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December 16

RAMNARAYAN MOR AND ANOTHER

v.

STATE OF MAHARASHTRA

(B.P. SINHA, C.J., K. SUBBA RAO, M. HIDAYATULLAH, J.C. SHAH AND N. RAJAGOPALA AYYANGAR JJ.)

Code of Criminal Procedure (Act V of 1898), ss. 173(4) and 207A(6)—"Evidence", meaning of—If includes documents under s. 173(4).

On the receipt of a police report, the Magistrate First Class Akola took cognizance of offences under ss. 406, 408, 409, 120B and 477A Indian Penal Code against the appellants. The Investigating Officer furnished the accused persons with copies of documents which are required by s. 173(4) of the Code of Criminal Procedure to be furnished. At the commencement of the enquiry under Ch. XVIII of the Code of Criminal Procedure, the Public Prosecutor informed the Court that the evidence in the case being "mainly documentary" the prosecution did not desire to examine any witnesses at the stage of the committal proceeding. After the arguments on behalf of the State and the accused were heard, an application was submitted by the Prosecutor that the accused be examined by the Magistrate under s. 207-A(6) of the Code of Criminal Procedure.

The application was granted by the Magistrate after rejecting the objections raised by some of the accused and the accused were ordered to remain present in court for examination under s. 207-A sub-ss. (6) and (7). Against that order the appellants moved the High Court in revision but without success.

It was urged on behalf of the appellant that in an enquiry for commitment to the Court of Session the accused person can be asked to explain circumstances appearing against him only from the oral evidence recorded under s. 207-A(4), and not from circumstances appearing from the documents furnished under s. 173(4) of the Code.

Held (per B.P. Sinha, C.J. K. Subba Rao and J.C. Shah, JJ.) (1) that the legislature has used the expression "evidence" at three places in cl. (6) of s. 207A of the Code of Criminal Procedure. In the first clause of sub-s. (6) the evidence is, as the statute expressly enacts "the evidence referred to in sub-s. (4)" and the expression "that *such evidence* and documents disclose no grounds for committing" indicates, having regard to the context that the evidence referred to in sub-s. (4) alone is comprehended thereby. But in the context of the explanation of the accused for the purpose of enabling him to explain any circumstances appearing against him, the legislature has used the expression "in *the evidence* against him", which is not expressly qualified by reference

to sub-s. (4) nor does any implication arise from the context which would suggest that it has a limited content.

(*ii*) The legislature did not intend by using the expression "examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him" that the opportunity to be given to the accused for explaining circumstances appearing from the oral evidence. Such a construction of the clause, by putting a restricted interpretation upon the meaning of the word 'evidence' would in many cases involve great prejudice to the accused. The circumstances appearing against the accused would in a large majority of cases be from the statements recorded under s. 161(3) under s. 164 and other documentary evidence referred to in s. 173(4) and if the accused is not to be given an opportunity to explain those circumstances, to a large extent the judicial character of the proceeding would be impaired. The accused may have a complete answer to the documents on which the prosecution seeks to rely. But if by the words used in cl. (6) the Magistrate is prohibited from examining him in respect of those documents the provision might frequently operate oppressively against the accused. The scheme of s. 251A of the Code which was brought on the statute book simultaneously with s. 207-A by Act 26 of 1955, also furnishes an indication that in the examination of the accused for enabling him to explain circumstances appearing in the evidence against him, documents referred to in s. 173(4) cannot be excluded.

(*iii*) Section 207A(6) contemplates examination only for the purpose of explaining any circumstances appearing against the accused. Declining to avail himself of such an opportunity and reserving his right to make a defence at the trial do not amount to refusal to answer a question and no presumption can arise under illustration (h) to s. 114 of the Evidence Act against such refusal.

The scheme of cl. (6) of s. 207A is not the same as the scheme of s. 342 of the Code of Criminal Procedure for the reason that under the latter section the court can ask the accused any general question to explain any circumstances appearing against him.

(*iv*) Normally in a criminal trial, the court can proceed on documents which are duly proved, or by the rules of evidence made admissible without formal proof. but under the amended Code the Legislature has in s. 207-A prescribed a special procedure in proceedings for commitment of the accused. The record consists of the oral evidence recorded under sub-s. (4) of s. 173, and it would be difficult to regard only those documents which are duly proved or which are admissible without proof as "evidence" within the meaning of cl. (6) and not the rest. Section 3 of the Evidence Act also supports that proposition. The expression "evidence" as defined in s. 3 of the Evidence Act means and includes all statements which the court permits or requires to be made

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before it by witnesses and all documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence.

(*Per* Ayyangar and Hidayatullah JJ. (dissenting): The word 'evidence' in sub-s. (6) of s. 207A of the Code of Criminal Procedure is confined to the oral evidence of the prosecution witnesses. The word 'evidence' occurs three times in this sub-section. In the opening words of the sub-section where it occurs first referring, as they do, specifically to the evidence recorded under sub-s. (4) the word is obviously used only in the sense of oral evidence recorded under sub-s. (4) together with the cross-examination and re-examination permitted by sub-s. (5). This is followed by the words 'the Magistrate has considered all the documents referred to in s. 173'. Documents therefore are treated here as a distinct category of material distinct from "evidence" and the sub-section proceeds on the existence of a dichotomy between these two species of material which the Magistrate has to take into account before ordering committal. If this dichotomy and this distinction between "evidence" and documents underlie the texture of the entire sub-section, it could not be disputed that the word 'evidence' on the second occasion when it occurs in sub-s.(6) has to be read as meaning only the evidence of witnesses examined under sub-s. (4). The last place where the word 'evidence' occurs in the sub-section is the passage reading 'such Magistrate shall if he is of opinion that such evidence and documents disclose no grounds for committing the accused persons for trial'. It is clear that here the word 'documents' denotes the documents referred to earlier namely those in s. 173 and these are again distinguished from 'evidence'. Here also there cannot be any doubt that the word 'evidence' is a reference to the evidence recorded under sub-s. (4).

Sub-sections (4), (6) and (7) draw a clear and sharp distinction between 'evidence' and 'the documents' referred to in s. 173 of the Code of Criminal Procedure.

No importance should be attached to the absence of the word 'such' and the use instead of the word 'the' in the relevant clause. The definite article 'the' obviously in the context refers to the 'evidence' already referred to in the opening words of the sub-section, namely that recorded under sub-s. (4).

Ramdas Kikabhai v. *State of Bombay*, A.I.R. 1960 Bom. 124, not relied on.

Re Macmanaways, [1951] A.C. 161, referred to.

(*ii*) The Magistrate would have no jurisdiction to examine an accused under s. 342(1) of the Code (a) either when no oral evidence for prosecution has been recorded or (b) in respect of matters about which there is no evidence adduced in the sense in which the expression is used in the Indian Evidence Act for enabling the court to hold any fact in issue or a relevant fact to

be proved. The same principle applies as to the circumstances in which an accused can be examined by the Magistrate under s. 207-A(6). Where there is no evidence recorded under sub-s. (4) of s. 207-A, the Magistrate has no jurisdiction to examine an accused under s. 207-A(6). In the present case the Magistrate has no jurisdiction to direct the accused to appear before him for examination.

Bachchan Lal v. *State*, A.I.R. 1957 All. 184 and *Bahawala* v. *Crown*, I.L.R. 6 Lah. 183, relied on.

(*iii*) The accused should be examined under s. 207A(6) with reference to what appears against him in evidence legally admissible before the court, while he is not to be required to commit himself by his answers in respect of matters which would be proved against him only at the trial and as regards which he would be examined later under s. 342(1) of the Code. Interpreted otherwise the section would give a good chance for fishing expedition and of modulating the prosecution case to destroy the accused's explanation at the appropriate stage. The accused cannot be asked under sub-s. (6) with reference to documents mentioned in s. 173(4) of the Code unless those are legally proved. If without evidence, properly so called, a magistrate examines an accused, he would be converting himself into an investigating agency and there is therefore every possibility of the accused being prejudiced and that might be the very reason why the sub-section has been framed in a manner to avoid the result. The position is, of course different under s. 251A(2) where the examination is by virtue of the statute and so it stands in a class apart.

(*iv*) The Magistrate has no jurisdiction to ask question under sub-s. (6) with the reference to documents mentioned in s. 173(4) of the Code as they are not evidence under sub-s. (4) of s. 207-A of the Code. The expression 'evidence' as defined in s. 3 of the Evidence Act gives merely the dictionary meaning of the word and it has no application for interpreting the word 'evidence' in sub-s. (6). The expression 'evidence' is used throughout the criminal procedure as meaning judicial evidence *i.e.* oral evidence tested by cross-examination if any and documents which have been proved and which are relevant and admissible. The expression 'documents produced for inspection of the court' under s. 3 of the Evidence Act means merely "for inspection of the Court" and the court cannot base its findings on the contents of such documents.

(*v*) The court will be entitled under illustration (h) to s. 114 of the Evidence Act to draw adverse inference for refusal to answer question put under s. 207A(6) to the accused.

(*vi*) The rule of interpretation which is applicable was stated by Lord Radcliffe: "the meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a court of law is to find the natural meaning of the words in the context in which they

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occur, the context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

Re Macmanaway In re, [1951] A.C. 161, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 164 of 1963.

Appeal by special leave from the judgment and order dated August 30, 1963 of the Bombay High Court in (Nagpur Bench) in Criminal Application No. 197 of 1963.

A.S. Bobde, *O.C. Mathur*, *J.B. Dadachanji* and *Ravinder Narain*, for the appellants.

M.C. Setalvad, *H.R. Khanna* and *R.H. Dhebar*, for the respondent.

December 16, 1963. The Judgment of B.P. Sinha, C.J., K. Subba Rao, and J.C. Shah JJ. was delivered by Shah J. The dissenting Opinion of M. Hidayatullah and N. Rajagopala Ayyangar JJ. was delivered by Ayyangar J.

Shah J.

SHAH J.—A police report was lodged in the Court of the Magistrate First Class, Akola, against the appellants and fifty-five others on charges for offences punishable under ss. 406, 408, 409, 120-B and 477-A Indian Penal Code. The Investigating Officer furnished the accused persons with copies of documents which are required by s. 173(4) of the Code of Criminal Procedure to be furnished. At the commencement of the enquiry, the Public Prosecutor informed the Court that the evidence in the case being "mainly documentary" the prosecution did not desire to examine any witnesses at the stage of the committal proceeding. After the arguments on behalf of the State and the accused were heard, an application was submitted by the prosecutor that the accused be examined by the Magistrate under s. 207-A (6) of the Code of Criminal Procedure. The application was granted by the Magistrate after rejecting the objections raised by *some of the accused* and the accused were ordered to remain present in Court for their examination under s. 207-A sub-ss. (6) & (7). Against

that order the appellants moved the High Court of Bombay in revision, but without success. With special leave, the appellants have appealed to this Court.

The appellants say that in an enquiry for commitment to the Court of Session the accused person can be asked to explain circumstances appearing against him only from the oral evidence recorded under s. 207-A(4) and not from circumstances appearing from the documents furnished under s. 173(4) of the Code.

A brief review of the provisions relating to proceedings for commitment of the accused to the Court of Session may be useful in considering the plea of the appellants. The Court of Session has except in cases expressly provided in the Code no power to take cognisance of a case directly on a complaint or a report of a police officer or on its own motion. The case must be committed by a Magistrate competent in that behalf. Commitment under the Code predicates some enquiry into the case for the prosecution by a Magistrate who must be satisfied that there is a *prima facie* case against the accused. The enquiry is calculated to serve a dual purpose to give to the person accused of the serious offence with which he is charged information about the case together with the nature of the evidence with which it is sought to be established, and at the same time to eliminate cases in which there is no reasonable ground for conviction. For this purpose, under the Code of Criminal Procedure as originally enacted in all cases exclusively triable by the Court of Session, or where in the opinion of the Magistrate the case ought to be tried by such Court, witnesses intended to be examined before the Court of Session were examined before the Magistrate, documents on which the prosecution sought to rely were duly proved and tendered in evidence and if the Magistrate was satisfied that there was sufficient ground for committing the accused for trial, a charge was framed on which the accused was committed for trial. But this procedure was often found cumbrous and led to great delay in the trial of criminal

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cases, without affording any real compensating advantage to the accused at the trial. The Legislature with a view to secure expeditious disposal of cases tried by the Court of Session, incorporated by Act 26 of 1955 s. 207-A, which prescribed for enquiry in proceedings commenced on the report of a police officer, a simpler procedure while maintaining the original procedure for commitment of cases commenced otherwise. Simultaneously with the incorporation of s. 207-A provision was incorporated in s. 173(4) imposing a statutory obligation upon the police officer to furnish or cause to be furnished before the commencement of an enquiry or trial, copies of the police report, first information report, and of all other documents or relevant extracts thereof on which the prosecution proposed to rely, including statements and confessions recorded under s. 164, and statements recorded under s. 161 (3) of the Code. The new scheme for enquiry in proceedings for commitment commenced on police report is briefly this: on receiving a report of a police officer, the Magistrate fixes an early date for holding the enquiry , and if before the date fixed the prosecutor applies for process to compel attendance of witnesses or production of documents or things he may do so. After satisfying himself at the commencement of the enquiry that the accused has been furnished with the documents referred to in s. 173(4), the Magistrate records evidence of persons produced by the prosecution as witnesses to the actual commission of the offence, and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of other witnesses he may take such evidence, the accused having liberty to cross-examine all such witnesses examined by the prosecutor or by the Court. All the documents on which the prosecutor seeks to rely in support of the case for the prosecution, statements of all witnesses recorded in the course of investigation by the Investigating Officer, report of the police officer, the first information, and confession and statements, if any, recorded under s. 164 Criminal Procedure Code are made available to the accused. Witnesses to

the actual commission of the offence if produced by the prosecutor and witnesses called at the instance of the Magistrate are also examined in his presence. The object of these provisions is manifestly to give full information to the accused about the entire pattern of the prosecution case. The documents of which copies are supplied to the accused and the oral evidence of witnesses examined before the Magistrate from the record of the Magistrate. These documents together with the examination of the accused, the list of witnesses furnished by the accused, which form the record of the enquiry, together with the charge has to be sent to the Court of Session. If the order of commitment is erroneous on a point of law, it may be quashed by the High Court in exercise of its jurisdiction under s. 215 of the Code on a consideration of this record. The order of discharge may in appropriate cases be revised in exercise of the revisional jurisdiction by the Court of Session or the High Court on the same record.

Sub-sections (6) & (7) of s. 207-A on which the argument in this case principally turns provide:

(6) "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 given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly."

(7) "When, upon such evidence being taken, such documents being considered, such examination

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(if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged."

The scheme of the two sub-ss. (6) & (7) is plain: the Magistrate holding an enquiry may discharge an accused person if he is of opinion that the evidence referred to in sub-s. (4) and the documents referred to in s. 173 do not disclose any ground for committing the accused person for trial, and if he is of opinion, on a consideration of the oral evidence and the documents referred to in s. 173 that the accused should be committed for trial, he has to frame a charge and commit the accused for trial.

In exercising his functions under sub-s. (6) or sub-s. (7) a Magistrate indisputably performs a judicial function. He is bound 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 even if the prosecutor does not produce any witnesses the Magistrate may, if he is of opinion that it is necessary in the interests of justice to take evidence of any one or more witnesses for the prosecution, take that evidence. By the terms of the statute, an overriding duty is cast upon the Magistrate whether the prosecutor has or has not produced witnesses to the actual commission of the offence to examine witnesses whose examination is, in his view, necessary in the interests of justice and this power to examine witnesses is not restricted to the examination of witnesses to the actual commission of the offence alleged. After recording the evidence of such witnesses and considering the documents which are referred to in s. 173(4), the Magistrate may examine the accused, if he considers it necessary to do so, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. The Magistrate then gives to the prosecution and the accused an

opportunity of being heard. He thereafter forms his opinion whether the evidence and the documents disclose any ground for committing the accused for trial.

The object underlying the procedure prescribed by sub-ss. (4), (6) & (7) is to determine, after the accused has been apprised of the nature and the details of the prosecution case together with the evidence oral and documentary on which the case against the accused is sought to be proved, whether there is a *prima facie* case against the accused which should go before the Court of Session for trial. In the performance of his functions the Legislature has made it obligatory upon the Magistrate to record evidence tendered, or appearing to him necessary, to consider the documents produced and to give the prosecutor and the accused opportunity of being heard. The Magistrate is also authorised to examine the accused, if necessary, for the purpose of enabling him to explain any circumstances in the evidence against him. The power is in terms discretionary—that is made clear by the use of the expression "if necessary"—but the discretion must be exercised on sound judicial principles having regard to the purpose of the enquiry which is to judicially ascertain whether there is a *prima facie* case made out against the accused for commitment.

In the context of this scheme it would be difficult to believe that the Legislature by enacting sub-s. (6) of s. 207-A sought to restrict the examination of the accused only to matters which are disclosed on the oral evidence. It is true that the Legislature has used the expression "evidence" at three places in cl. (6), but having regard to the context in which the expression occurs at different places, the argument of counsel for the appellants that it uniformly means oral evidence recorded either of witness produced by the prosecutor or witnesses examined on his own initiative by the Magistrate, and does not include documentary evidence, cannot be accepted. In the first clause of sub s. (6) the evidence is, as the statute

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expressly enacts "the evidence referred to in sub-s. (4)", and the expression "that such evidence and documents disclose no grounds for committing" indicates, having regard to the context, that the evidence referred to in sub-s. (4) alone is comprehended thereby. But the expression "*the* evidence" in the clause "examined the accused for the purpose of enabling him to explain any circumstances appearing in *the* evidence against him" is, in our judgment, not restricted to the oral evidence recorded under sub-s. (4). Among the documents which the Magistrate has to consider are the documents which the prosecution proposes to rely upon at the trial including the statements and confessions, if any, recorded under s. 164 and s. 161 (3). The documents form part of the record of the Magistrate, and it would be open to the prosecutor and the accused to rely thereon in support of their respective contentions when they exercise their right of being heard. Those documents have to be considered together with the oral evidence by the Magistrate in forming his opinion whether the accused should be committed to the Court of Session or be discharged. It would indeed be surprising if the Legislature intended by using the expression "examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him" that the opportunity to be given to the accused for explaining circumstances appearing against him must be restricted to circumstances appearing from the oral evidence, whereas in making an order of commitment or discharge the Magistrate may take into consideration the documents referred to in s. 173 (4) as well as the oral evidence recorded in sub-s. (4) of s. 207-A and afford an opportunity to the prosecutor and the accused of being heard on the entire record. Such a construction of the clause, by putting a restricted interpretation upon the meaning of the word "evidence" would in many cases involve great prejudice to the accused. The circumstances appearing against the accused would in a large majority of cases be from the statements recorded under s. 161 (3), under s. 164 and other documentary evidence, but

if the accused is not to be given an opportunity to explain those circumstances, to a large extent the judicial character of the proceeding would be impaired, for in determining whether the record discloses a *prima facie* case against the accused justifying an order of commitment to the Court of Session for trial, examination of the accused for the purpose of enabling him to explain any circumstances appearing against him only from the oral evidence and not from the documents referred to in s. 173(4) would fail to give to the Magistrate a complete picture of the case. The accused may have a complete answer to the documents on which the prosecution seeks to rely. But if by the words used in cl. (6) the Magistrate is prohibited from examining him in respect of those documents the provision might frequently operate oppressively against the accused.

There has been a deliberate change of phraseology in using the expression "the evidence" in cl. (6). In the opening clause the evidence referred to is evidence taken under sub-s. (4) and as we have already observed in the last clause the expression "such evidence" presumably is the evidence referred to in that sub-section. But in the context of the examination of the accused for the purpose of enabling him to explain any circumstances appearing against him, the Legislature has used the expression "in the evidence against him", which is not expressly qualified by reference to sub-s. (4) nor does any implication arise from the context which would suggest that it has a limited content.

It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the Evidence Act which applies to the trial of all criminal cases, the expression "evidence" is defined in s. 3 as meaning and including all statements which

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the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and all documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence. Normally in a criminal trial, the Court can proceed on documents which are duly proved, or by the rules of evidence made admissible without formal proof, but under the amended Code the Legislature has in s. 207-A prescribed a special procedure in proceedings for commitment of the accused. The record consists of the oral evidence recorded under sub-s. (4) of s. 173, and it would be difficult to regard only those documents which are duly proved, or which are admissible without proof as "evidence" within the meaning of cl. (6) and not the rest. There is no substance in the contention that the Legislature could not have intended that the accused should be examined in respect of documents which are not duly proved before the Court, because to do so might in some cases operate, as "a trap for the accused". The object of the examination it may be remembered is to afford an opportunity to the accused to explain any circumstances appearing against him. He may avail himself of the opportunity, but he is not obliged to do so, and if he does not avail himself of the opportunity he is by the statute exposed to no prejudicial consequences. But it was urged that if the accused declined to explain circumstances in answer to the Court's question, an adverse inference may be raised, and reliance in that behalf was placed upon illustration (h) to s. 114 of the Evidence Act which provides that the Court may raise a presumption "that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him". We are unable to hold that because the accused in an enquiry for committal declines to avail himself of the opportunity to explain circumstances appearing against him from the oral or documentary evidence, a presumption may be raised against him. Declining to avail himself of such an opportunity and reserving his right

to make a defence at the trial do not amount to refusal to answer a question. The opportunity contemplated by s. 207-A (6) for the examination of the accused is for his benefit and solely for the purpose of enabling him if he desires to do so to explain circumstances against him from the oral evidence and also the documents referred to in s. 173(4). The scheme of cl. (6) of s. 207-A is not the same as the scheme in s. 342 of the Code of Criminal Procedure. Under the latter section the Court is authorised to put questions to the accused for the purpose of enabling him to explain any circumstances appearing against him and the Court is required for that purpose to question him generally on the case after the witnesses for the prosecution have been examined and before he is called upon to enter upon his defence. But s. 207-A (6) does not contemplate such general questioning: it contemplates examination only for the purpose of explaining any circumstances appearing against the accused. Therefore by merely failing to avail himself of the opportunity to explain circumstances to which his attention is drawn the accused does not refuse to answer a question which would justify a presumption against him that the answer if given would be against him.

The scheme of s. 251-A which was brought on the statute book simultaneously with s. 207-A by Act 26 of 1955, also furnishes an indication that in the examination of the accused for enabling him to explain circumstances appearing in the evidence against him, documents referred to in s. 173(4) cannot be excluded. Section 251-A prescribes a special procedure for warrant cases, instituted upon police reports. In a case started otherwise than on a police report, the old procedure of examining witnesses and framing a charge on which the accused is to be tried continues to apply. But where the proceedings commence on a police report, the Magistrate has under s. 251-A (2) to consider the documents referred to in s. 173(4) and then to examine the accused, if necessary, and to give the accused and the prosecutor

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opportunity of being heard. Under s. 251-A no provision is made for examination of witnesses before making an order under sub-s. (2) discharging the accused or under sub-s. (3) framing a charge. Under sub-s. (2) of s. 251-A the Magistrate may upon consideration of the doucments referred to in s. 173(4) and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecutor and the accused an opportunity of being heard, discharge the accused if he considers the charge to be groundless, or frame a charge against him under sub-s. (3) if there is ground for presuming that the accused has committed an offence. In a warrant case therefore there will be no evidence of witnesses and the examination of the accused if found necessary by the Magistrate must of necessity be restricted to the circumstances appearing from the documents under s. 173 (4). The Legislature has therefore in enquiries in warrant cases contemplated examination of the accused solely upon circumstances appearing from the documentary evidence referred to in s. 173 (4) and it cannot be assumed that the examination of the accused in respect of circumstances appearing from those documents which are not proved but of which copies have been furnished to the accused, is so inconsistent with principles of criminal jurisprudence that it must be discountenanced. If opportunity may be given to an accused person before framing a charge under s. 251-A (2), to explain circumstances appearing from the documents referred to in s. 173(4), it is difficult to see any ground on which the Magistrate holding an enquiry for commitment may be disentitled to do so under s. 207-A (6). It would be somewhat anomalous, if it were true, that in the enquiry before framing a charge against the accused in respect of a charge for an offence which is triable by the Court of Session as well as by a Magistrate, two different rules relating to the examination of the accused would prevail, according as the accused is to be tried by the Court of Session, or by the Magistrate.

We are therefore of the view that the Magistrate has the power, if he thinks it necessary, to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence—such evidence being oral evidence, if any, as may have been recorded and the documents referred to in s. 173(4).

We are not concerned to decide whether the Magistrate in the present case was justified in calling upon the accused to remain present for their examination after the arguments of the prosecution and the accused were concluded. Normally, such an examination would take place before arguments of the prosecutor and the accused are heard. But there is nothing in the Code to prevent the examination, if in the course of hearing the arguments, the Magistrate entertains the opinion that such examination may be necessary in the interests of justice for the purpose of enabling the accused to explain any circumstances appearing against him.

In that view of the case this appeal fails and is dismissed.

AYYANGAR, J.—We regret our inability to agree with the judgment just pronounced. *Ayyangar J.*

Section 207-A(6) of the Criminal Procedure Code reads:

> "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 given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record the reasons and discharge him, unless it appears to the Magistrate that such person should be tried

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before himself or some other Magistrate, in which case he shall proceed accordingly."

The import of the expression 'to explain any circumstances appearing in the evidence against him' is the only question that is raised for consideration in this appeal which comes before us by virtue of special leave granted by this Court under Art. 136 of the Constitution.

Before dealing with that question and as preliminary thereto it will be convenient to narrate the facts which have given rise to this appeal.

The appellants before us are two out of 57 accused who are being prosecuted for offences under ss. 120-B, 406, 408, 409 and 477-A, read with s. 34 of the Indian Penal Code. The amount said to have been misappropriated is stated to be over Rs. 53 lakhs and the conspiracy in pursuance of which these various offences were committed are stated by the prosecution to have extended over a period of twelve years from 1948 to 1960. The charge-sheet was presented on the 24th of December, 1962, in the court of Shri Halbe, who was appointed as a Special Magistrate for the trial of the case. It is common ground that he was dealing with the case as one which was liable to be committed to Sessions for trial, if the charges made against the accused were held to be *prima facie* proved and as the proceedings were initiated on a police report, the Magistrate is making the inquiry under the provisions of s. 207-A of the Criminal Procedure Code, or for shortness, the Code. On March 28, 1963, the Public Prosecutor filed before the Special Magistrate a memorandum, the material portion of which read:

> "The evidence in this case is mainly documentary. As such the prosecution does not want to produce any witnesses as evidence before the committal before this Court.
>
> The Court may be pleased to take into consideration all the evidence contained in the documents the copies of which have been supplied

to the accused and also submitted before this Court as required by s. 173(4) of the Code.

The Court may then be pleased to give the prosecution an opportunity of being heard to explain the whole case."

Subsequent to this date the documents under s. 173 of the Code were filed. Immediately thereafter, the parties addressed arguments to the court based on the documents before the Court. The prosecution commenced its arguments from July 8, 1963, and after this was completed the accused made their submissions and these arguments concluded on the 26th of July, 1963. On the same day a large number of the accused submitted a memorandum to the court in which they urged that as the prosecution had led no oral evidence under s. 207-A(4) of the Code, but had merely relied on the documents filed in proof of a *prima facie* case against the accused, the Magistrate should not "examine the accused" and this they urged on two grounds: (1) that on a proper construction of s.207-A(6) of the Code it was not open to the court to examine them and (2) that such examination, even assuming that the court had jurisdiction to do so, would, in the circumstances of the case, work serious prejudice to them particularly as any statement made by the accused during their examination might be used as evidence against them. The Special Public Prosecutor in his turn filed a memorandum on July 27, 1963, opposing the prayer of the accused and submitting that the court might be pleased to examine the accused by asking each of them "a few general questions so as to enable them to explain the circumstances appearing againt them" and relying for this purpose on the construction of s. 207-A(6) adopted by the Bombay High Court in *Ramdas Kikabhai* v. *The State of Bombay*[1]. A truly Gilbertian situation thus arose, the accused pleading that they did not want any opportunity to explain anything at that stage and that it would not be in their interests to have them examined or questioned then, but that

(1) A.I.R. 1960 Bom. 124

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on the other hand such examination would seriously prejudice them, while on the other, the State through the Public Prosecutor urging that it was in the interests of the accused that they should be immediately examined by the Magistrate so as to give them the opportunity to explain a step which they were resisting.

The learned Magistrate acceded to the prayer of the counsel for the prosecution and directed the accused to appear before him on August 9, 1963. The present appellants thereupon filed a revision before the learned Sessions Judge and obtained orders staying the order of the Magistrate. That revision was, however, dismissed on August 19, 1963, the learned Sessions Judge holding that though there were decisions of other High Courts in which a different construction of s. 207-A(6), which the accused submitted was the proper one, had been upheld, he was bound by the decision of the Bombay High Court relied on by the State, and he, therefore, held that the Magistrate had jurisdiction to examine the accused at that stage and that he would not interfere with that order. A further revision by the accused to the High Court was dismissed *in limine* and thereafter the accused applied for and obtained special leave from this Court to prefer this appeal and that is how the matter is before us.

The question raised is whether the Magistrate is empowered to examine the accused when no evidence has been recorded under s. 207-A(4) to be presently read, and this primarily turns on a proper construction of sub-s. (6) of s. 207-A of the Code which we have extracted earlier. For this purpose it is necessary to set out some of the other sub-sections of s. 207-A, because it is in the context of those provisions that the words of this particular sub-section could be understood:

> "s. 207-A(1). When, in any proceeding instituted on a police report, the Magistrate receives the report forwarded under s. 173, he shall for the purpose of holding an inquiry under this section fix a date which shall be a date not later

than fourteen days from the date of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.

(2) 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 for reasons to be recorded, he deems it unnecessary to do so.

(3) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged."

Section 207-A was newly introduced into the Code by s. 29 of the Criminal Procedure Code Amendment Act, (Act 26 of 1955). By this enactment with a view to cut short the delay that was occurring in committal proceedings different procedures were prescribed for inquiry before a Magistrate of cases (a) where the case is triable exclusively by the Court of Sessions or the High Court and (b) where in his opinion the case is to be tried by such court depending whether the proceedings commenced by the institution of a police report or on a private complaint. If it was on a police report, the procedure was prescribed by s. 207-A, whereas if it was instituted otherewise than by a police report, section 208 and the sections following were attracted. It might be pointed out that in proceedings instituted otherwise than by a police report which were governed by the provisions of the Code as they existed before, an accused could be committed for trial under s. 210, and evidence in the sense of judicial evidence had to be called before the Magistrate. After such evidence was taken *i.e.*, oral evidence on oath together with such evidence as was afforded by documents which had been proved

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in accordance with the provisions of the Indian Evidence Act, s. 209(1) provided for the examination of the accused "for the purpose of enabling him to explain any circumstances appearing in the evidence" against him. That, however, was not the scheme of s. 207-A. Under the terms of sub-s. (4) the Magistrate "after satisfying himself under the provisions of the sub-section that the documents referred to in s. 173 had been furnished to the accused" proceeds to take the evidence of such persons *if any* as may be produced by the prosecution as witnesses to the actual offences alleged and of other witnesses whom the Magistrate considers it necessary to examine. Turning now to s. 173 the documents that are referred to therein are first a report by the Officer-in-charge of the Police Station setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused has been taken in custody or have been released and if so in what manner. Besides the report, the other documents that are referred to are those mentioned in sub-s. (4): (1) the First information Report or relevant extracts thereof on which the prosecution proposes to rely including the statements and confessions, if any, recorded under s. 164 and (2) the statements recorded under sub-s. (3) of s. 161 of all the persons whom the prosecution proposes to examine as its witnesses. There are some reservations to these provisions under which certain documents might be withheld but we shall not refer to them as the same are not relevant to the context.

We shall now take up for consideration the terms of s. 207-A(6) and the controversy now centres round the words 'to examine the accused ..... to explain any circumstances appearing *in the evidence* against him'. It is common ground and is not disputed by Mr. Setalvad, the learned counsel for the respondent-State, that the jurisdiction of the court to examine the accused conferred by this sub-section

is solely for the purpose of enabling him to explain the circumstances appearing *in the evidence* against him. Consequently it will follow that if there is no *evidence* there cannot be circumstances appearing in that evidence against him which he can or need be called on to explain with the result that the court would not have jurisdiction to examine the accused at that stage. The point, therefore, resolves itself into the meaning of the word 'evidence' in the expression 'circumstances appearing *in the evidence*'.

During the course of the arguments, the word 'evidence' has been stated to convey three distinct ideas: (1) Evidence of witnesses recorded under s. 207-A(4) of the Code, (2) Besides the above, such portion of the documentary evidence referred to in s. 173(4) of the Code which the Magistrate is directed to consider before ordering commitment, which being public documents need no proof under the Indian Evidence Act, and which would be judicial evidence before a court under the latter enactment, (3) The entirety of the documents under s. 173(4) on which material under s. 207-A, the Magistrate could base his committal order, under sub-ss. (6) & (7), whether these documents be admissible in evidence or not and whether or not they have been proved as required by the Evidence Act. The submission of the counsel for the appellants is that the word 'evidence' is confined to the oral evidence of persons who have been produced by the prosecution under sub-s. (4) as witnesses or of witnesses whom the Magistrate examines under the powers conferred in that behalf by the concluding words of that sub-section. We consider that there is considerable force in this submission. The word 'evidence' occurs three times in this sub-section. In the opening words of the sub-section where it occurs first referring, as they do, specifically to the evidence recorded under sub-s. (4)—the word is obviously used only in the sense of oral evidence recorded under sub-s. (4) together with the cross-examination and re-examination permitted by sub-s. (5). This is followed by the words 'the

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Magistrate has considered all the documents referred to in s. 173'. Documents therefore are treated here as a distinct category of material distinct from "evidence" and the sub-section proceeds on the existence of a dichotomy between these two species of material which the Magistrate has to take into account before ordering committal. If this dichotomy and this distinction between "evidence" and documents underlie the texture of the entire sub-section, it could not be disputed that the word 'evidence' on the second occasion when it occurs in sub-s. (6) and which calls for construction in the appeal has to be read as meaning only the evidence of witnesses examined under sub-s.(4). We shall revert to this however after referring to the rest of this sub-section to ascertain what light this throws on the continued maintenance of this dichotomy. The last place where the word 'evidence' occurs in the sub-section is the passage reading 'such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial'. It is clear here the word 'documents' denotes the documents referred to earlier, namely those in s. 173 and these are again distinguished from 'evidence'. Here also there cannot be any doubt that the word 'evidence' is a reference to the evidence recorded under sub-s. (4)—and which has already been referred to in the opening words of the sub-section and this also we might say was not disputed by Mr. Setalvad. Pausing here and taking up sub-s. (7) the distinction between "evidence" in the sense of oral evidence recorded under sub-s. (4) and the documents under s. 173 is again seen to be maintained with rigour for the phraseology adopted in that sub-section is "upon such evidence being taken, and such documents being considered". With the phraseology employed in sub-section(4), two out of three places in sub-ss. (6) & (7) it would require very strong and compelling reasons to hold that when words "the evidence" were used in the passage now in question they were employed in a different sense divorced from the dichotomy between 'evidence' and 'documents'

which runs throughout these provisions. In fact, even the judgment of the Bombay High Court on which the Magistrate and the learned Sessions Judge relied, proceeds on the acceptance of this construction of sub-s. (6). The learned Chief Justice after referring to the several sub-sections of s. 207-A observed:

> "The learned Assistant Government Pleader has urged that the word 'evidence' which follows with the words 'any circumstances' appearing in sub-s. (6) is used in a wider sense so as also to include the documents referred to in s. 173. This argument cannot be accepted, in view of the latter part of the sub-section, which requires the Magistrate to form an opinion on 'such evidence and documents'. Here again the documents are referred to separately from evidence. It is, therefore, clear that 'evidence' does not include the documents, which are mentioned separately in both sub-secs. (6) and (7). Consequently, 'evidence' in these provisions means evidence, if any, recorded under sub-s. (4). The section, therefore, contemplates an examination of the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, that is in the evidence, if any, recorded under sub-section (4)."

But the learned Chief Justice then proceeded to point out that there was an apparent lacuna in the sub-section which, however, he held was remedied by the later part of the sub-section directing the Magistrate 'to give the accused an opportunity of being heard,' and that under this provision the Magistrate was vested with power to examine the accused for the purpose of explaining why he should not be committed for trial before the Sessions.

With great respect to the learned Judges we are unable to accept as correct the reasoning on which this conclusion is based. In the first place, it is not possible to accept the view that there is a lacuna in the sub-section arising out of the construction of

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the word 'evidence' which the learned Judges accepted. The scheme of s. 207-A(6) & (7) is that there are two sets of materials on the basis of which the Magistrate is directed to make up his mind whether a *prima facie* case has been made out against an accused person justifying his being committed to take his trial, oral evidence recorded under sub-s. (4) and the documents referred to in s. 173 and filed before him. If on a proper construction of sub-s. (6), it is held that in the event of one type of material being placed before the Court *viz.*, oral evidence, the accused shall be questioned in order to explain the circumstances appearing against him on that material—the provision discloses no lacuna. On such a construction it would mean that the accused is not to be questioned if no such evidence has been recorded in the case and is present before the Magistrate. Nor are the learned Judges right in saying that the words 'given the accused an opportunity to be heard' involve an examination of the accused. These are words of common occurrence in the Code and elsewhere and mean an opportunity to submit reasons for the acceptance of the Court. They do not refer to questions and answers which must be recorded verbatim and made part of the record, and which could be used as evidence under s. 287 of the Code. In the context they are capable of meaning only hearing the arguments or submissions by the accused on the case or in regard to the documents where there has been no evidence of the type mentioned in sub-s. (4). In this connection it has to be pointed out that when the accused is examined, the statement recorded by the Magistrate may be used as evidence against the accused under s. 287 of the Criminal Procedure Code and this sub-section merely speaks of an opportunity to be heard. It is needless to point out that along with the accused the prosecution is also to be given "an opportunity to be heard" and in their case it is obvious that the relevant word cannot mean an examination by questions put and answers recorded. This is made more clear and this conclusion is reinforced by the terms of sub-s. (7) which we have

extracted. If nothing more could be urged in support of the construction adopted by the courts below than the reasoning to be found in the judgment of the Bombay High Court, it is manifest that the order now under appeal cannot be sustained.

Mr. Setalvad, however, did not rely on the judgment of the Bombay High Court, nor did he seek to support the reasoning on which it is based and, in fact, he conceded that the main reason given by the learned Judges based upon the words 'the accused being given an opportunity to be heard' could not be sustained. We invited him to point out any other place where such words had the meaning attributed by the High Court of Bombay but he could not.

The points, however, urged by him were three. First the employment of the expression '*the* evidence' as contrasted with 'the evidence referred to in sub-s. (4)' or *such* evidence which were the expression used in the other two places where the word 'evidence' was used in sub-s. (6). Based on this the argument was that the words '*the* evidence' were used in a comprehensive sense not confined to the oral evidence recorded under sub-s. (4) and extended to the entirety of the material on which the Magistrate was to determine the *prima facie* case against the accused. We feel unable to accept this argument. We have already analysed the terms of the sub-section. In the light of the phraseology employed in other sub-sections, particularly sub-ss. (4) & (7), we have found that the sub-sections draw a clear and sharp distinction between "evidence" and "the documents" referred to in s. 173. Such a distinction is made in every part of sub-s. (6), as well as in sub-s. (7). In the circumstances we attach no importance to the absence of the word 'such' and the use instead of the word 'the' in the relevant clause. The definite article 'the' obviously in the context refers to the 'evidence' already referred to in the opening words of the sub-section, namely that recorded under sub-s. (4). It is the same evidence which is again referred to in the third place

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where that word is used in the concluding part of that sub-section. The rule of interpretation which is applicable was stated by Lord Radcliffe—"the meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a Court of law is to find the natural meaning of the words in the context in which they occur, the context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."(1)

Mr. Setalvad's next submission was based on a comparison of sub-s. (6) of s. 207-A with sub-s. (2) of s. 251-A. In this connection stress was laid on the fact that both ss. 207-A and 251-A were introduced by the same enactment—Act XXVI of 1955, and both dealt with the procedure to be adopted in cases instituted on a police report. Sub-s. (2) of s. 251-A empowers the Magistrate to examine the accused, if necessary, in respect of matters appearing in the documents under s. 173(4). Section 251-A (2) reads:

> "If, upon consideration of all the documents referred to in s. 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him."

This is preceded by sub-s. (1) which is an analogue of sub-s. (3) of s. 207-A and enacts:

> "When in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such

(1) *Macmanaway In re* [1951] A.C. 161 at p. 169.

documents or any of them, he shall cause them to be so furnished."

The argument based upon sub-s. (2) was two fold:

(1) There is no anomaly or injustice in empowering the Magistrate to examine an accused person in respect of the matters appearing in the documents under s. 173; for Parliament has in terms made provision for such an examination.

(2) In view of the terms of s. 251-A(2) which was enacted at the same time as s. 207-A, the word 'evidence' in sub-s. (6) is capable of being understood as meaning 'on the examination of the accused with reference to the material on which the Magistrate proceeds to act', for in both the cases the object of the examination is in the interests of the accused and in order to afford the accused an opportunity not to be committed or to have a charge framed against him as the case may be. We do not think that such a comparison is a sound rule of construction. Besides we feel unable to agree that a comparison of the provisions of s. 251-A(2) affords the respondent any assistance. On the other hand, the contrast in the language employed in the two provisions appears to us to favour the construction that the expression 'evidence' in the relevant portion of s. 207-A(6) is a reference to the evidence recorded under sub-s. (4) which has been tested by cross-examination, if any. It is to be noticed that when the framers of Act 26 of 1955 referred to the documents under s. 173, they are both in s. 207-A, as well as in s. 251-A referred to as 'documents' and not as evidence. Added to this is the circumstance that when s. 251-A(2) empowers the court to examine the accused it not merely does not use but scrupulously avoids the use of the expression 'evidence'. It does not make such examination compulsory—mark the words 'if any'—and does not even refer to the documents at all. In this connection it may be pointed out that when the Bill 20-B of 1954 which later became Act 26 of 1955 emerged from the Select Committee, the relevant words in s. 207-A(6)

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were identical with those which are now found in s. 251-A(2) *i.e.*, without the use of the word 'evidence' and without even an indication of the purpose for which the court was empowered to examine the accused. It was during passing of the Bill in Parliament that sub-s. (6) was amended so as to read as it does at present. This, in our opinion, is a circumstance which shows that the word 'evidence' was not used by error or inadvertently but that a deliberate change was intended from the provision contained in s. 251-A (2). That is an additional reason why we consider that the terms of s. 251-A(2) far from assisting the respondent in reality militate against the acceptance of the submission.

We might, in this connection make a reference to another provision in the Code where the language now calling for construction has also been employed. Section 342(1) opens with the words 'For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him'. It is obvious that the Magistrate would have no jurisdiction under this provision to examine an accused (a) either when no oral evidence for the prosecution has been recorded or (b) in respect of matters about which there is no *evidence* adduced in the sense in which that expression is used in the Indian Evidence Act for enabling the court to hold any fact in issue, or a relevant fact to be proved. Speaking of this section, Raghubar Dayal J. as he then was, observed in *Bachchan Lal* v. *The State*(1).

> "The object of the examination of the accused under s. 342, Criminal Procedure Code, is to afford him an opportunity to explain away the circumstances which go against him and is not to elicit matter on the record about which there is no evidence. The Court is not an investigating agency whose duty is to find out facts which could be put before the Court at the trial";

and in another decision reported in *Bahawala* v. *The Crown*(2) the Court held that an illegality was committed

(1) A.I.R 1957 Allahabad 184. (2) I.L.R. 6 Lah. 183.

when the accused was examined before the evidence for the prosecution was recorded. The reasoning was that at that stage there was no *evidence* against him and consequently there were no circumstances in that *evidence* which he could be called upon to explain. We consider that the principle laid down by these decisions correctly explains the law as to the circumstances in which an accused could be examined by the Magistrate under a provision worded like s. 207-A(6).

The last submission of Mr. Setalvad was based on the definition of the expression 'evidence' in s. 3 of the Indian Evidence Act where evidence is defined thus: 'evidence' means and includes..... (1) oral evidence and (2) all documents produced for the inspection of the court; such documents are called documentary evidence." Based on this definition, and taken in conjunction with the fact that under s. 207-A the documents referred to in s. 207-A(3) are treated as material upon which the court might arrive at the conclusion that a *prima facie* case has been made against the accused, it was submitted that there was no impropriety in referring to these documents as 'evidence'. We are not impressed by this argument. Perhaps it might not be a great objection that the expressions are defined in s. 3 only for the purpose of Indian Evidence Act and this, we would add, is merely the dictionary meaning of the word. The more serious objection is the use of this definition for the purpose of importing probative value to the documentary evidence which might be inadmissible or irrelevant or prohibited by law and in any event not proved so as to permit a court to look into them for basing any judicial decision apart from any statutory provision to the contrary. If the expression 'evidence' is used throughout the Criminal Procedure Code as meaning judicial evidence *i.e.*, oral evidence tested by cross-examination, if any and documentary evidence which has been proved and which has been held to be relevant and admissible, it would, to say the least, be a strange use

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of that word in the provision now under consideration that it means documents produced for "the inspection of the Court". If it is used merely "for the inspection of the court", it is obvious that the court could not on its terms base any finding on the contents of such a document, and in fact that would have been the position but for the special provision contained in s. 207-A and s. 251-A. We have, therefore, no hesitation in rejecting this submission also.

This argument was presented in a slightly modified form by suggesting that even if the Magistrate could not examine the accused with reference to those parts of the documents which could be held not to be 'proved', still if among the documents referred to in s. 173 there were some which required no proof as being either public documents or in regard to which proof was dispensed with by any special law, the Magistrate could examine the accused with reference to those matters which appeared against him in such documents. The precise object of this submission was to make it out that besides oral evidence under sub-s. (4), there could be other species of evidence which would be evidence "strictly so called, and that it could not have been the intention of the legislature to exclude such "evidence" from the content of that word in sub-s. (6). This argument must fail in the face of the scheme of the section. The whole scheme of s. 207-A proceeds on drawing a clear and sharp line of distinction between the two terms 'evidence' and 'documents' the latter meaning the documents referred to in s. 173 and that dichotomy is maintained throughout, admittedly twice, in sub-s. (6) and in sub-s. (7). When therefore 'documents' are referred to in sub-ss. (6) & (7), it is a reference to them *en masse i.e.*, the entirety of the documents referred to in s. 173 and by no possible construction of s. 207(6) can a distinction be drawn between the documents which prove themselves and those which require to be proved by oral evidence.

Lastly, it was submitted that the provision was in the interests of the accused and that consequently

the words must receive a liberal and not a literal construction so as to subserve the underlying purpose *viz.*, that the accused should be in a position to explain the circumstances appearing against him, whether the circumstances appear in the oral evidence or in the documents, since the Magistrate was empowered to take into consideration both these as affording material for committing the accused. If the text of the statute is clear there might be no escape from the duty of the court to give effect to it. But the word 'evidence' in the context and even otherwise is incapable of the construction for which the respondent contends. If so, this argument has no basis to support it. If, however, there were an ambiguity, and the word was reasonably capable both of a narrower and a wider construction, the court would, no doubt, be justified in adopting that construction which would further the purpose of the provision and promote the cause of justice. In order to attract the application of this rule of construction, the court would have to be satisfied that the words if so construed should always operate in favour of the accused. What we have said earlier about the effect of an examination of the accused without there being 'evidence' against him with reference to s. 342(1) of the Code would be apposite in this connection. It is in this context that we have the situation in the present case where the accused do not desire to be examined and are resisting the questions being put to them on the ground that such questions would lead them to give answers before they are fully aware of the details of the prosecution case and the manner in which it is proposed to use the documents under s. 173 or the precise construction which they place on the contents of the documents on which they propose to rely.

The prosecution insists that it is in the interests of the accused that they should be examined, and the accused are asserting that their 'examination' at this stage is calculated to trap them into making statement which might be used to destroy their defence

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at the trial. Undoubtedly we are concerned in this appeal not with the facts of this prosecution, for that would be a matter for the Magistrate to consider as to whether or not he would 'examine' the accused and on what points he would 'examine' them, keeping in mind the purpose of the examination specified in the sub-section, but with the larger question as to the jurisdiction of the Magistrate to 'examine' the accused with reference to what is disclosed against them by the documents under s. 173 of the Code. The documents mentioned in s. 173(4) might include some which can never be *evidence* against the accused at the trial, and yet if the respondent is right, the accused might be called on to explain the circumstances against them in such documents, and here it must be noted, the explanation or statement of the accused even in answer to such questions would be evidence against him under s. 287 of the Code. It would, in the circumstances, be manifest that the construction of the sub-section which the State urges for our acceptance is, to say the least, capable of prejudicing the accused, and consequently, even in the event of there being an ambiguity in the meaning of the word 'evidence', is not one which the Court could accept. Nor are we satisfied that without such a power in the Magistrate to examine the accused, the accused would lose the chance of avoiding a committal by offering a reasonable explanation for the circumstances appearing in the documents. After all, the Magistrate is directed to look into the documents in the light of the submissions made by the accused as regards their contents and it would not be unreasonable to hold that the intention of the legislature was that the accused should be examined with reference to what appears against him in evidence legally admissible before the court, while he is not to be required to commit himself by his answers in respect of matters which would be proved against him only at the trial and as regards which he would be examined later under s. 342(1) of the Code, and be examined about documents which may never be moved later. Interpreted otherwise the section

would give a good chance for a fishing expedition and of modulating the prosecution case to destroy the accused's explanation at the appropriate stage.

It was however suggested that if an accused found it inconvenient to answer any of the questions put to him, there being no legal obligation on the accused to do so, he might as well decline to answer them since he could not be held liable for refusing so to do. But this argument, however, ignores the fact that an inference adverse to the accused might be drawn from his refusal to answer. Among the illustrations given in s. 114 of the Indian Evidence Act is one which reads:

> "The Court may presume—
>
> (h) "that, if a man refused to answer questions which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"

The court would, therefore, be justified in drawing this inference from his refusal to answer. Whether or not a Court would do so, it is certain that if the accused refuses to answer when examined by the Magistrate at the committal stage, any explanation which he might offer at later stage could properly be characterised as an after-thought. In the circumstances it would not be correct to assume that the exercise of the power at this stage by the Magistrate to question the accused might not result in serious prejudice to the accused. No doubt by the use of the expression 'if any' in the sub-clause the Magistrate is given a discretion to examine or not to examine the accused and the legislature may well have presumed that the discretion would be properly exercised, or could be the subject of complaint at a later stage if this were not done properly. Undoubtedly where the evidence is recorded under sub-s. (4) these considerations apply and establish the propriety and justice of the proceeding. But the question for consideration is that when the power is sought to be invoked where the Magistrate by virtue of the specific provisions of the statute is enabled to find a *prima facie* case

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by reference to unproved, untested and possibly inadmissible documents on which the prosecution proposes to rely, whether to such a case those considerations necessarily apply. If without evidence, properly so called, a Magistrate examines an accused, he would be converting himself into an investigating agency and there is therefore every possibility of the accused being prejudiced and that might be the very reason why the sub-section has been framed in a manner to avoid this result. The position is, of course, different under s. 251-A(2) where the examination is by virtue of the statute and so it stands in a class apart, and we are not concerned to consider whether an examination under that provision might prejudice the accused.

We, therefore, hold that where there is no evidence recorded under sub-s. (4) of s. 207-A, the Magistrate has no jurisdiction to examine an accused under s. 207-A(6) and consequently the Magistrate in the present case had no jurisdiction to direct the accused to appear before him for examination.

We would accordingly allow the appeal and set aside the order of the Magistrate directing the accused to appear before him for being examined.

ORDER

In view of the Judgment of the majority, the appeal fails and is dismissed.

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December 16

THE STATE OF PUNJAB

v.

S. RATTAN SINGH

(P.B. GAJENDRAGADKAR, K. SUBBA RAO, K.N. WANCHOO, J.C. SHAH AND RAGHUBAR DAYAL JJ.)

The Patiala Recovery of State Dues Act (Act IV of 2002 BK), ss. 4 and 11—Scope of—Civil Court—Jurisdiction to decide if a person is defaulter.

Provincial Insolvency Act (5 of 1920), s. 4—Whether Insolvency Court can go behind decree.