

F.D. Larkins Vs. State

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Court : Delhi

Decided On : Sep-12-1984

Reported in : 1984(2)Crimes734; 26(1984)DLT486

Judge : J.D. Jain, J.

Acts : [Official Secrets Act, 1923](#) - Sections 3 and 13(3); [Indian Penal Code \(IPC\), 1860](#) - Sections 120B; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 4(2), 200, 202, 208 and 460

Appeal No. : Criminal Revision Appeal Nos. 78 and 90 of 1984

Appellant : F.D. Larkins;jasbir Singh

Respondent : State;state

Advocate for Pet/Ap. : R.L. Mehta,; Neerja Mehra,; Harjinder Singh,;

Judgement :

J.D. Jain, J.

(1) The facts giving rise to the above mentioned revision petitions succinctly are that four persons Maj. Gen. (Retd.) F. D. Larkins (petitioner in Cr. R. 78/84), his brother Air Vice-Marshal (Retd.) K. H. Larkins, Lt. Col. (Retd.) Jasbir Singh (petitioner in Cr. Revision No. 90/84) and Jaspal Singh Gill alias Jassi Gill have been committed by Additional Chief Metropolitan Magistrate, New Delhi, vide order

dated 16th April 1984 to stand trial on charges under Sections 3, 5, 6, 9 of the [Official Secrets Act, 1923](#) (for short the Act) read with Section 120-B of the Indian Penal Code, on the ground that the offences are exclusively triable by the Court of Sessions. Earlier cognizance was taken by the learned Additional Chief Metropolitan Magistrate on 4th February 1984 on a charge-sheet being presented by the police who had investigated into the case and the complaint instituted by the Deputy Commissioner of Police, Special Branch, Delhi, which was attached to the police report. The petitioners have called in question the legality and validity of the cognizance of the offences taken by the learned Additional Chief Metropolitan Magistrate as also the order of commitment, mentioned above, on various grounds.

(2) On the basis of a complaint lodged by Air Vice Marshal S. Raghavendran, Air Headquarters, New Delhi, on 9th November 1983 alleging that Air Vice Marshal (Retd.) K. H. Larkins had committed an offence of espionage during the period 21st March 1983 to 5th April 1983, a case under Sections 3, 5 & 9 of the Act was registered at Police Station Tughlak Road on 10th November 1983. The investigation of the case was conducted by Shri R.S. Khurana, Inspector, Special Staff, under the supervision of the Deputy Commissioner of Police, Special Branch-11, New Delhi. On completion of investigation, a police report under Section 173 of the Code of Criminal Procedure (for short the Code) which was accompanied by a complaint signed by the Deputy Commissioner of Police, Special Branch, Delhi, was filed in court and cognizance of the offence was taken by the learned Additional Chief Metropolitan Magistrate who made the following order :

'THIS challenge under Sections 3, 5, 6 & 8 of the O. S. Act & Section 120-B Indian Penal Code has been presented today. Heard. Perused the record. I take cognizance of the offence. The case be registered. The accused are stated to be in judicial custody up to 6th February 1984. Put up on 6th February 1984 for appearance of the accused and for supplying copies to them'.

(3) Consequently, as stated above, the accused were committed to the Court of Session for trial vide order dated 16th April 1984.

(4) The learned counsel for the petitioners have assailed both the aforesaid orders on the following grounds :

(1)The case is not exclusively triable by the Court of Session in view of the provisions contained in sub-sections (1)& (2) of Section 13 of the Act. (2) The court could not take cognizance of the offences under the Act except on complaint made by the appropriate Govt. or under the authority from the appropriate Govt. as envisaged in sub-section (3) of section 13. So, the filing of the police report and the cognizance taken on its basis is bad in law. (3) Cognizance ought to have been taken on the complaint, if any, made by the Deputy Commissioner of Police in accordance with the provisions contained in Section 200 of the Code, but that has not been done. (4) The court ought to have examined all the prosecution witnesses if the court had found the case to be exclusively triable by the Court of Session, as contemplated by the proviso to sub-section (2) Section 202 of the Code but commitment was made without complying with the said provision of law and as such it is liable to be quashed.

(5) Ground No. 1. Sub-sections (1) and (2) of Section 13 of the Act on which reliance is placed read as under :

'(1)No Court other than that of a Magistrate of the first class specially empowered in this behalf by the appropriate Government, which is inferior to that of a District or Presidency Magistrate shall try any offence under this Act. (2) If any person under trial before a Magistrate for an offence under this Act at any time before a charge is framed claims to be tried by the Court of Session, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that Court, notwithstanding that it is not a case exclusively triable by that Court.'

(6) The argument advanced on behalf of the petitioners precisely is that all the offences in the instant case are triable by a first class Magistrate specially empowered in this behalf as envisaged under sub-section (1) (supra) and it is only if an accused claims to be tried by the Court of Session before the charge is framed that the Magistrate has to commit the case to the Court of Session for trial even though it is not otherwise exclusively triable by that Court. However, such an interpretation of the provision of Law is not warranted on the plain language

thereof. All that sub-section (1) lays down is that a court inferior to that of a District or Presidency Magistrate, except a Magistrate of the first class specially empowered in this behalf by the appropriate Government, shall not try any offence under the Act. It is thus a disabling provision so far as inferior courts are concerned but it nowhere lays down that a court of District or Presidency Magistrate or for that matter court of the Magistrate of first class specially empowered in this behalf will be entitled to try an offence even though it is exclusively triable by the Court of Session under the Code. Similarly, sub-section (2) simply enables an accused to claim to be tried by the Court of Session, a superior court, notwithstanding that the offence is not exclusively triable by that Court. This conclusion may be more clearly enunciated by reference to the nature of offences with which we are concerned in the instant case. Clause (c) of Section 3(1) of the Act deals, with offences of spying and prescribes punishment of imprisonment for a term which may extend to 14 years where the offence is committed in relation to any work of defense, arsenal, naval, military or air force establishment etc. or in relation to the naval, military or air force affairs of the Government. The case against the petitioners is in relation to military and air force affairs of the Government and as such they would be prima facie, if convicted, liable to be sentenced to imprisonment for 14 years. Part I of the first Schedule to the Code contains the classification of offences under the Indian Penal Code while part II deals with classification of offences against other laws- Its perusal would show that if an offence is punishable with death imprisonment for life or imprisonment for more than seven years it is triable exclusively by the Court of Session. It is also cognizable and non-bailable. On the other hand, if an offence is punishable with imprisonment for three years and upward and not more than seven years, it will be triable by a Magistrate of the first class. Thus, according to the said classification an offence under Section 3(1)(c) of the Act will be clearly triable by the Court of Session alone and no other court.

(7) Section 4 deals with cognizable offences triable under the Indian Penal Code and other laws. Its sub-section (1) lays down that all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions contained in the Code. However, its sub-section (2) provides that all offences under any other law shall be investigated, enquired into,

tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Evidently this sub-section contains a statutory recognition of the principle that a special law creating offences may also create special procedure for dealing with them. In other words, the special law creating any special procedure would not be invalid as being inconsistent with the provisions of the Code. However, there can be no manner of doubt that where an enactment provides a special procedure only for some matters, its provisions must apply in regard to those matters and the provisions of the Code will apply to the matters on which the special law is silent. This position is further amplified by Section 5 of the Code which provides that nothing in the Code shall affect any special law. The said provision embodies the maxim 'generally specialibus non derogant'.

(8) The question would, therefore, arise whether the provisions contained in sub-sections (1) & (2) of Section 13 of the Act are in any way inconsistent with or repugnant to the general provisions contained in the Code so as to over-ride the same. As already observed by me, sub-section (1) is only intended to ensure trial of offences by a relatively senior class of a Magistrate but it nowhere lays down that offence under Section 3(1)(c) will be triable by the court of a Magistrate of the first class specially empowered or Presidency Magistrate etc. even though it falls within the category for which sentence may extend to imprisonment for 14 years. It may be pertinent to notice here that Section 3(1)(c) of the Act also comprises offences which are punishable with sentence of imprisonment up to three years only. In other words, the offences described in Section 3 comprise two distinct categories, one punishable with imprisonment up to three years and the other punishable with imprisonment up to 14 years. The allegations contained in the complaint instituted against the petitioners prima facie make out an offence falling under the latter category and as such it will be triable exclusively by the Court of Session. Even attempt to commit or abetment to commit an offence under the Act is punishable with the same punishment and the accused is liable to be proceeded against in the same manner as if he had committed such an offence by virtue of Section 9 of the Act. Indeed, sub-section (2) of Section 13 in terms recognises two distinct categories of offences under the Act itself, one triable exclusively by the

Court of Session and the other triable by the court of a Magistrate of the first class etc. as would be clear from the words 'notwithstanding that it is not a case exclusively triable by that Court' appearing therein. These words, to my mind, clinch the issue in favor of the view that all the offences under the Act are not triable by a court of the Magistrate specified in sub-section (I) of Section 13. I am fortified in the view I have taken indirectly if not directly by order dated 12th November 1981 of a learned Judge of this Court in Cr. M.(M) No. 448/81, Tikka Ram Kashyap v. State (Delhi Administration), dismissing in limine the revision petition which was directed against an order of an Additional Sessions Judge holding that an offence falling under clause (e) of Section 3 is exclusively triable by the Court of Session. Hence, this contention of the petitioners' counsel is devoid of any merit.

(9) Ground No. 2 Adverting to Section 13(3) of the Act, the learned counsel for the petitioners have canvassed with considerable force that in view of the categorical prohibition contained therein, cognizance of the offences under the Act could be taken only upon a complaint made by order of or under authority from the appropriate Government which in this case would mean Central Government or some officer empowered by the appropriate Government in this behalf. However, as would appear from order dated 4th February 1984 which is under challenge the cognizance was taken by the Additional Chief Metropolitan Magistrate on police report submitted under Section 173 of the Code rather than the complaint. In view of the explicit bar contained in Section 13(3) it is not disputed by the learned counsel for the State that cognizance of the offences under the Act can be taken only on a complaint as envisaged in Section 13(3) of the Act and not otherwise. However, according to him, a complaint by a duly authorised officer was filed Along with the police challan and it was duly taken notice of the learned Additional Chief Metropolitan Magistrate while taking cognizance of the offences and as such there is no discernible lapse on the part of the court below. Admittedly, a complaint dated 27th January 1984 purporting to have been instituted by Shri Ramakrishnan, Deputy Commissioner of Police, Special Branch, Delhi, was filed Along with the police challan and there is a specific reference to this fact in the list of documents filed with the police challan dated 27th January 1984. Further the original sanction accorded by the Central Government on 25th January 1984 to prosecute the

petitioners etc. as contemplated in sub-section (3) of Section 13 of the Act was also filed Along with the complaint. The said sanction authorises Shri Ramakrishnan, Deputy Commissioner of Police, Special Branch, to lodge a complaint in respect of the offences in question. Still the gravamen of the grievance of the petitioners is that the cognizance of the offences was taken on police challan and not on the complaint filed by the authorised person Along with the challan as would appear from a bare reading of the order dated 4th February 1984. The precise argument put forth is that the complainant did not present the complaint personally to the court and only the Special Public Prosecutor who was representing the State appeared when the police challenge was presented to the court. Further, the opening sentence of the order dated 4th February 1984 refers to the challan and not the complaint and there is not even a whisper about the complaint in the said order. In this context my attention has also been invited to the fact that a prayer was made in the complaint for exemption of the complainant from personal attendance on every date of hearing but no such order was made by the learned Magistrate. Thus, relying upon *Narayandas Bhagwandas Madhavdas v. The State of West Bengal*, : 1959 CriLJ1368 , it has been urged that it is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 and subsequent Sections of Chapter Xv of the Code or under Section 204 of Chapter Xvi of the Code that it can be positively said that he has applied his mind judicially to the complaint and has taken cognizance of the offence complained of.

(10) It is now well settled that the expression 'taking cognizance' merely means judicial application of the mind by the Magistrate to the facts mentioned in the complaint with a view to taking further action. No doubt, in the case of *R. R. Chart v. State of Uttar Pradesh*, : 1951 CriLJ775 and again in *Narayandas Bhagwandas Madhavdas* (supra) the Supreme approved the following observations of Das Gupta, J., in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar. Banerjee*, : AIR1950 Cal437 :

'WHAT is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence

under S. 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-proceeding under Section 200 and thereafter sending it for inquiry and report under S. 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under S. 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.'

(11) However, the Supreme Court made it abundantly clear that it is impossible to attempt to define what is meant by 'taking cognizance' and as to when cognizance is taken of an offence will depend upon the facts and circumstances of each case. Similarly, in *Tula Ram & Others v. Kishore Singh*, : 1978 CriLJ8 , it was observed that :

'THUS,what Section 190 contemplates is that the magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine of test the validity of the said allegations.'

(12) Applying this criterion it may well be presumed that the learned Additional Chief Metropolitan Magistrate must have perused the complaint too at the time of taking cognizance of the offences. This inference may well be drawn from his observation, 'Heard. Perused the record.' Needless to say that the substance of the allegations contained in the police report under Section 173 of the Code which, of course, was superfluous in the instant case having regard to the explicit provision contained in Section 13(3) of the Act, and that of the complaint was identical. Moreover, it does not appeal to reason that the Special Public Prosecutor would not have invited the attention of the learned Magistrate to the sanction accorded by the Central Government for prosecution of the accused persons which was a condition precedent to the taking of cognizance by the court. Looked at the matter from this angle, I am not persuaded to hold that there was no application of judicial mind by the learned Additional Chief Metropolitan Magistrate on the contents of the complaint even though she has not expressly alluded to the

complaint in the aforesaid order.

(13) Ground No. 3 The next contention of the petitioners is that provisions of Section 200 of the Code which lays down the procedure to be followed by a Magistrate taking cognizance of an offence on a complaint have not been complied with inasmuch as it was incumbent on the Magistrate to examine the complainant on oath and the witnesses present, if any, before issuing the process. However, the learned Magistrate did not follow the said procedure and as such the order made by her for issue of process which could only be made under Section 204 of the Code was bad in law. This argument again is devoid of any merit as it evidently overlooks the first proviso to Section 200 which lays down clearly that in cases of complaints by a court or by a public servant acting or purporting to act in the discharge of his official duties, examination of the complainant and his witnesses is not at all necessary. Obviously the statute has extended this privilege to public servants in the expectation that a complaint would be filed by such public servants with due care and caution i.e. after fully ascertaining the complicity of the accused in the commission of the crime disclosed in the complaint. Of course, the Magistrate is not absolved from his duty to peruse the complaint and then make up his mind whether to summon the accused or not. As 'already observed, there is sufficient ground to warrant an inference that the learned Additional Chief Metropolitan Magistrate did apply her mind in the instant case before taking cognizance of the offences.

(14) Faced with this predicament, the learned counsel for the petitioners have come forth with a rather ingenious argument that the Deputy Commissioner of Police, Special Branch, who had instituted the complaint in the instant case, cannot be said to be a public servant acting or purporting to act in the discharge of his official duties. Mr. Harjinder Singh, counsel for Jasbir Singh-petitioner, has canvassed vigorously that the expression 'Deputy Commissioner of Police' connotes only a designation and he is not a juristic person and as such he was not competent to institute this complaint. Secondly, he has urged that the authorisation by the Central Government to lodge a complaint was in favor of a specific individual Shri Ramakrishnan, who also happened to be Deputy Commissioner of Police, Special Branch, Delhi and not in favor of any public servant as such. So, it

was no part of the duty of the Deputy Commissioner of Police to lodge a complaint as contemplated by clause (a) of the first proviso to Section 200. This argument, to say the least, has to be stated merely to be rejected. The very fact that clause (a) of the proviso envisages complaint by a public servant is enough to dismiss the contention of the learned counsel for the petitioners that the complainant must be a juristic person. It is true that the expression 'Deputy Commissioner of Police' may be just a designation but there can be no manner of doubt that Deputy Commissioner of Police, Special Branch, Delhi, is a particular officer who has been assigned the duties of that officer and as such he will be deemed to be a public servant as defined in Section 21, clauses (7), (8) and even (12)(a). The words 'who holds any office' appearing in clause (7) are very significant to note. If clauses (7) and (8) are read together they will clearly cover the case of a police officer. It is then to be seen whether he was acting or purporting to act in the discharge of his official duties when he filed the complaint in this case. Reliance has been placed by the learned counsel for the petitioners on *K. Krishna Worrier v. T. R. Velunni*, : AIR1960 Ker350 , in which a complaint was instituted by a District Magistrate who had been appointed Commissioner of Inquiry under Commissions of Inquiry Act, 1952, *Ramashray Singh v. Dr. Anand Mohan*, 1977 Criminal Law Journal 1024, in which a complaint was lodged by a civil surgeon under Sections 353, 500 and 506(2) of the Indian Penal Code and *Kalu Munchi and Others v. State of Assam* Air 1965 gua29, in which a complaint filed by a Magistrate was found to be not covered by the provisions of Section 195 of the Code, in support of their contention that it was no part of the duty of the Deputy Commissioner of Police to file the complaint. In other words, he should have been enjoined by law or nature of his duties to make the complaint but that was not so. On an examination of these authorities I do not think that they are of any assistance to the petitioners in this behalf, rather they are clearly distinguishable on facts. As observed earlier, the investigation was conducted by the Special Branch of Delhi Police under the overall supervision of the Deputy Commissioner of Police, Special Branch. It is thus obvious that he was concerned with the investigation of the case at all its stages. Evidently it was on that account that he was specifically authorised to institute the complaint also. Under Section 13(3) of the Act, any officer empowered by the appropriate Government is entitled to make the

complaint and if he does so, there can be no shadow of doubt about his acting or at least purporting to act in the discharge of his official duties. Needless to say that the relationship of command and obedience which existed between the Central Govt. and the Deputy Commissioner of Police cast an obligation upon the latter to obey the command and file the complaint. Thus, the act of the Deputy Commissioner of Police in filing the complaint is integrally connected with the duties attaching to his office as head of the Special Branch of Delhi Police. Surely a very restricted and narrow interpretation on the words 'acting or purporting to act in the discharge of his official duties' cannot be placed in the sense that the law must enjoin a public servant to institute a complaint before he can do so. It is enough that the act of lodging the complaint is connected with or falls within the scope of his general duties. In the instant case, the circumstances adverted to above clearly rendered it obligatory upon him to file the complaint and as such this case will be squarely covered by clause (a) of first proviso to Section 200. I am fortified in this view of the matter by the following observations of the Supreme Court in *Mown v. The Superintendent Special Jail, Nowgong, Assam and Others* : 1971 CriLJ1 :

'WHEN the complaint is in writing by a public officer under the directions of the State Government the magistrate need not examine the complainant.'

(15) Even assuming for the sake of argument that the instant case does not fall within the purview of clause (a) to the proviso of Section 200, omission to examine the complainant would not vitiate the cognizance of the offences stated in the complaint as it will not constitute a serious legal infirmity or manifest error resulting in miscarriage of justice as to warrant quashing of the order of commitment. Section 460 (Section 529 old) enumerates irregularities which do not vitiate the proceedings. By virtue of clause (e) of the said Section if a Magistrate not empowered by law to take cognizance of an offence under Section 190(1) clauses (a) or (b) (new) erroneously but in good faith takes cognizance, the proceedings shall not be set aside merely on the ground of his not being so empowered. If defect of jurisdiction is not enough to vitiate proceedings covered by clause (e) of Section 460, a fortiori it would follow that where a Magistrate is empowered by law and is otherwise competent to take cognizance of an offence, any irregularity in

the manner of the exercise of the jurisdiction should not by itself be fatal to the proceedings. Section 461 (Section 530 old) enumerates the irregularities which vitiate proceedings and the one in question certainly does not fall within its ambit. There is abundant authority for the proposition that the failure to examine a complainant before issuing a process is not an irregularity falling under Section 461 (Section 530 old) of the Code. Reference in this context may be made to a Bench decision of Patna High Court in *State of Bihar v. Deodar Jha & Others*, : AIR1958 Pat51 and *Jasman Rai v. Smt. Sonamaya Rai & Another* (Sikkim High Court). So, the infraction of Section 200, if any, will at best be a mere irregularity curable under Section 465 (See. 537 old) of the Code. On a parity of reasoning failure on the part of the complainant, viz. Deputy Commissioner of Police, Special Branch, to present the complaint personally cannot be termed as an irregularity going to the root of the jurisdiction. Indeed, neither Section 190(1) nor Section 200 of the Code in terms states that the complaint must be presented in by the complainant. Clause (a) of Section . 190(1) simply states, 'may take cognizance of any offence upon receiving a complaint of facts which constitute such offence'. Similarly, Section 200 provides that a Magistrate taking cognizance of an offence of complaint shall examine the complainant on oath. thereforee, it cannot be said that the complaint could not be presented by the Special Prosecutor in the instant case as he was obviously representing the prosecution i.e. complainant who happened to be a public servant. Reference in this context may be made with advantage to *Kanhaiyalal Daulatramji*, : AIR 1965 MP53 , *State v. S. D. Gupta and P. N. Dubey etc. v. State of Uttar Pradesh* 1979 Cr. L. J. 53. In all these cases it has been observed that there is no provision in the Code staling either expressly or impliedly that the complaint must be presented to the Magistrate by the complainant personaally. At any rate, as observed earlier, non-presentation of the complaint personally is not a jurisdictional error to cut at the very root of jurisdiction or as to constitute a material irregularity causing failure of justice. Indeed, it is well settled that at the stage of inquiry under Sections 200 to 204 the accused has no locus standi to appear and take part in the proceedings. Hence, the question of any prejudice to the accused or miscarriage of justice which may vitiate the cognizance of offences by the Magistrate or the order of commitment made pursuant thereto does not arise.

(16) Ground No. 4 Lastly, the learned counsel for the petitioners have canvassed with great fervour, that in view of proviso to sub-section (2) of Section 202 in a complaint case triable exclusively by the Court of Session, it is incumbent upon the Magistrate to call upon the complainant to produce all his witnesses and to examine them on oath. According to them, the proviso is mandatory in nature and it has been apparently inserted because in order to simplify the procedure for cases triable by a Court of Session the legislature has done away with the pre-committal magisterial inquiry and the holding of trial by the Sessions Court being a serious affair, nobody should be made to undergo the same unless there is tangible material available against him. Reliance in this context has been placed on reported decisions of various High Courts, viz. *Paranjothi Udayar and Others v. State and Others* 1975 MLJ 629. *Ram Adhar and Another v. State and Another* 1980 ALJ 528, *Bajji v. State of Madhya Pradesh*, *Ramchander Rao and Others v. Boina Ramchander and Another*, and *Shyarnkant Wamanrao Pawar and others v. State of Maharashtra and Others*. All these authorities lend support to the view that the proviso to Section 202(2) makes it obligatory on the Magistrate in the case of offences triable exclusively by the Court of Session to call upon the complainant to produce all his witnesses and examine them on oath. The reasons given by the various High Courts in support of the said view may be summarised as under:

(A) In the case of a private complaint, there is generally speaking no prior investigation by the police and as such the statements of witnesses recorded under Section 161 and/or 162 of the Code are not available. Therefore, the legislature in its wisdom has made this wholesome provision. (b) A reading of the proviso to clause (2) of Section 202 together with Section 208(1) would clearly show that in a complaint case where the offence disclosed is triable exclusively by the Court of Session the statements of all the witnesses to be produced by the complainant must be recorded and the copies of statements of the witnesses so recorded and the documents relied upon by the prosecution shall be furnished to the accused free of cost. The object of furnishing copies to the accused in cases instituted on a police report is to facilitate the accused to prepare his defense in advance by knowing what the materials by which the prosecution seeks to prove its case against him are. However, in respect of a private complaint where the offences appear to be exclusively triable by the Court of Session the documents

mentioned in Section 207 will not be available to the accused as all those documents come into existence during the course of investigation by the police. The scope and object of Section 208 of the Code has, therefore, to be considered in this background. (e) In a private complaint unless the witnesses are examined as contemplated by proviso to Section 202(2), the accused will not be in a position to point out any contradictions when they give evidence in the Court of Session. The accused can cross examine the witnesses with regard to their earlier statements in the court of the Magistrate and point out the contradictions. therefore, it cannot be said that the accused is not prejudiced at the stage of trial in the Sessions Court by non-examination of all the witnesses under the proviso which is intended to give a fair and reasonable opportunity to the accused to get adequate information about the charge against him and compliance therewith is not a mere formality.

(17) A learned Judge of Allahabad High Court in Ram Adhar's case (supra) has gone to the extent of saying that :

IT is obvious that the statements of the complainant and other witnesses produced on his behalf are required to be recorded by the Magistrate under the proviso to sub-section (2) of Section 202 so these statements may be available to the accused for cross-examining them during the trial. It, therefore, follows that no witness can be examined during the trial on behalf of the prosecution in a case exclusively triable by the Court of Session whose statement has not been recorded by the Committing Magistrate under the proviso to sub-section (2) of Section 202 and the copy of whose statement has not been furnished to the accused under Section 208 after his appearance in Court. In such a case, the proceedings before the Committing Magistrate and the Sessions Court would be illegal.'

(18) On a careful consideration and examination of both Sections 200 and 202 of the Code, I am, with great respect, unable to subscribe to the view expressed in the above mentioned authorities. It may be noticed that there is no anatomy of Section 202 in these authorities with a view to determine the interplay of or the impact which different portions of the Section especially sub-section (1) and sub-

section (2) thereof may have on each other. Section 202 is reproduced below for ready reference.

'(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 section 192 may, if he thinks fit, postpone the issue of process against the accused, and either inquiry into the case himself or direct an investigation to be made by a police officer or by such other person as he things 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 Section 200. (2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath; Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. (3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of a police station except the power to arrest without warrant.'

(19) On a plain reading of sub-section (1), especially the words 'may, if he thinks fit' it is manifest that it is entirely within the discretion of the Magistrate whether or not an inquiry under this Section should be made or an investigation ordered. A combined reading of Section 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 Section 202 before dismissing a complaint or issuing process to the accused after taking cognizance of the offence complained of. The Magistrate can after following the procedure laid down in Section 200 straightway dismiss the complaint under Section 203 but if he thinks fit to postpone the issue of process against the accused and to make an inquiry into the case, he has to follow the procedure laid down in Section 202 before he resorts to Section 203. Similarly, he may direct issue of process where after complying with provisions of Section 200 he is of opinion that cognizance should be taken of the

offence as there is 'sufficient ground for proceeding', as envisaged in Section 204 of the Code. It is only when he decides to postpone the issue of the process and to hold an inquiry that the provisions of sub-section (2) of Section 202 will be attracted. The first part of the proviso to sub-section (1) forbids the Magistrate to direct an investigation when the offence complained of appears to him to be triable exclusively by the Court of Session. Under sub-section (2) while holding an inquiry, he is entitled to record evidence of witnesses on oath if he thinks fit. However, the proviso to sub-section (2) casts a duty on the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath where it appears to him that the offence complained of is triable exclusively by the Court of Session. The true purpose of the proviso to Section 202(2) of the Code, therefore, seems to be that where the Magistrate postpones the issue of process and decides to hold an inquiry and the case appears to him one exclusively triable by the Court of Session, it will be imperative for him to examine all the witnesses for the complainant on oath.

(20) That it is discretionary with a Magistrate to postpone the issue of the process or not and there is no legal bar or impediment in his way to straightway issue the process is well settled. In other words, it is not necessary for the Magistrate in every case to take recourse to Section 202. It is only in case of doubt and hesitancy where a Magistrate is unable to make up his mind to issue the process after complying with procedure laid down in Section 200 that he may adopt the procedure provided by Section 202. The Supreme Court has in a recent decision in *A. R. Antulay v. Ramdas Srinivas Nayak & Another*, : 1984 CriLJ647 , enunciated the legal position in relation to the scope of Section 202 of the Code as under :

'UPON a complaint being received and the court records the verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the court of necessity must hold the inquiry as envisaged by Section , .. 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate 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.....'..., for the purpose of deciding whether or not there is sufficient ground for proceeding'. thereforee, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision.'

(21) It is thus manifest that it is not at all obligatory on a Magistrate to hold an inquiry before issuing process and he has the power to take cognizance and issue the process without holding inquiry or directing the investigation as envisaged in sub-section (1) of Section 202.

(22) It maybe pertinent to notice that the proviso in question is pitted against the parent sub-section (2) and not sub-section (1) and as such it can hardly .be construed as controlling or fettering the discretion which vests in the Magistrate under sub-section (1). It is a fundamental rule of construction that a proviso, must be considered in relation to the principal matter to which it stands as a proviso. As said by Bray, J., in *The King v. Dibdin*, (1910) Probate Division 5,7 (9.1):

'THE words of the proviso are undoubtedly very wide; but, being a proviso, it must be construed with reference to the clause to which it is appended, i.e., the first part of section.'

(23) Thus, there can be no manner of doubt that the proviso in question is intended, to qualify sub-section (2) to which it is appended and make it obligatory upon the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath if it appears to him that the offence complained of is triable exclusively by the Court of Session. However, this does not, in any manner, impinge upon the discretion which vests in the Magistrate to postpone the issue of process or not. In this view of the matter, I am fortified by several reported decisions of various High Courts. Indeed, there is sharp divergence of opinion with regard to the interpretation of the proviso to Section 202(2). I have already

adverted to one strain of thought and the other strain of thought is to be found in *Boya Lakshmanna v. Boyachinna Narasappa and Another* 1976 Cr. L.J. 127, *Budaraju Seshagiri Rao and Others v. T. V. Sharma and Another* 1976 Cr. L.J. 902 (both these decisions are by Single Judges of Andhra Pradesh High Court which were over-ruled by a Division Bench of that High Court in *Ramchander Rao & others* (supra), *P. S. Sulaiman v. Eachara Worrier*(1978) 22 MLJ 630 (a Bench decision of Kerala High Court), *Ram Bharos Mahton v. Ram Lachhan Mahton & Others* (1975) 54 Pat 67 (Bench decision of Patna High Court), *M. Govindaraja Pillai v. Thangavelu Pillai* (deceased by L. Rs.) and *Others* 1983 Cr. L.J. 917 (decision by a learned Single Judge of Madras High Court who preferred to follow the Bench decision of Kerala High Court as against judgment of a Single Judge of that very Court in *Paranjothi Udayar & Others* (supra) and in re : *The Extra Assistant & Additional Sessions Judge, Ahmednagar* 1984 Cr. L. J. 801 (which is again a Bench decision of Bombay High Court on a reference made by Extra Assistant and Additional Sessions Judge, Ahmednagar)). On an analytical examination of the provisions contained in Sections 200 to 204, their Lordships, inter alia, observed that :

'THE proviso to Section 202(2) comes into play when the Magistrate postpones the issue of process and holds inquiry.'

(24) In *Budaraju Seshagiri Rao & Others* (supra) *Chinnappa Reddy, J.* (as His Lordship then was), inter alia, observed that ;

'IN cases where the offences complained of are triable exclusively by the Court of Session, it is not intended to give a lever to the accused to complain that the Magistrate should not have taken cognizance of the case without examining all the complainant's witnesses. A complainant may complain against the refusal of a Magistrate to take cognizance of the case without examining all his witnesses The accused does not enter the picture at all at that stage. The enquiry by the Magistrate under Section 202 is only for the purpose of enabling him to decide whether or not there is sufficient ground for proceeding.'

I am in respectful agreement with these observations.

(25) As for the argument that proviso to Section 202(2) 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 defense and also to effectively cross-examine the witnesses at the stage of Sessions trial with reference to the earlier statements of the witnesses before the Magistrate, suffice it to say that no such consideration need weigh with the Magistrate when he is at the stage of taking cognizance under Section 200 unless, of course, he embarks upon an inquiry under Section 202 of the Code by postponing the issue of the process. It is true that preliminary inquiry by Magistrates in cases exclusively triable by the Court of Session has been dispensed with. Section 209 of the Code now provides for commitment of a case to the Court of Session when the offence is triable exclusively by it whether the case is instituted on police report or otherwise i.e on complaint. It lays down in no uncertain terms that before doing so he must comply with the provisions of Section 207 or Section 208, as the cases may be, of the Code. Section 208 applies to cases instituted otherwise than on police report which in the opinion of the Magistrate involve offences exclusively triable by the Court of Session. It enjoins upon a Magistrate to furnish to the accused, free of cost, a copy of each of the following :

'(i) the statements recorded under section 200 or Section 202, of all persons examined by the Magistrate; (ii) the statements and confessions, if any, recorded under Section 161 or Section 164; (iii) any documents produced before the Magistrate on which the prosecution proposes to reply :'

(26) On its plain reading it is manifest that copies of the statements recorded under Section 200 or 202 have to be supplied to the accused. Obviously it postulates that the statements of the complainant or the witnesses may have been recorded either under Section 200 or Section 202 or both the sections but it cannot be read as further laying down that the Magistrate must record statements of the complainant and all the witnesses under the aforesaid Sections in cases exclusively triable by the Court of Session. The principle underlying this provision is that if an accused is not supplied with copies of the statements recorded by the Magistrate either under Section 200 or under Section 202 or under both of them he will be handicapped in cross-examining the witnesses successfully and

effectively so as to disprove the prosecution case. In P.S. Sulaiman (supra) this contention was examined by the Division Bench of Kerala High Court and their Lordships gave the following answer :

'NOW, the provision in Section 208(i) regarding the furnishing of copies of statements is one made not cumulatively but alternatively. It says copies to be furnished should be of statements under Section 200 or Section 202. Use of the word 'or' there is important. It is used there disjunctively and not conjunctively. When so read it produces an intelligible result. It then means that the accused should be furnished with copies of the statements of persons recorded under Section 200 or Section 202 as the case may be. Section 208(i) does not contemplate an accused being furnished with copies of statements recorded under Section 202 when the commitment is made based on the statements taken under Section 200 alone.'

(27) That was a case of private complaint. It was, therefore, imperative for the Magistrate to have examined the complainant under Section 200 and also his witnesses, if any, present at the time of taking cognizance of the complaint. The instant is a case of complaint by public servant and as observed earlier it was not at all necessary by the Magistrate to examine the complainant. therefore, an argument may well be advanced that the very purpose of the provisions contained in Section 208 is defeated because there has been no examination of the complainant or of the witnesses either under Section 200 or under section 202. However, this argument though spacious does not stand close scrutiny as the answer to the same is to be found in clause (ii) of Section 208 which requires furnishing of copies of the statements and confessions, if any, recorded under Section 161 or Section 164. Since Section 208 deals specifically with cases instituted otherwise than a police report it may be legitimately concluded that the purpose of effective cross-examination would be served by furnishing copies of the statements recorded under Section 161 or Section 164 of the Code. In other words, there is no bar to such statements being made available to the accused for the purpose of preparing his defense and effectively cross-examining the witnesses. Obviously, there is neither any basis nor any Justification for the view that statements recorded by the police under Section 161 during the course of

investigation are not admissible for any purpose in a case instituted on a complaint. Moreover, copies of all the documents produced before the Magistrate on which prosecution proposes to rely have to be supplied to the accused under clause (iii). So even if statements under Section 200 or Section 202 have not been recorded, clause (ii) and clause (iii) of Section 208 take sufficient care of the interest of the accused in the matter of defense. Reference in this context may be made with advantage to Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick and others, : 1981 CriLJ341 , in which the Supreme Court while dealing with the ambit and scope of Section 14 of the Act observed that the said Section does not in any way affect or over-ride the provisions of the Code relating to inquiries or trials held therein and does not in any way deprive the valuable right of the accused to get copies of statements recorded by the Magistrate or statements of witnesses recorded by the police or the documents obtained by the police during the investigation. Indeed, such a conclusion clearly flows from the language of Section 208, clauses (ii) & (iii). Thus, the contention that non-examination of the complainant and the witnesses under Section 200 or Section 202 is likely to materially prejudice the accused in the preparation of their defense is devoid of any merit.

(28) To sum up, therefore, the issue of the process by the Magistrate in the instant case without examining the complainant or the prosecution witnesses under Section 200 or Section 202 and consequent commitment of the case to the Court of Session for trial is not tainted with any legal infirmity or material irregularity, In other words, the commitment, in the instant case, is quite valid and proper and does not warrant any interference by this Court. As for the merits of the case, suffice it to remark that it is for the Sessions Judge to consider after hearing the public prosecutor, as contemplated in Section 226 of the Code, whether or not there is sufficient ground for proceeding against the accused and then pass order under Section 227 discharging the accused or framing the charge against the accused as envisaged in Section 228 of the Code. The Sessions Judge, while considering the question of framing the charge against or discharging the accused under Section 227, has the undoubted power to lift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out against the accused. It is not open to this Court to consider at this stage the

sufficiency or otherwise of the material on record for this purpose.

(29) The upshot of the whole discussion, therefore, is that both the revision petitions must fail as being devoid of any merit. They are accordingly dismissed.

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