CASE NO.:
Appeal (crl.) 18-19 of 2000

PETITIONER:
ROSY AND ANR.

RESPONDENT:
STATE OF KERALA AND ORS.

DATE OF JUDGMENT: 10/01/2000

BENCH:
K.T. THOMAS & M.B. SHAH

JUDGMENT:
JUDGMENT

2000 (1) SCR 107

The Judgments of the Court were delivered by SHAH, J.

Leave granted

These appeals by special leave are filed against the common judg-ment dated 7.6.1999 passed by the High Court of Kerala in Crl. Reference No, 2 of 1999 and Criminal R.P.- No. 1035 of 1998. A Division Bench of the High Court quashed the committal order in Sessions Case No, 39 of 1990 pending before the Sessions Court, Trissur and directed the Magistrate to conduct a fresh enquiry in terms of proviso to Section 202 (2) Criminal Procedure Code (for Short "the Code") and thereafter to pass an order of committal to the Sessions Court.

The criminal proceedings wherein it is alleged that methyl alcohol was present in the arrack, the sample of which was taken by an Excise Inspector on 26.2.1988 and which are pending since November, 1989 are being unduly delayed on one account or the other including a reference made by the Sessions Judge and the directions now issued by the High Court. The Excise Inspector after completing the the enquiry filed a complaint before a Judicial Magistrate, Trissur on 16.11.1989 for offences punishable under Sections 57-A and 56(b) of the Kerala Abkari Act (for short 'the Act'). As the offences are exclusively triable by the court of Sessions, the learned Magistrate by his order dated 26.5.1990 committed the case to the court of Sessions, Trissur. After framing the charge, trial was commenced and prosecution examined witnesses and thereafter the accused were questioned under Section 313 of the Code. Public Prosecutor then filed an application for recalling PWs 4 and 5, and they were recalled and examined; further statements of the accused under Section 313 of the Code were recorded. Thereafter accused examined PWs 1 to 4 and it was during the course of arguments that the counsel for the accused raised the contention that the Magistrate erred in not following the procedure prescribed in proviso to Section 202 (2) of the Code before passing committal order dated 26.5.1990. After hearing both the sides, the learned Sessions Judge arrived at the conclusion that there was breach of man-datory provisions and consequently prejudice was caused to the accused, He found it difficult to decide as to which further course was required to be followed and, therefore, he made a reference to the High Court under Section 395(2) of the Code.

That case was numbered as Crl. Reference No. 2 of 1999. The accused filed Crl. R.P. No. 1035 of 1998 against the reference order. Both matters were disposed of by the High Court as per the impugned judgment. The High Court arrived at the conclusion that proviso to Section 202 (2) is mandatory, therefore, non- examination of the witnesses at that stage would result in substantial failure of justice and hence the order of com-mittal was vitiated. The Magistrate was directed to conduct a fresh enquiry in terms of proviso to Section 202 (2) by examining all the witnesses and thereafter

to commit the case to the Sessions Court. That order is under challenge now before this Court.

The learned counsel for the appellants submitted that proviso to sub-section (2) of Section 202 Cr.P.C. is mandatory and as that was not complied with by the Magistrate, accused ought to have been acquitted and the Court ought to have directed to drop the proceedings. It is contended that a post trial enquiry by the committing Magistrate after framing of charges by the Sessions Judge does not serve the purpose and object as contemplated under Section 202 Cr.P:C. Hence, accused ought to have been discharged and there should not have been any direction to face a farce of fresh enquiry under Section 202 Cr.P.C.

Learned Counsel for the State fairly agreed with the submission of the learned counsel for the appellants that there was no necessity for holding a fresh enquiry under Section 202 Cr.P.C. and a direction to commit the case to the Sessions Court in view of the fact that Sessions trial was practically already over. The High Court ought to have directed the Sessions Court to hear the arguments and to pass the judgment according to law. According to him the scheme of Section 202 (2) CrJP.C. clearly reveals that it is the discretion of the Magistrate whether or not to hold the enquiry before committing the case to the Sessions Court.

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

For appreciating the contention raised by the learned counsel, we would first refer to Sections 200 and 202 Cr.P.C., which are as under :

"200. Examination of complaint - A Magistrate taking cog-nizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if ’a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192 :

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

202. Postponement of issue of process - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :

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

(a) where it appears to the Magistrate that the offence com-plained of

is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath :

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

(Emphasis added)

The aforesaid Section 200 requires a Magistrate taking cognizance of an offence on a complaint to examine upon oath the complainant and the witnesses present, if any. The proviso to the said section carves out an exception in cases where a complaint is filed by a public servant acting or purporting to act in the discharge of his official duties or in cases where the Court has made the complaint. In such case complainant and witnesses need not be examined. In such cases, if he is satisfied that there is sufficient ground for proceeding, he can straightway issue process. At this stage, the Magistrate has three options :

(i) to issue process on the basis of complaint, if he is satisfied that there is sufficient ground for proceeding against the accused (Sec. 204); or

(ii) to dismiss the complaint (Sec. 203); or (iii) to hold an enquiry -

(a) by himself, or

(b) by directing investigation by the Police Officer,

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

It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the court of Sessions, the Magistrate himself has to hold the inquiry and no direction for investigation by police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit. Sub- section (2) of Section 202 gives discretion to the Magistrate to record evidence of witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the court of Session the Magistrate shall shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Sections 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dis-missal of complaint, he is required to briefly record his reasons for so doing. In other cases, he has to issue process i.e. either summons or warrants as the case may be as provided under Section

204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnessess has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

In a case, Ranjit Singh v. The State of Pepsu (now Punjab, AIR (1959) SC 843, where the Sub-Inspector of Police was convicted under Section 193 1PC by First Class Magistrate, it was contended that the procedure adopted by the Magistrate was erroneous because he did not hold an enquiry as required under Sections 200 and 202 of the Code. This Court negatived the said contention and held thus :

"That contention is equally untenable because under Section 200 proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against."

Further, it is settled law that the inquiry under Section 202 is of limited nature. Firstly, to find out whether there is prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceed-ing against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. (Re : Chandra Deo Singh v. Prakash Chandra Bose & Anr., [1964] 1 SCR 639, Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker, [1961] 1 SCR 1, Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar, [1962] Supp. 2 SCR 297, Nimaljit Singh Hoon v. The State of West Bengal and Another, [1973] 3 SCC 753 and Mohinder Singh v. Gulwant Singh and Others, [1992] 2 SCC 213.

This Court in Kewal Krishan v. Suraj Bhan and Another, [1980] Supp. SCC 499, dealt with the case where instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The Court held that the Magistrate committed an irregularity by exceeding his jurisdiction and observed thus :

"At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see "whether on a cursory perusal of the complaint and the evidence recorded during the preliminary in-quiry under Sections 200 and 202. Criminal Procedure Code, there is prima fade evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused."

The Court further made it clear thus :

"At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima fade evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufftcieat ground for issuing process to the accused and committing them for trial to the Court of Session."

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

However, the learned counsel for the appellants vehemently sub-mitted that in a case of complaint where the case is exclusively triable by the court of Session, the Magistrate must follow the mandate of proviso to sub-section (2) and examine the complainant and his witnesses on oath before committing the case to Sessions Court as this would give protection to the accused because he would be in a position to know the case against him and the evidence relied upon by the complainant in support of his case. He relied upon a Full Bench decision of the Kerala High Court in Moideenkutty Haji & Ors. v. Kunhikoya & Ors., (1987) 1 K.L.T. 635. The question involved in that case was whether it is mandatory that a Magistrate, before issuing process to the accused on a complaint disclosing as offence which is exclusively triable by a Court of Session, shall call upon the complainant to produce all his witnesses and examine them on oath. A Division Bench of the Court in Sulaiman v. Eachara Worrier, (1978) KLT 424 had taken the view that it is not mandatory since the duty to conduct an enquiry under S, 202 (1) of the Code of Criminal Procedure itself is only discretionary, The correctness of that view was doubted and hence the question as well as the cases had been referred to the Full Bench. The Court referred to various decisions of Kerala High Court wherein a view was taken to the effect that an inquiry under Section 202 (1.) is desirable in complaint case which involves offence exclusively triable by the court of Sessions. It is only discretionary and the obligation to comply with the proviso to Section 202 will arise only when Magistrate exercises his discre-tion to hold an inquiry. The Court also referred to other decisions of various High Courts where the same view was taken and also decisions where the contrary view was taken. The Full Bench referred to objects and purposes recommended by the Law Commission for the new provision of Section 202 in the Act and finally held that in a complaint case the inquiry under Section 202 by the Magistrate into the truth of the complaint is made mandatory and in a way it is intended to take the place of investigation by the police. This safeguard must be to take the place of the preliminary inquiry proceedings provided in the old Code and that sub-section (2) together with the proviso must be read as a proviso to Section 202. When it is so read, the objects underlying in the scheme of Chapter XV can be better served.

The Madras High Court in M.G. Pillai v. T. Pillai, (1983) Crl. L.J. 917 has held that order of committal passed under Section 209 by the Magistrate taking cognizance of an offence under Section 200 and there-after straightway issuing process under Section 204 is a valid committal order

and that cannot be challenged as illegal on the ground that Magistrate has not availed himself of an inquiry under Section 202. How-ever, the Court further held that once the Magistrate decides to follow Section 202, which is an enabling provision, the proviso to Section 202 (2) would come into operation, which makes it obligatory for Magistrate to call upon the complainant to produce all his witnesses and examine them on oath; the failure on his part to comply with the statutory direction given under the said proviso would vitiate the further proceedings taken by him.

We agree with the conclusion of the Madras High Court to the effect that Section 202 is an enabling provision and it is a direction of the Magistrate depending upon the facts of each case, whether to issue process straightway or to hold the enquiry. However, in case where enquiry is held, failure to comply with the statutory direction to examine all the witnesses Would not vitiate further proceeding in all cases for the reasons that (a) in a complaint filed by a Public servant acting or purporting to act in dis-charge of his official duties, the question of holding inquiry may not arise, (b) whether to hold inquiry or not is discretionary jurisdiction of the Magistrate, (c) even if he decided to hold inquiry it is his further discretion to examine the witnesses on oath. If he decides to examine witnesses on oath in a case triable exclusively by the court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath, (d) it would also depend upon facts of each case depending upon the prejudice caused to the accused by non-compliance of the proviso (Sec. 465), and (e) that the objection with regard to non-compliance of proviso should be taken at the earlier stage when the charge is framed by the Sessions Court.

At initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the words "shall", it appears that language used in the proviso is of mandatory nature. At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself discretionary one - giving option to examine or not to examine witnesses. Hence, proviso to the said sub-section is required to be read accordingly though couched in mandatory term by using the word ’shall’. Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed, not by the public servant, and where the offence is exclusively triable by the court of Session the Magistrate should follow the proviso to sub-section (2) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath. This would be in consonance with the provision of Section 208 which inter alia provides for supply of copy of statements and documents to accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the Sessions triable case, under Section 226 the prosecution has to open its case by describing the charge brought against the accused and stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such considera-tion, if the court finds that there is no sufficient ground for proceeding against the accused, he shall be discharged as provided under s. 227. In case, where there is sufficient ground, court is required to frame the charge as provided under s. 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know allegation made against him as well as evidence in support thereof. However, in a case where complaint is filed by a public servant after holding inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance of proviso by the Magistrate in all Sessions

triable cases is not a must and would not vitiate the further trial unless prejudice caused to the accused is established.

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

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

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

Hence, what emerges from the above discussion is :

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

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

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

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

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives

mandatory direc-tions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be com-mitted to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204 (2) before issuance of the process,

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

The High Court failed to notice the provisions of Section 465 of the Code as the objection with regard to such error, omission or irregularity in the committal order was required to be raised at the earliest stage. After committal order in the case, the trial was almost over as evidence of the prosecution witnesses was recorded by the sessions court, statements of the accused under Section 313 of the Code were also recorded, thereafter witnesses were recalled and examined, further statements were recorded and only at the stage of arguments the contention with regard to the so-called irregularity was raised, which is upheld by the Sessions Court and the High Court. In the background of these facts, we hold that holding of fresh inquiry under Section 202 would be totally unnecessary in the present case and thereafter to commit the case again to the Sessions Court. Hence, the appeals are allowed, the impugned order passed by the High Court is set aside and the reference made by the Sessions Judge is answered in the afore-mentioned terms. The Sessions Court is directed to complete hearing of arguments and dispose of the case on merits in accordance with law.

THOMAS, J. I have read the draft judgment prepared by my learned brother M.B. Shah, J, and I respectfully agree with the conclusion that the judgment of the High Court should be interfered with and the Sessions Judge be directed to proceed from where he stopped. But I have a different approach regarding the interpretation of Section 202 of the Code of Criminal Procedure (for short 'the Code')- Interpretation of the said provision is of great practical importance in inquiries and trials. Hence I deem it appropriate to express my views on the interpretation of the proviso to Section 202(2) of the Code.

The facts of this case reflect the glaring example of how failure to raise objection at the appropriate stage could, procrastinate criminal proceedings unduly to unpalatable levels, Almost eleven years have passed since the alleged offence was committed (being in possession of arrack containing methyl alcohol) and except the first two yeas which the Excise officers took for completing the formalities to launch the prosecution, the rest of the years rolled on due to the delay in court procedures. If the impugned order of the High Court is to sustain the already protected criminal proceedings which reached almost final stage in the trial court alone would stand relegated to square one for commencing all the legal steps over again and if the progress thereafter is at the same pace quite possibly another decade would be consumed for the trial to reach where it has already reached. Is it so inevitable a course to be adopted?

It was on 16.11.1990 that one Excise Inspector, in his capacity as such, filed the complaint against the appellants and a few others before a Judicial Magistrate of Second Class alleging certain offences which were exclusively triable by the Court of Session and on 26.5.1990 the said Magistrate, without examining any witness, committed the case to the Sessions Court. In the list of witnesses appended to the complaint names of ten persons were included. For almost six years the case remained in limbo in the sessions court presumably due to orders passed by the High Court. However, by the end of 1993 the decks were cleared for the Sessions Court

to commence proceedings. Neither then nor when charges were framed by the Sessions Court on 2.9.1996 nor even thereafter did any of the accused raise any objection that the order of committal was wrong due to non-examination of any witness in the committal court.

It is to be further pointed out that during progress of the trial ia the Sessions Court, the accused preferred a revision in the High Court chal-lenging an order passed by the trial court on. 15.3.1997 as per which the trial court granted permission to re-open the evidence. Even then the accused did not raise any objection regarding non-examination of the witnesses in the committal court. The High Court dismissed the aforesaid revision on 27.1.1998. Some witnesses were recalled by the Sessions Court for further examination and on completion of the prosecution evidence, after such prolonged proceedings, the Sessions Judge would have heard argument? as envisaged in Section 232 of the Code of Criminal Procedure (For short the Code). It is apparent that the accused did not raise any objection even at that stage regarding the invalidity of committal order on account of non-examination of witnesses in committal court. Hence, the Sessions Court passed over to the next stage envisaged in Section 230 of the Code and directed the accused to enter upon his defence. The accused availed themselves of that opportunity and examined four witnesses on the defence side. It was when arguments were being neard the defence counsel raised the objections on the ground that witnesses were not examined in the committal court.

It seems that the Sessions Judge felt constrained by the two decisions of the Kerala High Court, one rendered by a Full Bench in Moideenkutty Haji and Others v. Kunhikoya and Others, [1987] 1 Kerala Law Times 635 and other rendered by a Division Bench in State of Kerala v. Balakrishnan, (1991) 2 Kerala Law Times 323, Instead of succumbing to the arguments of the defence that the case should end in complete acquittal on account of non-examination of witnesses in the committal court, the Sessions Judge had chosen to make a reference to the High Court as provided in Section 395(2) of the Code. The present appellants were dis-satisfied with the aforesaid reference order and hence they challenged that order by filing a revision before the High Court. By the impugned order a Division Bench of the High Court disposed of the aforementioned reference and the revision petition.

The first point is that the stage had passed long ago for the accused or the prosecution to have raised objections that the committal order was vitiated due to non-examination of witnesses before the Magistrate issued process to the accused. Even if there was any such omission before process was issued the accused cannot raise it as an objection for the first time at the fag end of a long drawn trial in the Sessions Court. Section 465 of the Code is extracted below :

"465. Finding or sentence when reversible by reason of error, omission or irregularity. - (1) Subject to the provisions hereinbefore con-tained, no finding, sentence of order passed by a Court of com-petent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any Inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been oc-casioned thereby.

(2) In determining whether any error, omission or Irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

The above section, when re-read as to apply to this case, would be thus: No order by a court of competent jurisdiction shall be reversed or altered by

a revisional court on account of any omission in any proceedings held under this Code unless the court reaches the conclusion that such omission has occasioned a failure of justice. One of the tests to ascertain whether such omission has occasioned failure of justice is incorporated in sub-section (2), i.e. whether objection had been taken at any earlier stage regarding such omission. If no such objection has been taken earlier normally the court cannot permit that party to raise it at the last stage.

While dealing with Section 465(2) of the Code in Kalpnath Rai v. State, [1997] 8 SCC 732 this Court has stated thus : "Sub-section (2) of Section 465 of the Code is not a carte blanche for Tendering all trials vitiated on the ground of the irregularity of sanction if objection thereto was raised at the first instance itself. The sub-section only says that the court shall have regard to the fact ' that objection has been raised at the earlier stage in the proceedings. It is only one of the considerations to be weighed but it does not mean if objection was raised at the earlier stage, for that very reason the irregularity in the sanction would spoil the prosecution and transmute the proceedings into a void trial."

When the accused have chosen not to raise objection on the premise of omission to examine witnesses before process was issued by the magistrate, it must be taken that they had no grievance that such omission had occasioned failure of justice. Even if they had taken such objection after committal of the case to the Sessions Court there was no need to turn the switch board backwards as there is no scope for believing that such omission had occasioned failure of justice. This is because no evidence of any witness would be used in the trial court unless such witness was examined in the trial court and the accused is afforded reasonable oppor-tunity to cross-examine him.

Now I will proceed to the next question whether the magistrate Should have examined all the witnesses of the prosecution before the case was committed to the Court of Session, or before process was issued to the accused.

Power of taking cognizance of offence and the conditions for the same are dealt with in Chapter XIV of the Code of which Section 190 specifies the powers of a magistrate to take cognizance of the offence. Three different sources are indicated therein of which what is material in this case is taking cognizance "upon receiving a complaint of facts which constitute such offence". Taking cognizance of the offence involves the exercise of deciding whether process should be issued to the accused. Section 204 of the Code envisages "issue of process". It only means issuing either summons or warrant for the purpose of bringing the accused before such magistrate. The provision says that summon or warrant need be issued only if the magistrate is of opinion that "there is sufficient ground for proceeding". Sub-section (3) says that in any proceeding instituted on complaint made in writing, the summons or warrant issued shall be accompanied by a copy of such complaint.

I may turn back to Chapter XV of the Code which contains the provisions to be invoked during the interregnum between filing of the complaint and issuance of process to the accused. Section 202 deals with postponement of process. The first sub-section says that any magistrate, on receipt of a complaint of offence, "may if he thinks fit postpone the issue of process against the accused", for resorting to any of the two courses i.e. either inquire into the case himself or direct an investigation to be made. But if the offence is triable by a Court of Session the magistrate cannot make a direction for investigation. So the magistrate taking cognizance of the offence upon a complaint, when such offence is not triable by the Sessions Court, can adopt either of the three courses: (1) straightway-issue the process or (ii) he can postpone the issue of process for holding an inquiry or (iii) he can direct an investigation to be made. If the offence is triable by a Court of Session, it is impermissible for the magistrate to direct an investigation. To see whether in such cases he can straightway issue process to the accused without holding the inquiry, a careful

interpretation of sub-section (2) of Section 202 of the Code is called for. That sub-section is hence extracted below :

"(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath."

It may appear, prima facie, that the question of examining all wit-nesses would arise only when the magistrate opts to hold an inquiry, otherwise not.

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

Chapter XVI of the Code contains provisions for commencement of proceedings before magistrate. Section 204, which is already referred to, enjoins on the magistrate to issue process if the magistrate forms the opinion that there is "sufficient ground for proceeding". When the offence is triable by a court of session the task of the magistrate cannot be restricted to considering whether process should be issued. There must be sufficient ground for proceeding. Proceeding to what? In this context Section. 208 of the Code is important and hence it is extracted below :

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

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii) the statement and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely :

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

Three categories of documents are mentioned in the aforesaid sec-tion the copies of which the magistrate, who proceeds from the stage in Section 204, has to supply to the accused free of cost (in a complaint case involving an offence triable exclusively by a Court of Session). As the words used here are "shall furnish", it is almost a compelling duty on the magistrate to supply the said document to the accused. How can the magistrate supply such documents? (In the present context the documents referred to in the third

category mentioned in clause (iii) are not impor-tant.) The first category delineated in clause (1) of Section 208 consists of "statement recorded under Section 200 or Section 202 of all persons examined by the magistrate." It is now important to note that the words "if any" have been used in the .second category of documents which is delineated in clause (ii) of Section 208, but those words are absent while delineating the first category. In my view those two words have been thoughtfully avoided by Parliament .in clause (i).

If a magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate as the language used in the sub-section is of any indication) what is that manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused? The mere fact that the word ''or" is employed in clause (1) of Section 208 is not to be understood as an indication that the magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant under Section 200. A case can be visualized in which the complainant is the only eye witness or in which all the eye witnesses were also present when the complaint was filed and they were all examined as required b Section 200. In such a case the com-plainant, when asked to produce all his witnesses under Section 202 of the Code, is at liberty to report to the magistrate that he has no other witness than those who were already examined under Section 200 of the Code. When such type of cases are borne in the mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

It is pertinent to consider yet another aspect. It is of importance from practical point of view also. Section 209 of the Code enjoins on the magistrate to commit the case to the Court of Session after complying with the provisions in Section 208 of the Code. Once the case is committed it proceeds to the next stage for which the venue is the Court of Session. The trial in the Court of Session is envisaged in Chapter XVIII. It must be borne in mind that in the Sessions Court a public Prosecutor alone can conduct prosecution, whether the case was instituted on police report or on complaint. Section 226, falling within the aforesaid Chapter, requires the public prosecutor to make the open address to the Sessions Court. That section reads thus :

"226. Opening case for prosecution. - When the accused appears or is brought before the Court in pursuance of a commitment of the case by describing the charge brought under section 209, the prosecutor shall open his case against the accused and stating by what evidence he proposes to prove the guilt of the accused,"

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

In this context it is useful to know the reason for incorporating such a proviso in Sub-section (2) of Section 202 of the Code. For that purpose a peep into the corresponding legal position which existed prior to the introduction of the new Code will be useful.

Under the Code of Criminal Procedure 1898 (old Code) a full-fledged magistrate inquiry was contemplated in the committal court and the prosecution was then required to examine all the witnesses at that stage itself. By Act 26 of 1955 the Parliament abridged the above procedure and it was provided therein that in police charge-sheeted cases only the wit-nesses to the occurrence need be examined in the committal court (vide Section 207A of the old Code).

While the situation remained thus as provided in Section 207A of the Code, the Law Commission submitted its 41st Report recommending various changes in the Code among which it was recommended that inquiries in committal courts should be dispensed with. After giving elaborate reasons for such abolition the Law Commission made the follow-ing recommendations also :

"We are recommending an a subsequent chapter (referred to earlier) the abolition of commitment inquiries. This necessitates certain amendments in the procedure to be followed in an inquiry into complaints where the offence complained of is one triable exclusively by the Court of Sessions. We recommend that the Magistrate who takes cognizance of such offence on complaint must himself make an inquiry into the complaint, and call upon the complainant to produce all his witnesses and examine them on oath. Further, in such cases the Magistrate should not direct an investigation by a police officer or other person. For this purpose, we propose two amendments of Section 202 in the form of another proviso to sub-section (1) and a proviso to sub- section (2)''.

The recommendations so made by the Law Commission have been virtually incorporated by Parliament in Section 202 of the present Code. This Court has already taken the stand that it would be advantageous to look into the deliberations made in the legislature, the objects and Reasons for the enactments including recommendations of the Law Com-mission for the purpose of discerning the legislative idea behind inclusion of any particular provision (vide Santa Singh v. State of Punjab, [1977] 1 SCR 229 and Mithilesh Kumari v. Prem Behari Khare, [1989] 2 SCC 95. In the latter decision a two-judge Bench has stated thus :

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

Regarding Section 202 of the Code Parliament has taken the cue from the Law Commission Recommendation and introduced all the parameters in accordance with such recommendations. That is yet another factor which lends support to the interpretation which I have adverted to above. Thus I have no doubt that the proviso incorporated in Sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the magistrate, but a compelling duty on him to perform in such cases. I wish to add that the magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course if the complainant requires the help of the Court to summon such witnesses it is open to the magistrate to issue such summons, for, there is nothing in the Code which prevents the magistrate from issuing such summons to the witnesses.

I reiterate that if the magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings. If no objec-tion is taken at the earlier stage regarding such omission the court can consider how far such omission would have led to miscarriage of justice, when such objection is taken at a later stage. A decision on such belated objection can be taken by bearing in mind the principles adumbrated in Section 465 of the Code.

With all the above reasons I agree with my learned brother that the impugned order passed by the High Court is to be set aside and the Sessions judge be directed to dispose of the case on merits in accordance with law,