

CALCUTTA HIGH COURT

Satya Kinkar Roy

Vs.

Nikhil Chandra Jyotishopadhaya

F.B. Ref. No. 1 of 1951 (in Cr. Revision No. 614 of 1950)

(Harries, C.J., Banerjee and Das Gupta, JJ.)

19.03.1951

JUDGMENT

Harries, C.J.

1. This is a reference made to a F.B. by a Bench of this Ct. in a criminal matter.
2. In order to appreciate the points involved it will be necessary shortly to set out the facts giving rise to the proceedings culminating in this reference.
3. The opposite party was a tenant of the Petitioner On 11.8.1949 the Petitioner gave a receipt for Rs. 101 which sum, it is alleged, was paid by the opposite party as rent in advance. On 13.1.1950 the Petitioner through a pleader, gave to the opposite party a notice to quit alleging that there had been default in the payment of rent for three consecutive months, namely, from September to November 1949. On 6.2.1950 the opposite party, through his pleader, wrote stating that the rent in question was not in arrear and that it had actually been paid in advance. On 7.2.1950 the Petitioner filed a complaint in the Ct. of the Presidency Mag. under Sections 468 and 471, Penal Code. It was alleged that the opposite party had altered the receipt for Rs. 101 paid as rent and that the receipt as altered showed a payment of Rs. 1101. Consequently, it was said that the opposite party was guilty of the offence of forgery and using as genuine a forged document.
4. On 7.2.1950 a notice was issued on the opposite party by the Ct. to produce the receipt granted by the Petitioner for Rs. 101 which had been forged to show a receipt of Rs. 1101 in place of Rs. 101. In the alternative the opposite party was called upon to show cause why the document should not be produced.
5. On 9.2.1950 the opposite party, through his pleader, denied forgery and on 28.2.1950 the opposite party showed cause in answer to the notice to produce. He contended that if he produced the document it might prejudice him in his defense in civil proceedings which were apparently pending before the Rent Controller. As he refused to produce the document the learned Mag. on the same day issued a search warrant. The house of the opposite party was searched but the receipt was not found and on 4.4.1950 a case under section 204 of the Penal

Code was filed for alleged secreting of this document. The matter was consideration by the learned Presidency Mag. who by an order of 23.6.1950 discharged the opposite party under section 253, Criminal Procedure Code, holding that there was no prima facie case against him. In the view of the Presidency Mag. the opposite party could never be held guilty of secreting this document because all that he had done was to refuse to produce it when called upon to do so. In the view of the learned Mag., mere refusal to produce on notice given, did not amount to secreting a document and therefore no case under section 204, Penal Code could possibly be made out against him.

6. The Petitioner apld. to this Ct. by way of revision that the order of discharge be set aside and that the matter be decided upon the merits. The case came before a Bench of this Ct. and before that Bench it was contended that the opposite party could never be guilty of an offence under section 204, Penal Code, because no summons to produce any document could be served upon him under section 94, Criminal Procedure Code and therefore he could not be guilty of secreting any document which he could lawfully be compelled to produce as evidence in a Ct. It was pointed out to the Bench hearing the revision case that the authorities of this Ct. were conflicting. In some cases such as *Mahomed Jackariah and Co. v. Ahmed Mahomed*¹, it had been expressly held that Section 94, Criminal Procedure Code appld. to accused persons and a summons under that section could be served on an accused person. A contrary view had been expressed in another case *Ishwar Chandra v. Emperor*², There it had been held that the provisions of Section 94, Criminal Procedure Code could not apply to the case of an accused person on his trial and no notice under that section to produce an incriminating document could be served upon him. Faced with this conflict of authority the Bench found itself unable to decide the case. Whatever view it took of Section 94, Criminal Procedure Code, it was bound to dissent from one or other of these cases and that being so the Bench referred this case to a F.B. for the decision of the following question.

"Do the provisions of Section 94, Criminal Procedure Code apply to the case of an accused person who is on trial?"

7. By the Rule of this Ct. this F.B. has been constituted to answer the question submitted and also to decide the case itself.

8. It seems to me that the order of the learned Presidency Mag. cannot possibly be sustained. He appears to have thought that the opposite party was under a duty to produce this document by reason of the summons served upon him under section 94, Criminal Procedure Code. The Mag., however, thought that this was a case of mere refusal to produce the document and merely refusing to produce a document which had been summoned could never amount to secreting that document. That view may well be the correct view. But the learned Mag. entirely overlooked the fact that a search warrant had been issued and that this document could not be found when the accused's premises were searched. The accused in showing cause had admitted the possession of such a document, but had urged as a ground for not producing it that he would be prejudiced in other proceedings. It was, therefore, clear that the document was in his possession and he had been summoned to produce it. Not only did he fail to produce it, but he must have had it

¹15 Cal 109

²12 CWN 1016

removed from his premises because a thorough search of those premises failed to disclose

the document. That being so, there was evidence before the Ct. from which it might be inferred that the accused had secreted the document. We do not hold that he had. But there were materials before the Ct. which the Ct. would have to consider. Much more had happened in this case than a mere refusal to comply with the summons to produce.

9. Mr. Majumdar, learned counsel for the accused opposite party has contended that this was not a case of secreting a document because his client had handed the document over to a pleader. That may or may not be so. But prima facie something had happened to the document, because - though admittedly it had been in the possession of the accused opposite party it could not be found when a thorough search was made. That being so, the ground given by the learned Mag. for discharging the accused opposite party cannot possibly be maintained. There was evidence of secreting which the Ct. would have to consider.

10. It was, however, urged before the Bench and again before us that an accused person cannot be called upon to produce any document and further that if he failed to produce a document in answer to a summons no search warrant could be issued. That being so, no such person could be prosecuted under section 204, Penal Code, because it could not be said that he had secreted any document even if he had hidden such document so as to make him liable under the section, because he could never be legally liable to produce such a document.

11. Section 204, Penal Code, is in these terms :

"Whoever secrets or destroys any document which he may be lawfully compelled to produce as evidence in a Ct. of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Ct. or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

12. As I have already said there was material from which a Ct. could hold that this document had been secreted. But no offence could be established under section 204 unless the document was such that he could be lawfully compelled to produce it as evidence in a Ct. of justice. What is said is that an accused person can never be lawfully compelled to produce any document and therefore he can never secret that document so that an offence is committed under section 204, Penal Code.

13. On the other hand, it is contended by the Petitioner that an accused person can be called upon by a summons under section 94, Criminal Procedure Code to produce a document. If he does not produce it, a search warrant can be issued under section 96, Cr P. C., and if upon search the document cannot be found but has been secreted all the elements constituting an offence under section 204 are present and the accused person could be convicted of a further offence under this section.

14. Section 94, Criminal Procedure Code, is in these terms :

"(1) Whenever any Ct., or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in-charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Ct. or officer, such Ct. may issue a summons, or such officer a written order to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same....."

15. It will be seen that this section is framed in the widest terms. Whenever any Ct. considers that the production of any document is necessary or desirable for the purposes of any inquiry, trial or other proceeding the Ct. may issue a summons to the person, in whose possession or power such document is, to produce the same. The section is framed wide enough to cover the right to serve a summons on a person accused in a case to produce a document, and there is nothing in the section to suggest that it would not cover an accused person. Sub-Section (2) of Section 94 provides that any person who is required to produce may do so in a certain manner. Again the words "any person" are wide enough to cover a person accused.

16. Section 96, Criminal Procedure Code provides :

"(1) Where any Ct. has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95 sub-sections (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition.

Or where such document or thing is not known to the Ct. to be in the possession of any person, Or where the Ct. considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained....."

17. Again this section is absolutely general in terms and would apply to any person to whom a summons or order under section 94, has been addressed. Of course if no summons under section 94 could be addressed to an accused person then Section 96 would not apply to an accused person. But as I have already said Section 94 is framed in the widest possible terms, and that being so it appears to me that a search warrant under section 96, Criminal Procedure Code could be issued to search the premises of an accused person who was known to be in possession of a document and who had refused to produce it after a summons for production had been served upon him.

18. The view which I take has been taken by this Ct. on a number of occasions, the earliest case being the case of *Mahomed Jackariah and Co. v. Ahmed Mahomed*³, In that case it was expressly held that Section 94, Criminal Procedure Code applied to an accused person. The same view was

taken by another Bench of this Ct. in the case of *Nizam of Hyderabad v. A.M. Jacob*⁴, At p. 68 Ameer Ali, J., observed;

"He contended that the Mag. had absolutely no power to call either upon the accused or upon his bailee for the production of anything alleged to be connected with the offence. In the course of the argument, however, he modified this somewhat startling proposition, and admitted that under the section the Mag. can call for documents or other things, though only for purposes of evidence in a pending proceeding. Now, the words of Section 94, are very large and it seems advisedly so.....Having regard to the words of this section, it seems to me a Mag has the power of calling upon any person to produce any document or 'thing', in that person's possession or power which has any connection with the offence which happens to be under investigation or inquiry. Of course he cannot call for anything and everything from anybody and everybody."

19. There can be no doubt that the Bench in this case were clearly of the view that Section 94, Criminal Procedure Code, applied to the case of an accused person and such a person could be called upon to produce a document relevant to the case.

20. Another Bench decision of this Ct. in which the same view was taken is *Bissar Misser v. Emperor*⁵, in which it was expressly held that Sections 94 and 165, Criminal Procedure Code, extended to accused persons.

21. The matter was again consideration by a Bench of this Ct. in *Ajoy Krishna v. S.G. Bose*⁶, and both the learned Judges who decided that case were clearly of the view that a search warrant under section 96 should be issued against a person accused of an offence.

22. The view expressed by these cases has been folld in a number of cases in other Cts. namely, in *Re. S. Kondareddi*, 37 Mad 112 in which it was expressly held that under section 94, Criminal Procedure Code. Mag. has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him.

23. A similar view was taken by the Punjab Chief Ct. in the case of *Municipal Committee, Jhang v. Muhammad Hayat*⁷, and by the Patna H. Cr. in the case *Demri Ram v. Emperor*⁸,

24. A contrary view, however, was taken by a Bench of this Ct. in the Case of *Ishwar Chandra v. Emperor*⁹, in which it was held that the provisions of Section 94, Criminal Procedure Code, cannot be taken to apply to the case of an accused person on his trial to whom a notice had been issued to produce an incriminating document. It was further held that where an accused, while on his trial for offences under Sections 471 and 193, Penal Code, being directed to produce a certain incriminating document did not

³15 Cal 109

⁵41 Cal 261

⁷AIR 1941 Lah 587

⁴19 Cal 52

⁶33 C WN 369

⁸ AIR 1918 Pat 590

⁹12 CWN 1016

produce the document and in consequence the prosecution against him failed he could not be convicted under section 175, Penal Code, for his omission to produce the document.

25. It is unfortunate that in this case no one appeared on behalf of the prosecution and the earlier cases of this Ct. in which a contrary view had been expressed were never referred to. The Bench appears to have thought that Section 94, Criminal Procedure Code, could not apply to an accused person because such a construction would be contrary to the provisions of Sections 342 and 343, Criminal Procedure Code.

26. Section 342, Criminal Procedure Code, makes it clear that an accused person cannot be compelled to give evidence. He can only be examined to explain any circumstance appearing in the evidence against him and he does not render himself liable to punishment by refusing to answer any such question.

27. Section 343 of the Code simply provides that no influence is to be used to induce an accused person to make any disclosures.

28. It appears to me that if Section 94, Criminal Procedure Code be held to apply to accused persons it would, in no way, affect the provisions of Sections 342 and 343, Criminal Procedure Code. Calling upon an accused to produce a document is not tantamount to compelling him to give evidence against himself. He may be called upon to produce a document, but he cannot be called upon to prove it or to establish in any way what the document is or purports to be. It seems to me that the procedure under Sections 94 and 96, Criminal Procedure Code, cannot possibly be said to conflict with any provision making it illegal to compel an accused person to give evidence or to answer any questions addressed to him by the Ct. Section 94, Criminal Procedure Code, merely contemplates compelling an accused to produce a document for what it is worth. What use will be made of that document and how it will be proved are not matters in which the accused can be compelled to assist. Having regard to the very wide terms of Sections 94 and 96 of the Code, it seems to me that the case of *Ishwar Chandra v. Emperor*¹⁰. must be held to be wrongly decided.

29. This case was folld. by two other cases, namely, *Bajrangi Gope v. Emperor*¹¹, and *Raj Chandra v. Hara Kishore*¹², Both these cases were decided by a Bench consisting of Holmwood and Sharfuddin, JJ. and in both cases the view is taken that Sections 94 and 96 cannot apply to accused persons. There is no discussion in either of the judgments and no reference to earlier authority. It seems to have been taken for granted that as long as an accused was under trial no process under section 96 could be issued against him, neither could he be compelled to produce a document under section 94 of the Code.

30. Learned counsel for the opposite party has urged that if Section 94, Criminal Procedure Code, is framed widely enough to cover an accused person, we should have to hold the section to be ultra vires by reason of Article 20(3), Constitution Ind. which provides that no person accused of any offence shall be compelled to be a witness against himself.

¹⁰12 CWN 1016

¹²9 I.C. 564

¹¹38 Cal 304

31. It appears to me that this clause of Article 20 of the Constitution does not create any new right fundamental or otherwise. Even before the Constitution no accused person in India could be compelled to be a witness against himself and this clause simply repeats what the law was before the Constitution. As I have said earlier, calling upon an accused person to produce a document is not compelling the accused to give evidence against himself. He gives no evidence of any sort

and he cannot be made to say anything concerning the document which is produced. The document may of course prejudicially affect him later, but it does not prejudice by reason of the accused being compelled to give evidence against himself.

32. That being so, it does not appear to me that the construction of Section 94 which I am inclined to accept, would make the section ultra vires. The importance of giving all words in a section their full and grammatical meaning was stressed by their Lordships of the PC in the case of *Narayana Swami v. Emperor*¹³, In that case their Lordships had to consider whether the phrase "any person" in Section 162, Criminal Procedure Code covered an accused person. This Ct. had held in the case of *Azimuddy v. Emperor*¹⁴, that the phrase "any person" could not cover an accused person because if such a meaning was given to it then Section 162, Criminal Procedure Code would be in conflict with Section 27, Evidence Act. Nevertheless their Lordships of the PC held that the term "any person" in Section 162, Criminal Procedure Code had to be given its ordinary and grammatical meaning and as the phrase was wide enough to cover a person accused in the case the section applied to him as well as to others. In the judgment of the Board which was delivered by Lord Atkin stress is laid on the importance of a grammatical construction and two well-known observations of very distd. English Judges were referred to. In *Grey v. Pearson*¹⁵, at p. 106 Lord Wensleydale observed :

"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Cts. of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther."

33. In *Comrs. for Special Purposes of Income-tax v. Pemsell*¹⁶, Lord Halsbury L.C. observed at p. 542 :

"My Lords, to quote from the language of Tindal, C.J., when delivering the opinion of the judges in the Sussex Peerage case, (1844) 11 Cl. and F. 85 at p. 143 the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting intention, to call in aid the ground and cause

¹³43 CWN 473

¹⁵(1857) 6 HLC 61

¹⁴54 Cal 237

¹⁶(1891) AC 531

of making the statute, and to have recourse to the preamble which according to

Dyer, C.J., *Stowel v. Lord Zouch*¹⁷, is a key to open the minds of the makers of the Act and the mischiefs which they are intended to redress."

34. As I have said earlier, giving Section 94 ordinary grammatical construction, it must be held that it applies to accused persons as well to others. Further, there is in my view no inconsistency between this provision and other provisions of the Code and giving Section 94 the construction which I suggest should be given to it would not cause any ambiguity whatsoever. That being so, effect must be given to the plain words of the section and I would, therefore, answer the question submitted to this F.B. in the affirmative.

35. As I have stated earlier the learned Presidency Mag. was wrong in disposing of this case and discharging the accused on the ground that a mere refusal to produce could never amount to secreting as that term is used in Section 204, Penal Code. He must consider the whole case, particularly the issue of the search warrant and the results of the search and any evidence which may be adduced on behalf of the accused opposite party. Upon that material he must come to a conclusion whether or not there has been secreting of this particular document which we hold a Ct. was legally competent to compel him to produce.

36. That being so the order of discharge of the accused opposite party must be set aside and the case remanded to the Ct. of the Presidency Mag. to be disposed of in accordance with law and in accordance with the observations made in this judgment.

Banerjee, J.

37. I agree.

Das Gupta, J.

38. I agree.

Case remanded.