

CALCUTTA HIGH COURT

Hiralal Agarwalla

Vs.

State (Calcutta)

Criminal Revn. No. 439 of 1955

(Debabrata Mookerjee, J.)

28.07.1955

ORDER

Debabrata Mookerjee, J.

1. The petitioner in this case is being proceeded against under Chapter XVIII of the Code of Criminal Procedure. A Chalan was submitted against him by the police under Sections 120B/379, 466/34 of the Indian Penal Code where after the learned Chief Presidency Magistrate commenced an enquiry preliminary to commitment to the Court. In the course of the enquiry several witnesses have been examined by the prosecution in support of the charges mentioned in the chalan.

2. On the 11th of March, 1955 the Public Prosecutor prayed to the court that the petitioner be directed to give his specimen handwriting in court for comparison with the petitioner's disputed writings and for sending the same to the Handwriting Expert attached to the Criminal Investigation Department, Government of West Bengal. As soon as that was proposed to be done objection was taken on behalf of the petitioner to the procedure of compelling the accused person to furnish evidence against himself. The learned Magistrate however overruled that objection, holding that the court was entitled to compare the handwriting of the accused taken in his presence with the disputed writings. Thereafter the petitioner gave his specimen writing on the 9th of March, 1955 in obedience to the order of the Court when his objection to giving the writing had been overruled. On the 24th of March, 1955 the Public Prosecutor wanted to make use of the specimen writings thus obtained from the petitioner and the Bench Clerk attached to the court of the learned Magistrate was examined as a witness who formally proved the writing of the petitioner given in obedience to the order of the court. The effect of that was that this writing furnished by the petitioner became a part of the prosecution evidence. The matter did not rest there. There was a further suggestion made on behalf of the prosecution that the income-tax Department at whose instance the petitioner is being prosecuted, should be allowed to take a

photograph of the writing thus obtained from the petitioner in order that the photograph might be sent for comparison to a prosecution witness who was a handwriting expert examined in the case. The idea was that if these fresh materials were made available to the expert he would be in a better position to give the results of his examination and comparison at a later stage of the proceeding. Objection was then taken on behalf of the petitioner that this was a procedure wholly unknown to law and not warranted by the provisions of Section 73 of the Indian Evidence Act. Apparently the learned Magistrate was not prepared to give effect to the petitioner's objection where after an application was made to this court on which the present Rule was issued.

3. Mr. Dutta has argued that the procedure adopted by the learned Magistrate is not justified by the provisions of the law. His criticism further is that the Magistrate has compelled the petitioner to incriminate himself by furnishing materials which are now being proposed to be used in evidence against him. This would, according to Mr. Dutta, be not only illegal but unconstitutional.

4. I am not pronouncing upon the larger question of constitutional right raised by Mr. Dutta firstly because it was not pressed and secondly because I think that it is not necessary for the immediate purpose of this Rule. Confining myself within the limits of Section 73 of the Indian Evidence Act, I feel bound to say that that section permits the learned Magistrate

"to direct any person present in court to write any words or figures for the purpose of enabling Court to compare the words or figures so written with any words or figures alleged to have been written by such person".

It is thus clear that the section permits the court to direct the accused person to write words and figures for the purpose of comparison and such comparison is to be instituted with a view to enabling the court to form its own conclusion and in order that it might do complete justice between party and party. The learned Chief Presidency Magistrate by asking the accused petitioner to write in court did not in my view go beyond the permissible limits of Section 73 of the Indian Evidence Act. The Magistrate was entitled to satisfy himself as to the question whether a particular piece of disputed writing was in the hand of the accused, but beyond that it was not open to the Magistrate to allow the prosecution to make use of that document to supplement the evidence which the prosecution has so far adduced. Section 73 does not in my view entitle the Court to assist a party to the proceedings. It entitles the court to assist itself to a proper conclusion in the interests of justice. In so far therefore as the learned Magistrate wanted to be satisfied as to the genuineness or otherwise of certain writings it was open to him to ask the petitioner to write out certain words and figures in order that a comparison might be made between them and the disputed writing but it was certainly not open to the learned Magistrate to hand the document over to the prosecution in order that they might make use of it as a piece of their own evidence. I do not see the propriety of allowing the Bench Clerk to step into the witness box with a document in hand swearing to the fact that the writing was done by the

accused and thereafter treating that document as a prosecution exhibit in the case. Far less do I appreciate the Magistrate's proposed procedure of sending it to an Expert who is a prosecution witness. Not only that, it seems that the learned Magistrate was inclined to send the writing taken in court to a photographer of the Income-tax Department at whose instance the petitioner is being prosecuted. If the learned Magistrate wanted further assistance in the shape of enlargement of the writing, it was perfectly open to the court to call in its own photographer take the enlargements under its own supervision, study them and if necessary, call its own Expert as a court witness in order that it might be assisted to a proper conclusion. I am not prepared to construe Section 73 as an instrument or a device to be used for the advancement of any party either the prosecution or the accused. S.73 is one of those sections where large powers are given to the court with the obvious object of enabling the court to find out the truth to do complete justice between party and party. If the section is proposed to be put to any other use, I should consider that use to be wholly unjustified.

5. The result therefore is that this Rule is made absolute and the learned Magistrate is directed not to allow either party to the proceedings to make use of the writings taken from the accused at the instance of the court as part of its own evidence. The Court of course will be free to make whatever use it can under the law of the writings thus taken. It must be borne in mind that this is properly no part of the prosecution evidence nor a part of the defense evidence. It is material brought on the record by the Court for its own guidance and consequently neither the prosecution nor the defense should be allowed to take any undue advantage of it.

6. I leave open the wider constitutional aspect of the question raised but not persisted in, as respects the validity of the procedure involved in Section 73 of the Evidence Act on the ground of self-incrimination.

7. The Rule is disposed of in these terms.
Rule made absolute.