Nupur Talwar vs Cbi & Anr on 7 June, 2012

Equivalent citations: AIR 2012 SUPREME COURT 1921, 2013 (2) ALL LJ 295, 2013 (2) ABR 345, (2012) 3 RECCRIR 595, (2012) 3 CURCRIR 23, (2012) 3 CHANDCRIC 5, (2012) 2 MADLW(CRI) 862, (2012) 2 MAD LJ(CRI) 799, (2012) 3 CRIMES 31, (2012) 2 ORISSA LR 185, (2012) 3 ALLCRIR 2908, (2012) 5 SCALE 744, (2012) 78 ALLCRIC 481, (2012) 52 OCR 687, 2012 (11) SCC 465, 2013 (1) SCC (CRI) 689, 2012 (06) ADJ 8 NOC, 2012 (3) KLT SN 8 (SC)

Bench: A.K. Patnaik, Jagdish Singh Khehar

"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

REVIEW PETITION (CRL.) NO. 85 OF 2012

IN

CRIMINAL APPEAL NO. 68 OF 2012

Nupur Talwar …. Petitioner

Versus

Central Bureau of Investigation & Anr. …. Respondents

O R D E R

1. The instant controversy emerges out of a double murder, committed on the night intervening 15-16.5.2008. On having found the body of Aarushi Talwar in her bedroom in house no. L-32, Jalvayu Vihar, Sector 25, Noida, her father Dr. Rajesh Talwar got a first information report registered at Police Station Sector 20, Noida, on 16.5.2008. In the first information report Dr. Rajesh Talwar pointed the needle of suspicion at Hemraj, a domestic help in the household of the Talwars. On 17.5.2008 the dead body of Hemraj was recovered from the terrace of the same house, i.e., house no. L-32, Jalvayu Vihar, Sector 25, Noida, where Aarushi's murder had also allegedly been committed.

2. The initial investigation into the double murder was carried out by the U.P. Police. On 29.5.2008 the State of Uttar Pradesh handed over the investigation to the Central Bureau of Investigation (hereinafter referred to as, the CBI), thereupon investigation was conducted by the CBI.

3. During the course of investigation, besides Dr. Rajesh Talwar, the needle of suspicion came to be pointed towards Krishna Thadarai, Rajkumar and Vijay Mandal. Dr. Rajesh Talwar was arrested on 23.5.2008. Originally a three days' remand was granted to interrogate him to the U.P. Police. Dr. Rajesh Talwar remained in police and judicial custody from time to time, wherefrom, he was eventually released on bail on 11.7.2008. The other three individuals, namely, Krishna Thadarai, Rajkumar and Vijay Mandal were also arrested by the police. Since investigation against the aforesaid three could not be completed within the period of 90 days, they were ordered to be released on bail.

4. Having investigated into the matter for a considerable length of time, the CBI submitted a closure report on 29.12.2010. The reasons depicted in the closure report indicated the absence of sufficient evidence to prove the alleged offences against the accused Dr. Rajesh Talwar, beyond reasonable doubt. A summary of the reasons recorded in the said report itself, are being extracted hereunder:

> "Despite best efforts by investigating team, some of the major shortcomings in the evidence are :-
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> i. No blood of Hemraj was found on the bed sheet and pillow of Aarushi. There is no evidence to prove that Hemraj was killed in the room of Aarushi.
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> ii. Dragging mark on steps only indicate that murder has taken place somewhere other than the terrace.
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> iii. On the clothes of Dr. Rajesh Talwar, only the blood of Aarushi was found but there was no trace of blood of Hemraj.
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> iv. The clothes that Dr. Nupur Talwar was wearing in the photograph taken by Aarushi in the night of the incident were seized by CBI but no blood was found during forensic examination.
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> v. Murder weapons were not recovered immediately after the offence.
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> One of the murder weapon i.e. sharp edged instrument could not be recovered till date and expert could not find any blood stain or DNA of victims from golf stick to directly link it to the crime.
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> vi. There is no evidence to explain the finger prints on the scotch bottle (which were found along with blood stains of both the victims on the bottle). As per police diary, it was taken into possession on 16th morning itself. In spite of best efforts, the fingerprint(s) could not be identified.
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> vii. The guards of the colony are mobile during night and at the entrance they do not make any entry. Therefore, their statements regarding movement of persons may not be foolproof. viii. Scientific tests on Dr. Rajesh Talwar and Dr. Nupur Talwar have

not conclusively indicated their involvement in the crime.

ix. The exact sequence of events between (in the intervening night of 15-16/05/2008) 00.08 mid night to 6:00 AM in the morning is not clear. No evidence has emerged to show the clear role of Dr. Rajesh Talwar and Dr. Nupur Talwar, individually, in the commission of crime.

x. A board of experts constituted during earlier investigation team has given an opinion that the possibility of the neck being cut by khukri cannot be ruled out, although doctors who have conducted postmortem have said that cut was done by surgically trained person with a small surgical instrument.

xi. There is no evidence to explain the presence of Hemraj's mobile in Punjab after murder.

xii. The offence has occurred in an enclosed flat hence no eye witness are available.

xiii. The blood soaked clothes of the offenders, clothes used to clean the blood from the flat and stair case, the sheet on which the Hemraj was carried and dragged on the roof, the bed cover which was used to cover the view from the steel iron grill on the roof are not available and hence could not be recovered.

26. The investigation revealed several suspicious actions by the parents post occurrence, but the circumstantial evidence collected during investigation has critical and substantial gaps. There is absence of a clear cut motive and incomplete understanding of the sequence of events and non-recovery of the weapon of offence and their link to either the servants or the parents.

In view of the aforesaid shortcomings in the evidence, it is felt that sufficient evidence is not available to prove the offence(s) U/s 302/201 IPC against accused Dr. Rajesh Talwar beyond reasonable doubt. It is, therefore, prayed that the case may be allowed to be closed due to insufficient evidence."

5. On the receipt of the closure report submitted by the CBI, the Special Judicial Magistrate (CBI), Ghaziabad (hereinafter referred to as "the Magistrate") issued notice to the Dr. Rajesh Talwar in his capacity as the first informant. In response to the notice received by Dr. Rajesh Talwar, he submitted a detailed protest petition dated 25.1.2011, wherein, he objected to the closure report (submitted by the CBI). In the protest petition he prayed for further investigation, to unravel the identity of those responsible for the twin murders of Aarushi Talwar and Hemraj.

6. On 9.2.2011, the Magistrate rejected the closure report submitted by the CBI. The Magistrate also rejected, the prayer made in the protest petition for further investigation (by Dr. Rajesh Talwar). Instead, having taken cognizance, the Magistrate summoned Dr. Rajesh Talwar (father of Aarushi Talwar) and his wife Dr. Nupur Talwar (mother of Aarushi Talwar) for committing the murders of

Aarushi Talwar and Hemraj, as also, for tampering with the evidence.

7. The aforestated summoning order dated 9.2.2011, was assailed by Dr. Nupur Talwar by filing a revision petition before the High Court of judicature at Allahabad (Criminal Revision Petition no. 1127 of 2011). The aforesaid Criminal Revision Petition came to be dismissed by the High Court vide an order dated 18.3.2011. Dissatisfied with the order passed by the High Court dated 18.3.2011, Dr. Nupur Talwar approached this Court by filing Special Leave Petition (Criminal) no. 2982 of 2011 (renumbered as Criminal Appeal no. 16 of 2011). The aforesaid Criminal Appeal was dismissed by this Court by an order dated 6.1.2012. Through the instant review petition, the petitioner Dr. Nupur Talwar has expressed the desire, that this Court reviews its order dated 6.1.2012 (dismissing Criminal Appeal no. 16 of 2011). The instant Review Petition was entertained, and notice was issued to the respondents. Lengthy arguments were advanced at the hands of the learned counsel representing the review petitioner. Learned counsel representing the CBI also went to great lengths, to repudiate the same. It emerged from the submissions advanced at the hands of the rival parties, that the focus of attack was against the order passed by the Magistrate dated 9.2.2011.

8. The order passed by the Magistrate on 9.2.2011 was startlingly criticized for being unnecessarily exhaustive. The Magistrate was accused of discussing the evidence in minute detail, and thereby, for having evaluated the merits of the controversy, well before the beginning of the trial. It was sought to be canvassed, that even if the Magistrate having taken cognizance, was satisfied that process deserved to be issued, he ought not have examined the factual intricacies of the controversy. The Magistrate, it was submitted, has the authority only to commit the controversy in hand, to a Court of Session, as the alleged offences emerging out of the first information report dated 16.5.2008, and the discovery of the murder of Hemraj thereafter, are triable only by a Court of Session. It was submitted, that the controversy had been examined as if, the Magistrate was conducting the trial. It was asserted, that a perusal of the order passed by the Magistrate dated 9.2.2011, gives the impression of the passing of a final order, on the culmination of trial. It was, therefore, submitted, that the order dated 9.2.2011 be set aside, as all the inferences, assumptions and conclusions recorded therein, were totally uncalled for.

9. Undoubtedly, merely for taking cognizance and/or for issuing process, reasons may not be recorded. In Kanti Bhadra Shah vs. State of West Bengal, (2000) 1 SCC 722, this Court having examined sections 227, 239 and 245 of the Code of Criminal Procedure, concluded, that the provisions of the Code mandate, that at the time of passing an order of discharge in favour of an accused, the provisions referred to above necessitate reasons to be recorded. It was, however, noticed, that there was no such prescribed mandate to record reasons, at the time of framing charges against an accused. In U.P. Pollution Control Board vs. M/s. Mohan Meakins Ltd. and others, (2000) 3 SCC 745, the issue whether it was necessary for the trial court to record reasons while issuing process came to be examined again, and this Court held as under:-

> "2. Though the trial court issued process against the accused at the first instance, they desired the trial court to discharge them without even making their first appearance in the court. When the attempt made for that purpose failed they moved for exemption from appearance in the court. In the meanwhile the Sessions Judge,

> Lucknow (Shri Prahlad Narain) entertained a revision moved by the accused against the order issuing process to them and, quashed it on the erroneous ground that the magistrate did not pass "a speaking order" for issuing such summons.
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> 3. The Chief Judicial Magistrate, (before whom the complaint was filed) thereafter passed a detailed order on 25.4.1984 and again issued process to the accused. That order was again challenged by the accused in revision before the Sessions Court and the same Sessions Judge (Shri Prahlad Narain) again quashed it by order dated 25.6.1984.

5. We may point out at the very outset that the Sessions Judge was in error for quashing the process at the first round merely on the ground that the Chief Judicial Magistrate had not passed a speaking order. In fact it was contended before the Sessions judge, on behalf of the Board, that there is no legal requirement in Section 204 of the Code of Criminal Procedure (For short the 'Code') to record reasons for issuing process. But the said contention was spurned down in the following words:

> My attention has been drawn to Section 204 of the Code of Criminal Procedure and it has been argued that no reasons for summoning an accused person need be given. I feel that under Section 204 aforesaid, a Magistrate has to form an opinion that there was sufficient ground for proceeding and, if an opinion had to be formed judicially, the only mode of doing so is to find out express reasons for coming to the conclusions. In the impugned order, the learned Magistrate has neither specified any reasons nor has he even formed an opinion much less about there being sufficient ground for not proceeding with the case.

6. In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons vide Kanti Bhadra Shah v. State of W.B., (2000) 1 SCC 722. The following passage will be apposite in this context:

> “12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial.”

12. In the above context what is to be looked at during the stage of issuing process is whether there are allegations in the complaint by which the Managers or Directors of the company can also be proceeded against, when the company is alleged to be guilty of the offence. Paragraph 12 of the complaint read thus:

> "That the accused persons from 2 to 11 are Directors/Managers/Partners of M/s. Mohan Meakins Distillery, Daliganj, Lucknow, as mentioned in this complaint are responsible for constructing the proper works and plant for the treatment of their highly polluting trade effluent so as to conform the standard laid down by the Board. Aforesaid accused persons are deliberately avoiding to abide by the provisions of Sections 24 and 26 of the aforesaid Act which are punishable respectively under Sections 43 and 44 of the aforesaid Act, for which not only the company but its Directors, Managers, Secretary and all other responsible officers of the accused company, responsible for the conduct of its business are also liable in accordance with the provision of the Section 47 of the Act." The appellant has further stated in paragraph 23 of the complaint that "the Chairman, Managing Directors and Directors of the company are the persons responsible for the act and therefore, they are liable to be proceeded against according to the law."

(emphasis is mine) Whether an order passed by a Magistrate issuing process required reasons to be recorded, came to be examined by this Court again, in Dy. Chief Controller of Imports and Exports vs. Roshanlal Agarwal & Ors., (2003) 4 SCC 139, wherein this Court concluded as below:-

> "9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in U.P. Pollution Control Board v. M/s. Mohan Meakins Ltd. & Ors., (2000) 3 SCC 745, and after noticing the law laid down in Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722, it was held as follows:
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> "The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

(emphasis is mine) Recently, in Bhushan Kumar and another vs. State (NCT of Delhi) and another (Criminal Appeal no. 612 of 2012, decided on 4.4.2012) the issue in hand was again considered. The observations of this Court recorded therein, are being placed below:-

"9. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished Under Section 174 Indian Penal Code. It is a ground for contempt of Court.

10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

11. Time and again it has been stated by this Court that the summoning order Under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith." (emphasis is mine) It is therefore apparent, that an order issuing process, cannot be vitiated merely because of absence of reasons.

10. The matter can be examined from another perspective. The Code of Criminal Procedure expressly delineates irregularities in procedure which would vitiate proceedings. Section 461 thereof, lists irregularities which would lead to annulment of proceedings. Section 461 aforesaid is being extracted hereunder:-

"461. Irregularities which vitiate proceedings-

If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-

section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446, his proceedings shall be void." In the list of irregularities indicated in Section 461 of the Code of Criminal Procedure, orders passed under Section 204 thereof, do not find a mention. In a situation, as the one in hand, Section 465(1) of the Code of Criminal Procedure, protects orders from errors omissions or irregularities, unless "a failure of justice" has been occasioned thereby.

Most certainly, an order delineating reasons cannot be faulted on the ground that it has occasioned failure of justice. Therefore, even without examining the matter any further, it would have been sufficient to conclude the issue. The present situation, however, requires a little further elaboration. Keeping in mind the peculiarity of the present matter and the special circumstances arising in this case, some observations need to be recorded. Accordingly, to determine whether reasons ought to have been recorded by the Magistrate, in this case, is being dealt with in the succeeding paragraphs.

11. On the basis of the foundational facts already recorded above, I shall examine the merits of the first submission advanced before the Court. First and foremost it needs to be remembered, that the CBI had submitted a closure report on 29.12.2010. The Magistrate could have accepted the report

and dropped proceedings. The Magistrate, however, chose not to accept the CBI's prayer for closure. Alternatively, the Magistrate could have disagreed with the report, by taking a view (as she has done in the present case) that there were sufficient grounds for proceeding further, and thereby, having taken cognizance, could have issued process (as has been done vide order dated 9.2.2011). A third alternative was also available to the Magistrate. The Magistrate could have directed the police to carry out further investigation. As noticed hereinabove, the Magistrate inspite of the submission of a closure report, indicating the absence of sufficient evidence, having taken cognizance, chose to issue process, and thereby, declined the third alternative as well. Since the CBI wanted the matter to be closed, it was appropriate though not imperative for the Magistrate to record reasons, for differing with the prayer made in the closure report. After all, the CBI would have surely wished to know, how it went wrong. But then, there are two other important factors in this case, which further necessitated the recording of reasons. Firstly, the complainant himself (Dr. Rajesh Talwar, who authored the first information report dated 16.5.2008) was being summoned as an accused. Such an action suggests, that the complainant was really the accused. The action taken by the Magistrate, actually reversed the position of the adversaries. The party which was originally pointing the finger, is now sought to be pointed at. Certainly, the complainant would want to know why. Secondly, the complainant (Dr. Rajesh Talwar) had filed a protest petition dated 25.1.2011, praying for a direction to the police to carry out further investigation. This implies that the CBI had not been able to procure sufficient evidence on the basis whereof, guilt of the perpetrators of the twin murders of Aarushi Talwar and Hemraj could be established. Whilst, the rival parties were pleading insufficient evidence, the Magistrate's order dated 9.2.2011 issuing process, implies the availability of sufficient material to proceed against the accused. This second aspect in the present controversy, also needed to be explained, lest the Magistrate who had chosen to issue process against all odds, would have been blamed of having taken the decision whimsically and/or arbitrarily. Before rejecting the prayer made in the closure report, as also, the prayer made in the protest petition, it was appropriate though not imperative for the Magistrate to narrate, why she had taken a decision different from the one sought. Besides the aforesaid, there is yet another far more significant reason for recording reasons in the present matter. The incident involving the twin murders of Aarushi Talwar and Hemraj are triable by a Court of Session. The authority of the Magistrate was limited to taking cognizance and issuing process. A Magistrate in such a situation, on being satisfied, has the authority to merely commit the case for trial to a Court of Session, under Section 209 of the Code of Criminal Procedure. Section 209 is being extracted hereunder:

> "Commitment of case to Court of Session when offence is triable exclusively by it – When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall –
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> (a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session." In this background, it was essential for the Magistrate to highlight, for the perusal of the Court of Session, reasons which had weighed with her, in not accepting the closure report submitted by the CBI, as also, for not acceding to the prayer made in the protest petition, for further investigation. It was also necessary to narrate what prompted the Magistrate to summon the complainant as an accused. For, it is not necessary that the Court of Session would have viewed the matter from the same perspective as the Magistrate. Obviously, the Court of Session would in the first instance, discharge the responsibility of determining whether charges have to be framed or not. Merely because reasons have been recorded, the Court of Session will have an opportunity to view the matter, in the manner of understanding of the Magistrate. If reasons had not been recorded, the Court of Session may have overlooked, what had been evaluated, ascertained and comprehended by the Magistrate. Of course, a Court of Session, on being seized of a matter after committal, being the competent court, as also, a court superior to the Magistrate, has to examine all issues independently, within the four corners of law, without being influenced by the reasons recorded in the order issuing process. In the circumstances mentioned hereinabove, it was befitting for the Magistrate to pass a well reasoned order, explaining why she was taking a view different from the one prayed for in the closure report. It is also expedient for the Magistrate to record reasons why the request made by the complainant (Dr. Rajesh Talwar) praying for further investigation, was being declined. Even the fact, that the complainant (Dr. Rajesh Talwar) was being summoned as an accused, necessitated recording of reasons. An order passed in the circumstances noted hereinabove, without outlining the basis therefor, would have been injudicious. Certainly the Magistrate's painstaking effort needs a special commendation. At this juncture, it would be apposite to notice the observations recorded by this Court in Rupan Deol Bajaj and another vs. KPS Gill and another, (1995) 6 SCC 194, wherein this Court remarked as under:-

"28. Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the complainant, as the person aggrieved raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefore be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimize chances of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such

police report without any demur from the complainant. As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant, it has got to be set aside and we do hereby set it aside. Consequent thereupon, two courses are left open to us; to direct the learned Magistrate to hear the parties afresh on the question of acceptance of the police report and pass a reasoned order or to decide for ourselves whether it is a fit case for taking cognizance under Section 190(1)(b) Cr.P.C. Keeping in view the fact that the case is pending for the last seven years only on the threshold question we do not wish to lake the former course as that would only delay the matter further. Instead thereof we have carefully looked into the police report and its accompaniments keeping in view the following observations of this Court in H.S. Bains. v. State, (1980) 4 SCC 631, with which we respectfully agree:

"The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclosed an offence under Section 324, Indian Penal Code only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report."

29. Our such exercise persuades us to hold that the opinion of' the Investigating Officer that the allegations contained in the F.I.R. were not substantiated by the statements of witnesses recorded during investigation is not a proper one for we find that there are sufficient materials for taking cognizance of the offences under Sections 354 and 509 I.P.C. We, however, refrain from detailing or discussing those statements and the nature and extent of their corroboration of the F.I.R. lest they create any unconscious impression upon the Trial Court, which has to ultimately decide upon their truthfulness, falsity or reliability, after those statements are translated into evidence during trial. For the selfsame reasons we do not wish to refer to the arguments canvassed by Mr. Sanghi, in support of the opinion expressed in the police (final) report and our reasons in disagreement thereto." (emphasis is mine) Therefore, even though the Magistrate was not obliged to record reasons, having passed a speaking order while issuing process, the Magistrate adopted the more reasonable course, though the same was more ponderous, cumbersome and time consuming.

12. Therefore, in the present set of circumstances, the Magistrate having examined the statements recorded during the course of investigation under Sections 161 and 164 of the Code of Criminal Procedure, as also, the documents and other materials collected during the process of investigation, was fully justified in recording the basis on which, having taken cognizance, it was decided to issue process. I, therefore, hereby find absolutely no merit in the criticism of the Magistrate's order, in being lengthy and detailed. In passing the order dated 9.2.2011 the Magistrate merely highlighted the circumstances emerging out of the investigation carried out in the matter, which constituted the basis of her decision to issue process. The Magistrate's order being speaking, cannot be stated to have occasioned failure of justice. The order of the Magistrate, therefore, cannot be faulted on the ground that it was a reasoned order.

13. During the course of hearing, the primary ground for assailing the order of the Magistrate dated 9.2.2011 was focused on projecting, that the Magistrate had not only drawn incorrect conclusions, but had also overlooked certain vital factual aspects of the matter. Before examining the details on the basis whereof the order passed by the Magistrate (dated 9.2.2011) can be assailed, it will be necessary to first summarize the basis whereon the Magistrate perceived, that there was sufficient material for proceeding against the accused in the present controversy. Different aspects taken into consideration by the Magistrate are accordingly being summarized hereunder:

Firstly, based on the statements of Umesh Sharma and Bharti recorded during the course of investigation, coupled with the factual position depicted in the first information report, it was sought to be inferred, that on the night of the incident Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi Talwar and Hemraj only were present at the place of the occurrence, namely, house no. L-32 Jalvayu Vihar, Sector 25, Noida. Being last seen together, the needle of suspicion would point at the two surviving persons, specially if it could be established, that the premises had not been broken into. Secondly, on the basis of the statement of Mahesh Kumar Mishra, recorded during the course of investigation, who alleged that he was told by Dr. Rajesh Talwar, that he had seen his daughter Aarushi Talwar on the fateful night upto 11:30 p.m., whereafter, he had locked the room of his daughter from outside, and had kept the key near his bed head. Coupled with the fact, that the lock on Aarushi Talwar's room was of a kind which could be opened from inside without a key but, needed a key to be opened from outside. And further, coupled with the fact, that the outer exit/entry door(s) to the flat of the Talwars, had not been broken into. It was assumed, that there was no outside forced entry, either into the bedroom of Aarushi Talwar or the flat of the Talwars, on the night of the twin murders of Aarushi Talwar and Hemraj.

Thirdly, the Magistrate noticed from the investigation carried out, that the dead body of Hemraj was covered with a panel of a cooler, and on the grill a bed sheet had been placed. Likewise, from the fact that Aarushi Talwar's body was found murdered on

her own bed, yet her toys were found arranged "as such" behind the bed and also, there were no wrinkles on the bed sheet. On the pillow kept behind Aarushi Talwar, there ought to have been blood stains when she was attacked (as she was hit on her head, and her neck had been slit), but the same were absent. These facts were highlighted by the Magistrate to demonstrate the dressing up of the place(s) of occurrence, to further support the assumption of the involvement of an insider, as against, an outsider. Fourthly, based on the statements of Virendera Singh, Sanjay Singh, Raj Kumar, Chandra Bhushan, Devender Singh, Ram Vishal and Punish Rai Tandon, recorded during the course of investigation, it was sought to be assumed, that no outsider was seen either entering or leaving house no. L-32, Jalvayu Vihar, Sector 25, Noida, on the night intervening 15-16.5.2008. This also, according to the Magistrate, affirmed the main deduction, that no outsider was involved.

Fifthly, based on the statements of Dr. Anita Durrani, Punish Rai Tandon and K.N. Johri, recorded during the course of investigation, it was sought to be inferred, that the other servants connected with the household of the Talwar family, namely, Raj Kumar, Vijay Mandal and Krishna Thadarai, were present elsewhere at the time of the commission of the twin murders, and also that, there was no material depicting their prima facie involvement or motive in the crime, specially because, no "... precious things like jewellery or any other thing from the house of Talwars couple ..." was found missing and further that "... no rape on Aarushi Talwar had been confirmed ...". Accordingly, it was sought to be reasoned, that no outsider had entered the premises.

Sixthly, from the statements of Deepak Kanda, Bhupender Singh and Rajesh Kumar, recorded during the course of investigation, it was felt that on the night when the murder was committed, i.e. the night intervening 15- 16.5.2008 the internet connection was regularly used by Dr. Rajesh Talwar from 11:00 p.m. to 12:08 a.m. In fact, both Dr. Rajesh Talwar, as also, Dr. Nupur Talwar themselves confirmed to the witnesses whose statements were recorded during the course of investigation, that the internet router was switched on at 11:00 p.m. and Dr. Rajesh Talwar had thereafter used the internet facility. Based on this factual position it was gathered, that both Dr. Rajesh Talwar and Dr. Nupur Talwar were awake and active at or around the time of occurrence (determined in the post-mortem report).

Seventhly, from the statements of Sunil Kumar Dorhe, Naresh Raj, Ajay Kumar and Dinesh Kumar recorded during the course of investigation, it was sought to be inferred, that the private parts of the deceased Aarushi Talwar were tampered with, inasmuch as, the white discharge was found only in the vaginal area of Aarushi Talwar indicating, that her private parts were cleaned after her death. The said white discharge was found not to be originating from the body of the deceased. The aforesaid inference was sought to be further supported by assertions, that the vaginal opening of Aarushi Talwar, at the time of the post mortem examination, was unusually wide. Accordingly, a deduction was made, that evidence had been tampered with, by those inside the flat, after the occurrence.

Eighthly, it was also sought to be assumed, that the death of Aarushi Talwar and Hemraj was occasioned as a consequence of injuries caused by an iron 5 golf club (on the head of both the deceased), as also, "... injury on the neck of both the deceased ... caused by a surgically trained person ...". Since the golf club in question was not immediately produced, and since, the accused themselves were surgically trained, it was gathered that Dr. Rajesh Talwar and Dr. Nupur Talwar were themselves responsible for the twin murders.

Ninthly, in paragraph 15 of the Magistrate's order dated 9.2.2011 it is noticed, that a request was made to Dr. Sunil Kumar Dhore for not mentioning the word "rape" in the post mortem proceedings. Investigation also established, that Dr. Dinesh Talwar (brother of Dr. Rajesh Talwar), had spoken to Dr. Sunil Kumar Dhore and exerted influence over Dr. Sunil Kumar Dhore through Dr. Dogra who allegedly instructed Dr. Sunil Kumar Dhore in connection with the post mortem examination. On the basis of the aforesaid material highlighted in the order dated 9.2.2011, the Magistrate further expressed the view, that influence was allegedly being exerted on behalf of the accused, on the doctor who was conducting the post mortem examination.

Tenthly, based on the statements of Umesh Sharma, Kalpana Mondal, Vimla Sarkar and Punish Tandon, recorded during the course of investigation, it was sought to be concluded, that the door leading to the terrace of house no.L-32, Jalvayu Vihar, Sector 25, Noida, had always remained open prior to the date of occurrence. It was gathered therefrom, that the lock on the door leading to the terrace of the house in question on the date of occurrence, was affixed so that the investigating agency would not immediately recover the body of Hemraj, so as to hamper the investigation. These facts allegedly spell out the negative role played by Dr. Rajesh Talwar in causing hindrances in the process of investigation. Eleventhly, based on the statements of Rohit Kocchar and Dr. Rajeev Varshney, recorded under Section 164 of the Code of Criminal Procedure, disclosing, that they had informed Dr. Rajesh Talwar, that the terrace door, the lock on the terrace door, as also, the upper steps of the staircase had blood stains. They also asserted, that Dr. Rajesh Talwar "... climbed up some steps but immediately came down and did not say anything about keys and went inside the house ...". The aforesaid narration, coupled with the fact, that Dr. Prafull Durrani one of the friends of Dr. Rajesh Talwar stated, that he was "... told by Dr. Rajesh Talwar, that the key of the terrace used to be with Hemraj. He did not know about the key ..." was the basis for assuming, that Dr. Rajesh Talwar was preventing the investigating agency from tracing the body of Hemraj, which was eventually found from the terrace, after breaking open the lock on the terrace door. Twelfthly, Umesh Sharma the driver of the Talwars, stated during the course of investigation, that he had placed two golf clubs, i.e. irons 4 and 5 in the room of Hemraj, when the Santro car owned by the Talwars, was given for servicing. The iron 5 club, which is alleged to be the weapon of crime (which resulted in a V shaped injury on the heads of both Aarushi Talwar and Hemraj), remained untraced during the course of active investigation. The same was recovered from the loft of the house of Dr. Rajesh Talwar, and handed over to the investigating agency, more than a year after the occurrence on 30.10.2009. The Magistrate noticed, that the loft from where it was allegedly found, had been checked several times by the CBI. To which the explanation of Dr. Rajesh Talwar allegedly was, that one golf club might have dropped from the golf kit, and might have been left there. This factual aspect lead to the inference, that the weapon used in the crime, was deliberately not handed over to the investigating agency, after the occurrence.

Thirteenthly, another factual aspect emerging during the course of investigation was, that the body of Hemraj was recovered on the day following the murder of Aarushi Talwar, i.e., on 17.5.2008. When Dr. Rajesh Talwar was shown the body, he could not identify it as that of Hemraj. The dead body was identified by one of Hemraj's friend. Dr. Nupur Talwar confirmed, that the body recovered from the terrace was of Hemraj, on the basis of the inscription on the shirt worn by him. From the fact that, neither Dr. Rajesh Talwar nor Dr. Nupur Talwar could identify the body of Hemraj, from its appearance, it was sought to be figured, that they were not cooperating with the investigation.

Besides the aforesaid conspicuous facts depicted in the order passed by the Magistrate, a large number of other similarly significant facts, have also been recorded, in the order dated 9.2.2011. The same are not being mentioned herein, as the expressive and weighty ones, essential to arrive at a determination on the issue in hand, have already been summarized above. Based inter alia on the inferences and the assumptions noticed above, the Magistrate issued process by summoning Dr. Rajesh Talwar and Dr. Nupur Talwar.

14. The facts noticed in the foregoing paragraph and the impressions drawn thereupon by the Magistrate, are based on statements recorded under Section 161 of Code of Criminal Procedure (and in a few cases, under Section 164 of the Code of Criminal Procedure), as also, on documents and other materials collected during the course of investigation. Neither the aforesaid statements, nor the documents and materials taken into consideration, can at the present juncture be treated as reliable evidence which can be taken into consideration, for finally adjudicating upon the guilt or innocence of the accused. It is only when the witnesses appear in court, and make their statements on oath, and their statements have been tested by way of cross examination; and only after the documents and other materials relied upon are proved in accordance with law, the same would constitute evidence which can be relied upon to determine the controversy. It is on the basis of such acceptable evidence, that final conclusions can be drawn to implicate the accused. That stage has not yet arisen. At the present juncture, the Magistrate was required to examine the materials collected by the investigating agencies, and thereupon, to determine whether the proceedings should be dropped (as was suggested by the investigating agency, through its closure report dated 29.12.2010), or whether, a direction should be issued for further investigation (as was suggested in the protest petition filed by Dr. Rajesh Talwar), or whether, there was sufficient ground for proceeding further, by issuing process (as has been done in the present case). Having examined the material on the record, the Magistrate having taken cognizance issued process on 9.2.2011, and while doing so, recorded the following observations in the penultimate paragraphs of summoning order dated 9.2.2011:

> "From the analysis of evidence of all above mentioned witnesses prima facie it appears that after investigation, on the basis of evidence available in the case diary when this incident occurred at that time four members were present in the house – Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi and servant Hem Raj; Aarushi and Hem Raj the two out four were found dead. In the case diary there is no such evidence from which it may appear that some person had made forcible entry and there is to evidence regarding involvement of the servants. In the night of the incident internet was switched on and off in the house in regard to which this

evidence is available in the case diary that it was switched on or off by some person. Private parts of deceased Aarushi were cleaned and deceased Hem Raj was dragged in injured condition from the flat of Dr. Rajesh Talwar up to the terrace and the terrace was locked. Prior to 15.5.2008 terrace was not locked. According to documents available on the case diary blood stains were wiped off on the staircase, both the deceased were slit with the help of a surgical instrument by surgically trained persons and shape of injury on the head and forehead was V-shaped and according to the evidence available in the case diary that appeared to have been caused with a gold stick. A person coming from outside, during the presence of Talwar couple in the house could have neither used the internet nor could have taken the dead body of deceased Hem Raj to the terrace and then locked when the Talwar couple was present in the house. On the basis of evidence available in the case diary footprints stained with blood were found in the room of Aarushi but outside that room bloodstained footprints were not found. If the assailant would go out after committing murder then certainly his footprints would not be confined up to the room of Aarushi and for an outsider it is not possible that when Talwar couple were present in the house he would use liquor or would try to take dead body on the terrace. Accused after committing the offence would like to run away immediately so that no one could catch him.

On the basis of evidence of all the above witnesses and circumstantial evidence available in case diary during investigation it was expected from the investigating officer to submit charge-sheet against Dr. Rajesh Talwar and Dr. Nupur Talwar. In such type of cases when offence is committed inside a house, there direct evidence cannot be expected. Here it is pertinent to mention that CBI is the highest investigating agency of the country in which the public of the country has full confidence. Whenever in a case if any one of the investigating agencies of the country remained unsuccessful then that case is referred to CBI for investigation. In such circumstances it is expected of CBI that applying the highest standards, after investigation it should submit such a report before the court which is just and reasonable on the basis of evidence collected in investigation, but it was not done so by the CBI which is highly disappointing. If I draw a conclusion from the circumstances of case diary, then I find that in view of the facts, the conclusion of the investigating officer that on account of lack of evidence, case may be closed; does not appear to be just and proper. When offence was committed in side a house, on the basis of evidence received from case diary, a link is made from these circumstances, and these links are indicating prima facie the accused Dr. Rajesh Talwar and Dr. Nupur Talwar to be guilty. The evidence of witness Shoharat that Dr. Rajesh Talwar asked him to paint the wooden portion of a wall between the rooms of Aarushi and Dr. Rajesh Talwar, indicates towards the conclusion that he wants to temper with the evidence. From the evidence 3 so many in the case diary, prima facie evidence is found in this regard. Therefore in the light of above evidences conclusion of investigating officer given in the final report deserve to be rejected and there is sufficient basis for taking prima facie cognizance against Dr. Rajesh Talwar and Dr.

> Nupur Talwar for committing murder of deceased Aarushi and Hem Raj and for tempering with the proof. At this stage, the principle of law laid down by Hon'ble Supreme Court in the case of Jugdish Ram vs. State of Rajasthan reported in 2004 AIR 1734 is very important wherein the Hon'ble Supreme Court held that investigation is the job of Police and taking of cognizance is within the jurisdiction of the Magistrate. If on the record, this much of evidence is available that prima facie cognizance can be taken then the Magistrate should take cognizance, Magistrate should be convinced that there is enough basis for further proceedings rather for sufficient basis for proving the guilt."

15. In order to canvass the primary ground raised for assailing the order of the Magistrate dated 9.2.2011, it was submitted, that the Magistrate would have arrived at a conclusion, different from the one drawn in the order dated 9.2.2011, if the matter had been examined in its correct perspective, by taking a holistic view of the statements and materials recorded during investigation. It is sought to be canvassed, that a perusal of the impugned order reveals, that too much emphasis was placed on certain incorrect facts, and further, certain vital and relevant facts and materials were overlooked. In sum and substance it was submitted, that if the factual infirmities were corrected, and the facts overlooked were given due weightage, the conclusions drawn by the Magistrate in the order dated 9.2.2011, would be liable to be reversed. To appreciate the instant contention advanced at the hands of the learned counsel for the petitioners, I am summarizing hereunder, the factual aspects highlighted by the learned counsel for the petitioner during the course of hearing:-

> Firstly, it was submitted, that the inference drawn by the Magistrate to the effect, that there was no outsider other than Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi Talwar and Hemraj in house no.L-32, Jalvayu Vihar, Sector 25, Noida, on the fateful day, is erroneous. It was submitted, that the said inference was drawn under the belief, that there was no forceful entry into the premises in question. To canvass the point, learned counsel drew the attention of this Court to the site plan of the flat under reference, which had been prepared by the U.P. Police (during the course of investigation by the U.P. Police), and compared the same with, the site plan prepared by the CBI (after the CBI took over investigation). It was pointed out, that a reference to the correct site plan would reveal, that there could have been free access, to and from the residence of Talwars, through Hemraj's room.
>
> Secondly, it was pointed out, after extensively relying upon the statement of Bharti, that the grill and mash door latched from the outside clearly evidenced, that after committing the crime the culprits had bolted the premises from outside. The absurdity in the inference drawn by the Magistrate, it was submitted, was obvious from the fact, that the actual perpetrator of the murders, while escaping from the scene of occurrence, had bolted the Talwars from outside. It was also pointed out, that the iron mashing/gauze on the door which was bolted from outside, would make it impossible for an insider, to bolt the door from outside. Thirdly, according to the learned counsel, the impression recorded in the investigation carried out by the CBI reveals, that the stairway leading to the terrace was from inside the flat (of the

Talwars), was erroneous. This inference was sought to be shown to have been incorrectly recorded, as the stairs leading to the terrace were from outside the flat, i.e., from the common area of the apartment complex beyond the outermost grill-door leading into the house no.L-32, Jalvayu Vihar, Sector 25, Noida. It was therefore submitted, that under no circumstances Dr. Rajesh Talwar or Dr. Nupur Talwar could be linked to the murder of Hemraj, since the body of Hemraj was found at a place, which had no internal connectivity from within the flat of the Talwars.

Fourthly, as noticed above, since the flat of the Talwars was bolted from the outside, neither Dr. Rajesh Talwar nor Dr. Nupur Talwar could have taken the body of Hemraj to the terrace, even if the inference drawn by the CBI, that the murder of Hemraj was committed at a place different from the place from where his body was found, is to be accepted as correct. It is sought to be suggested, that the accused cannot, in any case, be associated with the murder of Hemraj. And since, both murders were presumably the handiwork of the same perpetrator(s), the accused could not be associated with the murder of Aarushi Talwar as well.

Fifthly, substantial material was placed before the Court to suggest that the purple colored pillow cover belonging to Krishna Thadarai, was found smeared with the blood of Hemraj. In order to substantiate the instant contention reference was made to the seizure memo pertaining to Krishna Thadarai's pillow cover, and thereupon, the report of the CFSL dated 23.6.2008, as also, the report of the CFSL (Bio Division) dated 30.6.2008 depicting, that the blood found on the pillow cover was of human origin. It was the vehement contention of the learned counsel for the petitioner, that Krishna Thadarai could not have been given a clean chit, when the blood of Hemraj was found on his pillow cover. It is necessary to record, that a similar submission made before the High Court was turned down by the High Court, on the basis of a letter dated 24.3.2011 (even though the same was not a part of the charge papers). It was submitted, that the aforesaid letter could not have been taken into consideration while examining the veracity of the inferences drawn by the Magistrate. In order to support the instant contention, it was also vehemently submitted, that during the course of investigation, neither the U.P. Police nor the CBI, found blood of Hemraj on the clothes of either Dr. Rajesh Talwar or Dr. Nupur Talwar.

The presence of the blood of Hemraj on the pillow cover of Krishna Thadarai and the absence of the blood of Hemraj on the apparel of Dr. Rajesh Talwar and Dr. Nupur Talwar, according to learned counsel for the petitioners, not only exculpates the accused identified in the Magistrate's order dated 9.2.2011, but also reveals, that the investigation made by the U.P. Police/CBI besides being slipshod and sloppy, can also be stated to have been carried on without due application of mind.

Sixthly, in continuation of the preceding issue canvassed on behalf of the petitioners, it was submitted, that the finding recorded by the CBI in its closure report, that DNA of none of the servants was found on any of the exhibits collected from the scene of crime, was wholly fallacious. The Magistrate having assumed the aforesaid factually incorrect position, exculpated all the servants

of blame, in respect of the twin murders of Aarushi Talwar and Hemraj. It was submitted, that as a matter of fact, scientific tests shorn of human considerations, clearly indicate the involvement of Krishna Thadarai with the crime under reference. In this behalf the Court's attention was also drawn to the narco analysis, brain mapping and polygraph tests conducted on Krishna Thadarai. Seventhly, the investigating agency, it was contended, was guilty of not taking the investigative process to its logical conclusion. In this behalf it was submitted, that finger prints were found on a bottle of Ballantine Scotch Whiskey, found on the dining table, in the Talwar flat. The accused, according to learned counsel, had requested the investigating agency to identify the fingerprints through touch DNA test. The accused had also offered to bear the expenses for the same. According to the learned counsel, the identification of the fingerprints on the bottle, would have revealed the identity of the perpetrator(s) to the murders of Aarushi Talwar and Hemraj. It is therefore sought to be canvassed, that the petitioner Dr. Nupur Talwar and her husband Dr. Rajesh Talwar, had unfairly been accused of the crime under reference, even though there was material available to determine the exact identity of the culprit(s) in the matter. Eighthly, it was submitted, that footprints were found in the bedroom of Aarushi Talwar, i.e., from the room where her dead body was recovered. These footprints according to learned counsel, did not match the footwear impressions of shoes and slippers of Dr. Rajesh Talwar and Dr. Nupur Talwar. This according to the learned counsel for the petitioners also indicates, that neither Dr. Rajesh Talwar nor Dr. Nupur Talwar were involved in the murder of their daughter Aarushi Talwar. The murderer, according to learned counsel, was an outsider. And it was the responsibility of the CBI to determine the identity of such person(s) whose footwear matched the footprints found in the room of the Aarushi Talwar. Lack of focused investigation in the instant matter, according to the learned counsel for the petitioners, had resulted in a gross error at the hands of the Magistrate, who has unfairly summoned Dr. Rajesh Talwar and Dr. Nupur Talwar as the accused, rather than the actual culprit(s). Ninthly, learned counsel for the petitioner also referred to the post mortem report of Aarushi Talwar dated 16.5.2008, and in conjunction therewith the statement of Dr. Sunil Kumar Dhore dated 18.7.2008, the report of the High Level Eight Member Expert Body dated 9.9.2008 (of which Dr. Sunil Kumar Dhore was a member), and the further statements of Dr. Sunil Kumar Dhore dated 3.10.2008, 30.9.2009 and 28.5.2010. Based thereon, learned counsel submitted, that in the post mortem report conducted by Dr. Sunil Kumar Dhore, he had expressly recorded NAD (No Abnormality Detected) against the column at serial no.7, pertaining to the private parts of Aarushi Talwar. It was submitted, that the aforesaid position came to be substantially altered by the subsequent oral statements made by Dr. Sunil Kumar Dhore. It was submitted, that the different factual position narrated by Dr. Sunil Kumar Dhore, subsequent to the submission of the post mortem report, cannot be taken into consideration. Viewed from the instant perspective, it was also submitted, that the investigating agencies utterly failed in carrying out a disciplined and proper investigation. It was also asserted, that Dr. Sunil Kumar Dhore had been persuaded to turn hostile to the contents of his own document, i.e., the post mortem report dated 16.5.2008. Even though originally Dr. Sunil Kumar Dhore found, that there was no abnormality detected in the private parts of Aarushi Talwar, after the lapse of two years his supplementary statements depict a number of abnormalities. It was submitted, that the Magistrate having referred to the last of such statements dated 25.5.2010, inferred therefrom, that the private parts of Aarushi Talwar had been cleaned after her murder. It was submitted, that the absurdity and improbability of the assumption could be established from the fact, that the white discharge found from the vagina of Aarushi Talwar, was sent for pathological

examination, which showed that no spermatozoa was detected therein. The instant inference of the Magistrate, according to learned counsel, had resulted in grave miscarriage of justice.

Tenthly, it was contended, that the dimension of the injury on the heads of Aarushi Talwar and Hemraj, was stated to match with the dimension of a 5 iron golf club. It was pointed out, that the 5 iron golf club recovered from the premises of the Talwars, did not have any traces of blood. It was submitted, that the said golf club as a possible weapon of offence, was introduced by the second team of the CBI in September/October 2009. The Magistrate, according to learned counsel, had erroneously recorded in the impugned order dated 9.2.2011, that experts had opined that the injuries in question (on the heads of Aarushi Talwar and Hemraj) were possible with the golf club in question. It was sought to be highlighted, that no expert had given any such opinion during the entire investigative process, and as such, the finding recorded by the Magistrate was contrary to the record. Eleventhly, it was asserted, that the Magistrate ignored to take into consideration, the fact that the clothes of Dr. Rajesh Talwar were found only with the blood of Aarushi Talwar. But it was noticed, that there was no blood of Aarushi Talwar on the clothes of Dr. Nupur Talwar. This fact is also erroneous because the blood of Aarushi Talwar was actually found on the clothes of Dr. Nupur Talwar also. According to learned counsel, the discovery of blood of Aarushi Talwar on the clothes of her parents was natural. What is important, according to learned counsel, is the absence of blood of Hemraj, on the clothes of the accused. It was submitted, that the prosecution had never denied, that the blood of Hemraj was not found on the clothes of either Dr. Rajesh Talwar or Dr. Nupur Talwar. This factual position, for the same reasons as have been indicated at serial no. fourthly above establishes the innocence of the accused in the matter.

16. Just as in the case of the reasons depicted in the order of the Magistrate (based on the statements recorded during the course of investigation and the documents and other materials placed before her), the factual submissions advanced at the hands of the learned counsel for the petitioners (noticed in the foregoing paragraph), cannot be placed on the pedestal of reliable evidence. It is only when statements are recorded in defence, which are tested by way of cross examination, and only after documents and material relied upon (in defence), are proved in accordance with the law, the same would constitute evidence, which can constitute a basis, for determining the factual position in the controversy. It is only on the basis of such acceptable evidence, that final conclusions can be drawn. That stage has not arisen. Even though the demeanor of learned counsel representing the petitioners was emphatic, that no other inference beside the one suggested by them was possible, I am of the view, that the stage is not yet right for such emphatic conclusions. Just as the learned counsel for the petitioner had endeavored to find fault with the factual inferences depicted in the order dated 9.2.2011 (which constituted the basis of issuing process), learned counsel for the CBI submitted, that the factual foundation raised by the petitioner (details whereof have been summarized above) were based on surmises and conjectures. Even though I have recorded a summary of the factual basis, on which the learned counsel for the petitioner have based their contentions, I am intentionally not recording the reasons whereby their veracity was assailed. That then, would have required me to further determine, which of the alternative positions were correct. I am of the view, that such an assessment at the present stage would be wholly inappropriate. My dealing with the factual contours of the present controversy, at a juncture well before evidence has been recorded by the trial court, would have adverse consequences

against one or the other party. Even though, while dealing with issues as in the instant case, High Courts and this Court have repeatedly observed in their orders, that the trial court would determine the controversy uninfluenced by observations made. Yet, inferences and conclusions drawn by superior courts, on matters which are pending adjudication before trial courts (or other subordinate courts) cannot be easily brushed aside. I shall, therefore, endeavor not to pre-maturely record any inferences which could/would prejudice one or the other side.

17. Having recorded the aforesaid observations, in respect of the submissions advanced at the hands of the learned counsel for the petitioner, I shall now proceed to determine the validity of the order passed by the Magistrate on 9.2.2011, as also, the legitimacy of the defences raised by the learned counsel for the petitioner. Although it would seem, that there would be a common answer to the proposition canvassed, I am of the view, after having heard learned counsel for the rival parties, that the issue canvassed ought to compartmentalized under two heads. Firstly, I shall examine the validity of the order dated 9.2.2011, and thereafter, I will deal with the substance of the defences raised at the hands of the petitioner. That is how the matter is being dealt with in the following paragraphs.

18. The basis and parameters of issuing process, have been provided for in Section 204 of the Code of Criminal Procedure. Section 204 aforementioned is extracted hereunder :

> "204. Issue of process – (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be –
>
> (a) a summons-case, he shall issue his summons for the attendance of the accused, or
>
> (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate of (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
>
> (2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.
>
> (3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.
>
> (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
>
> (5) Nothing in this section shall be deemed to affect the provisions of section 87.

The criterion which needs to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court. I shall therefore, first examine the declared position of law on the subject. Reference in this behalf may be made to the decision rendered by this Court in Cahndra Deo vs. Prokash Chandra Bose alias Chabi Bose and Anr., AIR 1963 SC 1430, wherein it was observed as under :

> "(8) Coming to the second ground, we have no hesitation is holding that the test propounded by the learned single judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is "sufficient ground for proceeding" and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the bar in which the question of the scope of the enquiry under Section 202 has been considered. Amongst those decisions are : Parmanand Brahmachari v. Emperor, AIR 1930 Pat 20; Radha Kishun Sao v. S.K. Misra, AIR 1949 Pat 36; Ramkisto Sahu v. State of Bihar, AIR 1952 Pat 125; Emperor v. J.A. Finan, AIR 1931 Bom 524 and Baidya Nath Singh v. Muspratt, ILR 14 Cal 141. In all these cases, it has been held that the object of the provisions of Section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant." (emphasis is mine) The same issue was examined by this Court in M/s. India Carat Pvt. Ltd. vs. State of Karnataka and Anr., (1989) 2 SCC 132, wherein this Court held as under :

> "(16) The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case

> against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

(17) The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a compliant before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in Tula Ram v. Kishore Singh, (1977) 4 SCC 459, that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with." (emphasis is mine) The same issue was examined by this Court in Jagdish Ram vs. State of Rajasthan and Anr., (2004) 4 SCC 432, wherein this Court held as under:

> "(10) The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal, (2003) 4 SCC 139)." (emphasis is mine) All

along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court, that for the purpose of issuing process, all that the concerned Court has to determine is, whether the material placed before it "is sufficient for proceeding against the accused". The observations recorded by this Court extracted above, further enunciate, that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and established guilt". Having taken into consideration the factual position based on the statements recorded under Section 161 of Code of Criminal Procedure (as also, under Section 164 thereof), and the documents appended to the charge sheet, as also, the other materials available on the file; I have no doubt whatsoever in my mind, that the Magistrate was fully justified in issuing process, since the aforesaid statements, documents and materials, were most certainly sufficient to proceed against the accused. Therefore, the order issuing process under Section 204 passed by the Magistrate on 9.2.2011 cannot be faulted on the ground, that it had been passed in violation of the provisions of Code of Criminal Procedure, or in violation of the declared position of law on the subject. Despite my aforesaid conclusion, I reiterate, that the material taken into consideration by the Magistrate will have to be substituted by cogent evidence recorded during the trial; before any inferences, assumptions, views and deductions drawn by the Magistrate, can be made the basis for implicating the accused. As the matter proceeds to the next stage, all the earlier conclusions will stand effaced, and will have to be redrawn, in accordance with law.

19. Rolled along with the contention in hand, it was the submission of learned counsel representing the petitioner, that if the defences raised by the petitioner are taken into consideration, the entire case set up by the prosecution would fall. I shall now advert to the defences raised on behalf of the petitioner. All the defences raised on behalf of the petitioner have already been summarized above. Based on the said defences it was sought to be canvassed, that the Magistrate (while passing the order dated 9.2.2011) had taken into consideration some facts incorrectly (while the factual position was otherwise), and certain vital facts were overlooked. On the subject under reference, it would first be appropriate to examine the settled legal position. In this behalf reference may be made to the decision rendered by this Court in Cahndra Deo vs. Prokash Chandra Bose alias Chabi Bose and Anr., AIR 1963 SC 1430, wherein it was observed as under :

"(7) Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of

course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No.1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions, can according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of Section 202, Cr. P.C. is to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but als with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterized as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in th case before us that the two persons who were examined as court witnesses were so examined at the instance of respondent No.1 but from the fact that they were persons who were alleged to have been the associates of respondent No.1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No.1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection, the observations of this court in Vadilal Panchal v. Dattatraya Dulaji, (1961) 1 SCR 1 at p.9 : (AIR 1960 SC 1113 at p. 1116) may usefully be quoted :

"The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on

trial." (emphasis is mine) Recently an examination of the defence(s) of an accused, at the stage of issuing process, came to be examined by this Court in CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. and Anr., (2005) 7 SCC 467, wherein this Court held as under :

"10. In the instant case, the appellant had filed a detailed complaint before the Magistrate. The record shows that the Magistrate took cognizance and fixed the matter for recording of the statement of the complainant on 1-6-2000. Even if we assume, though that is not the case, that the words "cognizance taken" were not to be found in the order recorded by him on that date, in our view that would make no difference. Cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority, etc. These are cases where the Magistrate will refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry. We are, therefore, of the opinion that in the facts and circumstances of this case, the High Court erred in holding that the Magistrate had not taken cognizance, and that being a condition precedent, issuance of process was illegal.

11. Counsel for the respondents submitted that cognizance even if taken was improperly taken because the Magistrate had not applied his mind to the facts of the case. According to him, there was no case made out for issuance of process. He submitted that the debtor was the Company itself and Respondent 2 had issued the cheques on behalf of the Company. He had subsequently stopped payment of those

> cheques. He, therefore, submitted that the liability not being the personal liability of Respondent 2, he could not be prosecuted, and the Magistrate had erroneously issued process against him. We find no merit in the submission. At this stage, we do not wish to express any considered opinion on the argument advanced by him, but we are satisfied that so far as taking of cognizance is concerned, in the facts and circumstances of this case, it has been taken properly after application of mind. The Magistrate issued process only after considering the material placed before him.

We, therefore, find that the judgment and order of the High Court is unsustainable and must be set aside. This appeal is accordingly allowed and the impugned judgment and order of the High Court is set aside. The trial court will now proceed with the complaint in accordance with law from the stage at which the respondents took the matter to the High Court." (emphasis is mine) A perusal of the legal position expressed by this Court reveals the unambiguous legal position, that possible defence(s) of an accused need not be taken into consideration at the time of issuing process. There may be a situation, wherein, the defence(s) raised by an accused is/are factually unassailable, and the same are also not controvertable, it would, demolish the foundation of the case raised by the prosecution. The Magistrate may examine such a defence even at the stage of taking cognizance and/or issuing process. But then, this is not the position in the present controversy. The defences raised by the learned counsel for the petitioner are factual in nature. As against the aforesaid defences, learned counsel for the CBI has made detailed submissions. In fact, it was the submission of the learned counsel for the CBI, that the defences raised by the petitioner were merely conjectural. Each of the defences was contested and controverted, on the basis of material on the file. In this case it cannot be said that the defences raised were unassailable and also not controvertable. As already noticed above, I do not wish to engage myself in the instant disputed factual controversy, based on assertions and denials. The factual position is yet to be established on the basis of acceptable evidence. All that needs to be observed at the present juncture is, that it was not necessary for the Magistrate to take into consideration all possible defences, which could have been raised by the petitioner, at the stage of issuing process. Defences as are suggested by the learned counsel for the petitioner, which were based on factual inferences, certainly ought not to have been taken into consideration. Thus viewed, I find no merit in the instant contention advanced at the hands of the learned counsel for the petitioner. The instant determination of mine, should not be treated as a rejection of the defences raised on behalf of the petitioner. The defences raised on behalf of the accused will have to be substantiated through cogent evidence and thereupon, the same will be examined on merits, for the exculpation of the accused, if so made out.

20. The submissions dealt with hereinabove constituted the primary basis of challenge, on behalf of the petitioner. Yet, just before the conclusion of the hearing of the matter, learned counsel representing the petitioner stated, that the petitioner would be satisfied even if, keeping in mind the defences raised on behalf of the petitioner, further investigation could be ordered. This according to learned counsel will ensure, that vital aspects of the controversy which had remained unraveled, will be brought out with the possibility of identifying the real culprits. This according to the learned counsel for the petitioner would meet the ends of justice.

21. The contention advanced at the hands of the learned counsel for the petitioner, as has been noticed in the foregoing paragraph, seems to be a last ditch effort, to savage a lost situation. The plea for further investigation, was raised by Dr. Rajesh Talwar in his protest petition dated 25.1.2011. The prayer for further investigation, was declined by the Magistrate in her order dated 9.2.2011. Dr. Rajesh Talwar who had raised the aforesaid prayer, did not assail the aforestated determination. The plea for further investigation therefore attained finality. Dr. Nupur Talwar, the petitioner herein, did not make a prayer for further investigation, when she assailed the order passed by the Magistrate dated 9.2.2011 before the High Court (vide Criminal Revision Petition no.1127 of 2011). Having not pressed the aforesaid prayer before the High Court, it is not open to the petitioner Dr. Nupur Talwar, to raise the same before this Court, in a proceeding which emerges out of the determination rendered by the High Court (in Criminal Revision Petition no.1127 of 2011). I, therefore, find no merit in the instant contention advanced by the learned counsel for the petitioner.

22. I shall now embark upon the last aspect of the matter, namely, the propriety of the petitioner in filing the instant Review Petition. The parameters within which an order taking cognizance and/or an order issuing process needs to be passed, have already been dealt with above. It is apparent from my determination, that the matter of taking cognizance and/or issuance of notice, is based on the satisfaction of the Magistrate. In the conclusions recorded hereinabove, while making a reference to past precedent, I have concluded, that it is not essential for the concerned Magistrate to record reasons or to pass a speaking order demonstrating the basis of the satisfaction, leading to issuance of process. Despite the same, the Magistrate while issuing process vide order dated 9.2.2011, had passed a detailed reasoned order. The order brings out the basis of the Magistrate's satisfaction. The aforesaid order dated 9.2.2011 came to be assailed by the petitioner before the High Court of judicature at Allahabad through Criminal Revision Petition no.1127 of 2011. The High Court having concluded, that the satisfaction of the Magistrate was well found, dismissed the Revision Petition vide an order dated 18.3.2011. The High Court expressly affirmed that the order dated 9.2.2011 had been passed on the basis of record available before the High Court, and on the basis of the Magistrate's satisfaction, that process deserved to be issued. The petitioner approached this Court by filing Special Leave Petition (Criminal) no.2982 of 2011 (renumbered as Criminal Appeal no. 16 of 2011). While dismissing the aforesaid Criminal Appeal vide order dated 6.1.2012 this Court in paragraph 11 observed as under :

> "...Obviously at this stage we cannot weigh evidence. Looking into the order of Magistrate, we find that he applied his mind in coming to the conclusion relating to taking of cognizance. The Magistrate has taken note of the rejection report and gave his prima facie observation on the controversy upon a consideration of the materials that surfaced in the case. ..." (emphasis is mine) Thereafter, the matter was disposed of, by this Court, by recording the following observations :
>
> "24. In the above state of affairs, now the question is what is the jurisdiction and specially the duty of this Court in such a situation under Article 136?
>
> 25. We feel constrained to observe that at this stage, this Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by

the Magistrate, otherwise the holding of a trial will be stalled. The superior Courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice.

26. Reference in this connection may be made to a three Judge Bench decision of this Court in the case of M/s India Carat Private Ltd. vs. State of Karnataka & Anr., (1989) 2 SCC 132.

Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we could rather quote the observation as under :-

"The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of an order the issue of process to the accused. Section 190(1)(b) doest not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused..."

27. These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.

28. We are deliberately not going into various factual aspects of the case which have been raised before us so that in the trial the accused persons may not be prejudiced. We, therefore, dismiss this appeal with the observation that in the trial which the accused persons will face, they should not be prejudiced by any observation made by us in this order or in the order of the High Court or those made in the Magistrate's order while taking cognizance. The accused must be given all opportunities in the trial they are to face. We, however, observe that the trial should expeditiously held.

29. The appeal is accordingly disposed of." (emphasis is mine) Unfortunately, while addressing submissions during the course of hearing no reference whatsoever was made either to the order passed by the High Court, and more significantly, to the order passed by this Court (dated 6.1.2012) of which review has been sought. No error whatsoever was pointed out in the order passed by this Court on 6.1.2012. Learned counsel for the CBI during the course of hearing, was therefore fully justified in repeatedly canvassing, that through the instant review petition, the petitioner was

not finding fault with the order dated 6.1.2012 (of which review has been sought), but with the order passed by the Magistrate dated 9.2.2011. That, I may say, is correct. The order of this Court did not fall within the realm of the petitioner's rational acceptability. This, in my view, most certainly amounts to misuse of jurisdiction of this Court. It was sufficient for this Court, while determining a challenge to an order taking cognizance and/or issuing process to affirm, that the Magistrate's order was based on satisfaction. But that has resulted in the petitioner's lamentation. This Court has been required to pass a comprehensive order after hearing detailed submissions for days at end, just for the petitioner's satisfaction. I have noticed, that every single order passed by the Magistrate, having any repercussion, is being assailed right up to this Court. Of course, the right to avail a remedy under law, is the right of every citizen. But such a right, cannot extend to misuse of jurisdiction. The petitioner's attitude expresses discomfort at every order not acceding to her point of view. Even at the earlier juncture, full dress arguments, as have been addressed now, had been painstakingly advanced. Determination on the merits of the main controversy, while dealing with the stage of cognizance and/or issuance of process, if deliberated upon, is bound to prejudice one or the other party. It needed extreme restraint not to deal with the individual factual aspects canvassed on behalf of the petitioner, as have been noticed above, even though each one of them was sought to be repudiated on behalf of the CBI. I am of the considered view, that the very filing of the instant Review Petition was wholly uncalled for, specially when this Court emphatically pointed out its satisfaction in its earlier order dated 6.1.2012 (which is the subject matter of review) not only in paragraph 11 thereof, but also, for not accepting the prayers made on behalf of the petitioner in the subsequent paragraphs which have been extracted hereinabove. As of now, I would only seriously caution the petitioner from such behaviour in future. After all, frivolous litigation takes up a large chunk of precious court time. While the state of mind of the accused can be understood, I shall conclude by suggesting, that the accused should henceforth abide by the advice tendered to her, by learned counsel representing her. For, any uncalled or frivolous proceedings initiated by the petitioner hereinafter, may evoke exemplary costs.

23. As a matter of caution I direct the Magistrate, not to be influenced by any observations made by the High Court or by this Court, while dealing with the order dated 9.2.2011, specially insofar as the factual parameters are concerned.

24. Dismissed.

.....J. (Jagdish Singh Khehar) New Delhi;

June 7, 2012.

Reportable IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION REVIEW PETITION (CRL.) NO. 85 OF 2012 IN CRIMINAL APPEAL NO.68 OF 2012 Nupur Talwar

... Petitioner Versus Central Bureau of Investigation & Anr. ... Respondents O R D E R A. K. PATNAIK, J.

I have carefully read the order of my learned brother Khehar, J. and I agree with his conclusion that this Review Petition will have to be dismissed, but I would like to give my own reasons for this conclusion.

2. As the facts have been dealt with in detail in the order of my learned brother, I have not felt the necessity of reiterating those facts in my order, except stating the following few facts: The Magistrate by a detailed order dated 09.02.2011 rejected the closure report submitted by the CBI and took cognizance under Section 190 Cr.P.C. and issued process under Section 204, Cr.P.C. to the petitioner and her husband, Dr. Rajesh Talwar, for the offence of murder of their daughter Aarushi Talwar and their domestic servant Hemraj on 16.05.2008 under Section 302/34 IPC and for the offence of causing disappearance of evidence of offence under Section 201/34 IPC. The order dated 09.02.2011 of the Magistrate was challenged by the petitioner in Criminal Revision No.1127 of 2009 before the High Court of Judicature at Allahabad, but the High Court dismissed the Criminal Revision by order dated 18.03.2011. The order of the High Court was thereafter challenged by the petitioner in S.L.P. (Crl.) No.2982 of 2011 in which leave was granted by this Court and the S.L.P. was converted to Criminal Appeal No.16 of 2011. Ultimately, however, by order dated 06.01.2011, this Court dismissed the Criminal Appeal and the petitioner has filed the present Review Petition against the order dismissing the Criminal Appeal.

3. The petitioner is aggrieved by the order dated 09.02.2011 of the Magistrate taking cognizance under Section under Section 190 Cr. P.C. and issuing process under Section 204 Cr.P.C. against her and her husband. As admittedly there are offences committed in respect of the two deceased persons, Aarushi and Hemraj, there cannot be any infirmity in the order of the Magistrate taking cognizance. Hence, the only question that we are called upon to decide is whether the Magistrate was justified in issuing the process to the petitioner and her husband by her order dated 09.02.2011.

4. Sub-section (1) of Section 204 Cr.P.C. under which the Magistrate issued the process against the petitioner is extracted hereinbelow:

> "Section 204(1). If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
>
> a) a summons-case, he shall issue his summons for the attendance of the accused, or
>
> b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction." It is clear from sub-section (1) of Section 204, Cr.P.C. that the Magistrate taking cognizance of an offence shall issue the process against a person if in his opinion there is sufficient ground for proceeding against him.

5. The standard of scrutiny of the evidence which the Magistrate has to adopt for deciding whether or not to issue process under Section 204 Cr.P.C. in a case exclusively triable by the Sessions Court has been laid down by this Court in Kewal Krishan v. Suraj Bhan & Anr. [1980 (Supp) SCC 499] this Court thus:

> "At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. This Court has held in Ramesh Singh case that even at the stage of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial, is not to be meticulously judged. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session." Thus, in a case exclusively triable by the Court of Session, all that the Magistrate has to do at the stage of Section 204 Cr.P.C. is to see whether on a perusal of the evidence there is "sufficient ground for proceeding" against the accused and at this stage, the Magistrate is not required to weigh the evidence meticulously as if he was the trial court nor is he required to scrutinise the evidence by the same standard by which the Sessions Court scrutinises the evidence to decide whether to frame or not to frame charges under Section 227/228, Cr.P.C.

6. Keeping in mind these distinctions between the standards of scrutiny at the stages of issue of process, framing of charges and the trial, the contentions of the parties can be now considered. Learned senior counsel for the petitioner, Mr. Harish Salve, produced before us the materials which were collected during the investigation and submitted that had the Magistrate considered all the relevant materials, she would have come to the conclusion that sufficient grounds did not exist for proceeding against the petitioner and her husband and would have directed further investigation as prayed by Dr. Rajesh Talwar, but unfortunately the order dated 09.02.2011 does not disclose that the Magistrate considered all relevant materials collected during investigation. The relevant materials on which the petitioner relies upon have been discussed in the order of my learned Brother at length. Mr. Siddharth Luthra, learned senior counsel for the CBI, on the other hand, submitted that the entire case diary including all the materials (statements recorded under Section 161 Cr.P.C., the post mortem and scientific reports and material objects) collected in the course of investigation were placed before the Magistrate and, therefore, the argument of Mr. Salve that the

Magistrate has not looked into all the materials collected during investigation is misconceived.

7. By writing a long order dated 09.02.2011 and not referring to some of the relevant materials on which the petitioner relies upon, the Magistrate has exposed herself to the criticism of learned counsel for the petitioner that she had applied her mind only to the materials referred to in her order and not to other relevant materials collected in course of investigation. Sub-section (1) of Section 204, Cr.P.C. quoted above itself does not impose a legal requirement on the Magistrate to record reasons in support of the order to issue a process and in U.P. Pollution Control Board v. Mohan Meakins Ltd. & Ors. [(2000) 3 SCC 745] and Deputy Chief Controller of Improts & Exports v. Roshallal Agarwal & Ors. [(2003) 4 SCC 139] this Court has held that the Magistrate is not required to record reasons at the stage of issuing the process against the accused. In the absence of any legal requirement in Section 204 Cr.P.C. to issue process, it was not legally necessary for the Magistrate to have given detailed reasons in her order dated 09.02.2011 for issuing process to the petitioner and her husband Dr. Rajesh Talwar.

8. The fact, however, remains that the Magistrate has given detailed reasons in the order dated 09.02.2011 issuing process and the order dated 09.02.2011 itself does not disclose that the Magistrate has considered all the relevant materials collected in course of investigation. Yet from the mere fact that some of the relevant materials on which the petitioner relies on have not been referred to in the order dated 09.02.2011, the High Court could not have come to the conclusion in the revision filed by the petitioner that these relevant materials were not considered. Moreover, this Court has held in Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors. [(1976) 3 SCC 736] that whether the reasons given by the Magistrate issuing process under Section 202 or 204 Cr.P.C. were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Section 397/401 Cr.P.C when the order issuing process under Section 204 Cr.P.C. was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 Cr.P.C. In the present case, the High Court has not examined whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the petitioner and her husband, but while hearing the Review Petition, we have perused the relevant materials collected in the course of the investigation and we cannot hold that the opinion of the Magistrate that there was sufficient ground to proceed against the petitioner and her husband under Section 204 Cr.P.C was not a plausible view on the materials collected in course of investigation and placed before her along with the closure report. As we have seen, sub- section (1) of Section 204 Cr.P.C. provides that the Magistrate shall issue the process (summons or warrant) if in his opinion there was sufficient ground for proceeding and therefore so long as there are materials to support the opinion of the Magistrate that there was sufficient ground for proceeding against the persons to whom the processes have been issued, the High Court in exercise of its revisional power will not interfere with the same only because it forms a different opinion on the same materials.

9. Mr. Harish Salve, however, cited the judgment of this Court in State of Karnataka v. L. Muniswamy & Ors. [(1977) 2 SCC 699] in which the High Court in exercise of its power under Section 482 Cr.P.C. has quashed the proceedings before the Sessions Court on the ground of

insufficiency of evidence and this Court agreed with the view of the High Court and dismissed the appeal. The decision of this Court in the case of State of Karnataka v. L. Muniswamy & Ors. (supra) does not relate to a case at the stage of issue of process by the Magistrate under Section 204 Cr.P.C., and as the facts of that case indicate, that was a case where the High Court was of the view that the material on which the prosecution proposed to rely against the respondents in that case was wholly inadequate to sustain the charge against them in the case which was pending before the Sessions Court. As has been clarified by this Court in Kewal Krishan v. Suraj Bhan & Anr. (supra), at the stage of Section 204 Cr.P.C. the standard to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing of charges by the Sessions Court.

10. The result of the aforesaid discussion is that the order dated 09.02.2011 of the Magistrate taking cognizance under Section 190 Cr.P.C. and issuing process against the petitioner and her husband under Section 204 Cr.P.C. could not have been interfered with by the High Court in the Revision filed by the petitioner. Moreover, once the order of the Magistrate taking cognizance and issuing process against the petitioner and her husband was sustained, there is no scope for granting the relief of further investigation for the purpose of finding out whether someone other than the petitioner and her husband had committed the offences in respect of the deceased persons Aarushi and/or Hemraj. As has been held by this Court in Randhir Singh Rana v. State (Delhi Administration) [(1997) 1 SCC 361], once a Magistrate takes cognizance of an offence under Section 190 Cr.P.C., he cannot order of his own further investigation in the case under Section 156(3) Cr.P.C. but if subsequently the Sessions Court passes an order discharging the accused persons, further investigation by the police on its own would be permissible, which may also result in submission of fresh charge-sheet.

11. For these reasons, I agree with my learned brother Khehar, J. that this Review Petition has no merit and should be dismissed.

.....J. (A. K. Patnaik) New Delhi, June 07, 2012.

Correction In paragraph No.8 of the order pronounced by Hon'ble Mr. Justice A.K. Patnaik, for Section 397 Cr.P.C. read Section 397/401 Cr.P.C.
