

Asha Das and ors. Vs. the State

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Court : Guwahati

Decided On : Jul-16-1952

Judge : Ram Labhaya and Deka, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 156, 156(1), 156(3), 190(1), 200, 202, 204, 529 and 537

Appeal No. : Criminal Reference No. 22 of 1951

Appellant : Asha Das and ors.

Respondent : The State

Advocate for Def. : R.K. Goswami, Jr. Govt. Adv.

Advocate for Pet/Ap. : S.K. Ghose and P. Chaudhuri, Advs.

Disposition : Reference rejected

Judgement :

Ram Labhaya, J.

1. This is a reference under Section 438, Criminal P. C., from the Additional Sessions Judge, U. A. D.

2. The facts giving rise to the reference are as follows :

3. A complaint was put in by Sabitri Rani Das under Sections 307, 342, 355, Penal Code, against her husband, 5 members of his family and a maid servant in the Court of the Magistrate at Silchar on 31-10-1949. The learned Magistrate after examining the complaint passed an order which is as

follows :

'To O. C. Silchar P. S. for registering a case under appropriate sections of the I. P. C. and report after investigation please. Fix 9-11-49.'

In pursuance of the above order, the complaint was sent to O. C. Silchar Police Station who treated it as an F. I. R. The usual investigation followed and as a result thereof a charge sheet was submitted in the Court of the learned Magistrate. On that charge sheet the proceeding was initiated. On 8th February, the learned Magistrate ordered the police to produce the accused who were on bail and also directed that warrant should issue to secure the attendance of three accused who were shown as absconders. After recording the prosecution evidence, the Court framed charges against all the accused under Section 323, Penal Code.

Only 3 out of the accused viz., Asha Das, Arati Das and Bashmati Jhi were found guilty under Section 323, Penal Code, and sentenced to pay a fine of Rs. 50 each. The three accused assailed the correctness of their convictions by a revision petition. The learned Additional Sessions Judge has recommended that their convictions be quashed. He has pointed out that after recording the statement of the complainant the learned Magistrate sent the complaint to the O. S. Silchar police station directing that the case be registered and a report made to him after investigation. In his view the learned Magistrate having taken cognizance of the case had no jurisdiction to send the case to the police for investigation and report, and the trial held on the basis of the charge sheet was illegal. He relied in support of this view on *Pulin Bshart Ghosh v. The King*, 53 Cal. w. N. 653 and *Pacha v. The King*, 54 Cal, w. N. 181.

4. The first question that arises in the case is whether in the circumstances of the case it can be said that the learned Magistrate had taken cognizance of the offence complained of on the complaint under chap. XVI. Section 200 of chap, XVI

provides that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate. It seems to be quite clear that the examination of the complainant under Section 200 follows the 'taking cognizance' of the offence. It is only on taking cognizance that he has to proceed to examine the complainant. Where therefore a complainant has been examined on his complaint under Section 200 there can be no manner of doubt that cognizance has been taken.

If before examining the complainant, any order or direction is issued to the police that order would not be covered by any section of chap. XVI, for without examining the complainant no order under Section 202 can be passed. Any enquiry that the Magistrate may think fit to make or order under Section 202 can be made or ordered after the examination of the complainant under Section 200. This is clear from the proviso to Section 202 which lays down that save where the complaint has been made by a Court, no such direction (as is permissible under Section 202) shall be made unless the complainant has been examined on oath under the provisions of Section 200. Beading the two sections together it is obvious that an order for investigation even to the police under Section 202 can be made only after the examination of the complainant.

Where a Magistrate examines a complainant under Section 200, there cannot be any doubt that he has taken cognizance of the case. For he could examine the complainant only on taking cognizance and not without it. If he proceeds 'further' and passes any order under Section 202, there would not be merely the cognizance of the case, but also the indication of the way that the Magistrate has thought fit to proceed. He may instead of issuing the process for compelling the attendance of the person complained against, either inquire into the case himself or if he is a Magistrate other than the Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him or by a police officer or such other person as he thinks fit. He can choose any of the three courses for the preliminary enquiry if he decides not to issue a process. Acting under Section 202 would be in pursuance of a decision to proceed under chap. XVI.

5. In the circumstances of this case it is clear to me that cognizance of the offence on complaint was taken by the learned Magistrate under chap. XVI. This circumstance that complainant was examined appears to me to be conclusive on the point. Whether the order passed after the examination of the complainant is covered by Section 202 or not is a separate question. So far as cognizance of the offence is concerned, mere examination of the complainant under Section 200 should be enough to show that cognizance was taken.

6. The expression 'taking cognizance' has not been defined and it would probably defy any attempt at defining it. At what stage cognizance may be said to have been taken in a given case may be a matter of some difficulty. In *Sourindra Mohan v. Emperor*, 37 Cal. 412, it was held that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. In *Harnarayan Bhikamchand v. Govindram Agyarani*, 41 Cri L.J. 645(Nag.) the view enunciated was that taking cognizance occurs as soon as a Magistrate reads the complaint and even before he examines the complainant which he is bound to do. It is also said that the expression 'cognizance' is used to indicate the point of time when a Magistrate first takes judicial notice of an offence: vide *Gopal v. Emperor*, A.I.R. 1943 Pat. 245. It is not necessary for our purposes to examine closely these different views. In the case before us, the difficulty is resolved by the fact that the complainant has been examined under Section 200. When the Magistrate actually examines the complainant, there cannot be any doubt that he has taken cognizance. On this point I do not find any divergence of authority. Some recent cases bearing on the point may now be examined.

7. In *Pulin Behari v. The King*, 53 Cal. w. n. 653, a Magistrate on reading the complaint but without examining the complainant ordered as follows:

'Read the complaint. It discloses cognizable offences. Police to take cognizance. To. D. D. I., concerned for investigation and report.'

The report from the police was not helpful. The matter was referred to a Magistrate for judicial enquiry who reported that a thorough investigation by police was necessary. The complaint was again forwarded to D. C. D. D., for causing an

investigation to be made and for report after taking cognizance of the case. No report came and the complaint was dismissed under Section 203 in the absence of the complainant. Later the police submitted a charge-sheet against the accused under Section 420/120, Penal Code, on which a trial was held and conviction followed. On these facts it was held that the Magistrate having proceeded under chap, XVI of the Code had no jurisdiction to direct the police to investigate under chap, xiv and the trial Magistrate acted wholly without jurisdiction in proceeding on the charge sheet submitted later by the police. It will be noticed that though the complainant was not examined, the Magistrate was held to have taken cognizance of the offence under chap. XVI. In Superintendent & Remembrancer of Legal Affairs, West Bengal v. Abuni Kumar Banerjee, A.I.R. 1950 Cal. 437 the phrase 'taking cognizance' was explained. A petition of complaint was filed before the Chief Presidency Magistrate of Calcutta. The learned Magistrate passed the following order:

'To D. C. D. D. for enquiry and report'. If it is found that the Bank has ceased functioning, the enquiring officer to seize the books at once on the strength of a search warrant I should issue on his application. If the Bank is functioning he should apply to me for instructions. To 13/2.'

The report that was received was that the bank had ceased functioning. The Chief Presidency Magistrate then issued a search warrant. A report from the police was received on which the following order was passed:

'Heard learned Pleader. Let D. C. D. D., take cognizance of this case at once, and seize the books of this Bank that are necessary.'

A challan was later received under Section 408, and the case was transferred to another Magistrate for disposal, who held that the accused had been illegally arrested and ordered his release and fixed the date for the examination of the complainant under Section 202. It was against this order that the petition of revision was directed. It was argued Before the learned Judges of the Division Bench that when a Magistrate takes action say by issuing a warrant or by directing the police to enquire and investigate, he does take cognizance of the case. The learned Judges held that this was giving a wrong connotation to the words 'taking

cognisance.' What is 'taking cognizance' was explained as follows:

'What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190 (1) (a), Criminal P. C., he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,--proceedings under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e. g., ordering investigation under Section 156 (3), or, issuing a search warrant for the purpose of the investigation, he cannot be said to have taken- cognizance of the offence.'

In the circumstances of the case, it was held that the charge-sheet submitted formed a valid basis for further proceedings and that cognizance had not been taken under chap, XVI, notwithstanding the orders that were passed by the Chief Presidency Magistrate before ordering the police to take cognizance of the case. Their Lordships of the Supreme Court approved of the approach to the question indicated in this case in *R.R. Ghari v. State of Uttar Pradesh*, A. I. R. 1951 s. c. 207. The view enunciated in this case, therefore, is binding. It will, however, be noticed that on facts this case is distinguishable. The Chief Presidency Magistrate received the complaint. He did apply his mind to it and wanted to know through the police if the Bank had ceased functioning. On getting that information, he issued a search warrant and then directed the police to take cognizance of the case.

The learned Judges held that cognisance had not been taken under chap. XVI. The test they laid down was that in order to take cognizance of an offence under Section 190 (1) (a), the Magistrate must have not only applied his mind to the contents of his petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this chapter, proceedings under Section 200 and thereafter etc. Applying this test to the facts of the present case it is obvious that the Magistrate can be said to have taken

cognizance of the case. There can be no doubt that he applied his mind to it. That would not be enough for taking cognizance under Section 190 (1) (a) according to this authority. There should further be an indication that he took cognizance with a view to proceeding under chap. XVI.

The learned Magistrate in this case did examine the complainant. That he could do only on taking cognizance of the case under chap. XVI. In the Calcutta case the complainant had not been examined. That case therefore is different so far as facts go and the proposition laid down there cannot *mutatis mutandis* be applied to a different set of facts. It has got to be read in relation to facts of that case. It is the examination of the complainant that supplies the necessary evidence of what is called 'taking cognizance' under chap. XVI., Cognizance here has been taken and the cognizance fully satisfies the requirements of the test laid down in A. I. R. 1950 cal. 437.

The facts in the case before their Lordships of the Supreme Court also were very different. The appellant in that case was suspected by the police of having been guilty of offences under Sections 161/165, Penal Code. They applied to the District Magistrate for a warrant of his arrest on 20-10-1947. The warrant was issued next day. The appellant was arrested the same day but was allowed bail on 26-11-1947. The District Magistrate cancelled the bail as he considered that the sureties were not proper. On 1st December, a special Magistrate was appointed for the trial of the appellant. He granted bail. On 6-12-1948 sanction was granted by the Provincial Government for the prosecution of the appellant. It was contended that the cognizance of the offence had been taken when the warrant was first issued on 22-10-1947 and that no sanction having been obtained before that date, the initiation of the proceeding was illegal.

Their Lordships held that by virtue of the provisions contained in Section 3, Prevention of Corruption Act, offences under Sections 161 and 165 had become cognizable. The police could investigate subject to two limitations on their powers of investigations. These limitations were--(1) that investigation should be conducted by an officer not below the rank of a Deputy Superintendent of Police unless a Magistrate of the First Class otherwise orders and (2) if an arrest had to

be made, an order from the Magistrate should be obtained. Their Lordships held that the order of the Magistrate for the arrest of the appellant which had been obtained was during the course of the investigation and not after its completion.

The order which may be applied for and made during the police investigation by virtue of the proviso to Section 3 of the Act would be before the Magistrate takes cognizance of the offence under Section 6 of the Act or under Section 190, Criminal P. C. That according to the view of their Lordships was the result of the reading of Sections 3 and 6 of Act 2 of 1947 and 190, Criminal P. C. together. The argument that the Magistrate took cognizance when he issued the warrant did not find favour with their Lordships on the ground of the provisions contained in the proviso to Section 3 of Act 2 of 1947 as would appear from the following observations :

'The only effect of that proviso is that instead of the police officer arresting on his own motion he has got to obtain an order of the Magistrate for the arrest. In our opinion it is wrong from this feature of Section 3 of the Act alone to contend that because the warrant is issued, it must be after the Magistrate has taken cognizance of it and the Magistrate's act can only be under Section 190, Criminal P. C.'

8. It will be noticed that when the warrant of arrest in this case was issued there was no complaint before the Court; nor was the complainant examined under Section 200. In the absence of any complaint cognizance under chap, XVI could not be said to have taken place. The Magistrate did order the arrest but that was in the course of the investigation started by the police in virtue of its

own powers and the warrant was obtained under the proviso to Section 3 of Act 2 of 1947. The issue of warrant in these circumstances was held not to amount to cognizance of the offence or offences under chap. XVI. There is nothing in common between that case and the case before us. Here there is a complaint which discloses cognizable offences. On that the complainant is examined. These facts were not before their Lordships of the Supreme Court and the case' has got no bearing on the question before us. .

9. In this case not only was the complaint received by the learned Magistrate but he applied his mind to it. The statement of the complainant has also been taken. It could be taken only under Section 200 and it can be taken only after cognizance has been taken. The statement under Section 200 must follow and not precede the taking of cognizance.

This is clear from the language of Section 200. When therefore the statement is taken under Section 200 two things are indicated-- (1) that the cognizance has been taken and (2) that proceedings under ch. XVI were contemplated. The test laid down in Supdt.

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v. Abani Kumar, A. I. R. 1950 cal. 437 is thus satisfied. There was judicial application of mind, the future course of action was also indicated. My conclusion therefore is that cognizance of the offence was taken on the complaint and action was taken under Section 200.

10. There is some divergence of judicial opinion in the Calcutta High Court on the point whether when a complaint is lodged, the Magistrate is bound to take cognizance or not. The view of Sen J. has been that a Magistrate is bound to take cognizance of the offence disclosed in the complaint but as pointed out by DasGupta J. in Superintendent & Remembrancer of Legal Affairs West Bengal v. Abani Kumar, A. I. R. 1950 Cal. 437, this view has been dissented from in two Division Bench decisions of the same Court reported in Naksetan Bibi v. Habibar Rahaman, 82 cal. L. J. 22 and in Pulin Behari v. The King, 53 cal. w. N. 653. It is not necessary for the purposes of this case to resolve this conflict. For in this case cognizance of the offence on complaint has been taken.

11. After having taken cognizance of the offence on complaint under chap, XVI, the learned Magistrate could have issued process for the attendance of the accused or deferred its issue for preliminary enquiry under Section 202. The learned Magistrate may have made the enquiry himself. He could also have directed the police or any other individual to investigate and report. On receiving the report if he did not make the enquiry himself, he could issue process for the attendance of the accused or dismiss the complaint under Section 203. If cognizance of the offence had not been taken on the complaint under chap, XVI, the learned Magistrate may have ordered the officer, in-charge of the police station concerned to investigate the offence under Section 156 (3) according to the view which has prevailed in several Division Bench cases of the Calcutta High Court.

In *Pulin Behari v. The King*, 53 Cal. W. N. 653, a Division Bench consisting of Harries C. J. and Das J., held that when a complaint is filed before a Magistrate, he shall either take cognizance of it under Section 200 of the Code and proceed under chap. XVI or send it to the officer-in-charge of the Police Station directing him to proceed under chap. XIV of the Code. He should not make a hybrid composite order both under Section 156 (3) and under Section 202 of the Code. In *Pacha v. The King*, 54 Cal. W. N. 181, Harries C. J., held that Section 156 (3), Criminal P. C. expressly provides that any Magistrate empowered under Section 190 of the Code may order an investigation by the police. Accordingly, where a Magistrate does not take cognizance, but merely forwards the complaint to the police for investigation and for taking cognizance, he acts under Section 156 (3), Criminal P. C., and proceedings based on a charge-sheet submitted by the police in such a case are perfectly valid. In *Bissen Singh v. Prameswari Singh*, A. I. R. 1950 Cal. 99, Harries C. J. and Mitter J. held that

'when a complaint is filed before a Magistrate he can adopt one of the two courses. He can examine the complainant upon oath and then issue process. On the other hand he can under Section 202 of the Code postpone the issue of process and refer the complaint to a Magistrate or the police for further enquiry and then take action on receipt of the report. The other course open to the Magistrate is to send the complaint to the police asking, them to take action under Section 156 (3) of the Code. In that case the Magistrate would not examine the complainant, but merely forward the complaint to the police for investigation and taking cognizance.'

12. The learned Magistrate proceeded under chap. XVI. He also forwarded the complaint to the police with the direction that the case be registered. The offences disclosed in the complaint were cognizable. The police treated the complaint as an F. I. R. and charge-sheeted the accused. The Court proceeded on the charge-sheet and disposed of the case. The Court did not expressly order the police to submit a charge-sheet. What was asked for was a mere report. But the direction for the registration of the case was there and if the police registered the case, they could not have avoided submitting a charge-sheet if they found that a cognizable offence had been committed. The implication of the order therefore was that

charge-sheet may be submitted if facts justified that course.

This involved going back to chap. xiv which according to the Calcutta view the Magistrate was not competent to do, he having taken cognizance of the offence under chap. XVI. If he had not recorded the statement of the complainant, the direction given to the police would have been perfectly legal. As things are, there is necessarily a non-compliance with the provisions contained in chap. XVI which require the disposal of the complaint as laid down in the chapter when a Magistrate having taken cognizance of it has complied with the requirements of Section 200, Criminal P. C. It has been urged by the learned Government Advocate that the order of the Magistrate directed the police to investigate and report. That order may be covered by Section 202, Criminal P. C. but such an order would not debar the police from exercising their independent powers of arrest and investigation under Section 156 (1). He has relied first on *Emperor v. Bhola Bhagat*, A. I.R. 1923 pat. 547 in support of this contention.

In this case the complaint was under Section 379. The Sub-divisional Magistrate recorded the complaint and passed the following order on it:--

'Police to take cognizance under Section 379. Penal Code, make quick enquiry and report by 8-2-1922.'

The Sub-Inspector deputed another officer next in seniority to him to the place of occurrence and to

hold an enquiry. The writer constable who was deputed, went to the place of occurrence and after making some investigation arrested 3 persons. The allegation was that when he was bringing those persons to the police station a mob of 2,000 persons forcibly rescued the prisoners and assaulted the constable.

An enquiry was instituted against the persons who had engaged in the rescue of the prisoners and some 20 persons were sent up for trial. 11 out of 20 persons were convicted. On appeal they were acquitted by the Sessions Judge on the ground that the arrest of the 3 persons who were alleged to have been rescued was illegal. An appeal was preferred by the local Government. The learned Judges

expressed the view that the order of the Magistrate had not been made under Section 202 and even if that order was an order under Section 202 the jurisdiction of the police to arrest and send up a charge-sheet was not ousted. Mullick J. observed in this connection as follows :

'Even if the order of the Magistrate was an order under K. 202, Criminal P. C., I cannot see why the jurisdiction of the police to arrest and to send up a charge-sheet was ousted. In practice, of course, the police would not ordinarily take independent action in respect of a complaint which had already been distrusted by the Magistrate ; but to lay down the general proposition that a Magistrate's order under Section 202 debars the police from exercising their powers of arrest and investigation would, in my opinion, be neither expedient nor correct.'

13. In *Rashid Ahmad v. Emperor*, A.I.R. 1932 Lah. 579, a private complaint under Section 420, Penal

Code was sent by a Magistrate under Section 202, Criminal P. C. for investigation and report to the police. The police instead of submitting a report drew up a charge-sheet and challaned the accused. The question referred to the Division Bench was whether when a Magistrate who has taken cognizance of an offence on a complaint made to him and has directed an investigation to be made by a police officer, the police are entitled, after investigation, to send up the case for trial under a charge-sheet, as if they had taken cognizance of it under their ordinary powers of investigation.

The learned Judges held that the powers given to the police by Section 156 are not affected when an order to investigate under Section 202 is made; and though it is not open to the Magistrate when a complaint has been made to him, to direct the police to make a charge in the same case, it is open to the police to do so, if they think proper. *Isaf Nasya v. Emperor*, A. I. R. 1928 Cal. 24, was distinguished and *Nurmohamed Rajmohamed v. Emperor*, A. I. R. 1929 Bom. 72, was differed from.

14. Jackson J., in *Gopal Naik v. Alagirisami Naick*, A. I. R. 1931 Mad. 770, also held that on receiving information contained in a complaint forwarded to them

under Section 202, Criminal P. C., the police can investigate under Section 156, Criminal P. .C., if they choose to do so. The investigation is not illegal though a mere report is sufficient.

15. In *Emperor v. Ghulam Nabi*, A. i. R. 1933 sind 136, also the Magistrate took cognizance of cognizable offences (under Section 379/411, Penal Code) and after examining the complaint directed investigation by the police under Section 202, Criminal P. C. The Sub-Inspector to whom the complaint and the statement of the complainant has been forwarded treated the statement as the first report and after investigation submitted a charge-sheet under Sections 379 and 215, Penal Code. The Magistrate took cognizance of the case under Section 190 (b). The proceeding was sought to be quashed by a revision petition; It was held that a Magistrate's order under Section 202 directing the police to investigate into a cognizable case does not debar the police from exercising their powers of arrest and investigation in regard to the subject-matter of the complaint.

16. These cases lay down a proposition the correctness of which may not be disputed. A Magistrate acting under Section 202 has certain powers. He may before issuing any process either enquire into the case himself, if he is a Magistrate other than a Magistrate of the third class, direct the enquiry and investigation to be made by any Magistrate Subordinate to him or by a police officer or such other person as he thinks fit. He may direct the police to investigate and report. The police would be merely bound to report to the Court the result of investigation. But the power which the officer-in-charge of a police station is given under Section 156 (1), Criminal P. C., is independent of any action that a Magistrate may take. He has the power of arrest and investigation in cognizable cases.

This power is not affected by any order that a Magistrate may pass under Section 202 for investigation by the police. It would be desirable in such a case for the police merely to submit a report. But if after investigation the police in the exercise of its independent powers submits a charge-sheet, the Court will have no option but to entertain the charge-sheet and take cognizance of the offence under Section 190 (1) (b) even though it has already taken cognizance of the complaint.

The language of Section 156 gives the indication that the intention of the Legislature was that the powers of an officer-in-charge of a police station are capable of independent exercise even where the Magistrate has ordered investigation under Section 202 and I am in complete agreement with the view enunciated in these cases.

With great respect I find it difficult to subscribe to the view taken in *Nurmahomed Eajmahomed v. Emperor*, 53 Bom. 339, which appears to lay down that any order under Section 202 requiring the police to investigate a cognizable case deprives the police officer concerned of his independent powers of investigation under Section 156 (3). The view enunciated in the 4 cases discussed above, however, does not support the proposition that a Magistrate after having taken cognizance of the offence and even after taking action under Section 200 can order or direct

the police to submit a charge-sheet after investigating under Section 156 (3). The Magistrate may order an investigation by the police under Section 156 (3) before taking cognizance of the offence on complaint under chap. XVI. Once he has taken cognizance he can take only such action as he is permitted to take under Section 200.

To this extent there is no conflict between the two sets of cases relied on by the learned Advocate for the petitioners and the learned Government Advocate respectively. If read together the proposition that may be deduced from them is that while the powers given to an officer-in-charge of a police station under Section 156 (1) are not affected by any order that a Magistrate may pass under Section 202, the Magistrate also has the power to direct an investigation under Section 156 (3). But this power he may exercise before taking cognizance of the offence under chap. XVI. After taking cognizance his powers are confined to the limits imposed on them by Section 202 and though he may in the exercise of those powers order the police to investigate and submit a report, he cannot direct the police to investigate and submit a charge-sheet under Section 156 (3).

17. *Emperor v. Ghulam Nabi*, A. I. R. 1933 Hind 136 was overruled in *Emperor v. Bikha Moti*, A. I. R. 1938 sind 113 (F.u.). The view enunciated in the later case was that when a Magistrate has referred a complaint to the police for investigation

under Section 202, Criminal P. C., it is not competent to the police to investigate the offence complained of independently of the Magistrate's direction and send up the accused for trial upon a charge-sheet, though it was observed that Section 202 reserved to the police officer to whom the complaint may be referred, his powers of arrest under Section 54, Criminal P. C., and all other powers that may be exercised by a police officer in the course of an investigation. In view of the provisions contained in Section 202, the ratio decidendi was that when a Magistrate takes cognizance of a case under Section 200, Criminal P. C., and refers the complaint to the police for enquiry under Section 202, Criminal P. C., he must pass the necessary orders on the police report under Sections 203 and 204, Criminal P. C.

This course was found incompatible with independent proceedings by the police on the same facts, as the Magistrate would not be able to pass orders upon the complaint if the police do not report the result of their investigation but take independent proceedings of their own. The learned Judges, however, did not consider the effect of 156 (i) which confers independent powers on the police. It appears that no orders of the Magistrate under Section 200, Criminal P. C., should have the effect of curtailing the powers of the police under Section 156 (i). It may not be desirable on the part of the police to start independent proceedings when a case is referred to them. But if they do, the Magistrate may, as pointed out by the learned Judges in this case, treat the charge-sheet as a

police report or may take cognizance of the offence under Section 190 (1) (b) and dispose of the complaint and the police case relating to the same offence by a joint trial.

In *U Po Yone v. Emperor*, 34 cri. l. j. 1185 (Rang.), it has been held that a Magistrate can take cognizance of a case either under Section 190 (1) (a) or (b) or (c), Criminal P. C., or under all three of them if he is invested with powers thereunder. Summing up, my view after consideration of all the authorities referred to above is that a Magistrate has the power to order the police to investigate cognizable cases under Section 156 (3) before taking cognizance of the complaint under Section 190 (1) (a). On taking cognizance he must examine the complainant

at once and under Section 202 may issue a process for the attendance of the accused or may postpone the issue of the process and may himself make an enquiry or if he is a Magistrate of the first or second class, may order a subordinate Magistrate or a police officer or any other person to make an enquiry or investigation into the allegations made in the complaint.

At this stage he cannot direct the police to proceed under Section 156 (3) as his powers are limited by the express provisions contained in Section 202. If a complaint is referred to the police for investigation under Section 202 the police have to report the result of their investigation and it is neither desirable nor necessary for the police to start investigation independently of the order of the Magistrate as Section 202 fully reserves to the police its powers of arrest and investigation as held in A. I.R. 1938 sind 113. But I am not prepared to hold with great respect to the learned Judges who have taken the contrary view that any action taken by the Magistrate under Section 202 deprives the police of its powers which it may exercise independently under Section 156 (1). In fact even in A. I. R. 1938 sind 113 it was recognized that where investigation discloses a different or more serious offence, there is nothing to prevent the police from submitting a charge, sheet.

18. Now what has happened in this case is that the complaint was received and the complainant was examined. After that, instead of issuing a process for the attendance of the accused, the learned Magistrate directed the police to register the case and after investigation report the result.

19. I have come to the conclusion that the learned Magistrate took cognizance of the offence disclosed in the complaint under chap. XVI. For it is only on taking cognizance that he could record complainant's statement. He then should have proceeded under Section 202. In the exercise of his powers under that section, he could have ordered an investigation by the police. This is what he has done. But it is argued that the direction to the police to register the case implies that the police were ordered to investigate under Section 156 (3). It appears that the police also interpreted this order in

the same way. They incorporated that complaint in the F. I. B. and after completing the investigation submitted a charge-sheet.

The Magistrate initiated proceedings on the charge-sheet which was based on the complaint and which had been for all practical purposes converted into a first report. The order of the learned Magistrate when read in this way involves contravention of the provisions contained in Section 202, He could ask for a report from the police after investigation but at that stage when he passed the order he could not expressly or by necessary implication ask for a charge-sheet after investigation. To that extent there has been a deviation from the provisions contained in Section 202.

20. The next question that arises for consideration is whether this deviation vitiates the trial. I think in the circumstances of this case such a serious consequence need not follow. Chapter XLV, Criminal P. C., deals with irregular proceedings. Section 529 enumerates irregularities which do not vitiate proceedings. By virtue of Clause (e) of this section if a Magistrate not empowered by law to take cognizance of an offence under Section 190 (1) (a) or (b) erroneously but in good faith takes cognizance, the proceedings shall not be set aside merely on the ground of his not being so empowered. Thus so far as cognizance of an offence under Section 190 (1) (a) or (b) is concerned, mere want of jurisdiction even is not sufficient to vitiate the proceeding.

The clause applies to cases where a Magistrate takes cognizance under Clause (a) or Clause (b) when he is not empowered by law to take cognizance under these clauses. If defect of jurisdiction even is not enough to vitiate proceedings covered by Clause (e) of Section 529, it follows that where a Magistrate is empowered by law and is otherwise competent to take cognizance of an offence, any irregularity in the manner of the exercise of the jurisdiction should not by itself be fatal to the proceedings. Section 530 enumerates irregularities which vitiate proceedings, Clause (k) of that section deals with cognizance of offences under Section 190 (1) (c). If a Magistrate not empowered by law to take cognizance under Clause (c) does so, the proceeding is vitiated. Distinction thus has been made in cases where cognizance is taken under Section 190 (1) (a) or (b) and

those in which cognizance is taken under Section 190 (1) (c).

Sections 531 to 536 deal with certain specific matters. Section 537 is the general or the residuary section which provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be altered or reversed on account of any error or omission or irregularity in any proceeding before or during the trial or in any enquiry or other proceedings under this Code, unless the error or omission or irregularity has in fact occasioned a failure of justice. The explanation to the section provides that in determining whether error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

The learned Magistrate in this case was empowered to take cognizance of the offence under Section 190 (1) (a) and (b). His competence to enquire into and try the cases is not in dispute. The contention is that his direction to the police to register a case being in contravention of the provisions contained in Section 202, is an illegality which would vitiate the trial. In *Subramania Iyer v. The King*, 25 Mad. 61 (p C.), the view enunciated was that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by Section 537. But the decision of their Lordships of the Privy Council in *Abdul Bahman v. Emperor*, A. I. R. 1927 p. C. 44 lays down that the mere fact that an imperative statutory rule of procedure (Section 360) has been broken, is not enough to vitiate the trial or the proceeding in the absence of any probable suggestion of any failure of justice having been occasioned thereby.

It has been held in recent cases, vide *Emperor v. Mehtar Dhanwa Satwami*, A. I. R. 1940 Nag. 375; *Kapoor Chand v. Suraj Prasad*, A. I. R. 1933 ALL. 264 (F.b.) ; *Bamaraju Tevan v. Emperor*, A. I. R. 1930 Mad. 857; *Emperor v. Hiralal Das*, A. I. R. 1939 cal. 636; *Emperor v. Ernamali*, A. I. R. 1930 cal. 212 (F.b.) on the strength of the pronouncement made in *Abdul Rahman's* case, that if the judgment has been passed by a Court of competent jurisdiction, the sole criterion is whether there has been a failure of justice. The test to be applied is whether the accused had a fair trial inspite of the transgression of the prescribed rule or procedure. In

Karan Ilahi v. Emperor, A. I. R. 1947 Lah. 92, it was laid down that Section 537 applies even to a case of what is termed as an illegality i. e., where express or imperative provisions of law are ignored no finding, sentence or order passed by a Court of competent jurisdiction can be reversed or altered on appeal or revision on account of any illegality unless it has actually occasioned a failure of justice. In Pulukuri Kottaya v. Emperor, A. I. R. 1947 P. C. 67, it was held that

'if a trial is conducted in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537 and none the less so because the irregularity involves as must nearly always be the case, a breach of one or more of the comprehensive provisions of the Code. The distinction in many of the cases in India between the illegality and irregularity is one of degree rather than of kind.'

Section 537 makes no distinction between an illegality and irregularity. Both are curable under the section if the error has not occasioned a failure of justice. Munshilal v. Emperor, A. I. R. 1948 ALL. 278. This case satisfies both the requirements of Section 537. The Magistrate was competent to try the accused. He could take cognizance of the

offence. The trial was substantially in the manner provided in the Code. No suggestion of any probable injustice having been occasioned has been made. There is no basis for any finding that a failure or miscarriage of justice has taken place in point of fact. The mere non-compliance with the provisions contained in Section 202 which has taken place in this case, is not such that it may be said that failure of justice may be deemed to have taken place. It does not make the Magistrate incompetent to try the offence. His jurisdiction for that purpose remains.

The contravention merely involves irregular exercise of jurisdiction. He should have disposed of the complaint under chap, XVI without asking for the charge-sheet. He got the charge-sheet with the complaint merged in it and took cognizance under Section 190 (1) (b). He could have taken cognizance under Section 190 (1) (a) and (b) both as held in E Po Yone v. Emperor, 34 ori. L. j. 1185 (Rang.). The irregularity or the illegality affected the manner of the exercise of jurisdiction and not the jurisdiction itself. The effect of the charge-sheet was that a

complaint which should have been disposed of under chap, XVI was treated as merged in the charge-sheet. The accused could not prevent a charge-sheet from being entertained as the police in the exercise of their independent powers could have submitted a charge-sheet, which the Magistrate would have had to dispose of. In my opinion even if the non-compliance is described as an illegality, it is curable as the case falls within the provisions of Section 537.

21. In considering whether failure of justice in fact has been caused, the explanation to Section 537 permits consideration of the question whether the objection could and should have been raised at an earlier stage of the trial. It was open to the accused to urge in the trial Court that the complaint be proceeded with and disposed of in the manner laid down in chap, XVI. They could have objected to the trial being held on the charge-sheet. They did not raise this objection at that stage. This omission on their part justifies the inference that the accused did not apprehend that failure of justice would be occasioned or that prejudice would be caused to them.

22. An irregularity (assuming that there was one) similar in character to the one we have in this case was held cured by the subsequent issue of a process under Section 204 in *Kaghunath Puri v, Emperor*, A. I. B. 1932 Pat. 72.

23. Mr. Ghose the learned counsel for the petitioner has relied on two cases of the Calcutta High Court for showing that the contravention of the provisions contained in Section 202 by the learned Magistrate affected his jurisdiction. The first case relied on by him is reported in *Yakub Sheikh v. The King*, 54 Cal. w, N. 373. This case need not detain us. The view enunciated in this case is based on the ground that when a complaint is received by a Magistrate he has no jurisdiction at all to order the police to investigate the case under Section 156 (3). This view of the law has been dissented from in at least two Division Bench cases of the Calcutta High Court. The learned Judge also distinguished between irregularities and illegalities without considering the effect of these irregularities. Besides the question whether these illegalities were curable was not examined in the light of recent Privy Council decisions.

In *Pulin Behari v. The King*, 53 Cal. W. N. 653, it was held that the Magistrate having proceeded under chap, XVI of the Code had no jurisdiction to direct the police to investigate under chap, xiv and the trial Magistrate acted wholly without jurisdiction in proceeding on the charge-sheet submitted later by the police. It is noteworthy that the proceedings resulting in the conviction could not have been upheld in that case on the basis of charge-sheet inasmuch as the complaint was neither forwarded to the officer-in-charge of the police station to enable him to proceed under chap, xiv nor was the complaint treated as F.I.R. and entered as such, nor was the charge-sheet submitted by the officer-in-charge of the relevant police station. The complainant was not examined on the complaint.

In these circumstances the conviction on the basis of the charge-sheet was not upheld and it was observed that the trial was without jurisdiction. The facts on which the conclusion was arrived at are entirely different. Besides even in this case the question whether the illegality was curable under Section 537 in the light of the Privy Council decisions was not raised and decided.

24. For the reasons given above I hold that trial is not vitiated. The recommendation made in the reference is, therefore, not accepted. The petition is dismissed.

Deka, J.

25 This is a matter that comes on a reference under Section 436, Criminal P. C. from the Additional Sessions Judge, U. A. D. for setting aside the convictions and sentences passed against 3 accused persons who were convicted a charge under Section 323, Penal Code, and sentenced to a fine of Rs. 50.

26. The facts leading to this reference may be shortly put as follows:

One Sabitri Rani Das filed a complaint against her husband Jitendra Mohon Das and his other relations including his sisters and a maid-servant complaining of assault and wrongful confinement and the learned Senior Magistrate in whose Court the complaint was filed on 31-10-49 examined the complainant on oath but instead of proceeding with the matter further sent the complaint to the police after

passing the following order:

'To O. C. Silchar P. S. for registering a case under appropriate sections of the Indian Penal Code and report after investigation please. Fix 19-11-49.'

27. The complaint petition was redirected to the police who treated it as an F. I. R. in the case,

and after completing investigation submitted a charge sheet to the Senior Magistrate who took cognizance of the case by his order dated 8-2-50 and directed warrants to issue against the charge-sheeted Reused persons. The trial proceeded in the Court of the Senior Magistrate who ultimately by his judgment dated 8-8-51 found three of the accused persons guilty under Section 323, Penal Code, and sentenced them each to a fine of Rs. 50,

28. The convicted accused persons moved the Sessions Judge, U. A. D., for a reference who transferred the case to the Additional Sessions Judge who referred the case to this Court for setting aside the conviction as in his view the procedure followed in the matter of the trial was highly defective and he relies in support of his view on two of the Calcutta decisions reported in *Pulin Behari v. The King*, 53 Cal. w. N. 659 and *Pocha v. The King*, 54 Cal. w. N. 181.

29. Mr. Ghose appearing in support of the reference has placed before us few more Calcutta cases in support of the view taken by the learned Additional Sessions Judge and they are *Isaf Nasya v. Emperor*, 54 Cal. 303 ; *Bissen Singh v. Prameswari Singh*, A.i. r. 1950 Cal. 99 ; *A. C. Samaddar v. Sureshchandra Jana*, 53 Cal. w. N. 270 ; *Yakub Sheikh v. The King*, 54 Cal. w. n. 373 and *Nurmohamed Eajmohamed v. Emperor*, 53 Bom, 839.

30. The Assistant Government Pleader Mr. Goswami in opposing the reference has placed reliance on the following decisions : -- *Rashid Ahmad v. Emperor*, A. I. R. 1932 Lah. 579 ; *Emperor v. Uholu Bhagat*, A. i. R it. 1923 Pat. 547 ; *Rayhunath Puri v. Emperor*, A. I. R. 1932 pat. 72 ; *Gopal Naik v. Alagirisami Naik*, A. i. R. 1981 Mad. 770 and *Emperor v. Ghulam Nabi*, A. i. r. 1933 sind 136.

31. Before examining any of the legal decisions let us examine the order passed by the learned Magistrate on 31-10-49 which has been already quoted, with a view to see whether this is an order that comesh under Section 202, Criminal P. C. or it amounts to an order for investigation under Section 156 (3), Criminal P. C. and whether in any view the order can be sustained to be legal and the trial based on a report submitted pursuant to this order can be said to be regular in the eye of law. Section 202 (I), Criminal P. C. runs as follows :

'Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under Section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the persons complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry of investigation to be made by any Magistrate subordinate to him, or by a Police Officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

Provided that no such direction shall be made (a) unless the complainant has been examined on oath under the provisions of Section 200, or

(b) where the complaint has been made by a Court under the provisions of this Code.'

This clearly goes to show that any Magistrate on receipt of a complaint of an offence of which be is authorised to take cognizance, may direct an enquiry or investigation to be made by any Magistrate subordinate to him or by police officer or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint and this can be done only after his examining on oath the complainant under the provisions of Section 200, Criminal P. C.

32. In this case the complainant was examined and the Magistrate had every right to ask any Police Officer to submit a report after investigation. If we take the charge-sheet to be a report under Section 202, Criminal P. C. there has been no irregularity whatsoever and the Magistrate is quite competent to take notice of the report both under Section 203, Criminal P. C. as well as under Section 204,

Criminal P. C. In this connection, I quite agree with the view expressed by Mohammad Noor J. in *Raghunath Puri v. Emperor*, A.i.r. 1932 Pat. 72 where he says that there is no proscribed form for a report by the Police except the two forms known as charge-sheet or a final report. I accept the reasonings as given by him and consider that nothing was irregular if the report from the police was in the form of a charge-sheet on which the senior Magistrate has taken action.

33. If on the other hand we interpret the order of the learned Magistrate dated 31-10-49 to be an order for investigation and report as contemplated under Section 156 (a), Criminal P. C., the submission of the charge-sheet and the cognizance of the case on the basis thereof was also perfectly justified.

34. The Calcutta view, however, is as expressed by Roxburgh J. in *Dr. Robiul Hossain Molla v. K. K. Earn*, 82 cal. I. J. 222, there is some slight confusion in the order as actually given,--where he considered a similar order passed by one of the Magistrates. The order in that particular case passed by the learned Magistrate after examining the complainant on oath was in the following form:

'To O. C. Matiaburuj P. S. for enquiry and if necessary to start a case treating the petition as F. I. R.' Harries C. J. of the Calcutta High Court takes a stronger view and in *Bissen Singh v. Prameswari Singh*, A.i.r. 1950 cal. 99, he gives his opinion in the following words :

'..... that when a complaint is filed before a Magistrate he should either take cognizance of it under Section 200, Criminal P. C. under Chap. XVI or send the complainant to the officer-in-charge of the Police Station-directing him to proceed under Chap. XIV of the Code. He should not make a hybrid composite order, both under Section 156 (3) and under Section 202 of the Code.'

and this practically represents the present Calcutta view. This decision was passed following an earlier decision of the Calcutta High Court reported in *Pulin Behari v. The King*, 53 cal. w. N. 658 to which Harries G. J. was a party and his subsequent judgment in *Pacha v. The King*, 54 cal. W. N. 181 is in accordance with the view he expressed in A. i. r. 1950 Cal. 99, The earlier case *Isaf Nasya v. Emperor*, 54 cal. 303 can be distinguished on facts and *Nurmuhomed Raj-*

mohamed v. Emperor, 53 Bom. 339 is a decision taken following 54 Cal. 303 without considering whether the facts were similar.

35. The High Courts in India are not unanimous in the matter of supporting the Calcutta view that if a Magistrate examines the complainant on oath, he cannot under Section 202 refer the case to the police for investigation with the idea of having a charge-sheet submitted. Emperor v. Ghulam Nabi, A. I. K. 1933 Sind 136 is a case on the point where it was held that the Magistrate's order under Section 202 directing the police to enquire into a cognizable case does not debar the police from exercising the powers of arrest and investigation in regard to the same matter as formed the subject-matter of the complaint and in the opinion of the Judicial Commissioners, Section 156 (3) is wide enough and the utility of the section would be much diminished if that section were held to apply only to those cases in which a Magistrate takes cognizance under Section 190 (1) (e), Criminal P. C. and this decision was taken following the decision of the Patna High Court reported in Emperor v. Bhola Bhagat, A. r. R. 1923 Pat. 547.

In Gopal Naik v. Alagirisami Naick, A. i. r. 1931 Mad. 770, it was held that on receiving information from a complaint forwarded under Section 202, Criminal P. C. the police can investigate under Section 156 if they so choose and investigation is not illegal but mere report by them is sufficient. In this case also the case of Emperor v. Bhola Bha-gat, reported in A.i.r. 1923 pat. 547 was approved.

36. If we take the Calcutta view as such, it comes to this that the Magistrate would be perfectly justified in sending the case to the police for investigation and report if he did not examine the complainant. Let us see if the examination of the complainant under Section 200 makes any perceptible difference and involves a breach of procedure which is likely to result in the failure of justice or whether it is such an irregularity as is likely to cause prejudice to either of the parties. In my view it is not. There is nothing in the Code of Criminal Procedure itself which debars a Magistrate from sending a complaint case relating to a cognizable offence to the police for investigation and report under Section 156 (3), Criminal P. C. It is only a question of interpretation.

If we take it that the recording of the statement of the complainant under Section 200, Criminal P. C. amounts to a cognizance of the offence, the Magistrate might be said to have deprived himself of the jurisdiction of trying the case himself if he sends the matter to the police for submission of a charge-sheet. There are some decisions of the Calcutta High Court wherein it was held that if a complaint is filed before a Magistrate, he is

bound to take cognizance of the same and examine the complaint forthwith but there are later decisions which do not favour that view. For decision of the points involved in this case, we need not examine those cases but whether we can say that examining the complainant under Section 200, Criminal P. C. by itself amounts to cognizance.

There is no definition of the word 'cognizance' in the Code itself but the Supreme Court accepts the view expressed in *Gopal v. Emperor*, A. I. R. 1943 pat. 245 where it was observed that the word 'cognizance' is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of the offence and that it is some: thing different from the initiation of the proceeding itself. The Supreme Court in its decision reported in *R. R. Chart v. State of Uttar Pradesh*, A. i. R. 1951 a. C. 207, supports the view taken by the Calcutta High Court in its decision reported in *Supdt, & Remembrancer of Legal Affairs, West Bengal v. Abani Kumar*, A. i.r. 1950 cal. 437 wherein the relevant observation runs as follows:

'It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190 (1) (a), Criminal P. C. he must not only have applied his mind to the contents of the petition, but he must have done so far the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,-- proceeding under Section 200 and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e. g. ordering investigation under Section 156 (3) or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the

offence.'

In my opinion, examining of the complainant under Section 200 does not amount to exercising a judicial mind with regard to the offence and the Magistrate has still the liberty to decide as to which course he would like to take i. e., whether he would like to proceed with the case himself or send the same to the police to be registered and investigated for the purpose of submitting a report as provided under the law. In this view, the sending of the case to the police for investigation even after recording the statement of the complainant under Section 200 cannot be said to be irregular or illegal. Section 202, Criminal P. C. comes after Section 200 and it speaks of the examination of the complainant but the words used with regard to the Magistrate at that stage are not a Magistrate having already taken cognizance' but as a Magistrate who is authorised to take cognizance' and this in my opinion would lend support to the view that the cognizance cannot be said to be taken simply because a complainant is examined under Section 200, Criminal P. C.

37. Apart from 'cognizance' let us see whether the trial had actually commenced before the Magistrate,--and if it had not, the question of the Magistrate surrendering his jurisdiction does not arise. I respectfully dissociate with the view, expressed in some of the Calcutta decisions that no sooner a complaint case comes before a Magistrate than he is bound to take cognizance of it. I fully associate with the view expressed by Meredith J. in the Special Bench case reported in *Gopal v. Emperor*, A. I. R. 1943 pat. 245 at page 252:

'Reverting again to complaint cases, it is clear from the wording of the Code that it is only when the stage is reached of an order under 3. 2U4, that is for issue of process, that proceedings before the Magistrate can be said to commence, for Section 2u4 is the first section in the Chapter headed ; 'Of the commencement of proceedings before Magistrate.'

In this view, the proceeding had not commenced before the Magistrate when he sent the complaint to the police,-- but the proceeding commenced only when actions were taken under Section 204, Criminal P. C., against the accused persons on receipt of the charge-sheet--and consequently the question of

surrendering of jurisdiction does not arise.

38. Even if we hold in the light, of the Calcutta decision reported in Dr. Rohiul Hossain Molla, v. K. K. Ram, 82 Cal. L. J. 222, that the order in the present form is a slightly confused one, it cannot be said that the trial proceeding on the basis of the police report was so irregular as to make the trial void ab initio.

39. Mr. Goswami in opposing the reference cited some more cases which support the view that an independent trial on the basis of a police report is quite valid in matters of cognizable cases which come under Section 190 (1) (b), Criminal P. C. but as a matter of fact that view has not been challenged nor are we called upon to pronounce any view on that aspect of the law. Here we have only to examine whether the procedure followed in this case has been regular or the trial has been vitiated. I have already given my reasons for holding that the trial cannot be said to be irregular and the conviction has therefore to be maintained and the reference rejected.

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