

WORKSHOP PAPER

For the Workshop of Judicial Officers of Ahmednagar District
3rd Workshop Dated 22/03/2015

WORK SHOP SUBJECT [GROUP-B]**(A) GROUP "CRIMINAL" -- Applicability of Provisions under Section 202 and Section 156(3) of Criminal Procedure Code 1973.**

1 **SCOPE OF SECTION 156(3) OF CR.P.C :-** Ch.XII of Cr.P.C. deals with information to police and their powers to investigate. As per provisions of Section 154 of Cr.P.Code, every information relating to the commission of cognizable offence, if given orally, to an officer in-charge of Police station, shall be reduced in writing by him or under his direction. If officer incharge of police station refuses to record the information, referred in sub-section (1), the aggrieved person may send the substance of such information in writing to the Superintendent of Police concerned, who will investigate the case himself or direct an investigation to police officer subordinate to him.

2 Honourable Supreme Court in a case of **Lalita Kumari Vs. State of U.P and others, reported in 2014(2) S.C.C 1** has held that, 'the registration of First Information Report is mandatory in cognizable offences and action will be taken against the Police officer for his failure to register F.I.R. on compliant of cognizable offence.

3 As per provisions of Section 156 of Cr.P.Code, police officer can start investigation of any cognizable case, without order of Magistrate.

4 Sub-section (3) of Section 156 of Cr.P.Code enables to the Magistrate to order investigation of an offence of which, he could take cognizance U/s.190 of the Code. This order could be passed **at pre-cognizance stage only and not after taking the cognizance.**

5 When a petition or complaint is presented before Magistrate in which request is made for taking action as mentioned in Section 2 (d) of the Code, the Magistrate has to ascertain as to whether the contentions made in petition/complaint constitute any offence. If they constitute some offence, then the Magistrate is expected to take decision as to whether the matter needs to be referred to the Police for investigation as provided U/s.156(3) of the Code or he needs to proceed further as provided in Section 200 and subsequent section of Chapter XI of the Code. There is discretion to the Magistrate in this regard. Though police officer is duty bound to register the case on receiving information of cognizable offence, the Magistrate is not bound to refer the matter to Police under section 156 (3) of the Code (**State of Maharashtra Vs. Shashikant Shinde, 2013 ALL MR (Cri) 3060**)

6 The Magistrate can also monitor the investigation to ensure proper investigation. When there is no sufficient material on record to take cognizance of the offence, the Magistrate may refer the matter to the police U/s.156(3) of Code of Criminal Procedure, for the purpose of investigation. When once the Magistrate after scrutinizing the complaint, the sworn statements and other material available on record, comes to conclusion that he can take cognizance of the offence. There is no need to have resort to Section 156 (3) of Cr. P.Code. There are three possibilities (1) The Magistrate can issue process against accused if sufficient material is available, (2) the Magistrate may come to conclusion that there are no sufficient grounds for proceeding and dismiss the complaint, and (3) the Magistrate can take recourse to provision of Section 202 of Cr.P.Code and direct investigation/inquiry into the matter.

Difference between investigation under Sec.156 (3) and Inquiry by Magistrate or investigation by police in terms of Section 202 (1) of Cr.P.C.

Section 156(3)

Section 202.

1. Power to direct the police investigation is at pre-cognizance stage.

1. Whereas power to direct inquiry or investigation is at a post cognizance stage.

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| <p>2. Police officer in charge of the police station is directed to investigate the cognizable offence in private complaints.</p> | <p>2. Inquiry U/s.202 of Cr.P.C is carried out mainly for helping the Magt to decide "Whether or not there is sufficient ground for him to proceed further in the private complaint"</p> |
| <p>3. Cognizance of the offence is not take, only direction is issued to the officer of the police station. The complainant need not be examined as magistrate is not taken cognizance of the offence.</p> | <p>3. Complainant is examined on on oath i.e. verification. Hence cognizance of the offence taken.</p> |

7 The prime difference between the investigation under section 156(3) of the Cr. P. C and inquiry by magistrate or investigation by police n terms of section 202 of Cr P C is that , for the investigation under section 156(3) registration of FIR in police station is must, however in inquiry or investigation under section 202 no registration of FIR is needed

8 In the case of **Devarapalli Laxminarayana Reddy & others Vs. V. Narayana Reddy and others (1976)3 SCC 252** the Hon'ble Supreme Court held that,

1. Section 156(3) occurs in Chapter XII, under the caption "Information to the Police and their powers to investigate" while Section 202 is in chapter XV which bears the heading "Of complaints to magistrate"
2. The power to order investigation under section 156(3) is different from the power to direct investigation conferred by section 202(1)
3. The two operates in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage. The second at post cognizance

stage when the magistrate is in seizin of the case.

9 An order made under section 156(3) of the Cr. P. C is in the nature of pre-emptory reminder or intimation to the police to exercise their plenary powers of investigation under section 156(1) of the Cr. P. C Such an investigation embraces the entire continuous process which begins with the collection of evidence under section 156 of Cr. P. C and ends with the report either under section 173 or section 169 of Cr. P. C.

10 On the other hand, section 202 of Cr. P. C. comes in at a stage when some evidence has been collected by the magistrate in proceedings under chapter XV, but the same is deemed insufficient to take decision as to the next step in the prescribed procedure. In such situation the magistrate is empowered under section 202 of Cr. P. C. to direct within the limits circumscribed by that section an investigation for the purpose of deciding whether or not there is sufficient ground for proceeding. Thus the object of investigation under section 202 of Cr. P. C. is not to initiate fresh case on police report, but to assist the magistrate in completing proceedings already instituted upon a complaint before him. Similar are the observations of Hon'ble Supreme Court in **Suresh Chand Vs. State of M.P 2001 SCC(Cri) 377.**

Maintainability of revision against order under Sec.156 (3) and whether accused has right of hearing in revision.

11 Order under Section 156(3) of Cr.P.C merely means that alleged cognizable offence should be investigated. Interference by superior courts with an order of Magistrate under Section 156(3) should normally be confirmed to cases in which there are some very exceptional circumstances. This is observed in a case reported case of in **(Shivaji Vithalrao Bhikane Vs.Chandrasen J.Deshmukh 2008 Cri.L.J. 376)**

12 In reported of **Narayandas Hralalji Sarda Vs. State of Maharashtra 2009 (2) Mh.L.J.426** : It is held that, order passed by

Magistrate for directing police to submit report U/s.156(3) of Cr.P.Code is revisable and writ petition is not tenable.

13 In the case of Manharbhai Kakade and another Vs. Shailesh Bhai Patel and another 2013 Cri.L.J.144 Revision was filed against the order of magistrate dismissing case U/s.203 of Cr.P.Code It was held by three Judges of Hon.Apex Court that, the accused or the person suspected to have committed crime, has right to be heard, whether the order under challenge is at pre-process stage or at post process stage is unsequential.

Procedure to be applied when the offence complained of is triable exclusively by the Court of Sessions. Proviso (a) of Sec.202 of Cr.P.Code.

14 As per proviso of Section 202 (a), where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

15 This provision is mandatory and process can not be issued without such an examination. Sub-section (2) serves the purpose of preliminary inquiry as regards private complaints triable exclusively by Court of Sessions. The object of inquiry is to ascertain the truth or falsehood of the complaint.

16 In the case of Tukaram Janu Bhoge and another Vs. State of Maharashtra and another 1982(1) Bom C.R 758 Private complaint U/s.302 of I.P.Code was filed before Magistrate. The Magistrate fixed the date for recording evidence and also called report from the Police. The police filed report contending that the deceased had committed suicide. On the date fixed for recording evidence, learned Magistrate passed order and sent process observing that, prima facie case was made out for committing accused to Sessions Court, on the basis of contents of complaint. Legality of the said

order was challenged. It was observed that, order of Magistrate was erroneous as there was no compliance of provision of Section 202(2) of Cr.P.Code.

17 The Magistrate can not compel the complainant to examine any witness This was observed in (**Mehtab Khan S/o.Madar Khan and others Vs.Sarfaraz Khan Hussain Khan and others 2001 Bom C.R. (Cri) 397 (Nagpur Bench)**)

Post-Cognizance courses available to Magistrate in private complaint.

18 **Scope of Section 190** :- Magistrate can take cognizance of the offence U/s.190 of Cr.P.Code ,

- (1) Upon complaint,
- (2) Upon Police report, or
- (3) Upon his own knowledge.

"Taking cognizance" is judicial application of mind of a Magistrate to the facts mentioned in the complaint with a view to take further action. Thus, Magistrate is said to have taken cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decide to examine or test the validity of the said allegations, (**Tukaram Vs.Kishor Sing AIR 1977, S.C.2401**)

19 Section 200 to 203 of Cr.P.Code deal with the procedure to be followed by Magistrate in case of complaint.

Section 200 of Cr.P.Code is postcognizance stage.

20 In the case of a complaint when the Magistrate decides to examine the complainant on oath, he can be said to have taken cognizance of

the offence. Complaints which are mentioned under Clause (a) and (b) of Proviso to Section 200 of Cr.P.Code, examination of complainant is not necessary.

21 As regards to Police report, the visible expression of taking cognizance is the issuance of process U/s.204 of Cr.P.Code. Section 204 of Cr.P.Code is also post-cognizance stage. If there is sufficient ground for proceeding Magistrate can issue summons to accused in summons case and he may issue a summons or a warrant to the accused in a warrant case.

Cognizance of the offence and not of offender :

22 Cognizance is taken of offence and not of offender. Taking cognizance is a mental as well as judicial act. It ordinarily means that, the magistrate has come to conclusion that there is a case to be inquired into. The word cognizance is used to indicate the point when Magistrate or a Judge first takes judicial notice of the offence.

Object behind postponement of issue of process (Sec.202)

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

24 In the case of **Chandra Dev Singh Vs. Prakash Chandra Bose , AIR 1991, SC 1430**, Hon. Apex Court has ruled that , accused has no locus standi before issue of process. He is not entitled to be heard before pre

cognizance stage or before issue of process. When matter is at the stage whether or not process should be issued, accused has no right of being heard. Investigation U/s.202 (1) is only for helping to Magistrate to decide whether or not, there is sufficient ground to proceed further.

25 The object of an investigation U/s.202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceeding already instituted upon a complaint before him. Investigation U/s.202 helps the Magistrate for forming opinion as to whether process should be issued or not.

26 Purpose of inquiry U/s.202 is to ascertain whether there is evidence in support of the complaint, so as to justify the issuance of process and commencement of the proceeding against person concerned.

27 In the case reported of **Agarwal International Mumbai Vs. State of Maharashtra and others 2010 (3) Mh.L.J.(Cri) 685** It is observed that, once Magistrate has passed order U/s.202 of Cr.P.Code and directed the police to hold investigation and submit report, Magistrate has no choice but to wait for the report and to consider that report before any further order is passed U/s.203 or 204 of Cr.P.Code.

28 By the amended Criminal Procedure Code (Amendment Act, 2005) the following words were added in Sub Section (1) of Section 202 of Code of Criminal Procedure.

"and shall, in a case where the accused is residing at the place beyond the area in which he exercise his jurisdiction"

29 In that case Magistrate is duty bound to postpone the issue process. That amended portion of Section 202 of Code of Criminal Procedure, came into effect from 23/6/2006 by Notification No.SO-923 (E) dated 21/6/2006.

30 Following is the object behind 2005 Amendment in Criminal Procedure Code :

31 False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons. It is obligatory on Magistrate that before summoning accused, he shall carry out inquiry or direct inquiry through Police.

Scope of Enquiry U/s.202 of Cr.P.C.

32 The scope of inquiry U/s. 202 of Cr.P.Code is limited to find out whether or not there is sufficient ground for proceeding in order to determine whether process should be issued or not.

33 In the case reported of **Mohinder Singh Vs.Gulwant Singh and others 1992 Cr.L.J.3161 (SC) AIR 1992 1894** it is observed that, in that matter learned Magistrate exceeded the scope of inquiry U/s.202 of Cr.P.Code and has gone into the question of sufficiency of evidence for commission of the offence of bigamy.

34 This section contains yet another check to prevent false and vexatious complaints being filed. Therefore, by way of Amendment of 2005. it is made mandatory to make inquiry when the accused is residing at the place beyond the area in which the Magistrate exercises his jurisdiction. The scope of inquiry, in short, under this section is that, Magistrate should be careful before issuing process against accused. Summoning an accused is not an automatic formality. Issuing process is a serious matter and it has to be done with due application of judicial mind. Any mistake is likely to cause irreparable damage to reputation, status, well-being, comfort and money of person concerned.

Essentials of issuance of process.

1) Examination of complainant and his witnesses :

35 Before passing order of issuance of process, Magistrate has to consider various provisions of the Code. As per Section 201, Magistrate has to examine upon oath the complainant and the witnesses present if any. He has to reduce into writing the substance of such examination. But if complaint is filed by public servant, acting in the discharge of his official duty, it is not necessary to examine complainant and witnesses. But the complaint must be in writing.

2) Return of complaint -Section 201 :-

36 If complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall (a) if the complaint is in writing, return it for presentation to proper court with an endorsement to that effect., (b) if the complaint is not in writing, direct the complainant to the proper court.

3_ Postponement of issue of process :

37 Section 202 Provides for postponement of issue of process. Magistrate can inquire into the case himself or he can direct investigation to be made by Police. If offence is exclusively triable by Court of Sessions the Magistrate must call upon complainant to procedure all witnesses and examine them on oath.

4) Sufficient grounds for proceeding :

38 For issuance of process the Magistrate has to form an opinion that, there are sufficient grounds for proceeding against the accused. For forming this opinion the Magistrate has to consider the statements on oath of complainant and witnesses and the result of inquiry or investigation if any U/s.202 if the Magistrate is of opinion that there is no sufficient ground for proceeding, he has to dismiss the complaint. But he has to briefly record his reasons for so doing. As per Section 204 if in the opinion of the Magistrate there is sufficient ground for proceeding, then he is empowered to issue

process against the accused. But no summons or warrant shall be issued against the accused until the list of prosecution witnesses has been filed.

Purport and essentials for directing investigation U/s.156 (3) of Cr.P.C.

39 In India, the administration of criminal justice is controlled under the provisions of Cr.P.Code 1973. Two procedures for redressing the grievances of the victim against the offender are accepted in our system.

1) Direct access and invocation of court system i.e remedy U/s.200 of Cr.P.Code

2) Adopting a channel through state agency i.e police/investigating agency i.e. remedy U/s.154 of Cr.P.Code.

40 To ascertain purport and essentials for invoking power under section 156(3) of Cr.P.Code a reference can be given to case ("**Sakiri Vasu Vs.State of U.P.and Ors (AIR 2008 SC 907)**")

41 In a case of **M/s.Skipper Beverages Pvt Ltd., Vs.State reported in MANU/DE/0415/2001** It is observed that the discretion for giving direction for investigation U/s.156(3) ought to be exercised after proper application of mind and only in those cases where the Magistrate is of the view that, the nature of the allegation is such that, the complainant himself may not be in position to collect and produce evidence before the Court.

42 In connection with this topic following material points need to be considered :

1) A Judicial Magistrate has to exercise discretionary power U/s.156(3) of Cr.P.Code judiciously on proper grounds and not in a mechanical manner.

2) Section 156(3) of Cr.P.Code empowers the Magistrate to refer and direct the police to investigate the cognizable offence.

3) When the allegation made in complaint does not disclose cognizable offence, the Magistrate has no jurisdiction to order police investigation under the provisions of Sec.156(3) of Cr.P.Code.

4) The Magistrate is expected to apply judicial mind for determining as to whether in the facts and circumstances of the case investigation by police machinery is actually required or not.

5) When allegations are not very serious and complainant himself is in possession of evidence to prove allegations there is no necessity to pass order u/s.156 (3) of Cr.P.Code.

6) Magistrate has to assign brief reasons for the order

7) A certified copy of complaint is required to be sent to police along with communication of the order passed by the Magistrate.

8) For the purpose of enabling the Police to start investigation, it is open to Magistrate to direct the Police to register FIR. There is nothing illegal in doing so.

Procedure on submission of report under Section 156 (3) of Cr.P.C.

43 If the Magistrate sends the complaint to the Police for investigation U/s.156(3) of Cr.P.Code, the private complaint loses its original character and becomes a final report U/s.173, when the police submit the charge sheet. The Magistrate after taking cognizance of the case upon such police report has to proceed U/s.240 and not U/s.244 and 245.

44 At this stage Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and material before him. In doing so Magistrate is not bound by the opinion of investigation officer and he is competent to exercise discretion irrespective of the views expressed by Police in its report and may prima facie point out whether an offence had been made out or not.

45. On receipt of matter U/s.156 (3) only two courses are available to the police either to file report or (charge sheet U/s.173(2) of Cr.P.Code) or report U/s.169 of Cr.P.Code. On submission of report U/s.156 (3) of Cr.P.Code court may either accept it or redirect further investigation. Magistrate is not bound by the opinion of police.

46. On submission of report U/s.169 of Cr.P.Code magistrate is required to call say of complainant as a rule of prudence. Complainant may file protest petition against report U/s.169 of Cr.P.Code. The protest petition is to be treated as complaint by Magistrate and Magistrate may further proceed as per Section 200 of Cr.P.Code without accepting report submitted U/s.169.

CONCLUSION :-

47. As discussed above, Magistrate has discretion to pass appropriate orders for issuing process. It needs to be noted that, issuing process is a serious matter, therefore, discretion is required to be used by application of judicial mind. Any mistake is likely to cause irreparable damage to reputation, status, well being, comfort and money of concerned person.

List of authorities discussed in Workshop dt. 22.03.2015 :

- 1) Raj Singh Vs. State of U.P. reported in 2014 ALL MR (CRI) JOURNAL 386.
- 2) Rajesh Chandmal Verma Vs.State of Maharashtra reported in 2014 ALL MR (Cri.) 4459-
- 3) Panchbhai Vs.State of Mahartashtra reported in 2010 ALL MR (Cri) ` 244.
- 4) Rakesh and others Vs. State of U.P.Reported in AIR 2014, Supreme Court 3509 :
- 5) Mr. Nilersh Daulatrao Lakhani Vs.State of Maharashtra Criminal Writ Petition No.855 of 2013 dated 25/9/2014.
- 6) AIR 2000 SUPREME COURT 1456--U.P.Pollution Control Board Vs.M/s.Mohan Mekins Ltd. and others. In this case it is observed that :
- 7) Chandrakant s/o. Tahaji Pawar and others Vs.State of Maharashtra 2014 (1) B.Cr.C.199.---Criminal Procedure Code, 1973, Section 202
