form an opinion whether there is sufficient ground for proceeding either under S 227 or under S.228, though the standard of consideration of such materials at the time of framing the charge is not exactly the same standard that is to be applied at the time of finding out the guilt or otherwise of the accused, therefore, it would always be desirable to resort to an inquiry under S.202 (2) in cases exclusively triable by a Court of Session so that the Sessions Judge can have the materials collected under S.200 and 202 to form an opinion as to whether there is no sufficient ground for proceeding against the accused or whether there is ground for presuming that the accused has committed an offence.

(4) The object of s.202 is to prevent harassment of innocent persons by indiscriminately assuming process, in cases where there is no sufficient ground for proceeding against them. It is pertinent to note in this connection that while the present S.202 (a) gives a wide and unfettered discretionary power to the Magistrate to postpone the issue of process against the accused if he thinks fit, S.202 (1) of the old Code conditioned the discretionary power of postponing the issue of process by requiring him to record the reasons for such postponement in writing, even if he thought fit to do so. The words "for reasons to be recorded in writing" are now omitted in S.202 (1) of the present Code. The reason for the omission of the said words, is evidently for enabling the Magistrate to use his discretionary power whenever he thinks fit to do so and he need not give reasons for such postponement of the issue of process. In other words, he can use his discretionary power without any fetter or restriction so

that he can freely resort to this section (S.202) for the purpose of collecting mere materials to decide whether or not there is sufficient ground for proceeding against the accused.

26. For the reasons mentioned in the above paragraphs. I am of the view that as the procedural law relating to the cases inclusive of cases triable

exclusively by the Court of Session¹ stands, the Magistrate taking cognizance of an offence on a complaint after compliance with S.209, can

straightway either dismiss the complaint under S.203 if there is no sufficient ground for proceeding or issue process to the accused under S.204 if,

in the opinion of the Magistrate, there is sufficient ground for proceeding without holding an inquiry or investigation as contemplated under S.202,

Crl.P.C. Therefore, an order of committal passed under S.209 by the Magistrate taking cognizance of an offence under S.200 and thereafter

straightway issuing process under S. 204, is a valid committal order and that committal order cannot be challenged as illegal on the ground that the

Magistrate has not availed of an inquiry under S.202. But, in ease the a Magistrate, after compliance with S.200, does not propose to proceed

with the case either under S.203 or under S.204, but thinks fit to make an inquiry into the allegations of the complaint as contemplated under S.

202, he may postpone the issue of process and, after considering the statements of the complainant and the witnesses recorded under S.200 and

the further statements of the witnesses, recorded under S.202, may either the dismiss complaint under S.203 or issue process under S.204 as

warranted by the facts of each case. Once the Magistrate resorts to follow S.202, which is an enabling provision, it would be clear that the

Magistrate wants to satisfy himself either by an inquiry or by an investigation, whether or not there is sufficient ground for proceeding. In other

words, the Magistrate taking cognizance of the offence requires some more material in support of the allegations made in the complaint in addition

to the statements made on oath by the complainant and the statement or statements. This witness or witnesses, if any, examined under S.200 so as

to enable him to form an opinion as to whether process should be issued or not. As repeatedly pointed out, the proviso to S.202(2) makes it

obligatory for the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath. This course of resorting to an

inquiry under the proviso to S.202 (2) in cases triable exclusively by the Court of Session, is always desirable, though not mandatory, for the

various reasons stated supra, and thereafter the Court shall issue the process and commit the case under S.209 if there is sufficient ground for

further proceeding.

27. The next question that arises for consideration is whether the complainant should be called upon to produce all his witnesses for examination on

oath by the Court when it resorts to an inquiry as per the proviso to sub-S.(2) of S.202. On this point also there is a conflict of views. In Paranjothi

Udayar v. State 1975 M.L.J. CrL. 629 = 1975 L.W. (CrL.) 229 Krishnaswamy Reddy, J. has expressed the view that the recording of statements

of all witnesses on oath as provided under the proviso to S.202 (2) and furnishing of copies of such statements as provided under S.208(1) are

mandatory. The Division Bench of the Kerala High Court in Sulaiman v. Eachara Warier 1978 M.L.J. CrL. 630 has ruled that the proviso to sub-

S(2) of S.202 makes it obligatory on his (Magistrate's) part to call upon the complainant to produce all his witnesses and then to examine them on

oath. The Full Bench of the Kerala High Court in Bargavi Amma v. Ravindran Nair 1976 Cri.L.J. 1279 reaffirms the above view holding that the

proviso makes it obligatory on the Magistrate to call upon the complainant to produce all the witnesses and examine them. In Murugaiyan v.

Jayaveera Pandia Nadar 1979 L.W. CrL. 199. I have expressed the view that if the Magistrate has decided to resort to an inquiry under S.202, he

shall call upon the complainant to produce all his witnesses and examine them on oath and issue process only if there is sufficient ground for further

proceeding. Paul, J, while disposing of CrL.M.P. 890 of 1978 (judgment dt. 3rd March, 197(sic)). following the ruling of a single Judge of the

Andhra Pradesh High Court in M.N. Reddy v. (sic) Mal Reddy 1977 M.L.J. CrL. 10 = 1977 CrL.L.J. 1473 has held that the Magistrate is bound

to examine only the witnesses produced by the complainant when he is called upon to produce them even in an inquiry under S.202(2), CrL.P.C.,

and that, the Magistrate need not examine all the witnesses cited in the complaint. The reasoning of the learned Judge for taking the said view is

that the proviso to Sub-S.(2) of S.202 only says that the Magistrate shall call upon the complainant to produce all his witnesses and examine them

on oath, which, according to the learned Judge, means that this proviso does not say that the Magistrate shall examine all the witnesses cited in the

complaint. In M.N. Reddy's Case 1977 M.L.J. CrL. 10=1977 CrL.L.J. 1473 though the complainant therein cited ten witnesses, he produced only

P.Ws.1 to 6 and 10 and gave up the examination of the remaining P.Ws.7 to 9. The accused therein filed a petition under S.482 of the Code for

quashing the proceedings taken against them on the ground that the Magistrate taking cognizance of the offence without examining all the witnesses

cited in the complaint is in violation of the mandatory provision of S.202 (2) of the Code. This contention was rejected by the Court holding that:

the expression of "his witnesses" as occurred in the proviso shall have to be understood only as such of those witnesses that were produced by the

complainant but not those witnesses that were given up by him.

According to the learned Judge, the complainant may cite a number of witnesses, but examine only such of the witnesses from the list and give up

the remaining and the Magistrate is competent to examine only those witnesses that were produced by the complainant to produce witnesses given

up by him. It is not clear from the judgment whether the complainant gave up some of the witnesses once for all and examined only those witnesses

whom he proposed to examine before the Sessions Court.

28. In Ramachander Rao v. Baina Ramachander 1980 CrL.L.J. 593=1980 M.L.J. CrL. 67, it has been held by a Division Bench of the Andhra

Pradesh High Court that the proviso to S.202 (2) makes it clear that if the offence complained of is triable exclusively by a Court of Session, the

Magistrate shall examine all the witnesses on oath. They have made emphasis on the meaning of the word ""all"" and stated that ""all"" does not mean

some"". According to the Bench, the examination of the witnesses is not a mere formality, but a mandatory direction which has to be complied

with.

29. A learned Judge of the Calcutta High Court, before whom a similar question arose in Kamal Krishna De Vs. State and Another, quashed the

proceedings on the ground that all the witnesses mentioned in the complaint had not been examined by the Magistrate before issuing process to the

accused.

30. The Allahabad High Court in Bain Ram v. State of Uttar Pradesh 1968 CrL. L.J.

1430, while dealing with the same section, has held that in a case exclusively triable by the Court of Session, the accused could be summoned only after the Magistrate has called upon the complainant to produce all his witnesses and examined them on oath.

31. From the above decisions, it can be seen that except Paul, J., in CrI. MP. 890/1978 following the judgment of a single Judge of the Andhra

Pradesh High Court in M.N. Reddy's case 1977 CrI. L.J. 1473, which ruling has been impliedly overruled by a Division Bench of the Andhra

Pradesh High Court in Ramachander Rao's case 1980 CrI.L.J. 593, most of the Judges of this Court and the various other High Courts have taken

the view, with which I am in respectful agreement, that when once the Magistrate resorts to an inquiry under S.202 in cases triable exclusively by a

Court of Session, by application of the proviso to S.202 (2), it is imperative on the part of the Magistrate taking cognizance of the offence to call

upon the complainant to produce all his witnesses and examine them on oath before arriving at a conclusion whether he should proceed either

under S.203 or under S.204 of the Code. The failure on the part of the Magistrate to comply with this statutory direction given under the proviso

to S.202 (2) would vitiate the further proceedings taken by the Magistrate.

32. Coming to the reference on hand, it is seen from the that of witnesses appended to the complaint that the complainant has cited nine witnesses

of whom he has examined only three witnesses listed as Nos. 6, 8, and 9, besides examining himself, and the other six witnesses cited as Nos. 1, 5

and 7 have not been examined. The learned Magistrate who has committed the case has stated that he thought it fit to make an inquiry in this case

by resorting to S.202 (2). Under these circumstances, therefore, I am of the view that the learned Magistrate ought to have called upon the

complainant to produce all his witnesses and examined them on oath and he is not justified in saying that from the examination of the complainant

and the three witnesses produced before him, he came to the conclusion that a prima facie case had been made out against the accused and hence

he ordered the issue of process and passed the committal order without examining the other witnesses cited.

33. Hence, the order of committal passed by the learned Magistrate has to be and is accordingly quashed and the entire matter is restored to the

file of the committing Magistrate who, on receipt of this order, shall call upon the complainant to produce all his witnesses and examine them on oath and thereafter pass the final order according to law.