**REPORTABLE**

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1158 OF 2010**
(Arising out of SLP (Crl.) No.1416 of 2009)

Shivjee Singh ……Appellant

Versus

Nagendra Tiwary and others ……Respondents



**J U D G M E N T**

**G.S. Singhvi, J.**

1. Leave granted.

2. Whether examination of all witnesses cited in the complaint is *sine qua non* for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions is the question which arises for consideration in this appeal filed against order dated 18.4.2007 passed by the learned Single

Judge of Patna High Court in Criminal Miscellaneous Petition No.1778 of 2007 whereby he remitted the case to Chief Judicial Magistrate, Saran with the direction to make further inquiry and pass appropriate order in the light of proviso to Section 202(2) of the Code of Criminal Procedure (Cr.P.C.).

3. The appellant's son, Ajay Kumar Singh is said to have been killed by respondent Nos.1 to 4 on 1/2.1.1997. The appellant lodged First Information Report on the same day at Police Station, Isuapur. After conducting investigation, the police submitted final form on 3.9.1998 with the finding that they had no clue about the culprits. Thereupon, the appellant filed a protest petition accusing the police of not conducting the investigation properly due to political pressure and prayed that the accused persons be summoned and punished. By an order dated 3.9.2002, the learned Judicial Magistrate accepted the final form submitted by the police but, at the same time, directed that the protest petition be registered as a separate complaint. He also directed the complainant (appellant herein) to produce his witnesses. The appellant examined himself and two out of four witnesses cited in the protest petition-cum-complaint but gave up the remaining two witnesses because he thought that they had been won over by the accused. After considering the statements of the appellant and two witnesses, Chief Judicial Magistrate, Saran passed an order dated

13.12.2006 whereby he took cognizance against respondent Nos.1 to 4 for offence under Section 302 read with Section 120B Indian Penal Code and Section 27 of the Arms Act and directed issue of non bailable warrants against them.

4. The respondents challenged the order of the Chief Judicial Magistrate by filing a petition under Section 482 Cr.P.C. The learned Single Judge accepted their contention that the Chief Judicial Magistrate could not have taken cognizance against them without requiring the appellant to examine all the witnesses and remitted the matter to the concerned court for passing appropriate order after making further inquiry in the light of proviso to Section 202(2) Cr.P.C.

5. Shri Gaurav Agrawal, learned counsel for the appellant argued that proviso to Section 202(2) Cr.P.C. is not mandatory in character and the High Court committed serious error by remitting the matter to the Chief Judicial Magistrate for further inquiry only on the ground that all the witnesses named by the appellant had not been examined. Learned counsel further argued that non-examination of two witnesses cited in the protest petition-cum-complaint did not preclude the Chief Judicial Magistrate from taking cognizance against respondent Nos.1 to 4 because he felt satisfied that a

prima facie case was made out against them. In support of his arguments, learned counsel relied upon the judgment of this Court in **Rosy v. State of Kerala** (2000) 2 SCC 230. Shri Gopal Singh, learned counsel for the respondents argued that proviso to Section 202(2) Cr.P.C. is mandatory and the Chief Judicial Magistrate committed a serious error in taking cognizance against respondent Nos.1 to 4 and issuing non-bailable warrants against them without insisting on the examination of remaining two witnesses named in the complaint. He relied upon the observations made by Thomas, J. in **Rosy v. State of Kerala** (supra) and the judgment in **Birendra K. Singh v. State of Bihar** (2000) 8 SCC 498 in support of his submission that proviso to Section 202(2) Cr.P.C. is mandatory.

6. We have considered the respective submissions. By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word `shall'. Chapter XIV of Cr.P.C. enumerates conditions for initiation of proceedings. Under Section 190,

which forms part of the scheme of that chapter, a Magistrate can take cognizance of any offence either on receiving a complaint of facts which constitute an offence or a police report of such facts or upon receipt of information from any person other than a police officer or upon his own knowledge, that such an offence has been committed. Chapters XV and XVI contain various procedural provisions which are required to be followed by the Magistrate for taking cognizance, issuing of process/summons, dismissal of the complaint, supply of copies of documents and statements to the accused and commitment of case to the Court of Sessions when the offence is triable exclusively by that Court. Sections 200, 202, 203, 204, 207, 208 and 209 Cr.P.C. which form part of these chapters and which have bearing on the question raised in this appeal read as under:

> "**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:
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> Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses–
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> (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
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> (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

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

**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 section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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 Sessions; 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 witness 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.

**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 Section 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 record his reasons for so doing.

**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 Magistrates 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 provisions of section 87.

**207. Supply to the accused of copy of police report and other documents. –** In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding there from any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

**208. Supply of copies of statements and documents to accused in other cases triable by Court of Session.–**Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:–

(i) the statements recorded under section 200 or section 202, or 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 rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

**209. Commitment of case to Court of Session when offence is triable exclusively by it.–**When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall–

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

7. An analysis of the above reproduced provisions shows that when a complaint is presented before a Magistrate, he can, after examining the complainant and his witnesses on oath, take cognizance of an offence. This procedure is not required to be followed when a written complaint is made

by a public servant, acting or purporting to act in discharge of his official duties or when a Court has made the complaint or if the Magistrate makes over the case for inquiry/trial to another Magistrate under Section 192. Section 202(1) empowers the Magistrate to 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 which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No.25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath. Section 203 empowers the Magistrate to dismiss the complaint if, after considering the

statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then he may issue summons for attendance of the accused in a summons-case. If it is a warrant-case, then the Magistrate can issue warrant for causing attendance of accused. Section 207 casts a duty on the Magistrate to supply to the accused, copies of the police report, the first information report recorded under Section 154, the statements recorded under Section 161(3), the confessions and statements, if any, recorded under Section 164 and any other document or relevant extract thereof, which is forwarded to the Magistrate along with police report. Section 208 provides for supply of copies of statement and documents to accused in the cases triable by the Court of Sessions. It lays down that if the case, instituted otherwise than on a police report, is triable exclusively by the Court of Sessions, the Magistrate shall furnish to the accused, free of cost, copies of the statements recorded under Section 200 or Section 202, statements and confessions recorded under Section 161 or Section 164 and any other document on which prosecution

proposes to rely. Section 209 speaks of commitment of case to the Court of Sessions when offence is triable exclusively by it. This section casts a duty on the Magistrate to commit the case to the Court of Sessions after complying with the provisions of Section 208. Once the case is committed, the trial is to be conducted by the Court of Sessions in accordance with the provisions contained in Chapter XVIII.

8. The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a prima facie case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence then he is required to issue process. Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is

satisfied that there is sufficient ground for doing so. The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a prima facie case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. This interpretation of the provisions contained in Chapters XV and XVI of Cr.P.C. finds adequate support from the judgments of this Court in **R.C. Ruia v. State of Bombay**, 1958 SCR 618, **Vadilal Panchal v. Duttatraya Dulaji Ghadigaonkar** (1961) 1 SCR 1, **Chandra Deo Singh v. Prokash Chandra Bose** (1964) 1 SCR 639, **Nirmaljit Singh Hoon v. State of West Bengal** (1973) 3 SCC 753, **Kewal Krishan v. Suraj Bhan** (1980) Supp SCC 499, **Mohinder Singh v. Gulwant Singh** (1992) 2 SCC 213 and **Chief Enforcement Officer v. Videocon International Ltd.** (2008) 2 SCC 492.

9. In **Chandra Deo Singh v. Prokash Chandra Bose** (supra), it was held that where there was prima facie evidence, the Magistrate was bound to issue process and even though the person charged of an offence in the complaint might have a defence, the matter has to be left to be decided by an appropriate forum at an appropriate stage. It was further held that the issue of process can be refused only when the Magistrate finds that the evidence led by the complainant is self contradictory or intrinsically untrustworthy.

10. In **Kewal Krishan v. Suraj Bhan** (supra), this Court examined the scheme of Sections 200 to 204 and held:

> "At the stage of Sections 203 and 204 of the Criminal Procedure Code in a case exclusively triable by the Court of Sessions, 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 of the Criminal Procedure Code, there is prima facie evidence in support of the charge leveled 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 scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing charges."

11. The aforesaid view was reiterated in **Mohinder Singh v. Gulwant Singh** (supra) in the following words:

> "The scope of enquiry under Section 202 is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should issue or not under Section 204 of the Code or whether the complaint should be dismissed by resorting to Section 203 of the Code on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the enquiry at that stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the Code calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of the enquiry contemplated

> under Section 202 of the Code. To say in other words, during the course of the enquiry under Section 202 of the Code, the enquiry officer has to satisfy himself simply on the evidence adduced by the prosecution whether prima facie case has been made out so as to put the proposed accused on a regular trial and that no detailed enquiry is called for during the course of such enquiry."
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> (emphasis supplied)

12. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word `his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to

examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

13. We may now refer to the judgment in **Rosy v. State of Kerala** (supra) on which reliance has been placed by both the learned counsel. The factual matrix of that case reveals that the Excise Inspector filed a complaint before Judicial Magistrate, Thrissur for offences punishable under Section 57-A and 56(b) of the Kerala Abkari Act. As the offences were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions, Thrissur. After the prosecution examined witnesses, the accused were questioned under Section 313 Cr.P.C. The public prosecutor then filed an application for recalling two witnesses, who were recalled and examined. Thereafter, further statements of the accused under Section 313 were recorded. The accused examined four witnesses. At that stage, an argument was raised that the committal order was bad because the Magistrate did not follow the procedure prescribed in the proviso to Section

202(2). The learned Sessions Judge opined that there was breach of the mandatory provision but made a reference to the High Court under Section 395(2) because he found it difficult to decide the course to be adopted in the matter. The High Court held that the order of committal was vitiated due to violation of the mandate of proviso to Section 202(2). Before this Court, the issue was considered by a two-Judge Bench. M.B. Shah, J., referred to Sections 200 and 202, the judgment of this Court in **Ranjit Singh v. State of Pepsu** AIR 1959 SC 843 and held:

> "Further, it is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry 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."

Shah, J. then referred to the ratio of the judgment in **Kewal Krishan v. Suraj Bhan** (supra) and observed:

> "In this view of the matter it is apparent that the High Court erred in holding that there was breach of the mandatory provisions of the proviso to Section 202(2) of the Code and the order of committal is vitiated and, therefore, requires to be set aside. The High Court failed to consider the proviso to Section 200, particularly proviso (*a*) to the said section and also the fact that inquiry under Section 202 is discretionary for deciding whether to issue process (under Section 204) or to dismiss the complaint (under Section 203). Under Section 200, on receipt of the complaint, the Magistrate can take cognizance and issue process to the accused. If the case is exclusively triable by the Sessions Court, he is required to commit the case to the Court of Session."

Shah, J. also referred to the judgment of the Full Bench of Kerala High Court in **Moideenkutty Haji v. Kunhikoya** (1987) 1 KLT 635 and of Madras High Court in **M. Govindaraja Pillai v. Thangavelu Pillai** 1983 Cri LJ 917, approved the ratio of the latter decision that Section 202 is an enabling provision and it is the discretion of the Magistrate depending upon the facts of each case, whether to issue process straightaway or to hold the inquiry and held:

> "We agree with the conclusion of the Madras High Court to the effect (*sic* extent) that Section 202 is an enabling provision and it is the discretion of the Magistrate depending upon the facts of each case, whether to issue process straight away or to hold the inquiry. <u>However, in case where inquiry is held, failure to comply with the statutory direction to examine all the witnesses would not vitiate further proceeding in all cases</u> for the reasons that
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> (*a*) in a complaint filed by a public servant acting or purporting to act in discharge of his official duties, the question of holding inquiry may not arise,

(*b*) whether to hold inquiry or not is the discretionary jurisdiction of the Magistrate,

(*c*) even if he has decided to hold an inquiry it is his further discretion to examine the witnesses on oath. If he decides to examine witnesses on oath in a case triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath,

(*d*) it would also depend upon the facts of each case depending upon the prejudice caused to the accused by non-compliance with the said proviso (Section 465), and

(*e*) that the objection with regard to non-compliance with the proviso should be taken at the earlier stage when the charge is framed by the Sessions Court."

(emphasis supplied)

K.T. Thomas, J. adopted a different approach regarding interpretation of Section 202. He referred to the scheme of Chapters XIV, XV and XVI Cr.P.C. and observed:

**"**Three categories of documents are mentioned in the aforesaid section the copies of which the Magistrate, who proceeds from the stage in Section 204, has to supply to the accused free of cost (in a complaint case involving an offence triable exclusively by a Court of Session). As the words used here are "shall furnish", it is almost a compelling duty on the Magistrate to supply the said documents to the accused. How can the Magistrate supply such documents? [In the present context the documents referred to in the third category mentioned in clause (*iii*) are not important.] The first category delineated in clause (*i*) of Section 208 consists of "statements recorded under Section 200 *or* Section 202, of all persons examined by the Magistrate". (emphasis supplied) It is now important to note that the words "if any" have been used in the second category of documents which is delineated in clause (*ii*) of Section 208, but those words are absent while delineating the first category. In my view those two words have been thoughtfully avoided by Parliament in clause (*i*).

If a Magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate if the language used in the sub-section is of any indication) what is the manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused? The mere fact that the word "or" is employed in clause (*i*) of Section 208 is not to be understood as an indication that the Magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant under Section 200. A case can be visualised in which the complainant is the only eyewitness or in which all the eyewitnesses were also present when the complaint was filed and they were all examined as required in Section 200. In such a case the complainant, when asked to produce all his witnesses under Section 202 of the Code, is at liberty to report to the Magistrate that he has no other witness than those who were already examined under Section 200 of the Code. When such types of cases are borne in mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

If a case instituted on a complaint is committed to the Court of Session without complying with the requirements in clause (*i*) of Section 208 of the Code how is it possible for the Public Prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused? If no inquiry under Section 202 is to be conducted a Magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Session, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the Public Prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of the accused". If the offence is of a serious nature or is of public importance the consequence then would be a miscarriage of justice."

Thomas, J. then referred to the recommendations made by the Law Commission in its 41st Report and held:

> "Thus I have no doubt that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the court to summon such witnesses it is open to the Magistrate to issue such summons, for, there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses.
>
> I reiterate that if the Magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings. If no objection is taken at the earlier stage regarding such omission the court can consider how far such omission would have led to a miscarriage of justice, when such objection is taken at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code."
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> (emphasis supplied)

14. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202(2) but there is no discord between them that non examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath,

failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2).

15. In **Birendra K. Singh v. State of Bihar** (supra), the only question considered by this Court was whether non-compliance of Section 197 Cr.P.C. was fatal to the prosecution. While holding that an objection regarding non-compliance of Section 197 can be raised only after the case is committed to the Court of Sessions, this Court observed that it was not made aware of the fact whether process was issued after complying with the provisions of Section 202. Therefore, that judgment cannot be read as laying down a proposition of law on interpretation of proviso to Section 202(2). That apart, it is important to mention that in **Abdul Wahab Ansari v. State of Bihar** (2000) 8 SCC 500, a three-Judge Bench held that the decision in **Birendra K. Singh's** case does not lay down the correct law.

16. As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202(2).

17. In the result, the appeal is allowed and the impugned order is set aside. Since the matter is more than 12 years old, we direct the concerned Magistrate to pass appropriate order in terms of Section 209 within one month from the date of receipt/production of copy of this order. We further direct that after committal of the case, the Sessions Judge to whom the matter is assigned shall conduct and complete the trial within a period of 9 months. A copy of this order be forwarded to the Registrar General, Patna High Court, who shall place the same before Hon'ble the Chief Justice of that High Court.

…….J.

**[G.S. Singhvi]**

…..…..……..J.
**[Asok Kumar Ganguly]**

New Delhi,
July 6, 2010.