

GUJARAT HIGH COURT

State of Gujarat

Vs.

Shah Lakhamshi Umarshi

Criminal Revn. Applns Nos. 130 and 248 of 1964, Kutch at Bhuj in Cri. Revn. Appln. No. 49 of 1963

(J.M. Shelat, C.J, P.N. Bhagwati and B.J. Divan, JJ.)

24.12.1965

ORDER

J.M. Shelat, C.J,

These Revision Applications raise an interesting question, namely, whether in a case where an Investigating Officer investigating into a cognizable offence has or completion of the investigation submitted a final report as distinguished, from a charge-sheet under Section 173 of the Code of Criminal Procedure requesting that "A", "B" or "C" Summary be issued, the Magistrate can direct the Investigating Officer to submit a charge-sheet if he disagrees with the recommendation of the police and takes the view that the facts set out in the final report constitute an offence and there is a case for placing the accused on trial. The question is one of some importance since it is likely to arise frequently before Magistrates and that is why the Revision Applications have been referred to a Full Bench by Bakshi and Vakil, JJ. before whom they originally came up for hearing. The facts of each revision application are different but it is not necessary to set them out in detail for the purpose of deciding the Revision Applications. It is sufficient to point out that in each case the police investigating the offence - a cognizable one - took the view on completion of the investigation that there was not sufficient evidence or reasonable ground of suspicion to justify putting up of the accused for trial and accordingly submitted a final report to the Magistrate asking for a "B" Summary to the effect that the case was maliciously false. The Magistrate on a consideration of the final report and other police papers did not agree with the recommendation of the police and declined to grant "B" Summary. The Magistrate took the view that the facts disclosed in the final report and the police papers constituted an offence and there was a case for putting up the accused on trial and he therefore directed the police to submit a charge-sheet against the accused. This was the order passed by the Magistrate in each case and the State in the first case and the accused in the second thereupon preferred a Revision Application to the Sessions Court. The learned Sessions Judge in each case

held following the decision of the Bombay High Court in *State v. Murlidhar*¹. that the Magistrate had power to fall for a charge-sheet when he disagreed with the final report submitted by the police asking for "A". "B" or "C" Summary and the order of the Magistrate in each case directing the police to submit a charge-sheet was, therefore, a valid and legal order. The State in the

¹61 Bom LR 1656 : (AIR 1960 Bom 240)
first case and the accused in the second thereupon moved the High Court in revision and the Revision Applications in the first instance came up for hearing before a single Judge but having regard to the importance of the question involved, the learned single Judge referred them to a Division Bench and that is how they ultimately came up before the Division Bench consisting of Bakshi and Vakil, JJ. The decision in Murlidhar's case, 61 Bom LR 1656 : (AIR 1960 Bombay 240) being a decision given by a Division Bench of the Bombay High Court prior to bifurcation, Bakshi and Vakil, JJ. would have ordinarily followed that decision but they found that there was considerable conflict of opinion amongst various High Courts on this point and there was a Full Bench decision of the Calcutta High Court in *A.K. Roy v. State of West Bengal*², where a directly contrary view was taken and they, therefore, referred the Revision Applications to a Full Bench so that the point may be reconsidered in the light of the Calcutta decision and the law may be authoritatively settled so far as this Court is concerned.

2. Mr. A.D. Desai, learned Assistant Government Pleader appearing on behalf of the State in the first Revision Application and Mr. Syed, learned advocate appearing on behalf of the petitioners in the second Revision Application pleaded for acceptance of the Calcutta view in A.K. Roy's case, AIR 1962 Calcutta 135 (FB) (supra) while Mr. Y.S. Mankad, learned advocate appearing on behalf of the first opponent (complainant) in the first Revision Application supported the Bombay view in Murlidhar's case, 61 Bom LR 1656 : (AIR 1960 Bombay 240). The conflict was, therefore, mainly between these two decisions - as to which of them represented the correct law but besides these two decisions, several other decisions of various High Courts were also cited before us and we shall have to consider them. But before we refer to these decisions, it would be desirable to examine the question on principle and to do that we must see what is the scheme of the Code relating to investigation of offences.

3. The provisions relating to the power of the police to investigate into offences and the procedure to be adopted by them are to be found in Chapter XIV which falls in Part V headed : "Information to the Police and their powers to investigate" An officer-in-charge of a police station may investigate into any cognizable offence 'without the order of a Magistrate (Section 156(1)) but no police officer can, investigate a noncognizable case without an order from a Magistrate specified in Section 155(2). Under Section 156 (3) any Magistrate empowered under Section 190 may order the police to investigate into a cognizable case. Section 157 prescribes the procedure to be followed where 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 Section 156 to investigate and declares that in such a case the officer must forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report

and proceed in person, or depute one of his subordinate officers, to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender except in the two cases set out in the provisos in which he need not proceed to investigate the case. 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 inquiry into, or otherwise to dispose of, the case in manner provided in the Code (Section 159). The Magistrate can thus direct the police to make an investigation even if the officer in charge of the police

² AIR 1962 Cal 135

\station thinks that it is not worthwhile to investigate the case or that there is no sufficient ground for entering on an investigation. Section 164 empowers certain Magistrates to record statements or confessions in the course of the investigation and when a search is made by the investigating officer, the record of the search is required to be sent to the nearest Magistrate empowered to take cognizance of the offence under Section 165. If the investigation cannot be completed within twenty-four hours, the Investigating Officer must send the accused forthwith to the nearest Judicial Magistrate together with a copy of the entries in the diary relating to the case and the Magistrate may, in such a case, whether or not he has jurisdiction to try the case, authorize the detention of the accused in custody for a term not exceeding fifteen days (S. 167). These provisions are clearly intended to secure that an investigation does take place into a reported offence and the investigation is carried out within the limits of the law without causing any harassment to the accused and is completed without unnecessary or undue delay. The manner and method of conducting the investigation are, however, left entirely to the police and the Magistrate has no power under any provision of the Code to interfere with the same.

4. Now if upon an investigation under Chapter XIV it appears to the officer in charge of the police station or to the 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, says Section 169, release the accused, if in custody, on his executing a bond, to appear, if and when 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. If on the other hand it appears to the officer in charge of the police-station, upon an investigation under Chapter XIV, that there is sufficient evidence or reasonable ground to justify the forwarding of the accused to a Magistrate, such officer is required under Section 170 to forward the accused 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, take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate. In either case, on the completion of the investigation, the officer in charge of the police station has to submit a report to the Magistrate under Section 173 in the prescribed form furnishing various details. Sub-Section (1) of that Section provides that every investigation under the Chapter shall be completed without unnecessary delay, and, as soon as it 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."

What is to be done by the Magistrate on receiving the report under Section 173 is a matter we shall presently consider but before we do so, it is necessary to advert to one or two other matters. We must first refer to Section 173 Sub-Section (3) for in the minority judgment of D.N. Das Gupta, J., in the Calcutta case strong reliance has been placed on this provision and the power of the Magistrate to call for a charge-sheet is found in this provision. Section 173 Sub-Section (3) enacts that "whenever it appears to the Magistrate from the report forwarded under Section 173 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." Thus provision in our opinion does not confer any power on the Magistrate to call for a charge-sheet but that we shall discuss later when we deal with the arguments of the parties. The other matter which it is necessary to point out is that neither Section 173 - nor for the matter of that any other provision of the Code - uses the expression "charge-sheet" or "final report" Section 173 talks only of a report to be submitted by the police on completion of the investigation and that report has to be submitted whether the case falls within Section 169 or Section 170. Neither Section 173 nor any other provision of the Code gives any particular nomenclature to a report made by the police in a case falling within Section 169 or to a report made by the police in a case falling within Section 170; in both cases the report is generically a report under Section 173. But when we turn to the Bombay Police Manual which contains inter alia Rules and Regulations made by the Inspector General of Police, we find that a distinction is made between the two types of cases. The report to be made by the police in a case falling within Section 170 - where there is sufficient evidence to justify the sending of the accused to the Magistrate - is called a "charge sheet" in Rule 218 and that Rule says that the charge-sheet shall be in Form Civil Procedure Code 20 and shall comply with the requirements specified in that Rule where the case falls within Section 169 - that is, there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, the report to be submitted by the police is termed as "final report" and Rule 219 directs that such final report shall be submitted by the Police Station Officer through the Superintendent of Police or the Sub Divisional Officer and while forwarding such final report, a request should be made to the Magistrate to classify the case and to issue an appropriate summary of his order. There are three kinds of summary which can be asked for by the Investigating Officer when he is of the opinion that there is no sufficient evidence to justify the forwarding of the accused to the Magistrate. A request for "A" Summary is to be made when the police officer investigating the case is of the view that the offence is true

but undetected and where there is no clue whatever about the culprits or property or where the accused is known but there is no evidence to justify his being sent up for trial, "B" Summary is to be asked for when the complaint is maliciously false and "C" Summary when the complaint is neither true nor false, that is, due to mistake of facts or is of a civil nature. Whether the report to be submitted under Section 173 should be a charge-sheet or a final report, therefore, depends upon whether the case falls within Section 170 or Section 169 and having regard to the words of subjective satisfaction used in both these Sections as indicated by the use of the expression "If it appears to the officer in charge of the police station", that in its turn depends upon the opinion formed by the officer in charge of the police-station or the investigating officer as to whether there is sufficient evidence or not for placing the accused on trial. As observed by the Supreme Court in *H.N. Rishbud v. State of Delhi*³, at page 201 : "..... 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" and that opinion determines whether the report under Section 173 is to be a charge-sheet or a final report. The charge-sheet is submitted when the police-station officer is of the opinion that there is a case for placing the accused

³ AIR 1955 SC 196

on trial while the final report is submitted when the police-station officer is of the opinion that there is no such case and in the latter case the police-station officer may ask for one of these summaries, namely, "A", "B" or "C".

5. But the question then arises; what is to be done by the Magistrate on receiving the report under Section 173? In this connection, in addition to the Sections already noticed, it is necessary to refer to Section 190 which is the first section in the group of Sections headed "Conditions requisite for initiation of proceedings". Sub-Section (1) of Section 190 is the only relevant provision and that provides for taking cognizance of an offence by the Magistrate in the following terms :

"190. (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate and any other Magistrate specially empowered in this behalf may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police-officer;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed."

Section 190(1)(b) covers the case of a report under Section 173 and we shall, therefore, for the time being be concerned only with that provision. Under Section 190(1)(b) a Magistrate may take cognizance of an offence on a report under Section 173 disclosing facts which constitute such offence. The word "may" imports the exercise of judicial discretion and the Magistrate receiving the report under Section 173 would have to consider the report and decide judicially whether or not to take cognizance of the offence. It is, therefore, apparent that where the police

has submitted a charge-sheet under Section 173, the Magistrate is not bound to accept the opinion of the police that there is a case for placing the accused on trial and to take cognizance of the offence as reported by the police. The Magistrate may on considering the charge-sheet take the view that the facts disclosed do not in his opinion constitute an offence and the condition for taking cognizance under Section 190(1)(b) therefore, does not exist or that even if the facts disclose! constitute an offence, there is not sufficient evidence to place the accused on trial and in either view he may decline to take cognizance of the offence whatever be the opinion of the police. As a matter of fact in such a case the Magistrate would be bound not to take cognizance of the offence and if he does, his order being a judicial order would be revisable by the superior Court. This view is clearly supported by the decision of the Calcutta High Court in *Lee v. Adhikary*⁴, and the decision of the Bombay High Court in *In re Shivlingappa Bhayappa*⁵. In the latter case a Division Bench of the Bombay High Court held that even where a charge-sheet is submitted by the police, the Magistrate can and must refuse to take cognizance of the offence if he finds that the facts constituting the offence are not set out in the charge-sheet as required by Section 190(1)(b) or the charge-sheet fails to give details or circumstances constituting the nature of the information as required by Section 173 and a fortiori it would follow that if the Magistrate is of the view that the facts disclosed in the charge-sheet do not constitute an offence or that even if they do, there is not sufficient evidence to place the accused on trial, the Magistrate could not only be justified but would be bound to disagree with the

⁴(1910) ILR 37 Cal 49

⁵ AIR 1930 Bom 372

opinion of the police and to decline to take cognizance of the offence. The position therefore, seems to be fairly clear and undisputed as to what course of action a Magistrate can adopt when the report submitted to him by the police under Section 173 is a charge-sheet.

6. But what are the courses of action open to a Magistrate where the report submitted by the police under Section 173 is a final report and not a charge-sheet ? There would obviously be no difficulty where the Magistrate on a consideration of the final report agrees with the opinion of the police; he may in such a case accept the recommendation of the police and issue the kind of summary asked for, namely, "A", "B" or "C". But even where he agrees with the opinion of the police that there is no case for putting up the accused on trial. He is not bound to issue the kind of Summary asked for by the police. As observed by a Division Bench of the Bombay High Court in *State v. Shankar Bhauroo*⁶, a Magistrate who is invited to give "B" Summary may on the evidence give "A" Summary. The Magistrate has to apply his mind judicially to the final report and decide what kind of Summary is justified on the facts and circumstances of the case. The Magistrate may also refuse to issue any Summary at all if on a consideration of the final report and the police papers he is of the view that the request of the police is not well grounded. The Magistrate may take the view that the opinion formed by the police is not based on full and complete investigation and he may direct the police to make further investigation under Section 156(3). This power of the Magistrate is now recognized by all High Courts barring only the

erstwhile Court of the Judicial Commissioner of Kutch which took the view in *State of Kutch v. Budhgar Dharamgar*⁷, that a Magistrate receiving a final report cannot direct further investigation even if he is not satisfied with the investigation already made and considers further investigation necessary. But this view is clearly erroneous as it is based on a disregard of the provisions of Section 156(3). In *J.D. Boywalla v. Sorab Rustomji Engineer*⁸, Beaumont, C.J., said :

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

These observations were relied on by Shah, J., in Murlidhar's Case 61 Bom LR 1656 : (AIR 1960 Bombay 240) and were quoted with approval by S.K. Sen, J., in A.K. Roy's Case AIR 1962 Calcutta 135 (FB). It must, therefore, be taken as well settled that if a Magistrate considering a final report finds that the investigation is unsatisfactory or incomplete or there is scope for further investigation, he may decline to issue any Summary arid order further investigation generally or in specific directions under Section 156(3) and on completion of such further investigation the police may submit a charge-sheet if it appears to them as a result of such further investigation that there is a case for

⁶61 Bom LR 591 (AIR 1959 Bom 437)

⁸43 Bom LR 529 : (AIR 1941 Bom 294)

⁷ AIR 1954 Kutch 26

putting up the accused on trial and if it appears to them despite such further investigation that there is no case for putting up the accused on trial the police may once again submit a final report.

7. This is one of the courses of action which may be pursued by a Magistrate on receiving a final report but the Magistrate may in a given case find that no further investigation is necessary and on the investigation already made there is a case for placing the accused on trial. The Magistrate in such a case is not bound to accept the opinion of the police and to issue any Summary as asked for by the police. If in the opinion of the Magistrate the facts set out in the final report constitute an offence and; having regard to the final report and the police papers there is a case for placing the accused, on trial, the Magistrate can take cognizance of the offence under Section 190(1)(b) notwithstanding the contrary opinion of the police expressed in the final report. Section 190(1)(b) empowers a Magistrate to take cognizance of an offence on a report under Section 173 containing facts constituting such offence and a final report is as much a report under Section 173 as a charge-sheet and, therefore, if the final reports contains facts which according to the Magistrate constitute an offence, the Magistrate can take cognizance of the offence on the final report under Section 190(1)(b). That is why Section 169 provides that even though on investigation the police station officer or the investigating officer forms the opinion that there is no case for proceeding against the accused, he shall while releasing the accused take a bond from

him to appear if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try him or to commit him for trial. This provision has been obviously enacted to meet the contingency that on judicially considering the final report the Magistrate may not accept the opinion of the police station officer or the investigating officer and may choose to take cognizance of the offence if he finds that the facts disclosed by the final report constitute such offence notwithstanding the opinion of the police to the contrary and in an event he may require the accused to be produced before him. It is, therefore, clear on a consideration of the language of Section 190(1)(b) and the implication of the provision enacted in Section 169 that a Magistrate receiving a final report has to deal with the final report judicially and in so doing he is not bound by the opinion of the police and if he takes the view that the facts appearing in the final report constitute an offence and there is reasonable ground for putting up the accused on trial, he not only can but must take cognizance of the offence under Section 190(1)(b) and the order passed by him would be a judicial order and not an administrative order. This view apart from being supportable on principle is affirmed in various decisions of different High Courts of which we may mention only a few, namely : *Siddappa Gurappa v. State of Mys*⁹, *Lumbaram v. State of Rajasthan*¹⁰, *Raghunath Puri v. State of Bihar*¹¹. *Murlidhar's Case*, 61 Bom LR 1656 (AIR 1960 Bombay 240) (supra) and *A.K. Roy's Case* AIR 1962 Calcutta 135 (FB), (supra). The tone dissent to this view is provided by two decisions of the Pepsu High Court, one in *Harbir Singh v. State of Pepsu*¹², and the other in *Mt. Ido v. Gainda*¹³, where the Pepsu High Court took the view that though the Magistrate is not bound to agree with the opinion of the police where the police has submitted a final report, all that the Magistrate can do when he disagrees with the opinion of the police is to record his disagreement and he cannot take cognizance of the offence under Section 190(1)(b). These decisions are, however, plainly erroneous in that they fail to give due effect to the language of Section 190(1)(b) which empowers the

⁹ AIR 1960 Mys 237

¹¹ AIR 1932 Pat 72

¹³ AIR 1952 Pepsu 38

¹⁰(1957) Cr. LJ 231 (Raj)

¹² AIR 1952 Pep 29

Magistrate to take cognizance of an offence on a report under Section 173 irrespective whether the report be a charge-sheet or a final report.

8. So much is indisputable but the question then arises : Can the Magistrate to whom a final report is submitted, direct the police to submit a charge-sheet and it is here that the disagreement between the parties commences. When the Magistrate on a consideration of the final report disagrees with the opinion of the police and takes the view that the facts disclosed in the final report constitute an offence and there is a case for proceeding against the accused, the Magistrate can certainly take cognizance of the offence, but can the Magistrate in such a case instead of taking cognizance of the offence call to a charge-sheet from the police as a preliminary step to taking cognizance of the offence ? This question may also arise, where the Magistrate finds on a consideration of the final report and the police papers that the offence does appear to have been committed and that there is reasonable ground for proceeding against the accused but the facts set out in the final report do not make out such offence with the result that the magistrate is unable to take cognizance of the offence on the final report under Section 190(1)(b). Can the

Magistrate in such a case call for a charge-sheet from the police so that he can take cognizance of the offence on the charge-sheet? Now obviously this power, if it exists, must be as a result of conferment by express enactment or by necessary implication. So far as express enactment goes, we do not find any provision in the Code which expressly confers such power on the Magistrate. Even Shah, J. in Murlidhar's Case 61 Bom LR 1656 : (AIR 1960 Bombay 240) and Bhattacharya J., one of the minority Judges in A.K. Roys Case AIR 1962 Calcutta 135 (FB), who took the same view as the Bombay High Court in Murlidhar's case, 61 Bom LR 1656 : (AIR 1960 Bombay 240) did not rely on any express provision of the Code in support of the view taken by them. They rested their conclusion only on necessary implication and held that the power could be clearly implied from the scheme of the provisions relating to investigation contained in the Code. Of that, more hereafter. But D.N. Das Gupta, J. the other minority Judge in A.K. Roy's Case AIR 1962 Calcutta 135 (FB), found the power expressly conferred by the language of Section 173(3) and according to him, that Section empowered the Magistrate to call for a charge-sheet from the police, when he disagreed with the recommendation of the police in the final report that "A", "B" or "C" Summary should be issued and accused should be discharged. It is, therefore, necessary to consider the true meaning and effect of Section 173(3). That Section provides that whenever it appears to the Magistrate from the report under Section 173 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." D.N. Das Gupta, J. held that the words ". . . or otherwise as he thinks fit" gave the Magistrate very wide powers and in exercise of the powers given by these words, the Magistrate was competent to direct the police to submit a charge-sheet where he took the view on a consideration of the final report and the police papers that an offence was committed and there was reasonable ground for proceeding against the accused. This construction is, in our opinion, with the greatest respect to the learned Judge, erroneous. It ignores not only the context and setting but also the sequence and collocation of the words. The words 'as he thinks fit' do not go with the word "otherwise": They go with the words "such order" and the word "otherwise" is used in contradistinction to the words "for the discharge of such bond" so that the provision that is enacted in the Section is that the Magistrate shall make such order as he thinks fit for the discharge of the bond or otherwise. The order that is contemplated under the Section is clearly an order in reference to the bond. The word "otherwise" does not give an unlimited discretion to the Magistrate to make any kind of order he likes such as an order calling for a charge-sheet. That word must be read in the context in which it occurs and so read it can mean only an order in reference to the bond otherwise than for the discharge of the bond. Such an order may well be an order requiring the production of the accused but it cannot include an order calling for a charge-sheet from the police. The latter order would have no relation to the bond and would not, therefore, fall within the category of orders which can be made by the Magistrate under the power conferred by the use of the word "otherwise". Moreover, even if the word "otherwise" were to be wrested from its context and given a broad and expansive meaning so as to confer a carte blanche power on the Magistrate to make any kind of order which he thinks fit under the circumstances of the case, it cannot still be construed as authorizing the Magistrate to make an order calling for a charge-sheet from the

police for such an order would, as we, shall presently point out, be not only contrary to the scheme of the Code but also opposed to the language of Sections 169, 170 and 173 and it is elementary that a power conferred in general terms cannot be construed to authorize the doing of something which is contrary to or inconsistent with some other specific provision of the statute. We cannot therefore, accept the view that Section 173(3) constitutes an express enactment conferring power on the Magistrate to call for a charge-sheet from the police.

9. There being no express enactment, we must turn to see whether there is any power in the Magistrate by necessary implication to call for a charge-sheet from the police. Shah, J., in Murlidhar's Case, 61 Bom LR 1656 : (AIR 1960 Bombay 240) and Bhattacharya I. in A.K. Roy's Case AIR 1962 Calcutta 135 (FB) held that the Magistrate had such power by necessary implication, but with the greatest respect to the learned Judges we find ourselves unable to accept the view taken by them. In the first place it is an elementary principle of construction that a power to do an act cannot be implied unless the doing of such act is essentially necessary for effectual exercise of a jurisdiction or power conferred by the statute so that if such implication is not made, it would not be possible to effectually exercise the jurisdiction or power and the conferment of the jurisdiction or power would be rendered futile or purposeless. The principle on which the implication of power is permitted to be made is that where the Legislature enacts a provision conferring a jurisdiction or power, it must be deemed to have also given at the same time by necessary implication, power to do all such acts and employ all such means as are essentially necessary for its execution, for otherwise the legislative will would be frustrated and the provision would be reduced to futility. *Ubi aliquid conceditur, conceditur et sine quo res ipsa non esse potest.* (Maxwell on Interpretation of Statutes, Eleventh Edition, page 350 and Craies on Statute Law, Sixth Edition, page 258). The implication of power can, therefore, be made by Judicial construction only where it is clear that without such power a provision of the statute conferring jurisdiction or power would be rendered meaningless or ineffectual and not merely because it may appear to be more convenient or desirable that such power should exist to imply power in the latter case would be to legislate and not to interpret the statute. This principle of construction applied in the present case clearly negatives the implication of any power in the Magistrate to call for a charge-sheet from the police. It is not at all necessary to imply such a power in the Magistrate for there is no jurisdiction or power conferred on the Magistrate under the Code which would be rendered meaningless or futile if the power to call for a charge-sheet from the police is not held to be vested in the Magistrate. The Magistrate has the power to direct further investigation under Section 156(3) if the investigation is incomplete or unsatisfactory and he has also the power to take cognizance of the offence under Section 190(1)(b), if he finds, despite the opinion of the police to the contrary, that an offence has been committed and there is reasonable ground to proceed against the accused. Neither of these two powers is rendered ineffectual or futile without the aid of the power to call for a charge-sheet from the police. Of course, as pointed out above, where the facts set out in the final report do not make out an offence but it appears to the Magistrate on a consideration of the final report and the police papers that an offence has been committed and there is reasonable ground for proceeding against

the accused, the Magistrate would be unable to take cognizance of the offence under Section 190(1)(b) but that would be by reason of the fact that the final report being deficient in setting out facts constituting the offence, the terms of the Section would not be satisfied and not because though the terms of the Section are satisfied and the Magistrate has power to take cognizance of the offence under the Section, the Magistrate is unable to do so in the absence of the power to call for a charge-sheet from the police. The power to call for a charge-sheet in such a case is not indispensable to the exercise of the power to take cognizance of the offence under Section 190(1)(b) : the power to take cognizance of the offence under Section 190(1)(b) does not arise at all and no power can be implied to call for a charge-sheet from the police so that the terms of Section 190(1)(b) may be satisfied and the Magistrate may have the power to take cognizance of the offence under that Section. As a matter of fact we may point out that in cases of this type there is no need at all to make an implication of a power in the Magistrate to call for a charge-sheet from the police in order to enable the Magistrate to take cognizance of the offence for though the Magistrate cannot for reasons already stated take cognizance of the offence under Section 190(1)(b), he can always proceed to take cognizance of the offence under Section 190(1)(c). Section 190(1)(c) empowers the Magistrate to take cognizance of an offence "upon information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed". This provision is obviously intended to secure that offences may not go unpunished and justice may be vindicated even where persons individually aggrieved are unwilling or unable to prosecute or the police deliberately or through *bona fide* error fail to make a report setting out facts constituting the offence and a wide power is, therefore, conferred on the Magistrate to take cognizance of an offence not only where the Magistrate receives information about the commission of the offence from a third person but also where he has knowledge or even suspicion that the offence has been committed. Now in a case where the Magistrate finds on a consideration of the final report and the police papers such as the statements recorded under Sections 162 and 164 that an offence has been committed, it may not be possible to say that information relating to the commission of the offence is received by the Magistrate from any person or persons other than a police officer, for even the statements of witnesses recorded under Sections 162 and 164 would be received by the Magistrate from the police and the information contained in those statements might plausibly be said to be information received from the police and not from the witnesses so far as the Magistrate is concerned. The Magistrate may not, therefore, be able to take cognizance of the offence under the first part of Section 190(1)(c) but he can certainly take cognizance of the offence under the second part of that Section on the ground that having regard to the final report and the police papers he has reason to suspect that an offence has been committed. The final report and the police papers can in such case be relied on as affording ground for suspicion that an offence has been committed and acting on such suspicion the Magistrate can take cognizance of the offence under Section 190(1)(c). This conclusion would seem to follow logically and indisputably from the language of Section 190(1)(c) but we find that it is also supported by the decision of a Full Bench of the Calcutta High Court in *Queen Empress v. Sham Lall*¹⁴, This being the true legal position there is no difficulty at all in the way of the Magistrate taking cognizance of an offence

where he finds on a consideration of the final report and the police papers that an offence has been committed but the final report as drawn up by the police does not set out facts constituting the offence. The Magistrate undoubtedly cannot in such a case take cognizance of the offence under Section 190(1)(b) but he can certainly proceed to take cognizance of the offence under Section 190(1)(c). The necessity or justification for implying a power in the Magistrate to call for a charge-sheet from the police is thus clearly excluded and in the absence of such necessity or justification the power obviously cannot be implied.

10. This reason which we have given would be enough to negative the implication of a power to call for a charge-sheet from the police but we find there are other equally weighty reasons which induce us to reach that conclusion. It is elementary that a power cannot be implied to do an act which is contrary to or inconsistent with some specific provision of the statute and to imply a power in the Magistrate to call for a charge-sheet from the police would be plainly inconsistent with the scheme of the Code and the provisions enacted in Sections 169, 170 and 173. While analysing the provisions of the Code relating to investigation by the police, we had occasion to point out that whether the report to be submitted by the police under Section 173 should be a charge-sheet or a final report depends upon whether the case falls within Section 170 or Section 169 and that in its turn depends upon the opinion formed by the officer in charge of the police station or the investigating officer as to whether there is sufficient evidence or not for putting up the accused on trial. The formation of the opinion as to whether or not there is case to place the accused on trial is to be that of the officer in charge of the police station and that opinion determines whether the report under Section 173 is to be a charge sheet or a final report. When the police station officer forms an opinion that there is no case for placing the accused on trial and in view of that opinion submits a final report instead of a charge-sheet, the Magistrate may disagree with the opinion of the police and adopt any one of the courses indicated above but we do not see how he can direct the police to submit a charge-sheet. Whether the report to be submitted under Section 173 should be a charge-sheet or a final report depends on the opinion of the police and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion on the investigation and to submit a report according to such opinion. The formation of the opinion, as observed by the Supreme Court in *Rishbud's Case* AIR 1955 Supreme Court 196 (supra) is to be that of the police and the Magistrate cannot be permitted to encroach on the sphere of the police and to decide according to his opinion whether the report under Section 173 should be a charge-sheet or a final report. That function is assigned by the Legislature to the police and the Magistrate cannot usurp that function : to hold that he can do so would be to fly in the face of Sections 169, 170 and 173 and Rules 218 and 219 of the Bombay Police Manual. Moreover it must be remembered that the functions of the judiciary and the police under the Code are "complementary, not overlapping" and each is entitled to exercise its own functions without interference by the other. This proposition

¹⁴(1887) ILR 14 Cal 707

emerges clearly from the decision of the Judicial Committee of the Privy Council in *Emperor v. Nazir Ahmed*¹⁵, where Lord Porter delivering the opinion of the Privy Council observed :-

"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."

These observations were quoted with approval by the Supreme Court in *State of West Bengal v. S.N. Basak*¹⁶, It is manifest from these observations that the function of forming an opinion whether there is evidence or not for placing the accused on trial which would dictate the nature of the report, namely, whether it should be a charge-sheet or a final report, being entrusted by the Legislature under the Code to the police, the Magistrate cannot interfere with the exercise of that function by the police and direct the police to form a particular opinion and submit a report in accordance with such opinion. Even if we look at the question from a slightly different angle, we arrive at the same conclusion. The observations of the Privy Council to which we have just referred clearly show that the right to investigate the circumstances of an alleged cognizable offence without requiring any authority from the Magistrate is vested by the Code in the police and the police is entitled to carry on the investigation upto the end without any interference by the Magistrate. Investigation under the Code consists generally of several stages ending with the formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and the submission of a charge-sheet or a final report dependant on the opinion so formed. The formation of the opinion as to whether there is or not a case for placing the accused on trial is, as observed by the Supreme Court in *Rishbud's Case* AIR 1955 Supreme Court 196 ((supra), the final step in the investigation and that final step is to be taken by the officer in charge of the police station. See also *Parulbala Sen v. State*¹⁷. The formation of the opinion whether or not there is a case for placing the accused on trial and the submission of a charge-sheet or final report dependent on such opinion being a stage in the investigation, though the last stage, the Magistrate clearly cannot in view of the" observations of the Privy Council, approved as they are by the Supreme Court, interfere with the formation of

such opinion by the police or require the police to submit a charge-sheet instead of a final report or a

¹⁵71 Ind. App. 203 : (AIR 1945 PC 18)

¹⁷ AIR 1957 Cal 379

¹⁶ AIR 1963 SC 447

final report instead of a charge-sheet for that would be tantamount to interference by the Magistrate with the statutory right of the police to investigate into a cognizable offence without authority from the Magistrate. On principle, therefore, the conclusion seems to be fairly clear and indisputable that where the police has submitted a final report, the Magistrate cannot require the police to submit a charge-sheet. But apart from principle, the validity of this conclusion becomes apparent if we look at the converse case. Suppose the police has submitted a charge-sheet: can the Magistrate in such a case, if he disagrees with the opinion of the police, direct the police to submit a final report ? The Magistrate can certainly refuse to take cognizance of the offence, but can he call upon the police to submit a final report and ask for a particular kind of summary ? Obviously he cannot. But if that be so, how can he direct the police to submit a charge-sheet when the report submitted by the police is a final report ? The Magistrate can certainly disagree with the opinion of the police and he may either direct further investigation under Section 156(3) if he finds that the investigation is improper or unsatisfactory or he may take cognizance of the offence under Section 190(1)(b) if the final report sets out facts constituting the offence or even if the final report does not set out facts constituting the offence, he can still proceed to take cognizance of the offence under Section 190(1)(c) and where he takes cognizance of the offence under Section 190(1)(b) or Section 190(1)(c), he can call upon the police to assist him in the prosecution and the police would be bound to render all possible assistance and the accused, if guilty, would thus be brought to book. But the Magistrate cannot call upon the police to submit a charge-sheet. The Magistrate does not have such power either by express enactment or by necessary implication. We are, therefore, unable to agree with the judgment of the Division Bench in Murlidhar's Case 61 Bom LR 1656 : (AIR 1960 Bombay 240) and the minority judgments of Bhattacharya and D.N. Das Gupta, JJ. in A.K. Roy's Case AIR 1962 Calcutta 135 (FB) (supra).

11. Before we close the discussion of this point, we must refer to three decisions of the Patna High Court which were cited at the bar as having some bearing on the determination of the question in dispute between the parties. The first was the decision in *Shukadeva Sahay v. Hamid Miyan*¹⁸, but this decision does not help, for the only point involved in this decision was whether the Sub-Divisional Magistrate having disposed of the final report by accepting the recommendation of the police, the District Magistrate had power to call for a charge-sheet and it was held that the District Magistrate had no such power. The question as to whether the Sub-Divisional Magistrate was entitled to call for a charge-sheet if he disagreed with the recommendation contained in the final report was not in issue and there was no decision on that question. The second decision was that reported in AIR 1932 Patna 72. In this case a single Judge of the Patna High Court undoubtedly held that a Magistrate to whom a final report is made

under Section 173 - can if he disagrees with the recommendation of the police contained in the final report direct the police to submit a charge-sheet but he took this view on the basis that calling for a charge-sheet from the police was merely an irregular mode of issuing process for compelling the attendance of the accused on taking cognizance of the offence. This view, with the greatest respect to the learned judge, is clearly erroneous. If the Magistrate takes cognizance of the offence on the final report - which he can certainly under Section 190(1)(b) as already discussed - he can straightway proceed under Section 204 and issue

¹⁸ AIR 1928 Pat 585

process for the appearance of the accused. The process may be a summons or a warrant but it certainly cannot be an order for submission of a charge-sheet. A charge-sheet is nothing but a report under Section 173 and an order for submission of a report under Section 173 in the form of a charge-sheet can never be regarded as an order for issue of process. Moreover, it is difficult to see how a Magistrate can call for a fresh report under Section 173 when he has already taken cognizance of the offence on the final report under Section 190(1)(b). Once the Magistrate takes cognizance of the offence under Section 190(1)(b), he must proceed under Section 204 and there is no provision in the Code which authorizes him to call for a fresh report under Section 173 in the form of a charge-sheet or otherwise. To hold that the Magistrate can in such a case call for a charge-sheet which is nothing but a fresh report under Section 173 by describing it as an irregular mode of issuing process would be to go contrary to the scheme of the Code. This criticism applies equally to the decision of the Orissa High Court in *Hrushikesh v. Krushna Chandra*¹⁹,

12. The last decision of the Patna High Court to which we must refer is the one reported in *Uma Singh v. Emperor*²⁰. This decision, we are afraid, proceeds on an erroneous reasoning which cannot be accepted by us. The Division Bench of the Patna High Court held in this case that an order made by the Magistrate directing a case reported to him under Section 173 to be struck off is not a judicial but purely an administrative order and the principle of *autrefois acquit* not being applicable, the Magistrate can reopen the case calling for a charge-sheet. Now in the first place we cannot agree that an order made by the Magistrate on a consideration of the report made to him under Section 173 is an administrative order : it is by its very nature a judicial order. For the Magistrate has to apply his mind judicially to the report and decide on the course of action. Secondly, the ground on which it is held that the Magistrate can call for a charge-sheet is that the Magistrate may take cognizance of the offence under Section 190(1)(c) and taking cognizance under that Section, he may call for a charge-sheet, but if the Magistrate takes cognizance under Section 190(1)(c), he must proceed under Section 204 and cannot possibly call for a charge-sheet and in any event there would be no point in calling for a charge-sheet for he cannot take cognizance of the offence over again on the charge-sheet submitted by the police. Probably the Division Bench held the Magistrate to have the power to call for a charge-sheet on the view that on taking cognizance of the offence under Section 190(1)(c), the Magistrate was entitled to issue process and calling for a charge-sheet from the police was an irregular mode of issuing process, but this view is, for reasons we have already stated, plainly incorrect. This decision of the Division Bench of the Patna High Court also cannot, therefore, induce us to take a view different

from the one which we are taking.

13. It is, therefore, clear that in both the cases which are before us the Magistrate had no power to call for a charge-sheet from the police. The order calling for a charge-sheet from the police would, therefore, have to be set aside, but the question is, what order should be made in place of the order calling for a charge-sheet. Now there is no doubt from the judgment of the learned Magistrate in each case that on a consideration of the final report and the police papers in each case, the learned Magistrate was of the view that an offence was committed and there was reasonable ground for proceeding against the accused. No doubt the facts set out in the final report in Revision Application No. 130 of 1964 were

¹⁹ AIR 1958 Oris 104

²⁰ AIR 1933 Pat 242

not sufficient to constitute an offence and the learned Magistrate was, therefore, not entitled to take cognizance of the offence in that case under Section 190(1)(b), but the learned Magistrate was certainly entitled to take cognizance of the offence under Section 190(1)(c) since on a consideration of the final report and the police papers he had reason to suspect that the offence was committed and there was a case for placing the accused on trial. The same position also obtains in regard to Revision Application No. 248 of 1964. In that case too the learned Magistrate was of the view on a consideration of the final report and the police papers that an offence did appear to have been committed and there was a case for placing the accused on trial and he was, therefore, entitled to take cognizance of the offence under Section 190(1)(c) though in view of the final report as drawn up by the police he might not have been entitled to take Cognizance of the offence under Section 190(1)(b). We would, therefore, direct the learned Magistrate in each case to take cognizance of the offence under Section 190(1)(c) and to proceed further in the matter in accordance with the provisions of the Code. There will be order accordingly in both the Revision Applications.

Petitions allowed. Cases remanded.