

(1983) 01 MAD CK 0035

In the Madras High Court

Case No : Criminal R.C. No. 163 of 1981

M. Govindaraja Pillai

APPELLANT

Vs

Thangavelu Pillai (Deceased by L.Rs.) and Others

RESPONDENT

Date of Decision : 18-01-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 202(1), 202(2), 202(3)

Citation : (1983) 01 MAD CK 0035

Hon'ble Judges : S. Ratnavel Pandian, J

Bench : Single Bench

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

Judgement

1. 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. Sections 200 to 203 of Chapter XV of the Cr.P.C., 1973, under the heading ""Complaints to Magistrates"", deal

with the examination of the complainant and the procedure to be followed by the Magistrate 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 has 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 an other 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.

4. 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.

5. Section 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(1) and another proviso to S. 202(2). I shall reproduce

sub-sections (1) and (2) of S. 202, 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 - (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, -

(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

under 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)".

Section 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 proceedings, and for passing such an order of 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 proceedings, he can issue process to the accused as provided under S. 204.

6. A combined reading of Sections 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-section (1) of that section, if he thinks fit to do so, after postponing the issue of process, but subject

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

discretionary power to take evidence of the witnesses on oath. The proviso to sub-section (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.

7. 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.

8. Now, I shall refer to the various decisions rendered on this point.

9. Krishnaswamy Reddy, J., in *Paranjothi Udyar and Others Vs. State and Others*, has held as follows :-

In case 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 Clauses (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.

A similar question arose before me in *P.R. Murugaiyan Vs. Jayaveera Pandia Nadar*, . In that case, it was observed that if the Magistrate, in cases

triable exclusively by the Court of Session, had 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-section (2) 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, CrI.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 resort 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.

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 Cr.P.C. the Magistrate did not consider it necessary to postpone the issue of process, the case

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

202, Cr.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, Cr.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 LJ 630 had 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 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 proceedings he has to inquire into the case himself. And if he does that the proviso to 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 (Sulaiman v. Eachara Warriar 1978 MLJ

630 referred similar cases to a Full Bench. A Full Bench of the Kerala High Court in Kaimala Bhargavi Amma Vs. Kundumadathil Ravindran Nair

and Others, , on such reference, examined the decision of the Division Bench in Sulaiman v. Eachara Warriar (supra) 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 that -

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 at 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-section (2) of the S. 202, it does not control and govern sub-section (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-section (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.

Paul, J. (while disposing of CrI.M.P. 1700 of 1977 - judgment dated 27-2-1978) : (Reported in Rajarathnam Vs. Anantha Narayanan and

Others, 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 Crl.M.P. 7809 of 1976 in Doraiswami Padayachi v. Arumugha Padayachi (judgment dated 21-6-1978),

quashed the proceedings in a Sessions case, holding that the non-application of the proviso to the sub-section (2) of Section 202 in an inquiry held

u/s 202(1) is illegal.

13. In Mokkasami v. Revenue Divisional Officer, Sivaganga 1978 M LW 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 Section 202(1), Cr.P.C., the committal proceedings were

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

Section 202(2) for a twofold 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 filed 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 CrI.P.C. was attracted to the facts of the case and the question of

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

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

taken in Paranjothi Udyar and Others Vs. State and Others, and P.R. Murugaiyan Vs. Jayaveera Pandia Nadar, . In fact, the examination of the

witnesses by resorting to Section 202(2) is only discretionary and the 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 u/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 Section 202(2) is enacted, stating that unlike a charge-sheet laid by the police, where the statements of witnesses recorded

during inquest or u/s 161(3) CrI.P.C. would be made available to the accused free of cost, the statements of witnesses tot 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).

15. The view I have expressed in P.R. Murugaiyan Vs. Jayaveera Pandia Nadar, 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 u/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

Mokkasami's case 1978 M LW 135 is in consonance with the principle underlying Paranjothi Udyar and Others Vs. State and Others, and

Murugaiyan's case (1977 Cri LJ 1700).

16. A Division Bench of the Andhra Pradesh High Court in Ramchander Rao and Others Vs. Boina Ramchander and Another, has also stressed

the importance of the inquiry under the proviso to Section 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 that

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.

17. In this connection, I feel that it would be worthwhile to compare S. 202 of the new Code and Section 202 of the old Code, the latter of which contemplated a 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 u/s 192. There was no separate provision under the old code similar or analogous to the proviso to section 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-section (1), take cognizance of the case u/s 202 and then straightway issue process u/s 204 if, in his opinion, there was sufficient ground for further proceeding. However, discretion was given to the Magistrate u/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 cases 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 therefore 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 Section 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 u/s 202(1) of the old Code, but I shall limit myself citing only some of the decisions on this aspect.

18. The Rangoon High Court in *S. D. Vardon v. R. Hearsey* (1935) Cri LJ 75 : AIR 1934 Rang 167 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 u/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 u/s 202 (of the old Code 1898) which provided for a committal inquiry. See *Thakur Prasad Singh v. Emperor* (1906-10 Cal

WN 1090).

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

The inquiry (under S. 202(1)) 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.

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 Section 202, CrI PC, is to enable the Magistrate to scrutinise carefully the allegations made

in the complaint with a view of 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 u/s 202 has been considered. Amongst those decisions are : *Paramanand*

Brahmachari v. Emperor, AIR 1930 Pat 30 : (1929) Cri LJ 554; *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 : 1932 Cri LJ 169 and *Baidya Nath Singh v. Muspratt*, ILR (1887) Cal 141. In all these

cases, it has been held that the object of the provisions of Section 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-section (1) of Section 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.

20. When Section 202 of the new code is examined in juxtaposition with Section 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 Section 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 u/s 200, and to avoid frivolous complaints.

21. In view of the above discussions, I hold that the action of the Magistrate choosing the course of resorting to an inquiry u/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 P.R. Murugaiyan Vs. Jayaveera Pandia Nadar, 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 straightway after complying with the provisions of section 200 and without resorting to Section 202. I would like to re-emphasize the view taken in Murugaiyan's case, 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 u/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.

22. The above view as to the desirability of the Magistrate holding an inquiry u/s 202(2), receives support from the principles underlying the

various statutory provisions of the Code, which I shall presently enumerate :

(1) Section 202(1) covers all the cases instituted before a Magistrate on private complaints and also cases that are made over to him u/s 192,

inclusive of the cases triable exclusively by the Court of Session. this provision lays down three alternative modes of inquiry viz., (i) 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 Section 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 Section 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 u/s 202, the proviso to sub-section (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 Sections 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 Sections 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 sections 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 u/s 202.

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

to issue process straightway u/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 Section 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 Court shows that many complainants 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 committment 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 the 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 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 u/s 202, Cr.P.C. in cases triable exclusively by the Court of Session, though such a course is not

mandatory.

(2) u/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 u/s 200 or u/s 202 of all persons examined by the Magistrate, (ii) the statements and confessions, if any, recorded u/s

161 or Section 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

offence levelled against him. The objects and reasons in respect of this newly introduced Section 208, mentioned by the Law Commission in its

41st report, reads as follows :

Where the Magistrate issues process u/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 u/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

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

(3) A new section viz., Section 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 documents referred to in Section 208), which will include the statements of the complainant and the

witnesses examined under Sections 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 -

(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 the

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

warrant-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 Vs. Ramesh Singh, , 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 Session, 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 Vs. L. Muniswamy and Others*, has 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 act 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 Sections 227 and 228 would come into operation only in committal of the proceedings by the Magistrate on it appearing to him that the offence is exclusively triable by the Court of Session, 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 Sections 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 Session. 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 Sections 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 issuing 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 more materials to decide whether or not there is sufficient ground for

proceeding against the accused.

23. 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 Sessions - stands, the Magistrate taking cognizance of an offence on a complaint after compliance with S. 200, 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,

Cr.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 u/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 case the Magistrate, after compliance with S. 200 does not propose to proceed with

the case either under Rs. 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 dismiss the 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 statement made on oath by the complainant and the statement or statements of his 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 cases under S. 209 if there is sufficient ground for further proceeding.

24. 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-section (2) of S. 202. On this point also there is a conflict of views. In

Paranjothi Udyar and Others Vs. State and Others, , Krishnaswamy Reddy, J. has expressed the view that the recording of statements of all the

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 Warriar 1978 MLJ 630 has ruled that the proviso the sub-

section (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 Bhargavi Amma v. Ravindran Nair 1979 CLJ 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 P.R.

Murugaiyan Vs. Jayaveera Pandia Nadar, , 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 CrI.M.P. 890 of 1978 (judgment dated 3-3-1978), following the ruling of a single Judge of the Andhra

Pradesh High Court in M. N. Reddy v. Kanakanti Mal Reddy 1977 Mad LJ10 : 977 Cri LJ 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), Cr.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-section (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

complainant. In *Musara Narayana Reddy and Others Vs. Kanakanti Mal Reddy and Another*, , 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 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 (sic) 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 the examined only those witnesses whom he proposed to examine before the Sessions

Court.

25. In *Ramchander Rao and Others Vs. Boina Ramchander and Another*, , 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 laid 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.

26. A learned Judge of the Calcutta High Court, before whom 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.

27. The Allahabad High Court in Babu Ram v. State of Uttar Pradesh 1978 Cri 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.

28. From the above decision, it can be seen that except Paul, J. in Cri. M.P. 890/78, following the judgment of a single Judge of the Andhra

Pradesh High Court in Musara Narayana Reddy and Others Vs. Kanakanti Mal Reddy and Another, , which ruling has been impliedly overruled

by a Division Bench of the Andhra Pradesh High Court in Ramchander Rao and Others Vs. Boina Ramchander and Another, , 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.

29. Coming to the reference on hand, it is seen from the list 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 to

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.

30. 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.

31. Order accordingly.