RAJASTHAN HIGH COURT

Ghisa

Vs.

State (Rajasthan)

Criminal Ref. No. 75 of 1959
(I.N. Modi and D.M. Bhandari, JJ.)

02.06.1959

JUDGMENT

D.M. Bhandari, J.

1. This is a reference by the Additional Sessions Judge. Tonk, recommending that the order of commitment of the Munsiff Magistrate, First Class, Malpura dated 16-12-1957 committing the accused Gheesa and seven others under Sections 307, 148 and 307/149 I.P.C. be set aside.

2. According to the challan, there were eleven eye-witnesses of the incident out of which the prosecution produced only file such witnesses. The remaining eye-witnesses were neither produced by the prosecution, nor were examined by the learned Magistrate. The learned Additional Sessions Judge is of the opinion that under Section 207-A Sub-Section (4), it was the duty of the committing Magistrate to take the evidence of all the eyewitnesses and as admittedly he failed to do so, the commitment order was bad and illegal. He has therefore recommended that the committing order be set aside and the case be remanded to the committing Magistrate with a direction to examine all the witnesses to the actual commission of the crime whom the prosecution intends to produce at the trial and then to proceed according to law. This reference came up for hearing before me sifting as a Single Judge and I referred this to a Division Bench as there was considerable divergence of opinion on the point involved in the case. Notices were issued to the accused and the Government Advocate, but no one appeared on behalf of the accused. We heard the learned Government Advocate, who supported the order of commitment passed by the learned Magistrate.

3. The main point for determination in this reference is, whether under sub-section (4) of Section 207-A Criminal Procedure Code, it was incumbent on the committing Magistrate to take the evidence of all the eye-witnesses, and as he has failed to do so, the order of commitment is illegal and the commitment should be set aside under our revisions jurisdiction.

4. Sub-Section (4) to Section 207-A relates to the procedure adopted in committal proceedings on a Police report. Sub-Section (1) provides that the Magistrate shall fix a date for the purpose of holding an inquiry under that section. Sub-Section (2) provides that if at any time before such date, the officer conducting the prosecution, applies to the Magistrate to issue a process to compel the attendance of any witness, or the production of any document or thing, the Magistrate shall issue such process, unless he deems it unnecessary to do so. Sub-Section (3) provides that the Magistrate shall satisfy himself that the documents referred to in Section 173; have been furnished to the accused, and if such documents, or any of them have not1 been furnished, he shall cause them to be so furnished. Then comes Sub-Section (4) which runs, as follows :

> "'The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution he may take such evidence also."

Sub-Section (5) provides that the accused shall be at liberty to cross-examine the witnesses examined under Sub-Section (4), Sub-Section (6) relates to the power of discharge in case the Magistrate is of opinion that the evidence recorded by him and the documents disclose no grounds for committing the accused person for trial. Sub-Section (7) deals with the framing of a charge. Then follow the other provisions which are not very material for the purpose of deciding the point at issue.

5. Sub-Section (4) is divided in two parts. The first part makes it the duty of the Magistrate to take the evidence of such persons as may be produced by the prosecution as witnesses to the actual commission of the offence alleged. The second part grants a, discretion to the Magistrate to take the evidence of any one or more of the other witnesses for the prosecution, if he is of opinion that it is necessary in the interests of justice to do so. The first part of Sub-Section (4) has been considered by

various High Courts and has given rise to a conflict of opinion in interpreting it. These cases are :

(i) *State v. Govind Thampi Bhaskaran Thampi,* [2]
(ii) *State v. Hamratan Bhudhan,*[3]
(iii) *Krishna v. State of Mysore,* [4]
(iv) *M. Pavalappa v. State of Mysore,* [5]
(v) *State v. Yasin,* [6]
(vi) *Manik Chand Chowdhury v. State,* [7]
(vii) *A. Ishaque v. State,* (viii) *In re Kotta Narayan,* [8]
(ix) *State v. Anadi Betenkar,* [9]

6. In this Court, Sub-Section (4) of Section 207-A came up for consideration in *State v. Birda,* [10] was a Division Bench case. The point involved in that case was whether the Magistrate should record evidence of anyone or more of the prosecution witnesses in case where there were no eye-witnesses. The Court was of the opinion that the only proper way in which the Magistrate could exercise judicial discretion would be to hold that the interests of justice required that the evidence other than that of eye-witnesses must be recorded to establish the connection of the accused with the crime, and that being so, he must proceed to record such evidence and thereafter exercise the powers vested in him under Sub-Sections (6) and (7) of Section 207-A Criminal Procedure Code Their Lordships observed that in case there were eye-witnesses, a question may arise whether the prosecution should produce all the eye-witnesses, or it may produce some of them before the committing Magistrate.' Their Lordships did not express any opinion on this point, as that point was not directly raised in the case before them, but nevertheless pointed out that the prosecution should not hold back eye-witnesses to the actual commission of the offence alleged at their sweet will and pleasure, and in any case, they would be running a grave risk if they later produce such witnesses air the trial whom they have not produced before the committing Magistrate.' In the present case, the question, whether the Magistrate is to take evidence of ail the eye-witnesses, is directly involved and we are called upon to express final opinion on this point. 7. I may at this stage take note of the cases of the various High Courts referred to above.

8. In AIR 1957 Travencore Cochin 29 the view taken was that the words 'if any' relate to the expression "witnesses to the actual commission of the offence alleged", and that the word 'may' should be construed as equivalent to 'shall' as the statute authorizes the

doing of a thing for the sake of justice or for the public good. Their Lordships also noticed the history of the enactment of Section 207-A.

9. In AIR 1957 Madhya Bharat 7 the view taken is that –

> "The first part of Sub-Section (4) of Section 207-A lays down that in the event of there being persons who have witnessed the actual commission of the alleged offence, the prosecution shall produce them and the committing Magistrate shall record their evidence."

This interpretation, that the word 'may' used in the first part of the Sub-Section shall be construed as 'shall', has been arrived at on the principle that where a statute directs the doing of a tiling for the sake of justice and public good, the word 'may' has a compulsory force.

10. In AIR 1957 Mysore 5 the view expressed is that –

> ".....what is obligatory on the Magistrate is the recording of the evidence of witnesses to the actual occurrence, and if there are no witnesses to speak to the actual commission of the offence, the Magistrate is not bound to examine any other witness or witnesses."

In that case, it appears that there were no eyewitnesses and the committing Magistrate had committed the accused on the perusal of the documents referred to in Section 173 Criminal Procedure Code and produced by the prosecution. As such, the first part of Sub-Section (4) did not come up for interpretation. Padamnabhiah, J. of the Mysore High Court, who delivered the judgment, was of the opinion that the second part of the sub-section granted discretion to the Magistrate and therefore the omission to examine any other witness or witnesses suo motu could not be such as to vitiate the order of committal. This view is contrary to the view taken by this Court in AIR 1957 Rajasthan 318, where it has been pointed out that the proper way to exercise the discretion is to record the statements of other witnesses on the point, otherwise the committing Magistrate will be failing in his duty and would not be in a position to extracts his power vested in him under Sub-Sections (6) and (7) properly.

11. The other case of Mysore High Court in AIR 1957 Mysore fit, was a case in which there were eye-witnesses and the first part of Sub-Section (4) came up for

consideration Their Lordships took the view that there was some warrant on a strictly grammatical construction on the wording of the section to hold that it was entirely open to the prosecution to produce or not to produce eye-witnesses of the occurrence for giving evidence, yet that could not have been the intention of the Legislature. Their Lordships further took assistance from the second part of Sub-Section which was interpreted as meaning that the Magistrate could, if he thought it necessary, compel the production of witnesses other than eye-witnesses while under the first part he could examine them and it was thought to be an illogical position that he could not call upon the prosecution to produce eye-witnesses.

12. *In re Kanjan Raghavan,* [11,] the view expressed was that -

> "The wording of Sub-Section (4) gives no room for doubt that the Magistrate conducting the inquiry should take the evidence of all the persons produced by the prosecution as witnesses to the actual commission of the offence alleged aid that he has no discretion to dispense with the examination of any of them."

For taking this view, reliance was placed on 1956 Ker. LT 550 : (AIR 1957 Travencore Cochin 29), AIR 1957 Madhya Bharat 7 and AIR 1957 Mysore 5.

13. Sub-Section (4) came up for consideration before a Division Bench of Calcutta Rich Court in AIR 1958 Calcutta 324. Chakravartti, CJ. who delivered the judgment of the Bench first pointed out that it was not necessary for the purpose of decision in that case to deal with the interpretation of Sub-Section (4) of Section 207-A. but he gave his views as these were points of great importance. He disagreed with the Travencore Cochin and Madhya Bharat High Courts in constructing the word "may" as 'shall' in the first part of that sub-section. In his view, the first part of the Sub-Section laid an obligation but that was only an obligation on a magistrate to examine such witnesses of the actual commission of the offence alleged as the prosecution may produce before him. The second part laid no obligation at all but only conferred a power and discretion on the Magistrate to examine on his own accord witnesses other than those examined by the prosecution if he considered to be in the interests of justice to do so. In the opinion of their Lordships of the Calcutta High Court, the words 'evidence of such persons, if any, as may be produced by the prosecution as witnesses of the actual offence alleged' do not purport to confer any power on the prosecution to produce witnesses of the kind mentioned, but describe the witnesses by the fact of their production by the prosecution. It was further pointed out that in that context, the word 'may' cannot be construed as 'shall' because the word 'may' was not used with a verb which confers a power on a certain person and enables or permits him to exercise

it but was used with a verb in the passive voice which occurs in an adjectival phrase, describing a fact and occurs in conjunction with the other words which completely exclude implications of an obligation. It was further pointed out that if the Sub-section had said, "the prosecution may produce for examination person, who were witnesses of the actual commission of the offence alleged and the Magistrate shall take their evidence", there might to be room for a contention that, in the context, the word 'may' ought to be read as 'shall' or 'must', as advancement of justice was intended. The view of the Travancore Cochin High Court that the words 'if any' relate to the expression "which were witnesses of the actual commission of the offence A alleged" was also adversely commented upon, and lit was observed that however closely the section may be read, the words cannot be taken as qualifying anything but "such persons as may be produced", the meaning being that the Magistrate must take the evidence of such persons as may be produced by the prosecution as witnesses of the actual commission of the offence, if any persons are produced by them as such witnesses. The remarks of the Madhya Bharat High Court, that "if the first part of Section 207-A(4) be not construed as making it obligatory on the prosecution to produce all their witnesses of the actual commission of the offence, they may not examine any of the witnesses at all, and that in such an event very important evidence would be allowed to slip through the fingers of the Magistrate and that the commitment proceedings would be reduced to farce" were also examined. It was observed that to meet such a contingency, the Magistrate has been given power, by the second part of the sub-section, to examine witnesses for himself, if he finds it necessary in the interests of justice to do so. On the second part of Sub-Section (4), it was pointed out that the Magistrate must consider after the prosecution has closed their evidence and equally in a case where the prosecution have not produced any witness at all, whether it is necessary in the interests of justice that he should examine some or some other prosecution witnesses for himself. It was also observed that it cannot be said that where the prosecution have not produced some of their witnesses of the actual commission of the offence alleged, the second, part of Section 207-A(4) requires the Magistrate, as a matter of law, to examine them on his own account. It was also observed that" "Other witnesses for the prosecution" obviously mean witnesses for the prosecution named, but not examined by them whether they were witnesses of the actual commission of the offence or not. The same position was taken up by the Calcutta High Court in another case in AIR 1958 Calcutta 341.

14. A Single Judge of the Andhra Pradesh High Court in AIR 1958 Andhra Pradesh

851, has held that the Magistrate has a discretion vested in him, to be satisfied that a prima facie case is made out to commit the accused to Sessions after the examination of the witnesses produced by the prosecution, and not necessarily all the witnesses relied on by the prosecution.

15. In the Orissa High Court, Narasimham, C.J. sitting as a Single Judge held in AIR 1958 Orissa 241 that is there are witnesses to the actual commission of the offence, the Magistrate has no option but to examine them before commencing the enquiry. He followed the cases of Travancore Cochin, Madhya Bharat and Mysore High Courts referred to above.

16. The latest decision on this point is a Division Bench decision of the Allahabad High Court in AIR 1958 Allahabad 861. It was held that under the first part of Sub-Section (4), the initiative is entirely with the prosecution and that under that part if the prosecution does not examine any eyewitnesses or examine only some of them, the Magistrate cannot compel the examination of the remaining witnesses.
It was also pointed out that the word 'other used in connection with the expression 'witnesses, for the prosecution' means all those witnesses direct or otherwise on whose testimony, the prosecution propose to base their case. The observations of this Court in AIR 1957 Rajasthan 318 were treated as obiter dicta. The interpretation of the Travancore Cochin, Madhya Bharat and Mysore High Courts on the word 'may' as meaning 'shall' was not accepted.

17. These are all the cases that bear on the interpretation of Sub-Section (4) of Section 207-A. A careful examination of the cases, reveals that the controversy has arisen firstly because of the interpretation of the words 'if any', and secondly, because of the use of word 'may' in the first part of the sub-section. In my humble opinion, the difficulty in the interpretation of these words disappears altogether if a construction which I venture to adopt, is given to that Sub-Section. Under Section 173 Criminal Procedure Code, every investigation is to be completed without unnecessary delay. As soon as it is completed, the officer in charge of the police station is to forward to a Magistrate empowered to take cognizance of the offence on a police report, a report, which amongst other things must contain the names of the persons, who appear to be acquainted with the circumstances of the case. In order to ensure expeditious disposal of an inquiry or a trial, it may be taken that the prosecution should produce all the oral and documentary evidence against the accused along with the accused before the

Magistrate, and now a provision has also been made under Sub-Section (4) of Section 173 that the accused should also be furnished copies of the documents referred to therein. Under Section 207A as soon as the Magistrate receives the report forwarded under Section 173, he should fix a date for holding an inquiry. In my opinion, on the date so fixed, it is the duly of the prosecution to bring forward all the documents on which the prosecution proposes to rely as also all the persons whom the prosecution proposes to examine as witnesses at the trial. It is only when this is done that it may be expected that the magistrate shall finish the inquiry expeditiously. For this, under Sub-Section (2), a provision is made for issuing process to compel the attendance of any witness or the production of any document or thing. The officer conducting the prosecution is under a duty to apply to the Magistrate at any time before such date, to issue a process and the magistrate is bound to issue such a process, unless, for reasons to be recorded, he deems it unnecessary to do so, Sub-Section (3) lays down the duty of the magistrate to satisfy himself that the documents referred to in Section 173 nave been furnished to the accused. Then comes Sub-Section (4). In the opening part of the section, a duty is cast on the magistrate to take the evidence of the persons produced by the prosecution. Who are such persons whose evidence the magistrate is bound to record under the first para of Sub-Section (4) ? By the kind of information supplied to the magistrate under Section 173, the magistrate knows the names of the persons who appear to be acquainted with the circumstances of the case.

He further knows the persons whom the prosecution proposes to examine as its witnesses, and the nature of the evidence which they are likely to give at the trial. Now, if there are several eyewitnesses of an incident, the prosecution may, for justifiable reasons, produce some of them only. There must be in the words of their Lordships of the Privy Council in *Stephen Senevirane v. The King,* [12] "utmost candour and fair ness on the part of those conducting prosecutions." but proceeded their Lordships to say that "at the same time they cannot, speaking generally, approve of an idea that the prosecution must call witnesses irrespective of considerations of number and reliability or that a prosecution ought to discharge the functions both of prosecution and defense." This being the position, the prosecution may not think it proper or conducive to the fair trial of the case to produce all the eye-witnesses and may, for justifiable reasons, limit their number. It has already been pointed out that all the prosecution witnesses must appear before the committing magistrate on the date fixed by him for holding the inquiry. Sub-Section (4) directs that the magistrate shall take the evidence of all the witnesses produced by the prosecution as witnesses to the actual commission of the offence alleged, if there are any such witnesses before him.

This amounts to this that the magistrate is bound to record the evidence of all the eye-witnesses who have appeared before him and whom the prosecution intends to produce at the trial in support of its case. Now let me proceed to examine the language of the first part of Sub-Section (4) in this light.

Sub-Section (4) does not say that the prosecution is to produce anybody in evidence. The duty of recording evidence is cast on the Magistrate. In contrast with the phraseology used in Sub-Section (4), we may examine the phraseology used in sub-section (2) of Section 286, Criminal Procedure Code which relates to the trial of an accused Sub-Section (2) of that section by providing that "the Prosecutor shall then examine his witnesses", leaves it to the Prosecutor to produce his witnesses in evidence. We may also note S. 208, Sub-Section (1). where it is provided that "in any proceeding other than on a police report, the Magistrate shall take .....all such evidence as may be produced in support of the prosecution or on behalf of the accused or as called for by the Magistrate".

Similarly, under Section 263, which lays down the procedure instituted on a police report, the Magistrate is, after framing of the charge, to take all such evidence as may be produced in support of the prosecution. The language in sub-section (4) of it 207-A is in marked contrast with the language of the other sections referred to above. In other sections, an indication is given that the prosecution is to produce witnesses in evidence in. support of its case, while under Sub-Section (4), it is the Magistrate, who is to take the evidence. Such persons are brought forward by the prosecution before the Magistrate for the expeditious disposal of the inquiry. It is in this sense that the word 'produce' should be interpreted. The word 'may' does not I create any difficulty on this interpretation as it is a word giving discretion to the prosecution in the matter of restricting the number of the eye-witnesses, which I may say, it must do in a manner so as not to be unfair to the accused. The use of the word 'may' is appropriate as it grants that discretion.

18. Be it noted that the Magistrate is not to record the statement of any other eye-witnesses who may appear to be present at the scene of the incident, but on whom the prosecution does not want to rely. If that power is to be exercised, it can be done only under Section 540, Criminal Procedure Code

19. Coming to the words, 'if any', they clearly refer to such persons and the word 'such' carries in its train the whole of the qualification of a person mentioned in the Sub-Section, that is, he must be person produced by the prosecution as a witness to the

actual commission of the offence alleged. Sub-Section (4) says that if there is any such person, the Magistrate is bound to take his evidence. On the interpretation of the words, 'if any', I am in agreement with the view taken by Chakravartti, C.J. in AIR 1958 Calcutta 324, but with respect, I may say that the words 'produced by the prosecution' have been unnecessarily construed as meaning produced by the prosecution in evidence and this has led to all the difficulty. The section in effect says that the prosecution may produce before the Magistrate such witnesses of the actual commission of the offence alleged, as they may think proper and the Magistrate is bound to take the evidence of such persons.

20. In this interpretation, I am supported by the course the legislation took in the Parliament before it emerged in the form of Section 207-A. The original Bill provided that the statements of all the material witnesses should be recorded under Section 164 Criminal Procedure Code The report of the Joint Select Committee was to the effect that apart from other considerations, there are administrative difficulties in the examination of witnesses from time to time before a Magistrate as the investigation proceeds, and the Committee deleted the proposed amendment to Section 161 which imposed an obligation on a Police Officer to get the statements of the material witnesses recorded under Section 164. The Committee also redrafted Section 207-A. The relevant portion of the report on this point is, as follows :-

> "As the original Clause 20 has been omitted, there is no longer any obligation on a Police Officer to get the statements of all the material witnesses recorded under Section 164. It has, therefore, been provided that persons who have witnessed the actual commission of the alleged offence, should be produced before the Magistrate and ho should record their statements. The Magistrate has also been given the discretion to record the statement of any one or more of the other witnesses, if he considers it necessary to do so."-(Report of the point Select Committee-Gazette of India, Extraordinary, dated the 3rd of September, 1954, Part II, Section 2. Page 413).

Sub-Section (5) to 207-A was added by the Parliament to make it beyond doubt that the accused has liberty to cross-examine the witnesses examined under Sub-Section (4). This course of legislation clearly shows, as does the report of the Select Committee, that it was the intention of the Parliament that the persons who had witnessed the actual commission "at the alleged offence should be produced before the

Magistrate and he should record their statements. In my opinion, this intention has been carried out in the language employed in Sub-Section (4) and there is nothing in that section which may be said to be creating any difficulty in construing the section in that light.

21. The construction of Sub-Section (4) in the aforesaid manner is also advantageous to the accused. Before the amendment of the Code of Criminal Procedure and the enactment of Section 207-A, the accused had the right to see that the prosecution witnesses are examined and cross-examined even at the inquiry stage. For the expeditious disposal of the cases at the inquiry stage, the Legislature thought it proper to curtail this right of the accused to a certain extent. Lest it might operate adversely against the accused, it provided under Section 173(4) that the Officer in charge of the Police Station should, before the commencement of an inquiry or trial furnish or cause to be furnished to the accused free copies of the documents referred to therein and such documents give sufficient information of the nature of the charge which he has to face and of the evidence that was to be produced against him in serious cases of trial by a Court of Session, or by the High Court. Section 207-A further laid down that at least all the eye-witnesses on whom the prosecution wants to rely should be examined before the Magistrate and the accused should have a right of cross-examination. The Parliament was jealous not to curtail the rights of the accused beyond a limit. It must be recognized that the trial in a criminal case mostly depends on oral testimony. From the point of defense, successful cross-examination is the main weapon in the hands of the accused by which he can unravel the untruths and falsehoods in the prosecution case. Sufficient preparation in advance as to the antecedents of the witnesses is required for an effective cross-examination, and when a witness is said to be an eye-witness of a serious offence, it must have been deemed necessary that the accused must have an occasion to see him face to face before the trial commences and to elicit such information from him as may supply sufficient information regarding the antecedents of the witness and the manner in which the witness is alleged to have seen the incident. All this information is likely to prove very useful to the accused at the trial in the cross-examination of the witness. Sometimes an advance information of the type is absolutely necessary in order that there might be an investigation by the defense not only regarding the antecedents, of the witness but also in other circumstances of the case. In my opinion, the Parliament had all this in mind when it provided in Sub-Section (4) that the Magistrate should record the evidence of the eye-witnesses of the prosecution and further provided expressly by way of abundant

caution under Sub-Section (5) that the accused shall have a right of cross-examination though such a right could be taken for granted as a matter of law.

22. Now, let me consider the case from the point of view of me committing court. Under Sub-Sections (6) and (7), a committing court has important functions to perform. Sub-Section (6) gives the power of discharge and Sub-Section (7) gives the power of framing a charge when the Magistrate is of the opinion that the accused should be committed for trial. How can this power be effectively and judicially exercised if the Magistrate is left with certain documents on which to base his opinion ? The "Division Bench of this Court in AIR 1957 Rajasthan 318 was of the opinion in a case where there were no eye-witnesses that the only proper way in which the Magistrate in a case of this character could exercise his discretion judicially would be to hold that the interests of justice required that the evidence other than that of the eye-witnesses must be recorded to establish the connection of the accused with the offence and that being so, he must proceed to record such evidence and thereafter exercise the powers vested in him under Sub-Sections (6) and (7) of Section 207-A, Criminal Procedure Code

23. In my humble opinion, the aforesaid considerations are sufficient to outweigh any consideration of delay at the stage of inquiry which might be occasioned by recording the statements of the eye-witnesses. The Parliament struck a balance between avoiding delay at the stage of inquiry and giving fair play to the accused, who was suspected of having committed a serious offence. It also took note as to how a Magistrate could effectively discharge his duties at the inquiry stage, and in Sub-Section (4) laid down a procedure which met both the demands of justice and expeditious disposal of the case at the inquiry stage. The language of Sub-Section (4), in my humble opinion, carries this meaning without straining it in any manner.

24. In my opinion the commitment order of the learned Munsiff-Magistrate, First Class, Malpura dated the 16th of December 1957, deserves to be quashed. Section 215, Criminal Procedure Code cannot govern the present case, as it applies to an order of commitment under Section 213 which applies to the proceedings on a private complaint, but I would quash this order under the revisional jurisdiction of the Court under Section 489, Criminal Procedure Code

25. The result is that the order of the learned Munsiff-Magistrate. First Class, Malpura

dated the 16th of December, 1957 is set aside and the case is remanded to him with a direction to examine all the witnesses to the actual commission of the offence whom the prosecution intends to produce at the trial and then to pass order according to law.

I. N. Modi, J.

26. I have perused the judgment prepared by my learned brother Bhandari, J. and desire to express my own opinion separately as I was party to the decision in " AIR 1957 Rajasthan 318, and the question involved in this reference is of considerable importance.

27. The precise question which arose for decision in Birda's case, AIR 1957 Rajasthan 318, relating as it did to the interpretation of Section 207A(4), Criminal Procedure Code, was somewhat different although we ventured to express our opinion on the question now raised as well, at the end of our decision in that case. What we said was this :

> "Reverting to the other question for a moment, namely, whether the prosecution should produce all the persons who are witnesses to the actual commission of the offence alleged or they may produce only a few of them before the committing Magistrate, we think (though we do not wish to express a firm opinion in this matter as the point is not directly raised by the present reference) that the prevention should not hold back eye-witnesses to the actual commission of the offence alleged at their sweet will and pleasure, and, in any case, they would be running a grave risk it they later produce such witnesses at the trial whom they have not produced before the committing Magistrate. We are inclined to the view that the prosecution should produce all such witnesses as it intends to produce at the trial."

28. That question has been pointedly raised in the present reference. Briefly put, the question is whether Sub-Section (4) of Section 207-A leaves it entirely to the discretion of the prosecution to produce only some or even none of the eye-witnesses to the crime under enquiry before the committing Magistrate out of those they intend to produce at the trial, or it envisages or requires them to produce all the eye-witnesses before the committing Magistrate whom they intend to examine at the trial.

29. At the very outset I should like to say, with all respect, that the language of this Sub-Section is not as happy or clear as one should have wished it to be and that is why it has given rise to a sharp cleavage of judicial opinion in the various High Courts in our country. While some courts have gone to the length of holding that the first part of this Sub-Section casts a duty on the Magistrate to record only such evidence as the prosecution may choose to examine before him and that it leaves an almost unfettered discretion to and imposes no obligation on the prosecution whether to produce any eye-witnesses or not at the committal stage, and that it may be open to the Magistrate to commit the accused merely on reading the police papers under Section 173 Criminal Procedure Code even though no evidence whatsoever has been recorded by him, other Courts have held that the word "may" in the expression "as may be produced by the prosecution to the actual commission of the offence alleged" has a compulsive force and that thereby an obligation is cast on the prosecution to produce the evidence of all eye-witnesses, if any, of the offence under enquiry before the committing Court.

30. I have given the matter my most careful and anxious consideration may state at once that neither of these views can be accepted as sound. The view that the section leaves it entirely to the discretion of the prosecution whether or not to produce any eye-witnesses to the actual commission of the offence before the committing Magistrate and that even so the prosecution can ask for the committal of the accused is, with as respect, entirely unsound on general principles of criminal jurisprudence as also having regard to the entire scheme and structure of Section 207A and Sub-Sections (6) and (7) thereof in particular. The acceptance of this extreme view would to my mind, reduce the accused's right of discharge almost to a nullity for the vast majority of cases. I propose to revert to and examine this aspect of the case in greater detail later.

31. As for the view that the word "may" in the expression "as may be produced by the prosecution as witnesses "to the actual commission of the offence alleged" has a compulsive force and is tantamount to "shall", I do not think that it would be correct to construe a qualifying phrase containing the word "may" in such obligatory sense. The actual substitution of the words "may" by "shall" would at once go to show that it would he utterly bad English to do anything of the kind. I should also like to point out here that, after all, the law does not compel the prosecution to produce all eye-witnesses, even at the trial (See Section 286 of the Code) and a certain amount of

reasonable discretion has, in the very nature of things, to be left to the prosecution so as to enable them to choose their witnesses and discard such of them as may not be trustworthy or may be superfluous. See AIR 1936 PC 289; *Adel Muhammed v. Attorney-General of Palestine,* [13] and *Malak Khan v. Emperor* [14] To quote the observations of Lord Porter in AIR 1946 PC 16 :

> "It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, find no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be leveled at the absence of possible witnesses." The Supreme Court approved these observations in *Abdul Gani v. State of M.P.*[15] The interpretation of the word "may" as "shall" so as to deprive the prosecution of this ultimate discretion would, to my mind, be wrong and I do not see any sound justification to adopt this extreme view also. I am, therefore, not prepared to hold that the word "may" should be read as "shall" in the context in which it has been used, and I find it difficult to accept the reasoning in AIR 1957 Madhya Bharat 7 and AIR 1957 Trav Co. 29 and other cases which have adopted that view, as correct.

32. The question whether Section 207A requires all eye-witnesses to the actual commission of the offence to be produced before the committing Magistrate by the prosecution whom they rely en and intend to produce at the trial or only a few of them or none at all, has, in my opinion, to be principally determined by the entire scheme of Section 207A and the general objective behind a committal procedure consistently with the discretion to which I have referred above.

This objective as explained by me in Birda's case AIR 1957 Rajasthan 318 is two-fold. On the one hand, the object is that the accused must have an adequate notice of the case for which he is going to be prosecuted and of the main evidence by which the prosecutor would seek to prove his case so that the accused may be fully enabled to prepare his defense and meet the case for the prosecution. The other object, which is not far less important, is that a Court of Session (or, for that matter, a High Court

where the case may have to be committed to it) may not be unnecessarily burdened with the task of conducting trials into serious offences where there may be really no chance of conviction of the accused for such offences, and in such cases it is the duly of the Magistrate to discharge the accused after recording his reasons. Furthermore, there are cases in which the Magistrate may come to the conclusion that the accused need not be committed and should be tried before himself or some other Magistrate for a lesser offence, in which event he is required to take necessary action accordingly. It was further pointed out that although it was correct that the Legislature desired up simplify and speed up the procedure for commitment, in cases instituted on police report, and to that end introduced amendments by the Criminal Procedure Amendment Act of 1955, yet, so long as the procedure of commitment has been preserved by our Code for trial into certain classes of offences the main objective behind a commitment proceeding should not be lost sight of, and that objective, so far as the accused is concerned, unquestionably is that he must have a fair and adequate notice of the case for which he is going to be prosecuted and of all material and important evidence collected by the prosecutor and by which he would seek to prove the case against him, and that he should be afforded the opportunity of testing it at the stage of commitment.

33. Adverting to the amended procedure provided under Section 173 of the Code, it was further pointed out that although this would certainly enable the accused to have an idea of the material which has been collected against him, this by itself would not be sufficient notice to the accused of the case for which he was going to be prosecuted for obvious reasons. That is why even in cases instituted on a police report, Sub-Section (4) provides for the recording of evidence, and indeed it is indisputable that the Magistrate must record the evidence of all the eye-witnesses which the prosecution may produce before him, and it is further provided that where he considers it necessary in the interests of justice, he should record other evidence also in his own discretion.

34. Turning nest to Sub-Section (6) it was pointed out that it provides that when the evidence referred to in Sub-Section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, and after giving the prosecution and the accused an opportunity of being heard, the Magistrate may cither discharge the accused if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial or, broadly speaking, where he comes to a conclusion that there is a case on which the accused should he tried, he must frame a

charge and commit the accused for trial under Sub-Section (7). Now I adhere to the view which was expressed in Birda's case AIR 1957 Rajasthan 318 that it would be extremely difficult if not impossible for a Magistrate to perform the duties laid down by Sub-Sections (6) and (7) unless he records some evidence in the case himself. It can only be in this manner that the accused can have a proper opportunity of knowing the case against him and afro congest it for which provision has been made within the section itself.

35. It was on these considerations that the Bench of which I was a member held, in Birda's case AIR 1957 Rajasthan 318, that where a case depends not upon the direct testimony of certain persons who may have witnessed the actual commission of the crime, but it rests on circumstantial evidence, the only proper manner in which the Magistrate could and should exercise his discretion to record the other evidence or not would be to hold that it was necessary in the interests of justice to take the evidence of the other witnesses connecting the accused with the crime, and, that being so he must record such evidence also.
I have no hesitation in saving that if the discretion which has been vested in the Magistrate in such oases is not exercised in the manner pointed out above, it would be almost impossible for the Magistrate properly to consider the discharge of the accused in a given case. By no other manner would be enabled to formulate a proper opinion on the question whether the accused deserves to be committed or discharged.

36. Bearing in mind the aforementioned overall objects of a committal proceeding and a close examination of the provisions of Section 207A and the connected sections, and the general principles applicable to criminal trials in offences of a serious character, it seems to me that the view which the bench expressed in Birda's case AIR 1957 Rajasthan 318 on the question raised before us now is correct.

37. I proceed to critically examine some of these provisions now. Section 170 provides that if after an investigation into an alleged crime, the police come to the conclusion that there is sufficient evidence or reasonable ground to justify the trial of the accused, the officer in charge of the police station concerned shall forward the accused to a Magistrate competent to try the case himself or to commit him for trial as the case may be. Sub-Section (2) of this section further lays down that the police officer shall require the complainant, if any, and so many of the persons who appear to him to be acquainted with the circumstances of the case as he may think necessary to execute a

bond to appear before the Magistrate and prosecute or give evidence against the accused. Section 171 then provides that no witness or complainant shall be required to accompany a police officer on his way to the court of the Magistrate. In other words, the police cannot insist on the physical presence of the witnesses with themselves to the court of the Magistrate. Then we come to Section 173. This section, in so far as it is material for our present purposes, provides that as soon as an investigation is completed (and it is laid down that if should he completed without unnecessary delay), he shall forward a report to the Magistrate concerned in the prescribed form setting forth among other things "the names of the persons who appear to be acquainted with the circumstances of the case." Under Sub-Section (4) the officer in charge of the Police Station is required before the inquiry or the trial commences to furnish a copy of the challan - and the first information report and all other documents on which the prosecution relies including the statements (and confessions if any) of all the persons whom the prosecution proposes to examine as its witnesses, to the accused free of cast.

38. This brings us to Section 207A. It may be pointed out that the old Code prescribed a single procedure for committal of cases instituted on police report or otherwise. The amendment Act of 1955, however, has retained the old procedure for cases committed otherwise than on a police report but has introduced a somewhat shorter and speedier procedure for commitment; of cases instituted on a police report. In order to obviate delays, the Magistrate is required by Sub-Section (1) of Section 207A. ordinarily, to fix a date not later than 14 days from the receipt of the report under Section 173 for the purpose of holding an enquiry. By Sub-Section (2), facility is provided to the officer conducing the prosecution to apply to the Magistrate before the commencement of the enquiry to issue process to compel the attendance of any of the prosecution witnesses. Sub-Section (3) requires that the Magistrate must assure himself at the time of the commencement of the inquiry that the necessary pagers under Section 173 (4) have been supplied to the accused, and, if not, be must cause them to be so supplied before the enquiry commences.

39. Then comes Sub-Section (4) which is in the following terms :-

> "The Magistrate shall then proceed to tike the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is; of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other

witnesses for the prosecution he may take such evidence also." This Sub-Section may be divided into two parts. The first part appears to deal with eye-witnesses and the second part with witnesses other than eyewitnesses. Again, a duty seems to have been laid on the Magistrate by the first part thereof but a discretion seems to have been vested so far as the second part is concerned. (Birda's case AIR 1957 Rajasthan 318 referred to above arose under the second part of the Sub-Section and not under the first part as there were no eye-witnesses in that case and a commitment had been made therein without examining any witnesses whatever).

40. Now the question is this what precisely is the duty which has been enjoined under the first part. Quire obviously the duty has been enacted from the angle of the Magistrate and not from that of the prosecution. But the two aspects are inter-related and cannot be divorced from each other. There can be no gainsaying the position that the Magistrate must examine in such witnesses whom the prosecution seek to examine as eye-witnesses, and if he declines to examine any of, them, he would be committing an illegality.

The further question that arises is whether the prosecution have an unfettered discretion to examine only some of the eye-witnesses or none at all at the stage of commitment out of those whom they intend to produce at the trial and whose names are contained in the challan or they must produce all of them. The narrow point which arises for consideration in this connection is what is the proper meaning which should be attributed to the expression "produced" in the context in which it occurs. I think that this word can be properly interpreted only if we bear in mind the provisions of Sections 170 and 173 which impose a certain duty on the prosecution. Section 170 clearly lays down that when the police officer forwards an accused to the competent Magistrate for enquiry or trial, he must make up his mind as to which of the witnesses he would produce in support of the prosecution and he is required to bind them over to give evidence at the enquiry or the trial as the case may be. Under Section 173 he is bound to mention in his police report the names of all such persons. These may obviously be eye-witnesses as well as others. Having regard to these provisions, my view is that the phrase "such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged" properly means and covers such eye-witnesses whose names have been disclosed in the police report under Section 173 and who are obviously intended to be produced at the trial, I hold accordingly.

41. I may point out that this view, in no way, militates against the ultimate discretion of the prosecution to produce not all but such witnesses as seem to them to be genuine and truthful in support of their case and to Formulate their list of witnesses accordingly. But it seems to me to be equally important that it should not generally speaking, be open to them once they have fixed their list of witnesses, to examine only a few of them before the committing Magistrate and ask for a committal. I should also like to point cut in this connection that after all is said and done the object of the prosecution is not to work for a conviction at any cost but to see that justice is done and that it is essential for this purpose that the accused should have a fair trial. It cannot be over-emphasized that if the intention of the Legislature in enacting this provision were to leave an unlimited discretion to the prosecution in this regard it is hardly any use imposing any duty on the Magistrate to examine eye-witnesses, because such a duty could always be set at naught by the prosecution declining to examine any eye-witnesses before the committing Magistrate. And if such a contingency were to be permitted, I have no doubt that the utility of a committal proceeding would be entirely defeated.

42. Summing up my conclusion therefore is that if a commitment proceeding which has been retained by our Legislature is to have any real value and is not to be a meaningless formality, then the requirement of the first part of Sub-Section (4) of Section 207-A is that where there are eyewitnesses to a crime and whom the prosecution is not prepared to discard for any valid reasons as false or unreliable, then such witnesses should be produced by the prosecution before the committing Magistrate, and if they are not so produced, the committing Magistrate must examine them in pursuance of the duty which has been cast upon him under this Sub-Section.

43. It may be remembered in this connection that under the old procedure, which has still been retained for cases instituted otherwise than on a police report, the prosecution, generally sneaking is required to examine all the evidence on which it relies before the committing Magistrate. See Section 208 Criminal Procedure Code The expression "all such evidence as may be produced in support of the prosecution" also occurs in this section.
It seems to me to have been generally recognized that under this procedure the entire evidence on which the prosecution places its reliance is required to be examined, that is of eye-witnesses and others as well. But, in the interests of speedy justice, the old

requirement as to the examination of witnesses other than eye-witnesses in cases instituted on police report has been done away with and that, to my mind is the true effect of Section 207-A. According to the ruling of this Court in Birda's case, AIR 1957 Rajasthan 318, the examination of such other evidence is now a matter of discretion with the Magistrate where there are no eyewitnesses, but this discretion has to be exercised judicially, and the only proper manner in which it can be so exercised is to examine the circumstantial evidence which goes to connect the accused with the alleged crime.

44. It may be permissible in this connection to refer to the legislative history of the amended Section 207-A, though I am fully conscious that, ordinarily speaking it is the duty of the Courts to interpret a particular provision of law on its own language, putting the natural meaning on the words used without being guided by any such extraneous aid. But it seems to me that where the language of a particular provision of law is not clear and is somewhat obscure and the question is as to what was the intention of the Legislature in enacting it, it may not be improper to refer to historical material leading to such legislation. As to the enactment of Section 207-A as now amended, the Joint Committee of the two Houses of our Parliament in their report made the following observations in this connection :

> "The Committee have redrafted Section 207-A. As the original Clause 20 has been omitted, there is no "longer any obligation on a police officer to get the statements of all the material witnesses recorded under Section 164." *It has, therefore, been provided that persons who have witnessed the actual commission of the alleged offence should be produced before the Magistrate and he should record their statements.
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> * Note : By this clause, Sub-Section (5) was proposed to be added to Section 161 imposing an obligation on a police officer to get the statements of all the material witnesses recorded under Section 164, and this procedure was to be followed in all cases triable by a Court of Session and as far as practicable in other cognizable cases also. The Joint Committee deleted be proposed Sub-Section (5) of Section 161 as it was of the view that apart from other considerations there were administrative difficulties in the examination of witnesses from time to time before a Magistrate as the investigation proceeds.

Than Magistrate has also been given the discretion to record the statement of any one

or more of the other witnesses, if he considers it necessary to do so. The Magistrate shall take into consideration the statements recorded by the police under Sub-Section (3) of Section 161 and all other documents referred to in Section 173 along with the statements recorded by him. It he finds that these statements and documents disclose no grounds for committing the accused person for trial he may discharge the accused. Otherwise the accused should be committed for trial, and the Magistrate shall frame a charge which should be read and explained to the accused. In order to avoid delay in the disposal of these cases, it has been provided that the Magistrate should, on receipt of a report forwarded under Section 173, fix a date for the recording of the statements of witnesses which shall be not later than fourteen days from the date of the receipt of the report. It has also been provided that the absence of a witness or of any one or more of the accused should not be a ground for adjournment. This procedure will not prejudice the case of the accused because the witnesses whose statements are not recorded at this stage will be examined at the trial before a Court of Session." The above cited extract from the Report of the Joint Committee of the two Houses of Parliament strengthens mo in the conclusion to which I have come above that the true intention of the Legislature in enacting this section was to require that the prosecution should produce and the Magistrate should examine all eye-witnesses to the actual commission of the crime on whom the prosecution place reliance and whom they intend to produce at the trial. As pointed out in Birda's case, AIR 1957 Rajasthan 318, there may be exceptional cases, e.g. where a witness may not be available in the course of preliminary inquiry on account of serious illness or his having left his usual place of residence and his whereabouts may not be known or for like causes and in such cases the prosecution would be within their bounds in omitting to produce such witnesses before the committing court and may produce them later in the Court of Session and invoke the assistance of Section 540 of the Code.

45. At this stage, I wish particularly to refer to the decision of a Division Bench of the Allahabad High Court in AIR 1958 Allahabad 861. Takru, J. who delivered the main judgment in the case held1 that the initiative under the first part of Section 207-A lies entirely with the prosecution and that if the prosecution do not examine any eye-witnesses or examine only some of them, the Magistrate cannot compel the examination of the remaining eye-witnesses under the first part of the Sub-Section'. (The underlining here into ' ' is mine).
As to the second part of the Sub-Section, the learned Judge observed that it was of wider amplitude and that it embraced witnesses direct or otherwise on whose

testimony the prosecution proposed to base their case, and that under this Sub-Section the Legislature has vested the Magistrate with the discretion to examine any one or more of them suo motu or at the instance of the accused if he considers their examination necessary in the interests of justice. Further, the learned Judge observed that the object of the amendments in file Criminal Procedure Code in 1955 was to simplify and speed up the trial of criminal cases, and that this object could not be achieved to any appreciable extent if the Magistrate was required to record the evidence of all the eye-witnesses and that was why Section 173 Criminal Procedure Code was framed in the manner in which it was. In this view of the matter, the learned Judge came to the conclusion that under Section 207-A the Magistrate, was only bound to record the evidence of such witnesses to the actual commission of the offence alleged as the prosecution might choose to examine, and that a committal order based upon an examination of only some of such witnesses, provided they were the only witnesses tendered by the prosecution for that purpose, would not suffer from any infirmity or illegality, nor would the prosecution be precluded from adducing in the Sessions Court witnesses other than those examined before the Committing Court. The other learned Judge. James, J. who concurred in the decision of Takru, J. observed that the discretion of producing eyewitnesses rests entirely with the prosecution, and that if in a particular case they do not choose to produce a single such witness, they cannot the compelled to do so.

46. With utmost respect, it is impossible to accept this view as sound in law, and James, J. himself seems to have realized the far-reaching implications of his view inasmuch as he hastened to add that "it would be desirable for at least some of the eye-witnesses to be produced for examination." The question would, however, still remain what is the true intent and effect of Section 207-A read as a whole? If it is entirely at the discretion of the prosecution whether to produce any eye-witness of the offence alleged or not, and still a commitment made on merely perusing the documents under Section 173 Criminal Procedure Code must be held to be good in law, then if is hardly any use saying that it would be desirable for some of the witnesses to be produced for examination.

The learned Judges in the above case Seem to have been greatly influenced in the decision to which they camp by the consideration that the object of the Legislature in introducing Section 207-A in file Code was to expedite and simplify the commitment procedure. It is true that that was the object of the legislature in enacting the new Section 207-A. I venture to submit however, that it does not seem to me to be correct to hold that the Legislature intended to sacrifice the real object of a commitment

proceeding at the altar of mere speed and therefore the last-mentioned consideration should not be allowed to 'outweigh all other considerations which are equally important, if not more; and the Joint Select Committee of both Houses of the Parliament who were mainly responsible for putting in this provision and who should naturally have been fully aware of the legislative intention ,to shorten and simplify the procedure need in that case have hardly said that it has been provided that "persons who have witnessed the actual commission of the alleged offence should be produced before the Magistrate and he should record their statements."

47. Putting the whole matter in a nut-shell, I should like to sum up the position like this. Firstly, Sub-Section (4) of Section 207-A should be read in its proper context and not taken in Isolation as some Courts, with great respect, seem to me to have done. Secondly, the entire scheme and structure of See. 207-A should be carefully borne in mind. Thirdly, the two-fold object of a commitment proceeding should not he lost sight of, which is (a) that the accused should have a fair notice of tire case against him and of the material evidence by which the prosecutor would seek to prove his case so that the accused is fully enabled to prepare his defense and meet or test the case for the prosecution, and (b) that the Court of Session may not be unnecessarily burdened with the task of conducting trials into serious offences where such a course is not called for. Fourthly, a statutory obligation has been laid by the first part of Section 207-A, namely, that it is the duty of tire Magistrate to examine all eye-witnesses whom the prosecution has selected to produce at the trial and whose names have therefore been mentioned in the police report under Section 173 Criminal Procedure Code and therefore it should be equally the duty of the prosecution to produce such witnesses for examination before him, otherwise the duty imposed on the Magistrate would be benefit of all meaning. This rule is of course subject to the exception that it would be open to the prosecution not to produce witnesses at the committing stage who may not be available during the enquiry for reasons of sickness or want of knowledge of their whereabouts or for like causes in which case it would be legitimate for the prosecution to produce such witnesses at the trial under Section 540 Criminal Procedure Code Further, the Magistrate has been invested with a discretion to record other evidence also, that is, of witnesses other than eye-witnesses where he considers the recording of such evidence necessary in the interests of justice. Lastly this view of Sub-Section (4) of Section 207A does not in any way militate against the intention of the Legislature in speeding up commitment proceedings. Any other view, in my humble judgment, would only lead to uncertainty and confusion in trials of this type of

cases which, I have no doubt, should not be permitted.

48. In this view of the whole matter, I agree, though for somewhat different reasons, with the conclusion to which my learned brother Bhandari, J. has come, namely, that the true requirement of See. 207A is that the prosecution should, as a general rule, produce all the eye-witnesses of the offence alleged before the Committing Magistrate whom they intend to produce at the trial and that the Magistrate should examine all such witnesses.

49. It follows that the order of commitment made in the case before us without examining all the eye-witnesses must be held to be bad in law, and, therefore, I agree that the order of commitment be set aside, and the case sent back to the Magistrate concerned with a direction that he must examine all the eye-witnesses to the actual commission of the offence who have been named in the police report under Section 173 and whom the prosecution wish to examine at the trial and then proceed according to law.
Case sent back.

Cases Referred.

1. AIR 1957 Trav Coc 29
2. AIR 1957 Madh. B. 7
3. AIR 1957 Mys 5
4. AIR 1957 Mys 61
5. AIR 1958 All 861
6. AIR 1958 Col 324
7. AIR 1958 Cal 311
8. 1958 Andh Pra 651
9. AIR 1958 Oris 241
10. AIR 1957 Raj 318
11. AIR 1957 Ker 32
12. AIR 1933 PC 289
13. AIR 1945 PC 42
14. AIR 1946 PC 16
15. AIR 1954 SC 31