CALCUTTA HIGH COURT

Pemchand Khetry

Vs.

State (Calcutta)

Criminal Revn. No. 508 of 1957

(Chakravartti, C.J. and K.C. Das Gupta, J.)

28.11.1957

JUDGMENT

Chakravartti, C.J.

1. This is a Rule, calling upon the Chief Presidency Magistrate to show cause why the proceedings pending against the petitioner before a Presidency Magistrate should not be quashed or why such other order or orders should not be made as to this Court may seem fit and proper. The petitioner, Premchand Khetry, is one of three persons who are on trial for certain offences under the Opium Act and who were being tried according to the procedure laid down in Section 251A of the Cri. P. C. His contention is that Section 251A does not apply to v the case and that the procedure laid 'down in Section 252 and subsequent sections of the Code ought to be followed.

2. The facts are simple. It is alleged that on receipt of some information, an Inspector of Excise, named Sri B. N. Ray, began to maintain a watch on premises No. 42, Ganesh Chandra Avenue, Calcutta, from 24-7-1956 and on that very day noticed a car, bearing the number MBI-1864, coming to the place at about 8-30 P. M. The petitioner was driving the car. On the next day, the same car came to the place twice during the day time and again at about 7-30 P. M. When it came in the evening, the petitioner was driving it as on the previous day and he had with him another of the accused persons, Raj Kumar, seated by his side. On arriving at the place, both the men went inside the house and they came out after about 15 minutes, followed by the third accused, Monohar Singh, who was carrying a wooden box. Five such boxes were brought out. one after another, three of which were placed inside the luggage carrier and two on the back seat. The petitioner then took his place at the driver's seat. Raj Kumar seated himself by his side, while Monohar Singh sat on the back seat by the side of the two wooden boxes. The car then started to go, but it had gone only a few yards when it was stopped. On examining the boxes, it was found that all of them bore the same address, viz.. "M. Kumar and Bros. Tinsukia, self" and inside them were found 1 maund and 10 seers of opium. Subsequently, Room No. 4 of the house, which was in the occupation of the petitioner and Monohar Singh, was searched and further quantity of opium, weighing 13 seers and 13 chattaks, was recovered. A large assortment of other materials was also found such as packing cases, coverings of postal parcels addressed to M. Kumar and

Bros and false number plates of motor cars. The three men were immediately placed under arrest and they were produced befpre the Chief Presidency Magistrate on the following day. According to the Excise Officers, all the accused persons bore aliases, the petitioner having as many as ten.

3. The investigation was commenced by Sri B. N. Ray, but it appears that after sometime it was taken over by another officer, named Sri P. R. Das. In the course of the investigation, two other persons, named Bhawandas Kishindas and Dayaldas Kishenchand, were arrested, the former at Bombay and the latter at Delhi. On 10-12-1956, Sri P. R. Das submitted a challan against only the three persons originally arrested. All of them were charged under Section 120B of the Indian Penal Code, read with Sections 9(a) and 9(c) of the Opium Act. They were also charged under Section 9(a) of the Opium Act in respect of the possession of the 1 maund and 10 seers of opium. In addition, the petitioner and Monohar Singh were further charged under Section 9(c) in respect of the 13 seers and 13 chattaks of opium recovered from the room in their occupation. Simultaneously with the challan, an application was submitted for the learned Magistrate's sanction under Section 196A(2) of the Code for the prosecution of the accused persons on the conspiracy charge on the footing that the offences which it was the object of the conspiracy to commit were non-cognizable offences. As regards Bhawandas Kishindas and Dayaldas Kishenchand, it was prayed by a separate application that they might be discharged, as the evidence against them was not sufficient.

4. By an order passed on the same date, the learned Chief Presidency Magistrate gave his sanction for the prosecution of the three original accused on the conspiracy charge and discharged the two accused persons, subsequently arrested. He then transferred the case to Sri R. D. Roy Chaudhuri for disposal.

5. Sri Roy Chaudhuri proceeded under Section 251A of the Code. He ascertained that the accused had been furnished with the copies to which they were entitled under the section and then, on a perusal of the police papers, framed charges against the accused as per the challan, fixing 16-4-1957 for evidence. On that date, before any prosecution witness could be examined, an objection was raised on behalf of the petitioner to the procedure that was being followed. It was contended that the procedure prescribed by Section 251A of the Code, which was applicable only to cases instituted on a police report, could not apply to the case and that the procedure prescribed for other warrant cases ought to have been followed. Subsequently, the petitioner put his objection in writing in the form of an application and prayed thereby that the case might be adjourned for sometime so that he might move this Court for a direction as to which procedure was applicable. The learned Magistrate acceded to the prayer and granted an adjournment. Thereafter this Court was moved and the present Rule obtained.

6. The procedure to be followed at the trial is not now the same for all warrant cases. By the amendment of the Code made in 1955, warrant cases were divided into two classes and a new procedure prescribed for one of them. The classification was made by Section 251, a new section, placed at the beginning of Chapter XXI and reading as follows:

> "251. Procedure in warrant cases.- In the trial of warrant cases by Magistrates, the Magistrate shall-
> (a) in any case instituted on a police report, follow the procedure specified in Section

251A; and
(b) in any other case, follow the procedure specified in the other provisions of this Chapter".

7. The two classes of warrant cases contemplated by the section are thus (i) cases instituted on a police report and (ii) other cases. Section 251A, which prescribes the procedure for the trial of cases coming under clause (a) of Section 251, provides by sub-section (1) as follows:

> "251-A. Procedure to be adopted in cases instituted on police report. - (1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished."

8. Consistently with Section 251(a), this section describes the cases, for the trial of which it is prescribing a special procedure, as "any case instituted on a police report." It also contemplates that there will be in such cases the documents referred to in Section 173 or at least some of them.

9. The entire procedure to be followed at the trial of warrant cases coming under clause (a) of Section 251 is laid down in Section 251A, but the procedure to be followed at the trial of other warrant cases is spread over a number of sections beginning with Section 252. Consistently with Section 251(b), Section 252 describes the cases to which the procedure prescribed by it and some subsequent sections will be applicable as "any case instituted otherwise than on a police report."

10. It will thus appear that in order that the procedure prescribed by Section 251A may be applicable to the trial of a warrant case, it must be a case "instituted on a police report" and the investigation leading up to its institution must be an investigation to which Section 173 may be applied. The petitioner's contention is that the present case is not a case instituted on a police report, because an excise officer is not a police officer and also because the investigation after which the report was made was not an investigation under Chapter XIV of the Code in which Section 173 occurs.

11. In my judgment in *Manik Chand Chowdhury v. The State*[1], delivered earlier today, I have pointed out that the expression "police report", as used in the Code for reports of offences made by the Police, carries a special meaning. As used in the old Section 190(1) (b), the expression was interpreted by several High Courts as meaning reports made under Section 173, that is to say, reports of cognizable offences or non-cognizable offences with regard to which there had been a direction by a Magistrate to investigate, made after an investigation under Chapter XIV. The result of that interpretation was that cognizance of an offence could be taken under Section 190(1) (b) only on police reports of that particular kind and not on other police reports. Other police reports were to be treated as complaints, coming under Section 190 (1) (a). Apparently, the Legislature did not desire that the operation of Section 190(1) (b) should be so restricted and so in 1923 it amended the section by replacing the expression 'police report' by the more general words "report

[1] Criminal Revn. No. 1161 of 1956 (Cal)
in writing of such facts (i.e. facts constituting an offence) made by any police officer" which would cover all police reports. At the same time, the Legislature left the expression, as occurring in Sections 170 and 173, untouched. It must therefore be presumed that the Legislature accepted the judicial construction of the expression 'police report', as used in the Code for reports of offences made by the police and that where it left the expression used in a similar context untouched, it intended the expression to continue to bear the meaning which had been put upon it by the Courts. Not only did the Legislature not make any change in the expression 'police report,' when amending the Code in 1923, at any place other than Section 190 (1) (b), but when it amended the Code again in 1955, it itself used the same expression in enacting the new Sections 207, 207A, 251 and 251A and in amending Sections 208 and 252. In those circumstances, it must equally be presumed that in the amendments made by it in 1955, the Legislature used the expression 'police report' in the sense in which it had been construed to bear in the old Section 190(1) (b). The only difference made by the language of Sections 207A and 251A is that while a report under Chapter XIV of the Code is still contemplated, the report on which a case is instituted appears to have been taken to be the earlier report under Section 157 rather than the later report under Section 173. For taking that view, I have given detailed reasons in my earlier judgment and it is not necessary to repeat them here.

12. Criminal Revn. No. 1161 of 1956 (Cal) (A) was concerned with Section 207A of the Code. The present case is concerned with Section 251A, but with regard to the meaning of the expression 'police report', as used in the two sections and the investigation contemplated as leading up to the report, I can find no valid ground for distinguishing one from the other. It is true that the words "the Magistrate receives the report forwarded under Section 173", which occur in Section 207A, do not occur in Section 251A, but their absence in the latter section appears to me to be immaterial. By Section 251A(1), the Magistrate is enjoined to see that the documents referred to in Section 173 have been furnished to the accused. Barring confessions or statements recorded under Section 164, such documents are the report forwarded under Section 173(1), i.e. the report made after the conclusion of an investigation under Chapter XIV, the first information report recorded under Section 154, which is a section in the same Chapter, statements of witnesses recorded under Section 161(3), i.e., statements of witnesses examined by a Police Officer making an investigation under Chapter XIV, as the section expressly states and all other documents or extracts thereof on which the prosecution proposes to rely. I am leaving out confessions or statements recorded under Section 164, because such confessions or statements may be recorded not only in the course of an investigation under Chapter XIV of the Code but also in the course of an investigation "under any other law for the time being in force". Barring confessions or statements recorded under Section 164, it is impossible to see how the documents particularly specified in Section 173(4), specially the report under Section 173(1), can there be at all, unless there has been an investigation under Chapter XIV. Although Section 251A says that if the Magistrate finds that the accused has not been furnished with "such documents or any of them", he shall cause them to be furnished, I would concede that the section does not contemplate that in every case there must be all the documents which Section 173(4) mentions. As I pointed out in my earlier judgment, there may not be a first information report in a case or there may not be any confession. But it does not seem possible that there may not even be a report under Section 173(1) or an investigation under Chapter XIV. The reference to "the documents referred to in Section 173" implies incontrovertibly that an investigation under Chapter XIV is presupposed, because it is only in the course of such an investigation that all but

one of the documents specifically mentioned in Section 173(4), including the report under Section 173(1), can come into existence. The whole basis of Section 251A is that there has been an investigation under Chapter XIV and that basis appears not only from the use of the expression 'police report', but also from the provision that the accused must be supplied with copies of certain specified documents, none of which except one, can possibly come into existence unless there is such an investigation. The excepted document, a confession or statement recorded under Section 164, does not suggest any different intention of the section, because although a confession or statement may be recorded in the course of an investigation "under any other law", it may also be recorded in the course of an investigation under Chapter XIV and, obviously, it is only confessions or statements, so recorded, that are contemplated. I am accordingly of opinion that although receipt of a report forwarded under Section 173 is not specifically mentioned in Section 251A(1) as marking the stage from which the Magistrate is to commence the trial proceedings, the omission does not, in this regard, make the import of the section different from that of Section 207A. Since the copies which are to be furnished to the accused under the former section include a copy of the report forwarded under Section 173, it is clearly contemplated that such a report has been made and received. Both Section 207A and Section 251A thus contemplate that there has been a report by the Police under Section 173, i.e., a report of a cognizable offence or a non-cognizable offence which they had been directed by a competent Magistrate to investigate, made after an investigation under Chapter XIV. Unless there is such a report neither section can apply.

13. In this case, the Excise Officer has proceeded on the basis that the offences with which the accused were charged were non-cognizable offences. I am not sure that he was right. It is true that under Section 9 of the Opium I Act, as amended in Bengal, the penalty for an offence under clause (a) or clause (c) of the section is rigorous imprisonment for a term which may extend upto two years or fine or both. According to the third item under "Offences against other laws" in Schedule II to the Code, the Police shall not arrest anyone for such offences without a warrant. Necessarily, by virtue of the provision with regard to an offence under Section 120B of the Indian Penal Code, contained in the same Schedule, no arrest without a warrant can be made for a criminal conspiracy to commit such offences. But the definition of a cognizable offence, as given in Section 4(1) (f) of the Code, is an offence for which a Police officer, within or without the Presidency towns, may arrest without a warrant "in accordance with the Second Schedule or under any law for the time being in force". Turning now to the Opium Act, Section 11 of it provides that in any case in which an offence under Section 9 of the Act has been committed, the opium in respect of which it has been committed shall be liable to confiscation. Next, Section 14 of the Act, as amended in Bengal, provides inter alia that any officer, not below the rank of a Sub-inspector of the Department of Excise, Police and any officer of the Customs, Salt and Revenue Departments who may in right of his office be authorized by the State Government in this behalf and who has reason to believe from personal knowledge or information taken down in writing that opium liable to confiscation under the Act is kept or concealed in any building, vessel or enclosed place, may, at any time by day or night, enter into such building, vessel or place and detain and search and, if he thinks proper, arrest, any person whom he has reason to believe to be guilty of any offence relating to such opium under the Act or any other law. Section 15, again, provides that any officer of any of the said Departments or of certain other Departments may seize in any open place or in transit any opium which he has reason to believe to be liable to confiscation under Section 11 of the Act or any other law and may detain and search any person whom he has reason to believe to be guilty of any offence under the Act or any

other law and arrest him, if he has opium in his possession. It will thus be seen that though, in view of the measure of the penalty prescribed for an offence under Sections 9(a) or 9(c) of the Opium Act or a criminal conspiracy to commit the same, the Police cannot, under second Schedule to the Code, arrest persons suspected of such offences without a warrant, they can do so under Sections 14 and 15 of the Opium Act itself in the circumstances stated in those sections. Indeed, the accused persons in the present case were in fact arrested without a warrant. On behalf of the petitioner reliance was placed on the decision in *Bahabal Shah v. Tarak Nath*[2], in support of the contention that an offence under Section 9 of the Opium Act was not a cognizable offence. The decision was given in 1897 when the penalty for an offence under Section 9 of the Act had not been increased in Bengal to rigorous imprisonment for two years, but as it still remains below three years, the difference is not material. The decision, however, itself excepts cases coming under Section 14 of the Act. In the Present case, a part of the opium was seized in an open place when in transit and a part was seized from a room in a building, in regard to which there was some previous information. The quantity in transit was being transported by all the three accused persons and the room in which the other quantity was found was in the occupation of two of them. In those circumstances it would seem that the offences were cognizable offences, but for reasons presently to be stated it is not necessary for me to decide the point.

14. Whether or not the offences were cognizable offences is not very material for the purposes of the present case, because even assuming that they were cognizable, Section 251A cannot apply to the trial, unless it can be made out that the case was instituted on a 'police report.' The petitioner contended that there was not and could not be any police report in this case because apart from any other consideration, a police report has to be a report made by the Police which the challan, or the earlier report by which the accused were forwarded to the Magistrate in the present case, was not. They were reports made by an Excise Officer who, it was said, was not a Police Officer. I do not think that that contention can succeed. Whether or not an Excise Officer is a Police Officer is a vexed question and it is undoubtedly true that although he has been held to be a Police Officer for certain purposes, it by no means follows that for ail purposes he is so. On behalf of the State, reference was made to the decisions in *Nanoo Sheikh Ahmed v. Emperor*[3], *Amin Sharif v. Emperor*[4] and *Public Prosecutor v. Paramasivam*[5], where it was respectively held that, for the purposes of Section 25 of the Evidence Act, an Abkari Officer investigating a cognizable offence punishable under the Bombay Abkari Act, an Excise Officer investigating an offence under the Bengal Excise Act or the Opium Act even before its amendment for Bengal and an Excise Officer investigating an offence under the Opium Act, as amended in Madras, was a Police officer. Those decisions are not relevant, because they proceed on a consideration peculiar to Section 25 of the Evidence Act and hold that the object of the section being to prevent the procurement of statements by an improper exercise of influence, the expression 'Police Officer', as used in it, should be read not in any strict technical sense,

[2] ILR 24 Cal 691
[3] ILR 51 Bom 78: ((AIR 1927 Bom 4) (FB)
[4] ILR 61 Cal 607 : (AIR 1934 Cal 580) (FB)
[5] AIR 1953 Mad 917

but according to its more comprehensive and popular meaning of persons entrusted with the duty of preventing and detecting crimes. Decisions on Section 25 of the Evidence Act are thus of no help. At the same time, the petitioner's contention is answered by the Opium Act itself. Section 20 of the Act, as substituted in Bengal, empowers the State Government to authorize any class of officers of the Excise, Police or Customs Departments to investigate offences under the Act; and Section 20G. which appears to be a combination of Sections 170 and 173 of the Code, provides inter alia that when an officer of the Excise Department forwards any person accused of an

offence under the Act to a Magistrate, he shall submit a report, containing particulars of the offence charged and of the witnesses and that

> "upon receipt of such report, the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if such report is a report in writing made by a police officer under clause (b) of sub-section (1) of Section 190 of the Code of Criminal Procedure, 1898."

15. The sentence I have just quoted from the section is riot very accurately worded, because Section 190(1)(b) of the Code does not provide for any report being made under it, but only provides that cognizance may be taken of an offence when there is a report by the Police of facts constituting the same. The report itself is made under other provisions. Be that as it may, it is clear from Section 20G that although an Excise Officer may not be a Police Officer in fact and in law, the report made by him is to be deemed to be a report by a Police Officer for the purposes of taking cognizance of the offence reported. From the point of view of the status of the person making the report, a report of an offence under the Opium Act made by an Excise Officer must therefore be held to be a 'police report' within the meaning of Section 251A of the Code.

16. This, however, does not dispose of the objection raised on behalf of the petitioner. The effect of Section 20G of the Opium Act is no more than that a written report of facts constituting an opium offence made by an Excise Officer is "a report in writing of such facts made by a Police Officer", as contemplated by Section 190(1) (b) of the Code. But the language of Section 190(1) (b) is very general and covers, as is now well-settled, not merely reports made under Section 173 after an investigation under Chapter XIV, or earlier reports under Section 157 but ail reports of an offence made by the police. It follows that although Section 20G of the Opium Act makes an Excise Officer's report of an opium offence a report made by a Police Officer, it does not make it a 'police report' in the special and restricted sense of that term. For determining whether it is such a report, an examination of certain other provisions of law is necessary.

17. It appears to me that a report of an opium offence made by an Excise Officer cannot be said to be a 'police report' within the meaning of that term, as used in the Code with respect to reports of offences made by the Police. A 'police report', I have already pointed out, is a report made by the Police under Section 157 of the Code when entering upon an investigation under Chapter XIV or a report under Section 173 made after such investigation. An Excise Officer does not investigate an offence under the Opium Act under Chapter 14 of the Code - indeed he does not investigate it under the Code at all-but does so under Section 20 of the Opium Act itself. He examines witnesses in the course of his investigation, but does so under Section 20B of the Opium Act and not under Section 161 of the Code. If he has the power to compel the attendance of witnesses, it is not a power directly conferred on him by Section 160 of the Code but a power conferred on him by Section 20B of the Opium Act and also by Section 20E which makes the relative provisions of the Code applicable, so far as may be. He can release an accused person when the evidence against him is deficient but derives his power to do so from Section 20G of the Opium Act and not from Section 169 of the Code. He has to maintain a diary of the proceedings of his investigation and, again, the obligation is cast on him not by Section 172 of the Code, but by Section 20J of the Opium Act. and lastly, he forwards the accused persons, if arrested, to a Magistrate and makes his report of the offence under Section 20G of the Opium Act

and not under Sections 170 and 173 of the Code. Indeed, it appears that even if a Police Officer and not an Excise Officer investigates an offence under the Opium Act, he has to do so, not under Chapter XIV of the Code but under the provisions of the Opium Act itself. Where the offence is a non-cognizable one and there is no direction by a competent Magistrate to investigate it, no question of proceeding under Chapter XIV of the Code and making a report under Chapter XIV can at all arise, even in the case of a Police Officer. In the case of an Excise Officer, to proceed under Chapter XIV of the Code in any circumstances is altogether out of the question.

18. It is interesting to note that as regards the powers of an Excise Officer to make an investigation and the exercise of those powers, the provisions of the Bengal Excise Act, which is not concerned with opium, are markedly different. Section 74(1) of the Act authorizes Excise Officers, specially empowered in that behalf, to exercise the powers of investigation conferred on a Police Officer by Sections 160 to 171 of the Code and sub-section (4) of the section requires them, if they find at the close of the investigation that there is sufficient evidence to justify the forwarding of the accused to a Magistrate, to submit a report which, it is said, "shall for the purposes of Section 190 of the Code of Criminal Procedure, 1898, be deemed to be a police report". It is to be noticed that unlike Section 20G of the Opium Act, Section 74(4) of the Bengal Excise Act uses the expression 'police report' and not 'report in writing made by a police officer'. and then there is sub-section (3) of Section 74 which provides that

> "For the purposes of Section 156 of the Code of Criminal Procedure, 1898, the area to which an Excise Officer empowered under Section 73, sub-section (2), is appointed, shall be deemed to be a police-station and such officer shall be deemed to be the officer in charge of such station."

19. Whether the provision in effect makes an investigation under the Bengal Excise Act an investigation under Chapter XIV of the Code and whether Section 74(4) makes the report submitted on the conclusion of such investigation a 'police report' for the purposes of Section 251A is a question which will have to be decided when a proper- occasion for it arises. It is sufficient to note here that, in the Opium Act, there are no provisions like those in the Bengal Excise Act which approximate the investigation under that Act very closely to an investigation under Chapter XIV of the Code, if they do not completely identify one with the other.

20. So far as the present case is concerned, the Excise Department treated the offences charged against the accused as non-cognizable. If they were so, the case against the accused was instituted on a report made by an Excise Officer of certain non-cognizable offences. The report might be, by reason of the provisions of Section 20G of the Opium Act, a report in writing made by a Police Officer, but it was not a 'police report', as contemplated by the Code. Even if the offences were cognizable, the report was not a police report because there was not and could not be any investigation under Chapter XIV of the Code and the report was not made under Section 157 or Section 173. The challan described itself correctly as a 'Report to Magistrate under the Opium Act', because it was under Section 20G of that Act that the report was made. The preliminary condition to be satisfied by a case if section 251A of the Code is to apply to it. was thus not satisfied. Nor could Section 251A really work, if it was sought to be applied. Although it is true that there may not be in every case all the documents mentioned in Section 173(4), it is

nevertheless clear that like Sections 207A (3) and 207A (6), Section 251A(1) contemplates that there has been an investigation under Chapter XIV. Otherwise, there could be no meaning in the section saying that the Magistrate must satisfy himself that all the documents mentioned in Section 173 have been furnished to the accused. As I have already pointed out, except confessions or statements recorded under Section 164, those documents could come into existence only in the course of an investigation under Chapter XIV. If Section 251A was sought to be applied in the present case, it would be found that the provisions of sub-section (1) could not be complied with, because there was neither any first information recorded under Section 154, nor any statement recorded under Section 161, nor any report forwarded under Section 173(1), of which copies could be furnished to the accused. It appears from the order-sheet that copies of certain documents were furnished to the accused, obviously in Purported compliance with Section 251 A(1), but whatever they were, they could not be copies of any of the documents mentioned in Section 173 and therefore there was no real compliance with the section. If copies of the documents mentioned in Section 173 could not be and were not furnished and if no such documents were in existence, as they were not, the proceeding, as a proceeding under Section 251A, could make no further progress, because the next step, as laid down in sub-sections (2) and (3), could be taken only "upon consideration of all the documents referred to in Section 173" and "upon such documents being considered". It is thus obvious that Section 251A of the Code is not so designed as to be applicable to a case of an offence or offences under the Opium Act instituted on a report made by an Excise Officer.

21. For the reasons given above, this Rule is made absolute and the proceedings so far had under Section 251A of the Code are quashed. The learned Magistrate will proceed with the trial in accordance with law, i.e., in accordance with Section 252 of the Code and the sections immediately following.

K.C. Das Gupta, J.

6. I agree.

Rule made absolute.