

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.REV.P. 737/2007**

% Date of reserve: 19.05.2009.
Date of decision: 27.05.2009.

A.K. JAJODIA ...PETITIONER
Through: Mr. A.S. Chandhiok, Sr. adv., Mr.
A.K. Sengupta, Mr. Suraj Prakash,
Adv.

Versus

THE STATE (THROUGH CBI) ...RESPONDENT
Through: Mr. Vikas Pahwa, Addl. Standing
Counsel with Mr. Saurabh Soni, adv. for
State.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **MOOL CHAND GARG, J.**

1. This order shall dispose of the aforesaid petition filed under Section 397/401 of the Code of Criminal Procedure challenging the correctness legality and propriety of the order dated 16.11.2007 passed by the learned Special Judge CBI Delhi dismissing the application filed by the petitioner (one of the accused) with a prayer to remand the Sessions case No. 5/2006 titled "CBI through Chanda Rani Vs. K.K. Jajodia and Ors.), arising out of a Complainant under Section 3/5 of the Official Secrets Act (hereinafter referred to as O.S. Act) read with Section 120B IPC, to the Chief Metropolitan Magistrate for complying with the provisions of proviso to Sub Section (2) of Section

202 and Section 208 of the Cr.P.C before committing the case to the sessions.

2. Briefly stating the facts giving rise to the filing of the present petition are:

- i) Complaint dated 15.04.1987 was filed by one Mr. Navin Sikand, Regional Manager of a Courier Company viz. M/s. Trident Express, Trident Travels & Tours (P) Ltd., on or about 17.04.1987 to the Central Bureau of Investigation (CBI) which resulted in the registration of an FIR/Criminal Case being RC 4(S)/87-SIU-1 by its Special Investigating Cell under Section 120B IPC read with Sections 3 and 5 of the OS Act, against the Partners/Proprietors/Directors of M/s. William Jacks (Pvt.) Ltd. In the said complaint inter alia it was alleged;-
 - (a) That a letter addressed to one Mr. Marc De Saint Denis, M/s. Coprint, Paris was received by the aforementioned Courier Company for dispatch on 04.04.1987 as per Airway Bill No. 236 dated 04.04.1987. Another letter addressed to Mr. J.W.H. Weavers, Netherlands was also received on 13.04.1987 vide Airway Bill No. 893 dated 13.04.1987 by the same Courier Company for dispatch. Both these covers were picked up by the courier boys of the aforesaid Courier Company from M/s. William Jacks and the particulars of the sender on Airway Bills were given as one Mr. K.C. Das, Kiran Bhawan, Barakhamba Lane, New Delhi and Mr. Kashyap, Kiran Building, Barakhamba Road, New Delhi respectively and the charges were paid in cash.
 - (b) That on suspicion, the covers were opened and inside the covers addressed to the person in Paris was a Xerox copy of "User Evaluation Trial Report on

R.A.T.A.C.S. battlefield Surveillance Radar BFSR Phase-I” pertaining to the Army, Ministry of Defence and the other cover, addressed to the person in Netherlands, contained draft letters in 13 pages containing details of some radars Fly Catchers for detection and tracking of low level enemy aircrafts.

- ii) In view of that after the FIR was registered, the CBI investigated the matter and thereafter, Shri R.S. Dwivedi, Deputy Superintendent of Police, CBI filed a complaint on 07.02.1989 in the Court of the Chief Metropolitan Magistrate (CMM), Delhi who took the cognizance of offences under Section 120B IPC read with Sections 3 and 5 of the OS Act and Sections 3 and 5 of the OS Act against the accused persons including the petitioner and transferred the case to Addl. Chief Metropolitan Magistrate (ACMM). Subsequently vide order dated 19.09.1989, the ACMM to where the case was transferred by CMM committed the case to the Court of Sessions since the offence under Section 3 of the OS Act was exclusively triable by the Court of Sessions.
- iii) That vide order dated 22.07.1995 Shri Dinesh Dayal, Learned Special Judge, Delhi discharged the accused persons as prior sanction under Section 197 of the Code of Criminal Procedure (Cr.P.C.) to prosecute two of the accused persons viz. Dr. W.N. Nerurkar and Brig. R.S. Deol was not obtained.
- iv) That after a year Shri S.S. Sandhu, Inspector, CBI filed a Second Complaint dated 17.12.1996 in the Court of the CMM based on similar allegations after the Sanction was given under Section 197 Cr.P.C. The CMM again took cognizance of the offences and issued process. Subsequent to the appearance of the accused persons, the case was again committed to the Court of Session on 01.12.1997. Preliminary Objection was raised on behalf of some of the

accused that the Sanction was accorded without application of mind and Shri Dinesh Dayal, Learned Special Judge, Delhi by his judgment and order dated 30.05.1998 discharged the accused persons again.

- v) Again after a period of fourteen months, a third Complaint on the same allegations was filed in the Court of the Learned CMM on 22.06.1999 along with the requisite sanction under Section 197 of the Cr.P.C. This time also the CMM issued process against all the accused persons.
- vi) It may be observed here that the complaint filed by the CBI was also accompanied with the report of investigation carried out by it on the basis of the FIR registered at the instance of M/s Trident Express. The investigation report was accompanied with copy of the statement of the witness recorded under Section 161 Cr.P.C. as well as the documents seized by the prosecution during the course of investigation. It may be observed here before that, in exercise of powers conferred under Section 13(1) of the OS Act, 1923 (Act No. 19 of 1923), the Central Government vide Notification No. G.S.R. 126 (E) dated 06.03.1998 published in the Gazette of India, Part II, Section 3, Sub-Section (i), conferred jurisdiction/power upon this Learned Court viz. the Court of the Learned CMM Delhi, to try offences punishable under the OS Act, 1923.
- vii) On 9.10.2000, the petitioner filed an application before the Learned CMM for recalling the summoning order dated 16.08.1999 on the grounds mentioned therein and to follow the procedure laid down in the proviso to Section 202 (2) Cr.P.C.
- viii) The aforesaid application was disposed off vide order dated 11.02.2004, with the following observation: -

"It may be mentioned that vide notification No. 1/17017/16/91-1 SUS (DII) dated 06.03.1998 issued under the signature of Joint Secretary of India Ministry of Home Affairs, CMM, Delhi has been empowered by the

Central Government to try the offence punishable under Official Secret Act, 1923, notwithstanding the fact that under Section 3 of OS Act, offence is punishable up to 14 years. In Cr.P.C. offences under Section 377 IPC, 409 IPC and 467 IPC are punishable with imprisonment of life or custodial sentence of specified years. But still offences are M.M. triable one under the scheme of Cr.P.C. Moreover, vide 13(2) of the OS Act liberty has been given to the accused to claim for trial by the court of Sessions. It has been provided that Magistrate shall, if he is not discharging the accused, commit the case for trial to Sessions Court, although it is not a case exclusively triable by the Court. "In this case, still the stage of charge has not been reached. Prosecution would lead its precharge evidence and thereafter, it would be decided whether any charges are made out or not against the accused persons and at that stage accused shall also be at liberty to claim trials by the Sessions Court whereupon it shall be committed to Learned Sessions Court if there is no discharge by the CMM in this case. Ld. Predecessor took cognizance of the complaint after duly advertent to the earlier two complaints on the same set of facts, which on each committal was dismissed by Id. Sessions Court for technical reasons."

- ix) That after dismissal of the application the CMM fixed the case for recording pre-charge evidence on 22.03.2004. That thereafter, from time to time, the case was adjourned for recording pre-charge evidence.
- x) When prosecution obtained summons against its witnesses and on certain occasions, though witnesses attended the Court to depose, they were not examined for various reasons. That in the meantime, by another Notification No. G.S.R. 373 (E) dated 21.06.2006 published in Gazette of India, Part-II, Section 3, Sub-Section (i), the Central Government, in exercise of the powers conferred by Sub-Section (1) of Section 13 of the OS Act, 1923, has rescinded the earlier Notification No. G.S.R. 126 (E) dated 06.03.1998 empowering CMM to try offences punishable under the OS Act, 1923. The said notification reads as under:

Ministry of Home Affairs

Notification

New Delhi, the 21st June, 2006

G.S.R. 373 (E) – In exercise of the powers conferred by Sub Section (1) of Section 13 of the Official Secrets Act, 1923 (19 of 1923) read with Section 21 of the General Clauses Act, 1897 (10

of 1897), the Central Government hereby rescinds the Notification published in the Gazette of India, Part II Section 3, Sub Section (i), vide G.S.R. 126 (E) dated the 6th March, 1998, empowering the Chief Metropolitan Magistrate, Delhi under the said Act, with immediate effect, such rescission shall not affect anything done or omitted to be done under the said Notification before such rescission.

(F.No. 17017/7/2005-IS-I)
VIRENDRA KUMAR, Under Secy

3. It may be observed that before this, one of the co-accused namely Dr. N.W. Nerurkar had filed a writ petition for quashing of the proceedings against him on the ground of delay which was allowed by a Division Bench of this Court but the said order was reversed by the Apex Court in a SLP filed by the CBI with the following directions vide order dated 26.08.2002.

Accordingly the judgment of the High Court is quashed and the matter is remitted back to the High Court. The High Court shall hear the matter afresh, permit the parties to place materials which according to it will be relevant for the purpose of determination of the dispute before it, and take a fresh decision in accordance with law. As mentioned above, we are not expressing any opinion on the merits of the case."

4. The writ petition of Dr. N W Nerurkar came up for hearing before a Division Bench of this Court subsequent to the order of remand by the Apex Court, which was disposed off as under:

"In the facts and circumstances of this case, we direct learned CMM, Delhi, dealing with the matter to proceed with recording of the pre-charge evidence on a day-to-day and complete the same within 4 weeks of his taking up the case in the first instance.

With the above directions, this writ petition stands disposed of. Copy of this order be given dasti to the parties and sent to the CMM for compliance."

5. During the course of hearing the CMM who was recording pre-charge evidence, after the notification permitting the CMM to try the offences under of Officials Secrets Act was withdrawn committed the case to the learned Court of Sessions without completing the recording

of precharge evidence and directed all the accused persons to appear before the Court of Learned District and Sessions Judge on 05.12.2006.

6. The petitioners along with other accused persons appeared before the Sessions Judge on 05.12.2006 when the case was transferred to a Special Judge and the case was listed on 22.01.2007. It is thereafter the petitioner also filed an application before the Learned Special Judge to remand the case to the CMM with a direction to follow the procedure laid down in proviso to Sub Section (2) of Section 202 and the procedure laid down in Section 208 Cr.P.C. but the said application was also dismissed vide impugned order dated 16.11.2007 and consequent thereupon the petitioner has filed the present petition.

7. It is the submissions of the petitioner that despite withdrawal of the notification dated 06.03.1998 empowering the CMM to try offences punishable under the Official Secrets Act, in view of the order dated 13.11.2006 passed by the Hon'ble High Court Delhi directing the CMM to conclude recording of pre-charge evidence within 4 weeks, the CMM was bound to have recorded pre-charge evidence. However, this ground has not been pressed during the course of arguments.

8. It is submitted by the petitioner that dismissal of the application vide order dated 16.11.2007 is based upon a misconceived understanding of the law relating to committal of cases instituted upon the complaint to the Court of Session and is liable to be set aside on the following grounds:

- I. Because the Learned Special Judge failed to appreciate that the proviso to Sub-Section (2) of Section 202 Cr.P.C. is

a mandatory requirement and as such the Learned CMM was duty bound to comply with the aforesaid provision. He was obliged to direct the Complainant to produce all his witnesses, examine them on oath and before committing the case to the Court of Session, to supply copies of all the statements of witnesses so recorded and the documents relied upon by the prosecution to the accused free of cost.

- II. Because the learned Special Judge also failed to take note of the mandatory requirement of Section 208 Cr.P.C. which cannot be complied with unless there is due compliance of proviso to Section 202 (2) Cr.P.C.
- III. Because the Learned Special Judge ought to have set aside the order dated 30.11.2006 passed by the Learned CMM committing the case to the Court of Session solely on the ground that there was non-compliance of mandatory provision i.e. proviso to Sub-Section (2) of Section 202 Cr.P.C. and should have complied with the said provision and proceeded in accordance with law.
- IV. Because the Learned Special Judge ought not to have relied upon the judgment passed by this Hon'ble Court in the case of Frank Dalton Larkins and etc. Vs. State (Delhi Administration) reported in 1985 Crl.L.J. 377 since the said judgment suffers from various glaring infirmities. The Petitioner submits that in order to avoid repetition the submissions incorporated in the foregoing paragraphs 3 (f) (i) to 3 (f) (vii) may be treated as grounds in support of his prayer for setting aside the order dated 16.11.2007 impugned herein.
- V. Because in the judgments delivered by the Hon'ble Supreme Court in the cases of Rosy & Anr. Vs. State of Kerala & Ors. reported in (2000) 2 SCC 230 and Birendra K. Singh Vs. State of Bihar reported in 2000 (2) SCC 498 the proviso to Sub Section (2) of Section 202 Cr.P.C. has been held to be mandatory in a complaint Case more so when it

is triable by Sessions in view of Section 203 of the code Reference has also been made to the recommendations of the Law Commission in its 41st Report (incorporated in the foregoing paragraph No. 7 of this petition). It is submitted that in view of that the Learned Special Judge ought to have held that the obligation of the Learned CMM to call upon the complainant to produce all his witnesses for their examination on oath cannot be avoided and is a must.

- VI. Because the Learned Special Judge misconceived the scope and application of the law laid down by the Hon'ble Supreme Court in the cases of Rosy and Birendra K. Singh (supra) as the Learned Judge did not read the aforesaid judgments in their proper perspective and hence the order of the Learned Judge dismissing the application of the petitioner based upon a partly concurred judgment is not legally tenable.
- VII. Because the Learned Special Judge ought to have held that when the petitioner did raise his objection about the non-compliance of the mandatory provision of Section 202 (2) proviso at the earliest opportunity, the Learned Special Judge ought to have remanded back the matter to the Court of Learned CMM for its compliance in accordance with law.
- VIII. Because the Learned Special Judge ought to have held that when a particular provision of law has been declared mandatory by the Hon'ble Supreme Court, the non-compliance of the same, if brought to the notice of the Learned Court at the earliest opportunity, is by itself an illegality and prejudice is apparent, inherent and implicit so far the procedure of trial of the accused is concerned.

9. The respondents CBI on the other hand opposed the prayers made by the petitioner and submitted that the petition is completely mis-conceived, inasmuch as in the present case, the complaint had to

be filed by the CBI in view of the mandatory provisions contained in the Official Secrets Act. However, the complaint in this case was accompanied with the report of the investigation conducted by the CBI in the FIR which was registered on the Complaint of the Courier Company. The report also included the statement of witnesses recorded under Section 161 Cr.P.C. as well as the documents relied upon by the prosecution and, therefore, despite this being a complaint case it was a case based upon a report of investigation carried out by the CBI of which copies have been duly supplied to the petitioner and other accused persons. It is submitted that since the complaint was filed by a public servant, his examination was dispensed with by the Magistrate under Section 200 (2) Cr.P.C. and therefore holding of an enquiry of the evidence in such a case before committing the case to the Sessions/ Special Judge was discretionary as per the proviso contained under Section 202 despite this being a Sessions triable case. It is also submitted that even otherwise when the competent Court was seized of a matter where both complaint and the report of complete investigation coupled with statements recorded under Section 161 Cr.P.C. and the documents was available on record, what was required to be done was only to take cognizance on the basis of those documents i.e. the averments made in the complaint and the report of investigation there was no necessity of examination of the witnesses of the complainant before committal as precharge evidence as the copies of the statement recorded under Section 161 of Cr.pc was sufficient to enable the petitioners to argue their case as to whether charges were made out or not. It is also submitted that the peculiar facts of this case were not before the Apex Court in Rosy Case while exactly a similar

case was before the Id. Single Judge of this court in the case of Frank Dalton (Supra). Even otherwise in the given facts of this case can be tried as a case based upon police report in view of Section 210 Cr.P.C. once the copies of the report of investigation and the statement recorded under Section 161 Cr.P.C. and the documents stands supplied to the petitioner.

10. Thus, it is submitted that the judgments cited by the petitioner are of no consequence and the order of the Magistrate in committing the case to the Special Judge and the order of the Special Judge dismissing the application moved on behalf of the petitioner vide order dated 16.11.2008 is valid and requires no interference by this Court while exercising powers of revision under Section 397 Cr.P.C.

11. It may be observed here that vide orders dated 09.04.2009 the matter was admitted for regular hearing and interim orders were modified. However, when an application was filed by the petitioner i.e. Crl.M.A. No. 5361-64/2009 the matter was taken up for hearing it was submitted on behalf of the petitioner that the point which was raised by them in their application of preponing of the proceeding and amendment of the order dated 09.04.2009 was same and in fact the entire petition can be disposed of after hearing arguments from the petitioner only on the point “whether the procedure prescribed in the *proviso to Sub Section (2) of Section 202 was mandatory in the present case as the offence involved are exclusively triable by Sessions Court*”.

12. Accordingly, with the consent of the parties arguments were heard only on the main petition. The case on behalf of the petitioner was argued by Mr. V.V. Lalit, Senior advocate while on behalf of the

respondents Mr. Vikas Pahwa, Addl. Standing counsel made his submissions. While the petitioners have mainly relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Rosy & Anr. Vs. State of Kerala & Ors. reported in 2002 (2) SCC 230 the respondents have relied upon the judgment delivered by a Learned Single Judge of this Court in the case of Frank Dalton Larkins etc. Vs. State (Delhi Administration) 1985 Crl.L.J. 377.

13. I have given my thoughtful considerations to the rival submissions and have gone through the facts of the case. Before advertng to the respective contentions it would be appropriate to take note of the provisions contained in Chapter XV of the Cr.P.C. which deals with the trial of a complaint case. Those provisions are reproduced hereunder:

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 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 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.

203. Dismissal of complaint.—If, after considering the statements on oath (if any) of the complaint 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 dismiss the complaint, and in every such case he shall briefly 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 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 provisions of Section 87.

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, 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 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.

210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.—(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

14. It is not disputed that this complaint was filed by public servant and the same was accompanied with the report of investigation which

included the statement of witnesses under Section 161 Cr.P.C. as well as the documents seized by the CBI during the course of investigation in this case. It is also a matter of record that copies of those documents has been supplied to the petitioner and other co-accused persons which fact has also been recorded in the order passed by the Addl. Sessions Judge.

15. The petitioners have relied upon a judgment delivered by the Hon'ble Supreme Court in the case of Rosy & Anr. Vs. State of Kerala & Ors. (Supra) which has also taken note of an earlier judgment of the Kerala Full Bench on the same issue. The relevant portion of the said judgment on which reliance has been laid by the learned Senior Counsel for the petitioner, is reproduced for the sake of reference:

7. We agree with the submission of learned counsel for the appellants that the order passed by the High Court to hold fresh inquiry under Section 202(2) of the Code was unnecessary because (1) under Section 200 read with Section 202 CrPC, it is only at the discretion of the Magistrate to decide whether to hold an inquiry or not before issue of process to the accused; and (2) the High Court as well as the Sessions Court failed to notice the provisions in Section 465 of the Code while considering the contention raised by the defence counsel.

8. For appreciating the contention raised by the learned counsel, we would first refer to Sections 200 and 202 CrPC, which are 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:

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 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, postpone the issue of process against the accused*, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under 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.” (emphasis added)

9. The aforesaid Section 200 requires a Magistrate taking cognizance of an offence on a complaint to examine upon oath the complainant and the witnesses present, if any. The proviso to the said section carves out an exception in cases where a complaint is filed by a public servant acting or purporting to act in the discharge of his official duties or in cases where the court has made the complaint. In such cases, the complainant and the witnesses need not be examined. In such cases, if he is satisfied that there is sufficient ground for proceeding, he can straight away issue process. At this stage, the Magistrate has three options:
(i) to issue process on the basis of complaint, if he is satisfied that there is sufficient ground for proceeding against the accused (Section 204); or
(ii) to dismiss the complaint (Section 203); or
(iii) to hold an inquiry—

(a) by himself, or

(b) by directing investigation by the police officer, or

(c) by any other person, for the purpose of deciding whether or not there is sufficient ground for proceeding.

10. It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the Court of Session, the Magistrate himself has to hold the inquiry and no direction for investigation by the police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit, sub-section (2) of Section 202 gives discretion to the Magistrate to record the evidence of the witnesses on oath. To this

discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the Court of Session, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Sections 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dismissal of complaint, he is required to briefly record his reasons for so doing. In other cases, he has to issue process i.e. either summons or warrants as the case may be as provided under Section 204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnesses has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

17. At the initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the word "*shall*", it appears that the language used in the proviso is of a mandatory nature. At the same time, it is a procedural law and it is to be read in the context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself a discretionary one — *giving the option to examine or not to examine witnesses on oath*. Hence, the proviso to the said sub-section is required to be read accordingly though couched in mandatory terms by using the word "*shall*". Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed not by the public servant and where the offence is exclusively triable by the Court of Session, the Magistrate should follow the proviso to sub-section (2) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath.

This would be in consonance with the provision of Section 208 which, inter alia, provides for supply of copy of statements and documents to the accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the sessions triable case, under Section 226 the prosecution has to open its case by describing the charge brought against the accused and stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and, after hearing the submissions of the accused and the prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such consideration, if the court finds that there is no sufficient ground for proceeding against the accused, he shall be discharged as provided under Section 227. In case, where there is sufficient ground, the court is required to frame the charge as provided under Section 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know the allegation made against him as well as the evidence in support thereof. However, in a case where a complaint is filed by a public servant after holding an inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance with the proviso by the Magistrate in all sessions triable cases is not a must and would not vitiate further trial unless prejudice caused to the accused is established.

18. Further, the aforesaid interpretation would be in consonance with Chapter XXXV CrPC, which deals with irregularities in the proceedings, which may or may not vitiate the proceedings. Sections 460 and 461 provide which irregularities would or would not vitiate the proceedings. In these sections, there is no mention of Section 202. For our purpose reference to Section 465 would suffice, which, inter alia, specifically provides that irregularity in the complaint, summons, warrant, order or other proceedings before or during trial or in any inquiry shall not be a ground for reversing an order passed by the competent court, unless in the opinion of that court a failure of justice has in fact been occasioned thereby. Sub-section (2) further provides that in determining whether any irregularity in proceedings has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Hence, the statute does not expressly provide for nullification of the order as a consequence of non-compliance with the proviso to sub-section (2) of Section 202, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry under Section 202 when the Magistrate examines the witnesses on oath, as far as possible the proviso is to be complied with but the mandate is not absolute.

19. This is also to be considered with the fact that this part of holding an inquiry is a procedural one and for that purpose, it would be proper to refer to the observation made by this Court in *State of Punjab v. Shamlal Murari*: (1976) 1 SCC 719.

“We must always remember that processual law is

not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time."

20. Hence, what emerges from the above discussion is:

I. (a) Under Section 200 the Magistrate has the jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present.

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case the court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by any other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant under Section 204(2) before issuance of the process.

(c) The irregularity or non-compliance therewith would not vitiate further proceedings in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later.

16. In a partly concurrent judgment Justice J.B. Shah (as his lordship then was) held as under:

34. I may turn back to Chapter XV of the Code which contains the provisions to be invoked during the interregnum between filing of the complaint and issuance of process to the accused. Section 202 deals with postponement of process. The first sub-section says that any Magistrate, on receipt of a complaint of offence, “may, if he thinks fit, postpone the issue of process against the accused”, for resorting to any of the two courses i.e. either inquire into the case himself or direct an investigation to be made. But if the offence is triable by a Court of Session the Magistrate cannot make a direction for investigation. So the Magistrate taking cognizance of the offence upon a complaint, when such offence is not triable by the Sessions Court, can adopt either of the three courses: (i) straight away issue the process, or (ii) he can postpone the issue of process for holding an inquiry, or (iii) he can direct an investigation to be made. If the offence is triable by a Court of Session, it is impermissible for the Magistrate to direct an investigation. To see whether in such cases he can straight away issue process to the accused without holding the inquiry, a careful interpretation of sub-section (2) of Section 202 of the Code is called for. That sub-section is hence extracted below:

“202. (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.”

35. It may appear, prima facie, that the question of examining all witnesses would arise only when the Magistrate opts to hold an inquiry, otherwise not.

36. The crucial issue therefore is, when the offence, sought to be taken cognizance of by the Magistrate, is exclusively triable by the Court of Session, is it incumbent on the Magistrate to conduct an inquiry as enjoined in the proviso to Section 202(2) of the Code or can he dispense with such inquiry? The answer would not have been difficult if we go by the placement of the said proviso alone, as it can then be said that inquiry is not a must. If the said proviso was placed in Section 200 of the Code even a doubt that the legislative idea is to have all witnesses examined by the Magistrate when the offence complained of is triable exclusively by the Court of Session would have been displaced. Nonetheless the placement of the proviso is not the only criterion in discerning the legislative intent. Indications can be gathered from other connected provisions for taking a contrary view.

37. Chapter XVI of the Code contains provisions for commencement of proceedings before a Magistrate. Section 204, which is already referred to, enjoins on the Magistrate to issue process if the Magistrate forms the opinion that there is “sufficient ground for proceeding”. When the offence is triable by a Court of Session the

task of the Magistrate cannot be restricted to considering whether process should be issued. There must be sufficient ground for proceeding. Proceeding to what? In this context Section 208 of the Code is important and hence it is extracted below:

“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, 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 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.”

39. 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.

41. 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.

45. The recommendations so made by the Law Commission have been virtually incorporated by Parliament in Section 202 of the present Code. This Court had already taken the stand that it would be advantageous to look into the deliberations made in the legislature, the objects and reasons for the enactments including recommendations of the Law Commission for the purpose of discerning the legislative idea behind inclusion of any particular provision (vide *Santa Singh v. State of Punjab* (1976) 4 SCC 190 and *Mithilesh Kumari v. Prem Behari Khare* (1989) 2 SCC 95. In the latter decision a two-Judge Bench has stated thus:

“Is it permissible to refer to the Law Commission’s Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report as in this case. What importance can be given to it will depend on the facts and circumstances of each case.”

46. Regarding Section 202 of the Code Parliament has taken the clue from the Law Commission recommendation and introduced all the parameters in accordance with such recommendations. That is yet another factor which lends support to the interpretation which I have adverted to above.

47. 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.

17. A bare perusal of the judgment shows that there was a difference of opinion between the two judges regarding the mandatory nature of the proviso to Sub Section 2 of Section 202.

18. This judgment has also been cited by the petitioner before the Special Judge who has dealt with the same in the impugned order dated 16.11.2007. It may be appropriate to take note of some of the observations made by the learned Special Judge while dealing with the

aforesaid proposition made on behalf of the petitioner relying upon the judgment delivered in the case of Rosy (supra).

18. The matter also came up before Hon'ble Supreme Court in Rosy Vs. State of Kerala (2000) 2 SCC 220 wherein Hon'ble Mr. Justice M.B. Shah held in the middle para No.10 that "therefore the question of complying with the proviso of Sub Section 2 of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decide to hold the inquiry and secondly in such inquiry by him, if he decide to take evidence of witnesses on oath. But it object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may felt upon the mere perusal of complainant and the consideration of evidence of the complainant and the consideration of the complainant's evidence on oath and finally in para 20 of the said judgment Hon'ble Mr. Justice J.B. Shah concluded as under:

I. (a) Under Section 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of

the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204 (2) before issuance of the process.

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later.

Hon'ble Mr. Justice J.C. Thomas gave a partly concurring judgment.

19. It is submitted by the learned Counsel for the applicant that it is mandatory on the part of Magistrate to comply with the proviso to Sub Section (2) of Section 202 as held by the Hon'ble Supreme Court in case of **Birendra K. Singh Vs. State of Bihar (2008) 8 SCC 498**. In this case Hon'ble Supreme Court has reiterated the view taken in Rosy's case.

20. In view of the judgment of Hon'ble Supreme Court and Hon'ble High Court no illegality has been committed by the learned CMM.

21. It is submitted by counsel for applicant that mandatory provision of Section 208 has not been complied with in this case. It is already stated that in this case since it was a complaint by public servant, the statement of complainant was not recorded in view of Section 200 of Cr.P.C. and no inquiry was conducted under Section 202. There was no question of supplying of copy of statement of complainant as no statement of complainant was recorded. The copy of complainant and statement of witnesses recorded during investigation were already supplied to the applicant. Though I have disposed of the objection raised by learned counsel for applicant regarding the committal order but I find force in the submission of learned Special prosecutor for CBI this Court is to see only whether the case is triable by sessions court or not and not to look into the vires of committal.

19. At this stage, it would also be relevant to take note of the judgment relied upon by the respondents delivered in the case of **Frank Dalton Larkins (supra)**. This judgment is directly on the issue which is arising for adjudication in this case before this Court, whereas the facts in the case of Rosy and Birendra K. Singh (Supra) was entirely different inasmuch as those matters were not under the Official

Secrets Act and in those cases the complaint was not accompanied with the Police challan as is the case before in hand.

20. Some of the observations made in Frank Dalton Larkins case (supra) relevant for the purpose are reproduced hereunder, for the sake of reference:

19. On a plain reading of sub-sec.(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 Ss.200 to 204 of the Code would show that there is no legal obligation on the part of a Magistrate taking cognizance of an offence to resort to the procedure laid down in S.202 before dismissing a complaint or issuing process to the accused after taking cognizance of the offence complained of. The Magistrate can after following the procedure laid down in S.200 straightway dismiss the complaint under S.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 S.202 before he resorts to S.203. Similarly, he may direct issue of process where after complying with provisions of S.200 he is of the opinion that cognizance should be taken of the offence as there is "sufficient ground for proceedings", as envisaged in S.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-sec.(2) of S.202 will be attracted. The first part of the proviso to sub-sec.(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-sec.(2) while holding an inquiry, he is entitled to record evidence of witnesses on oath if he thinks fit. However, the proviso to sub-sec.(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 S.202 (2) of the Code, therefore, seems to be that where the Magistrate postpones the issues 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 S.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 S.200

that he may adopt the procedure provided in S.202. The Supreme Court has in a recent decision in *A.R. Antulay v. Ramdas Siriniwas Nayak*, (1984) 2 S.C.C. 500: (1984 Cri. LJ. 647), enunciated the legal position in relation to the scope of S.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 S.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". Therefore, the matter is left to the judicial discretion of the Court whether on examining the complainant and the witnesses if any as contemplated by S.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."

25. That was a case of private complaint. It was, therefore, imperative for the Magistrate to have examined the complaint under S.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 complaint. Therefore, an argument may well be advanced that the very purpose of the provisions contained in S.208 is defeated because there has been no examination of the complainant or of the witnesses either under S.200 or under S.202. However, this argument though specious does not stand close scrutiny as the answer to the same is to be found in clause (ii) of S.208 which requires furnishing of copies of the statements and confessions, if any, recorded under S.161 or S.164. Since S.208 deals specifically with cases instituted otherwise than on 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 S.161 or S.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 defence 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 S.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 cl.(iii). So even if statements under S.200 or S.202 have not been recorded, cl.(ii) and cl.(iii) of S.208 take sufficient care of the interest of the accused in the matter of defence. Reference in this context may be made with advantage to Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick, AIR 1981 SC 917 : (1981 Cri LJ 341) in which the Supreme Court while dealing with the ambit and scope of S.14 of the Act observed that the said Section does not in any way affect or override 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 S.208 cls.(ii) and (iii). Thus, the contention that non-examination of the complainant and the witnesses under S.200 or S.202 is likely to materially prejudice the accused in the preparation of their defence is devoid of any merit.

26. 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 S.200 or S.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 S.226 of the Code, whether or not there is sufficient ground for proceeding and then pass order under S.227 discharging the accused or framing the charge against the accused as envisaged in S.228 of the Code. The Sessions Judge, while considering the question of framing the charge against or discharging the accused under S.227, has the undoubted power to sift 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.

27. 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.

21. Nothing has been brought to my notice by the petitioners, that this judgment delivered by Justice J.P. Jain has either been overruled by any Division Bench of this Court or Hon'ble Supreme court of India. I may also observe that this judgment was not even brought to the notice of the Hon'ble Supreme Court in Rosy's case (supra).

22. It may also be observed that in the case of Rosy even though it was a complaint case which was committed to Sessions Court was not a complaint based upon any investigation conducted by the Police. No evidence was collected in favour of the complainant, whereas in the present case the First Information Report proceeded with an investigation by the CBI of the complaint lodged with them by the complainant M/s. Trident Express. They filed the complaint which even otherwise was filed on different facts, after completing the investigation, as it was the statutory requirement under the Official Secrets Act. Along with the complaint they also filed report of investigation, copy of which as stated above has already been supplied to the petitioner and other co-accused persons.

23. As such, the facts of this case are entirely different to the cases of Rosy and Birendra K. Singh (supra) relied upon by the petitioner.

24. It is a matter of record that in the entire judgment in Rosy's Case (Supra) no discussion has taken place about the provisions contained under Section 210 Cr.P.C. It is true that on a very strict reading of Section 210 Cr.P.C. one can say that such procedure is contemplated to be followed in a case in which earlier a complaint is filed and thereafter a Police challan is also filed. But even if that may not be so, if both the things are done together which has been done in the

present case to say that provisions contained under Section 210 Cr.P.C. are not attracted would make the reading of Section 210 Cr.P.C. redundant and would be contrary to the principles of interpretation of statutes inasmuch, as it will not only be contrary to the golden rule of Interpretation but also purposive theory of interpretation.

25. It is appropriate to take note of a judgment delivered by the Apex Court in the case of Sankaran Moitra Vs. Sadhna Das 2006 (4) SCC 584 where the provisions of Section 210 Cr.P.C. and the invocation of that provision has been discussed in the following words:

76. A bare reading of the above provision makes it clear that during an inquiry or trial relating to a complaint case, if it is brought to the notice of the Magistrate that an investigation by the police is in progress in respect of the same offence, he shall stay the proceedings of the complaint case and call for the record of the police officer conducting the investigation.

77. The object of enacting Section 210 of the Code is threefold:

- (i) it is intended to ensure that private complaints do not interfere with the course of justice;
- (ii) it prevents harassment to the accused twice; and
- (iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once.

78. The Joint Committee of Parliament observed:
“It has been brought to the notice of the Committee that sometimes when a serious case is under investigation by the police, some of the persons file complaint and quickly get an order of acquittal either by cancellation or otherwise. Thereupon the investigation of the case becomes infructuous leading to miscarriage of justice in some cases. To avoid this, the Committee has provided that where a complaint is filed and the Magistrate has information that the police is also investigating the same offence, the Magistrate shall stay the complaint case. If the police report (under Section 173) is received in the case, the Magistrate should try together the complaint case and the case arising out of the police report. But if no such case is received the Magistrate would be free to dispose of the complaint case. *This new provision is intended to secure that private complainants do not interfere with the course of justice.*”
(emphasis supplied)

26. It would also be relevant to take note of a judgment of this Court delivered long back by Hon'ble Mr. Justice V.D. Mishra reported as State Vs Har Narain and Ors. 1976 CRI.L.J 562(1). The relevant observation made in the said judgment for invoking Section 210 Cr.P.C. in the new code i.e. the Code of Criminal Procedure which came into existence in 1973, are reproduced hereunder:

6. The old Code did not contain any provision corresponding to Section 210 of the new Code. The Joint Select Committee states the object of enacting this section thus :

"It has been brought to the notice of the committee that sometimes when a serious case is under investigation by the police, some of the persons concerned file a complaint and quickly get an order of acquittal either by collusion or otherwise. Thereupon the investigation of the case becomes infructuous leading to miscarriage of justice in some cases. To avoid this, the committee has provided that where a complaint is filed and the Magistrate has information that the police is also investigating the same offence, the Magistrate shall stay the complaint case. If the police report is received in the case, the Magistrate should try together the complaint case and the case arising out of the police report. But if no such report is received, the Magistrate would be free to dispose of the complaint case."

Section 210 is in the following, terms :

210. (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report of the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with provisions of this Code."

It is contended by the respondent that since the offences alleged to have been committed by them in the complaint case and the police report are different, the provisions of this Section are not attracted. Now, one of the ingredients of Sub-Section (1) is that the offence enquired into or tried by the Magistrate in the complaint case should also be under police investigation. The word

'offence' has been defined in Section 2(n) of the Code as "any act or omission made punishable by any law for the time being in force.." **In other words, it is the act or omission which has to be common. As long as the facts under investigation by the police include the facts mentioned in the complaint case, then it will make no difference if the police come to the conclusion that offences not mentioned in the complaint have been committed by the accused. In the instant case a bare reading of the police report and the complaint shows that the facts complained of are the same. It is true that the period is covered by the complaint case. But that is because after the matter had been reported to the police the assessee filed further income-tax returns for the succeeding periods and the police found that similar offences had been committed by the respondents in the succeeding periods.**

7. Once the criteria laid down in Sub-Section (1) are satisfied, then if the Magistrate takes cognizance of 'any offence' against 'any person who is an accused in the complaint case' on the basis of police report, it is the duty of the Magistrate under Sub-Section (2) to try the two cases together as if they were instituted on a police report. The respondents contend that the words 'any offence' used in Sub-Section (2) show that the offence cognizance of which is taken on the basis of the police report should be the same which is being enquired into or tried in the complaint case. In my opinion this contention is not well-founded. The word 'any' does not denote or refer to a particular or a specific offence. On the other hand, it suggests that it is sufficient if cognizance of 'an offence' is taken. The Concise Oxford Dictionary gives the meaning of 'any' thus : "One, some (no matter which), as have you any wool ? have you any of them ? were any Frenchmen there ?" The Shorter Oxford Dictionary gives its meaning when used as singular equivalent to 'a' thus : "no matter which, or what" ; when used as plural equivalent to 'some' it means "no matter which, of what kind or how many." It, therefore, follows that if on the basis of a police report, cognizance of an offence, though it may be different from the offence mentioned in the complaint, is taken, the first ingredient of Sub-Sec. (2) is satisfied. The second ingredient of the Sub-Section is that cognizance of offence should be taken against 'any person who is an accused in the complaint case.' This would be satisfied if cognizance of the offence is taken against even only one of the persons accused in the complaint case. Where both the ingredients are satisfied, the procedure to be followed in the two cases is as if both were instituted on a police report.

10. In the instant case the police report is against all the persons who are named as accused in the complaint case. The Magistrate took cognizance of various offences on the police report when he started commitment proceedings under Section 207-A of the old Code. Therefore, the ingredients of Sub-Section (2) stand satisfied and the complaint case has to be tried as if it was instituted on a police report.

27. Similar view has been taken by Punjab and Haryana High Court in the case of Ram Rattan Vs. State of Haryana 2004 CrLJ 3617, where it has been held:

6. A perusal of sub-section 1 and sub-sec. 2 of Section 210 of the Act, shows that the policy of the Code which aims at avoiding the conflict between the investigation to be carried by the police on the basis of an FIR or an enquiry to be initiated by the Magistrate by taking cognizance of the offences alleged to have been committed by an accused on the basis of a complaint. The proceedings in the complaint are required to be stayed by the Magistrate or he can refer the complaint under Section 156 (3) to the police. However, in case the police report has been submitted and a complaint has been filed in respect of the same offence then under sub-section 2 of Section 210 the Magistrate is under obligation to order trial of both the cases together.

28. The issue also came up for consideration before Andhra Pradesh High Court in the case of Namathoti Sankaramma Vs. State of A.P. and Ors. 2000 CrLJ 4831 where the Court has interpreted as to how the provisions of Section 210 Cr.P.C. should be interpreted. The observation made by the learned Single Judge reflects the theory of Harmonious construction of Statute. The relevant observations made are reproduced herunder:

14. However, under sub-section (2) of Section 210 of Cr.P.C., the word 'offence' appears to have been used to indicate a particular transgression labelled as a particular offence under IPC or any other law. It is obvious from the fact that normally when the Court takes cognizance of an offence, it does not refer to taking cognizance of the whole incident in which offences are committed but to particular violations, which have been defined as specific offences. Inasmuch as the object of the provision appears to be as stated above to avoid enquiries or trials sought to be initiated on two different footings, namely, the complaint and the police report on parallel tracks leading to conflicting results, obviously it is the commonality of the incident which are the subject matters of the complaint and the first information report under investigation by the police and not the labels of a particular transgression of law affixed by the complainant in the complaint or in the first information report which, if it were not so, the provisions

of Section 210 of Cr.P.C. can be evaded by a mere device of labelling the transaction with different offences. As stated above in this case, the stage of staying the proceedings in the complaint case under sub-section (1) of Section 210 of Cr.P.C., has passed and the stage for calling for a report from the police has also been passed inasmuch as the police report under Section 173 of Cr.P.C. has been filed already. The provision in sub-section (1) of Section 210 of Cr.P.C. has been made as stated above for preventing parallel enquiries or trials. Where a question as to application of the provisions under Section 210 of Cr.P.C. arises at certain stage of enquiry in the complaint case or after the report under Section 173 of Cr.P.C. has been filed by the police, it cannot be said that because the stage for invoking sub-Section (1) of Section 210 of Cr.P.C. has crossed, the other provisions under it are not applicable.

15. For application of sub-section (2) of Section 210 of Cr.P.C., two conditions are required to be satisfied. (i) On the report of the police under Section 173 of Cr.P.C., cognizance of some offences has been taken by the Magistrate; and (ii) Any person who is an accused in the complaint case is among the accused against whom the Magistrate has taken cognizance of an offence on the basis of the police report.

29. In view of the aforesaid, it is necessary to give a purposive and harmonious interpretation to the provision contained under Section 210 Cr.P.C. in the facts of this case. Merely because the Police investigation was conducted prior to the filing of the complaint, it cannot be said that the situation as contemplated under Section 210 Cr.P.C. was not attracted. Thus, when the Magistrate took cognizance and committed the matter to Sessions that also after supplying copies of the statements recorded under Section 161 by the Police coupled with copies of the documents seized during the course of investigation to the accused persons before committing their case to the Sessions, he followed not only the complaint procedure but also the procedure as contemplated under Section 210 Cr.P.C. and, therefore, it was not a case where there was necessity of recording the statement of the witnesses prior to the stage of committal as contemplated under Section 202 (2) Cr.P.C. more so because it was a complaint filed by a

public servant and which was accompanied with the report of Police investigation which was complete in itself enabling the Court to satisfy as to whether prima facie a case was made out or not. Further the prejudice if any which may have been caused to the accused persons in such a case, as is contemplated under Section 207/208 Cr.P.C., was also not there because of supply of the documents and copies of the statements.

30. Moreover, if one goes by the judgment in *Rosy's case (supra)* and follow the judgment delivered by Justice Shah, this position becomes crystal clear as held by Justice J.D. Jain in *Frank Dalton Larkins case (supra)* that in the eventuality of the complaint filed by a Public Servant accompanied with the report of investigation, statements recorded under Section 161 Cr.P.C. along with the copies of documents, copies whereof have been supplied to the accused, the case has to be tried in accordance with Section 210 Cr.P.C. and in such a matter remanding back of a case for recording the statement of witnesses under Sub Section (2) of Section 202 Cr.P.C. does not arise and as such, the procedure prescribed under the proviso to Section 202 (2) is not mandatory and thus, there is no infirmity in the order passed by the Addl. Sessions Judge dated 16.11.2007 dismissing the application moved on behalf of the petitioner to remand back the case to the Court of Chief Metropolitan Magistrate. Accordingly, the revision petition is dismissed.

31. Let the parties now appear before the Special Judge on 07.07.2009 for addressing arguments on charge. Interim orders are vacated. However, the matter need not be proceeded with by the Trial

Court on 02.06.2009 i.e. the date already fixed.

32. TCR be sent back immediately with a copy of the order to the Special Judge for information and compliance.

MAY 27, 2009
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MOOL CHAND GARG, J.