

(1978) 05 PAT CK 0007

Patna High Court

Case No: Criminal Miscellaneous No's. 4871 of 1976 and 1787, 1803, 2369 and 2483 of 1977

Kuli Singh and Others

APPELLANT

Vs

The State of Bihar and
Others

RESPONDENT

Date of Decision: May 5, 1978

Acts Referred:

- Constitution of India, 1950 - Article 141
- Criminal Procedure Code, 1973 (CrPC) - Section 169, 173, 190, 190(1)

Citation: AIR 1978 Patna 298 : (1978) 26 BLJR 377 : (1978) CriLJ 1575

Hon'ble Judges: K.B.N. Singh, C.J; Uday Sinha, J; S. Ali Ahmad, J

Bench: Full Bench

Advocate: Ras Bihari Singh and Narbadeshwar Pandey, in Criminal Misc. No. 4871 of 1976, P.P. Sinha and A.B. Mathur, in Cri Misc. No. 1787 of 1977, P.S. Mishra and G.P. Singh, in Cri. Misc. No. 1803 of 1977, Ras Bihar Singh, Narbadeshwar Pandey and Ashok Kumar Singh, in Cri. Misc. No. 2483 of 1977, Ras Bihari Singh and Ashok Kumar Haran Singh, in Cri. Misc. No. 2483 of 1977, for the Appellant; K.D. Chatterjee, General, K.N. Singh Standing Counsel, No. 4, A.K. Sinha, Jr. Counsel, Manwendra Roy, (in Cri. Misc. No. 1803 of 1977), B.K. Prasad, No. II and Kameshwar Prasad, (in Cri. Misc. No. 2483 of 1977), for the Respondent

Final Decision: Dismissed

Judgement

Uday Sinha, J.

These five miscellaneous applications u/s 482 of the Cr, P. C., 1973 (hereinafter referred to as the Code) have been heard together by this Special Bench, as a common question of law is involved in all these applications. In Kailash Pandey v. State of Bihar 1977 BBCJ 722) a Division Bench of this Court held that after the enactment of the Cr. P. C., 1973 a Magistrate has no jurisdiction to differ with the conclusions of the police contained in a police report, if the police did not feel that any offence had been committed or if it did not recommend a particular accused

being put on trial. B. P. Sinha, J. not finding himself in agreement with the law laid down in that case directed Criminal Miscellaneous No. 1787 of 1977 and Criminal Miscellaneous No. 1803 of 1977 to be placed before a Division Bench. The other applications thereafter followed suit and were directed to be placed before a Division Bench. The Hon"ble Chief Justice, finding that three learned Judges of this Court had doubted the correctness of the law laid down in Kailash Pandey's case (supra), constituted the present Special Bench in order to set the law at rest in regard to the powers of a Magistrate. The question involved in these applications will be of wide importance for Magistrates in general in regard to their powers while considering police reports submitted in terms of Section 173 of the Code.

2. The point canvassed at the Bar is that when police submits a report u/s 173 of the Code after forming the conclusion that no offence had been committed or when it does not send any particular accused for trial, a Magistrate is bound to accept it as such. A Magistrate is obliged on receiving such report to accept the conclusion of the police, The only two options before a Magistrate on receiving such a report (described as Final Report in this State) is to accept it or order further investigation. According to learned counsel for the petitioners, a Magistrate could take cognizance of any offence and issue process thereafter only if a complaint was filed. Therefore, cognizance could be taken and process issued only in a case instituted upon a complaint, but not on the basis of the final report submitted by the police. Learned counsel for petitioners, for the above propositions, have drawn heavily upon [Abhinandan Jha and Others Vs. Dinesh Mishra](#), .

According to counsel for the petitioners, Abhinandan Jha's case laid down that when a Final Report (so called loosely in this State) was submitted, a Magistrate could take cognizance upon his own suspicion in terms of Section 190(1)(c) of the Code. But as Section 190(1)(c) of the Cr. P. C., 1898 has been amended by the Code of 1973 deleting the words "or suspicion" from that section, it necessarily followed, according to learned counsel for the petitioners, that Abhinandan Jha's case in the changed legal set up must be read as laying down by implication that a Magistrate has no power to take cognizance in terms of Section 190(1)(b), if the police is of the view that no offence had been committed or that there is no evidence justifying putting a particular accused on trial. The proposition enunciated by learned counsel for the petitioners, which found favour in Kailash Pandey's case (supra) is for consideration before this Special Bench.

3. Before proceeding to consider the submissions in support of the applications, it would be appropriate to state in brief the relevant facts, for deciding the point in issue, in each of these applications.

Criminal Miscellaneous No. 4871 of 1976.-- On 27-5-1976 on the basis of a Fardbeyan given before the police Wazirganj P. S. Case No. 17 (5) 76 was instituted in regard to commission of offences under Sections 147, 148, 149 and 302 of the Indian Penal Code. The police investigated into the case and submitted a police

report recommending Kauleshwar Manjhi and Moti Manjhi being put on trial. The police did not recommend placing the petitioners on trial in that case. The police report was put up before the Chief Judicial Magistrate, Gaya, who by order dated 8-11-1976 after taking cognizance of the offences. Issued processes against the petitioners as well. The order of the learned Magistrate dated 8-11-1976 has thus been impugned in this application.

Criminal Miscellaneous Nos. 2369 and 2483 of 1977.

4. These two applications arise out of Mohiuddin Nagar (Patori) P. S. Case No. 15 (11) 74. This case was instituted before the police on 24-11-1974 on the statement of Raj Kumar Singh alleging commission of offences under Sections 147, 148, 149, 302, 307, 379 etc. of the I.P.C. After investigation, police report was laid in court before the Chief Judicial Magistrate, Samastipur in which thirty persons were recommended for being placed for trial, Rajendra Singh and Ramadhar Singh were shown as absconders. The three petitioners in these applications were not sent up for trial. When the police report or charge-sheet was placed before the learned Chief Judicial Magistrate, he directed issuance of processes against the petitioners also, as he felt that there was material prima facie to justify their also being put on trial. The petitioners, therefore, moved this Court by these two applications for quashing the order of the learned Magistrate dated 10-8-1977 in so far as it directed issuance of processes against the petitioners.

Criminal Miscellaneous No. 1803 of 1977.

5. This application arises out of Nanpur P. S. Case No. 2 (4) 77 lodged by Harinandan Rai against ten persons. After investigation, charge sheet was submitted by the police in respect of offences punishable under Sections 147, 148, 149, 323, 324, 326 and 435 of the I.P.C. When the charge sheet was laid before the Subdivisional Judicial Magistrate, Sitamarhi East, he after perusing the case diary and hearing counsel for the accused took cognizance for the offence u/s 307 of the I.P.C. as well by order dated 29-6-1977. All the accused moved this Court against the order of the learned Magistrate. The application of petitioners other than Ram Sharan Rai was dismissed in limine. Rule was issued in respect of petitioner No. 1, Ram Sharan Rai only.

Criminal Miscellaneous No. 1787 of 1977.

6. This application arises out of Phulparas (Laukahi) P. S. Case No. 6 (12) 74 instituted on the statement of Shiva Ratan Raut alleging commission of offences under Sections 147/148/323/436 of the I. P. C. After investigation charge sheet was submitted against all the petitioners for having committed offences u/s 323/34 of the I. P. C. The Subdivisional Judicial Magistrate, Jhanjharpur at Madhubani took cognizance of offences u/s 436 of the Indian Penal Code as well and issued processes against the petitioners by order dated 23-6-1977. The petitioners thereafter moved this Court for quashing the impugned order.

7. I shall now proceed to consider the submissions urged on behalf of the petitioners. Section 190 of the Code of Criminal Procedure was and is as follows :

"190 (old)-- Cognizance of offences by Magistrates:--

190 (1) Except as hereinafter provided any Presidency Magistrate, District Magistrate or Subdivisional 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 officers,

(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.

(2) The State Government, or the District Magistrate subject to the general or special orders of the State Government, may empower any Magistrate to take cognizance under Sub-section (1), Clause (a) or Clause (b), of offences for which he may try or commit for trial.

(3) The State Government may empower any Magistrate of the first or second class to take cognizance under Sub-section (1), Clause (c), of offences for which he may try or commit for trial."

"190 (new) Cognizance of offences by Magistrates:--

190 (1)-- Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence.-

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

(b) upon a police report of such facts :

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

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-section (1) of such offences as are within his competence to inquire into or try."

It will be observed that in Section 190(1)(c) after the amendment in 1974 the words "or suspicion" have been deleted. It is conceded at the Bar that when a police report in terms of Section 173 of the Code is received, a Magistrate exercising jurisdiction u/s 190(1)(b) is obliged to apply his judicial mind to the report and the record of investigation. It is also conceded that while acting in terms of Section 190(1)(b) if the police submits charge sheet, a Magistrate is not bound by its opinion, but is free to differ with it. He may either direct further investigation or discharge the accused holding that the charge-sheet did not disclose commission of any offence in general

or against any accused in particular. The contrary position, however, is disputed by the petitioners. It is contended that now after the enactment of Code of 1973 where the police submits final report in terms of Sections 169 and 173 of the Code, a Magistrate was bound by the conclusions of the police. Having given my deepest consideration to the submissions urged on behalf of the petitioners, I have no manner of doubt that they are devoid of any substance and must be rejected.

8. Before considering the submissions urged on behalf of the petitioners, it will be useful to remember that a Magistrate has ultimate control over police investigation. That is a basic concept. If this is forgotten, we are bound to go astray. The ultimate jurisdiction of deciding who will be put on trial is in a Magistrate and not in the police. In that sense it would not be inapt to say that a Magistrate has ultimate control over investigation. The function of the police is to investigate and produce materials before a Court justifying putting particular accused on trial. But no collusiveness can be conferred upon the action of police. It is not for a moment suggested that there is any clash between the jurisdiction on the police and the jurisdiction of a Magistrate. The two are complementary. The function of the police ends with the collection of materials and transmission of its opinion in regard to bringing offenders to book. The function of Magistrate commences thereafter. In that sense courts and police must be considered to be complementary. In this connection, it would be useful to notice portions of the Bihar Police Manual 1930 in order to appreciate the co-relation between the police and magistracy, which then represented the judicial authority of the State. Chapter III of the Bihar and Orissa Police Manual 1930 is headed "Relations With Executive and Judicial Authorities", Reference may be made in particular to certain provisions in that Chapter which are quoted below:--

"27. The general relations between magistrates and the police are defined in the Code of Criminal Procedure, with the provisions of which, and the principal rulings on them, all investigating and prosecuting officers are expected to be familiar.

28. Powers of Magistrates--Except as provided in that or any other Act, or in any rules made or approved by Government, for the time being in force subordinate magistrates have no power to interfere in police work. But magistrates having jurisdiction and empowered to take cognizance of police cases are re-minded of their responsibility for watching the course of police investigation in the manner laid down in Chap. XIV, Cr. P. C."

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"30. Relations of police with courts and magistrates-- Police Officers shall treat all courts and magistrates with due respect, and endeavour to maintain cordial relations with them. While cases in which there is reason to believe there has been a failure of justice, or in which the police complain of unfair treatment, may be brought to the notice of the District Magistrate, notes and reports on such matters

shall be drawn up in temperate and respectful language. Reflections on judicial tribunals shall not be made in public, nor shall departmental reports and other similar documents, which are or may be published, contain disparaging criticism of judicial acts,"

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"32. Powers of Subdivisional Officers -- Except where it is provided otherwise in these rules or by any law for the time being in force, Subdivisional Officers shall have only the same powers in respect of the police as other subordinate magistrates; but it is the duty of every Subdivisional Officer to inspect all police stations within his jurisdiction annually. At such inspections they shall follow the instructions laid down for District Magistrates in Rule 21, and may give orders affecting the preparation and trial of cases but they are not empowered to issue executive orders to the police and shall confine themselves to bringing to the notice of the District Magistrate any matter which appears to call for intervention."

The above leaves no manner of doubt that a Magistrate has the last say in bringing offenders to book. The following observations of the Supreme Court in [Raghubans Dubey Vs. State of Bihar](#), are rather enlightening (at p. 1084 of Cri LJ):--

"Once he (Magistrate) takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved in it, it is his duty to proceed against those persons. The summoning of the additional accused in part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in [Pravin Chandra Mody Vs. State of Andhra Pradesh](#), , Pravin Chandra Mody v. State of Andhra Pradesh, the term "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance u/s 100(1)(a) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted " even though persons who had committed the offence were not known at that time. The same position prevails, in our view, u/s 190(1)(b)."

The above recognizes and lays down the basic structure of our legal system that the last say in the matter of putting accused on trial is with the Magistrate. In that view of the matter, I fail to appreciate the distinction in regard to the powers of a Magistrate when considering a police report sending up some persons for trial (a "charge-sheet") and a police report not sending up accused" for trial (a "final report" so-called). If the principle is conceded that the Magistrate is not bound by the opinion of the police in regard to charge sheet, I fail to appreciate why he should be bound by that opinion when there is a Final Report. In my view, when a Magistrate is called upon to consider a Final Report, so-called, he must be deemed to be exercising jurisdiction on the basis of a police report. Even then he has to exercise judicial discretion.

Since it is the duty of the Magistrate to come to a conclusion in regard to persons, who should be put on trial, a Magistrate may (a) accept that final report or (b) may reject that final report and issue summons or warrant against the accused or (c) direct the police to re-investigate into the offence if he considers the investigation to be incomplete in any respect or not directed on proper lines. The law in regard to putting accused on trial being the same in case of charge sheet or final report, I do not appreciate how and why a Magistrate while acting in terms of Section 190(1)(b) has courses (a) and (c) open to him but not (b). In my view, upon receiving a report u/s 173 of the Code, which is a final report, a Magistrate has full jurisdiction to differ with the conclusions of the police and direct that accused not named in the report or not sent up should also be put on trial. This exercise of jurisdiction must be in terms of Section 190(1)(b).

9. Counsel for the petitioners pinned their faith on *Kailash Pandey v. State of Bihar* (1977 BBCJ 722) where a Division Bench of this Court after considering the provisions contained in Section 190 of the old and the new Code observed as follows:--

"Thus, on a perusal of the two provisions, it is absolutely clear that the word "suspicion" does not find place in Section 190(1)(c) of the new Code. Therefore, Mr. Mishra has rightly contended that the only course left open to the Magistrate was to send the case for reinvestigation u/s 156(3), if he did not agree with the final report submitted by the police. In this view of the matter, the order of the learned Magistrate cannot be allowed to stand and must be set aside....."

The contention in that case was that while under the old Code the Magistrate was not bound to accept a final report, but had the discretion to send the case back for investigation u/s 156(3) or he could take cognizance after differing with the police report, but under the new Code the power to differ with the police report and take cognizance disappeared. The power to issue processes differing with the final report, according to learned counsel for the petitioners, was derived from Section 190(1)(c) of the Code and not from Section 190(1)(b). Since under the new Code- a Magistrate has no power to take cognizance in terms of Section 190(1)(c) except upon his own knowledge ("suspicion" having been deleted), a Magistrate could not take cognizance after differing with a final report. Reliance for the proposition was placed upon [Abhinandan Jha and Others Vs. Dinesh Mishra](#). That submission found favour with the learned Judges of the Division Bench in that case. It has, therefore, to be considered whether *Abhinandan Jha's* case (supra) lays down the rule of law enunciated by counsel for the petitioners and thus whether the Division Bench was right in accepting *Abhinandan Jha's* case as an authority for the proposition that under the new Code a Magistrate has no jurisdiction to disagree with the police.

10. Learned counsel for the petitioners laid special emphasis on paras 15, 16, and 17 in that case. It was contended that [Abhinandan Jha and Others Vs. Dinesh Mishra](#), laid down three propositions; firstly, that when a final report has been received by a Magistrate, he is free to differ with the conclusions of the police. Secondly, on

receipt of a final report, a Magistrate acting in terms of Section 190(1)(b) could only direct the police to re-investigate the matter, but cannot order placing any accused on trial, who had not been sent up for trial by the police. Thirdly, that a Magistrate's power to differ with the conclusions of the police must be found in Section 190(1)(c) and not Section 190(1)(b) of the Code. While agreeing with learned counsel for the petitioners that that case lays down that a Magistrate is not bound by the opinion of the police, I have considerable difficulty in accepting that Abhinandan Jha's case (supra) lays down that Section 190(1)(b) only clothes the Magistrate with jurisdiction to re-investigate the matter and not to issue processes against persons not sent up for trial. That case does, not lay down "sub silencio" (to borrow the expression from Mr. Prabha Shankar Mishra) anything of the kind suggested, in regard to powers of a Magistrate while acting in terms of Section 190(1)(b). The observations of the Supreme Court mentioned below provided the entire basis for the submissions on behalf of the petitioners (at p. of 1968 Cri LJ102 :-

"There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, u/s 190 of the Code. That provision in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly, or through bona fide error, fail to submit a report, setting out the facts constituting the offence."

There is no doubt the Supreme Court observed in that case that a Magistrate may take cognizance in terms of Section 190(1)(c) of the Code, but it does not lay down that in terms of Section 190(1)(b) a Magistrate has no jurisdiction to issue processes against persons not sent up for trial. All that is laid down is that out of several options open, it is open to a Magistrate to act in terms of Section 190(1)(c) and summon the accused. The Supreme Court in that case did not apply itself to the question whether Section 190(1)(b) empowered a Magistrate to differ with the conclusion of the police in a final report and issue processes against the accused. It only laid down that Section 190(1)(c) provided an obvious answer to the contention raised in that case and, therefore, Abhinandan Jha's case cannot be held to be an authority for the proposition that in terms of Section 190(1)(b) a Magistrate has no jurisdiction to issue process, differing with the police report.

It is well known that the three jurisdictions mentioned in Sub-section (1) of Section 190 are overlapping and are not mutually exclusive as observed by Courtney-Terrell, C. J. in [Bharat Kishore Lal Singh Deo Vs. Judhistir Modak](#), . The point which came up for consideration before the Supreme Court in that case was whether a Magistrate had jurisdiction to direct the police to submit charge sheet. In that context, it was held that if the power to summon was there in terms of Section 190(1)(c) why force the police to form a particular conclusion. A simple and straightforward and

convenient answer having been found, it was not necessary, on the State of the law as it then existed, to consider whether Section 190(1)(b) empowered a Magistrate to reject a final report and issue processes. Precedents of the Supreme Court are binding, even if they are obiter. But a case is an authority only for what it decides and not for what it does not decide. Reference may be made to [Bibi Kaniz Fatma Vs. Sk. Hossainuddin Ahmad and Others](#), with profit where it has been observed-

"In this connection it may further be observed that the case is an authority for what it actually decides and not for what may logically follow from that decision."

Relying upon the above observation even if I were to accept that what has been contended on behalf of the petitioners logically follows from Abhinandan Jha's case (supra), that case cannot be an authority for what has been propounded here as it has not been specifically so held in that case. The Supreme Court in [Rajeswar Prosad Misra Vs. State of West Bengal and Another](#), observed (at p. 821 of Cri LJ) :--

"No doubt, the law declared by this Court binds courts in India but it should always be remembered that this court does not enact."

Thus Abhinandan Jha's case (supra) cannot be an authority for the proposition that while acting in terms of Section 190(1)(b) the only jurisdiction that a Magistrate has is to order re-investigation. How ridiculous the position would be can be appreciated if it is considered as to what a Magistrate would be required to do if the investigation was complete in all respects. Would a Magistrate be still expected to order re-investigation and not differ with the conclusions of the police? That would be a fruitless exercise -- the police reporting that there was no evidence against a particular accused and the Magistrate holding that there was evidence prima facie and yet having no jurisdiction to put the accused on trial.

That would create a deadlock not postulated by the Cr. P. C. That would militate against the basic principles of Criminal Jurisprudence under which, not the police, but a Magistrate, alone is the ultimate arbiter of deciding who should be summoned to meet the charge. Having given my deepest consideration to the submissions urged on behalf of the petitioners, I have no manner of doubt that Section 190(1)(b) of the Cr. P. C. empowers a Magistrate to differ with the police report, be it a charge sheet or be it a final report so-called. That power is implicit in Section 190(1)(b) itself. It is not necessary to look to Section 190(1)(c) for that power. I have, therefore, not considered it necessary to consider the scope of the expressions "knowledge" and "suspicion" (deleted in the new Code) in Section 190(1)(c).

11. I shall now consider another line of submission for the proposition urged on behalf of the petitioners mentioned earlier. It was contended that Section 190(1)(b) of the Code cannot include a final report submitted by the police and, therefore, cognizance cannot be taken by a Magistrate in terms of Section 190(1)(b) if a final report has been submitted. It was submitted that the words "such facts" in Clause (b) refer to "facts which constitute such offence" in Clause (a). It was further

contended that if the police report did not contain facts which constitute offence, a Magistrate will have no jurisdiction to take cognizance upon such a report. The last link of the submission was that since by a final report the police does not recommend putting an accused on trial, it cannot be read as a report of facts constituting the offence. The reasoning is fallacious. The words, "such facts" in Clause (b) must undoubtedly refer to facts which constitute offence in clause (a). The entire import, however, of those expressions are that facts which in the opinion of the Court constitute an offence, not in the opinion of the police.

Upon the facts contained in the police report a Magistrate is called upon to decide whether there are facts disclosed in the report which constitute an offence. Section 173(2) of the Code provides for submission of police report. It lays down in seven sub-clauses matters which must be disclosed in the report. If those seven sub-clauses are duly fulfilled in any report, the report must be held to be sufficient to clothe the Magistrate with jurisdiction to take cognizance and issue process. While considering the report of the police the Magistrate cannot be debarred from applying himself to the record of investigation and all materials forwarded to him by the police. The Magistrate cannot confine himself to the report alone, for considering whether any offence has been committed or not. Even if the report in terms of Section 173 is cryptic, a Magistrate would be fully justified, rather he is expected to apply himself to the case diary and all relevant materials for considering whether any offence appears to have been committed or not.

If he is satisfied upon perusing all materials forwarded to Court, a Magistrate would be well within his jurisdiction to act in terms of Section 190(1)(b). A final report must also, therefore, be held to be a police report in terms of Section 190 of the Code. To contend that since a Magistrate has no inherent power, he cannot call for the case diary for applying himself to the police report is basically unsound and does not merit serious consideration. Section 173(4) provides that 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. This presupposes that a Magistrate is not bound to discharge an accused just because the police, being of the view that there is no sufficient evidence or reasonable ground or suspicion justifying forwarding an accused to the Magistrate, has released him on his executing a bond. In order to consider whether the accused should be discharged on his bond or not, the Magistrate would be well within his power to call for the case diary.

That he would be doing not in exercise of any inherent jurisdiction but in exercise of his obligation cast upon him in terms of Section 173(4) and Section 190(1)(b) of the Code. This must be so except in cases where a statute provides that a Court shall not take cognizance of an offence except on a report in writing of facts constituting an offence as provided under the Essential Commodities Act or the Defence of India Rules and similar statutes. In cases under the Penal Code or not covered by Special

Statutes, a Magistrate would be well within his power, in fact, it is his duty to peruse the case diary and to discern for himself whether there is evidence justifying putting an accused on trial. Mr. Parmeshwar Prasad Sinha appearing in one of the applications in support of the above proposition mentioned above relied upon a Single Judge decision of this Court in *Ram Parbodh Thakur v. State of Bihar* (1977 BBCJ 427) where it was held that a Magistrate cannot travel beyond the report of the police and that he cannot call for and look into the case diary for satisfying himself whether any offence has been committed or not.

I regret, I am unable to subscribe to that view. In my view, the case relied upon does not lay down the correct rule of law. A Full Bench of the Calcutta High Court in [A.K. Roy Vs. State of West Bengal](#), observed that 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 u/s 161 of the Code and if satisfied that there is a prima facie case against one or more accused, he would issue process. I am in respectful agreement with the view expressed in the Calcutta Full Bench. Mr. Ras Bihari Singh and Mr. Prabha Shankar Mishra, to be fair to them, conceded that it would be open to a Magistrate to look into the case diary and that a Magistrate cannot be confined merely to the police report. In my view, therefore, Section 190(1)(b) of the Code must include charge sheet as well as final report.

12. The view that I have taken in regard to the power of a Magistrate in terms of Section 190(1)(b) while considering a final report finds support from Section 173(4) of the Code as well. Section 173(4) of the Code reads as follows:--

"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 his bond or otherwise as he thinks fit."

The above provision brings out in clear profile the power of the Magistrate taking cognizance. When a police report has been forwarded to him showing that the accused has been released on his bond in terms of Section 169 of the Code, the Magistrate may discharge him or may not discharge him. If the Magistrate is vested with power not to discharge him, it necessarily follows that a Magistrate may take cognizance and issue processes on the basis of the record of investigation contained in the case diary. All these acts must be deemed to have been done by a Magistrate in terms of Section 190(1)(b) of the Code.

13. To sum up, my conclusions are that when a final report is submitted by the police to a Magistrate, a Magistrate is expected to apply his judicial mind to the report and to consider whether it discloses any offence or not. In arriving at that conclusion, it is open to a Magistrate to look into the case diary and other relevant materials. It is also open to him to seek elucidation from the police in regard to any matter relating to the case. After considering all relevant materials, a Magistrate

may accept the report. If he differs and if the investigation is incomplete, he may direct re-investigation or further investigation by virtue of the powers conferred by Section 156(3) of the Code. If the Magistrate feels that investigation is complete and the materials collected during the investigation reveal commission of an offence calling for putting one or more accused on trial, he may differ with the final report, take cognizance and issue processes. To that extent Kailash Pandey's case 1977 BBJ 722 (supra) must be held as not having laid down the correct law.

14. It is essential to take note of the submission urged by Mr. Brij Kishore Prasad for the informant in Criminal Misc. No. 2483 of 1977. It was contended by him that the report submitted in terms of Section 173(2) is one composite document and it cannot be dissected into a final report and a charge sheet. In the instant cases, charge sheet had been submitted in every case. The fact that some persons had not been sent up for trial or that no recommendation had been made for taking cognizance under some sections of the I.P.C. could not convert the charge sheet to that extent into a final report. I am in agreement with his submission. We have, however, considered all aspects of the matter because learned counsel for the petitioners vehemently submitted that it is possible to dissect a police report into charge sheet and final report and that a final report is not included within the expression "police report" occurring in Section 190(1)(b) of the Code.

15. For the reasons, stated above, I find no merit in any of the applications. They are accordingly dismissed.

K.B.N. Singh, C.J.

16. I agree with my learned Brother Uday Sinha, J. I would like, however, to add some observations of my own. The three circumstances, under which cognizance can be taken under Sub-section (1) (a), (b) and (c) of Section 190 of the Cr. P. C. are alternatives and not mutually exclusive. It is a settled law that even in a case where the police submits charge-sheet the Magistrate is not bound to accept the charge-sheet and summon the accused. The Magistrate may disagree with the police charge-sheet and hold that no offence is made out against any of the accused and discharge him. This has been so held in the case of [Abhinandan Jha and Others Vs. Dinesh Mishra](#), . Taking of cognizance u/s 190 of the Code does not mean, ipso facto, summoning the accused and putting him on trial. This refers to a stage where the Magistrate makes himself fully conscious of the allegations made in the complaint and decides to examine or test the validity of the allegations made therein, so as to find out whether, prima facie, the allegations are correct and constitute an offence or not.

To restrict the application of Clause (b), of Sub-section (1), Section 190 of the Code only to cases where police report is a charge-sheet, on interpretation of the expression "such fact" in Clause (b), is to put too narrow a construction on this clause. The Magistrate has not to confine himself to the police report only, as the

investigation is a continuous process, which begins with collection of evidence u/s 156 and ends with the submission of a report in a form prescribed by the State Government, giving the details mentioned in Section 173(2). It may be what is called a final report, u/s 169 or charge sheet u/s 170 of the Code. It could not have been the intention of the legislature, while enacting three modes in which the Magistrate could take cognizance of an offence, that, in cases relating to offences in which the police, after full investigation, leaving no scope for further investigation u/s 156(3), wrongly submits final form, the Magistrate will have no say in the matter.

Instances are not unknown that in many a case where the police submits final form, there is none prepared or left to file any complaint or protest petition. The Legislature could never have meant to make the police the final arbiter in such cases. It is a settled principle of construction of statutes that a construction which subserves the purpose of the statute is to be preferred to the one which goes counter to it. In *Abhinandan Jha's case* (supra) the main question that came for consideration before the Supreme Court was whether a Magistrate could direct the police to submit charge-sheet where the final form was submitted, a question on which the decisions of the High Courts were conflicting. The Supreme Court held that the Magistrate had no power to call for the charge-sheet, but, if he suspected that an offence was committed, he could take cognizance under Sub-section (1) (c) of Section 190 of the Code. The wide amplitude of the power of the Magistrate under old Section 190(1)(c) being available for easy answer, the question that arose before us did not squarely fall for consideration before the Supreme Court.

It is well settled that a case is an authority for what it actually decides and not what may logically follow from it. To hold *Abhinandan Jha's case* (supra) as an authority for holding that where the police submits final form the Magistrate has no jurisdiction to take cognizance u/s 190(1)(b) of the Code will run counter to the decision of the Supreme Court in the case of [Tula Ram and Others Vs. Kishore Singh](#), . That was a case under the present Code. In that case the Magistrate before whom the complaint was filed, referred the matter to the police u/s 156(3), for investigation admittedly, before taking cognizance. After the police submitted final form, the Magistrate examined the complainant on solemn affirmation u/s 200, and issued processes u/s 204.

The order of taking cognizance and summoning was under challenge before the Supreme Court and it was contended that after the final form was submitted two alternatives were only available to the Magistrate; either he could direct the investigation if he was not satisfied with the final form or he could straightway issue processes u/s 204 of the Code. The Magistrate having not adopted any of the two courses the order of taking cognizance was illegal. It was also contended that the complaint became non est after the Magistrate ordered investigation u/s 156(3) of the Code and the Magistrate could not act on that complaint any longer. The contentions were negated by the Supreme Court and all the three alternatives

were held to be available before the Magistrate. The following observations of the Supreme Court in that case wherein it has taken note of Abhinandan Jha's case (supra), may usefully be quoted (at p. 2406 of AIR):

"Where a Magistrate orders investigation by the police before taking cognizance u/s 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action u/s 190 as described above."

I may also add that the view taken by the learned single Judge of this Court in the case of Ram Prabhodh Thakur v. State of Bihar 1977 BBCJ 427 that a Magistrate, while taking cognizance under the old Code, could not look to the police papers, with great respect to the learned Judge is not correct, in view of what has been stated earlier. As a matter of fact, an earlier unreported decision of Uday Sinha, J., in the case of Bisheshwar Prasad Thakur v. State of Bihar (Criminal Misc. Case No. 2647 of 1975, decided on 22-12-1976) (Pat) taking a contrary view and distinguishing the decision in the case of Jeewan Agrawala v. State of Bihar 1976 BBCJ 518) followed in Ram Prabhodh Thakur's case (supra), was not noticed in the later case. Jeevan Agrawala's case (supra) related to prosecution for contravention of Defence and Internal Security of India Rules, 1971, whose provisions as to cognizance are entirely different and thus the case is distinguishable. Rule 183 (1) of the said Rules itself laid down that no court or tribunal, could take cognizance of any alleged contravention of any rule or Order made thereunder, except on a report in writing of facts constituting such contravention, made by a public servant. In my opinion, the earlier decision of this Court in Criminal Misc. case No. 2647 of 1975 (supra), has correctly laid down the law on the point.

S. Ali Ahmad, J.

17. I agree that these applications should be dismissed, but in view of the significance of the points raised in these applications, I would like to mention the reasons for the conclusion I have arrived at

18. It is not necessary for me to reiterate the short facts concerning these applications as they have been stated fully by Uday Sinha, J. All that has to be kept in mind is that so far as Criminal Misc. No. 4871 of 1976, Criminal Misc. No. 2369 of 1977 and Criminal Misc. No. 2483 of 1977 are concerned, they arise out of two cases registered by two different police stations on the basis of two first information reports. The police after registering the cases started investigation and submitted reports before the concerned Chief Judicial Magistrate's recommending" action against persons mentioned in the two reports. But so far as the petitioners of these three applications are concerned, they were not sent up for trial. The Chief Judicial Magistrates accepted the report (commonly known as charge-sheet) submitted before them and issued processes against those, who were sent up by the police for trial and also against the petitioners. Through these applications, these petitioners

have attacked the order by which processes have been directed to be issued against them.

In so far as Criminal Misc. No. 1803 of 1977 and Criminal Misc. No. 1787 of 1977 are concerned, the facts are slightly different. These two cases also arise out of two cases registered by two different police stations. In these two cases also, it appears that the police after registering cases submitted charge-sheets after completion of investigation under different sections against the petitioners. When the charge-sheets were placed before the concerned Sub-divisional Judicial Magistrates, cognizance was taken for offences mentioned in the charge-sheet and also u/s 307 of the I. P. C. in Criminal Misc. No. 1803 of 1977 and u/s 436, I.P.C. in Criminal Misc, No. 1787 of 1977. The grievance of the petitioners in these two cases is that the Subdivisional Judicial Magistrates had no jurisdiction to take cognizance of offences under such sections which were not recommended by the police in the charge-sheets.

19. The first question urged at length is that a Magistrate has no jurisdiction to take cognizance of an offence against a person with regard to whom the police has not submitted charge-sheet after completion of investigation and that the Magistrate is bound to accept the report as such submitted u/s 173 of the Cr. P. C., 1973. In other words, the argument is that the Magistrate is bound to accept the conclusion of the police when he finds that the investigation has been properly done and that in the circumstances no useful purpose will be served by directing further investigation into the matter. This question, in my mind, does not arise for consideration in this case. The facts of the case reported in *Kailash Pandey v. State of Bihar* 1977 BBCJ 722 the correctness of which has been doubted--were entirely different inasmuch as a final report had been submitted by the police saying that no case was made out against any person and as such none was sent up for trial.

In the instant cases charge-sheets have been submitted. I indicated this to learned counsel appearing for the parties that these applications can be decided without any reference to the aforesaid case. But all the learned counsel appearing in these five applications insisted that the case reported in 1977 BBCJ 722 (supra) fully applied to the facts of this case and as such its correctness should be examined. These applications were heard for several days. My learned Brother has also dealt with this aspect in his judgment. In these circumstances, I also propose to consider the point urged by learned counsel although I am fully aware that the decision on the point will be obiter.

20. The question regarding power of a Magistrate to take cognizance of an offence in cases where the police had submitted final form was set at rest by the Supreme Court in the case of [Abhinandan Jha and Others Vs. Dinesh Mishra](#), . The learned Judges had held in that case that u/s 190(1)(c) of the Code of Criminal Procedure cognizance could be taken by a Magistrate on a mere suspicion and therefore even if the police did not submit charge-sheet it was open to the Magistrate to take

cognizance on suspicion that an offence had been committed. The word "suspicion" has now been omitted and now cognizance cannot be taken on suspicion regarding commission of an offence. Taking advantage of this change in Section 190(1)(c) of the Cr. P. C., it was urged before a Bench of this Court that when the police did not send up any one for trial the Magistrate had no jurisdiction to take cognizance.

The argument found favour and the Bench held that under the new Code the Magistrate could not take cognizance of an offence unless the police submitted charge-sheet and that in such a situation the only course open to the Magistrate was to send the case back for reinvestigation u/s 156(3) of the Cr, P. C. if he did not agree with the final report submitted by the police. It is significant to note that in that case the police had submitted a final form and had not recommended anyone to be put on trial. The case, therefore, is clearly distinguishable. Be that as it may, I am not prepared to accept the argument of learned counsel for the petitioners that if the police does not submit charge-sheet against anyone the Magistrate is a helpless spectator. The law laid down by the Supreme Court in [Abhinandan Jha and Others Vs. Dinesh Mishra](#), in my opinion, clearly negatives the argument and I think Section 190(1)(c) of the Cr.P.C. still is wide enough to empower Magistrates to take cognizance under this clause in proper cases. But before I deal with this aspect of the matter, I would like to discard the argument of learned Advocate General that Section 190(1)(b) of the Code empowers the Magistrates to take cognizance in cases where the police has submitted only a final report.

21. Admittedly there has been no material change in the scope of Section 190(1)(b) of the Code. The learned Advocate General fairly conceded that the scope of Section 190(1)(b) of the Code (new) has not been enlarged to any extent in spite of slight change in the language of this clause. Keeping this fact in view, I now turn to [Abhinandan Jha and Others Vs. Dinesh Mishra](#), which considered the scope of different clauses of Sub-section (1) of Section 190 of the Cr. P. C. In para. 14 of the judgment Vaidialingam, J. said "now, the question as to what exactly is to be done by a Magistrate, on receiving a report, u/s 173, will have to be considered. That report may be in respect of a case, coming u/s 170, or one coming u/s 169".

After mentioning this, the learned Judge has observed that it is open to the Magistrate not to accept the report of the police and refuse to take cognizance. But, on the other hand, if the Magistrate agrees with the report, which is a charge-sheet submitted by the police, no difficulty whatsoever is caused because he will have full jurisdiction to take cognizance u/s 190(1)(b) of the Code. This will be the position when the report u/s 173 is a charge sheet. Thereafter in para. 15, the scope of Section 190(1)(b) of the Code has been considered when the police submits report u/s 173 of the Code saying that no case is made out for sending up an accused for trial which report is called in this State as a final report. It has been held that in cases where the Magistrate agrees with the said report he may accept the final report and close the proceeding. The learned Judge thereafter observed thus (at p.

"But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give directions to the police, u/s 156(3) to make a further investigation. That is. if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation u/s 156(3). The police after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, u/s 190(1)(c), notwithstanding the contrary opinion of the police, expressed in the final report."

22. The learned Judge, as stated by him, was considering in paras. 14 and 15 of the judgment "the question as to what exactly is to be done by a Magistrate on receiving a report u/s 173" and in that connection has taken all possible eventualities into account and while doing so it was not held that disagreeing with final report submitted by the police, the Magistrate could take cognizance of the offence u/s 190(1)(b) of the Code. The argument of the learned Advocate General that a case is an authority for the principle decided by it and not for what the case does not decide is undoubtedly correct. But this has no application to the facts of this case. In my opinion in [Abhinandan Jha and Others Vs. Dinesh Mishra](#), the scope of Section 190(1)(b) has been exhaustively decided and since it is not said that a Magistrate disagreeing with the report coming u/s 169 of the Code can take cognizance, I am of the view that this case has decided that Section 190(1)(b) of the Code does not empower the Magistrate to take cognizance disagreeing with the report coming u/s 169 of the Code.

23. Learned counsel for the petitioners strenuously urged that u/s 190(1)(c) of the new Code cognizance can be taken by a Magistrate upon information received from any person other than a police officer or upon his own knowledge regarding commission of an offence. In that connection, it was argued that the Magistrate did not have any information in these cases from any person other than a police officer and also that he did not have his own knowledge regarding the offences committed by the petitioners. Learned counsel have fairly conceded that under the old Code cognizance could be taken by the Magistrate in these cases on the ground of suspicion. According to Webster's New World Dictionary "knowledge" means acquaintance or familiarity (with a fact, place, etc.) awareness and understanding. "Suspicion", according to the same dictionary means the act or an instance of suspecting guilt, a wrong, harmfulness etc. with little or no supporting evidence. These two words "knowledge" and "suspicion" therefore, reflect the degree of

awareness and state of mind. In suspicion the degree of awareness is low but it is higher in knowledge. If I am right there, and I think I am, then there is no difficulty in holding that Section 190(1)(c) of the Code is still wide enough to empower Magistrate to take cognizance on his own knowledge where the report submitted by the police is one coming u/s 169 of the Code.

24. I may only refer to one more aspect that was canvassed at the Bar and that is that Section 190(1)(c) of the Code precludes action on any information by a police officer and that in these cases the learned Magistrates did not have any information other than statements recorded by the police in the case diary. That is so but in [Abhinandan Jha and Others Vs. Dinesh Mishra](#), also the basis and foundation of suspicion was the case diary; the Magistrate had no other information. If the case diary could be the basis of suspicion in Abhinandan Jha's case then I see no reason as to why it cannot be the basis of the knowledge also. For these reasons, I regret my inability to agree with brother Uday Sinha that Section 190(1)(b) and not Section 190(1)(c) of the Code empowers the Magistrate to take cognizance in a case where report is submitted by the police u/s 169 of the Code. To sum up, my view is that in case the Magistrate does not agree with the police report coming u/s 169 of the Code, it is open to him to send the case back for further investigation u/s 156(3) of the Code or in case further investigation is not necessary he may take cognizance u/s 190(1)(c) of the Code on his own knowledge notwithstanding the contrary opinion of the police expressed in the final report.

25. It has been observed that although the police did not send up the petitioners of Criminal Misc. No. 4871 of 1976, Criminal Misc. No. 2369 of 1977 and Criminal Misc. No. 2483 of 1977 yet it submitted charge-sheet against others. The concerned Chief Judicial Magistrates took cognizance and issued processes against the persons sent up by the police and against the petitioners of these three cases as well. In the case of [Raghubans Dubey Vs. State of Bihar](#), it has been held that when cognizance is taken by the Magistrate then he takes cognizance of an offence and not against the offenders and that once the Magistrate takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved then it is his duty to proceed against those persons also. It has also been held that summoning of additional accused is a part of the proceeding initiated by him on taking cognizance of an offence.

The above principle is fully applicable to the facts of these three cases. The concerned Chief Judicial Magistrates took cognizance of the offences and thereby initiated the proceeding and in course of that proceeding also summoned the petitioners of these three cases. The petitioners of these three cases in fact are aggrieved by the orders issuing processes against them u/s 204 of the Code. But since the orders were unquestionably within law they did not challenge these orders and raised a larger question regarding competency of the Magistrates to take

cognizance itself. For these reasons, I do not see any merit in these three applications which must be dismissed.

26. So far as the other two applications, namely, Criminal Misc. Nos. 1803 and 1787 of 1977 are concerned, they also have to be dismissed. Cognizance is always taken of the offence. It is immaterial as to what section is mentioned while taking cognizance. In these two cases the mere fact that the concerned Subdivisional Magistrates also mentioned some sections which were not noted in the charge-sheet does not make the order issuing processes illegal. These applications also have to be dismissed. For these reasons, I agree with brother Uday Sinha that the applications be dismissed.