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Subject: **Law**

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Paper : **Criminal Justice Administration**

Module : **Pre Trial Process: Role of Magistrate**

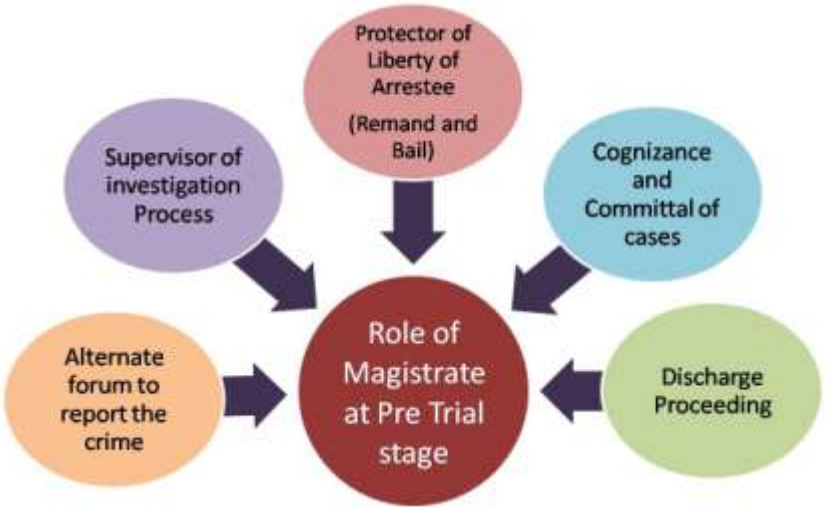
ज्ञान-विज्ञान विमुक्तये

Role	Name	Affiliation
Principal Investigator	Prof(Dr) Ranbir Singh	Vice Chancellor, National Law University, Delhi
Principal Co-investigator	Prof(Dr) G.S. Bajpai	Registrar, National Law University, Delhi
Content Writer	Mr. Pattabhi Ramarao K.	Assistant Professor, National Judicial Academy, Bhopal
Content Reviewer	Mr. Neeraj Tiwari	Assistant Professor, National Law University, Delhi
Paper Coordinator	Mr. Neeraj Tiwari	Assistant Professor, National Law University, Delhi

Subject	Law
Paper	Criminal Justice Administration
Module Title	Pre Trial Process: Role of Magistrates
Module Id	Law/CJA/V
Learning Objectives	• To make the learner understand the various functions the magistrates perform during pre trial stage • To make the learner understand the importance of protection of the rights of the accused during pre-trial stage • To make the learner understand legal provisions relating the role of magistrates during the pre-trial stage. • To make the students understand the role of the Magistrate in the process that take place before commencement of trial of criminal case

Pre-requisites	Basic understanding of the provisions of Code of Criminal Procedure, 1973 and peripheral view of the courts functioning is required.
Key Words	Pre-trial Procedure, custodial deaths, Magistrates power to order investigation, custodial rapes and disappearances, rights of the accused during the investigation, recording of the confessions, statements of the witnesses.

Module Overview: Crimes are investigated by the police and during the investigation the police interact with the Magistrates who preside over the courts at the gross root levels. The scheme of the Code of Criminal Procedure, 1973 is designed to see that during the course of investigation and before the commencement of the trial, rights of the accused are protected. The Magistrates do not interfere with the investigation and at the same time they closely supervise the investigation. The Magistrate is kept at all the stages of the investigation, but he does not ordinarily interfere with the investigation powers of the police. Magistrate also performs the duties which ensure the fairness in the investigation and collection the evidence by the police. Magistrate has the power to order the investigation and in certain circumstances he can order the stopping of investigation. In this module all the tasks which the magistrate undertakes before commencement of trial are discussed. The role of the Magistrate in the process before commencement of trial of a criminal case is pivotal and the role of the magistrate in safeguarding the rights of the accused, recording the confessions of the accused and the statements of the witnesses, power to order and stop investigation are discussed elaborately in this module.



INTRODUCTION:

Police commence investigation after registration of the First Information Report (hereinafter referred to as *the FIR)* under section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred to as *the Cr.P.C.*) in case of cognizable offences and after receiving an order for investigation from the Magistrate having jurisdiction to try or commit the case under section 155(2) of the Cr.P.C., in case of non cognizable offences. After completion of the investigation, the officer in charge of the police station files a report before the court under section 173 of the Cr.P.C. which in known as charge sheet/challan in common parlance. Though in the light of the scheme of the Cr.P.C. framing of charges or the process of discharge is considered as part of trial,[1] in practice, commencement of recording of the evidence of prosecution witnesses is considered to be the starting point of trial. Thus, framing of the charges and the process of discharge are also briefly discussed under the head of pre-trial process. It is to be mentioned that in the scheme of the Cr.P.C. it is Judicial Magistrate who deals with all the cases at initial stage, whether or not he is competent to try the case. If he is empowered to try the offence, he will commence the trial and if the offence is exclusively triable by the Court of Session he commits

[1] Sections 227,239 and 245 of the Cr.P.C providing for discharge of the accused are in Chapters relating to the trial of cases.

the case to the Court of Session under section 209 of the Cr.P.C. Till the commencement of the trial or commitment of the case to the Court of Session, the Magistrate acts as supervisor of the investigation. The Cr.P.C provides for independence of the police officers in the process of the investigation of the offences and non interference of the judiciary in the investigation process. At the same time to sustain the fairness in the investigation by the police and protect the rights of the accused, Judicial Magistrates are vested with certain powers. The Magistrates perform certain functions such as sending the seized objects for forensic laboratories, procuring of the specimen signatures and hand writing of the suspects[2] for sending them to the experts for analysis etc. which are indeed part of investigating process. The object behind entrusting this kind of functions of the Magistrates is to enhance the credibility of the scientific evidence.

But the general rule is that the courts do not interfere with the investigating powers of the police officers. The Judicial Magistrate is kept in the picture at all the stages of the police investigation but he is not authorized to interfere with the actual investigation or direct the police as to how the investigation is to be conducted.[3] Though there are some deviations from the above principle in recent times, the consistent view of the superior courts is that Magistrate shall not interfere with the investigation powers of the police officers. In *King Emperor vs. Khwaja Nazir Ahmed,*[4] the oft quoted judgment on the role of Magistrates rendered by the Privy Council it was observed:

> ”The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise it’s own function”.

This view of the Privy Council was accepted by the Supreme Court in a number of cases.[5] Thus the legal position as approved by the Supreme Court is that normally the courts do not interfere with the powers of the police during the investigation and act as supervisors of the

[2] See, Section 311 A ,Cr.P.C.
[3] 41st Report of Law Commission of India, Vol.1, P.167 Para 14.2
[4] AIR 1945 PC 18
[5] *H.N. Rishbud vs. State of New Delhi,* AIR 1955 SC 196, *Abhinandan Jha vs. Dinesh Nima,* AIR 1968 SC 117

investigation. It is only in case of any unnecessary harassment or grave injustice the High Courts or the Supreme Court can pass any orders exercising the powers under writ jurisdiction or under Section 482 of the Cr. P.C. However, there are many stages wherein the police and the Magistrates interact in the process before the commencement of trial. The Cr.P.C. provided for legal frame work in this regard to ensure independence of the police agency as well as fairness in investigation. The provisions of the Cr.P.C are interpreted by the courts to strike a balance between the powers of the police officers and the protection of the rights of the accused during investigation stage.

To be comprehensive, the role of Magistrates during the pre-trial stage of criminal cases can be discussed under the following heads:

A. Cases instituted on police report.

B. Cases instituted otherwise than on a police report (Complaint cases).

A. Cases Instituted on Police Report:

1. Dispatch of the FIR to the Magistrate

In all the cognizable cases instituted on a police report, the Magistrate receives the FIR and notes the accurate time and date of the receipt of the FIR by him.[6] This is important to find out whether there is delay in registration or dispatch of the FIR to the court. Under section 157 of the Cr. P.C it is the duty of the investigating officer to send the FIR to the court immediately. The time at which the FIR is received by the Magistrate concerned goes a long way in coming to the conclusion as to the time at which FIR may have been written, lodged and registered.[7] Failure to send FIR to the Magistrate is a "breach of duty and may go to show that the investigation in the case was not just, fair and forthright and that the prosecution case must be looked with suspicion.[8] Though unexplained delay in registration of the FIR is considered to be a factor which affects the credibility of the document, delayed dispatch of the FIR to the Magistrate is not considered so, if it could be shown that the FIR was actually recorded without delay and the investigation started on the basis of it. In such cases if there is no other infirmity in the case of prosecution the delayed dispatch of the FIR alone is not considered to conclude that the investigation is tainted.[9] It is from the stage of the receipt of the FIR by the Magistrate, his supervision over the investigation commences. Once the FIR is registered it is the duty of the investigating officer to inform the Magistrate regarding the investigation of the case by sending the reports containing the details of the investigation, search, seizure of documents and objects, copy of the case diary etc. The investigating officer forwards all the documents including the case diaries along with the report under section 173 of the Cr.P.C. but in the meanwhile for the purpose of any inquiry, any criminal court can send for the police diaries to aid it in such

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[6] Though the provisions of the Cr.P.C. do not indicate that the Magistrate require to record the time of the receipt of the F I R the rules of practice prescribed by the High Courts made it obligatory to record such time .

[7] See, *Swaran Singh vs. State* 1981 Cri LJ 364 (P&H), *Kamaljit Singh vs. State of Punjab* 1980 Cr.LJ 542 (P&H)

[8] Dr.KN Chandrasekharan Pillai, *R V Kelkar's Criminal Procedure*, (2008)(Fifth edition)Eastern Book Company) at p. 137

[9] *Pala Singh vs. vs. State of Punjab*,(1972) 2 SCC 640, See,also, *Gurpreet Singh vs. State of Punjab* (2005) 12 SCC 615

inquiry.[10] This power can be exercised by the criminal court during the trial also, if in any case diary is not forwarded to it by the police.

2. Safeguarding the Rights of the Accused on Arrest

The Cr.P.C provided for certain rights to the persons arrested by the police.[11] The Magistrate before whom the arrested person is produced shall be vigilant enough to ensure that the rights of the accused are not violated by the arresting authorities. Thus every Magistrate is required to verify, by questioning the person arrested and produced before him as to (1) whether arrestee is produced within twenty four hours[12] from the time of his arrest (2) whether arrestee is harassed during the period between the arrest and production before the court (3) whether the arrestee is informed of the grounds and reasons for his arrest (4) whether the factum of the arrest is informed to the relatives of the accused (5) whether there is any unnecessary restraint than required (6) whether the arrested is in need of any medical examination etc. If any of these rights of the arrestee are violated by the arresting authorities it is the duty of the Magistrate to see that legal requirements in this regard are properly complied with. It is to be mentioned here that as per section 59 of the Cr.P.C., once a person is arrested he cannot be discharged except under a bond or under the special order of a Magistrate. The said provision is as follows:

> **59**. **Discharge of person apprehended**:-- No person who has been arrested by a police officer shall be discharged except on his own bond or on bail or under the special order of a Magistrate.

The above provision though couched in negative language makes it lawful for the Magistrates to write a special order in case he finds that there are no grounds to proceed against him at all and even requiring a bond or surety for his appearance is also not warranted. This provision needs to be highlighted as the exercise of this power by the Magistrate appears to be rare, mainly because

[10] Section 172 (2) Cr.P.C. reads as follows: Any criminal court may send for the police diaries of a caase under inquiry or trial in such Court and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.
[11] See, Sections 41B, 41D, 49, 50, 50A, 57 of the Cr.P.C.
[12] Article 22 of the Indian Constitution and section 57 of the Cr.P.C.

of the negative language used in it. Except this provision there is no other provision which empowers the Magistrate to discharge a person before remanding the accused, when the arrest of a person is in connection with an act which is not an offence at all. Thus the Magistrate has a vital role in protecting the rights of the accused at the time of arrest.

3. Judicial or Police Custody

During the course of investigation, if any person is arrested or detained in the police custody, the investigation is to be completed within twenty four hours and if it could not be completed the investigating officer has to produce the arrestee to the nearest Judicial Magistrate.[13] Thus the persons arrested by the police can be produced before a Judicial Magistrate whether he has power to try the case or has not. The role of Magistrate as regards to the accused commences at this stage. Under section 167 of the Cr.P.C. the Magistrate authorizes the detention of arrestee, in such custody as he thinks fit. Theoretically the person arrested can be ordered to be detained in the custody of any person as per the discretion of the Magistrate. As per section 167 (2) of the Cr.P.C. the Magistrate can authorize the detention of the accused person either in police custody or otherwise than in custody of police. For authorizing the detention of the arrested persons either in the police custody or the judicial custody or any other custody under section 167 of the code it is always necessary that the accused is produced before the court. The object of requiring the accused to be produced before the Magistrate is to enable the Magistrate to decide judicially whether remand is necessary and also to enable the accused to make any representation to the Magistrate to controvert the grounds on which the police officer has asked for remand. The order of the detention is not to be passed mechanically as a routine order on the request of the police for remand.[14] It is also to be noted that the person who has the custody of the arrestee is responsible for the health and the safety of the detainee[15] and the Magistrate or the court ordering the investigation has to monitor the conditions of the persons who are ordered to be detained. The Magistrate has to exercise his judicial discretion while

[13] Section 167 (1) of the Cr.P.C.
[14] In *Re, Madhu Limayae,* (1969)1SCC 292. See also, *Bal Krishna vs. Emperor*, AIR 1931 Lah. 99, *Chadayam Makki vs. State of Kerala*, 1980 Cri. LJ 1195
[15] Section 55A of the Cr.P.C.

deciding whether or not the detention of the accused in any custody is necessary. He shall scrutinize all the papers including the entries in the case diary before authorizing the detention of the accused in the custody and it is obligatory on his part to record the reasons for it. Though the Cr. P.C. did not specify the persons under whom or place where the arrestee can be detained in the custody "otherwise than in police custody" as the practices goes, in majority of the cases it is only the judicial custody. Thus it is necessary to understand the nature of the judicial and police custody.

(a) Judicial Custody: Though this word is not mentioned in section 167 of the Cr.P.C, it is being commonly used in the language of legal fraternity. The Magistrate, on production of the accused before him orders that he be kept in the custody and on such order the accused is kept in a jail. This is known as judicial custody and during this period the police usually can not have any access to the accused, except under a specific order by the court. Magistrate can order detention of the accused in the jail for a period not exceeding fifteen days and it can be extended from time to time, unless the accused is released on bail. An accused can be detained in the judicial custody during the investigation or trial. When the person so detained is sentenced to imprisonment for a term, the period of detention undergone by him during the investigation, inquiry or trial of the case shall be set off against the term of imprisonment awarded to him and he shall be liable to serve the remainder of the sentence only.[16] It is to be noted that the judicial custody of an accused can be ordered under section 167 of the Cr.P.C. only during the course of the investigation and such custody can be ordered under section 209(a) and (b) of the Cr.P.C if it is before committing the case the Court of Session by the Magistrate and under section 309 (2) of the Cr.P.C if it is during the trial. The purpose of detention differs from one category to another.

(b) Police Custody: As it is seen, under section 167 of the Cr. P.C. the Magistrate can order detention of the accused in such custody as he thinks fit. Thus, the Magistrate can authorize the detention of the accused in the police custody. Unless a person is remanded to the judicial custody, the court cannot order the detention of the accused in the police custody. Section167(2)

[16] See, section 428 of the Cr.P.C.

is interpreted to the effect that the nature of custody can be altered from judicial custody to police custody and vice versa during the first period of 15 days mentioned there in. In *Central Bureau of Investigation vs. Anupam J Kulkarni*[17] the Supreme Court made it clear that police remand should not be resorted to after 15 days and after the first remand period the court can authorize the detention of a person only in the judicial custody. Police custody can be ordered by any Magistrate of First Class or Chief Judicial Magistrate and in case the Judicial Magistrate of First Class authorizes the detention in the police custody, it is obligatory on his part to forward the copy of the order to the Chief Judicial Magistrate as per section 167(4) of the Cr. P.C.

A study of earlier judgments[18] on granting the police custody reveals that the law was strongly against granting of the police custody after the arrest and the dominant opinion was that only in rare cases after judicial evaluation of special circumstances and that too for limited periods as the necessities of the case may require, police custody could be granted. The enormous growth of crime, particularly the growth of economic and financial crimes, the number of cases in which the police custody is being sought for is on increase. The complexity in modern day crime is another reason for such increase. The statute does not mention the circumstances in which the court can authorize the detention of the arrestee in the police custody and leaves it to the discretion of the Magistrate. The discretion is to be exercised judiciously and thus the decision depends upon the facts of the case in connection with which the person is detained. By and large it can be said that only in case of absolute necessity the court can order the detention of the arrestee in the police custody. It is quite usual that whenever the police custody is ordered, the Magistrates impose conditions. The conditions include directions not use third degree methods, medical examination prior to and on expiry of police custody, making legal counsel available during the investigation etc. In *Dileep Kumar Basu vs.State of West Bengal*[19]the Supreme Court has issued guidelines as to the rights of the accused during arrest and

[17] (1992)3 SCC 141
[18] For example See, *Jai Singh vs. Emperor*, AIR 1932 Oudh 11, *Queen Emperor vs. Engadu*, ILR 11 Madras 98
[19] (1997)1SCC416 ,For all the guidelines ,see, paragraph 36 of the judgment.See, also *Joginder Kumar vs. State of Uttar Pradesh* (1994) 4 SCC 260

interrogation and these guidelines are incorporated in the Cr.P.C.[20] The right of the arrested person to consult a lawyer during the investigation is now statutorily recognized.[21] The presence of the lawyer is with an object to protect the right of the accused not to be compelled to answer such questions, which incriminate him. In *Senior Revenue Intelligence Officer vs. Jugal Kishore Samra*[22] the Supreme Court ordered that that "the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation." It is submitted that mere presence of the advocate without the opportunity for being consulted will be of no use and does not serve any purpose. *Nandini Sathpathi vs. P.L. Dani*[23] is the leading case on the presence of the lawyer for consultation during the interrogation, in order to protect his right against self incrimination and the efficacy of the judgment as a binding precedent is seriously doubted in the above judgment in *Jugal Kishore Samra.*[24]

4. Bail

Another important aspect of pre trial process is bail. All the persons who are arrested in bailable cases are to be released on bail with or without sureties as per the discretion of the court. Section 436 of the Cr. P.C., mentions that persons other than those persons accused of a non bailable offences arrested or detained without warrant by an officer in charge of a police station or appears of is brought before a court and is prepared to give bail, such person shall be released on bail, either by the police officer who detained him or by the Magistrate before whom he is produced or appeared. It is important to notice that the section provides for release on bail of the persons who are arrested in cases other than non bailable offences. Thus if a person is arrested

[20] Sections 41B, 41C, 41D,50A.53A and 55A were inserted in the Cr.P.C by Cr.P.C. (Amendment) Act, 2005 (Act 25 of 2005) with effect from 23-06-2006
[21] Section 41D of the Cr.P.C.
[22] (2011)12SCC362
[23] (1978)2SCC 424
[24] (2011)12SCC362

without any offence being committed by him, then also the court can release the person with or without sureties. In such circumstances the court can release him by a special order under section 59 of the Cr.P.C. also. The court or police officer can insist security for his appearance or can release him on executing a bond. Prior to 2006, once surety is insisted by the court by an order, and the accused is not able to furnish the surety, the court had no option to review it's order. By an amendment to Cr.P.C. in the year 2005[25] a provision was added to section 436 of the Cr.P.C. to save the situation. If a person who was granted bail under section 436 of the Cr.P.C. on condition of furnishing the surety fails to furnish such surety within a week from the date of arrest, he shall be considered as an indigent person and shall be released on executing bond. This provision was added with an object that by reason of poverty, no person shall be deprived of his liberty.

Section 437 of the Cr. P.C., controls the grant of bail to the arrested persons accused of non bailable offences, by the Magistrates. The powers of the Magistrate to release a person accused of non bailable offence are limited by section 437 of the Cr. P.C. The Magistrate shall not order release of a person if there are reasonable grounds to believe that he has committed an offence punishable with death or imprisonment for life.

a. The Magistrate shall not order release of the persons who is accused of a cognizable offence and who was previously convicted of an offence punishable with death or imprisonment for life or imprisonment for seven years or more.

b. Convicted on two or more occasions of the offences punishable with imprisonment for a period of three years or more but less than seven years.

There are two exceptions to the above rules restraining the discretion of Judicial Magistrate.

1. If the accused person is under the age of 16 years or is a woman or sick or infirm person, the discretion to grant bail can be exercised by the Magistrate.

[25] By Cr.P.C. (Amendment) Act, 2005 (Act 25 of 2005) with effect from 23-06-2006

2. If any special reasons exist the Magistrate can order release of accused who fall in the second category.

The Court before granting bail to the persons accused of non-bailable offences, offences punishable with death, imprisonment for life or imprisonment for seven years or more, has to give notice to the public prosecutor and hear his objections. The Sessions Court or High Court can grant bail to the accused under section 439 of the Cr. P.C. A direction to grant bail immediately after arrest which is known as anticipatory bail can be given under 438 of the Cr. P.C. Under section 167(5) Cr. P.C., if the investigation in cases triable by the Magistrate could not be completed within 60 days and investigation in cases exclusively triable by the Session Court could not be completed within 90 days the court has to release the accused on bail. This is known as statutory bail. It is based on the policy that if enough material could not be collected by the investigating agency within the time limit, the arrested persons shall not suffer. The discretion to grant or refuse bail is an important pre trial judicial function. First Schedule annexed to the Cr.P.C. contains the information as to whether an offence is bailable or non bailable.

5. Power to order Investigation:

It is primarily the responsibility of the police to investigate in to the offences and in case of non cognizable offences police investigate in to the offence only after obtaining the order for investigation by the Magistrate having jurisdiction to try the case.[26] The object of requiring the order of the Magistrate for investigating in to non cognizable offences which are of less serious in nature is to protect the citizens from the policing power of the State instrumentalities on trivial reasons. The Magistrate can refuse to allow the investigation of non cognizable cases for a number of reasons including the protection of public interest. Section 156 (3) of the Cr.P.C authorizes the Magistrate empowered to take cognizance under section 190 of the Cr.P.C. to order investigation of the offences. Section 156 reads as follows:

[26] Section 155 (2) of the Cr.P.C

Section 156 : Police officer's power to investigate cognizable cases

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

Thus the Magistrate in the circumstances in which he can take cognizance of the offence, instead of taking cognizance can order the police to investigate in to any allegations made against any person. Thus the Magistrate can exercise the discretion to direct the investigation in all the situations mentioned in section 190 of the Cr.P.C. The Magistrate can order the investigation under section 156(3) of the Cr.P.C even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation.[27] The only bar is that once the court takes cognizance of the offence it cannot order further investigation under section 156 (3) of the Cr.P.C, though such an order can be passed under section 202 of the Cr.P.C. Usually on refusal to register the case by the police the aggrieved person approaches the Magistrate by filing a complaint[28] before him and on such complaint the Magistrate may direct the police to investigate in to the allegations made there in or he can inquire in to the matter without ordering the police to investigate into. If he decides to inquire in to the accusation by himself the case becomes the one instituted otherwise than on a police report. Before forwarding the case for investigation under section 156(3) of the Cr.P.C the Magistrate has to decide that investigation by police is needed and inquiry by himself might not be sufficient.

The theory of separation of powers and the long lasting court's practice of non interference with the powers of the police in the investigation, the Magistrates observe restraint

[27] *State of Bihar vs. J.A.C. Saldhana*, (1980)1 SCC 554.

[28] Section 2 (d) of the Cr.P.C. defines complaint as any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but does not include a police report.

in giving the directions regarding the manner in which the investigation is to be carried out and do not monitor the investigation. The view is that the Magistrate can order further investigation and cannot order reinvestigation in to any case. The Supreme Court did not approve the action of a High Court which had asked not only reinvestigation into the matter, but also directed examination of the witnesses who had not been cited as prosecution witnesses. The High Court furthermore directed prosecution of the appellant and the Supreme Court opined that such a course is unwarranted in law.[29] However in *Sakiri Vasu vs. State of U.P*[30] the Supreme Court has taken slightly different view and held that:

> Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

In the above the Supreme Court further observed thus:

> Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C. is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

But, it is submitted that there are no prescribed standards to decide whether investigation in a particular case is "proper". The complainant in a criminal case burning with the vengence may insist on "proper investigation" with an intention to procrastinate the investigation. In later

[29] *Popular Muthiah vs. State*, (2006)7SCC296
[30] (2008)2SCC409

judgments[31], the Supreme Court raised doubts regarding the ratio of the judgment in *Sakiri Vasu*[32] opining that it's correctness is open to question.

Whereas the ordering of investigation under section 156(3) of the Cr.P.C. can be done only at pre cognizance stage, under section 202 of the Cr.P.C the court can order further investigation even after taking cognizance of the offence. The court can order the investigation under this provision after recording the statement of the witnesses under section 200 of the Cr.P.C. In a case, decided by the High Court of Karnataka[33], on a complaint referred under section 156 (3) of the Cr.P.C. police forwarded the report of investigation and there after the Magistrate examined the witnesses under section 200 of the Cr.P.C. Not satisfied with the material available on record the Magistrate ordered the further investigation under section 202 of the Cr.P.C. and the order was upheld by the court. However, such a direction for investigation cannot be issued after issuing process for appearance of the accused.[34]

6. Power to Stop Investigation

As per section 167 (5) of the Cr,P,C if in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate *shall* make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary. This power is however not exercised by the Magistrates frequently and in few cases the accused approached the High Courts for quashing the proceedings contending that as the word used in the statute is "shall" it is to be deemed that after six months the investigating officer cannot proceed with the investigation. In *Hussainara Khantoon and Ors. v. Home Secretary, State of Bihar*[35] the Supreme Court speaking in the context of under-trial

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[31] *Nirmal Singh Kahlon vs. State of Punjab* (2009)1SCC441 *Kishan Lal vs.Dharmendra Bafna* (2009)7SCC685
[32] (2008)2SCC409
[33] *Bharathiben Verma vs. N G Lokanath*, 1998 Cr.LJ 17 (Karnataka)
[34] *Randhir Singh Rana vs. State (DelhiAdministration)* (1997) 1 SCC 361
[35] (1980)1SCC93

prisoners quoted section 167 (5) of the Cr.P.C and opined that the Magistrate ought to pass the orders to stop investigation in cases falling within the ambit of the section and also directed the High Court of Patna to "look into this matter and satisfy itself whether the Magistrates in Bihar have been complying with the provisions of Section 167(5)". However, in *State of Karnataka v. M. Raju*[36] the Apex Court took a view that there is nothing in sub-section 5 of Section 167 of the Cr.P.C. to suggest that if the investigation has not been completed within the period allowed by that sub-section, the officer in charge of the police station would be absolved from the responsibility of filing the police report under Section 173(2) of the Cr.P.C. The apex court further held that the criminal cases which come within the ambit of sub-section 5 of Section 167 of Cr.P.C. cannot be permitted to die down in police stations but have to meet their fate in criminal courts one way or the other. In *Nirmal Kanti Roy vs. State of W.B.*[37] the Supreme Court categorically opined that lapse of six months in investigation of summons cases does not lead to automatic closure of the criminal case and "Magistrate at that stage must look into the record of investigation to ascertain the progress of investigation thus far reached. If substantial part of investigation was by then over, the Magistrate should seriously ponder over the question whether it would be conducive to the interest of justice to stop further investigation and discharge the accused." The legal position under section 167 (5) of the Cr.P.C. is that the Magistrate need not order stopping of investigation in all summons cases in which the investigation could not be completed within six months and when no order is passed it does not amount to automatic culminations of criminal proceedings in such cases. Though the word *shall* is employed in the statute the Magistrate can take an independent decision assessing the facts of the case, public interest, progress of the investigation etc. and either pass an order stopping the investigation or allow the investigating officer to continue with the investigation. Even if no order is passed it does not result in automatic culmination of the proceedings. The power however can be exercised by the Magistrates to order stopping of the investigation when the law

[36] Order in Crl. Appeal No. 194 of 1991 dated 25.08.1994

[37] (1998) 4 SCC 590, See also, *State of West Bengal Vs. Makhanlal Chakraborty* JT2002(Suppl1)SC573 *State of W.B. v. Falguni Dutta* (1993) 3 SCC 288

enforcing agency could not proceed with the investigation and continuation of the criminal court proceedings is causing hardship to the litigants leading to injustice.

7. Acts in aid of the Investigation:

The Cr.P.C. provides for healthy and genuine cooperation between the investigating agencies and the courts. Though the investigation is the task of the police, during the collection of the evidence the investigating officers need the assistance of the court and the credibility of certain type of evidence increases when procured through the medium of the court. Therefore the statute envisions few important functions to be undertaken by the Magistrates which eventually may support the case of prosecution. Role of Magistrates in performing such acts is in the nature of aiding the investigating agency. At the same time it is to be done without developing any bias in favour of the case of the prosecution. The following are such acts of the Magistrates which help the investigating officers to build of the case of the prosecution and it is also to be noted that in this process fairness is ensured by the Magistrates in the process of procuring the evidence.

(a) Recording of Confessions and Statements: Section 164 of the Cr.P.C authorizes the Magistrate to record confessions of the accused and the statements of the witnesses. Any Magistrate or Metropolitan Magistrate can record them. Since the confession of the accused is considered to be a vital piece of evidence against the maker, a number of rules are prescribed for recording of the confessions of the accused. The Magistrate recording the confession shall be satisfied that the confession is being made by the accused voluntarily and without any inducement or coercion. If the Magistrate finds that the confession is not being made voluntarily he need not record the confession. Law also provides that the Magistrate who is recording confession shall inform the accused that he is not bound to make any confession and in case if he chooses to make confession that will be used as evidence against him. Furnishing of this information is mandatory to make the confession a valid piece of evidence. The Magistrate who records the confession shall prepare a memorandum to be appended to the confession recorded by him, incorporating his satisfaction regarding voluntariness of the accused in making the confession and that he has informed the accused about using the confession against him as

evidence. While recording the confession the Magistrate takes care that no police officer is present in the court. The confession is to be recorded as per the procedure for recording the statement of the accused mentioned in section 281 of the Cr.P.C. In practice it is always the police who file the application before the Chief Judicial Magistrate for recording the confession by a Judicial Magistrate and the Chief Judicial Magistrate makes over the application to the Judicial Magistrate who has no jurisdiction to try the case in which the confession of the accused is to be recorded. Similarly the Magistrate records the statement of the witnesses under section. Oath is also administered to the witness making a statement under section 164 of the Cr.P.C and it shall not be administered to the accused making the confession. The statement of the witness is to be recorded in the manner the evidence of a witness is to be recorded.

(b) Inquiry in cases of deaths and rapes during the custody and disappearances from the custody

By amendment to the Cr.P.C[38], Section 176 (1A) was added to the statute according to which, in the cases of custodial death or custodial rape or disappearance of a person from custody, Judicial Magistrate of First Class or Metropolitan Magistrate, as the case may be, in whose territorial jurisdiction the offence is committed has to hold an inquiry in to the incident The inquiry by the Magistrate is in addition to the investigation made by the police and the report of the Magistrate regarding the incident can be used as evidence. The object behind entrusting the task is to save the investigation from the institutional bias of the investigating officers and to see that no opportunity can be taken by anyone to destroy the evidence in such cases. No specific method is prescribed for the inquiry in to such incidents. The Magistrate is required to record the evidence in any manner prescribed in the Cr.P.C. "according to the circumstances of the case." A full Bench of Andhra Pradesh High Court held that the inquiry under section 176 (1A) is in addition to the investigation by the police and not a substitute to it and the police are not absolved from the duty of investigating the offences of such nature.[39]

[38] By Cr.P.C. (Amendment) Act, 2005 (Act 25 of 2005) with effect from 23-06-2006

[39] *A.P. Civil Liberties Committee (APCLC) rep. by its President, Mr. S. Subhash Chandra Bose vs. Government of A.P. rep by its Principal Secretary, Home Department, 2009(1)ALT754*

Recently in *Tmt.R.Kasturi vs. State*[40] Justice Nagamuthu of Madras High Court elaborately dealt with the nature of inquiry under section 176 (1A) of the Cr.P.C. and reached the conclusion that this Inquiry is on par with the other functions of the magistrates such as recording of the dying declarations, and confessions conducting test identification parades etc.

(c) Power to order persons to furnish the specimen signature or hand writing:

During the course of investigation, particularly in cases involving the documents or documentary evidence the prosecution may be required to prove that certain hand writing or signature is written by a particular person and in this connection they require to collect the specimen signatures and hand writing of the persons who is suspected to have authored the document or signature in question and get it analysed by scientific experts. Till the year 2006, the police used to collect the specimen signatures and hand writings in the presence of panch witnesses and in the majority of the cases though scientific evidence is obtained, in cases where the panch witnesses do not support the case of prosecution, it has been becoming difficult to prove that the specimens are of the persons who wrote or did not write the disputed content. To avoid this difficulty section 311 A is added in the Cr.P.C. which reads as follows:

> 311A. Power of Magistrate to order person to give specimen signatures or handwriting.--If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:
>
> Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

The provision lacks clarity as it authorises the Magistrate to order any person to furnish the specimen signatures and hand writings and clamps the power with a proviso that such order can

[40] Crl.O.P.No.20008 of 2013 and M.P.No.1 of 2013 dated 19.12.2014 (accessible on the web site of Madras High Court)

be issued only in respect of the persons who were arrested at any point of time in the course of the investigation of the case. The rationale for the proviso is not clear and it substantially hampers the power of the Magistrates. The police officers need to arrest a person if his signature and hand writings are to be analysed by the scientific experts though such arrest is otherwise unnecessary. Still this provision is of great help to the police investigating serious economic crimes and the cases in which documentary evidence is of great help in proving the scientific evidence relating to the disputed hand writing and signatures.

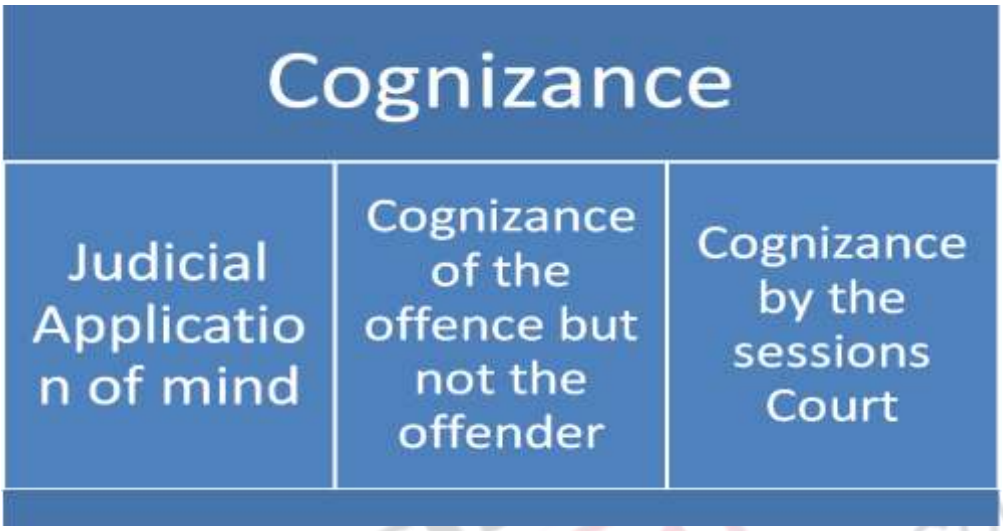
(d) Recording of Dying Declarations and Conducting of the Identification Parades:

Though this practice is not uniform throughout the country in some of the States it is the Judicial Magistrates who record dying declarations, conduct test identification of suspects and property. In few States it is the Executive Magistrates who discharge these duties. When the proceedings are done by the Judicial Magistrates more value and credibility are attached. There is no provision in this regard in the Cr.P.C. The Criminal Rules of Practice and Circular Orders framed by various High Courts make it obligatory for the judges to record dying declarations on receipt of the requisition from the medical officers and conduct test identification parade on requisition of the police officers.

(e) Sending samples to the Forensic Science experts:

Those who are familiar with court procedures can understand the value of sending the disputed documents, material objects and samples collected during the investigation to the forensic science experts through the courts. Though there is no provision in the Cr.P.C which makes it mandatory to send the samples through the courts in many cases the police prefer to send the samples through the Magistrates and in such cases the report of the expert is directly received by the court. This measure also makes the evidence procured from the experts easily proved and reliable. In certain cases where it is necessary to order the DNA test and the other scientific tests the Magistrate can pass orders to the effect. The Magistrate whenever necessary can order for the examination of any person by a medical officer.

8. Taking Cognizance of an offence



One concept which has been subject matter of confusion despite several judgments clarifying it is, taking Cognizance. The term is not defined in the Cr.P.C though it has been used in several contexts. The courts have been exploring the meaning of this term from time to time. The word "cognizance" has no esoteric or mystic significance in criminal Law or procedure.[41] Taking cognizance does not involve any formal action, or indeed action of any kind, but occurs, as soon as a Magistrate, as such applies his mind to the suspected commission of an offence for the purpose of proceeding to take subsequent steps towards inquiry or trial. There may be circumstances where the Magistrate applies his mind to the facts placed before him, not with an intention to proceed with any kind of inquiry or trial and in such circumstances it cannot be said that he has taken cognizance of the offence. Such circumstances include examination of a complaint for referring a case to the police for investigation under section 156(3) of the Cr.P.C., issuing orders for search of any premises etc.

There are ten sections in the Cr.P.C which deal with the subject of taking cognizance. While sections 190 to 194 deal with taking cognizance of offences by the different courts in

[41] Dr.KN Chandrasekharan Pillai, *R V Kelkar's Criminal Procedure*, (2008)(Fifth edition)Eastern Book Company) at p. 217

different situations , sections 195 to 199 deal with bar on taking cognizance of certain offences except under certain circumstances. Section 190 of the Cr.P.C describes the three modes in which a magistrate can take cognizance of the offence. It can be either (1) on receiving a complaint of facts which constitute such offence or (2) on police report as defined under section 2 (r) of the Cr.P.C, or (3) upon any information from any person other than a police officer, or upon his knowledge, that such an offence has been committed. Section 192 of the Cr.P.C. provides for taking of cognizance of the offences by the Chief Judicial Magistrate. The statute enables the Chief Judicial Magistrate either to try the case by himself or transfer it to any other Magistrate competent to try the case. The Cr.P.C vested the Chief Judicial Magistrate with the power of transfer the cases which cannot be done by the Magistrate of First Class. Section 193 of the Cr.P.C. provides that except as otherwise provided by the Code (Cr.P.C.) or any other law, no Court of Session shall take cognizance of an offence as a court of original jurisdiction unless the case is committed to it by a Magistrate under the Code. Thus the Sessions Court can take cognizance of an offence only when the case is committed to it by a Magistrate. An interesting question came before the Constitutional Bench in *Dharam Pal vs. State of Haryana*,[42] as to whether the Magistrate takes cognizance of the offence before committing the case to the Court of Session. The Supreme Court opined that since the cognizance of the offence can be taken only once the Magistrate does not take cognizance and on committal of the case the Sessions Court takes cognizance of the offence. It is submitted that this view is not clear as the Magistrate committing the case also applies judicial mind with an intention to proceed legally against the accused and the view of the Constitutional Bench needs reconsideration by the Supreme Court. However the courts which are conferred with the power of original criminal jurisdiction can take cognizance without the case being committed to it by Magistrate. There are some special laws which confer such jurisdiction on such courts which though are Sessions Courts, can directly take cognizance of the offences. The Special Judges appointed under section 3 of the Prevention of Corruption Act, 1988 can be cited as an example of a Sessions Court on which the law conferred the original jurisdiction.

[42](2014)3 SCC 306

Sections 195 to 199 are exceptions to the general rule and they impose conditions on taking cognizance of certain offences by the court. It is only on fulfilling some conditions the court can take cognizance of the offences. For example, under section 195(1) of the Cr.P.C. no court can take cognizance of the offences punishable under sections 172 to 188 of the Indian Penal Code, 1860 except on a written complaint by the court. It is only after taking cognizance of the offence the court decides whether process (summonses or warrants) can issue to the accused under section 204 of the Cr.P.C.

9. Supplying the Copies of police Report and other documents

When the accused appears before the court the accused or when the accused is brought before the court on issuance of process the first duty of the Magistrate is to furnish the copies of all the documents relied upon by the prosecution as contemplated under section 207 of the Cr.P.C in cases instituted on police report or section 208 of the Cr.P.C. in cases instituted otherwise than on police report. The Magistrate shall be careful in furnishing all the documents to the accused which is very important function if the court has to enhance fair trial of the accused. In all case instituted on police report the court has to furnish the copies of the FIR, charge sheet/challan, statements recorded by the police during the investigation under section 161(3) of the Cr.P.C., confessions and statements recorded by the Magistrate under section 164 of the Cr.P.C. and all the relevant documents on which the prosecution is relying on to prove the accusation against the accused. However, if the documents are voluminous, the court instead of furnishing the copy, direct that the accused or his pleader can inspect the document. The police officer filing the challan can request the court no to furnish certain portions of the statements recorded by the investigating officers, to the police. If the Magistrate is satisfied that the request is genuine he can direct that the portions in respect of which such a request is made are to be excluded from the copies of the documents that are to be furnished to the accused. Section 208 of the Cr.P.C describes the copies of such documents which are to be furnished to the accused in cases instituted otherwise than on a police report and which are exclusively triable by the Court of Sessions. The court under this provision has to furnish the copies of the statements recorded

under section 200 or 202 of the Cr.P.C., statements or confessions if any recorded under sections 161 and 164 of the Cr.P.C. and other relevant documents. Interestingly there is no provision in the Cr.P.C. which obligates the Magistrate to furnish the copies of the documents instituted otherwise than on a police report and which are not triable by the Court of Sessions.

Though it is provided that the copies are to be furnished by the Magistrate, the statute did not mention as to who has to file the copies. In some of the States, the High Courts have established a separate section in every criminal court to copy the documents while in some other States the police are filing the copies along with the charge sheet/challan. It is submitted that uniformity in this process by choosing the best practice is needed.

10. Committing the cases to the Court of Sessions

Under the Cr.P.C. the courts of Magistrates and Sessions Courts function as trial courts, First Schedule annexed to the Cr.P.C. mentions whether a particular offence is triable by the Magistrate or the Court of Sessions. If the offence is exclusively triable by the Court of Sessions, the Magistrate has to commit the case to the Court of Sessions under section 209 of the Cr.P.C The Magistrate has to ensure whether section 207 of the Cr.P.C is to be complied with and notify the Public Prosecutor of the court to which the case is to be committed. The Magistrate committing the case is under an obligation to send the record of the case and the material objects to the Court of Sessions. Before the commencement of the Code of Criminal Procedure, 1973, the previous Code prescribed elaborate procedure for an Inquiry before committing the case the Court of Sessions, the procedure which was dispensed under the present Code. The Magistrate at any stage of Inquiry or trial can commit the case to the Court of Session though initially it was considered as the case triable by the Magistrate and later it appears to him that it ought to be tried by the Court of Session.

B. Cases instituted otherwise than on a Police report

The Magistrate can take cognizance of the offences otherwise than on a police report and in such cases the court has to examine the Complainant and his witnesses and he has to record the

substance of such examination in writing. The complaint made to the Magistrate need not be in writing. However, if the complaint is made in writing by a public servant acting or purporting to act in the discharge of public duties or when any court has made the complaint, the magistrate need not examine the complainant or the witnesses of the complainant.[43] If the complaint is made to the Magistrate who is not competent to take cognizance he has to return the complaint to be presented in proper court and if the complaint is not in writing the magistrate has to direct the complainant to the court competent to entertain the complainant.[44] The magistrate has to issue the process if he is of the opinion that the court can proceed against the accused and he can even direct further investigation by the police.[45] Once the process is issued the court has to follow the procedure for trial of the cases instituted otherwise on a police report.[46]

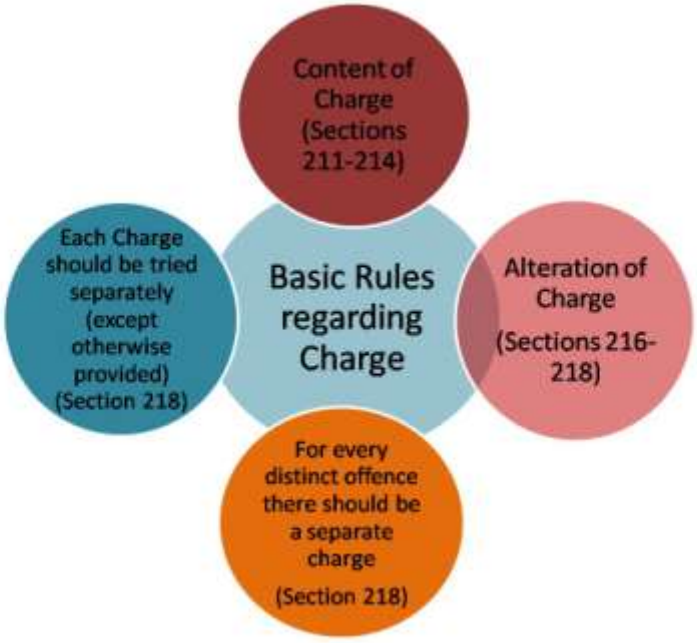
1. **Discharge**

On appearance of the accused the court has to furnish the copies of the documents mentioned in section 207 of the Cr.P.C and when the case is triable by the Magistrate as warrant case the Magistrate acting under section 239 of the Cr.P.C. has to consider the police report and other documents forwarded under section 173 of the Cr.P.C to find out whether charge against the accused will be groundless. The Magistrate is required to hear the accused as well as the prosecution to decide whether framing of the charges against the accused is appropriate. If he considers that the charges will be groundless the accused shall be discharged. Similarly the Sessions Judge has to undertake the same exercise under section 227 of the Cr.P.C in cases which are committed to him by the Magistrate. In cases instituted otherwise than on a police report if the Magistrate considers that no case against the accused has been made out which, if un rebutted, would warrant his conviction, the accused shall be discharged by him. There is no such provision for discharge of the accused in cases triable as Summons Cases and in cases of Summary trials. Still such power can be exercised by the Magistrate at the stage of explaining the substance of the accusation to the accused under section 251 of the Cr.P.C.

[43] See, Section 200(a) of the Cr.P.C.
[44] Section 201 of the Cr.P.C.
[45] Section 202 of the Cr.P.C.
[46] Sections 244 to 250 of the Cr.P.C

At the time of considering whether the accused can be discharged the court cannot make a roving inquiry and shall not appreciate the evidence. The court has to consider the material produced by the prosecution in case instituted on police report and material that could be produced by the complainant in cases institutes otherwise than on police report. This provision is incorporated to check the abuse of the process of the court by making serious accusation against the accused without any substance that can stand judicial scrutiny. The standard of evaluation however is that the case of the prosecution as it stands shall not warrant further probe to come to a conclusion that the accused cannot be convicted even if all the allegations made in the charge sheet or complaint are proved.

2. Framing of the Charge



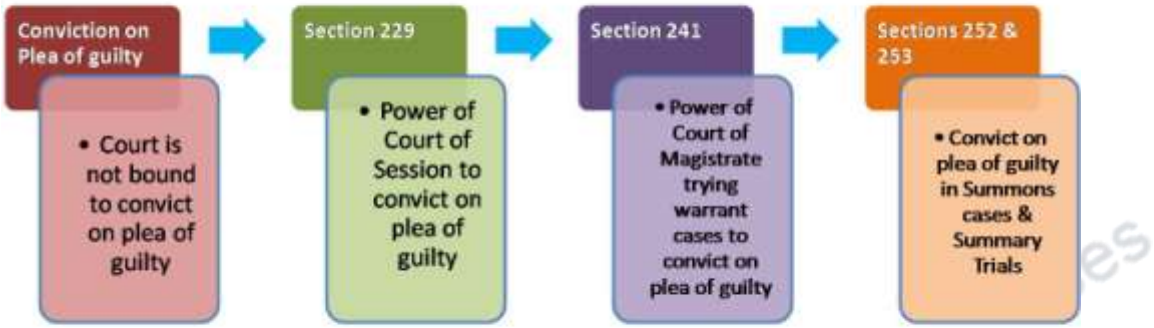
In all the cases triable by the magistrates as warrant cases and in all the cases triable by the Court of Session, charges are to be framed against the accused and they are to be explained to them in the language that can be understood by them. The purpose of framing the charges in the process of trying the accused for an offence is to bring to his notice of allegations made against him and to make him prepare his defence. Chapter XII of the Code of Criminal Procedure (for short

"Code") contains provisions regarding framing, non framing, alteration and joinder of charges. Achieving precision and accuracy in the exercise of framing charges, though desirable is not possible in all cases Provisions are made in the Cr.P.C., with pragmatic vision, to delete and alter the charges,[47] to frame alternative charges and also making possible to convict a person without charges. The concept of alternative charges is well known though the concept of inclusive charges is slowly gaining the attention of legal scholars.[48] Though as far as possible the courts shall endeavour to frame accurate charges, against the accused, there cannot be any over emphasizing of the accuracy. As rightly stated in *Willie (William) Slaney vs. State of M.P*[49]

" But when all is said and done what we are concerned to see is whether the accused had a fair trial ,whether he knew what he was being tried for ,whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."[50]

[47] Section 216 of the Cr.P.C.
[48] See, *Pattabhi Rama Rao Kovuru and Neeraj Tiwari*, Judicial Understanding of Alternative and Inclusive Charges, (2014) 1 MLJ (Crl) 29
[49] AIR 1956 SC116
[50] *Ibid* at p.128 (as per Bose J.)

3. Pleading Guilty



Once the court frames the charges against the accused, the same are put to his notice informing him the accusation made against him by the prosecution and the complainant and the court shall ensure that the accused understood the charges framed against him. In Summary Trial and cases triable as Summons cases the court explains the accused the substance of the accusation made against him. If the accused pleads guilty he can be convicted of the offence.[51] It is not necessary that the plea of the accused is to be accepted in all cases. The Judge or the Magistrate can ignore the guilty plea of the accused and require the prosecution to prove the accusation. If the accused does not plead guilty and chooses the trial -the Trial commences.

[51] Accused can be convicted on pleading guilty Under section 229 of the Cr.P.C. in the cases triable by the Court of Session, under section 241 of the Cr.P.C. in warrant cases and under section 252 of the Cr.P.C. in Summons Cases (and also summary trials) triable by the Magistrate.

Summary

The courts have been playing an important role in pre-trial process and have been acting as the guardians of the rights of the accused during the period. The rights of the accused at the time of arrest are protected by the Magistrates who act as supervisors of the investigation. Apart from it the Magistrate performs certain duties like recording of the confessions of the accused, procuring the specimen signatures and hand writings for comparing with the disputed signatures and hand writings, conducting of the test identification parades of the suspects and property etc. While performing such functions also the Magistrate ensures the fairness in the investigation.