COMMISSIONER OF INCOME-TAX, MADRAS v. NEDUNGADI BANK, CALICUT.

KRISHNAN, J.

expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no doubt section 10 (2) (ix) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

BEASLEY, J. BEASLEY, J.—I agree.

N.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Devadoss and Mr. Justice Wallace.*

1926, April 29.

APPA RAO MUDALIAR (ACCUSED), PETITIONER,

v.

JANAKI AMMAL (COMPLAINANT), RESPONDENT.*

Sections 202, 203, 204 *and* 436, *Criminal Procedure Code* (*V of* 1898, *as amended*)—*Practice of Magistrates sending notice to accused on receipt of complaint—Dismissal under ss.* 203 *and* 204 (3) *of complaint after appearance of accused, not a discharge within sec.* 436.

Unless and until a Magistrate is satisfied from an examination of the complainant and his witnesses that there is a *prima*

* Criminal Revision Case No. 790 of 1925 and Criminal Revision Petition No. 649 of 1925.

facie case against the accused justifying the issue of a process under section 204 of the Criminal Procedure Code, the Magistrate is not entitled to call upon the accused to appear before him even optionally and to have his say against the complaint. Any such practice of sending a notice to the accused at the stage of enquiry contemplated by section 202 is improper and must be discontinued.

Held further, that the fact that the accused appeared on such notice does not convert an eventual dismissal of the complaint under section 203 or 204 (3) into an order of "discharge," entitling the accused to notice before the dismissal is set aside and further enquiry ordered under section 436.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (V of 1898, as amended) praying the High Court to revise the Order, dated 1st December 1925, of the District Magistrate of Chingleput in Criminal R.C. No. 45 of 1925 (C.C. No. 443 of 1925, on the file of the Court of the Stationary Second-class Magistrate of Ponneri).

The accused preferred this Revision Petition which was posted before a full Bench at the request of the Public Prosecutor. The necessary facts appear from the Judgment of DEVADOSS, J.

K. Narasimha Ayyar for the petitioner.—The Magistrate is entitled to issue a notice to the accused even at the stage contemplated by section 202, to show cause why any process should not issue against him under section 204. Compare section 252 which enables the accused to appear before a Magistrate, before any summons or warrant is issued to him. The notice under section 202 is virtually a summons under section 204 and as the accused appeared in response to it, the dismissal of the complaint thereafter, though styled as one under section 203, is in effect a "discharge" of the accused under section 253. Hence he is entitled to notice before the order of dismissal is set aside and further enquiry is ordered under section 436.

Public Prosecutor (*J. C. Adam*) for the Crown, with *N. A. Krishna Ayyar* and *R. Viswanatha Ayyar* for the respondent (complainant).—There is no warrant under the Criminal Procedure Code for the issue of a notice to the accused at the stage of

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enquiry under section 202; see *Chandi Charun Mitra* v. *Manindra Chandra Roy Chowdhury*(1).

[CHIEF JUSTICE and WALLACE, J., referred to the Judgment of WALLACE, J., in Criminal Revision Case No. 578 of 1925 * condemning the issue of such notice.]

Emperor v. *Gajraj Singh*(2) holds that no notice to the accused is necessary before ordering further enquiry in such a case.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—I have had the advantage of perusing the judgment about to be delivered by my brother DEVADOSS and I entirely agree in the conclusion that he has arrived at, a conclusion which was also arrived at by WALLACE, J., in Criminal Revision Case No. 578 of 1925. As I also find myself in complete accord with the reasoning of those learned Judges, it is unnecessary for me to add more than a few words. It may no doubt happen from time to time that to allow a proposed accused person to appear and to hear what he has to say while the proceedings are at the stage contemplated by section 202 of the Criminal Procedure Code might turn the scale and satisfy the Magistrate that there was no case for issuing process under section 204. I make no doubt that it is in this view that Magistrates have been in the habit of giving a person against whom a charge is formulated at least an option to come before them if he so desires at the earliest stage. It seems to me that such a procedure is entirely unwarranted by the Code. The object of the chapter of the Code in which section 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out: and in my opinion the Code never contemplated that at that stage they should be either asked or permitted to state their cases. That is really enough to dispose of this

(1) (1922) 27 C.W.N., 196. (2) (1925) I.L.R., 47 All., 722.

* Printed at the end of this case.

matter but I am also of opinion that the practice of summoning an accused person at the stage marked by section 202 has much greater dangers than safeguards to the accused. He is obviously not bound to appear even if invited or given an opportunity of doing so. If he does not appear, it is likely to weigh against him with the Magistrate; if he does, he runs the danger of being committed to a statement of his case before he knows with any definiteness what exactly is laid to his charge. The argument that because Mr. Narasimha Ayyar's client, in fact, appeared before the Magistrate when the proceedings were at the stage of preliminary inquiry under section 202, he is therefore entitled to be heard when that proceeding is questioned in a higher Court is to my mind quite untenable. This appellant has never been discharged because he had never been charged.

I should like to say in conclusion that I entirely endorse the strictures passed by DEVADOSS, J., on the remarks contained in the Order of the District Magistrate which in effect really prejudge the case. I agree with the order proposed by DEVADOSS, J.

DEVADOSS, J.—This is an application to revise the Order of the District Magistrate of Chingleput directing further enquiry into a complaint dismissed under section 203 of the Criminal Procedure Code by the Stationary Second-class Magistrate of Ponneri. At the request of the Public Prosecutor, the learned Chief Justice has directed that this Criminal Revision Petition be heard by a Full Bench as one of the questions involved affects the practice prevailing in the Magistrates' Courts. Two questions arise for consideration: (1) Has a Magistrate jurisdiction to require the presence of the accused when he holds an enquiry or investigation under section 202 of the Criminal Procedure Code

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into a complaint of which he is empowered to take cognizance or which has been transferred to him under section 192? and (2) Is an order under section 436 of the Criminal Procedure Code for further enquiry into a complaint dismissed under section 203 bad for want of a notice to the accused?

First point.—When a complaint is presented or transferred to a Magistrate he may, after examining the complainant on oath, dismiss the complaint under section 203 if there is in his judgment no sufficient ground for proceeding, and if there is sufficient ground for proceeding he shall issue a summons or warrant under section 204 for the attendance of the accused. Section 202 authorizes a Magistrate for reasons to be recorded in writing to postpone the issue of process for compelling the attendance of the person complained against, and either enquire into the case himself, or direct an enquiry or investigation to be made by a Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. The object of section 202 is to prevent the harassing of innocent persons by an indiscriminate issue of processes in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding, he should not compel the appearance of the accused before him. It is to enable him to see that there is sufficient ground for proceeding that he is authorized to hold an enquiry by himself or by a subordinate Magistrate or by a police officer or by any other fit person. The object of the section would be defeated if the accused is made to appear in an enquiry under section 202. It is argued that the notice issued under section 202 to the accused gives him an option to appear or not, and

therefore it cannot be said that the Court compels his appearance when it issues notice to him under section 202; but the option is rendered useless as his non-appearance might be construed into a disinclination on his part to be present at the enquiry and might create a prejudice in the mind of the Magistrate against him, and if he appears the object of the postponement of the process is practically nullified. Should the Magistrate after such enquiry think that there is in his judgment sufficient ground for proceeding, any statement made by the accused might prejudice him in the trial of the case, and if he declines to answer any question that may be put to him by the Magistrate, that might prejudice the Magistrate against him. The question has been exhaustively considered by my brother WALLACE, J., in a recent case, Criminal Revision Case No. 578 of 1925, and as I entirely agree with his conclusion and the reasons therefor, it is unnecessary to discuss the cases noticed by him. I hold that the practice of issuing notice to the accused under section 202 is not illegal but is highly undesirable as it defeats the specific object of section 202 and might prejudice the accused if the complaint is not dismissed under section 202 and should therefore be put a stop to without delay.

Second point.—The proviso to section 436 of the Criminal Procedure Code makes it clear that a person is entitled to notice before an order is made under that section if he has been discharged. When an accused person has not been discharged according to the provisions of the Criminal Procedure Code, he is not entitled to notice when the District Magistrate or the Sessions Court or the High Court orders further enquiry into a complaint which has been dismissed under section 203, or sub-section (3) of section 204. Mr. Narasimha Ayyar's contention is that in this case his client appeared before

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the Magistrate on a notice under section 202 and as the complaint was dismissed, he must be considered to have been discharged. The dismissal of a complaint under section 203 of sub-section (3) of 204 is before the appearance of the accused, and no accused person can be said to be discharged when no process has been issued for his appearance. It is only where a Magistrate taking cognizance of an offence is of opinion that there is sufficient ground for proceeding, he issues a summons or warrant for the attendance of the accused. If the case is a summons case the trial is according to Chapter XX and when a complaint in a summons case is thrown out the accused is acquitted. In warrant cases the enquiry and trial are under Chapter XXX, and under section 253, if the Magistrate finds that no case has been made out against the accused which, if unrebutted, would warrant his conviction, he shall discharge him. An accused person is said to be discharged when the case against him is thrown out under sections 209, 253 or 259, or when the Advocate-General enters a *nolle prosequi* under section 333. The expression "person who has been discharged" in section 436 refers to a person who has been discharged under sections 209, 253 or 259. A person against whom no process has been issued under section 204 is not a discharged person and therefore no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under section 203 or sub-section (3) of section 204. The same view was held in *Emperor* v. *Gajraj Singh*(1). The answer to the second question is in the negative.

(1) (1925) I.L.R., 47 All., 722.

Mr. Narasimha Ayyar very properly contends that his client would be prejudiced by certain remarks of the District Magistrate in his Order. He calls a letter produced by the accused as a spurious letter. The evidence on record does not warrant such an opinion of the letter. Again, the observation 'Accused was certainly liable for trespass, insult and assault as complained by the complainant' is tantamount to a finding that the accused is guilty. Without the evidence of both sides it is not proper for any court to come to a definite conclusion that an accused person is guilty of an offence. The Stationary Sub-Magistrate followed the practice which, though condemned by *Sheik Meeran Sahib* v. *Ratnavelu Mudali*(1) seems to be in vogue throughout the Presidency and there is no reason for transferring the case for further enquiry to another Magistrate. Any Magistrate who enquires into this case will ignore the observations of the District Magistrate as regards the merits of the case and come to a conclusion on the evidence that might be adduced before him as to the guilt or the innocence of the accused. There is no reason to interfere with the order of the District Magistrate except setting aside that portion of the order by which the case is transferred to the Taluk Magistrate of Ponneri.

The case will be enquired into by the Stationary Sub-Magistrate of Ponneri who, if he thinks proper, may hold an enquiry under section 202 before issuing process to the accused in order to satisfy himself that there is sufficient ground for proceeding. If he is not satisfied he may dismiss the complaint under section 203; if he is satisfied that there is sufficient ground for proceeding he shall issue process under section 204.

(1) (1914) I.L.R., 37 Mad., 181.

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WALLACE, J.—I entirely agree. On the first point I have already said all that I wish to say in my judgment in Criminal Revision Case No. 578 of 1925.

WALLACE, J.

On the second point I agree that an accused to whom a process has not issued under section 204 (1) has not "appeared" at the proceedings contemplated by Chapters XVIII and XXI and therefore cannot claim that a dismissal of the complaint under section 203 of the Code of Criminal Procedure amounts to a discharge.

N.R.

The following is the Judgment in Criminal Revision Case No. 578 of 1925 referred to in the Judgment of the Full Bench :—

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1926, March 11.

P. VARADARAJULU NAYUDU (PETITIONER), COMPLAINANT,

v.

P. KUPPUSWAMY NAYUDU (RESPONDENT), ACCUSED.*

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Third Presidency Magistrate, Georgetown, Madras, dated 4th May 1925, in Application No. 3172 of 1925.

V. L. Ethiraj for the petitioner.

K. P. Krishna Menon for Crown Prosecutor.

O. Thanikachalam Chetti for the accused.

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* Criminal Revision Case No. 578 of 1925 (Criminal Revision Petition No. 487 of 1925).