CALCUTTA HIGH COURT

A.K. Roy

Vs.

State of W.B

Full Bench Ref. No.2 of 1961 in Criminal Revn. Case No.1717 of 1960

(S.K. Sen, N.K. Sen, Bhattacharya, D.N. Das Gupta and Amaresh Roy, JJ.)

04.10.1961

JUDGMENT

S.K. Sen, J.

1. This Full Bench Reference arises from a revisional application by the petitioner Arun Kumar Roy against an order of the Sub-Divisional Magistrate, Kurseong, dated 12th September, 1960, calling for charge-sheet against the petitioner under Sections 279 of the Indian Penal Code. On 16th April, 1960, about 8-30 P.M. the petitioner when driving a car is alleged to have knocked down a woman named Rani Tamangni who died on the spot. Sub-Inspector S.K. Roy registered a case, but after investigation he submitted a final report on 6th September, 1960, put up on 8th September 1960, before the Sub-Divisional Magistrate, taking the view that it was an accident, the death of the woman being due to her sudden rush across the road, so that the petitioner was not to blame. The Magistrate called for the case diary and after perusing the same he took the view that prima facie the petitioner was guilty of rashness and negligence and so he called for a charge-sheet under Sections 304A and 279 Indian Penal Code. The petitioner moved the Sessions Judge, Darjeeling, against the order. The learned Sessions Judge, relying on the Bombay decision *State v. Muralidhar Gobardhan*[1], held that the Magistrate had the power to call for a charge-sheet; and he observed that even (if?) it were held that the Magistrate had no such power, still it could be regarded as an irregular way of summoning the accused after taking cognizance, as was held in *Narendra Lal Mukherji v. State*[2], and that there was no reason to recommend the quashing of the order of Sub-Divisional Magistrate.

2. The petitioner then moved this Court, in revision and Criminal Revision Case No.1717/60 was started thereon. There being conflicting unreported decisions of Division Benches of this High Court on the point whether or not a Magistrate has the power to call for a charge-sheet when a final report is submitted by the police, the case has been referred to this Bench for decision along with the following question:

> "When the police upon investigation has submitted a final report under Section 173 of the Criminal Procedure Code, can a Magistrate direct the police to submit a charge-sheet, or in the alter native, can he take cognizance on the statement of

[1] AIR 1960 Bom 240
[2] AIR 1956 Ass127

facts contained in the final report and/or the materials contained in the case diary and issue process against the accused?"

The two conflicting Division Bench decisions of this Court on the point are *Kashem Ali Gomasta v. State*[3], and *Rabindra Nath Chakrabarti v. State*[4], In Kashem Ali Gomasta's case, Cri. Revn. No.226 of 1960 Dated 12-9-1960 (Cal.), the Magistrate on receiving the final report and a naraji or protest petition against the final report, called for the case diary including the statements under Section 161 of the Criminal Procedure Code and then took cognizance of offences under Sections 148 304/149 and 304/109 Indian Penal Code. Mitter and Bhattacharya, JJ. held that the Magistrate is not bound to accept a final report under Section 173 of the Criminal Procedure Code, but he may go through the materials collected by the Police and if satisfied that there is enough material to put up the case on trial, he may direct the police to submit a charge-sheet; but he cannot take cognizance on the basis of the police diaries and statements under Section 161 of the Code. In Rabindra Nath Chakrabarti's case Cri. Revn. Nos.898 and 921 of 1959 D/d. 5-1-1961 (Cal.) the Magistrate on receiving a charge-sheet against 6 persons under Section 147 of the Indian Penal Code only, called for the case diary in view of a naraji or protest petition filed before him and after perusing the police papers called for a revised charge-sheet under Sections 147, 304/149 and 201 Indian Penal Code and such a revised charge-sheet was thereafter submitted against 12 persons including the 6 persons originally sent up. The accused persons moved two separate revisional applications against the order of the learned Magistrate; and it was held by K.C. Sen, J. and myself that the course adopted by the Magistrate was irregular and that the Magistrate must take cognizance on the charge-sheet as originally submitted by the police, but on perusing the documents mentioned in Section 173(4) and Section 251A of the Code, he could summon additional accused and adopt the procedure under Section 207 A of the Code, if he thought that a sessions triable case was prima facie made out. In the course of this judgment it was observed that the Magistrate cannot interfere with the discretion of the police under. Sections 169 and 170 of the Code and direct submission of a charge-sheet when the police have submitted a final report, or a revised charge-sheet for specified offences when the police have submitted a charge-sheet; and that when a final report is submitted, the Magistrate may take cognizance of the offence disclosed, if any, from the facts which appear in the final report and summon the accused who, on perusal of the police papers, appear to him to be concerned in the offence.

3. In both the cases, it was observed that if there is a final report and a naraji or protest petition has been filed, it is open to the Magistrate to treat the naraji petition as a petition of complaint, examine the petitioner under Section 200 of the Code and take cognizance under Section 190 (1)(a) of the Code. But the two Benches took opposite views on the question whether the Magistrate may call for a charge-sheet in such a case, or in the alternative take cognizance on the basis of the final report under Section 190 (1) (b) after considering the materials collected by the police. On account of this difference in view, this Full Bench Reference has been made.

4. The question referred to the Full Bench involves 3 separate but connected questions, viz.,

[3] Cri. Revn. No.226 of 1960, D/d. 12-9-1960 (Cal)
[4] Cri. Revn. Nos.898 and 921 of 1959 D/d. 5-1-1961 (Cal)

(1) When the final report contains the facts constituting an offence in the opinion of the

Magistrate, can he take cognizance on the final report as on a police report under Section 190 (1) (b) of this Code?

(2) Can the Magistrate in such a case direct the police to submit a charge-sheet?

(3) Whether for the purpose of deciding which person or persons should be summoned or required to be sent up as accused, or for the purpose of making up his mind whether further action should be taken, can the Magistrate call for and peruse the case diary kept under Section 172 of the Code and/or the documents referred to in Section 173 (4) of the Code?

5. There is also a subsidiary question viz., whether a Magistrate on receiving a final report can direct the police to hold further investigation into the case.

6. There is no reported decision of the Calcutta High Court directly on the questions mentioned above. In *Ganga Prasad Singh v. Emperor*[5], there is a casual observation that when the police submitted a final report it was open to the Magistrate to call for a charge-sheet. The observation however, is clearly an obiter. It is necessary for answering the above questions to consider the relevant provisions of law and the reported decisions of the other High Courts.

7. The provisions relating to the power of the police to investigate cases and the procedure to be adopted by them are contained in Chapter XIV of the Criminal procedure Code. Under sub-section (1) of Section 156, any officer-in-charge of a police station may without the order of a Magistrate, investigate any cognizable case. Under sub-section (3) of Section 156, any Magistrate empowered under Section 190 may order such an investigation i.e. into a cognizable case. Under Section 155, it is provided that no police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate. But in respect of cognizable cases, the police have power to investigate under Section 156 (1) independently of any order by a Magistrate. Section 157 lays down the procedure to be observed by the police when a non-cognizable offence is suspected. If, from information received or otherwise, an officer-in-charge of a police station suspects the commission of an offence which he is empowered to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence and shall proceed in person, or shall depute one of his subordinate officers to the spot to investigate the case. Under the proviso to Section 157 (1) the officer-in-charge may refuse to make an investigation when the offence does not appear to be of a serious nature and the information has been given against any person by name and also when the officer-in-charge thinks that there is no sufficient ground for starting an investigation. Section 159 provides that the Magistrate on receiving a report under Section 157 may direct an investigation; or if he thinks, fit, may himself proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into or otherwise to dispose of the case. Section 167 provides that where a person is arrested and detained in custody and it appears that the investigation cannot be completed within twenty-four hours, the officer-in-charge or the police officer making the investigation shall transmit to the nearest Magistrate a copy of the entries in the diary relating to the case and shall at the

same time forward the accused to such Magistrate. Under sub-section (2) of Section 167, the Magistrate may, in such a case authorize the detention of the accused in custody for a term not

exceeding fifteen days. Section 168 provides that when any subordinate police-officer has made any investigation under this Chapter, he shall report the result of the investigation to the officer-in-charge of the police station. Section 169 provides that if, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station or to the police-officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall release the accused on his executing a bond, to appear if and when required before a Magistrate. Section 170 provides that if, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the for warding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence and try the accused or commit him for trial, or if the offence is bailable, shall take security from him for his appearance before such Magistrate on a day fixed and for his attend ance from day to day before such Magistrate. Section 172 provides that every police-officer making an investigation under this Chapter, shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Section 173 deals with the report of the police-officer on completing the investigation. It provides that as soon as the investigation is completed, the officer-in-charge of the police-station shall

> (a) forward to a Magistrate empowered to take cognizance of the offence on a police-report, a report in the form prescribed by the State Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond and if so, whether with or without sureties and
> (b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

8. The Criminal Procedure Code does not contain the terms "charge-sheet" and "final report". Section 173 of the Code only refers to the report of the police-officer, on completing the investigation and such report includes both the cases covered by Sections 169 and 170 of the Code, i.e., the case where the police-officer thinks that the evidence is insufficient to send up the accused and the case in which the police-officer thinks that the evidence is sufficient. The Police Regulations, Bengal, being the Regulations made by the Inspector General of Police under Section 12 of the Police Act, 1861 with the approval of the State Government, prescribes the forms in which the reports are to be submitted; and different forms are prescribed for the cases referred to in Sections 169 and 170. Rule 272 of the Police Regulations, Bengal prescribes a "charge-sheet" for the case referred to in Section 170 i.e. where the police-officer thinks that the case is true and there is sufficient evidence; and Rule 275 prescribes a "final report" which is to be submitted in the case referred to in Section 169 i.e. where the police-officer thinks that the case is not true or that there is no sufficient evidence to prove the case. The forms for the "charge-sheet" and the "Final Report" are also prescribed in the Police Regulations Bengal, Vol. II.

9. Both Sections 169 and 170 refer to the satisfaction of the officer-in-charge of the police station or the police-officer making the investigation, as indicated by the use of clauses like "when it appears to the officer-in-charge of the Police station that there is no sufficient evidence or reasonable ground." It appears to follow, therefore, that it is for the investigating officer or the officer-in-charge of the police station to decide whether a final report or a charge-sheet should be submitted. Accordingly, it would appear that when the police-officer has submitted a final report, thinking that the case has not been proved, the Magistrate empowered to take cognizance has no power to direct the investigating officer to submit a charge-sheet; and similarly, when the investigating officer submits a charge-sheet, the Magistrate has no power to direct him to submit a final report. In this connection, I may refer to the observations of the Privy Council in the case *Emperor v. Khawaja Nazir Ahmad*[6], The question before the Privy Council was whether the High Court had power under Section 561A of the Criminal Procedure Code to quash the proceedings taken in pursuance of two first information reports i.e. the police investigation started on the basis of two first information reports. In this connection the following observations of the Privy Council are relevant:

> "Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India there is a statutory right on the part of the police to investigate the circumstances of an alleged cognisable crime without requiring any authority from the judicial authorities and it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus."

Similarly a Bench of the Calcutta High Court in the case of *Parulbala Sen Gupta v. State*[7], after referring to the above cited Privy Council case, observed as follows:

> "The proceedings before the police investigation are proceedings over which the police have full control and neither the Magistrate nor even the High Court has power to interfere with such proceedings. That investigation will come to its natural end only under Section 173 of the Criminal Procedure Code either by a final report or by a charge-sheet."

10. Investigation by the police into an alleged crime involves several stages ending with

[6] AIR 1945 PC 18

[7] 61 Cal WN 361 : (AIR 1957 Cal 379)

the formation of the opinion whether on the materials collected there is a case to place the

accused before a Magistrate for trial. This is clear from the provisions of Chapter XIV of the Criminal Procedure Code already referred to. These stages have been summarised by the Supreme Court in the case *H.N. Rishbud v. State of Delhi*[8], at p.201, the last stage mentioned being formation of the aforesaid opinion by the Police. It is, therefore, clear that if neither the Magistrate nor the High Court can interfere with the statutory rights of the police to investigate into an alleged offence, the Magistrate or even the High Court cannot interfere with the formation of the opinion by the investigating officer as to whether or not on the materials collected there is a case to place the accused before a Magistrate for trial. Accordingly, it would appear to follow that in any case where the police-officer has come to the conclusion that there is no case to place before the Magistrate and has accordingly submitted a final report, a Magistrate cannot call for a charge-sheet, although he is not bound to accept the final report and he has other courses open to him.

11. Thus whatever be the nature of the report by the police, the informant has to be informed of the same; and if there is a final report, it is open to the informant to appear before the Magistrate and submit a naraji or protest petition, as he generally does and all the High Courts are agreed on the point in such a case the Magistrate may treat the protest petition as a petition of complaint, examine the petitioner under Section 200 of the Criminal Procedure Code and take cognizance under Section 190(1)(c) of the Code.

12. Again without treating the protest petition, if any, as a petition of complaint, the Magistrate may take cognizance under Section 190 (1) (b) of the Code, on the information contained in the final report itself, if the facts stated therein constitute an offence in the opinion of the Magistrate. A final report being a report by a police-officer on completion of the investigation, under Section 173 (1) of the Code, it must contain the names of the parties and the nature of the information. It should also contain the names of the persons who appear to be acquainted with the circumstances of the case; in so far as the prescribed form of the final report in the Police Regulations, Bengal, does not contain a column for showing names of witnesses, it is defective. But in any case, the Magistrate has before him the nature of the information and irrespective of the opinion arrived at by the police the Magistrate may come to his own conclusion whether an offence has been made out; and if so satisfied he may take cognizance on the final report under Section 190 (1) (b).

13. It has been urged that the final report submitted by the police may not contain a substance of the information and that there may be nothing in it from which the Magistrate may learn the facts constituting an offence and proceed to take cognisance. But under the terms of Section 173 (1) of this Code, the report submitted by the police after completing the investigation whether it is a charge-sheet or a final report, must set forth the nature of the information. If a final report does not set forth the nature of the information, it is not a report according to law and the Magistrate may ask for a fresh report according to law without asking the police to change their opinion. Normally, the final report contains the nature of the information and the information presumably makes out an of fence; otherwise there would have been no investigation by the police. The final report is rather analogous to a petition of complaint plus the report of an inquiring officer that the allegations are not true or not prima facie supported by evidence. In order to test

[8] AIR 1955 SC 196

the correctness of the report the Magistrate may call for the case diary together with the statements recorded under Section 161 and decide for himself whether to take further steps. The question whether the Magistrate has power to call for the police papers will be considered in detail in due course. It is sufficient to observe here that the final report if it sets out the nature of

the information must contain the facts constituting an offence and so the Magistrate if satisfied that it is desirable to proceed with the case, may take cognizance thereon.

14. On this question there are several cases of different High Courts, not all of them taking the same view. Beginning with the decisions of the Calcutta High Court, in the case, Cri. Revn. No.226 of 1960, D/d. 12-9-1960 (Cal.), a Division Bench of this Court held that the Magistrate cannot take cognizance on the final report taken along with the materials collected by the police. But in the case Cri. Revn. No.898 and 921 of 1959 (Cal.) the view was taken that where the final report contains facts which constitute an offence, the Magistrate may take cognizance thereon under Section 190(1) (b) and summon the accused who on perusal of the police papers appear to him to be concerned in the offence. In another unreported case viz., *Krishna Manna v. State*[9], decided by Guha Roy J., on the 3rd June, 1957, the question was discussed in some detail and the decisions on the point of various High Courts were discussed; and Guha Roy J. came definitely to the conclusion that the Magistrate was entitled to take cognizance under Section 190(1)(b) on the final report, when the final report contained a statement of facts constituting an offence and when on perusal of the police papers the Magistrate was satisfied that there was a prima facie case made out. Virtually the same view was also taken in a reported decision by a Bench of this Court, *Jiban Krishna Samanta v. State*[10], This was a decision by Das Gupta and Lahiri, JJ. and the head notes give a good summary of the decision:

> "Under Section 190 (1) of the Criminal Procedure Code, a Magistrate takes cognizance of an offence and not as against an offender. Thus when on receipt of a final report by the police-officer under Section 173 of the Code, a Magistrate passes the order "enter true", he takes cognizance of the offence, though he directs the discharge of the accused put up before him. There is nothing in Section 204 of the Criminal Procedure Code, to prevent a Magistrate from issuing process at a later stage, on perusal of the police diary, which he had not done before, in spite of the fact that he had discharged the accused persons at the time of the final report by the police, although there was no fresh petition of complaint or report by the police."

The above decision shows that even if a Magistrate first accepts the final report and disposes of it by recording the order "enter true," and discharges the accused even then, after perusal of the police diary, he may summon the accused. All the more, when he has not passed any order accepting the final report and discharging the accused, but on perusal of the final report and the police diary the Magistrate is satisfied that a prima facie case has been made out against a particular accused, the Magistrate is entitled to take cognizance and proceed with the trial.

[9] Cr. Revn. No.1249 of 1956
[10] ILR 1950 (2) Calcutta 66

15. Mr. Dutt has referred to two other decisions of this High Court, suggesting that a contrary view was taken therein. In *Akshoy Kumar Dutt v. Jogesh Chandra Nandi*[11], after a report by the investigating officer that the complainant's case was false, the complainant filed a naraji petition and on receipt of that petition the Magistrate passed an order for holding judicial inquiry. It was held that the Magistrate not having examined the complainant on oath when he filed the

naraji petition or at any earlier stage, It could not be said that the Magistrate had taken cognizance of the case and therefore, the order for judicial inquiry was misconceived, because such an order could be made only after the Magistrate had taken cognizance of the case. In this case, it is clear that the question whether cognizance could be taken on the facts contained in the final report did not arise for decision of the Court. There were some observations made concerning the procedure to be followed in such circumstances, but it was nowhere stated that a Magistrate could not take cognizance on the substance of the information contained in a final report. This decision is therefore not a decision in support of proposition that a Magistrate cannot take cognizance on a final report. The other case cited by Mr. Dutt is an unreported decision, *Saifur v. State*[12], In that case however, the point decided was that where the police has submitted a charge-sheet against certain persons, it is open to the Magistrate when commencing proceedings under Section 251A of the Code, after considering the documents referred to in Section 173 (4) of the Code and after hearing the prosecution and the defence, to summon certain additional persons not sent up by the police and try them along with the persons sent up by the police. In the course of that judgment, the decision Cr. Rev. No.226 of 1960 D/d. 12-9-1960 (Cal.) was considered and the case was distinguished by pointing out that that was a case where there was a final report and no charge-sheet at all on which the Magistrate could take cognizance. It is true that the observation may be read as importing agreement with the view taken in Cri. Revn. No.226 of 1960 D/d. 12-9-1960 (Cal.) : but the observation was made only to point out that the facts of the case were quite different and in any case, that observation, not being relevant to the point for decision in that case, must be considered an obiter.

16. Next, I proceed to consider some decisions of other High Courts. The Mysore High Court in the case *Siddappa Gurappa v. State of Mysore*[13], clearly held that on receipt of any report from the police under Section 173 recommending the dropping of the proceedings, it is for the Magistrate either to accept the same or not; and a Magistrate can take cognizance of an offence or the facts contained in the report of the police-officer, although in the opinion of such officer there is no evidence to justify taking further action. In course of the judgment it was pointed out that clause (b) of Section 190 (1) of the Code did not lay down that the Magistrate may take cognizance only if recommended by the police; all that the clause requires is that there should be report in writing from a police officer setting out the facts which constitute an offence; and the Magistrate can take cognizance on the facts contained in the report of the police-officer, whatever the opinion of the police-officer may be.

17. The Rajasthan High Court in the case *Lumbaram v. State*[14], held as follows:

> 'If in any case, there is such a report by the police officer which gives all the facts and on whose basis the Magistrate comes to the conclusion that an offence is constituted, then he can take cognizance of the offence and such cognizance would be covered by Section 190(1) (b).

[11] 60 Cal. WN 345 : (AIR 1956 Cal 76)
[12] Cri. Revn. No.1072 of 1959 D/d. 22-11-1960 : (AIR 1962 Cal 133)
[13] AIR 1960 Mys 237
[14] 1957 Cr LJ 231 (Raj.)

It is possible for a Magistrate to take cognizance of an offence on a police report even though the police wants him to accept its negative report, if that report contains facts constituting an

offence."

18. The Patna High Court in the case *Raghunath Puri v. State*[15] made the following observations (P.353 of Cri LJ) : (at p.76 of AIR)

> "There is no provision for a charge-sheet in the Criminal Procedure Code; charge-sheet is a form provided under Departmental Rules of the Government, presumably under Section 173 (1) (a) of the Code. That section requires the police to submit to the Magistrate empowered to take cognizance of the offence on a police-report, a report in the form prescribed by the Local Government. The Government have, as it appears prescribed two forms; one is called a charge-sheet; used when accused is sent up for trial and the other is called a final report, which is used when the accused is not sent up for trial. But either is such a report as is required by a Magistrate empowered under Section 190 (1) (b); he takes cognizance of the offence under that section even if the accused is not sent up, i.e. not a charge-sheet , but a final report is sent; the Magistrate if he applies his mind to that report takes cognizance of an offence and if he wants to place the accused on trial he can issue his process."

There are two decisions to the contrary of the Pepsu High Court viz., *Harbir Singh v. State*[16], and *Mt. Ido v. Gainda Singh*[17], in both of which the View was taken that though the Magistrate has every right to look into the police diary and to make up his mind independently of what the police have stated, still when the police submits a final report and the Magistrate does not agree with the report, the Magistrate can only record his disagreement with the report but cannot take cognisance; he must leave it to the aggrieved party to file a complaint or protest petition which may be treated as a complaint and he may take cognizance thereon. This view was considered by Guha Ray J. in Cri. Revn. No.1249 of 1956 D/d. 3-6-1957 (Cal) and also by the Rajasthan High Court in the case 1957 Cri. LJ 231 (Raj), but the view of the Pepsu High Court was rejected in both cases.

19. Thus by far the larger number of decisions is in favor of the view that the Magistrate may take cognizance on a final report when the facts stated in the report constitute an offence in the opinion of the Magistrate and taking of the cognizance would be under Section 190 (1) (b) of the Code.

20. Next, there is the question whether the Magistrate instead of taking cognizance himself on the facts contained in the final report, may direct the submission of a charge-sheet by the police and thereafter, take cognizance on such charge-sheet. On this point I have already expressed my opinion with reference to the relevant sections of the Code

[15] AIR 1932 Patna 72 : 33 Cri. LJ 349 [17] AIR 1952 Pepsu 38

[16] AIR 1952 Pepsu 29

and the decision of the Privy Council, that the police must be left free to exercise their powers of investigation. On this point too, the decisions of the High Courts are not uniform. It has been mentioned that in Cri. Revn. No.22,6 of 1960 D/d. 12-9-1960 (Cal) a Bench of this Court took the view that the Magistrate can direct the police to submit a charge-sheet, whereas in Cr. Revn. Nos.898 and 921 of 1959 D/d. 5-1-1961 (Cal) the view was taken that the Magistrate cannot

direct the police to submit a charge-sheet when a final report has been submitted. The Allahabad, Assam, Madhya Pradesh and Madras High Courts are of the view that a charge-sheet cannot be called for from the police when the police have submitted a final report. The Allahabad High Court decision is *Rama Sanker v. State of U.P*[18]*.,* in para 9 of the judgment, Desai J. who delivered the judgment observed as follows:

> "A Court has no judicial control over investigation and over the manner or the circumstances in which an investigating officer makes his report under Section 173. The investigating officer's act is wholly administrative. There is, therefore, nothing to prevent him from submitting a report in supersession of an earlier one; he can do so on his own initiative or under the direction of the Superintendent of Police or the District Magistrate. If the Superintendent of Police or the District Magistrate directs the investigating officer to submit a charge-sheet to replace a final report, the direction is administrative and not subject to control by the Court. A report under Section 173 has to be made by an investigating officer through a superior officer and such superior officer has been expressly authorized to direct further investigation pending the Magistrate's order. If final report is submitted at first and on further investigation ordered by the superior police, the investigating officer finds that the accused has committed an offence, he would surely be bound to submit charge-sheet against him to supersede the final report."

21. Since it was held that the Court has no judicial control over investigation and over the manner or the circumstances in which an investigating officer makes his report under Section 173, it follows that when the investigating officer has submitted a final report, the Magistrate acting judicially cannot direct him to submit a charge-sheet, though a superior police officer may do so, or may direct further investigation. A District Magistrate has certain administrative control over the police, vide Section 4 of the Police Act, 1861, which provides that the administration of the police throughout the local jurisdiction of the Magistrate of the District shall, under the general control and direction of such Magistrate, be vested in the District Superintendent of Police. Section 3 of the Police Act provides that except as authorized under the provisions of the Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functionary. It is therefore clear that a Court has no administrative control over the police officers and therefore a Magistrate cannot pass an administrative order directing the police officer to submit a report of another kind when the police officer has submitted a report of one kind.

22. There are three decisions of the Assam High Court on the point. The first one of these decisions is *Kachu Gogoi v. State*[19]*,* In that case the police submitted a charge-sheet against one person and the Magistrate after examining 2 witnesses called for a charge-

[18] AIR 1956 All 525
[19] AIR 1951 Ass 151

sheet against a second person. After the trial was over, there was a revisional application by the second person aforesaid in which the point was urged that the direction of the Magistrate for a charge-sheet against him was illegal. Ramlabhaya, J. held that the order for submission of the charge-sheet was illegal, while Thadani, J. took a different view. Deka J., the 3rd Judge to whom

the case was referred, agreed on the whole with the view taken by Thadani, J. and referred to Sections 351 and 204 of the Criminal Procedure Code, observing that they gave sufficient jurisdiction to the Magistrate for acting in the manner as he did. It is clear however that when a Magistrate is in seisin of a case instituted on a charge-sheet or on a petition of complaint, he has the jurisdiction to summon and try any other accused who appears from the evidence to have been concerned in the offence. Reference may be made in this connection to the decision *Hafizur Rahman v. Aminul Haque*[20], and also to the Full Bench decision of the Judicial Commissioners of Sind, *Mehrab v. Emperor*[21], It would appear that in the Assam case cited above, the order calling for the second charge-sheet was regarded as a mode of summoning the second accused who appeared to be concerned in the offence.

In the second case of the Assam High Court, *Abdul Rahim v. Abdul Muktadin*[22], decided by Thadani and Deka JJ. it was clearly laid down that an order directing the police to send a charge-sheet is illegal and when there is a protest petition against the final report, the Magistrate should dispose of the petition treating the same as a petition of complaint. In the next case of the Assam High Court, AIR 1956 Assam 127 (2), decided by Ramlabhaya, J. it was held that there was no provision in the Code permitting a Magistrate to call for a charge-sheet in a case where the police had submitted a final report. It was however observed that the order calling for a charge-sheet in such case might be regarded as an irregular way of summoning the accused after taking cognisance.

23. The Madras High Court in the case *Venkata Subba Rao v. Narahari Setty*[23], observed as follows:

> "It is quite obvious that the order directing the police who had put in a referred charge-sheet (equivalent to a final report) to put in a charge-sheet was not a legal order; the police must be allowed to form their opinion of a case when submitting their report and the Magistrate cannot ask them to change their opinion merely because he does not agree with them."

24. The Madhya Pradesh High Court in the case *Amar Premchand v. State*[24], held that under Section 190 of the Code, it was open to a Magistrate to take cognizance of a case even when the police was of the opinion that there was no case against the accused, but there was nothing in the section which empowered the Magistrate to order the police in such a case to submit a charge-sheet against the accused. In this case, an earlier decision by the Madhya Pradesh High Court was distinguished, that case being *Piyarji Mangilalji v. State*[25], In that case a Jimmadar who had been put in charge of 2 head of cattle failed to produce the same when called upon to do so and the Magistrate suspected criminal misappropriation in respect of

[20] 44 Cal WN 1114 : (AIR 1941 Cal185)
[21] 26 Cr. LJ 181 : (AIR 1924 Sind 71) (FB)
[22] AIR 1953 Ass 112
[23] AIR 1932 Mad 673 : 33 Cr. LJ 785
[24] AIR 1960 Mad Pra 12
[25] AIR 1958 Mad Prad 234

the cattle and took cognizance of the case under Section 190 (1) (c) on his own suspicion and directed the police to submit a charge-sheet against the Jimmadar under Section 406 Indian Penal Code. It was held by a single Judge of the Madhya Pradesh High Court that in such circumstances the order by the Magistrate on the police to submit charge-sheet would be quite legal, provided the order was passed after a judicial inquiry. Now the order to submit a charge-

sheet, after the Magistrate has already taken cognizance under Section 190 (1) (c) and found on inquiry that there is a prima face case, appears on the face of it to be inconsistent, if by charge-sheet is understood the police report on which cognizance is taken under Section 190 (1) (b); and such an order can be understood only by regarding the order to submit a charge-sheet as an irregular way of summoning the accused after taking cognizance, as was held by the Assam High Court in the case AIR 1956 Assam 127(2). The decision is therefore, not an authority for the proposition that on receiving a final report a Magistrate can direct the police to submit a charge-sheet and take cognizance on such charge-sheet. In this connection I may also refer to a decision of the Orissa High Court, *Hrushikesh v. Krushna Chandra*[26], where calling for a charge-sheet by the Magistrate, after the Magistrate had examined on oath the petitioner who filed a protest or a naraji petition, was held to be legal. It was however, observed that calling for a charge-sheet was nothing more than a mode of issuing process for compelling the attendance of the accused and that such a course had come into practical use and was hardly distinguishable from an order under Section 204 of the Criminal procedure Code, for cognizance had already been taken on the protest petition.

25. The decisions of Orissa, Patna and Bombay High Courts are to the effect that a Magistrate may direct submission of a charge-sheet in such a case, but as already pointed out, the Orissa High Court regarded that calling for a charge-sheet in such a case as a mode of issuing process for compelling, the attendance of the accused; and in another Orissa High Court case, *Mahabir Prosad v. State*[27], it was observed that where a final report is submitted by the police under Section 173 and there is a protest petition by the informant, two courses are open to the Magistrate; he may call for a charge-sheet and take cognizance under Section 190 (1) (b) or he may take direct cognizance on the protest petition treated as a petition of complaint. In this case, it appears that on the protest Petition, a judicial inquiry was ordered by the Sub-Divisional Magistrate and after considering the report of a Subordinate Magistrate, the Sub-Divisional Magistrate directed submission of a charge-sheet; therefore the order calling for a charge-sheet was clearly treated as a recognized way of summoning the accused or compelling the attendance of the accused, cognizance having already been taken.

26. The decisions of the Patna High Court are *Shukadeva Sahay v. Emperor*[28], and *Uma Singh v. Emperor*[29], In the first of these cases, it was held that an order of the District Magistrate directing a police officer to submit a charge-sheet was a judicial order and was not an executive order. This however is a view contrary to that taken by the Allahabad High Court and by the Patna High Court itself in a subsequent case. As regards the second case, AIR 1932 Patna 72 : S3 Cri LJ 349, reference has already been made to it in connection with the question of taking cognizance on the final report, which was approved by the decision. In that decision it was further observed that an order for submission of a charge-sheet might be an executive order or a judicial order: and that in

[26] AIR 1958 Ori 104
[27] AIR 1958 Oris 11
[28] AIR 1928 Pat 585, AIR 1932 Pat 72 : 33 Cr. LJ 349
[29] AIR 1933 Pat242

the former category is an order sometimes passed by the superior police officer and sometimes by a Magistrate to their Subordinates engaged in the investigation and in the second category is an order which is passed by the Magistrate empowered under Section 190(1) (b) and such a judicial order for submission of charge-sheet is only a mode of issuing process for compelling the attendance of the accused which has come into the practical use. This was the view which was

quoted with approval by the Orissa High Court in the case AIR 1958 Orissa 104. As regards the executive order, we are not concerned with an executive order by a superior police officer. As regards an executive order by a Magistrate on an investigating officer, it must clearly be held that a Magistrate has no power to give such an order in view of the provisions of Section 3 of the Police Act 1861 and in view of the fact that there is no provision in the Code permitting such an action. In AIR 1933 Patna 242 it was held by a Division Bench of the Patna High Court that the Magistrate's order accepting the final report under Section 173 was not a judicial order and therefore the Magistrate could re-open the case by calling for a charge-sheet. It was however held that in such a case, cognizance must be deemed to have been taken under Section 190 (1) (c). It may be pointed out that if the Magistrate has already taken cognizance under Section 190 (1) (c) on certain materials before him, then he cannot take cognizance over again on the charge-sheet directed to be submitted by the police and therefore the order calling for a charge-sheet must have been regarded as a method of issuing process for compelling the attendance of the accused. Neither the Orissa decisions nor the Patna decisions therefore are authority for the proposition that on receiving a final report the Magistrate may call for a charge-sheet and take cognizance under Section 190 (1) (b) on such charge-sheet.

27. There is however the decision of the Bombay High Court, AIR 1960 Bombay 240, where this view was definitely taken. In that case it was observed after reviewing the provisions contained in Chapter XIV of the Criminal Procedure Code, that at every stage of investigation by a police officer into a cognizable case, the Magistrate has the opportunity of supervising the investigation and when a referred report is submitted to a Magistrate under Section 173 of the Code, the Magistrate must act judicially and is not bound to accept the report, but he may call for a charge-sheet from the investigating officer. It was also observed that the Magistrate should not exercise such power lightly and only after a careful consideration of the materials placed by the police officer in his report, if a Magistrate is satisfied that there are sufficiently cogent grounds which require him to disagree with the opinion of the police officer, he will be justified in calling for a charge-sheet.

28. I would like to observe that if the Magistrate has already applied his mind to the facts of the case as contained in the police report or the case diary with a view to proceed with the case, he has taken cognizance and in such a case the order for submission of a charge-sheet with the idea of taking formal cognizance thereon appears to be a contradiction in terms; in such case the order calling for a charge-sheet can only be regarded as an irregular method of compelling the attendance of the accused.

29. What is taking cognizance was considered by this Court in the case *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerji*[30], It was held that

[30] AIR 1950 Cal 437

before it can be said that any Magistrate has taken cognizance of an offence under Section 190 (1) (a), he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter; and when the Magistrate applies his mind not for the purpose of proceeding under the subsequent provisions of the Chapter but for taking action of some other kind e.g. ordering an investigation under Section 156 (3) or issuing search warrant, he cannot be said to have taken cognizance of the offence. This view was approved by the Supreme Court in the case, *R.R. Chari v. State of U.P.*[31], Applying the aforesaid test, where it appears that a

Magistrate has not only applied his mind to the facts of the case contained in a police report and the connected police papers, but desires to proceed with the trial of the case, he must be held to have taken cognizance of the case and in such circumstances what he has to do is not to call for a charge-sheet for taking cognizance thereon, but to direct the police to send up the accused who may be on a bond taken by the investigating officer under Section 169 of the Code, or issue process under Section 204 of the Code. Thereafter, it the final report does not contain the names of the relevant witnesses, the investigating officer or the Court Inspector-in-charge must submit the names of the relevant witnesses in the case and must take action also under Section 173 (4) of the Code; but a direction on the police to take all these steps does not amount to calling for a charge-sheet, unless a charge-sheet is interpreted to mean an order on the police to arrange the production of the accused and to submit a list of witnesses and to take action under Section 173 (4) of the Code. But a charge-sheet really means the report which the police submit in the prescribed form when the police officer is satisfied in terms of Section 170 that there is sufficient evidence or reasonable suspicion to justify sensing up the accused for trial. I must clearly hold that the police cannot be directed to submit a charge-sheet in this sense when they have submitted a final report; and further where the Magistrate having considered the facts contained in the final report with the materials collected by the police, has decided to proceed with the case, he has already taken cognizance and there is no meaning in calling for a charge-sheet and taking cognizance thereon.

30. Next, there is the question how far a Magistrate can call for and use the case diary and the statements recorded under Section 161 of the Code. Mr. Ajit Kumar Dutt appearing for the petitioner has referred to the terms of Section 172 (2) which provide that any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the ease but to aid such inquiry or trial.

31. Mr. Dutt has urged that only for the limited purpose mentioned in sub-section (2) of Section 172 of the Code, a Magistrate can use the police diaries. In support of his contention Mr. Dutt has referred to the cases *Habeeb Mohammad v. State of Hyderabad*[32], *Abdul Rahim v. Salhu Kherwar*[33]and *Bholaram Dalmia v. State*[34], In the first two of these cases, some reference was made to the statements contained in police diary in the judgment of the Court. This was naturally criticised with reference to the terms of sub-section (2) of Section 172 of the Code. In the last cited case, the question was considered whether the statements in the police diaries could be used for the purpose of a judicial enquiry. It was, however, a case where the investigation had been made by the Calcutta Police at the time when Section 172 of the Code was not applicable to the Calcutta Police

[31] AIR 1951 SC 207
[32] AIR 1954 SC 51
[33] 10 CWN 600
[34] 58 Cal WN 597: (AIR 1955 Cal 234)

and further their Lordships were concerned with the question of what was appropriate at a judicial enquiry which was held on a naraji or protest petition treated as a petition of complaint. When a judicial enquiry was being held, it was natural to hold in such a case that the Magistrate could only use the materials in the police diary to find out who should be examined as witnesses in course of the judicial enquiry and that the enquiring Magistrate could not directly use the statements contained in the police diary as materials on which to base his conclusion. This decision, therefore, is not an authority for the proposition that a Magistrate cannot look into the police diary when no judicial enquiry is being held, but the Magistrate is considering, after perusing the statement of facts contained in the final report, whether there is sufficient material to

justify placing the accused on trial. It may be mentioned that it has been accepted by almost all the High Courts that a Magistrate can send for the case diaries including the statements of the witnesses recorded by the police and refer to them for deciding whether or not to accept the police report. This was the view taken in Cr. Rev. No.226 of 1960 (Cal) as well as in Cr. Rev. Nos.898 and 921 of 1959 (Cal) as also in Cr. Rev. No.1249 of 1956 (Cal). Even the Pepsu High Court in AIR 1952 Pepsu 29 held that the Magistrate could send for the police papers and examine the materials collected by the police, if only to record disagreement with the police report. In *S.P. Jaiswal v. State,*[35] the objection that the police diaries could not be looked into for determining whether any case had been made out, was discussed specifically in para 24 of the report. The Punjab High Court definitely rejected that contention and held as follows:-

> "That a Court has the power to look into police records seems to be clear from the various sections of the Criminal Procedure Code. How is the Magistrate to give a remand without looking into police diaries? How is a Magistrate to proceed under Section 173 if he does not look into-them? As a matter of fact the Code contemplates the. Magistrate to be in touch with the investigation by the police at all stages, right from the making of the first information report.....In the case of a bail application I cannot believe that a Magistrate can ever allow or refuse ball without looking into police diaries .....How can he order a discharge under Section 190 (1) (b) of the Code without going into the police papers and if a Magistrate can order a discharge after looking into the police diaries, surely it is open to this Court when the matter is brought before it under Section 561A of the Code to look into them". I respectfully agree with the view expressed above. Section 167 provides that along with a remand application, the investigating officer must forward to a Magistrate copies of the entries in the diary relating to the case. For dealing with bail applications, the Magistrate has necessarily to look into the case diaries. It is unreasonable to suggest that when the police have completed an investigation and submitted a report, suddenly the police diaries become a sealed book to the Magistrate. Where a charge-sheet is submitted, the statements recorded under Section 161 and other documents mentioned in Section 173 (4) are to be seen under the Statute not only by the Magistrate but also by the accused. Mr. Dutt has urged that for purposes of Section 251A and Section 207A of the Code, a Magistrate cannot use the diaries as distinct from the statements and documents mentioned in Section 173 (4), except for the limited purpose mentioned in Section 172 (2). When there is an inquiry or trial under Section 207A or 251A, necessarily the police diaries, as distinct from the documents mentioned in Section

[35] AIR 1953 Pun 149

> 173 (4), can only be used for the limited purpose of Section 172 (2). But when the police have submitted a final report and the Magistrate has to consider it judicially, there is no inquiry or trial of which the magistrate is in seism and section 172 (2) has no application. At that stage further the documents mentioned in Section 173 (4) have not been separately prepared, but remain as annexure to the case diaries. Unless therefore the Magistrate can look into them, he cannot decide whether the opinion of the police is correct. It must follow that he can and must have access to them; there is nothing in the terms of Section 172 (2) of the Code which debars a Magistrate from looking into the case diaries

including the statements of witnesses recorded under Section 161 of the Code, when considering whether a final report should or should not be accepted.

32. My reply, therefore, to the question referred to the Full Bench for decision is that when the police upon investigation has submitted a final report, a Magistrate cannot direct the police to submit a charge-sheet; but he can take cognizance on the statement of facts contained in the final report and for the purpose deciding whether further action should be taken, he may refer to the police diaries of the case including the statements under Section 161 of the Code and if satisfied that there is a prima facie case against one or more accused he may issue process or in the alternative direct the police officer to produce them before the Court if the accused are on bond taken by the police Cognizance cannot however be taken on the materials contained in the case diaries independently of the final report.

33. As regards the subsidiary question whether the Magistrate can direct further investigation, there is one decision to the contrary viz., *State of Kutch v. Budhgar Dharangar*[36], where it was held, that the Magistrate on receiving the final report cannot direct further investigation and that though a Magistrate can direct investigation under Section 169 of the Criminal Procedure Code, that applies to a case which was not investigated by the police and not to a case which has already' been investigated and in which final report has been submitted. There are, however, decisions of other High Courts to the contrary. Thus in the case *J.D. Boywalle v. Sorab Rustomji*[37], decided by Beaumont C.J. and Macklin J. it was observed as follows (p.296):

> "Where in the case of a man who has been arrested and released on bail, the police officer reports that there appears to be no case and invites the Magistrate to discharge the accused, the Magistrate is not bound to act upon the police view. He can undoubtedly say, 'I will have a further inquiry into the matter. I think the police are strong in suggesting that the accused should be discharged'. and he may order further investigation".

34. Further, while Section 159 specifically refers to the power of the Magistrate to order for an investigation on receiving a report under Section 157, the power conferred on a Magistrate to order an investigation under Section 156 (3) is general: and if the Magistrate can order investigation under the general powers he can also order further investigation, if he is not satisfied with the investigation already made. Section 173 (2) provides that where a superior officer of police has been appointed under Section 158, the

[36] AIR 1954 Kutch 26
[37] AIR 1941 Bom 294

report shall," in any case in which the State Government so directs, be submitted through that officer and he may, pending the orders of the Magistrate, direct the officer-in-charge of the police station to make further investigation. There is a direction by the State Government, contained in the Police Regulations, Bengal, that a final report should be submitted through a superior police officer. Such superior officer can direct further investigation. It must be held that the Magistrate can also pass an order for further investigation; in doing so, the Magistrate exercises, not an executive power over the police, but the power under Section 156 (3). This view is confirmed by the terms of rule 276 of the Police Regulations, which says that a Magistrate on receiving the final report may take cognizance, under Section 190 (1) (b) or may

order further investigation; and that the police officer holding further investigation may submit a charge-sheet if he thinks that the case is proved, or submit a final report again if he thinks that the case is not proved or not true. This Regulation was made by the Inspector General of Police under Section 12 of the Police Act with the concurrence of the State Government. These Regulations are for the guidance, of the police officers and they do not directly apply to Magistrates who are governed by procedure prescribed by the Criminal Procedure Code itself; but in my opinion the statement of procedure as contained in rule 276 of the Police Regulations is correct and a Magistrate may order further investigation where a police-officer has submitted a final report.

35. This subsidiary question however is-not really material for answering the question which has been referred to the Full Bench and even if the subsidiary question is answered differently, that would not affect the answer which I have already proposed to the question referred.

N.K. SEN, J.

36. I agree with the reasons and conclusions stated in the judgment just delivered by my Lord Sen, J. As repetition is unnecessary, I do not propose to add anything beyond the general expression of concurrence with the said reasons and the few observations which I shall presently make.

37. The question for decision before the Full Bench is where the police upon investigation has submitted a final report under Section 173 Criminal Procedure Code can a Magistrate refuse to accept the same and direct the police to submit a charge-sheet or in the alternative can a Magistrate take cognizance on the statements of facts contained in the Final Report and/or materials contained in the diary and issue process against the accused.

38. The learned referring Judges have pointed out that there are two decisions of two different Division Benches which have taken views directly in conflict with each other and cannot be reconciled. Both these cases are unreported. In one case Criminal Revn. No.226 of 1960 D/d. 12-9-1960 (Cal), Mitter and Bhattacharya JJ. were of the view that (a) where a police submitted a final report after investigation the Magistrate could not take cognizance of the offence on the basis of such reports and the materials collected by the police as contained in the police diary, (b) the Magistrate may, if satisfied that there is enough material against the accused, direct the police to submit a charge-sheet.

39. In the other case, Criminal Revn. Nos.898 and 921 of 1959 (Cal) S.K. Sen and K.C. Sen JJ. were of the view that (a) where the police has submitted a final report it was not open to the Magistrate to cal] for a charge-sheet, (b) it was not open to the Magistrate to call for fuller charge-sheet in respect of other offences disclosed in the final report and the case diary when the charge-sheet submitted by the police was limited to certain charges only.

40. S.K. Sen and K.C. Sen JJ. also decided the case of Cri. Revn. No.1072 of 1959 D/d. 22-11-1960 : (AIR 1962 Calcutta 133).

41. Before dealing with the two cases mentioned above in which conflicting views have been already expressed by two different Division Benches it may be noted that Mitter and Bhatta charya JJ. were clearly of the view that a Magistrate was not bound to accept the final report .under Section 173 Criminal Procedure Code. When the police submitted a final report

recommending that no action may be taken. Their Lordships held that it became the duty of the Magistrate concerned to carefully consider the materials collected by the Police and if satisfied that there was enough material to put the accused on trial, to direct the police to submit a charge-sheet. The learned Judges then went on to say that if the Magistrate was satisfied that the materials collected by the police disclosed the commission of the offence in question, it was his duty to direct the police to submit a charge-sheet or to examine the complainant before taking formal cognizance. It may be pointed out that in that particular case there was a Naraji petition filed in Court.

42. In the case of Rabindra Nath Chakrabarty, Cri. Revn. Nos.898 and 921 of 1959 (Cal) mentioned above the police submitted a charge-sheet against six persons. The widow of the deceased filed a Naraji petition on which the learned Magistrate directed the submission of charge-sheet against other persons including the 6 already sent up. In other words, cognizance on the charge-sheet had already been taken of the offence and thereafter the learned Magistrate directed submission of charge-sheet against others.

43. There are not many decisions of this Court directly on the point. The few worth mentioning are being noted. Guha Ray J. sitting singly in the case of Criminal Revn. 1249 of 1958 D/d. 3-6-1957 (Cal) held, in a case where on receipt of a final report the Magistrate simply passed an order saying "True Section 436 Indian Penal Code. Alamats may be destroyed" that the Magistrate had not disposed of the matter finally but later on, on perusal of the case diary and police papers, he directed issue of summons on some of the accused persons under Section 436 Indian Penal Code. His Lordship further held that although there was a Naraji petition filed by the complainant the learned Magistrate took cognizance not on the Naraji petition but on the police report after perusing the case diary and police papers. In deciding that case Guha Ray J. followed the decision of the Patna High Court in the case of AIR 1932 Patna 72 and held that when the Magistrate had applied his mind to the police Report, whether it was a charge-sheet or a Final Report, he was in fact taking cognizance of the offence and if he wanted to place the accused on trial he could issue process.

44. In another Calcutta case 45 Cal WN 195 : (AIR 1941 Calcutta 263), Henderson and Sen, JJ. in an entirely .different context observed in passing that "It was of course, open to a Magistrate to call for a charge-sheet". Purely obiter as it was, their Lordships gave no reasons for their saying so, There is yet another Calcutta case ILR (1950) 2 Calcutta 66, where their Lordships K.C. Das Gupta and Lahiri JJ. held that the magistrate in passing an order "Enter True" on a police report had in fact taken cognizance of the offence and thereafter by summoning the accused was only acting under Section 204 Criminal Procedure Code.

45. *Isaf Nasya v. Emperor*[38], cited at the Bar is of no assistance in deciding the point at issue.

46. Before discussing the cases of other High Courts it is necessary to have a clear idea as to the contents of Chapter XIV of the Code beginning from Section 154 Criminal Procedure Code, till the completion of investigation and submission of the police report under Section 173 of the Code. What are popularly known as a charge-sheet and a final report are only two different forms used by the police when submitting their report under Section 173 of the Code. Section 173 only contemplates that the police shall forward, to a magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government stating various details.

The police, however, in accordance with the Police Regulations submit a form which is known as a charge-sheet when according to the police the accused person was to face a trial. Another form known as final report is used only when the police think that no case has been made out against the accused. In clause (a) of Sub-Section (1) of Section 173, the police is bound while sending the report to the magistrate to set forth the names of the parties, the nature of the information, the names of persons who appear to be acquainted with the circumstances of the case and such other details as mentioned therein. If the police in its report omit to state such details as are required under the Code it may be assumed that the Report is not in accordance with law. It is on this report under Section 173 Criminal Procedure Code, that the magistrate is either to proceed against the accused persons or to discharge them. The magistrate is in no way bound either to accept the police report or to reject it. Section 190 (1) mentions in its three clauses (a) (b) and (c) the methods by which a magistrate may take cognizance of an offence. Clause (b) of Section 190 (1) empowers a magistrate to take cognizance when there is a report in writing made by police officer and Section 173 of the Code is the report of the police officer contemplated therein. It is, for this reason, that the police report must contain all materials which would enable the magistrate either to accept or to reject it.

47. There are various decisions of different High Courts that it is a judicial act on the part of a magistrate to call for a charge-sheet when the police had in fact submitted a final report. I do not propose to deal with those cases as I consider that whether calling for a charge-sheet is a judicial act or not does not help us in deciding the point before this Full Bench. In the cases of AIR 1933 Patna 242, AIR 1932 Patna 72, AIR 1928 Patna 585, AIR 1958 Orissa 11 and AIR 1960 Bombay 240, their Lordships were of the view that a magistrate was entitled to call for a charge-sheet to be submitted by the police where in fact they had submitted a final report. On the other hand; Madras, Madhya Pradesh and Assam High Courts held a contrary view to the effect that the magistrate has no jurisdiction to do so. AIR 1932 Madras 673. AIR 1960 Madhya Pradesh 12 and AIR 195p Assam 112 are the relevant cases.

[38] ILR 54 Cal 303 : (AIR 1928 Cal 24)

48. It seems to me to be opposed to reason to ask the police who had already completed the investigation and stated that there was no case against the accused, to send a revised report, namely, a charge-sheet making an altogether volte-face. This would be forcing them to say what they believe to be incorrect. It cannot be argued in view of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of 71 Ind App 203 : (AIR 1945 PC 18), that the court has any power to interfere with the investigation by the police who were to investigate the case in the way they thought best. The only power the magistrate probably has if he finds the reports under Section 173 Criminal Procedure Code, incomplete or the investigation perfunctory, is to order further investigation. Whether or not in such cases a Magistrate has powers to order further investigation was argued at the Bar. It is not necessary to go into the question elaborately.

In the case of AIR 1941 Bombay 294, Beaumont C.J. and Maclin J., held that even when the Police invited the Magistrate to discharge the accused, he was not bound to accept the recommendation made by the Police but if he thought there was scope for further investigation, he had undoubtedly the powers to say so and direct the Police accordingly. Apart from the decision, a reference to the provisions contained in Sections 159 and 156 (3) of the Code will show that the powers conferred upon the Magistrate to order investigation is not limited only up, to the time when a final report is submitted. The powers conferred under Section 156 (3) of the Code are general and do not seem to be limited in any manner. But it is impossible to hold that the Magistrate can order the police to submit a report making a recommendation in a way the

Magistrate wanted it. Therefore, assuming that a "Final Report" contains no materials upon which the magistrate is in a position to decide whether or not to accept it, it is necessary for us to consider what papers he can call for from the police to enable him to come to his own decision. Before discussing this point, we have got to remember what is meant by taking cognizance. The Supreme Court in the case of 1952 SCA 443 : AIR 1951 Supreme Court 207, has explained how and when a magistrate takes cognizance. Chief Justice Kania has quoted the decision of Das Gupta, J. in the case of AIR 1950 Calcutta 437 with approval. It is said that the magistrate takes cognizance of an offence when he applies his mind to the contents of the petition for the purpose of proceeding in a particular way indicated under Section 200 etc.

49. Mr. Justice J.P. Mitter with whom Bhattacharyya, J. agreed in deciding Kashem Ali's case Cri. Revn. No.226 of 1960, D/d. 12-9-1960 (Cal) (supra) held-

> (a) a magistrate could not take cognizance on the basis of police diary and statements recorded under Section 161 Criminal Procedure Code
> (b) it was the duty of the magistrate to carefully consider the materials collected by the police.

50. So far as police diaries are concerned, Section 172 (2) of the Code prohibits their use as evidence in Court. In the case of *Sk. Nur Md. v. The State*[39] Mitter, J. sitting with Debabrata Mookerjee J. held that for the purpose of framing of the charge as provided under Section 251A of the Code, the Court is entitled to consider only the documents referred to in Section 173 but their Lordships nowhere said that for the purpose of examining the correctness or otherwise of a Final Report not containing necessary details, a magistrate was precluded from looking at the police diary. The magistrate was not, of

[39]862 Cal WN 717 : (AIR 1959 Cal 278)

course, to use the same as evidence nor to frame a charge thereon.

51. So far as consideration of "materials collected by the police", I do not know what other papers their Lordships meant when statements recorded under Section 161 Criminal Procedure Code, were to be excluded. So far as statements recorded under Section 161 Criminal Procedure Code, are concerned, I am clearly of the view that they usually form the basis on which a magistrate was to decide whether or not to accept the police report. It must be remembered that we are now dealing with Section 251A of the Code. When a charge-sheet is submitted, it is on these statements that a magistrate has to frame a charge if a prima facie case appears to be made out. If, however, a Final Report comes in, it is impossible for the magistrate to decide whether or not to accept it, if the statement made under Section 161 Criminal Procedure Code, or the police diary be not permitted to be seen by the magistrate. I am not therefore in a position to understand what other "materials collected by the police" could be carefully considered. Das Gupta and Debabrata Mookerjee. JJ. in the case of 58 Cal WN 597 : (AIR 1955 Calcutta 234), held that where the statements made in a police diary were sought to be used; a magistrate was to secure the presence for examination to court of such persons whose statements provided materials that may justify the issue of process. Their Lordships surely meant the stage when the magistrate was to make up his mind as to whether a process was to issue or not. In this connection reference may be made to the case of 10 Cal WN 600.

52. The Supreme Court in the case of 11954 SCA 514 at p.535 : (AIR 1954 Supreme Court 51 at P.60), pointed out that during trial a judge could take assistance from the Police diaries by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused.

53. It is to be borne in mind that it was never the intention of the legislature to exclude: the use of police diary altogether by the magistrate. What was excluded was its use as evidence in course of the trial. But it was definitely mentioned that the diary could be used by the court to aid it in an enquiry or trial. Under the provisions of Section 167, if the police officer wanted further time for investigation he was to forthwith transmit to the nearest magistrate a copy of the entries in the diary. The purpose of this was to enable the magistrate to find out from those entries whether it was necessary to detain the accused in custody further for completion of the investigation. If the magistrate be permitted to examine the contents of the diary to see whether there were some materials for thinking that the accused in the case was implicated in the offence justifying his further detention in the custody, I do not see any reason why for the purpose of examining the correctness or otherwise of a perfunctory final report he should not be allowed to look at the police diary.

54. Having carefully considered the matter, my view is that a magistrate has nothing to do with the investigation by the police from the point a first information is lodged up to the submission of the final report and. as such he is not entitled to direct the police to act in a particular manner. The provisions in the Code as contained in the chapter relating to investigation, no doubt enjoin upon the police to keep the magistrate and the superior police officers informed as to the progress of investigation : such provisions are meant only to ensure that investigation is carried on in a proper manner leaving no loophole for any subsequent tampering with the records. That being the position, I would answer the question submitted before the Full Bench in the following manner:-

> (a) when the police upon investigation has submitted a Final Report under Section 173 Criminal Procedure Code, a Magistrate cannot direct the police to submit a charge-sheet;
> (b) a magistrate can take cognizance on the statement of facts contained in the final report after perusing, if necessary, the materials contained in the case diary and issue process against the accused or in the alternative direct the Police officer to produce the case diary before the Court if the accused are on bond taken by the Police. Cognizance cannot be taken on the materials contained in the case diaries independently of the final report.

Bhattacharya, J.

55. With the greatest respect I am unable to agree with the view that in an appropriate case a Magistrate cannot direct the Police to submit a charge-sheet when a Final Report has been sent in.

56. The Magistrate is in charge of supervision of the case. He has to exercise judicial discretion in many matters connected with the investigation. Can it be said that he is merely a dummy or an automaton who is expected to put a rubber stamp to whatever is suggested by the Police? The answer must be definitely in the negative. He' is to exercise his discretion and perform judicial

functions. When a 'Final Report' is submitted he may find that the Report is perfunctory in that some relevant witnesses have not been examined. It may be that the conclusion drawn by the Investigating Officer is not on the face of it supported by the data in the Police papers. Further, there may be a grave mistake when the Police report "mistake of law" or "mistake of fact". The infirmity may be based on an obvious wrong interpretation of law, e.g. right of private defence, provocation, or contributory negligence (as in the instant case - which has no place in the Criminal Law of this country) or mistake of facts and law (e.g. the civil nature of a dispute). In a case like this certainly the Magistrate will not blindly accept the Final Report and discharge the accused. Then again it may so happen that the Investigating Officer wanted to submit a charge-sheet and was definitely of the opinion that the accused should he brought to trial but under pressure of authorities, for example, even those higher up than what has been indicated in Section 4 of the Police Act, he was not allowed to submit a charge-sheet. A similar situation might have arisen in the past and it may happen again. In such a case are the hands of the Magistrate so tied that he cannot even give effect to the real opinion of the Investigating Officer and call upon him to submit a charge-sheet? The answer must be a definite No. As was pointed out in *Hakim Ally v. Emperor*[40],

> "It is part of the daily duty to Township Magistrates to receive both first and final reports of the Police and to pass orders on them. It would be a mere farce to tell a Magistrate that be has such a duty to perform if he may not correct a mistake made by the Police....."

[40]7 Cri LJ 414 (LB)

57. Suffice it to point out at this stage, before reverting to the topic hereafter, that the relevant order which a Magistrate passes or is expected to pass during investigation is judicial and not executive. The Magistrate is not expected to sign blindly all papers put up before him or accept without exercising any discretion, the recommendations of the Police. Light may be thrown by the following cases. In AIR 1955 Supreme Court 196, a case under the Prevention of Corruption Act, it was observed inter alia that if cognizance is in fact taken on a Police Report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it can be set aside. *In re : Shivlingappa Bhagappa*[41], it was that a Magistrate cannot take cognizance of an offence under Section 190 (1) (b) Criminal Procedure Code and upon a Police charge-sheet which does not contain the facts which constitute the offence. It was observed in *Lee v. Adhikary*[42], that a prosecution is not legally instituted under Section 190 (1) (b) of the Criminal Procedure Code when the Police Report under Section 173 does not set forth the nature of the information.....*K. Hoshaide v. Emperor*[43]. laid down that a Magistrate must apply his judicial mind to the question whether a search warrant is or is not to be issued when it appears that a Magistrate has not applied his mind this way and when it appears that action had been taken on insufficient material, High Court will always interfere and where the Police Report on which the Magistrate took cognizance of the case did not set forth the nature of the information against the accused, in the circumstances of the case the prosecution case instituted against the accused on the Police Report should be set aside.

58. A resume of the relevant provision of the Criminal Procedure Code will show the nature of the duties of the Magistrate in this connection and his responsibilities. Under Section 156 (1) of the Criminal Procedure Code the Police may investigate any cognizable case without the order of a Magistrate. Section 156 (3) authorizes a duly empowered Magistrate to order such an investigation. Section 157 of the Code directs that the Police should forthwith send a Report

when the commission of a cognisable offence is suspected. This Magistrate should be one empowered to take cognizance of such an often e upon a Police Report. Section 158 reiterates the necessity of sending a report to a Magistrate and the procedure how to submit it has been indicated. Section 159 is to the following effect :

> "Such a Magistrate, on receiving such report, may direct an investigation or, if it thinks fit, at once proceed or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise dispose of, the case in manner provided in this Court."

The words which deserve special attention in my opinion, are "may direct" and "if he thinks fit" (besides "otherwise dispose of"). As was pointed out in *Sarjoo v. State of West Bengal*[44], by a Division Bench of this Court, ".....A Magistrate acting under Section 159 is an authority legally competent to investigate". Test Identification Parades (including statements) take place under orders of the Magistrate in accordance with the provisions read with Section 9 of the Indian Evidence Act. Relevant statements or confessions are recorded under Section 164 of the Code. All these may take place in the course of any

[41] 31 Cr LJ 1142 : (AIR 1930 Bom 372)
[43] AIR 1940 Cal 97
[42] ILR 87 Cal 49 : 14 Cal WN 304
[44] Cr. Appeal No.750 of 1959, decided D/d. 5-8-1960 : (1961 (2) Cri LJ 71) (Cal)

investigation or at any time afterwards before the commencement of the inquiry or trial. Section 165 (5), in reference to search by Police Officers, lays down:

> "Copies of any record made under sub-section (1) Or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate :
> Provided that he shall pay for the same unless the Magistrate for some special reasons thinks fit to furnish it free of cost."

Similar provisions have been embodied in the next section, when an Officer-in-Charge of Police Station may require another to issue search warrant. Under Section 167, whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 61 and there are grounds for believing that the accusation or information is well-founded, the Police "shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused to such Magistrate". Thereafter the Magistrate may authorize the detention of the accused in such custody, as he may think fit, for a term not exceeding 45 days in the whole. Sub-section (3) enjoins recording of reasons by the Magistrate for authorizing detention in the custody of the Police. A bond is to be executed by the accused when evidence is deficient and the Police releases him. This execution of a bond is highly significant, because it is based on the possibility of future action and thereafter trial of the accused or committing him for trial. This is clear also from Section 173 (3) which is to the following effect:

> "Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such

bond or otherwise as he thinks fit."

The words "or otherwise as he thinks fit" is a clear indication of what the Magistrate may do in spite of a 'Final Report' submitted by the Police in accordance with Section 173 of the Code.

59. The Magistrate in. order to be able to discharge his duties according to law has a right to refer to police paper, including Diary and statement of witnesses. In AIR 1953 Punjab 149, Kapur, J., in repelling the argument that the Magistrate or the Judge would not be entitled to look into the Police diaries for determining whether any case has been made out or not, observed inter alia as follows :

> "This is a proposition of law which has only to be stated to be rejected. I cannot believe nor do I think that that is the law that a man can be put on trial and his liberty jeopardized when there is no material on which the Police could have made a report. That a Court has the power to look into the Police records seems to be clear from the various sections of the Criminal Procedure Code that I have mentioned above. How is the Magistrate to give a remand without looking into the diaries. How is a Magistrate to proceed under Section 173, Criminal Procedure Code, if he is not to look into them. As a matter of fact, the Code of Criminal Procedure contemplates the Magistrate to be in touch with the investigation of the Police at all stages right from the making of the first information report. If after investigation the Police comes to the conclusion that there is no case made out against the accused person the Magistrate can still go into the matter and give a judicial decision in regard to that. In the case of bail application I cannot believe that a Magistrate can either allow, or refuse bail without looking into the police diaries. Under Section 253 (2), Criminal Procedure Code a Magistrate in a warrant case is entitled to discharge an accused at any stage which would include the stage at which he takes cognizance of the case under Section 190 (1) (b) of the Code. How can he order a discharge without going into the police diaries and if a Magistrate can order a discharge after looking into the police diaries, surely it is open to this Court when the matter is brought before it under Section 561-A, Criminal Procedure Code, to also be able to look into them. In order to determine the correctness of the affidavits on the record it is necessary to look into the diaries".

60. I respectfully agree with the above view. Further, it may be stated that S.162, because of the words "whether in a Police diary or otherwise", indicates that the Police diary does not necessarily exclude statements made by persons before a Police Officer. The proviso to this section (Section 162) or Section 172 (2) merely indicates what use the statements may be put to in inquiry or trial. Sub-section (2) of Section 172 also says that any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court. It is true that there is no specific provision, barring that contained in Section 167 (1) of the Code, to the effect that during investigation the Magistrate may look into Police diaries (including statements), but it is equally true that there is no prohibition either. The significance of Section 167 in this connection should not be overlooked. In passing, it may be mentioned here that after the recent amendment of the

Criminal Procedure Code and the introduction of Sections 207-A and 251-A, this aspect has assumed some importance.

61. Mr. Dutt has referred to AIR 1954 Supreme Court 51, in support of his contention that a Magistrate or a Judge cannot refer to Police Diaries. But what was pointed out therein was merely : A Judge is in error in making use of the Police Diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those Diaries. The only proper use he can make of these Diaries is the one allowed by S.172. Obviously, this case does not support the contention that the Magistrate cannot look into the Police Diaries, including the statements contained in those Diaries, in calling for a charge sheet from the Police.

62. There is diversity of opinion amongst High Courts in India regarding the main question whether a Magistrate empowered to take cognizance of offence under Section 190 on a Police Report can direct the police to submit a charge sheet when the Police have submitted a 'Final Report'. So far as this Court also is concerned, there is no unanimity of opinion. In 45 Cal WN 195 : (AIR 1941 Calcutta 263). Henderson, J., in delivering judgment of a Division Bench, observed that when the Police submitted Final Report it was, open to the Magistrate to call for a charge sheet. It is true that the question mooted above was not directly in issue in that case, but in discussing the procedure to be adopted the above observations were made and in that sense with due respect, these were not, truly speaking, obiter, as was observed in Criminal Revision Nos.898 and 921 of 1959 (Cal), in which judgment was delivered on January 5, 1961. In Criminal Revision case, Cri. Revn. No.226 of 1960 (Cal), which was decided on September 12, 1960 by Mitter, J. and myself it was observed inter alia by Mitter. J. in course of delivering judgment:

> "When the Police submitted a Final Report recommending that no action need be taken, it becomes the duty of the Magistrate concerned to carefully consider the materials collected by the Police and if satisfied that there is enough material to put the accused on trial, to direct the Police to submit a charge sheet ..... As we say, if the Magistrate was satisfied that the materials collected by the Police disclosed the commission of the offence in question, it was his duty to direct the Police to submit a charge sheet or to examine the complainant before taking any cognisance."

It may be mentioned here that this case was not referred to in the latter decision of Rabindra Nath Chakrabarty. It would appear that the same learned advocate appeared in both the cases, but since presumably it is not expected that he would remember all the cases for or against him, which are not reported, no mention was made of Kassem AH Gomosta's case. In the case of Rabindra Nath Chakrabarty referred to above my learned brother S.K. Sen, J. and K.C. Sen, J. held a view which was contrary to that laid down in Kassem Ali Gomosta's case, Cri. Revn. No.226 of 1960 (Cal), when their Lordships observed:

> "If the Police are to be left to exercise their own functions it is clear that the judiciary should be held incompetent to direct the Police to submit a Report in a particular way. The Magistrate, however, has sufficient jurisdiction under the general provisions of the law to issue process if on a perusal of Police diaries he is satisfied that there is a prima

> facie case against the accused. Therefore, the interests of justice do not require that the Magistrate should be held competent to interfere with the discretion of the Police by directing the Police to submit a charge sheet in a case where the Police have submitted a Final Report.....".

Reliance was placed in this case on certain observations of Lord Porter in AIR 1945 PC 18. The facts, however, in Nazir Ahmad's case, AIR 1945 PC 18, were different and there the question was whether a Magistrate could intervene to stop a Police investigation and not whether he could direct the Police to submit a charge sheet when the Police had already submitted a Final Report. The relevant observations were to the following effect:

> "In India there is a statutory right on the part of the police, to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus. In such a case as the present, however, the Courts functions begin when a charge is preferred before it and not until then."

Relying on the observations above regarding the complementary nature of the work of the Judiciary and the Police, it may be stated in the instant case that the duty of the Police ends for the time being with the submission of the Report and the Magistrate's duty begins thereafter. There is a world of difference between stopping investigation and ordering submission of a charge sheet, on the materials appearing in the Report itself or, when the Report has silent features or prima facie shows some error, on a reference to the Police diary including the evidence collected by the Police. The ratio decidendi of the decision in this connexion in Rabindra Nath Chakrabarty's case, Criminal Revn. Nos.898 and 921 of 1959, D/d. 5-1-1961 (Cal), was first, that the Police should be left to exercise their own functions and the Judiciary is incompetent to direct the Police to submit a Report in a particular way and, secondly, that the Magistrate had sufficient jurisdiction under the general provisions of the law to issue process if on a perusal of Police diary he is satisfied that there is a prima facie case against the accused. If the Magistrate has any duty to perform in connection with Police investigation, certainly he can ask the Police to submit a charge sheet. With due respect, it will not be calling upon the Police to submit a Report in the way that the Magistrate likes. If the Police have committed any mistake and justice requires that the Magistrate should set it right, there is no question of dictating to the Police or coercing them into submitting a particular Report. A Magistrate takes over where the Police leaves the matter and no question of any interference with the Police can conceivably arise. It should be remembered in this connection that the Code has not specifically distinguished a charge sheet and a Final Report. It prescribes only one kind of Report under Section 173. The Police Regulations only have prescribed two forms of Reports - a charge sheet under Rule 272

and a Final Report under Rule 275, as though it is a Report required by Section 170 and Section 169 respectively of the Code. It may not be out of place to refer to Rule 276 of the Police Regulation which is to the following effect :

> "(a) On receipt of the final report, the Magistrate may accept the police finding and declare the case accordingly or may, under Section 156 (3), Code of Criminal Procedure, order further enquiry on specified points or may take cognizance under Section 190 (b) of that Code and, if the persons accused have not already been arrested issue process against them under Section 204 of the Code and require the investigating officer to furnish the names and addresses of the witnesses."Surely this cannot lay down any law as to the rights and duties of Magistrate.

63. It was pointed out in AIR 1960 Bombay 240, that from a resume of the relevant provisions of the Code it was evident that at every stage of Investigation by a Police Officer in a cognizable offence the Magistrate has the opportunity of supervising the investigation. According to their Lordships, Shah and Naik, JJ., an order passed by a Magistrate on a Report under Section 173 (1) of the Criminal Procedure Code requesting that a Final Report ("Summary A, B or C") be issued is in its very nature a judicial order and not an administrative order. According to this decision a Magistrate clearly is not bound to issue a 'Summary' which is asked for nor is he at all bound to issue a Summary. In such a case the Magistrate, it has been held, is empowered to call for a charge sheet from the Investigating Officer who has asked for a Summary after investigating a cognizable case. Concluding, it was laid down :

> "In our view, the power to call for a charge-sheet from the investigating officer who has asked for a summary after investigating a cognizable case is vested in the Magistrate because the Magistrate is required by law to deal with the report made to him judicially and also because the Magistrate has supervisory control over the investigation by a police Officer in the course of the investigation of an offence.....We may however observe that a. Magistrate may not, even though he has the power, lightly pass an order that a charge-sheet be filed. It is only after a careful consideration of the materials placed by a Police Officer in his report if a Magistrate is satisfied that there are sufficiently compelling grounds which require him to disagree with the opinion of the Police Officer and to reject the prayer for a summary asked for that he will be justified in calling for a charge-sheet."\

That the Magistrate is not bound to accept in to any Report from the Police will follow from certain observation in AIR 1960 Mysore 237, at p.238 although this case speaks of a Magistrate taking cognizance of an offence on the facts contained in Report of the Police Officer and does not purport to cover directly the point in issue in the instant case. In AIR 1958 Orissa 11, Narasimham, C.J. pointed out that even after accepting the Final Report the Sub-divisional Magistrate could revise his order and call for a charge-sheet . This powei to call for a charge-sheet was reiterated by Narasimham, C.J. and Das J. in AIR 1958 Orissa 104. The general power of the Magistrate to call for a charge-sheet was stressed in AIR 1958 Madhya Pradesh 234, although it is not clear from the reported facts whether a Final Report had been submitted. The order of the Magistrate calling for the charge-sheet was treated as being under Section 190 (1) (c)

of the Code, following AIR 1933 Patna 242.

64. I am in respectful agreement with those decisions according to which the Magistrate is empowered to call for the charge-sheet in appropriate cases when the Final Report is submitted by the Police. As was pointed out in AIR 1960 Bombay 240; absence of provision expressly conferring such a power is not decisive. There is nothing in the Code which justifies the view that the Magistrate who has power to supervise investigation has no power to correct the opinion of the Police Officer or to ignore the Police Officer's .opinion.

65. In AIR 1960 Madhya Pradesh 12, Shrivastava, J, in deciding that the Magistrate could not call for a charge-sheet when a Final Report has been sub mitted observed inter alia :

> "It is elementary that a person in authority should not be directed to file a report in a particular manner and against the conclusion reached, by him.

His conclusion may be erroneous, mischievous and mala fide but a Magistrate cannot direct the Police to say what he thinks it should say, for the Court has not judicial control over the investigating Officer to report under Section 173 of the Code of Criminal Procedure in a particular manner .. .." The scheme of the Code, however, was not examined, it is submitted with great respect and for the reasons stated by me I must respectfully differ for similar reasons I am to express my respectful dissent with the views stated in AIR 1954 Kutch 26 or AIR 1932 Madras 673 or AIR 1953 Assam 112 or AIR 1956 Assam 127 (2). It may be pointed out here that in the last mentioned case it was found that demanding a charge-sheet is rather an irregular way of summoning the accused but if the Magistrate thought that there was some basis for further inquiry into the allegations against the accused, the irregularity does not justify quashing of the charge-sheet.

66. From what I have stated in the judgment with all respect, I must also differ from the views held in this connexion in Cri. Revn. Nos.898 and 921 of 1959, D/d. 5-1-1961 (Cal), mentioned above.

67. The second ground mentioned in Rabindranath Chakrabarty's case, Cri. Revn. Nos.898 and 921 of 1959, D/d. 5-1-1961 (Cal), referred to above, to the effect that a charge-sheet is not to be called for because the Magistrate has sufficient jurisdiction under the general law to issue process, is one that is closely connected with the alternative question raised in the reference to the Full Bench, namely, whether a Magistrate can take cognizance on statement of facts contained in the Final Report and/or the materials contained in the case diary.

68. It has already been indicated in the course of this judgment that it is within the competence of a Magistrate, nay it forms a part of his duty, to look into police papers for the sake of administering justice.

69. Absence of unanimity of opinion amongst different High Courts as to the procedure involved may be mentioned. Till the Supreme Court approved of the observations in AIR 1950 Calcutta 437, in the case of AIR 1951 Supreme Court 207 and *Narayandas Bhagwandas v. State of West Bengal*[45], there was an uncertainty even about the meaning of "taking cognisance". Even now

this element is not altogether eliminated, for "as to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognisance", as was observed in the last mentioned case. Next, in ILR (1950) 2 Calcutta 66, it was held that under Section 190 (1) of the Code a Magistrate takes cognizance of an offence and not against an offender and that when on receipt of a Final Report under Section 173 of the Code, a Magistrate recorded the order "Enter True Section 302" and discharged the accused but subsequently after perusing the Police case diary issued summons on the accused under Section 304, Indian Penal Code, the Magistrate must be deemed to have taken cognistance when he recorded the order "Enter True". It is not clear, however, whether the order "Enter True" only suffices to give the Magistrate jurisdietion to take cognisance. There is no indication as to what would happen if the Magistrate had previously ordered "Enter False" or "Mistake of Fact" etc. In the course of the judgment in 60 Cal WN 345 : (AIR 1956 Calcutta 76), it was observed inter alia :

> "When a Magistrate directs an investigation under Section 156 (3), one or other or all these must follow. The Police, after holding the investigation directed may find the case to be true and may make a Report to that effect under Section 170. If such a Report is received by the Magistrate, he may proceed to issue process against the accused persons. If on the other hand the Police find the case to be false and

[45] AIR 1959 SC 1118

> reports accordingly, which report also, if appears, is to be made under Section 170, the Magistrate has nothing further to do in the chain of that proceeding. He is in seisin of nothing and neither the Police nor anybody else is complaining before him and insisting that a proceeding should be started or any further enquiry held."

Some of the observations in this judgment, it may be noted here, were characterized as obiter in Criminal Revn. No.1249 of 1956, D/d. 3-6-1957 (Cal) where little importance was attached to such entries as "Enter True". In AIR 1952 Pepsu 29, while conceding that the Magistrate has every right to look into the Police Diaries, to carefully scrutinise the investigation and to make up his mind independently, it was held inter alia that if the Report under Section 173 is that an offence had been committed the Magistrate can take cognizance of if under Section 190 (1) (b); if on the other hand, the Report is that the case is false, clause (1) (b) of Section 190 does not apply and no cognizance of the offence can be taken by the Magistrate. In 1952 Cri LJ 474 : AIR 1952 Pepsu 38, it was held that on a complaint to the Police a Report is made by the Police to the Magistrate for cancellation of the case, such a Report cannot be said to be a Report of facts which constitute an offence and all the Magistrate has to do, on receiving such a Report, is to make an order that the case be cancelled or to make note that he accepts the recommendation of the Police and if the complainant wants to proceed with the case and get a judicial decision from the Court, he can present a regular complaint under Section 190. In AIR 1932 Patna 72, the following observations appear :

> "Even when a Final Report is sent, the Magistrate when he applies his mind to that Report may take cognizance of the offence and if he wants to place the accused on trial he can issue his process. A Magistrate empowered under Section 190 (1) (a) and (b) can issue his process for compelling the appearance of the accused on the perusal of the Police Report submitted to him under Section 173 declaring the case to be false."

In Krishna Manna's case, Cri. Revn. No.1249 of 1956, D/d. 3-6-1957 (Cal), referred to above Guha Ray, J. opined that it was impossible to agree with the view that if the Police submit a Report saying that the case was false, it was not open to the Magistrate to take cognizance of the offence on such a Report provided the Report contains a statement of facts constituting the offence and provided further that the materials are available from the Police papers themselves to indicate that the case sought to be made out by the informant is true. It was further pointed out:

> "In the view I have taken, namely that the Magistrate took cognizance on tie Police Report and that he was in law entitled to do so, the Naraji petition which really moved him to look into the police papers and then to pass an order directing issue of process against the petitioners was not obviously treated as a petition of complaint, nor can cognizance be held to have been taken on such complaint. Cognizance in this case was clearly taken on the Police Report and that being so, the Magistrate was not bound to examine the complainant on oath under Section 200 of the Criminal Procedure Code."

70. At this state it may be mentioned that all petitions are not petitions of complaint nor all complaints are petitions of complaint, technically speaking. The question again as to the stage in which the complainant has to be examined compulsorily, it may be pointed, out, is not also free from doubts and difficulties in view of the decisions. In Akshay Kumar Dutt's case 60 Cal WN 345 : (AIR 1956 Calcutta 76) where the Magistrate without examination of the complainant on oath on his Naraji petition proceeded to take cognizance of the case, the procedure was held to be bad because according to the view taken the Magistrate was not entitled to take cognizance without the examination of the complainant on oath under Section 200 of the Criminal Procedure Code. The position may perhaps be slightly easier if there be already a charge sheet. In (Criminal Rev. No.1072 of 1959, D/d. 22-11-1960 : (AIR 1962 Calcutta 133), decided on 22nd November, 1960, the Police after investigation had submitted a charge sheet against eight accused, persons under certain sections of the Indian Penal Code. The informant filed the petition stating that there was prima facie case against some others. It was held that the Magistrate was entitled to summon additional accused against whom he considered that there was evidence after perusal of the statement recorded by the Police under Section 161 of the Criminal procedure Code and other documents referred to in Section 173 of the Code. In Rabindra Nath Chakrabarty's case, Criminal Rev. C. Nos.898 and 921 of 1959 (Cal) it was reiterated by S.K. Sen J. that when the Police has submitted a charge sheet against some accused persons under certain sections only, the Magistrate who summons additional accused persons and also takes note of other offence involved and summons all the offenders concerned in respect of all the offences disclosed would be acting within his jurisdiction. It was further observed that the case not being started on a Naraji petition treated as petition of complaint, the question of examination of the complainant under Section 200 of the Criminal Procedure Code could not arise. Concluding, His Lordship observed inter alia:

> ".. .. .. The proper course for him (Magistrate to adopt in a case where a Final Report is submitted is to take cognizance of the offence disclosed, if any, from the facts which appear from the Final Report of the Police and summon the accused who on a perusal of the Police papers appear to him to be concerned in the offence; and in a case where the

> Final Report does not disclose an offence or the Police papers do not reveal a .prima facie case against the accused and there was a Naraji petition, he may treat it as a petition of complaint and in such case he must examine the complainant under Section 200, Gr. P.C. and then proceed in accordance with law as held in 60 Cal WN 345 : (AIR 1956 Calcutta 76).. .. .."

71. An unrealistic touch is added when one considers the decision in AIR 1956 Allahabad 525. It was a case where the Investigating Officer had submitted a charge-sheet after having previously put a Final Report. It was observed that there was nothing to prevent the I.O. from submitting an other Report in supersession of an earlier one - either on his own initiative" or under the direction of the Superintendent of Police or the District Magistrate. This practice was not countenanced in *Emperor v. Ali4*[46]*,* where Jailal, J. observed inter alia :

> "I am aware of no legal sanction for further investigation by a Police Officer if he has sent up the case for trial under Section 173, specially with a view to find evidence in favor of the accused."

[46] AIR 1932 Lah 611

If a second Report can be put in, the difficulty for the Magistrate will naturally increase immeasurably. At what stage is he to interfere? Will there be any time limit for submission of the second Report? Is the Magistrate bound to change his opinion according to the varying reports of the Police and trim his sail, so to speak, to the prevailing wind of police whim or vacillation? Further, reference has been already made to Uma Singh's case, AIR 1933 Patna 242 where it was observed that the Magistrate could reopen the case, which had been struck off, by calling for a charge sheet, for instance, under Section 190 (1) (c). The difficulties in exercising the powers under Section 190 (1) (b), should not be minimized.

72. It will appear from the above discussion that the procedure open to the learned Magistrate is not an easy one. Diversity of opinion is patent. The view that a Magistrate can take cognizance of a case after a Final Report by the Police postulates that the Police Report includes the Police diary and/or the recorded statements of witnesses. It is exactly on this view that a Magistrate confronted with the Final Report which is absurd on the face of it and cannot be accepted calls upon the Police to submit a charge sheet. In my view, the Magistrate may be authorized to look into the Police papers and to proceed under Section 190 of the Code in taking cognizance, but when at an earlier stage he had the same opportunities and facilities, why should he take recourse to a round-about and devious step, which comes in much later and which involves some difficult questions such as examination of a complainant or if there is a proper petition of complaint? In my view, this was what was meant in Kassem Ali Gomosta's case, Criminal Revn. No.226 of 1960 (Cal). The point for decision there was whether a Magistrate had power to take cognizance of a case, notwithstanding a Final Report by the Police, in the absence of a Naraji petition and, therefore without examining a complainant. What was stressed there was that it was the duty of the Magistrate at the stage of submission of Final Report to decide whether a charge sheet should be called without waiting for the subsequent and devious stage of taking cognizance under Section 190 with or without a Naraji petition i.e., a petition of protest. In delivering judgment Mitter, J, observed :

"As we say if the Magistrate was satisfied with the materials collected by the Police disclosed the commission of the offence in question, it was his duty to direct the Police to submit a charge sheet or to examine a complainant before taking formal cognizance". It is accordingly held that it is competent for a Magistrate, to look into Police diaries including statements of witnesses recorded by the Police and he may in an appropriate case take cognizance under Section 190 of the Code but that he can call for a charge-sheet and indeed it is his duty to call for it in the circumstances mentioned previously, as in the instant case.

73. The question raised in this Reference to the Full Bench is, therefore, answered by me as above.

74. In the circumstances the proceedings are not to be quashed but the Police are to comply with the orders of the learned Magistrate and submit a charge sheet; and the connected Rule is to be discharged.

D. N. Das Gupta, J.

75. The following questions have been referred to the Full Bench for decision:-

"When the police upon investigation has submitted a final report under Section 173 of the Criminal Procedure Code, can a Magistrate direct the police to submit a charge-sheet, or in the alternative, can he take cognizance on the statement of facts contained in the final report and/or the materials contained in the case diary and issue process against the accused," Chapter XIV of the Code of Criminal Procedure deals with "Information to the Police and their powers to investigate." It is necessary to make a broad survey of the powers that have been given to a Magistrate under this Chapter relating to police investigation. An Officer-in-Charge of a police-station may investigate a cognizable case without a Magistrate's order (Section 156); but no police officer can investigate a non-cognizable case without the order of the Magistrate as specified in Section 155 (2), Under Section 156 (3) any Magistrate empowered under Section 190 may order the police to investigate. Under Section 157 (1), if, from information received or otherwise, an Officer-in-Charge of a police-station has reason to suspect the commission of an offence which he is empowered under Sec,, 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report. Under Section 159 the Magistrate on receiving the report under Section 157 may direct an investigation or, if he thinks fit, at once proceed, or depute any magistrate subordinate to him to proceed, to hold a preliminary enquiry into, or otherwise to dispose of, the case in manner provided in the Code. The words "such Magistrate, on receiving such report, may direct an investigation .. .. .. " obviously mean that if the police without sufficient reasons drop the investigation or are unwilling to proceed with the investigation, then the Magistrate can direct the police to proceed with the investigation. The Magistrate may

> direct investigation even when the Officer-in-charge of a police-station thinks that there is no sufficient ground for entering on an investigation. It is, therefore, clear that the Magistrate has the power to order investigation in a non-cognizable case under Section 155 (2) and in a cognizable case under Section 159. The Magistrate may order investigation also under Section 156 (3). The fact that a Magistrate has the power to order or direct investigation indicates that the Magistrate has some control over investigation, but I do not for a moment suggest that the Magistrate has any power to interfere with investigation.

76. The next section to be referred to is Section 167 which deals with the procedure when investigation cannot be completed by the police within 24 hours. This section provides that when investigation in respect of a person arrested and detained in custody cannot be completed within 24 hours (Section 61) and there are grounds for believing that the information is well founded, the investigating officer shall produce that person before a Magistrate as specified in the section with a copy of the entries in the diary, prescribed under Section 172, relating to the case. Whenever an investigating officer files a remand petition under Section 167 he has to submit along with that petition a copy of the entries in the diary, the obvious purpose being to enable the Magistrate to see whether there are satisfactory grounds for making a remand order. If the Magistrate is not satisfied that there are sufficient grounds for allowing the prayer for remand, he may reject the prayer and discharge the accused from the bail bond. The powers of, the Magistrate enumerated above would show that the Magistrate is not meant only to receive reports from the police and be the custodian of the reports but he has been given the power to see that investigation is completed without unnecessary delay and that the accused are not harassed. The power is in the nature of supervisory power.

77. The next section to be referred to is Section 169 and that section is very important for the purpose of the instant case. Section 169 is quoted below :

> "If, upon an investigation under this Chapter, it appears to the officer in charge of the police station or to the police officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial."

78. Along with Section 169 is to be read Section 173 and particularly sub-section (3) which is reproduced below:

> "Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit."

Reading Section 169 along with Section 173 (3) it is clear that if the Magistrate agrees with the

opinion of the investigating officer that there is no sufficient evidence or reasonable ground of suspicion against the accused, then he shall make an order for discharge of the bond upon which the accused had been released by the investigating officer. But the difficult question is what can the Magistrate do if he does not accept the opinion of the investigating officer. On this point the provision in Section 169 that the investigating officer shall, if the accused is in custody, release him on his executing a bond to appear before a Magistrate, is significant. This provision has undoubtedly been made to meet the contingency that the Magistrate may not accept the opinion of the Investigating officer. If the Magistrate thinks that the, facts, which the "final report" contains, constitute an offence, then the Magistrate who is competent to take cognizance of the offence may, if he chooses, take cognizance on the "final report", the investigating officer's opinion notwithstanding and compel the production of the accused before him. A "final report" is as much a report under Section 173 as a "charge-sheet" is. It is immaterial by what name the report is called so long as it is a report submitted under Section 173 after investigation has been completed. Cognizance taken on a "final Report" is under Section 190 (1) (b).

79. The next question is what can the Magistrate do if the facts disclosed in the "final report" do not constitute an offence. The answer, in my opinion, will be found in the words,".....or otherwise as he thinks fit" at the end of Sub-Section (3) of Section 173. That provision gives the Magistrate very wide powers indeed. The Magistrate may look into the case diary and the statements recorded by the police under Section 161 and if he thinks that there is sufficient evidence against the accused, he can direct the investigating officer to submit a charge-sheet Possibly he cannot take cognizance on the case diary or the statements recorded under Section 161 as they are not a "report" within the meaning of Section 173. The only course left open to the Magistrate is to direct the police to submit a charge-sheet and the Magistrate is quite competent to give this direction in exercise of the powers given to him by the provision "or otherwise as he thinks fit" in Section 173 (3). By such a course the Magistrate does not in any way interfere with the" police investigation as investigation is already over, nor does he compel the investigating officer to change his opinion, because he, only directs the investigating officer to act in the correct way pointing out his mistake, which may be deliberate or accidental. This power has been designedly given to the Magistrate to take cognizance on a "final report" or call for a charge-sheet. The ultimate result is the same whichever course is adopted and both the courses are warranted by the Code. Section 172 (2) cannot be a bar to the Magistrate's looking into the police diary or the statements recorded under Section 161 at this stage. Section 172 (2) applies to a case under enquiry or trial and defines the purpose for which a police diary may be used when a case is under enquiry or trial in court, but it cannot possibly have any application to a stage before cognizance has been taken by a Magistrate. Indeed, copies of entries in the police diary have to be submitted to Magistrate under Section 167 and, therefore, the Magistrate has ample opportunities of seeing the police diary before cognizance is taken. It would be-idle to suggest that a Magistrate who had the power of looking into the police diary under Section 167 has no power to do so at a later stage but before cognizance has been taken.

80. Calling for a "charge-sheet", when the Magistrate on examining the police diary and the statements under Section 161 finds that there is sufficient evidence against the accused, is an established practice. I do not find anything in this practice which is inconsistent with any of the provisions of the Code dealt with above. Therefore, I would answer the question as follows :

(1) The Magistrate can take cognizance of an offence of the statements of facts contained in the "final report" itself, if such facts constitute an offence of which the Magistrate is

competent to take cognizance;

(2) The Magistrate can direct the police to submit charge-sheet, if the "final report" does not contain sufficient particulars for taking cognizance but if after examining the police diary and/or the statements recorded under See.161 of the Code of Criminal Procedure the Magistrate is of the opinion that there is sufficient evidence against the accused.

Amaresh Roy, J.

81. In general I agree with the views expressed in the judgments delivered by my Lords-S.K. Sen J. and N.K. Sen, J. Before proceeding to give the reasons for my views I have to observe that the Criminal Revision No.1717 of 1960 which has been referred to this Full Bench seems to have persued me with astonishing persistence. The Revisional application on behalf of the accused that was directed against an order of S.D.O., Darjeeling whereby the said learned Magistrate had directed the Police to submit a charge-sheet against the petitioner Arun Kumar Roy in respect of offences raider Sees.304A and 279 of the Indian Penal Code, was moved before me on 19th December. 1980 and I issued the Rule. Thereafter on 3rd February 1961 the Revision Case came up for hearing before me and on that day upon hearing the learned Advocates on both sides, I encountered a direct divergence of views between two Division Benches of this Court on the point of law involved in the case-one in Cr. Rev. No.226 of 1960 (Cal.) decided by our learned brothers J.P. Mitter and B.K. Bhattacharya JJ., holding that when Police submits a final report it is the duty of the Magistrate to consider the materials collected by Police and if he is satisfied that there is enough material to put the accused on trial to direct the Police to submit a charge-sheet; and another in Cr. Rev. Nos. 898 and 921 of 1959 (Cal) decided by our learned brothers S.K. Sen and K.C. Sen JJ. holding that it is not competent for a Magistrate, even when he is dissatisfied with charge-sheet or final report submitted by Police, to call a charge-sheet whether generally or in respect of specified -offends. The two views were apparently irreconcilable and sitting singly then I felt compelled to refer the case to be heard by a Division Bench. On the day the case came up before the Division Bench presided over by the Hon'bla Mr. Justice S.K. Sen I happened to be sitting with his Lordship on the Bench and in view of the direct conflict we made the order of reference to a Full Bench. This Full Bench constituted to hear the matter has again included me. I find this persistence of persuit as enamouring as the point involved and the degree of divergence of opinion on it not only in this Court but in many other High Courts in India.

82. The point at first sight looks simple and arises only upon an imagined separation of functions of police and the Magistrate. Shred of technicalities it may be stated thus in plain language: In cognizable cases and also in non-cognizable cases when a Magistrate gives permission, Police investigates under Ch. XIV of Criminal Procedure Code and makes a report under Section 173 - it may be a final report or a charge-sheet depending on the view that Police takes of the case either under Section 169 or Section 170 thereof. A Magistrate takes cognizance of the offence upon a report in writing by any Police Officer under Section 190 (1) (b). What will the Magistrate do when Police has reported on one view of the case and the Magistrate takes a different view of the case? That broad question can be split thus

(i) When Police makes a final report upon a view as contained in Section 169 Criminal Procedure Code can the Magistrate take cognizance? or can the Magistrate direct the Police to submit a charge-sheet?

(ii) When Police submits a charge-sheet upon a view as contained in Section 170 Criminal Procedure Code can the Magistrate refuse to take cognizance of the offence? Or can the Magistrate direct the Police to submit a final report?
(iii) When Police has submitted a charge-sheet against some persons for some particular offence, can the Magistrate while taking cognizance of that offence take also cognizance of some other offence against those persons and/or against some other persons against whom Police has not submitted any charge-sheet? Can the Magistrate direct the Police to submit further charge-sheet in respect of those other offences against the persons named and/or not named in the charge-sheet already submitted?

83. The questions when tackled by reference to the provisions in the sections of the Code give rise to many other questions by way of ramifications of the main questions and one of these is: While deciding whether he will take cognizance or refuse to take cognizance, can and should the Magistrate look into the Police diary for that case and other Police papers including statements recorded under Section 161 Criminal Procedure Code during investigation?
84. Looking to the mass of judicial thought devoted to these questions it appears that one view has proceeded upon a notion that there Is no clear provision in the sections of the Code to cover those and they must be answered by recourse to general principles. The other view with equal cogency has proceeded upon the motion that the general scheme of the Code afford particular meanings to the particular sections which themselves do provide answers to the questions. Between these divergent views the situation is like one when the oracle spoke at Delphi and also at Dodoma, in ancient Greece.

85. It is not surprising therefore that at the hearing before this Full Bench both Mr. A.K. Dutt, the learned Advocate who appeared for the petitioner and Mr. S.N. Banerjee, the learned Deputy Legal Remembrancer who appeared for the State, have taken extreme positions antagonistic to each other yet both have been able to draw support from decisions of this Court as also other High Courts.

86. The position that Mr. Dutt has taken in substance is:

(a) The Magistrate has no power to direct the Police to submit a charge-sheet in a case the Police have taken the view under Section 169 Criminal Procedure Code. To do so would be interfering with investigation.
(b) The Magistrate is not bound by the view taken by Police, be it a view under Section 169 resulting in a final report or a view under Section 170 resulting in a charge-sheet. In either case the Magistrate may direct the Police to investigate further by making order under Section 156 (3) or Section 159 or he may himself proceed to hold an enquiry under Section 159 Cri. P. C.
(c) If the report submitted by Police, be it a final report or a charge-sheet, discloses materials that constitute an offence, the Magistrate can take cognizance on such report and should take cognizance under Section 190 (1) (b). If the Police report does not disclose facts or materials that constitute any offence, then he cannot take cognizance on such report, not even under Sec-190 (1) (c).

(d) If the report submitted by Police under Section 173 does not disclose an offence, the Magistrate may take step as in (b) above, hut he cannot look into the Police diary of the case and even if he can do so, he cannot certainly look into the other Police papers and the statements recorded by Police under Section 161 Criminal Procedure Code. The position taken by Mr. Banerjee on the other hand in substance is :

(a) The Magistrate in his discretion can direct the police to submit a charge-sheet even when Police has submitted a final report.

(b) When Police has submitted a final report upon the view as in Section 169 Criminal Procedure Code, the Magistrate should direct a charge-sheet to be submitted if he is of the view that material in the Police diary properly warrant the view as in Section 170 Criminal Procedure Code

(c) The Magistrate cannot take cognizance when Police has submitted a final report nor can he refuse to take cognizance when charge-sheet has been submitted.

(d) The Magistrate can look into not only the Police diary of the case but also into all Police papers including the statements recorded under Section 161 Criminal Procedure Code

87. For ascertaining which of these contentions are in accord with correct law, we have to examine not only what purpose investigation under Chap. XIV of the Code has, in relation to taking of cognizance under Chap. XIV in the general scheme of the Code of Criminal Procedure leading to commencement of proceedings by issue of process under Chap. XVII for bringing the accused to trial, but also the particular sections in Chap. XIV itself for ascertaining the functions of the Police and of the Magistrate during investigation and up to taking of cognizance by the Magistrate.

88. It is well settled now by the decision of the Supreme Court in the case of AIR 1955 Supreme Court 196 that "trial follows cognizance and cognizance is preceded by investigation" which, in the scheme of Criminal Procedure Code, is a

"normal preliminary to an accused being put up for trial for a cognizable offence, except when the Magistrate takes cognizance otherwise than on a Police report in which case he has the power under Section 202 of the Code to order investigation if he thinks fit." It has also been laid down by the Supreme Court in that case:

"The final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the Police Station." x x x x x x

"But it cannot be maintained that a valid and legal Police report is the foundation of the Jurisdiction of the Court to take cognizance." Within Chap. XIV, of the Code of Criminal Procedure,

Section 156 (1) gives authority to Police to investigate without order of Magistrate.
Section 156 (3) gives power to Magistrate to order investigation.
Section 157 (1) enjoins a report to be made by Police to the Magistrate and enjoins the Police to

proceed to investigate in a particular way.
Proviso (b) gives discretion to Police not to investigate. But Section 159 (2) requires the Police to state in report to Magistrate his reasons for not fully complying with requirement of Section 157 (1).
Section 159 empowers the Magistrate on receiving such report either to direct an investigation (by Police) or to hold a preliminary enquiry either himself or by any Magistrate subordinate to him.
Section 165 (5) requires the Police to send to the Magistrate certain records made under sub-sections (1) and (3) of that section.
Section 167 requires the police to send to the nearest Magistrate a copy of entries in the diary (kept under Section 172, Cri. P.C.).
Section 169 requires the Police to release the accused when he thinks evidence deficient but only upon a bond to appear, if and when so required, before the Magistrate.
Section 170 requires the Police to forward the accused to the Magistrate when Police thinks that there is sufficient evidence or reasonable ground for taking cognizance of the offence.
Section 172(1) enjoins 'keeping a diary and prescribes what it should contain.

> (2) provides power to court to call for diary of a case under enquiry and trial in such court but limits its use only to aid and not as evidence.

Section 173 requires) the Police to forward to the Magistrate a report in the form prescribed by State Government and directs that the report must set forth the names of parties, the nature of information and the names of the persons who appear to be acquainted with circumstances of the case.

89. This summary of the relevant sections' in Chapter XIV clearly point to one necessity in law more than any other, that the Magistrate has to be reported to at every step of investigation regarding the way the Police has taken in that matter during investigation and if the Police has not started investigation, to appraise the Magistrate of the reasons therefore; the investigation must culminate in the report under Section 173, whatever view the Police may have taken and even when Police releases the accused on the view that evidence is deficient that must be upon a bond to appear before the Magistrate if and when so required. The whole focus of investigation is therefore directed to the Magistrate's function under Section 190 Criminal Procedure Code in the matter of taking or refusing to take cognizance. That is the purpose of investigation by Police and it is not an end in itself.

90. The Police may investigate a cognizable offence without Magistrate's order and cannot investigate a non-cognizable case without such order. The Magistrate may direct Police to investigate under Section 156(3) and on receiving report under Section 157 why investigation has not been fully carried out, the Magistrate can either order Police to investigate or himself may proceed to hold preliminary enquiry under Section 159 Criminal Procedure Code. What is that preliminary enquiry if it is not a Magisterial supplement to incomplete investigation by Police without fully complying with the duties enjoined by Secc 157? In a recent case reported in 1961 (2) Cri. L.J. 71 (Cal) decided by Debabrata Mukherjee and D.N. Das Gupta, JJ. it has been held that by dint of Sea 159 Criminal Procedure Code the Magistrate participates in investigation when orders for T.I. Parades are made. I may add that similar function is discharged by the

Magistrate when he directs taking of specimen handwriting or thumb impression of the accused during investigation for comparison and examination by experts.

91. In the Privy Council decision reported in 49 Cal WN 191 : (AIR 1945 PC 18) no doubt it has been said:

> "The functions of the Judiciary and the Police are complementary, not overlapping and the combination of individual liberty with a due observance servance of law and order is only to be obtained by each to exercise its own function."
> * * * * *
> "The Court's functions begin when a charge is preferred before it and not until then."

But that was said by Privy Council in respect of the High Court that quashed investigation in that case before it was concluded and purported to do it by exercise of its inherent jurisdiction saved by Section 561A Criminal Procedure Code and not regarding the Magistrate's functions within Chap. XIV. Sections 157 and 159 Criminal Procedure Code were not considered in that case.

92. That Privy Council judgment therefore cannot be read as an authority for the proposition that investigation under Chap. XIV and all materials and statements collected during such investigation is a closed reserve of the Police and the Magistrate has no access to it.

93. Moreover Section 173 Criminal Procedure Code enjoins the Police to submit a report to the Magistrate at the close of investigation. Even when the 'final step' in investigation viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer-in-charge of the Police Station, that is not the final opinion that governs the Magistrate acting under Section 190 Criminal Procedure Code. What use is a report if materials on which it is based cannot be examined by the authority to whom the report is made? Again, the report, under Section 173 Criminal Procedure Code has to be made in the form prescribed by the State Government. In the Police Regulations however there are two forms, one for charge-sheet and another for final report. However that may be, the last column in both of those forms (Form Nos. 39 and 49) bear the heading that includes summary of materials obtained during investigation. In form No 49 for Final Report it is "Brief description of information or complaint, action taken by Police with result and reasons for not proceeding further investigation."

94. In form No.39 for charge-sheet it is "Charge or information: name of offence and circumstances connected with it, in concise detail and under what section of law charged."

95. In this form names of persons who are acquainted with facts of the case have to be mentioned. So in the report under Section 173 a summary of actions during investigation and summary of facts ascertained upon statements recorded under Section 161 and names of those persons have to be mentioned. There is nothing in the Code and in my opinion there is no reason why it should be thought, that the Magistrate at that stage cannot look to the Police diary of which the summary has to be included in the report under Section 173. To do so would, in my opinion, render the provision regarding contents of the report, useless and the Magistrate will be left only with a summary, the source of which cannot be looked into for ascertaining whether it is a correct and proper summary, or any material fact has been left out or a wrong view taken.

96. The function performed by Magistrate in taking cognizance under Section 190 is certainly a judicial function by applying his mind to the material facts of the case. He is neither an automaton nor a dummy machine to put judicial seal on the particular view that Police may have taken of the materials and evidence either under Section 169 or under Section 170 Criminal Procedure Code. For discharge of the Magistrate's function under Section 190 the nature of Police report is not the foundation of the jurisdiction of the Court as the Supreme Court has held in Risbud's case, above-quoted AIR 1955 Supreme Court 196. The foundation in law is Section 190 and the foundation in fact can only be the totality of materials collected during: investigation under Chap. XIV recorded in the Police diary under Section 172 with its summary to the report under Section 173 Criminal Procedure Code. The "normal preliminary" by way of investigation' is only for the purpose of enabling the Magistrate to-take cognizance under Section 190 (1) (b). When taking cognizance under Section 190 (1) (a) or (c) the Magistrate can have similar investigation clone by Police or any other person under Section 202 Criminal Procedure Code and in that event all materials and the report is available to the Magistrate before he decides to issue or not to issue process under Section 204, Cri. P.C. That being the position in respect of Section 190 (1) (a) and (c) there is no reason why disability should be imposed on a. Magistrate for his function under Section 190(1) (b) There is nothing in the Code, as far as I can see, to do so, at that stage.

97. Mr. Dutt has referred to Sec, 172(2) Criminal Procedure Code for his contention that only stage at which the Magistrate can call for the Police diary is during enquiry or trial and then also for using it not as evidence but only as aid. This, he contended, is the only stage and only power to look into the Police diary. This reading of Sub-Section (2) of Section 172 is in my opinion too wide. It has to be remembered that by operation of Section 192 Criminal Procedure Code the Magistrate taking cognizance is often not the Magistrate who holds enquiry and/or trial. For that reason Section 172 (2) has made the provision to enable the Magistrate holding enquiry and/or trial to call for the Police diary and limiting its use at the stage of enquiry or trial only. At the stage of Section 190 it is neither enquiry nor trial nor there is any question of limiting the Magistrate to evidence proper at that stage. Therefore Section 172 (2) does not cover the field outside enquiry or trial and the restriction imposed thereby should not be read into the stage Of Section 190 Criminal Procedure Code. In my opinion therefore the view that Police diary and materials and statements therein cannot be looked into by the Magistrate for the purpose of Section 190 (l) (b) is not correct reading of law.

98. In that view of the law the decisions in the cases 10 Cal WN 600, 58 Cal WN 597 : AIR 1955 Calcutta 234, 62 Cal WN 717 : (AIR 1959 Calcutta 276) cannot be considered to be authorities for the proposition that the Magistrate cannot examine the Police diary (and for the matter of that other Police papers including the statements, recorded under Section 161, Criminal Procedure Code) at the stage of taking cognizance under Section 190 (1) (b) upon a Police report made at the conclusion of investigation under Chap. XIV of the Code. The Supreme Court decision also in the case of (*Habeed Mohammad v. State of Hyderabad) reported in*[47] operates only in respect of the use of the diary during enquiry or trial and does not prohibit examination of those by the Magistrate for the purpose of his function at the stage of under Section 190 (1) (b). Special emphasis was made by Mr. Dutt in course of arguments on the statements recorded under Section 161 Criminal Procedure Code and he contended that those statements do not form part of the Police diary and are matters outside it. It is true that in Section 172 (1) where the maintaining of

the diary is enjoined, the Code does not specifically mention statements that are recorded under Section 161 Criminal Procedure Code. But the last phrase of that sub-section is in general terms as "A statement of circumstances ascertained through his investigation." That this phrase may include statements recorded under Section 161, Cri. P.C. is clearly envisaged by the Code in Section 162 (1) when it says "Nor shall any such statement or any record thereof whether in a Police diary or otherwise." Therefore there is no reason for making any special exception regarding those statements if, as I have already held, the Magistrate can examine the diary and other Police papers. Mr. Dutts contention that at the most the Magistrate can at that stage look to only those papers which have been mentioned in Section 173 (4) added by the amendment of Act 26 of 1955 cannot also be accepted because the documents mentioned in Section 173 (4) operate only at the stage of commencement of the enquiry or trial either under new Sections 207-A or 251-A and

[47] AIR 1954 SC 51

have no bearing at the stage of Section 190 (1) (b).

99. The main question whether the Magistrate can direct the Police to submit a charge-sheet or it is his duty to do so under certain circumstances, in my opinion, must be answered in the negative. It is now settled by the decisions of the Supreme Court in Risbud's case reported in AIR 1955 Supreme Court 196 :

> "The final step in investigation namely the formation of opinion as to whether or not there is an examination to place the accused on trial is to be that of the officer-in-charge of the Police Station."

That opinion may be either in terms of Section 169 or in terms of Section 170 Criminal Procedure Code reference to which is carried into Section 173 (1)(a) by the language "And stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, if so, whether with or without sureties." The first part of that language refers obviously to Section 170 and the second part to Section 169 Criminal Procedure Code, When the Police has taken one or the other view it is certainly open to" the Magistrate to take a different view. What the Magistrate can and should do I will discuss later. But it is obvious that the Magistrate cannot and he need not, as I will presently show, direct the police to change the opinion formed by them. That will involve importing an unreality in the scheme of the Code clearly expressed in Sections 169, 170 and 173. I am therefore of the opinion that it is not within the competence of the Magistrate and certainly not his duty in any circumstance, to direct the Police to submit a charge-sheet when in fact the Police has submitted a final report or vice versa and it would answer the first question referred to this Full Bench in the negative.

100. In this respect High Courts of Bombay, Orissa and Patna have taken the view that the Magistrate can direct the Police to submit a charge-sheet. Of course, the cases reported in AIR 1928 Patna 585; AIR 1932 Patna 72 and also the two Orissa cases reported in AIR 1958 Orissa 11 and AIR 1958 Orissa 104 do not appear to be clear decisions on the point and looks like hybrid order on different facts. On the other hand, High Courts of Allahabad, Assam, Madras and Madhya Pradesh have taken the view that the Magistrate cannot call for a charge-sheet but different reasons and different considerations have impelled those decisions in these several High Courts. In the case reported in AIR 1956 Allahabad 525 it was held that after the final report by

the Police they can submit a charge-sheet but the District Magistrate's direction to submit a charge sheet was held to be a purely administrative order by a superior officer. This decision only implies that the Magistrate as a Court cannot call for a charge sheet.

101. In the case of AIR 1953 Assam 112, it was held that the act of calling for a charge-sheet by a Magistrate is a mode of issuing process and in the case of AIR 1956 Assam 127(2) it was held that calling for a charge-sheet is not provided in law and it was held to be irregular but for that reason the proceeding need not be quashed.

102. In AIR 1982 Madras 673 it was held that the Magistrate cannot call for a charge-sheet and reason for that view was given.

103. In the case of AIR 1958 Madhya Pradesh 234 a similar view was taken but a contrary view in the same High Court appears to have been taken in the case of AIR 1960 Madhya Pradesh 12. The Mysore. High Court in the case of AIR 1960 Mysore 237 has taken the view that the Magistrate cannot call for a charge-sheet-i.e. similar view as I have taken.

104. In this High Court also the decisions have not been uniform. The extreme view appears to have been taken by a Division Bench Chakravarty C.J. and Lahiri, J. in the case of AIR 1958 Calcutta 76 where their Lordships held

> "If on the other hand, the Police finds the case to be false and reports accordingly, which report also it appears, is to be made under Section 170, the Magistrate has nothing further to do in the chain of that proceeding. He is in seisin of nothing and neither the Police nor anybody else is complaining before him and insisting that a proceeding should be started or any further enquiry held."

The other extreme view was in the case of (1950) 2 Cal 66, where a Division Bench composed of K.C. Das Gupta, J., as his Lordship then was and Lahiri, J. in this Court .held that when Police submitted a final report and the Magistrate accepted the recommendation "enter true Section 302 Indian Penal Code" and discharged the accused, then at a later date on perusal of Police diary, issued process it was a cognizance taken under Section 190 (1) (b) of the offence under Section 302 Indian Penal Code when the Magistrate said in his order "enter true Section 302 Indian Penal Code"

105. In the case of AIR 1950 Calcutta 437 the same Division Bench (Das Gupta and Lahiri JJ) held that a Magistrate is not bound to take cognizance of an offence merely because a petition of complaint is filed before him and that when the Magistrate applies his mind not for the purpose of proceeding under subsequent sections of this chapter but for taking action of some other, kind e.g. order investigation under Section 156 (3) or issuing search warrant for the purpose of investigation he cannot be said to have taken cognizance of the offence. Their Lordships noticed the contrary views expressed in the decisions reported in *A.C. Samaddar v. Suresh Chandra Jana*[48], *Pulin Behari Ghosh v. The King*[49]and *Dr. Robiul Hoseain Molla v. K.K. Ram*[50], On the facts of that case however their Lordships did not feel justified in referring the matter to the Full Bench. The decision in the case of 62 Cal WN 717 : (AIR 1959 Calcutta 276) concerns the stage of Section 251A Criminal Procedure Code and is of no help on the question before used.

106. The earliest decision placed before us in support of the view that the Magistrate cannot take cognizance upon even a charge sheet which does not disclose materials to constitute an offence is the case reported in ILR 37 Calcutta 49 : 14 Cal WN 304. Delivering the judgment of the Division Bench that decided that case, Jenkins C.J. held the form to be defective and on that ground alone quashed the proceeding. Same view appears to have been taken by Bombay High Court in the case reported in AIR 1930 Bombay 372. This view supports the view that in the matter of taking cognizance the Magistrate has to act on his own view of the facts and. materials obtained during investigation and its summary in the report under Section 173. If the Magistrate cannot

[48]53 Cal WN 270: (AIR 1949 Cal 197) [50]82 Cal LJ 222.
[49]53 Cal WN 653

take cognizance on a charge-sheet because facts disclosed in it do not constitute any offence, then when a final report does not provide the materials by proper summary the Magistrate is not bound to act on final report and should look for materials in the police diary and materials obtained during investigation and act according to his own views on that material. If he finds that investigation has not been properly and fully done he can and should proceed to take steps as provided in Section 159 Criminal Procedure Code either by directing proper investigation by Police or by proceeding to enquire himself or by any Magistrate subordinate to him.

107. This view finds support in two decisions one reported in *Md. Niwaz v. The Crown*[51], The decision in Rajasthan High Court reported in 1957 Cr. LJ 231 (Raj) has also held that the Magistrate can take cognizance of a final report by the Police. I have already held that this can be done if the final report discloses facts and materials which constitute an offence though the Police have thought otherwise. I have no hesitation therefore in holding that the Magistrate in the matter of taking cognizance under Section 190 is not bound either way by the opinion expressed in the Police report and he is free to act according to his own view of the facts and materials disclosed in such report, be it a charge-sheet or a final report, if materials are available on the report. If materials are not available on the report then it is not a proper report under Section 173. In such circumstance the Magistrate can and should look into the materials in the Police diary and other Police papers including statements recorded under Section 161 to see if those provide materials for the function of the Magistrate under Section 190. If, the Magistrate finds that investigation has not been done properly and fully as required under Section 157 Criminal Procedure Code then the Magistrate can and should take steps as provided in Section 159 Criminal Procedure Code. It also follows that even when final report has been submitted the, Magistrate can take cognizance arid issue process against accused persons on that report and perusal of the case diary of the Police, other Police papers and statements recorded under Section 161 Criminal Procedure Code. I am also clearly of the view that it is not competent for a Magistrate even when he is dissatisfied with the charge-sheet or final report submitted by the Police to call for a charge-sheet whether generally or in respect of specified offences or in respect of specified persons. I may also add that where after the Police has submitted final report the Complainant files naraji petition, it is open to the Magistrate to treat that naraji petition as a petition of complaint and proceed according to the provisions under Section 200 and the following sections in the Code.

108. The learned Deputy Legal Remembrancer Mr. S.M. Banerjee has contended that it should be held that the Magistrate has power to call for a charge-sheet otherwise according to his arguments grave prejudice is caused to the accused in the matter of compliance with Sees. 207 A

and 251A Criminal Procedure Code. This contention proceeds on the view that when Police has submitted a final report to take cognizance the Magistrate would not be acting under Section 190 (1) (b) but would be acting under Section 190 (1)(c). Even if that were so, I do not see any difficulty" at all nor do I see any reason for apprehension of prejudice caused to the accused. If the Magistrate takes cognizance under Section 190 (1) (c) the only effect is that the new Sees. 207A and 251A will not apply but the enquiry or trial will have to be held following the procedure in the other sections in Chapter XVIII or Chapter XXI as the case may be which are applicable

[51]48 Cr. LJ 774 (Lah) and AIR 1953 Pun 149

when the case is instituted otherwise than on a Police report. Mr. Dutt in answer to this contention of Mr. Banerjee has urged that even the knowledge or suspicion part in Section 190 (1) (c) must be from sources other than a Police officer and therefore that section will not apply when Police submits a final report and on that report the Magistrate is enabled to take cognizance. In my view both these contentions are untenable. Because even when the Magistrate takes cognizance when the Police has submitted a final report upon materials in the Police report itself and/or supplemented by the materials in the Police diary and other Police papers, it is, in my view, a case under Section 191(1) (b) and properly the case is instituted upon a Police report. The nature of the report has no bearing on the fact whether cognizance is taken and the case is instituted on that report, though, not according to that report.

109. In my view therefore the first part or the question referred to this Full Bench should be answered in the negative and the second alternative in that question should be answered in the affirmative and the third alternative in the question partly in affirmative and partly in negative thus:

> (i) When the police upon investigation has submitted a final report under Section 173 Criminal Procedure Code, a Magistrate cannot direct the police to submit a charge-sheet.
> (ii) The Magistrate can take cognizance on the statement of facts contained in final report, if those facts constitute, in the opinion of the Magistrate, an offence.
> (iii) For the purpose of deciding whether cognizance of an offence should be taken, the Magistrate can look into the materials contained in the case diary and obtained during investigation, including statements recorded under Section 161 Criminal Procedure Code but he cannot take cognizance and issue process against the accused on the materials contained in the case diary alone, unless facts contained in the report under Section 173 constitute an offence.

Answer accordingly.