STATE OF U.P.

v.

LAXMI BRAHMAN & ANR.

March 11, 1983

[D.A. DESAI AND R.B. MISRA, JJ.]

Code of Criminal Procedure, 1973—S. 167 (2) as it stood prior to 1978 and Ss. 170, 207, 209 and 309 (2)—Offence exclusively triable by Court of Session—Power of Magistrate to grant bail to or remand accused to custody—When investigation is not complete within prescribed limit Magistrate has power under S. 167(2) to grant bail to accused provided he applies for it and is prepared to furnish bail—After submission of police report under S. 170 and before committing accused to Court of Session under S. 209 Magistrate has power under S. 309(2) to remand accused to custody.

Code of Criminal Procedure, 1973—S. 2 (g) and Ss. 190, 207 and 209—Taking cognizance of offence by Magistrate under S. 190 is a judicial function —Discharge of statutory obligation by Magistrate to furnish copies of documents to accused under S. 207 read with S. 209 is also judicial function and constitutes 'inquiry' within the meaning of S. 2(g).

The respondents were suspected of having committed an offence punishable with death or imprisonment for life under section 302 I.P.C. triable exclusively by the Court of Session. They surrendered before the Magistrate on November 2, 1974 and were taken into custody. The investigating officer failed to submit the charge-sheet/police report against them within the period of 60 days contemplated by the proviso to sub-s. (2) of S. 167 of the Code of Criminal Procedure, 1973 as it stood prior to its amendment in 1978. However, the respondents did not apply to the Magistrate for being released on bail but approached the High Court under S. 439 Cr. P.C. According to the High Court, the charge-sheet against the respondents was submitted on February 5, 1975. The High Court directed that the respondents be released on bail pending trial by the Court of Session holding :

(i) that in a case triable exclusively by the Court of Session after the charge-sheet has been submitted under S. 170 and before committing the accused to the Court of Session the Magistrate has no jurisdiction to authorise the detention of an accused in custody under S. 167 Cr. P.C.;

(ii) that in such a case S. 209 would not confer power on the Magistrate to commit the accused to custody since after the enactment of the Code of Criminal Procedure, 1973, the procedure before the Magistrate under Chapter XVI of the Code would not be an inquiry within the meaning of S. 2 (g) thereof;

(iii) that in such a case S. 309 would also not enable the Magistrate to remand the accused to custody since he would not be competent to try the accused ; and

(iv) that in view of the provision contained in S. 207 read with S. 209 Cr. P.C. the Magistrate has to commit the accused forthwith to the Court of Session and it is only after the order of commitment is made that the Magistrate will have power to remand the accused to the custody during and until the conclusion of the trial.

Allowing the appeal,

HELD : The view that after the accused is brought before the court along with the police report under S. 170 Cr. P.C. the Magistrate must forthwith commit the accussed to the Court of Session because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to the Court of Session is made, is wholly untenable and must be set aside. [550-F-H]

Section 170 Cr. P.C. obligates the investigating officer to submit the police report, if in the course of investigation sufficient evidence or reasonable ground is made out for the trial or for commitment for trial of the accused, to the Magistrate empowered to take cognizance of the offence upon a police report. On this report being submitted, the Magistrate takes cognizance of the offence disclosed in investigation as envisaged by S.190. Cognizance of an offence even if exclusively triable by the Court of Session has to be taken by the Magistrate because S. 193 precludes the Court of Session from taking cognizance of any offence. Taking cognizance of an offence under S. 190 is a purely judicial function subject to judicial review. The statutory obligation imposed by S. 207 read with S. 209 on the Magistrate to furnish free of cost copies of documents mentioned in S. 207 to the accused is a judicial function and it has to be discharged in a judicial manner. It is distinctly possible that the copies may not be ready. That makes it necessary to adjourn the matter for some time which may be spent in preparing the copies and supplying the same to the accused. The Magistrate can proceed to commit the accused for trial to the Court of Session only after he judicially discharges the function imposed upon him by S. 207. This conclusion is fortified by the provisions contained in Ss. 226 and 227 of Chapter XVIII which prescribe the procedure for trial of a case by t e art of Session. When the Magistrate is performing a judicial function under . 207, it would undoubtedly be an inquiry. The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry. Thus from the time the accused appears or is produced before the Magistrate with the police report under S. 170 and the Magistrate proceeds to enquire whether S. 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before t e Magistrate would be an inquiry as contemplated by S. 2(g), and S. 309(2) would enable the Magistrate to remand the accused to custody till the inquiry to be made is complete.
[547-G-H ; 548-A-B ; 549-B-H ; 550A-D]

In the instant case, when the matter was before the High Court, the chargesheet had not been submitted against the respondents by the investigating officer meaning thereby that the investigation was still in progress. If the High Court had no information when the application for bail moved by the respondents for being enlarged on bail was heard as to whether the charge-sheet against the respondents had been submitted to the Magistrate or not, it was futile for the High Court to have undertaken an investigation of a point of law which did not directly arise in the facts before the High Court. As the High Court had dealt with the matter, it became a precedent and, therefore, it became necessary for the Court to examine whether the view of the High Court was in consonance with the provisions of the Code. [544-H ; 545-A-D]

The High Court was right in holding that the jurisdiction to grant bail, in case investigation is not completed within the prescribed limit as incorporated in the proviso to S. 167 (2) as it then stood, vests in the Magistrate if the accused applies for and is prepared to furnish bail. Section 167 envisages a stage when a suspect is arrested and investigation is not complete within the prescribed period. The investigation would come to an end the moment charge-sheet is submitted as required under S. 170 unless the Magistrate directs further investigation. [545 E-F]

State of Bihar and Anr. v. *J.A.C. Saldanha and Ors.*, [1980] 2 SCR 16, referred to.

CRIMINAL APPELLATE JURISIDICTION : Criminal Appeal No. 249 of 1976.

Appeal by Special leave from the Judgment and Order dated the 10th July, 1975 of the Allahabad High Court in Criminal Misc. No. 1104 of 1975.

Prithvi Raj and *Dalveer Bhandari* for the Appellant.

N.M. Ghatate for the Respondents.

The Judgment of the Court was delivered by

DESAI, J. : Respondents Lakshmi Brahman and Naval Garg were suspected of having committed an offence punishable with death or imprisonment for life under section 302 IPC. Both of them surrendered before the Magistrate on November 2, 1974 and were taken into custody. The investigation was then in progress. The investigating Officer failed to submit the charge-sheet against

them within a period of 60 days as contemplated by sub-sec. 2 of sec. 167 of 1973 Code prior to its amendment by the Criminal Procedure Code (Amendment) Act, 1978 which enlarges the period from 60 to 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. In this case we are concerned with the proviso to sec. 167 (2) of the Cr. P. C. 1973 prior to its amendment in 1978. It appears that the Investigating Officer failed to submit the charge-sheet within the prescribed period and according to the High Court till as late as February 5, 1975. Thereupon the two respondents moved an application under sec. 439 of the Cr. P. C. invoking the power of the High Court to grant bail to any person accused of an offence, even where the offence is punishable with death or imprisonment for life.

A Division Bench of the Allahabad High Court which heard the application was of the opinion that after the charge-sheet has been submitted under sec. 170 Cr. P. C., the Magistrate has no jurisdiction to authorise the detention of an accused in custody under sec. 167 Cr. P. C., and therefore, the authority to remand the accused to custody after the charge-sheet has been submitted, has to be gathered from other provisions of the Code. The High Court then posed to itself the question whether in a case instituted upon a police report exclusively triable by the Court of Sessions, the Magistrate while committing the accused to the Court of Sessions, under sec. 209 Cr. P. C. has, after the accused is brought before him and before the order committing the accused to the Court of Sessions is made, jurisdiction to remand the accused to custody other than the police custody ? The High Court was of opinion that since after the enactment of Code of Criminal Procedure, 1973, the proceeding before the Magistrate under Chapter XVI of the Code would not be an enquiry within the meaning of the expression in sec. 2 (g) and, therefore, sec. 209 would not confer power on the Magistrate to commit the accused to custody. Proceeding along the line, the High Court held that in view of the provision contained in sec. 207 read with sec. 209 of the Cr. P. C. the Magistrate has to commit the accused forthwith to the Court of Sessions and only after the order of commitment is made, the Magistrate will have power to remand accused to the custody during and until the conclusion of the trial. The High Court accordingly held that the Magistrate has no

jurisdiction, power or authority to remand the accused to custody after the charge-sheet is submitted and before the commitment order is made, and therefore the accused were entitled to be released on bail. So saying, the High Court directed that the respondents be released on bail pending the trial by the Court of Sessions. State of U.P. has preferred this appeal by special leave.

Respondents have not appeared even though served and the notice of lodgment of appeal has also been served upon them. As the respondents had not entered appearance, a fresh notice of hearing the appeal was also issued, but the respondents have not chosen to appear at the hearing of the appeal. Mr. Prithviraj, learned counsel appeared for the appellant, State of U.P. At the commencement of the hearing of the appeal, we enquired from him as to what has happened to the case against the respondents, whether the trial had taken place ; whether they were acquitted or convicted and whether any useful purpose would be served by hearing of the appeal which appears to us to have become practically infructuous. Mr. Prithviraj had no information about the stage of trial and the present position of the respondents. But it was urged that the interpretation put by the High Court on secs. 207, 209 and 309 if not examined by this Court is likely to result in miscarriage of justice in a large number of cases as the High Court has introduced a stage of compulsory grant of bail to persons accused of serious offence not warranted by the Code, and who would not be otherwise entitled to the discretionary relief of bail. It is this submission which has persuaded us to examine the contention on merits.

Section 2(g) of the Code defines inquiry to mean every inquiry, other than a trial, conducted under the Code by a Magistrate or Court. Cognizable offence has been defined in sec. 2(c) to mean an offence for which, a police officer may, in accordance with the First Schedule or under any other law for the time in force, arrest without warrant. Sec. 57 provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under Sec. 167, exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. In fact, the provision contained in sec. 57 incorporates the fundamental right guaranteed by Art. 22 of the

Constitution. Chapter XII of the Code incorporates provisions for initiation of investigation on receipt of information of a cognizable offence continuing the investigation culminating in the submission of a police report otherwise styled as charge-sheet under sec. 170 to the Magistrate having jurisdiction, which would imply the end of investigation. Subsequent proceeding before the Magistrate would be the commencement of inquiry or trial leading to either commitment for trial in the Session Court or to discharge or acquittal of the accused by the Court having jurisdiction to try the case. Sec. 167 finds its place in Chapter XII. Prior to its amendment by the amending Act of 1978, it read as under :—

"(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by sec. 57, and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

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

Provided that :

(a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied, that adequate grounds exist for doing so, but, no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days, and on the

expiry of the said period of sixty days, the accused person shall be released on bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of the Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

In this appeal, we are concerned with sec. 167 hereinabove extracted. The High Court after examining the scheme of sec. 167(1) and (2) with the Proviso rightly concluded that, on the expiry of 60 days from the date of the arrest of the accused, his further detention does not become *ipso facto* illegal or void, but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding to the contrary in sec. 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail. In this case, it is an admitted position that the respodents did not apply to the Magistrate for being released on bail on the expiry of 60 days from the date of their arrest. The High Court was of the opinion that as the respondents did not apply for bail on the expiry of sixty days from the date of their arrest, their continued detention would not be illegal or without the authority of law. So far there is no controversy.

It was next contended before the High Court that after the submission of the charge-sheet, when the investigation could be said to have ended, it was not open to the Magistrate to authorise the detention of an accused in custody under sec. 167 of the Code, and therefore, if the accused is to be detained in custody after the submission of the charge-sheet upon which the Magistrate takes cognizance of an offence, the power to remand the accused to custody will have to be gathered from other provisions of the Code. The High Court then took notice of the fact that the police report discloses an offence exclusively triable by the Court of Sessions and the Magistrate will have to proceed according to the provision contained in sec. 209 of the Code. Shorn of embellishment the High Court proceeded to find out how the accused against whom the allegation is that he is

suspected of having committed an offence punishable with death or imprisonement for life and in respect of whom the period for completion of investigation has elapsed and in the absence of charge-sheet, order committing him to Court of Sessions to stand his trial cannot be made and the accused does not apply for bail, how is he to be dealt with by the Magistrate. In other words during the interregnum, has the Magistrate power or jurisdiction to remand him to custody other than police custody and if there is such power, in which provision it is located. The High Court then combed other provisions of the Code, and, ultimately, concluded that since the 1973 Code does not envisage a preliminary enquiry to be held by the Magistrate under Chapter XVI, the Magistrate is not expected to hold any enquiry before committing the accused and therefore sec. 309, would not enable him to remand the accused to custody. In the terms High Court held that in such a situation for want of power in the Magistrate to remand accused to custody, the Magistrate must forthwith on receipt of charge sheet pass an order committing the accused to Court of Sessions to stand his trial and then exercise power under sec. 309 or to release him on bail notwithstanding the fact that accused has not sought an order of bail. The High Court left the question unanswered what would happen if the accused is unable to furnish bail by suggesting that the best thing to do for the Magistrate in such a situation is to forthwith pass an order committing the accused to Sessions to stand his trail and then invoke his jurisdiction to remand the accused to custody under sec. 309 of the Code. The High Court held that as the Magistrate before whom the charge-sheet was submitted remanded the resposdents to custody without making the order of commitment, the order remanding the accused to custody, cannot be sustained under secs. 167 (2), 209, 309 of the Code, and no other provision under which the respondents could be remanded to the custody at that stage having been indicated to the Court, the High Court considered it a compelling necessity to accede to the request of the respondents to direct that they should be released on bail. Serious exception is taken to this view of the High Court by the learned counsel for the appellant.

Respondents were suspected of having committed an offence punishable under sec. 302 IPC. On their having surrendered, they were taken into custody. When the matter was before the High Court as noticed by the High Court, the charge-sheet was not submitted against them by the Investigating Officer meaning thereby that

investigation was still in progress. The High Court proceeded to examine the powers of the Magistrate to whom the charge-sheet is submitted, in case of an offence exclusively triable by the Court of Sessions for dealing with an accused after he is produced before him presumably under sec. 170 and before an order committing the accused to the Court of Sessions as envisaged under sec. 209 is made. A

If the High Court had no information when the application for bail moved by respondents for being enlarged on bail was heard as to whether the charge-sheet against respondents was submitted to the Magistrate or not, in our opinion, it was futile for the High Court to undertake investigation of a point of law which would not directly arise in the facts before the High Court and ordinarily the academic exercise is hardly undertaken. However, now as the High Court has dealt with the matter it becomes a precedent and, therefore, it becomes necessary for us to examine whether the view of the High Court is in consonance with the provision of the Code. And if not whether in the larger interest of criminal justice, it is necessary to interfere with the same. B C D

We would proceed on the assumption as done by the High Court that the Investigating Officer has submitted the police report as contemplated by sec. 170 and as required therein forwarded the accused under custody to the Magistrate to whom the police report is submitted. Now, the High Court is right in holding that the jurisdiction to grant bail, in case investigation is not completed within the prescribed time limit as incorporated in the provision as it then stood, vests in the Magistrtate if the accused applies and is prepared to furnish bail. Section 167 envisages a stage when a suspect is arrested and the investigation is not completed within the prescribed period. The investigation would come to an end the moment charge-sheet is submitted as required under sec. 170 unless the Magistrate directs further investigation. This view is in accord with the decision of this Court in *State of Bihar Anr.* v. *J.A.C. Saldanha & Ors.* (1) E F G

The question is how the Magistrate is to deal with the accused forwarded to him with the police report under sec. 170 and the police report disclose an offence exclusively triable by the Court of Sessions. Provisions contained in Chapter XVI provide for commencement of proceedings before the Magistrate. But before we refer to H

(1) [1980] 2 SCR 16 at 39.

those provisions, we must make a passing reference to the provision contained in sec. 190 which provides for taking cognizance of any offence by Magistrate, one such mode of taking cognizance of an offence being upon police report if the facts disclose an offence. The police report contemplated by sec. 190(1)(b) is the one submitted to the Magistrate under sec. 170. Sec. 204 provides for issue of process. Sec. 207 provides that in any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of costs, a copy of each of the documents set out therein. There are two provisos to this section which are not material for the present purpose. Sec. 209 confers power on the Magistrate to commit the accused to the Court of Sessions when the offence disclosed in the police report is triable exclusively by it. Section 209 reads as under :

> "209. Commitment of case to Court of Sessions when offence is triable exclusively by it;
>
> When in a case instituted on a police report or otherwise the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-
>
> (a) commit the case to Court of Sessions;
>
> (b) subject to the provisions of this Code, relating to bail, remand the accused to custody during, and until the conclusion of the trial;...."

The High Court was of the opinion that on the submission of the police report under sec. 170, the Magistrate has to forthwith commit the accused to the Court of Sessions if the offence disclosed in the charge-sheet is the one exclusively triable by the Court of Sessions. This being the only function of the Magistrate according to the High Court, the proceeding before the Magistrate under sec. 207 read with sec. 209 would not be an inquiry within the meaning of the expression in sec. 2(g) of the Code. In reaching this conclusion, the High Court referred to secs. 84, 116, 125, 137, 138, 145 and 146 as well as secs. 159 and 202 of the Code to ascertain the meaning of expression 'inquiry' in the context in which it is used in these provisions. These provisions would hardly shed any light on the nature of the proceedings and the function discharged by the Magistrate from the time of receipt of a police report

under sec. 170 disclosing an offence exclusively triable by the Court of Sessions and until making of an order committing the accused to the Court of Sessions to stand his trial. The question posed is: is it an administrative function or it is a judicial function? It is certainly not an administration function. If it is judicial function, it has to be either an inquiry or a trial because the Code does not envisage discharge of judicial function by the Magistrate under the Code in any other manner. The High Court in this context has observed as under :

> "These sections (207-209) do not contemplate that before committing the case to Sessions, the Magistrate should conduct some proceeding with a view to ascertain or verify facts. Sec. 209 of the Code merely required the Magistrate, taking cognizance of an offence on the basis of a police report, to look into the report and if he finds that the case is triable exclusively by Court of Sessions to make an order committing the case to Sessions. Since in such a case the Magistrate taking cognizance of the offence is not required to conduct any proceeding for ascertaining or verifying facts with a view to commit the case to Sessions, it cannot be said that the provisions contained in secs. 204, 207 to 209 of the Code contemplate an inquiry under the Code."

With respect this approach is not only not borne out by the relevant provisions of the Code but it overlooks the scheme of the sections and the purpose underlying the same.

Section 170 obligates the Investigating Officer to submit the police report if in the course of investigation sufficient evidence or reasonable ground is made out for the trial or for commitment of the accused, to the Magistrate empowered to take cognizance of the offence upon a police report. On this report being submitted the Magistrate takes cognizance of the offence disclosed in investigation as envisaged by sec. 190. It is indisputable that taking cognizance of an offence under sec. 190 is a purely judical function subject to judicial review by court of appeal or revision to which the Magistrate is subject. Cognizance of an offence even if exclusively triable by the Court of Sessions has to be taken by the Magistrate because section 193 precludes it from taking cognizance

of any offence when it provides that no Court of Sessions shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed by the Magistrate under the Code. Thus even in case of an offence exclusively triable by the Court of Sessions, the police report on completion of investigation has to be submitted to the Magistrate having jurisdiction to commit the accused for trial. It is the Magistrate who takes cognizance of the offence and not the Court of Sessions though the case is one exclusively triable by the latter. Sec. 170 directs that if the accused in respect of whom police report is being submitted is in police custody, he has to be forwarded alongwith the police report to the Magistrate. When the Magistrate receives the report and the accused is produced before him it is necessary for him to pass some order for his further detention subject to provisions contained in Chapter XXXIII as to Bails and Bonds. The view taken by the High Court makes it a necessity for the Magistrate to release the accused on bail even if the accused is not otherwise entitled to the discretionary order of bail nor he applies for nor is ready to furnish bail only because the Magistrate has no jurisdiction to keep the accused in custody till an order committing the accused for trial is made. The High Court referred to sec. 209 which provides that the Magistrate shall commit the accused to Court of Sessions and subject to the provisions of the Code relating to bail, remand the accused to custody during and until the conclusion of the trial. This according to the High Court implies that the Magistrate can exercise power to release on bail or remand to the custody the accused only after making the order of commitment but the Magistrate has no such power anterior to the order of commitment and during the interregnum since the receipt of the charge-sheet. This dichotomy read by the High Court in secs. 207 and 209 is certainly not borne out by the provisions of the Code. Sec. 207 as it then stood made it obligatory for the Magistrate to supply free of costs, copies of the documents set out in the section. The duty cast on the Magistrate by sec. 207 had to be performed in a judicial manner. To comply with sec. 207 which is cast in a mandatory language, when the accused is produced before the Magistrate, he has to enquire from the accused by recording his statement whether the copies of the various documents set out in sec. 207 have been supplied to him or not. No order committing the accused to the Court of Sessions can be made under sec. 209 unless the Magistrate fully complies with the provisions of sec. 207. And if it is shown that the copies of relevant documents or some

of them are not supplied, the matter will have to be adjourned to get the copies prepared and supplied to the accused. This is implicit in section 207 and sec. 209 provides that on being satisfied that the requisite copies have been supplied to the accused, the Magistrate may proceed to commit the accused to the Court of Sessions to stand his trial. The statutory obligation imposed by sec. 207 read with sec. 209 on the Magistrate to furnish free of costs copies of documents is a judicial obligation. It is not an administrative function. It is a judicial function which is to be discharged in a judicial manner. It is distinctly possible that the copies may not be ready. That makes it necessary to adjourn the matter for some time which nay be spent in preparing the copies and supplying the same to the accused. The Magistrate can proceed to commit the accused for trial to the Court of Sessions only after he judicially discharges the function imposed upon him by sec. 207. This conclusion is fortified by the provisions contained in Chapter XVIII which prescribed the procedure for trial of a case by Court of Sessions. Sec. 226 provides for opening the case for the prosecution. Sec. 227 confers power on the Court of Sessions to discharge the accused if upon consideration of the record of the case and the documents submitted therewith, the Judge considers that there is no sufficient ground for proceeding against the accused. No duty is cast on the Court of Sessions to enquire before proceeding to hear the case of the prosecution under sec. 226 to ascertain whether the copies of the documents have been furnished to the accused because section 207 casts the bligation upon the Magisrate to perform the judicial function.

Now, if under sec. 207, the Magistrate is performing a judicial function of ascertaining whether copies have been supplied or not, it would undoubtedly be an inquiry for the purpose of satisfying himself that sec. 207 has been complied with in letter and spirit. That satisfaction has to be judicial satisfaction. It is not a trial but something other than a trial and being judicial function it would necessarily be an inquiry. The making of an order committing the accused to the Court of Sessions will equally be a stage in the inquiry and the inquiry culminates in making the order of commitment. Thus, from the time the accused appears or is produced before the Magistrate with the police report under sec. 170 and the Magistrate proceeds to enquire whether sec. 207 has been complied with and then proceeds to commit the accused to the Court of Sessions, the proceeding before the Magistrate would be an inquiry as contemplated by sec. 2(g) of the Code. We find it difficult

to agree with the High Court that the function discharged by the Magistrate under sec. 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously sec. 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made is complete. Sub-sec. 2 of sec. 309 provides that if the Court, after taking cognizance of an offence or commencement of trial, finds it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. There are three provisos to sub-sec. 2 which are not material. If, therefore, the proceedings before the Magistrate since the submission of the police report under sec. 170 and till the order of commitment is made under sec. 209 would be an inquiry and if it is an inquiry, during the period, the inquiry is completed, sec. 309(2) would enable the Magistrate to remand the accused to the custody. Therefore with respect, the High Court committed an error in holding "that the order remanding the respondents to custody, made after cognizance of offence was taken cannot be justified under section 167(2), 209 and 309 of the Code and no other provision under which the respondents can be remanded to custody at this stage, has been indicated by the learned Government Advocate, we feel that it would be proper to accede to the request made by the respondents and to direct that they would be released on bail after furnishing adequate security to the satisfaction of the Chief Judicial Magistrate, Banda."

The view taken by the High Court introduces a stage of compulsory bail not envisaged by the Code, and therefore, also the view of the High Court cannot be upheld. According to the High Court after the accused is brought before the court alongwith the police report, the Magistrate must forthwith commit the accused to the Court of Sessions because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to Court of Sessions is made. The view with respect is wholly untenable and must be set aside.

Mr. Prithviraj, learned counsel, drew our attention to the decision of this Court in *Gauri Shanker Jha* v. *The State of Bihar*

and Ors'(1) This case is of no assistance because it dealt with the situation under the Code of Criminal Procedure, 1898 which did require the Magistrate to be satisfied with *prima facie* case before an order committing an accused to the Court of Sessions could be made. A

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

C

H.L.C. *Appeal allowed.*

1. [1972] 3 SCR 129.