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clearly that in practice no appeals have been brought from interlocutory orders in regard to proclamations of sale. This confirms us in holding that there is no sufficient reason for our taking a different view from that of the four other High Courts. In these circumstances, we think that the preliminary objection succeeds, and the appeal is accordingly dismissed with costs.

MIRZA, J. :—I agree.

Decree confirmed.

J. G. R.

CRIMINAL REVISION

Before Mr. Justice Fawcett and Mr. Justice Mirza.

In re VIRBHAN BHAGAJI.*

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Criminal Procedure Code (Act V of 1898), section 202—Complaint—Notice issued to accused—Hearing—Discharge of notice—Dismissal of complaint—Practice.

Section 202 of the Criminal Procedure Code is not necessarily limited to the preliminary examination of the complainant and his witnesses. If a Magistrate deems it desirable for the purpose of his inquiry to give the accused an opportunity of appearing before him and stating what he has to say about the accusation, and even accepts and considers documentary evidence produced by the accused, he is not thereby committing an illegality.

Where a Magistrate is satisfied with the accused's explanation, he should formally dismiss the complaint.

Per FAWCETT, J. :—"The phraseology, 'Notice discharged' may no doubt be analogous to the expression 'Rule discharged.' But it is one that I think ought to be deprecated. The Magistrate, when he passes an order after a preliminary inquiry, should say plainly either that he dismisses the complaint, or that he thinks that there is ground for proceeding, and therefore directs the issue of a summons or warrant, as the case may be."

THIS was an application under the criminal revisional jurisdiction against an order passed by N. T. Jungalvala, Acting Presidency Magistrate, Fifth Court, Bombay.

The applicant filed a complaint against the two opponents charging them with offences punishable under sections 426, 447, 506 and 114 of the Indian Penal Code.

*Criminal Revisional Application No. 14 of 1928.

The Magistrate issued notices to the opponents, heard them, considered the documents produced by them, and issued summons only against opponent No. 1 for an offence under section 506 of the Indian Penal Code. Notice against opponent No. 2 was discharged.

The complainant applied to the High Court.

Noronha, with *Y. V. Bhandarkar*, for the applicant.

G. N. Thakor, with *V. N. Chhatrapati*, for the opponents.

P. B. Shingne, Government Pleader, for the Crown.

FAWCETT, J. :—[After discussing shortly certain parts of the evidence, proceeded :—] We have come to the conclusion after hearing full arguments that in regard to the offence of mischief under sections 426 and 114, Indian Penal Code, the summary dismissal of the complaint by the Magistrate is on the merits unjustified, and that the complaint, so far as it relates to those sections, should be accepted by the Magistrate and process issued against both the two accused.

We see no sufficient reason to interfere with the dismissal of the complaint so far as it alleges offences committed by the two accused under section 447, Indian Penal Code, nor so far as it alleges an offence committed by accused No. 2 under section 506, Indian Penal Code.

Mr. Noronha for the applicant has taken the point that the procedure adopted in this case by the Presidency Magistrate, Fifth Court, in issuing a notice to the accused, hearing him and then discharging the notice, is illegal. We have heard full arguments on this point. Mr. Noronha cites the rulings in *Appa Rao Mudaliar* v. *Janaki Ammal*[1] and *Bhim Lal Sah* v. *Emperor*[2] in support of his contention. On the other hand, *In re Tukaram*[3] has been relied upon by the Government

(1) (1926) 49 Mad. 918. (2) (1912) 40 Cal. 444.
(3) (1904) 6 Bom. L. R. 91.

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Pleader for the Crown, and Mr. Thakor for the opponent, in support of the view that that procedure is not illegal. I am prepared to agree with the statement made in the two cases relied upon by Mr. Noronha that what is ordinarily contemplated by section 202 of the Criminal Procedure Code is merely a preliminary examination of the complainant and his witnesses, or such of them as the Magistrate deems fit to examine, in the absence of the accused. But I am not prepared to go so far as to say that that section is limited to an inquiry of that kind, and that, if the Magistrate deems it desirable for the purpose of his inquiry to give the accused an opportunity of appearing before him and stating what he has to say about the accusation, and even accepts and considers documentary evidence which the accused produces as he did in this case, he is thereby committing an illegality. I think there is a clear distinction between considering whether such a procedure is illegal and whether such a procedure is desirable. I see the force of some of the remarks in the Madras and Calcutta cases as to the undesirability of such a procedure, at any rate in many cases. But that seems to me to be irrelevant to the question whether, although such a procedure may be undesirable, it is absolutely illegal. To my mind the answer clearly is in the negative. The section in wide terms gives the Magistrate, if he thinks fit, power to inquire into the case himself. The words " the case " are very wide, and if the Magistrate considers that the accused should be given an opportunity of being heard, there is nothing in the provisions of the section itself which to my mind debars him from doing so. I think, on the other hand, that there are indications to the contrary. For instance, the Magistrate under this section can direct a Police officer to investigate into the case, and such a Police officer would

exercise all the powers conferred on the Police under Chapter XIV of the Criminal Procedure Code. This is, for instance, shown by sub-section (3) of section 155 as regards non-cognizable cases, which a Police officer in charge of a Police station may investigate upon the direction of a Magistrate having jurisdiction, except that he cannot arrest the accused without warrant. In such a case it surely cannot be said that the investigating officer could not exercise his ordinary power of summoning and examining the accused, as a person supposed to be acquainted with the facts of the cases. Similarly, the Magistrate, though he cannot compel the attendance of the accused, because that is impliedly prohibited by the section, can, in my opinion, at any rate give the accused an opportunity of attending and being heard. Again sub-section (2) of section 202 says that any person who is making an inquiry or investigation under this section, who is not a Magistrate or a Police officer, can exercise all the powers conferred by the Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant. Thus such private person could, under section 94 of the Code, give a written order to an accused person to produce a specified document, which was the subject matter of the charge, supposing, for instance, it was alleged to be a forgery. And if a private person can exercise such a power, *a fortiori* a Magistrate making a preliminary inquiry can do so. In fact section 94, Criminal Procedure Code, authorizes this power being exercised not only for the purposes of a trial, but also for the purposes of any investigation or inquiry. While, therefore, I feel the force of the objections to having a sort of preliminary trial of a case, I do not think that there is anything absolutely illegal in the issue of a notice to an accused person.

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Personally I feel some doubts as to the desirability of there being such an extensive practice of this kind, as there appears to be in Bombay. But I think that is a matter more for any directions that the High Court as a body may think fit to issue than for this Bench to deal with. The only comment that I do think it right to make is this, that I object to the practice of Magistrates saying "Notice is discharged," as the Magistrate did in this case. There is no warrant in the Code for any order of that kind. All that the Magistrate is empowered to do under sections 202 and 203, Criminal Procedure Code, is to dismiss the complaint after considering the result of his preliminary inquiry. The phraseology "Notice discharged," may no doubt be analogous to the expression "Rule discharged." But it is one that I think ought to be deprecated. The Magistrate, when he passes an order after a preliminary inquiry, should say plainly either that he dismisses the complaint, or that he thinks that there is ground for proceeding, and, therefore, directs the issue of a summons or warrant, as the case may be. In the present case, I think, the Magistrate was not debarred from the dismissal of the complaint in regard to certain sections and from admitting it in regard to other sections mentioned in the complaint.

For these reasons I would pass the order that I have already indicated, setting aside the dismissal of the complaint against the two opponents as regards the alleged offence under sections 426 and 114, Indian Penal Code. Otherwise I would refuse to interfere.

MIRZA, J. :—I agree.

Rule made absolute.

R. R.