IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 04TH DAY OF NOVEMBER, 2026

R

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.3641 OF 2026

BETWEEN:

SRI SHIVA SHANKAR
S/O MALLANNA
AGED ABOUT 40 YEARS,
HEAD CONSTABLE TOKEN NO. 12856
BANDEPALYA POLICE STATION
BOMMANAHALLI POST,
BENGALURU – 560 068
(ACCUSED NO.3 IN P.C.R NO.
15677/2025)

... PETITIONER

(BY SRI RANGANATH REDDY R., ADVOCATE)

Digitally signed by PADMAVATHI B K
Location: High Court of Karnataka

AND:

1 . STATE OF KARNATAKA
BY BANDEPALYA POLICE STATION
REPRESENTED BY
STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA
BENGALURU – 560 001.

2 . SRI M.D.ANIL KUMAR
S/O DASE GOWDA,
AGED ABOUT 42 YEARS,
RESIDING AT NO. 482,
12TH 'A' MAIN ROAD,

HSR LAYOUT, 7TH SECTOR,
BENGALURU – 560 102.

... RESPONDENTS

(BY SRI B.N.JAGADEESHA, SPP-I FOR R-1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 528 OF B.N.S.S., PRAYING TO 1.QUASH THE ORDER DATED 12.12.2025 PASSED IN P.C.R. NO.15677/2025 BY THE LEARNED IX ADDL.C.J.M BENGALURU CITY ISSUING NOTICE TO THE PETITIONER UNDER SEC.223(1) OF BNSS; 2.CONSEQUENTLY QUASH THE ENTIRE PROCEEDINGS IN P.C.R. NO.15677/2025 PENDING ON THE FILE OF THE LEARNED IX ADDL.C.J.M BENGALURU CITY IN SO FAR AS THE PETITIONER IS CONCERNED.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

The petitioner is before the Court seeking the following prayer:

(a) "Quash the order dated 12-12-2025 passed in P.C.R.No. 15677 of 2025 by the learned IX Additional Chief Judicial Magistrate, Bengaluru City, issuing notice to the petitioner under Section 223(1) of BNSS;

(b) Consequently, quash the entire proceedings in P.C.R.No.15677 of 2025 pending on the file of the learned IX Additional Chief Judicial Magistrate, Bengaluru City, insofar as the petitioner is concerned;

(c) Pass such other order or orders as this Hon'ble Court deems fit in the interest of justice and equity."

2. Heard Sri **Ranganath Reddy R.**, learned counsel appearing for the petitioner and Sri **B.N. Jagadeesha, learned State Public Prosecutor – I** appearing for respondent No.1.

3. Facts, in brief, germane, are as follows: -

The petitioner, a public servant – Head Constable at Bandepalya Police Station is drawn as accused No.3 in a private complaint registered by the 2nd respondent/complainant in P.C.R.No.15677 of 2025 before the learned Magistrate invoking Section 223 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS' for short). The learned Magistrate, on the complaint being registered, passes the following order on 25-09-2025:

"**25-09-2025**
Order

ORDER

The complainant has filed this private complaint under Section 223(1) of BNSS against the accused Nos. 1 to 3 for the offences punishable under Sections 61, 109, 115(1), 115(2), 118(1), 126(2), 130 and Section 3(5) of BNS. In support of complaint he has filed documents.

I have perused the contents of the complaint and the documents. Heard the arguments of the learned counsel for complainants. It is just and necessary to record the sworn statement of the complainant.

For sworn statement, call on **27-10-2025**."

The learned Magistrate records sworn statement of the complainant and issues notices to the accused as obtaining under Section 223(1) of the BNSS by the following order dated 12-12-2025:

"**12-12-2025**
Order

ORDER

The sworn statement of complainant is recorded.

Now, it is just and necessary to give an opportunity to the accused Nos. 1 to 3 as required under proviso of Section 223(1) of BNSS. Section 223(1) of BNS which reads as under:

223. Examination of complainant.

"(1) A Magistrate having jurisdiction while 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 no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:"

Such being so, in the instant PCR, it is just and necessary to hear the accused No.1 to 3. Hence, this Court proceed to pass the following:

ORDER

Issue notice to accused No.1 to 3 if PF paid.
For appearance of the accused No.1 to 3.

Call on **31-01-2026**."

The petitioner is now before the Court calling in question the order of issuance of notice after recording the sworn statement of the complainant, on the score that the order suffers from procedural aberration as obtaining under Sections 218 and 223 of the BNSS.

SUBMISSIONS:

PETITIONER:

4. The learned counsel Sri **Ranganath Reddy R.** appearing for the petitioner would submit that the order dated 12-12-2025 quoted *supra* is without jurisdiction for it suffering from bar under Section 218 of the BNSS. It is his submission that without sanction, the concerned Court cannot take cognizance of the offence. If the cognizance itself is barred, the learned Magistrate lacks jurisdiction to issue notice. It is his submission that even to issue notice, there must be sanction at the hands of the competent authority. The purport of BNSS is thus defeated is his submission.

THE STATE:

5. *Per contra*, the learned State Public Prosecutor - I appearing for the 1st respondent Sri **B. N. Jagadeesha** would vehemently refute the submissions in contending that the stage of

cognizance is yet to arrive. Sanction would be required for taking cognizance of the offence on a report. The issue is still at the pre-cognizance stage. What is to be followed in a pre-cognizance stage is correctly followed by the concerned Court. He would submit that if the concerned Court would take cognizance without sanction, it is then the procedural aberration and not as is now projected. The learned State Public Prosecutor-I would seek dismissal of the petition.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

CONSIDERATION:

7. The afore-narrated facts are not in the realm of dispute. Equally undisputed is the position occupied by the petitioner as a Police Head Constable attached to Bandepalya Police Station at the relevant point in time. The genesis of the controversy lies in the celebrations of Karaga Mahotsava, said to have been organised by the 2nd respondent/complainant in Mangammanapalya and its surrounding areas. The petitioner, arrayed as accused No.3, along

with other police personnel attached to Bandepalya Police Station, was allegedly deployed to the places where the festivities were scheduled to be held, ostensibly for the maintenance of law and order and preservation of public peace during the celebrations.

8. The gravamen of the complaint is that the accused police personnel, including the petitioner, allegedly indulged in the use of filthy and abusive language against the participants of the Karaga Mahotsava, thereby disturbing public tranquillity and causing nuisance to those assembled. This, in essence, constitutes the sum and substance of the allegations that propelled the 2nd respondent to invoke the jurisdiction of the learned Magistrate by presenting a private complaint under Section 223 of the BNSS, alleging offences punishable under Sections 61, 109, 115(1), 115(2), 118(1), 126(2) and 130 read with Section 3(5) of the Bharatiya Nyaya Sanhita, 2023 ('BNS' for short).

9. What emerges with unmistakable clarity from a perusal of the complaint is that the entire edifice of the allegations against the petitioner/accused No.3 rests upon acts allegedly committed while he was deployed in connection with the discharge of his official

duties. The alleged occurrence is neither divorced from his official assignment nor entirely unconnected with the functions he was called upon to perform as a police officer. Whether the alleged acts were in the lawful discharge of official duty, or merely purported to be so, is a matter that assumes significance, in the light of the statutory protection engrafted under Section 218 of the BNSS.

10. The learned Magistrate, upon presentation of the complaint, passes an order on 25-09-2025 directing recording of the sworn statement of the complainant. The said order is extracted *supra*. Thereafter, on 12-12-2025, the learned Magistrate records the sworn statement and proceeds to issue notice to accused Nos.1 to 3. The latter order is also extracted *supra*. It is these proceedings that have brought the petitioner before this Court, calling in question the legality of the procedure adopted by the learned Magistrate and the sustainability of the proceedings initiated against him.

11. The controversy, therefore, crystallises into two distinct, yet interconnected, questions of law.

11.1. **The first** is, whether the protective mandate contained in Section 218 of the BNSS, corresponding to Section 197 of the erstwhile Code of Criminal Procedure, 1973, ('Cr.P.C.' for short) operates as a statutory embargo upon the learned Magistrate, taking cognizance of the alleged offences against a public servant, in the absence of the requisite sanction, when the acts complained of bear a reasonable nexus to the discharge or purported discharge of official duties. In other words, whether the requirement of previous sanction constitutes a condition precedent to the exercise of jurisdiction by the learned Magistrate in the circumstances obtaining in the case at hand.

11.2. **The second** is, whether the order directing issuance of notice to the accused withstands scrutiny on the touchstone of the procedure expressly prescribed under Section 223 of the BNSS, or whether it stands vitiated by a procedural infraction that strikes at the very foundation of the proceedings. The distinction between a notice affording the accused an opportunity of hearing before cognizance and a process issued upon taking cognizance is of considerable significance, for the statutory stages cannot be

conflated, nor can the procedural safeguards ordained by the legislature be reduced to empty formalities.

SANCTION UNDER SECTION 218 OF THE BNSS:

12. These questions are not merely matters of procedural nicety. They concern the limits of judicial cognizance, the protection accorded by law to public servants against prosecution for acts reasonably connected with official duty, and the obligation of a criminal Court to adhere scrupulously to the procedure prescribed by the statute. **A safeguard consciously woven into the fabric of criminal procedure cannot be treated as an expendable formality.** It is in the delicate balance between these competing considerations that the present controversy must be examined. To consider the first of the aforesaid issues, it becomes necessary to notice the statutory prescription contained in Section 218 of the BNSS, which reads as follows:

> "**218. Prosecution of Judges and public servants**.—(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as

otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)—

(*a*) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(*b*) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (*b*) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (*b*) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted:

Provided further that such Government shall take a decision within a period of one hundred and twenty days from the date of the receipt of the request for sanction and in case it fails to do so, the sanction shall be deemed to have been accorded by such Government:

Provided also that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 64, Section 65, Section 66, Section 68, Section 69, Section 70, Section 71, Section 74, Section 75, Section 76, Section 77, Section 78, Section 79, Section 143, Section 199 or Section 200 of the Bharatiya Nyaya Sanhita, 2023.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the

> maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.
>
> (4) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.
>
> (5) The Central Government or the State Government, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

As observed, Section 218 of the BNSS is a statutory successor of Section 197 of the Cr.P.C. Whether sanction as obtaining under Section 218 of the BNSS for referring the matter for investigation by the concerned Court is required or otherwise need not detain this Court for long or delve deep into the matter.

13. The Apex Court in **ANUMANDALA RAJESH REDDY v. STATE OF KARNATAKA[1],** interpreting Section 197 of the Cr.P.C., has held as follows:

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[1] **2026 SCC OnLine SC 2050**

"…. …. ….

26. We are of the firm opinion that the finding of the High Court that the investigation into the FIR could not continue for want of sanction under Section 197 CrPC [corresponding to Section 218 BNSS] is *per se* erroneous. Section 197(1) CrPC is quoted hereinbelow for sake of ready reference:—

> **"197. Prosecution of Judges and public servants:—**
>
> **(1)** When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, **no Court shall take cognizance of such offence** except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013] —
>
> (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.
>
> [Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]
>
> [Explanation — For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166-A, Section 166-B, Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 370, Section 375, Section 376, [Section 376-A, Section 376-AB, Section

376-C, Section 376-D, Section 376-DA, Section 376-DB] or Section 509 of the Penal Code, 1860.]"

[Emphasis supplied]

27. A bare perusal of the aforesaid provision, which confers a protective umbrella upon public servants who are alleged to have committed an offence during the discharge of their official duties, makes it clear that the requirement of sanction comes into operation only when the Court is to proceed to take cognizance of the offence. The concept of obtaining sanction under Section 197 CrPC at the stage of registration of an FIR is alien to the scheme of CrPC or BNSS. An order under Section 156(3) CrPC directing registration of an FIR and investigation is a pre-cognizance step and does not amount to taking cognizance of the offence. Consequently, where the Magistrate has, by exercising powers under Section 156(3) CrPC, directed registration of an FIR and to conduct investigation, the absence or otherwise of previous sanction under Section 197 CrPC cannot operate as a bar to such registration and investigation. This aspect was considered by this Court in the case of *Ashwini Kumar Upadhyay* v. *Union of India*[10], relevant paragraphs of which are extracted hereinbelow:—

> **"120. In the present case, the High Court has declined to direct registration of an FIR on the ground that prior sanction under Sections 196 and 197 of CrPC had not been obtained. The High Court has further proceeded on the premise that while exercising jurisdiction under Section 156(3) of CrPC, the Magistrate is deemed to have taken cognizance, and therefore, the requirement of prior sanction becomes a condition precedent.**
>
> **121. A coordinate Bench of this Court in *State of Karnataka* v. *Pastor P. Raju*[35], had occasion to consider the stage at which prior sanction becomes necessary under CrPC. The Court categorically held that there is no embargo on the registration of a criminal case, the conduct of investigation by the police, or the submission of a report under Section 173 of CrPC in the absence of prior sanction.**

122. The requirement of sanction, this Court clarified, operates at the stage of taking cognizance by the Court and not at the anterior stage of investigation. In this context, after surveying the earlier precedents on the subject, this Court observed as follows: —

> **"12.** In *Narayandas Bhagwandas Madhavdas* v. *State of W.B.* [1959 SCC OnLine SC 39: 1959 SCC OnLine SC 39 : (1960) 1 SCR 93: 1959 SCC OnLine SC 39 : AIR 1959 SC 1118: 1959 SCC OnLine SC 39 : 1959 Cri LJ 1368] it was held that before it can be said that **any Magistrate has taken cognizance of any offence under Section 190(1)(*a*) of the Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter—proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. It was observed that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. It was also observed that what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations**. The Court then referred to the three situations enumerated in sub-section (1) of Section 190 upon which a Magistrate could take cognizance. Similar view was expressed in *Kishun Singh* v. *State of Bihar* [(1993) 2 SCC 16 : 1993 SCC (Cri) 470: (1993) 2 SCC 16 : 1993 SCC (Cri) 470] that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged

> offender, he is said to have taken cognizance of the offence. …"

Thus, defining attribute of "taking cognizance" of an offence lies in the application of judicial mind by the Magistrate to the contents of the complaint or police report with a view to proceed in accordance with law, including under Sections 200 or 204 of CrPC. Until such stage is reached, any action undertaken by the Magistrate cannot be construed as taking cognizance of the offence.

123. In *Pastor P. Raju* (supra), the FIR therein had been registered under Section 153B of IPC, and the respondent was arrested and produced before the Magistrate. At the stage of remand under Section 167 of CrPC, the respondent sought quashing of the proceedings on the ground of absence of prior sanction under Section 196(1-A) of CrPC. While delineating the distinction between "taking cognizance" and subsequent procedural stages, including issuance of process, this Court held as follows: —

> "13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out.
>
> 14. In the present case neither any complaint had been filed nor any police report had been submitted nor any information had been given by any person other than the police officer before the Magistrate competent to take cognizance of the offence. After the FIR had been lodged and a case had been registered under Section 153-B IPC, the respondent was arrested by the police and thereafter he had been produced before the Magistrate. The Magistrate had merely passed an order remanding him to judicial custody. Section 167

CrPC finds place in Chapter XII which deals with information to the police and their powers to investigate. This section gives the procedure which has to be followed when investigation cannot be completed within twenty-four hours and requires that 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, he shall be forthwith transmitted to the nearest Judicial Magistrate along with a copy of the entries in the diary. Sub-section (2) of Section 167 will show that even a Magistrate who has no jurisdiction to try the case can uthorize the detention of the accused. A limited role has to be performed by the Judicial Magistrate to whom the accused has been forwarded viz. to uthorize his detention. This is anterior to Section 190 CrPC which confers power upon a Magistrate to take cognizance of an offence. Therefore, an order remanding an accused to judicial custody does not amount to taking cognizance of an offence. In such circumstances Section 196(1-A) CrPC can have no application at all and the High Court clearly erred in quashing the proceedings on the ground that previous sanction of the Central Government or of the State Government or of the District Magistrate had not been obtained. It is important to note that on the view taken by the High Court, no person accused of an offence, which is of the nature which requires previous sanction of a specified authority before taking of cognizance by the court, can ever be arrested nor such an offence can be investigated by the police. The specified authority empowered to grant sanction does so after applying his mind to the material collected during the course of investigation. There is no occasion for grant of sanction soon after the FIR is lodged nor such a power can be exercised before completion of investigation and collection of evidence. Therefore, the whole premise on the basis of which the proceedings have been quashed by the High Court is wholly erroneous in law and is liable to be set aside."

124. A cumulative reading of the principles laid down in *Pastor P. Raju* (supra) and *Sakiri Vasu* (supra) makes the legal position abundantly clear that an order passed by a Magistrate under Section 156(3) of CrPC does not amount to "taking cognizance" of an offence within the meaning of Section 190 of CrPC.

125. In the present case, the appellants, being aggrieved by the inaction of the police authorities in registering an FIR, approached the Magistrate by way of an application under Section 156(3) of CrPC. The bar contained in Sections 196 and 197 of CrPC operates only at the stage of taking cognizance. In other words, it restrains the Magistrate from proceeding under Section 190 and thereafter invoking the procedure under Sections 200 or 204 of CrPC in the absence of prior sanction.

126. The scheme of CrPC does not contemplate any embargo on the direction for registration of an FIR or the conduct of investigation at the pre-cognizance stage. To hold otherwise would amount to introducing a restriction not envisaged by the legislature. The process of criminal law is sequential: information of a cognizable offence must first be received; an FIR must then be registered; investigation must follow; a report under Section 173 of CrPC must thereafter be submitted; and it is only at that stage that the question of taking cognizance arises.

127. The requirement of sanction is, therefore, a condition precedent only for taking cognizance and not for the registration of an FIR or for the conduct of investigation. Any interpretation that makes the registration of an FIR contingent upon prior sanction would invert this statutory scheme and render the provisions relating to investigation unworkable.

128. In the facts of the present case, the prayer before the Trial Court was limited to seeking a direction to the Station House Officer, Parliament Street Police Station, to register an FIR on the basis of the complaint dated 29th January, 2020. In law, the Magistrate had two options: either to direct investigation under Section

156(3), or to take cognizance under Section 190(1)(a) and proceed in accordance with Chapter XV.

129. The bar under Sections 196 and 197 of CrPC would operate only in respect of the latter course. It could not have been invoked to deny the former. The Trial Court, therefore, fell in error in declining to exercise jurisdiction under Section 156(3) of CrPC on the ground of absence of prior sanction, and the High Court, in affirming such view, has adopted an interpretation which cannot be sustained in law."

[Emphasis supplied]

28. Thus, it is clear that the impugned order, insofar as it extends the benefit of the protective umbrella of sanction to the respondents at the stage of direction for registration of FIR under Section 156(3) CrPC, is *per se* unsustainable in the eyes of law."

The Apex Court, in the afore-quoted judgment, delineates with unmistakable clarity the stage at which the protective mantle of sanction, as contemplated under Section 197 of the erstwhile Cr.P.C., corresponding to Section 218 of the BNSS, assumes statutory significance. The Apex Court holds that the requirement of previous sanction is attracted at the stage of taking cognizance of the alleged offence against a public servant and not at a stage anterior thereto. The embargo engrafted in the provision is thus upon the Court taking cognizance without the requisite sanction, wherever such sanction is warranted in law. It does not operate as

an absolute interdiction against every preliminary step that a learned Magistrate may undertake before arriving at the stage of cognizance.

14. When the facts obtaining in the case at hand are examined on the touchstone of the aforesaid exposition of law, what emerges is that the learned Magistrate has not yet crossed the threshold of cognizance. The proceedings remain at the pre-cognizance stage. The learned Magistrate has recorded the sworn statement of the complainant and issued notice to the accused. Such issuance of notice, at this stage, cannot by itself, be construed as an act of taking cognizance of the alleged offences. The statutory interdiction under Section 218 of the BNSS has, therefore, not yet come into operation.

15. The submission advanced on behalf of the petitioner that the learned Magistrate was denuded of jurisdiction even to issue notice after recording the sworn statement of the complainant, for want of previous sanction under Section 218 of the BNSS, is consequently *sans* substance and merits no countenance. **A statutory safeguard that becomes operative at the threshold**

of cognizance cannot be invoked to invalidate proceedings that have not yet reached that threshold. To hold otherwise would be to advance the stage of the statutory embargo beyond what the legislature has ordained and transform a protection against unauthorised cognizance into an impediment against even preliminary judicial consideration.

16. Therefore, insofar as the challenge founded upon Section 218 of the BNSS is concerned, the proceedings before the learned Magistrate, up to the stage at which they are brought under challenge before this Court, cannot be held to suffer from want of jurisdiction, merely on the ground of absence of previous sanction. This conclusion, however, does not foreclose the question of sanction at the appropriate stage. Should the learned Magistrate proceed to take cognizance, the mandate of Section 218 of the BNSS, if attracted on the facts and in law, would necessarily require consideration and compliance. **The protection afforded to a public servant is neither extinguished by the initiation of preliminary proceedings nor prematurely attracted before the statutory occasion for its application arises.** The first

issue, therefore, stands answered against the petitioner, subject to the aforesaid clarification.

PROCEDURE UNDER SECTION 223 OF THE BNSS *QUA* PUBLIC SERVANTS:

17. The next issue, which assumes significance independent of the question of sanction is, whether the procedure adopted by the learned Magistrate bears fidelity to the statutory command contained in Section 223 of the BNSS. The 2nd respondent sets the criminal law in motion by presenting a private complaint invoking Section 223 of the BNSS. The legality of the proceedings must, therefore, be tested against the procedural architecture erected by the said provision. This Court in the case of **BASANAGOUDA R. PATIL v. SHIVANANDA S. PATIL**[2], while elucidating what would be the procedural drill for a private complaint under Section 223 of the BNSS, has held as follows:

> "…. …. ….
>
> **7.** The registration of the private complaint for offences punishable under Section 356(2) of the BNSS is not in dispute. The fulcrum of the compliant was that the petitioner made a

[2] **2024 SCC OnLine Kar 96**

defamatory speech against the respondent at an election rally. The issue that is brought before the Court, at this juncture, is not on the merit of the matter. The complaint is filed by the respondent invoking Section 223 of the BNSS, which is Section 200 in the earlier regime - Cr. P.C. The moment complaint is registered, a notice is issued to the accused. Issuance of notice to the accused has driven the petitioner to this Court, in the subject petition, contending that it is contrary to the procedure to be adopted in law. Therefore, it becomes germane to notice certain provisions of the BNS 2023. Filing of the private complaint is dealt with under Section 223 of the BNSS, which was Section 200 of Cr. P.C., it reads as follows:

> *"**223. Examination of complainant.—(1) A Magistrate having jurisdiction while 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 no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:***
>
> *Provided further 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 212:*
>
> *Provided also that if the Magistrate makes over the case to another Magistrate under Section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.*
>
> *(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless—*

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

(Emphasis supplied)

Proviso to sub-section (1) of Section 223 of the BNSS mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present if any and reduce it into writing. The proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the BNSS deals with issuance of process which is akin to Section 204 of the Cr. P.C. This stage is yet to arrive in the case at hand.

8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

> **10. Therefore, the procedural drill would be this way:**
>
> **A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate/concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.**
>
> **11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023**."

18. The question is not merely whether the learned Magistrate possessed the jurisdiction to entertain the complaint, but whether the jurisdiction so possessed has been exercised in the manner prescribed by law. **The existence of jurisdiction is one thing; its exercise in conformity with the procedure ordained by the statute is quite another.** A proceeding may survive a

challenge founded upon the absence of sanction and yet falter if the mandatory procedure governing its initiation has been observed in breach, rather than in compliance. The answer to the first issue, therefore, does not *ipso facto* furnish an answer to the second.

19. It becomes necessary, in that light, to notice the language of Section 223 of the BNSS, particularly, the procedural safeguards engrafted therein and the sequence of judicial steps contemplated by the legislature. Section 223 of the BNSS reads as follows:

> "**223. Examination of complainant**.—(1) A Magistrate having jurisdiction while 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 no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:**
>
> Provided further 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 212:

> Provided also that if the Magistrate makes over the case to another Magistrate under Section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.
>
> **(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless—**
>
> **(*a*) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and**
>
> **(*b*) a report containing facts and circumstances of the incident from the officer superior to such public servant is received.**"

A conjoint reading of Section 223 of the BNSS, particularly the first proviso to sub-section (1) and the safeguards engrafted under sub-section (2), brings to the fore a carefully structured procedural regime governing the entertainment of private complaints, more particularly those levelled against public servants for acts alleged to have been committed in the course of discharge of their official functions or duties. The provision marks a significant departure from the procedure obtaining under the erstwhile Cr.P.C. by introducing safeguards at the threshold of cognizance. The legislative intent is unmistakable: a public servant ought not to be exposed to the rigours of criminal prosecution for acts reasonably

connected with the discharge of official functions without the Magistrate first undertaking the scrutiny that the statute expressly commands.

20. The procedural architecture emerging from Section 223 of the BNSS, read in conjunction with Section 218 of the BNSS wherever applicable, may be delineated thus:

A. PROCEDURE AT THE PRE-COGNIZANCE STAGE

Step 1 - Examination of the complaint and recording of sworn statements:

20.1. Upon presentation of a private complaint, the learned Magistrate is required to examine the complaint and, in accordance with Section 223(1) of the BNSS, examine upon oath the complainant and the witnesses present, if any. The substance of such examination shall be reduced into writing and shall bear the signatures of the complainant, the witnesses, if any, and the Magistrate. This constitutes the foundational stage of preliminary judicial scrutiny, enabling the Magistrate to ascertain the nature

and substance of the allegations, before proceeding further in accordance with law.

Step 2 - Calling for a report from the superior officer:

20.2. Where the complaint alleges commission of an offence by a public servant in the course of discharge of his official functions or duties, the Magistrate is required, in terms of Section 223(2)(b) of the BNSS, to obtain a report containing the facts and circumstances of the incident from an officer, superior to such public servant. This requirement is not an ornamental addition to the statute. It serves the salutary purpose of placing before the Magistrate an account of the circumstances surrounding the alleged occurrence, thereby enabling a more informed consideration of the complaint. The report of the superior officer constitutes a statutory safeguard against precipitate cognizance of allegations arising out of the performance of official functions.

Step 2.1 - Consideration of the requirement of sanction:

20.3. Where the allegations concern acts committed by a public servant while acting or purporting to act in the discharge of

official duty, the Magistrate must advert to the requirement of previous sanction contemplated under Section 218(1) of the BNSS, wherever the said provision is attracted. The necessity of sanction must be examined in the light of the nature of the alleged acts, their nexus with official duty and the status of the public servant concerned. The actual statutory embargo upon proceeding without such sanction operates at the stage of taking cognizance and not at the antecedent stages of preliminary scrutiny.

Step 3 - Opportunity of hearing to the accused/public servant:

20.4. The Magistrate is, thereafter, required to afford the accused/public servant an opportunity of placing his version of the circumstances leading to the alleged incident, as contemplated under Section 223(2)(a) of the BNSS. This requirement must be read in harmony with the first proviso to Section 223(1), which mandates an opportunity of hearing to the accused before cognizance is taken. To render such an opportunity meaningful and effective, the accused/public servant must be apprised of the allegations and furnished the material necessary to respond

thereto, including the complaint, the relevant sworn statements and the report obtained from the superior officer.

20.5. An opportunity of hearing without adequate knowledge of the allegations and the material forming their foundation would be an opportunity in form and not in substance. The legislature did not intend a hearing that is reduced to a ritual, bereft of the means necessary to make an effective representation.

B. PROCEDURE AT THE STAGE OF COGNIZANCE

Step 4 - Consideration of cognizance after compliance with the prescribed safeguards:

20.6. Upon completion of the aforesaid preliminary requirements, including affording the accused an opportunity of hearing, the learned Magistrate may proceed to consider, whether cognizance of the alleged offences is warranted. It is at this stage that the Magistrate must apply judicial mind to the complaint, the sworn statements, the report of the superior officer, wherever applicable, and the submissions of the accused, for the purpose of

determining whether the complaint merits further proceedings in accordance with law.

Step 4.1 — Previous sanction as a condition precedent to cognizance:

20.7. Where the acts complained of bear the requisite nexus to the discharge or purported discharge of official duties and the public servant falls within the protective ambit of Section 218 of the BNSS, cognizance cannot be taken, except in conformity with the requirement of previous sanction prescribed thereunder. The Magistrate must, therefore, ensure that the statutory requirement of sanction, wherever attracted, stands satisfied before crossing the threshold of cognizance. The opportunity of hearing contemplated under Section 223 of the BNSS must also precede such cognizance.

21. The aforesaid stages demonstrate the distinction between preliminary judicial scrutiny and the act of taking cognizance. The examination of the complainant and recording of sworn statements at Step 1, obtaining the report of the superior officer at Step 2 and affording an opportunity of hearing to the accused public servant at

Step 3 are all steps anterior to cognizance. These preliminary exercises do not, by themselves, attract the embargo contained in Section 218 of the BNSS. **Sanction is a statutory prerequisite to cognizance, wherever Section 218 applies; it is not a prerequisite to every preliminary step undertaken by the Magistrate in contemplation of cognizance.**

22. The distinction is of considerable importance. **The law does not prohibit the Magistrate from examining a complaint against a public servant; it regulates the manner in which the Magistrate may proceed to take cognizance thereof.** Equally, the absence of a requirement of sanction at the preliminary stage does not dilute the independent procedural obligations imposed by Section 223. The two provisions operate in their respective spheres and must be construed harmoniously, so that neither the safeguard of previous sanction nor the safeguard of preliminary hearing is rendered otiose.

JUDICIAL LANDSCAPE ON PROCEDURE UNDER SECTION 223(2) OF THE BNSS:

23.1. Difference between Section 218(1) and Section 223(2) of the BNSS is succinctly interpreted by the High Court of Kerala in the case of **SUHYB P.J. v. STATE OF KERALA**[3], wherein it is held as follows:

"…. …. ….

> **8.** The first contention being regarding the failure of the Magistrate to follow the procedure prescribed in Section 223 of the BNSS, the said provision is extracted hereunder for easy reference
>
> > **"223. Examination of complainant.**
> >
> > (1) A Magistrate having jurisdiction while 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 no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:
> >
> > Provided further 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

[3] **2025 SCC OnLine Ker 5070**

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 212 : Provided also that if the Magistrate makes over the case to another Magistrate under Section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless-

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

(underline supplied)

9. The difference between the procedure prescribed in Section 202 of the Code of Criminal Procedure and Section 223(1) was noticed by this Court in *Suby Antony* v. *Susha*, [2025 (1) KHC 596], the relevant portion of which is extracted below;

"7. Indeed, a radical change in procedure is brought about by the proviso to S. 223(1) of BNSS. Pertinently, in spite of the proviso to S. 223(1) making it mandatory to provide opportunity of hearing to the accused before taking cognisance, S. 226 does not reckon the accused's objection at the stage of taking cognisance as a relevant factor for dismissing the complaint. Being guided by the precedents on S. 200 and S. 202 of the Code and the plain language of the proviso to S. 223(1) of the BNSS, this Court is of the opinion that, after the complaint is filed, the Magistrate should first examine the complainant and witnesses on oath and thereafter, if the Magistrate proceeds to take

cognisance of the offence/s, opportunity of hearing should be afforded to the accused."

10. In so far as cognisance was taken by the Magistrate in C.C. Nos. 612, 613 and 614 of 2024, without following the prescribed procedure, Crl.M.C. Nos. 73, 74 and 85 are liable to be allowed.

11. The next contention is regarding the failure to follow the procedure prescribed in sub-section (2) to Section 223 of BNSS. Here, it is pertinent to note that Section 202 of the Code of Criminal Procedure did not contain a provision corresponding to Section 223(2) of BNSS. The only provision in the Code providing such protection to public servants was Section 197(1) and the corresponding Section in the BNSS is Section 218(1), extracted below;

"218. **Prosecution of Judges and public servants.**

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his officer save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)—

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State of the State Government:

(underline supplied)

12. On careful scrutiny of Sections 218(1) and 223(2) it can be seen that the protection under Section 218 is confined to the offences alleged to have been committed by a public servant while acting or purporting to act in the discharge of official duty. On the other hand, sub-section (2) of Section 223 covers offences alleged to have been committed by a public servant in course of the discharge of the official functions or duties. Interpreting the words 'any offence alleged to have been committed by the public servant while acting or purporting to act in the discharge of his official duty, the Apex Court in *B. Saha* v. *M.S. Kochar*, [(1979) 4 SCC 177 : AIR 1979 SC 1841] has observed that if those words are construed narrowly, the provision will be rendered sterile, for, it is not part of an official duty to commit an offence and in the wider sense the words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. Therefore, the right approach lies between the two extremes. In *Rizwan Ahmed Javed Shaikh* (supra), the Supreme Court laid down the test for the applicability of Section 197 as under;

> "**15.** The real test to be applied to attract the applicability of Section 197(3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purported to be performed, the public officer would be protected."

13. Later, in *Sankaran Moitra* (supra), after extensive survey of precedents, the Supreme Court encapsulated its conclusion as to the primary object of Section 197 in the following words;

> "**67.** From the aforesaid decisions, in my opinion, the law appears to be well settled. The primary object of the legislature behind Section 197 of the Code

> is to protect public officers who have acted in discharge of their duties or purported to act in discharge of such duties. But, it is equally well settled that the act said to have been committed by a public officer must have reasonable connection with the duty sought to be discharged by such public officer. If the act complained of has no nexus, reasonable connection or relevance to the official act or duty of such public servant and is otherwise illegal, unlawful or in the nature of an offence, he cannot get shelter under Section 197 of the Code. In other words, protection afforded by the said section is qualified and conditional."

14. True, that in *Alavi C.* (supra), this Court, in the context of Section 197, has held that acts of physical torture and abuse cannot be said to have reasonable connection with official duty. Here, it is pertinent to note that **the wordings of Section 223(2) of BNSS are much more expansive than Section 197(1) of the Code (Section 218(1) of BNSS). While Section 218(1) contemplates sanction of the Government if the public servant is alleged to have committed <u>any offence while acting or purporting to act in the discharge of his official duty</u>, Section 223(2) provides an opportunity to the public servant to make his assertions with respect to <u>any offence alleged to have been committed in course of the discharge of his official functions or duties</u>. Undoubtedly, the words 'any offence alleged to have been committed in course of the discharge of his official functions or duties' would take in an excessive act committed by such person in the course of the discharge of his official functions or duties.**

15. Another vital difference between the provisions is that, in Section 218(1) only the word duty is used, whereas in Section 223(2), both duty and function are mentioned. While the expression 'public duty' refers to an obligation or responsibility imposed on a public official, the term public function refers to the activity, role or service performed by a public official or a person acting on behalf of the Government. Thus, it is apparent that the legislature has consciously used the expansive expression in Section 223(2) so as to provide additional layer of protection to public servants from prosecution based on false and frivolous complaints. Therefore, when

dealing with complaints alleging commission of offence by a public servant in course of the discharge of his official function or duty, the Magistrate is bound to follow the procedure prescribed in Section 223(2) of BNSS.

16. While on the subject it may also be profitable to note that while sanctioning under Section 218(1) of BNSS is confined to persons employed by the Central and State Governments, no such restriction is stipulated in Section 223(2), the expression used therein being public servant simplicitor. Therefore, all persons falling within the definition of 'public servant' under Section 2(28) of the BNS are covered by the protective umbrella of Section 223(2) of BNSS. Being so, the contention of the 2nd respondent that the 2nd petitioner is not appointed by the State Government and therefore do no fall within the ambit of Section 223(2) can only be rejected.

17. The above discussion leads to the conclusion that in CMP Nos. 2814 of 2024 and 2869 of 2024, the Magistrate should afford opportunity to the petitioners to offer their explanation regarding the alleged incident and call for a report from their superior officer. The 1st petitioner being the immediate superior of the 2nd petitioner, the Magistrate may call for a report from an officer superior in rank to both the petitioners."

23.2. While delineating the procedural drill that the learned Magistrate should follow under Section 223(2) of the BNSS, the High Court of Gujarat in the case of **RAJDIPSINH NARSINH NAKUM v. STATE OF GUJARAT**[4] has held as follows:

"…. …. ….

[4] **R/Criminal Revision Application (Against order passed by subordinate Court) No.1151 of 2026 disposed of on 22-04-2026**

7. The case of **G.C. Manjunath And Others** (supra), was referred by learned senior advocate Mr. Nanavaty, para nos.42 to 46 is reproduced herein under:

> ***42.*** *Turning to the case at hand, there is little doubt that the allegations levelled against the accused persons are grave in nature. Broadly classified, the accusations against the accused persons encompass the following:*
>
> *(1) abuse of official authority by the accused persons in allegedly implicating the complainant in fabricated criminal cases, purportedly driven by malice or vendetta;*
>
> *(2) physical assault and ill-treatment of the complainant by the accused persons, constituting acts of alleged police excess;*
>
> *(3) wrongful confinement of the complainant; and*
>
> *(4) criminal intimidation of the complainant.*
>
> ***43.*** *In the circumstances at hand, we are of the considered opinion that the allegations levelled against the accused persons, though grave, squarely fall within the ambit of "acts done under colour of, or in excess of, such duty or authority," and "acting or purporting to act in the discharge of his official duty," as envisaged under Section 170 of the Police Act and Section 197 of the CrPC, respectively.*
>
> ***44****. This Court, while adjudicating on instances of alleged police excess, has consistently held in Virupaxappa and D. Devaraja, that where a police officer, in the course of performing official duties, exceeds the bounds of such duty, the protective shield under the relevant statutory provisions continues to apply, provided there exists a reasonable nexus between the impugned act and the discharge of official functions. It has been categorically held that transgression or overstepping of authority does not, by itself, suffice to displace the statutory safeguard of requiring prior government sanction before prosecuting the public servant concerned.*

> ***45****. In the present case, it is an admitted position that the complainant was declared a rowdy sheeter by the Deputy Commissioner of Police, Law and Order (West), Bengaluru City, pursuant to a request made by the Mahalakshmi Layout Police Station, Bengaluru, upon due consideration of the criminal cases registered against the complainant, vide order dated 23.08.1990. Subsequently, multiple criminal cases have been instituted against the complainant. It is in the course of the investigation of these cases that the instant allegations have been levelled against the accused persons. As noted above, any action undertaken by a public officer, even if in excess of the authority vested in them or overstepping the confines of their official duty, would nonetheless attract statutory protection, provided there exists a reasonable nexus between the act complained of and the officer's official functions.*
>
> ***46.*** *In the present case, it is evident that the actions attributed to the accused persons emanate from the discharge of their official duties, specifically in connection with the investigation of criminal cases pending against the complainant. As previously observed, a mere excess or overreach in the performance of official duty does not, by itself, disentitle a public servant from the statutory protection mandated by law. The safeguard of obtaining prior sanction from the competent authority, as envisaged under Section 197 of the CrPC and Section 170 of the Police Act cannot be rendered nugatory merely because the acts alleged may have exceeded the strict bounds of official duty. In view of the foregoing, we are of the considered opinion that the learned VII Additional Chief Metropolitan Magistrate erred in taking cognisance of the alleged offences against the accused persons without the requisite sanction for prosecution in the instant case. The absence of the necessary sanction vitiates the very initiation of criminal proceedings against the accused persons.*

8. Section 223 of the BNSS is with the heading of 'Examination of complainant'. The first proviso itself makes it clear that the Magistrate shall not take cognizance of the offence without giving the accused an opportunity of being heard. Such opportunity has to be given in all the matters, even if, it would not be a case

against any public servant. The second proviso further clarifies that when a complaint is in writing, there is no need to examine the complainant and the witnesses, if the public servant acting or purporting to act in discharge of his official duty or a Court has made the complaint or in the case, if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212 of the BNSS, 2023.

8.1 The relevant provision, which touches the issue in dispute in the present matter is sub-section (2) of section 223 of the BNSS, 2023. It has been very clearly laid down that before taking the cognizance on the complaint against the public servant for any offence alleged to have been committed in course of discharge of his official functions or duties, the public servant is required to be given an opportunity, so that the public servant can produce his own case with statement of facts as to the situation that had led to the incident so alleged, further unless the report containing the facts and circumstances of the incident from the officers superior to the public servant is received.

9. Here, in this matter, the learned Magistrate has issued the process under section 227 of the BNSS, 2023 without complying the provisions of sub-section (2) of section 223 of the BNSS, 2023. **Though, a complaint has been made of custodial torture or mis-treatment or an assault, as provided under sub-section (2) of section 223, the provision mandates the Magistrate to hear the public servant so that he can make his own assertion as to the situation, which has been alleged by the complainant. It also becomes necessary to ask for a report from the superior officer of that of public servant, containing the facts and circumstances of the incident. It is only after an opportunity is granted to the public servant and on receiving the report from the superior officer of the public servant with regard to the facts and circumstances of the incident and the assertions made by the public servant with regard to the incident alleged, the learned Magistrate under the inquiry is required to apply the mind for taking the cognizance prior to issuance of the process under section 227 of the BNSS, 2023.**

> **10. This Court finds that the learned Magistrate has erred by not following the procedure under the provision of subsection (2) of section 223 of the BNSS, 2023.** The contention of learned advocate Mr. Dave that the revision ought to be filed before the Sessions Court cannot be given a countenance since both the High Court and Sessions Judge would have equal power to exercise the revision jurisdiction. Further, since the order has been passed by the Sessions Judge in 'Javak' No.8173/2025 dated 02.06.2025, it would not have been proper for the applicants to have approached the Sessions Judge challenging the order, directing inquiry.
>
> 11. Hence, the present application is allowed. The order dated 13.06.2025 passed by the Judicial Magistrate, First Class, (3rd Court), Surat in Criminal Inquiry No.107 of 2025 is set aside directing the learned Magistrate that since the statements of the complainants have already been recorded, the Magistrate to follow sub-section (2) of section 223 of the BNSS, for considering the case for issuance of the process."
>
> (Emphasis supplied at each instance)

24. If the law laid down by the Apex Court, this Court and the High Courts of Kerala and Gujarat, as noticed hereinabove, is juxtaposed with the facts obtaining in the case at hand, **three dates assume decisive significance**, for they trace the progression of the proceedings and bring into sharp focus the procedural infraction that has crept into the exercise undertaken by the learned Magistrate. The first is **08-09-2025**, when the 2nd respondent presents a private complaint under Section 223(1) of

the BNSS against the petitioner, who is admittedly a public servant. The allegations in the complaint themselves unmistakably disclose that the acts complained of were allegedly committed when the petitioner was deployed in connection with the Karaga Mahotsava celebrations, in the course of performing his official duties. The second is **25-09-2025**, when the learned Magistrate passes an order posting the matter for recording the sworn statement of the complainant. The third is **12-12-2025**, when the learned Magistrate, upon recording the sworn statement, proceeds to issue notice to the accused, in purported compliance with the first proviso to Section 223(1) of the BNSS, affording them an opportunity of hearing before cognizance.

25. The aforesaid chronology, though seemingly innocuous, reveals a statutory infraction of considerable significance. The infirmity does not lie in the learned Magistrate entertaining the complaint, recording the sworn statement or even issuing notice to the accused at the pre-cognizance stage. These are steps which the statutory scheme permits. **The infirmity lies in what the learned Magistrate omitted to do while undertaking what the statute**

otherwise permitted him to do. The complaint, on its very face, alleges acts committed by the petitioner in connection with the discharge of his official functions. This circumstance necessarily invited the application of Section 223(2) of the BNSS, which engrafts an additional and specific safeguard in the case of complaints against public servants.

26. The learned Magistrate was, therefore, required to secure a report, containing the facts and circumstances of the alleged incident from an officer superior to the petitioner, as mandated under Section 223(2)(b) of the BNSS, and to afford the petitioner an opportunity to place his version of the circumstances leading to the alleged incident, as contemplated under Section 223(2)(a). The record, however, does not disclose that any such report was called for or secured before the impugned order came to be passed. The learned Magistrate appears to have proceeded under the general procedure contemplated by Section 223(1) of the BNSS, without adverting to the additional statutory safeguards specifically incorporated under Section 223(2).

27. **The generality of sub-section (1) of Section 223 cannot be permitted to eclipse the specificity of sub-section (2) of Section 223.** When the legislature has consciously carved out a distinct procedure for complaints against public servants arising out of acts connected with their official functions, the Magistrate cannot proceed as though, the special prescription were absent from the statute book. **To countenance such a course would be to render sub-section (2) a dead letter and reduce a substantive legislative safeguard to a mere ornamental appendage.**

28. It must be emphasised that the present case does not involve an infraction of Section 218 of the BNSS at this stage, for the learned Magistrate has admittedly not yet taken cognizance. The embargo of previous sanction, wherever attracted, would arise at the stage of cognizance. **The vice that afflicts the impugned proceedings is not the absence of sanction under Section 218, but the failure to observe the mandatory procedure engrafted under Section 223(2) of the BNSS.** The distinction is fundamental and cannot be lost sight of.

29. The order dated 12-12-2025, passed after recording the sworn statement and directing issuance of notice to the accused under the first proviso to Section 223(1), without compliance with the requirements of Section 223(2), therefore, cannot be sustained in its present form. The learned Magistrate ought to have undertaken the exercise contemplated under the special statutory provision, before proceeding further towards consideration of cognizance. The omission to do so, renders the impugned order procedurally infirm and warrants interference to the extent necessary to restore the proceedings to the stage at which the statutory mandate ought to have been observed.

30. **The criminal process, however legitimate its initiation, must travel only along the path charted by the legislature. A Court cannot dispense with a statutory safeguard, on the premise that the proceedings are merely preliminary, when the safeguard itself has been designed to operate at that very preliminary stage. The sanctity of criminal procedure lies not merely in the ultimate decision**

that a Court renders, but equally in the fidelity with which it observes the law at every stage leading to that decision.

31. In the light of the aforesaid analysis, the challenge founded upon Section 218 of the BNSS must fail, while the challenge predicated upon non-compliance with Section 223(2) of the BNSS deserves acceptance. The proceedings need not be obliterated in their entirety; the procedural infirmity can be remedied by requiring the learned Magistrate to undertake the exercise mandated by law. **The petition, therefore, deserves to succeed, *albeit* in part, by setting aside the order dated 12-12-2025, insofar as it directs issuance of notice without compliance with Section 223(2) of the BNSS, and remitting the matter to the learned Magistrate to proceed afresh from the appropriate stage, strictly in accordance with law.**

32. For the aforesaid reasons, the following:

O R D E R

(i) Criminal Petition is **allowed in part**.

(ii) Proceedings before the learned Magistrate in P.C.R.No.15677 of 2025 up to the order dated 25-09-2025 stands sustained and the order dated 12-12-2025 stands obliterated.

(iii) The matter is remitted back to the learned Magistrate to redo the procedure after recording the sworn statement of the complainant, bearing in mind the observations made in the course of the order.

Sd/-
(M.NAGAPRASANNA)
JUDGE

Bkp
CT:MJ