
(1992) 08 GUJ CK 0005
In the Gujarat High Court

S.J. Singh and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 04-08-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 190, 191, 192, 200
Penal Code, 1860 (IPC) — Section 302, 323, 330, 34

Citation : (1993) 2 GLR 1267

Hon'ble Judges : M.S. Parikh, J

Bench : Single Bench

Judgement

M.S. Parikh, J.—Can a Magistrate who has been genuinely cited as a witness in a complaint, which might ultimately lead to disclosure of an offence triable by Sessions Court, issue process u/s 204 of the Code? This precisely is a question which has been posed in this petition.

2. The complaint which has been referred to by the petitioners recites that the deceased Husen Mamad Bhadala was the grand son of the complainant Karimabai Haji Abdeman Sale Bhadala. Although the deceased Husen Mamad Bhadala was innocent, he was apprehended by the petitioners who have been shown to be the accused Nos. 1 and 2 in the complaint, on 15th July, 1985 from Mandvi town. It is alleged in the complaint that said Husen Mamad Bhadala was beaten and ill-treated in the manner described in the first paragraph of the complaint. He was also made to move in the streets of Mandvi town in a condition described in the said para. Thereafter, he was taken to Bhuj on 16th July, 1985. At that time he was accompanied with one Mr. Anvar Abdulla Sama, who has been cited as a witness in the complaint. Even at Bhuj said Husen Mamad Bhadala was severely beaten both on his head and on whole of his body. The fact that he was apprehended on 15th July, 1985 was published in the newspaper "Kutch Mitra". As per law he ought to have been produced before the nearest Magistrate within a period of 24 hours of his apprehension. Instead of so acting, the petitioners and the third accused shown in the complaint Mr. Bhati, had severely beaten him for the purpose of extracting confession of some

offence. At about 5-30 O'clock in the evening on 17th July, 1985 the complainant's daughter, i.e., the mother of said Husen Mamad Bhadala had preferred an application u/s 97 of the Code, before the learned Chief Judicial Magistrate before whom the complaint in question was filed.

3. In para 2 of the complaint in question it is recited that while aforesaid Husen Mamad Bhadala was in custody of the petitioners and third accused shown in the complaint, all the said accused had severely beaten him resulting in serious injuries to him, leaving him in a serious condition. Consequently he was taken to Dr. Arya of village Madhapar of Bhuj Taluka and he was treated with injections, medicines and glucose. However, his condition was so serious that he was ultimately required to be taken to the General Hospital at Bhuj where after examining him the Doctors expressed that the condition of said Husen Mamad Bhadala was extremely serious and it was advisable to remove him to Ahmedabad. Necessary certificate for treatment at Ahmedabad as well as necessary transfer certificate was issued from the General Hospital, Bhuj. Even then the accused persons including the petitioners had forsaken said Husen Mamad Bhadala instead of taking him to Ahmedabad. He therefore, went to Mandvi and had taken treatment in the Government Hospital at Mandvi and thereafter had taken treatment in Gokul Hospital. However, since even there his condition was serious, he was brought to Bhuj where he had lodged a private complaint before the learned Chief Judicial Magistrate before whom the complaint in question was given. That complaint was given Criminal Case No. 780 of 1985. In that complaint also it was stated that as the condition of said Husen Mamad Bhadala was serious he was lifted by four persons for the purpose of producing him before the learned Chief Judicial Magistrate, who recorded his statement on his complaint. At that time he was not able to stand and had to depose to the facts of his complaint by sitting. After giving complaint before the learned Chief Judicial Magistrate, he had gone to the dispensary of Dr. Navlekar for treatment. However, observing his condition to be serious the Doctor transfused blood to him. However, finding that his condition was very serious Dr. Navlekar informed the relatives to take him home. It is finally recited that he had expired on his way home. It is, therefore, alleged that said Husen Mamad Bhadala had died as a result of the beating and torture resorted to by the accused persons including the petitioners. In the rest of the paragraphs of the complaint various pieces of evidence have been stated. In para 7 list of witnesses is given. At Item Nos. 8 to 11 following witnesses are named:

Shri Pathan, peon, Chief Judicial Magistrate Court, Shri Fakirmamad, peon of the Court of Chief Judicial Magistrate, Shri N.R. Pathan, Chief Judicial Magistrate, Kutch-Bhuj (himself) Concerned Clerk for production of the complaint filed by the Husen Mamad Bhadala, who is hereinafter referred to as "the deceased" including the statement recorded before the learned Chief Judicial Magistrate.

4. 3A. The aforesaid complaint was filed on 31-8-1985 and on the same day the learned Chief Judicial Magistrate had taken the cognizance and stayed further

proceedings u/s 210(1) of the Code, as the police was investigating the matter with regard to the same facts as are disclosed in the complaint. The learned Chief Judicial Magistrate while staying the further proceedings of the complaint directed the concerned Police Sub-Inspector to submit his report u/s 173 of the Code and to remain present before the learned Chief Judicial Magistrate on 15th September, 1985. It further appears from the certified copy annexed with the petition that on 11th February, 1986 the complainant was examined on oath. It appears that the final report under Criminal Register No. 1-91/85 was received and in that police asked for Class-A Summary. It also appears from the order of the learned Chief Judicial Magistrate that such a summary was asked as till that stage it was not fixed as to who had beaten the deceased and as a result of whose beating he had died and for the purpose of keeping the investigation pending, Class-A Summary was sought for by the police. It is doubtful whether the report so received by the learned Chief Judicial Magistrate was a final report or an interim report. However, that is not of much relevance for the purpose of decision in this matter. It is observed by the learned Chief Judicial Magistrate that he thought it fit to further inquire into the matter. He, therefore, proceeded to examine 10 witnesses. The summary of such examination has been noted in para 3 of the order. It does not appear from the order of learned Chief Judicial Magistrate as to what happened to aforesaid four witnesses inclusive of learned Chief Judicial Magistrate himself, who was cited as a witness in the complaint. The ultimate order that was passed on 3rd February, 1987 by the learned Chief Judicial Magistrate was to issue process of arrest by taking the complaint on record in so far as the petitioners were concerned. He however dismissed the complaint against me accused No. 3-Mr. Bhati, Custom Inspector, Bhuj, as there was no sufficient reason to proceed against him further. It is against this order of 3-2-1987 that the petitioners have approached This Court by way of this petition u/s 482 of the Code.

5. It may be noted here that consequent upon order dated 9th January, 1992 the accused No. 3-Mr. Bhati is now the respondents No. 3 in this petition.

The petitioners have sought following relief in this petition:

allow this application and quash and set aside the order passed by the learned Chief Judicial Magistrate, Kutch-Bhuj dated 3-2-1987 below the application bearing 32 of 1985 (Criminal Case No. 916 of 1987) and dismiss the complaint filed by the opponent No. 2.

Upon the presentation of the application on 11-2-1987, rule was issued and ad-interim relief in terms of para 9(b) was granted, with the result that the process issued against the petitioners and further proceedings were stayed. Mr. Naik learned Advocate for the petitioners has conceded that the complaint as such cannot be quashed and that part of the prayer cannot be granted. He, therefore, concentrated upon the first part of the prayer, namely, quashing of the impugned order passed by the learned Chief Judicial Magistrate on 3-2-1987 for issuance of process of arrest by taking the complaint under Sections 302, 330, 323 and 34 of

Indian Penal Code to file. He also submitted for quashing whole inquiry.

6. The short submission of Mr. Naik is that when the learned Chief Judicial Magistrate coupled with his peons came to be cited as material witnesses to cover the allegations made in para 2 of the complaint, the learned Chief Judicial Magistrate could not have passed the impugned order of issuance of process u/s 204 of the Code, inasmuch as he could not have acted as a Judge in a case where he himself was cited as a witness. He read before me the provisions contained in Sections 190, 191, 192, 200, 203 and 204 of the Code. He also placed reliance upon the provision contained in Section 479 of the Code.

7. Sections 190, 191 and 192 are contained in Chapter No. 14 with the title: "Conditions Requisite for Initiation of Proceedings". Chapter 15 with the title "Complaints to Magistrate", begins with Section 200. Section 204 is contained in Chapter 16 with the title "Commencement of Proceedings before Magistrate".

8. It is submitted on behalf of the petitioners that according to Section 190 any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence as stated in Clauses (a) to (c) which read:

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

It is provided in Sub-section (2) that the Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under any of the aforesaid clauses of such offences as are within his competence to inquire into or try. Section 191 reads:

191. Transfer on application of the accused: When a Magistrate takes cognizance of an offence under Clause (c), of Sub-section (1) of Section 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate, and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

It is submitted on behalf of the petitioners that on a plain reading of the aforesaid provision, when cognizance is taken under Clause (c), the Magistrate cannot proceed further and take evidence unless the accused is informed that he is entitled to have the case inquired into or tried by another Magistrate and in the event of the accused objecting to further proceedings before the Magistrate taking cognizance, the case has to be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

Reference is then made to Section 200 contained in Chapter 15 dealing with

complaints to Magistrate. The provision reads:

200. Examination of complainant:

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

Provided 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 u/s 192;

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

9. Section 201 deals with the procedure by Magistrate not competent to take cognizance of the case. Section 202 deals with the procedure that may be adopted by any Magistrate upon receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192. Section 203 of the Code deals with the dismissal of complaint and reads as under:

203, Dismissal of complaint:

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

10. Mr. Naik learned Advocate for the petitioners then read the material provision contained in Section 204 which is contained in Chapter 16 relating to "Commencement of proceedings before Magistrate". By virtue of Section 208 where, in a case instituted otherwise than on a police report, the offence is shown to be triable exclusively by the Court of Sessions, the Magistrate is required without delay to furnish to the accused free of cost copies of various documents particularised in that provision. Section 209 deals with commitment of case involving any offence triable exclusively by the Court of Sessions.

11. It is submitted on behalf of the petitioners that the legislature has taken care of one of the principles of natural justice that a person shall not be both a Judge and a witness in the same cause while enacting the provision contained in Section 191, which is quoted above. According to his submission the said provision should be made applicable to the present case.

12. In reply, Mr. J.G. Shah learned Advocate for the respondent No. 2 has submitted that although Section 191 casts a duty on the part of a Magistrate taking cognizance u/s 190(1)(c) to inform the accused before proceeding further into the matter so as to enable the accused to have his say whether he wants FURTHSR proceedings being held by the same Magistrate or whether he wants the case being transferred to some other Magistrate, the Magistrate is not prevented from taking cognizance. According to his submission there is no prohibition for the Magistrate to take cognizance of an offence even in cases falling u/s 190(1)(c) of the Code. According to his submission Section 200 deals with recording of the statements of complainant and witnesses by the Magistrate who deals with a complaint lodged before him. If the Magistrate could take cognizance, he could as well record the statements of the complainant and the witnesses u/s 202 of the Code and there is no prohibition in following the procedure laid down in that section. Referring then to Section 204, Mr. Shah submitted that the Magistrate is empowered to issue process for the purpose of securing presence of the accused at the ultimate trial of the case. According to his submission powers of the Magistrate in issuance of process u/s 204 are akin to the powers of the police in arresting the accused persons. For that purpose he read before me the provisions contained in Sections 41, 43 and 44 of the Code. Sections 41, 43 and 44 of the Code are contained in the Chapter V "Arrest of persons". Section 41 confers power on the police without an order from a Magistrate and without a warrant to arrest any person of the categories and under circumstances noted in Clauses (a) to (i) and Sub-section (2) thereof. Section 42 deals with arrest of a person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence, refuses on demand of such officer, to give his name and residence or gives false name and residence. Section 43 deals with arrest by private person and procedure on such arrest. Section 44 deals with arrest of a person by Magistrate and reads as under:

44. Arrest by Magistrate:

(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

13. According to the submission of Mr. Shah the consequences of the arrest under the aforesaid provisions, either by police or by a Magistrate, are identical with the consequence appearing in Section 204 of the Code. Section 204 may at this stage itself be reproduced. It reads:

204. Issue of process:

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under Sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provision of Section 87.

14. It is finally submitted by Mr. Shah that since the purpose of issuance of process in all the aforesaid cases is to secure presence of the accused persons at trial, it is immaterial that the Magistrate himself is cited as one of the witnesses by the complainant. According to his submission the jurisdiction and power to issue process u/s 204 of the Code should be held unaffected by the fact that the Magistrate himself is a witness in the cause. Short question that arises for consideration is whether a Magistrate who has been truly cited as a witness in a complaint, can issue process u/s 204 of the Code.

15. In order to deal with the question in its proper perspective, it is in the first instance necessary to dispel the doubt which is created by making reference to Sections 41, 43 and 44 of the Code. As can be seen from the said provisions noted above, Sections 41, 43 and 44 are set out in Chapter V relating to arrest of persons. Sections 41 and 43 deal with the powers of police and of private persons to arrest certain categories of persons who commit certain classes of offences. Those provisions have no bearing with the powers of a Magistrate under certain other circumstances. Section 44 deals with powers of a Magistrate. But it is plain to see from the provision itself quoted above that in arresting a person u/s 44 a Magistrate does not take cognizance of the case. The provision neither deals with taking of cognizance nor with conducting of inquiry or trial after taking of cognizance. It also does not deal with a process which would be required to be issued upon or after taking of cognizance of the case. As against this, Section 204 is contained in Chapter XVI dealing with commencement of

proceedings before Magistrate. It is plain to find that the provisions in Sections 41, 43 and 44 (Section 44 in particular) and the provision contained in Section 204 arise under altogether different situations and by no stretch of imagination can be said to be comparable in respect of the nature of the power of the Magistrate. It is plain to find that the process contemplated u/s 204 of the Code is a judicial process to be issued by a Magistrate taking cognizance of an offence.

16. MR. Shah conceded that taking of cognizance of an offence is a judicial function and yet even if a Magistrate is a witness as contemplated u/s 190(1)(c) of the Code, he can himself take cognizance, but then has to follow the procedure laid down in Section 191 of the Code. According to his submission, however, such a Magistrate can also issue process u/s 204 of the Code. The argument cannot be accepted for by virtue of Section 191 of the Code also before issuance of process a Magistrate is required to give an opportunity to the accused to have his say as to whether the case should be inquired into or tried by another Magistrate. In such a case the accused is entitled to object to further proceeding before the Magistrate being taking cognizance and once the accused objects to further proceeding before the Magistrate taking cognizance, the case has got to be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf. It is plain to see that Section 191 proceeds on the principle that a Judge cannot be both a prosecutor and a Judge and a Judge cannot be a witness and a Judge in the same cause. Thus, the legislature has taken care of the particular rule of natural justice while enacting the provisions contained in Section 191.

17. There is no reason why such a rule be not impliedly read in Section 204 of the Code, for the legislature has taken care of the very same rule even in Section 479 of the Code. Section 479 reads as under:

479. Case in which Judge or Magistrate is personally interested: No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation: A Judge or Magistrate shall not be deemed to be a party to, or personally interested in, any case by reason only that he is concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case.

Section 479 corresponds to old Section 556, omitting in the Explanation the words "within the meaning of this section" after "personally interested" and the words "a Municipal Commissioner or otherwise" after "by reason only that he is" and deleting the illustration which ran thus:

A as Collector upon consideration of information furnished to him, derelicts the

prosecution of B for a breach of the Excise Laws A is disqualified from trying this case as a Magistrate.

18. The scheme and purpose of the provision quoted above clearly shows that it applies to various stages of judicial function to be exercised by a Magistrate. The essence of the rule can be found well explained in the case of *Manak Lal Vs. Dr. Prem Chand*, In a case of misconduct alleged against an Advocate, the Tribunal appointed by the learned Chief Justice of the High Court of Rajasthan consisted of Shri Chhangani as one of the three members as its Chairman, who had himself appeared on behalf of the complainant in the proceedings u/s 145 of the Code of Criminal Procedure in question. The Supreme Court held that the Constitution of the Tribunal suffered from a serious infirmity and observed in para 4:

It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially, and it is of the essence of the judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.

It has further observed:

In dealing with cases of bias attributed to members constituting tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case.

19. One of the cardinal principle of natural justice is maxim "*nemo debet esse index in propria cause*" that is to say no one shall be a Judge in his own cause and it can be seen from the reading of Section 191 as well as Section 479 quoted above that the legislature has clearly displayed such principle to cover various stages of the proceedings upon and after taking of the cognizance of an offence by a Magistrate. It is, therefore, clear that a Magistrate cannot appropriate to himself a role of adjudicator and a witness, adjudicate in a sense that he takes decision either to issue or not to issue a process as contemplated under the provisions contained in Sections 204 and 203 of the Code. The rule can be tested in the facts of the present case. As stated earlier, the complainant has cited four witnesses including the learned Chief Judicial Magistrate himself as the witness

on the allegation of the fact that the condition of the deceased was serious when he was brought before the learned Chief Judicial Magistrate himself in as much as he was lifted by four persons for the purpose of producing him before the learned Chief Judicial Magistrate, who had an occasion to record his statement on his complaint. Thus, as a witness the Magistrate himself could be required, if called upon to step into the witness box, to state upon his observation the state of the health of the complainant at the time when he had an occasion to record his statement. The complainant in so far as the present complaint is concerned is the grand mother of the deceased. The question is whether she could have asked the Magistrate to step down and render his version as a witness on the aforesaid facts; could the Chief Judicial Magistrate himself record his own statement as a witness? It would be shocking to the notion of judicial propriety and fair play if those questions could be answered in the affirmative. In any case the accused could have legitimately apprehended that in taking the decision about the issuance of process against them the mind of the Magistrate might have worked under a bias, he having been cited as a witness to state certain facts.

20. Mr. Shah submitted that a Magistrate, while issuing process under Section 204, is not required to weigh evidence meticulously while deciding whether process is required to be issued or not. He has referred to a decision of the Supreme Court in the case of Kewal Krishan Vs. Suraj Bhan and Another, , where the Supreme Court examined the scheme of the Code reflected in Sections 200, 203, 204, 209 and 227 thereof. It has been held that at the stage of Sections 203 and 204 of the Code, in a case exclusively triable by the 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, 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 this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. 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. 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 could be sufficient ground for committing them for trial to Court of Sessions. Nonetheless the Supreme Court has not said that the function of a Magistrate under Sections 203/204 is not a judicial function.

21. In the above view of the matter, it is clear that the learned Chief Judicial Magistrate who was cited as a witness in the complaint, could not have issued process u/s 204 of the Code against the petitioners. The question, therefore, has got to be answered accordingly.

22. Before parting with the matter, it would be necessary to deal with the submissions of Mr. Naik that even recording of the statements by the learned Chief Judicial Magistrate in so far as other witnesses are concerned should be

quashed. In the first place the petitioners have not made grievance in this petition against the recording of the statements, in the second place in ground appearing at page 7 of the memo of the petition, the petitioners have made grievance about learned Chief Judicial Magistrate having not properly applied his mind on the statements recorded by him. According to the petitioners, the statements of the persons are not consistent and are contradictory on material aspects. The only relief the petitioners have prayed for is to quash and set aside the order of issuance of non-bailable warrants against the petitioners, passed by the learned Chief Judicial Magistrate, Kutch at Bhuj on 3rd February, 1987. In that view of the matter there is no question of quashing the statements recorded by the learned Chief Judicial Magistrate. Mr. J.G. Shah, learned Advocate for the respondent No. 2, upon being asked whether the complainant wants to examine the learned Chief Judicial Magistrate Mr. N.R. Pathan, who is now reported to have been promoted as an Assistant Judge, as a witness, upon instructions submitted that the complainant did not want to examine Mr. N.R. Pathan as her witness. Under such circumstances the learned Chief Judicial Magistrate, Kutch at Bhuj shall have now to apply his mind to the material on record for deciding whether any process against the petitioners is required to be issued or not. He shall take into consideration the report of the Investigating Officer, if any, including the statements of the witnesses recorded by the learned Chief Judicial Magistrate Mr. N.R. Pathan. Final order is, therefore, passed as under:

23. The order dated 3rd February, 1987 passed by the learned Chief Judicial Magistrate, Kutch at Bhuj in No. 32 of 1985 (Criminal Case No. 916 of 1987) in so far as it relates to issuance of non-bailable warrants against the petitioners is hereby quashed and set aside. The matter is remanded to the learned Chief Judicial Magistrate, Kutch at Bhuj, who is obviously not the same Chief Judicial Magistrate, for proceeding with the same in accordance with the law bearing in mind the observations contained in this judgment in so far as the present petitioners are concerned. It is made clear that the accused persons, namely, the petitioners shall not have any say into the matter before they are called upon by the Chief Judicial Magistrate dealing with the matter. Rule is made absolute to the aforesaid extent.