

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.937 of 2008

Arising Out of PS.Case No. -0 Year- null Thana -null District- PATNA

Sunita Devi, W/O Late Anil Paswan, R/O-Quila House, P.S.-Chowk, District-Patna.

.... Petitioner

Versus

- 1. The State of Bihar through the District Magistrate, Patna.
- 2. The Superintendent of Beur Jail, Patna.
- 3. The Senior Superintendent of Police, Patna.
- 4. The Officer-in-Charge, Chowk Police Station, Patna City.

.... Respondents

with

Criminal Writ Jurisdiction Case No. 856 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- MADHUBANI

Shani Kumar Raj @ Shani Raj, Son of Amiri Prasad, resident of Bholwa Tola, P.S. Jainagar, Distt. Madhubani.

.... Petitioner

Versus

- 1. The State of Bihar through Principal Secretary, Home Department, Govt. of Bihar, Patna.
- 2. The District Magistrate, Madhubani.

.... Respondents

Appearance :

(In Cr. WJC No.937 of 2008)

For the Petitioner : Mr. Mrigank Mauli, Advocate.
For the Respondents : Mr. Ranjit Kumar, A.C. to G.P. 26.

(In Cr. WJC No.856 of 2016)

For the Petitioner : Mr. Md. Soban Asghar, Advocate.
For the Respondents : Mr. Saroj Kumar Sharma, A.C. to A.A.G.3

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date: 31-01-2017



Both the writ petitions having same 'issue' and similar grievances, have been referred to the Full Bench.

2. Whether remand by the Magistrate to judicial custody after submission of charge sheet but before taking cognizance of the offence in a Sessions case is legally permissible under the Code of Criminal Procedure, 1973 (hereinafter referred as to 'the Code') is the significant solitary question arising from a deep-seated conflict of decisions within this Court, which has necessitated this reference to the Full Bench.

3. The facts require notice for determination of the 'issue' aforesaid, are that the petitioner namely, Sunita Devi, filed Cr. W. J. C. No. 937 of 2008 for her release from judicial custody in Chowk P.S. Case No. 96/2003, District- Patna, registered for the offences punishable under Sections 328, 302 read with Section 34 of Indian Penal Code and the petitioner namely, Shani Kumar Raj @ Shani Raj, filed Cr. W.J.C. No. 856 of 2016 for his release in Jainagar P.S. Case No. 31/2016, District-Madhubani, registered for the offences punishable under Sections 304(B) of the Indian Penal Code and Section 3/4 of Dowry Prohibition Act, on the common ground that their judicial custody in respective cases, after submission of charge sheet but without taking cognizance by the Magistrate is bad in law.



4. The Division Bench of this Court has referred both the aforesaid matters after framing the specific question, as indicated above for an authoritative pronouncement.

5. While referring the matters before the Full Bench, the Division Bench has taken note of the decisions rendered by the Division Bench of this Court, in the case of S.K. Lal –Vs- Laloo Prasad & Others reported in 1998 (1) PLJR 782, followed in the case of Pawan Kumar Jaiswal vs. State of Bihar, reported in (1999) 2 BLJR 1093, and the subsequent contrary view expressed by the Division Bench of this Court in the case of Ramayan Singh vs. State of Bihar and another, reported in 2000 (3) PLJR 407, and which being relied by another Division Bench in the case of Ramanuj Tiwari vs. State of Bihar 2002 (2) PLJR 88. In the present case, it has also been noticed that in the case of Ramayan Singh (supra) and in the case of Ramanuj Tiwari (supra), Division Benches of this Court followed the Full Bench decision of this Court rendered in the case of Ravindra Rai vs. State of Bihar, reported in 1984 PLJR 701.

6. In the case of S.K. Lal (supra) the Division Bench of this Court held thus:

“After a police report under section 170 is received by the Special Judge Under Section 173 of the Code, he must proceed under section 190



of the Code and take cognizance, or refuse to take cognizance, having regard to the provisions of sections 195 to 199 of the Code. If he decides not to take cognizance, no case is instituted before him on a police report. If he decides to take cognizance and the accused appears before him, or is produced before him, the stage of commencement of trial is reached. He must then, as required by section 238 satisfy himself that the provisions of section 207 have been complied with. After he is satisfied that section 207 is complied with, he must proceed to consider the relevant material required to be placed before him and either discharge the accused under Section 239 of the Code or proceed to frame charge under Section 240 of the Code. After he decides to frame charge, he must proceed with the trial of the accused in accordance with the relevant provision of Chapter XIX of the Code prescribing the procedure for trial of warrant cases by Magistrate.

The proceeding under Section 190 of the Code is a judicial proceeding, but is not an enquiry within the meaning of that expression in the Code. The proceeding under section 238 is not an enquiry in view of the judgment of the Supreme Court in (1996) 4 SCC 495: 1996 (1) PLJR 123 (SC) (Raj Kishore Prasad –Vs- State of Bihar). The stage under sections 239 and 240 is reached after institution of a case on police report and after appearance of the accused and is therefore a proceeding in the course of trial, and not an enquiry.”



In the case of S.K. Lal (supra), the Division Bench also held that if the Special Judge was unable to take cognizance under section 190 of the Code of Criminal Procedure for any reason whatsoever, or refused to take cognizance, he would have no authority to remand the accused in custody in view of section 309 (2) of the Code, which makes the taking of cognizance, condition precedent for the exercise of power of remand in a pending inquiry or trial. The view expressed in the case of S.K. Lal (supra) has been also followed by another Division Bench, in the case of Pawan Kumar Jaiswal (Supra).

7. The Full Bench of this Court had occasion to consider the similar issue but having the same effect, in the case of Rabindra Rai –Vs- State of Bihar, reported in 1984 PLJR 701. The issue before the Full Bench of this Court was as under:

“Whether even in a case where the charge sheet has been submitted within the statutory period of 90 days, an accused is entitled to be released on bail if cognizance is not taken on the day the charge sheet is submitted, is the question which has to be answered”.

In the case of Rabindra Rai (supra) it was contended that after submission of charge sheet and before taking of cognizance,



a Magistrate cannot pass an order of remand either Under Section 167 (2) or Under Section 309 (2) of 'the Code'.

The Full Bench of this Court answering the 'issue' aforesaid, held thus:

“5. It cannot be disputed that after submission of the charge sheet Magistrate can remand an accused person to custody only under section (2) of Section 309. That Sub-section on plain reading applied at the stage of inquiry or trial. This leads to the question as to when an inquiry within the meaning of sub-section (2) of section 309 commences? According to the counsel for the petitioner any such inquiry shall commence only after taking cognizance on the basis of charge sheet/police report. Sub-section (2) of Section 309 of the Code is follows:-

“If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary, or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.”

6. What is meant by taking cognizance has been explained from time to time by different Court, including the Supreme Court. In a nut shell the expressions 'taking cognizance' mean application of mind. In one of the earliest cases on the point in the case of Dalu Gaur and others –Vs- Maheshwar Mahato (AIR 1948 Patna 25) it



was pointed out that the expression 'cognizance' has not been defined in the Code. There are several decisions to the effect that taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate, as such applies his mind to the suspected commission of an offence". There has been a common practice that Magistrates before whom police report/charge sheet is submitted they mention on the order sheet that cognizance had been taken. But to establish in a particular case that cognizance has been taken any such order saying that cognizance has been taken is not a must. As such, an inquiry within the meaning of section 309 (2) may commence before the Magistrate no sooner charge sheet is submitted so as to vest him power of remand under sub-section (2) of Section 309 of the Code. This aspect of the matter has recently been considered by the Supreme Court in the case of State of U.P. –Vs- Lakshmi Brahman and another (AIR 1983 SC439). From the judgment of that case it will appear that the accused concerned had surrendered before the Magistrate on November 2, 1974, charge sheet was submitted on February 5, 1974 (sic) i.e. beyond the statutory period of sixty days as it was under original Code prior to amendment of section 167 (2) by the Criminal Procedure (Amendment) Act, 1978. There is nothing in the judgment to show that in that particular case cognizance had been taken on the date of the submission of the charge sheet. A question arose whether an order of remand could have been



passed under section 309 (2) of the Code between the period commencing from the date of submission of the charge sheet and passing of an order of commitment under section 209 of the Code. In that connection it was held as follows:

“Thus, from the time the accused appears or is produced before the Magistrate with the police report under section 170 and the Magistrate proceeds to enquire whether section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2 (g) of the Code.”

After making a reference to sub- section (2) of section 309, it was further observed:-

“If, therefore, the proceeding before the Magistrate since the submission of the police report under section 170 and till the order of commitment is made under section 209 would be an inquiry and if it is an inquiry, during the period, the inquiry is completed, Section 309 (2) would enable the Magistrate to remand the accused to the custody.”

In view of the clear enunciation of the position that an inquiry within the meaning of section 2 (g) of the Code shall deem to have commenced since the submission of the police report, and shall continue till an order of commitment is made under section 209, it is difficult for this Court to hold that such inquiry



shall commence only after a formal order is passed by the Magistrate saying that cognizance has been taken. Once, it is held that inquiry commences since the submission of the police report/charge sheet there should not be any difficulty in holding that the Magistrate has during that period power to remand the accused in terms of sub-section (2) of section 309 of the Code.

8. It is well known that even in an application for writ of Habeas Corpus where challenge on behalf of the petitioner is that his detention in custody is without any authority of law, that question has to be examined with reference to the date fixed for return of rule. Reference in this connection may be made to one of the decisions of the Supreme Court in the case of Talib Hussain –Vs- State of Jammu and Kashmir (AIR 1971 SC 62) where it has been pointed out:-

“In regard to the submission that the petitioner was arrested and deprived of his personal liberty long before the order of his arrest and this invalidated his detention, it is sufficient to point out that in habeas corpus proceeding, the Court has to consider the legality of the detention of the date of hearing. If on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue.”

Something has been pointed out in the Full Bench decision of this Court in the case



of Babu Nandan Mallah –Vs- The State (1971 PLJR 605). The detention of any such person may be illegal at the initial stage, but if this Court finds on the date fixed for the return of the rule, that such detention is legal and in accordance with law, then such application for writ of Habeas Corpus has to be dismissed. If an accused having shown to this Court that at one stage he was under illegal detention, is not entitled to be released, because later a valid order of remand has been passed, then I fail to understand, how the right to be released or to be released on bail, which might have accrued to an accused person during investigation or before commencement of inquiry/trial can be enforced at a later stage when he is under custody on basis of a proper order of remand. In my view, to entertain an application for bail on the plea that a valuable right of an accused to be released on bail has been denied to him at an earlier stage will amount to stretching the scope of sub-section (2) of section 167 too far and without any purpose. On a plain reading, proviso (a) to sub-section (2) of section 167 is a check on the investigation so that it should be concluded as early as possible. If never purported to introduce “a stage of a compulsory bail not envisaged by a Code” as observed by the Supreme Court in the aforesaid case of State of U.P. (supra).”

8. In the case of State of U.P.-Vs- Lakshmi Brahman and another, AIR 1983 SC 439, the Supreme Court held thus:

“14. The view taken by the High Court introduces a stage of compulsory bail not envisaged by the



Code. Therefore, also the view of the High Court cannot be upheld. According to the High Court after the accused is brought before the court along with the police report, the magistrate must forthwith commit the accused to the Court of Session because the magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case of Court of Session is made. The view, with respect, is wholly untenable and must be set aside.

16. In view of the discussion, this appeal is allowed and the order of the High Court granting bail to the respondents on the short ground that they could not be remanded to the custody before the order committing them to the Court of Session is made, is aside. However, if in the meantime, the trial is over, no question of taking the respondents into custody pursuant to the order would arise.”

9. A Division Bench of this Court had also an occasion to consider and determine the exactly same issue in the case of Ramayan Singh vs. State of Bihar and another, reported in 2000 (3) PLJR 407. In paragraph 5 of the judgment of Ramayan Singh case (supra),the ‘issue’ which was raised and involved therein, was as under:

“5. The only point urged on behalf of the petitioner is that once the charge sheet was submitted, the power of Chief Judicial Magistrate to remand Under Section 167 (2) of



the Code came to an end and, thereafter, the only power of remand as provided under the Code, is Under Section 309 (2) of the Code, which authorizes the Magistrate to remand after taking of cognizance during inquiry and trial and which stage having not reached as yet in this case as no cognizance has been taken and the case is not at the stage of inquiry and trial, the remand of the petitioner is unjustified and unwarranted in law.”

The Division Bench of this Court considering Full Bench decision rendered in the case of Ravindra Rai (supra) held that the decision in the case of S.K. Lal (supra) had no application to the facts of that case because the case was not a Sessions case but a case triable as a warrant case. The Division Bench in paragraph 29 of the judgment answered thus:

“29. The law as settled by the Apex Court and followed by a Full Bench of this Court case is binding, thus when the police report is submitted under Section 170 of the Code and an accused appears or brought before the Magistrate and the Magistrate proceeds to inquire whether Section 207 has been complied with and then proceeds to commit the case in the court of Session, proceeding before the Magistrate is an inquiry as contemplated under Section 2 (g) of the Code and the Magistrate has power to remand the accused during the stage of commitment under Section 209 (a) or 309 of the Code.”

10. It may also be noted that another Division Bench of



this Court in the case of Ramanuj Tiwari and Nagendra Pati Tripathi @ Laljee vs. the State of Bihar & Others 2002 (2) PLJR 88 considered the same issue that the remand made by the learned Magistrate to judicial custody after submission of charge sheet and without taking cognizance of the offence was invalid?

The Division Bench of this Court answering the issue raised therein as indicated above held thus:

“9. The question raised by learned counsel appearing on behalf of the petitioners, in our opinion, is squarely covered by the decision rendered by this Court in the case of Ramayan Singh (supra) and detention of the petitioner in the given case would not be illegal or without jurisdiction, as the learned Magistrate has not in specific words recorded that he took cognizance of the offence after filing of the charge sheet.”

11. The Supreme Court in its subsequent decision in Raj Kishore Prasad –Vs- State of Bihar (1996) 4 SCC 495 has, however, differed from the view taken by the court earlier in Lakshmi Brahman case (supra). While dealing with the question as to whether the Magistrate undertaking commitment under Section 209 of the Code of Criminal Procedure of a case triable by a Court of Session, associate another person as accused, in exercise of power under Section 319 of the Code of Criminal Procedure, also considered the question whether the commitment proceedings had



the essential attributes of the inquiry. In other words, the Supreme Court, inter alia, considered the question whether the proceedings under section 209 of the Code are inquiry. This is how the Supreme Court considered the matter:

“8..... Proceedings before a Magistrate under Section 209 Cr. P.C. are patently not trial proceedings and were never considered so at any point of time historically. There has never been any doubt on that account. Before the amendment of the Code of Criminal Procedure in the present form, commitment proceedings had the essential attributes of an inquiry and were termed as such. Now do they continue to be so, is the core question, to determine and spell out the powers of the Magistrates under Section 209 Cr. P.C. If proceedings under Section 209 Cr. P.C. continue to be an inquiry. Section 319 Cr. P.C. would be obviously attracted, subject of course to deciding whether the material put forth by the investigation could be termed as 'evidence' as otherwise no evidence is recordable by a Magistrate in such proceedings.

9. While enacting the Code of Criminal Procedure, 1973, the prefatory note before the Parliament containing 'Objects and Reasons' gave out the changes proposed to be made with a view to speed up the disposal of criminal cases. Item (a) specifically provided “the preliminary inquiry which precedes the trial by a court of Session, otherwise known as committal proceeding, is being abolished as it does not



serve any useful purpose and has been cause of considerable delay in the trial of offences”

10. The Law Commission beforehand in its 41st report while recommending change on the subject opined as follows:

“ 17.11- Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the court of Session, the Magistrate has to send up the case to the court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we proposed in regard to such offences, the provision in this respect can take a simple form and can be placed in this Chapter as forming part of the commencement of proceedings before Magistrate. It will be convenient to refer to this process as “commitment of the case to the court of Session” although the procedure is radically different from the commitment proceedings at present provided in Chapter 16.

(ii) Cl. 214 (S.209)- “Preliminary inquiries by Magistrates in cases exclusively triable by the court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of an inquiry provided for by the amendment made in 1955 and contained in Section 207 A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems. Preliminary inquiries are, therefore, being dispensed with in cases triable by a court of Session. However, to



perform certain preliminary functions like granting copies, preparing the records, notifying the Public Prosecutor, etc, provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit the case to the court of Session. As regards private complaints in cases triable exclusively by a court of Session the enquiry into the complaint made by the Magistrate under the existing Section 202 will serve the purpose of a preliminary scrutiny.” S.O.R. Gaz. Of Ind. 10.12.1970. Pt. II S.2, Extra, p.1309 (1320).”

(Emphasis supplied).

11. The present Section 209 is thus the product of the aforesaid expert deliberation followed by Legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as “committal proceedings” have been abolished in cases triable by a court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the Public Prosecutor etc, are thus preliminary or ministerial in nature. It is of course true that the Magistrate at this juncture takes cognizance of a sort, but that is solely to perform those preliminary function as a facilitator, towards placement of the case before the court of Session, rather than being the adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate no application of mind is required in order to determine any issue raised, or to adjudge any one guilty or not, or otherwise to pronounce



upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the court of Session is in order so that it can proceed straight away with the trial and nothing is lacking in content, as per requirements of section 207 and 208 of the Code of Criminal Procedure, such proceedings thus, in our opinion do not fall squarely within the ambit of “inquiry” as defined in Section 2 (g) of the Code of Criminal Procedure, which defines that “inquiry means every inquiry, other than a trial conducted under this Code by a Magistrate or a Court,” because of the prelude of its being “subject to the context otherwise requiring”. As said before the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old State of Law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at that stage of Section 209 Cr. P.C. is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need to be added or subtracted to face trial before the court of Session.

12. This Court in *State of U.P. vs. Lakshmi Brahman and another* (AIR 1983 Supreme Court 439 (445)) took a view which prima facie does not seem to be in accord with our views afore-expressed. It was held as follows:

“The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry and the inquiry culminates



in making the order of commitment. Thus from the time the accused appears or is produced before the Magistrate with the police report under Section 170 and the Magistrate proceeds to enquire under section 207 has been complied with and then proceeds to commit the case to the Court of Session, the proceedings before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. We find it difficult to agree with the High Court that the functions discharged by the Magistrate under Section 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code.”

From the text of the judgment it is clear that the statement of “Objects and Reasons” reflecting legislative policy as to the quality of ‘inquiry’ was not laid before this court as well as the report of the 41st Law Commission recommending abolishing of “inquiry” before the Magistrate, which was responsible for the change. Had the Bench been apprised of the historical perspective, we have no doubt in our mind that the comprehension of the word “inquiry” as meant for Section 209 Cr. P.C. would have been the same as gathered by us on becoming cognizant of the legislative scheme for early disposal of cases triable by a Court of Session.”

It appears that the view expressed in Lakshmi Brahman case was not accepted by the Supreme Court in the case of Raj Kishore Prasad (supra), the Supreme Court held that the



proceedings before the Magistrate at the stage of Section 209 (proceeding for commitment of the case to the court of Session) are not inquiry.

12. In view of the above referred various decisions of the Division Bench and Full Bench decision in the Case of Rabindra Rai (supra) of this Court, as also, in view of the decision of Raj Kishore Prasad (supra) of the Hon'ble Supreme Court, which disapproved the observation made in the case of Lakshmi Brahaman (supra) to the effect that from the time the accused appears or is produced before the Magistrate with the police report and the Magistrate proceeds to commit the case to the Court of Session, the proceedings Under Section 209 of the Code would be an inquiry as contemplated by Section 2 (g) of the Code, this matter has been placed before this Bench as to make an authoritative pronouncement on the question that whether remand by the Magistrate to judicial custody after submission of charge sheet but before taking cognizance of the offence in a Session case, is legally permissible?.

13. At this juncture we would like to notice the various provisions of the Code which contemplate, the authorization of detention in police custody, or judicial custody, during investigation, and remand of the accused in committal



proceedings, or inquiry or trial. The Section 167 (1) & (2) of the Code prescribes authorization of detention of the accused in police custody or judicial custody, during investigation, which reads thus:

“167. Procedure when investigation cannot be completed in twenty-four hours- (1) whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well founded, the Officer I/C of the Police Station or the Police Officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under the section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that, -

(a) the Magistrate may authorize the



detention of the accused person, otherwise than in the custody of the police beyond the period of 15 days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years,

(ii) 60 days, where the investigation relates to any other offence, and, on the expiry of the said period of 90 days, or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under the subsection shall be deemed to be released under the provision of Chapter XXXIII for the purpose of that chapter.

(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the Second Class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.”



14. We would also like to notice the provision to remand the accused to custody by the Magistrate, in order to commit the case to the Court of Session, as envisaged under Section 209 of the Code. Section 209 of the Code reads thus:

“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.”

15. There is another provision also in the Code under Chapter XXIV which empowers the Court to remand the accused in judicial custody during any inquiry or trial. Section 309 of the Code reads thus:



“309. Power of postpone or adjourn proceedings.- (1) In every inquiry or trial, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded;

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.

(2). If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody;

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time;

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the



sentence proposed to be imposed on him.

Provided also that-

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment.

(c) where a witness is present in court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.”

16. There are two significant expressions being used in the Code, one is ‘cognizance of offences by Magistrate’ and another is ‘cognizance of offences by Courts of Session’. These two expressions are quite distinct and being used differently under



the Code.

Section 190 of the Code talks about cognizance of offences by Magistrate, whereas Section 193 of the Code talks about cognizance of offences by the Courts of Session, which are as follows:

“190 Cognizance of offences by the Magistrate-
(1) subject to the provisions of this chapter, any Magistrate of 1st Class, and any Magistrate of 2nd Class specially empowered in this behalf Under Section 2 may take cognizance of any offence- (a) upon receiving a complaint of fact which constitute such offence; (b) upon a police report of such fact; (c) upon information received from any person other than a Police Officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the 2nd Class to take cognizance under sub-section 1 of such offences as are within his competence to inquire into or trial.

193. Cognizance of offences by the Court of Session- except as otherwise expressly provided by this Court or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.”

17. The word ‘cognizance’ is not defined in the code and what is ‘taking cognizance’ has not been explained in the



Code. Whether in a case cognizance has been taken or not depends upon the facts and circumstances of the case. In the case of Ajit Kumar Palit vs. State of West Bengal, reported in A.I.R 1963 SC 756, the Hon'ble Supreme Court held that "The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means 'become aware of' and when used with reference to a court or judge, to take notice judicially. In the case of Tula Ram vs. Kishore Singh, reported in (1977) 4 SCC 459, the Hon'ble Supreme Court observed that taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as the Magistrate, as such, applies his mind to the suspected commission of an offence for the purpose of proceeding to take subsequent steps towards inquiry or trial. In view of above referred observations made by the Hon'ble Supreme Court, it is not the mandate of the Code that unless the expression 'cognizance is taken' be recorded by the Court in its order sheet, there wouldn't be cognizance of offences. To establish in a particular case that cognizance has been taken, any such order saying that 'cognizance has been taken' is not a requirement of law.

18. In the case of Dharam Pal and others vs. State of Haryana and another (2014) 3 SCC 306, the Constitution Bench of



the Hon'ble Supreme Court primarily deciding the issue regarding power of the sessions Court to issue summons against the person who is not named in police report, after commitment of case to it by the Magistrate under Section 209 of the Code, also considered the question as to whether under Section 209 the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. The Hon'ble Supreme Court held thus:

“39. This takes us to the next question as to whether Under Section 209 the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter proceed to issue summon is not in accordance with law. If cognizance is to be taken of the offence it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with assumption of such jurisdiction. The provisions of Section 209 will, therefore have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from



the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.”

19. In view of the above referred observations made by the Constitution Bench of the Hon’ble Supreme Court in the case of Dharam Pal (supra) and conjoint reading of Section 190 and 193 of the Code, we are of the view that in order to commit the case to the Courts of Session, in terms of Section 209 of the Code, the Magistrate has a very limited and passive role in committing the case to the Court of Session. From the reading of Section 193 of the Code it is apparent that the Court of Session, after commitment of the case to it by the Magistrate, assumes original jurisdiction as to take cognizance of any offence. Section 190 and 193 both are under Chapter XIV of the Code which deals with the conditions requisite for initiation of proceedings. Section 193 does not contemplate that the Court of Session shall not take cognizance of any offence as a court of original jurisdiction unless cognizance has already been taken in terms of Section 190 of the Code by the Magistrate, rather for taking cognizance of the offences by the Court of Session the only condition precedent is that the case being committed to it by a Magistrate under Section



209 of the Code. Therefore, only requirement of the law for commitment of the case to the Court of Session is that the Magistrate has to only find out from the police report that the case is triable exclusively by the court of sessions. So far the 'cognizance' of offence is concerned, it could be taken either by the Magistrate or by the Court of Session, as being held by the Hon'ble Supreme Court in the Case of Dharm Pal (Supra).

20. As the Hon'ble Supreme Court in the case of Raj Kishore Prasad (supra) categorically held that commitment of case to the Court of Session under Section 209 of the Code, would not be an inquiry as contemplated by Section 2 (g) of the Code, therefore, General provisions as to inquiries or trials provided under Chapter XXIV of the Code are not of any aid, in the proceedings of commitment of case to the Court of Session, in terms of Section 209 of the Code.

21. Now, the question would arise that after completion of investigation and submission of police report, in terms of Section 173 (2) of the Code whether the Magistrate has got such power to remand the accused in judicial custody, in order to commit the case to the Court of Session, specially when, in view of the decision of Raj Kishor Prasad (Supra) the proceeding of commitment of case to the Court of Session, is not an inquiry as



contemplated by Section 2 (g) of the Code, and power of remand the accused in custody envisaged under Section 309 (2) of the Code is not available to the Magistrate in commitment proceeding.

22. We are of the view that Section 209 of the Code itself confers the power of remand the accused to custody in order to commit the case to the Court of sessions. Under the commitment proceeding as envisaged in Section 209 of the Code, the remand of the accused, if in custody, is not made in terms of Section 309 (2) of the Code. Therefore, the expression 'after taking cognizance' which finds place in Sections 309 (2) of the Code is not a pre-requisite and having no bearing, as to remand the accused to custody by the Magistrate, in order to commit the case to the Court of Sessions.

The power of remand conferred to the Magistrate under Section 209 (a) and (b) is not subject to the other provisions of remand i.e. Section 167 (2) and 309 (2) of the Code, rather this power is independent in nature and only available to the Magistrate under commitment proceedings.

23. Therefore, after submission of charge sheet, once it appears to the Magistrate that the offence is triable exclusively by the court of session, the accused is remanded to custody in terms of Section 209 of the Code under the commitment proceedings,



not under Section 309 (2) of the Code.

24. Taking all the facts and circumstances into consideration and in view of the discussions made above, we are of the opinion that the remand of the petitioners to Judicial custody by the Magistrate after submission of charge sheet, relating to offences triable exclusively by the court of session, is a valid remand, notwithstanding the fact that in the order sheet of the concerned cases, there being no such order saying that ‘cognizance has been taken’.

25. Therefore, accordingly, these applications are dismissed.

(Hemant Gupta, ACJ)

(Anjana Mishra, J)

(Sudhir Singh, J)

U.K./-

AFR/NAFR	AFR
CAV DATE	NA
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