

BOMBAY HIGH COURT

Nanoo Sheikh Ahmed

Vs

Emperor

(Marten, J.)

31.08.1926

JUDGMENT

Marten, C.J.

1. The question for this Full Bench is: Is an Abkari-officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act. exercises the powers conferred by the Code of Criminal Procedure 1898, upon an officer in charge of a police station for the investigation of a cognizable offence, a Police officer within the meaning of Section 25 of the Indian Evidence Act ?

2. The case itself has a somewhat sordid, if not petty, origin. The accused are alleged to have fallen into a trap laid for them by an Excise officer, and to have sold to him two bottles of beer under the mistaken belief that he was visiting the brothel in which the accused are apparently interested. The Magistrate has fined the accused Rs. 10 and Rs. 20 respectively, and they applied in revision to the High Court.

3. In convicting the accused, the Magistrate has relied upon a certain confession alleged to have been made by them to the Excise officer. It is contended that this confession was inadmissible in evidence having regard to Section 25 of the Evidence Act. Accordingly, the Division Bench have submitted, this question to the Full Bench for decision.

4. Now Section 25 of the Indian Evidence Act provides: No confession made to a Police officer shall be proved as against a person accused of any offence

5. I may also refer to Section 125, which provides: No Magistrate or Police officer shall be compelled to say whence he got any information as to the commissions of any offence, and no Revenue officer shall be compelled to, say whence he got any information as to the, commission of any offence against the public revenue.

Explanation.--'Revenue officer' in this section means any officer employed in or about the

business of any branch of public revenue.

6. Was then the Excise officer, in the present case, a Police officer within the meaning of Section 25 ? Now, it is quite clear that, under the Bombay Abkari Act 1878 as amended by subsequent Acts, certain important powers possessed by the ordinary police under the Criminal P.C. are given to particular Abkari officers.

7. Section 41 provides:

(1) Every Abkari officer not below such rank as Government may prescribe shall within the area for which he is appointed have power to investigate all offences punishable under this Act.

(2) Every such officer shall in the conduct of such investigation exercise the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence....

8. Then by Section 36 of the Abkari Act they have powers of entry into buildings, and of detention, search and arrest of persons, who, they have reason to believe, are; guilty of offences under the Abkari Act. There are also certain special powers of arrest under Section 38 A ; and Section 38 B provides for what is to be done as regards a person arrested under Section 38 A. Section 38 C provides: The provisions of Section 61 of the Code of Criminal Procedure, 1898, shall apply to all arrests made without warrant by Abkari officers.

9. Then, under Section 40, any Abkari officer' duly empowered in this behalf may issue a warrant for arrest and search.

10. Next, if one turns to the Criminal P.C. it will be found in Chapter XIV, what are the powers conferred upon an officer in charge of a police station with regard to cognizable offences. The sections in that Chapter mainly deal with investigation. They include the important power of examining persons supposed to be acquainted with the facts : see Section 161. The powers of arrest, so far as the Criminal P.C. is concerned, are contained in other sections. But, even though an arrest by an Abkari officer in any particular case may be under the express provisions of the Abkari Act, yet it is clear that the highly important stage of investigation, which is conducted ordinarily under the Criminal P.C. by an officer in charge of a police station, may here be conducted, not by that officer, but by an Excise officer. The result, in my opinion, is that either under the one Act or the other, viz., the Abkari Act or the Criminal P.C., the learned Magistrate has been correct in saying: The powers of the Excise and police officers are identical as regards the arrest of accused persons, their detention in custody, and investigation of offence.

11. Substantially, therefore, to all intents and purposes, we get here a person exercising all the

material powers of a Police officer, although he is not officially called by that name, but by the name of an Excise officer.

12. Now, what was the object of Section 25 of the Evidence Act ? It was, I take it to prevent the abuse of their powers by the police in this country in extorting confessions from persons in their custody ; and I take it that one of the most important periods, during which the accused persons were intended to be protected by the Legislature, was when the case was being investigated by the Police officers and when the accused were perhaps solely in police custody and not allowed to see any other person. Therefore, so far as the spirit of the Act is concerned, we have the same possibilities of evil, when an Excise officer investigates a case as we should have in the case of an investigation by Police officers in charge of a police station under the Criminal P.C.,

13. How, then, have the Indian High Courts interpreted Section 25 of the Evidence Act ? The case of *Queen v. Hurribole Chunder Ghose*¹ decided by Chief Justice Sir Richard Garth and Mr. Justice Pontifex, (who also became Chief Justice) is generally regarded as the leading case, and has, at any rate, been followed in this Court. That was a case as to whether a Deputy Commissioner of Police could properly be described as a Police officer within the meaning of Section 25 of the Evidence Act. He was also a Magistrate and it was accordingly contended that the confession having been made to him as a Magistrate, it was admissible under Section 26, and that Section 26 overrode Section 25. Dealing with this argument the Chief Justice at p. 215 says with respect to Section 25:

Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them....I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

14. Then he remarks at p. 216:

...and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

15. Accordingly, it was held that the confession in question was made to a Police officer and was, therefore, inadmissible.

16. In *Queen-Empress v. Bhima*² the question arose as to a Police Patel. It was there held by a Division Bench of this Court that a Police Patel is a Police officer within the meaning of Section 25. The judgment states (p. 486):

We follow *Queen v. Harribole Chunder Ghose*³ in which it was held that the term 'police officer'

in these sections should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, and we are of opinion that the evidence of 'the confession was inadmissible.

17. There is another case in *Queen-Empress v. Salemuddin Sheik*⁴ which was a case of a chowkidar in Bengal, and it was there held, by Mr. Justice Prinsep and Mr. Justice Stanley, that a chowkidar is a Police officer within the meaning of Section 25.

18. I next turn to a decision in *Ah Foong v. Emperor*⁵ by Sir Lancelot Sanderson C.J., and Mr. Justice Beachcroft. Now, that was not a decision under the Abkari Act, but was a decision under the Opium Act. Moreover, this important distinction is to be borne in mind, that though, under the Opium Act of 1878, there was given to the Excise officers certain limited powers of arrest, yet in Bengal, as opposed to Bombay, there have not been conferred on an Excise officer the powers of investigation and so on, which I have already alluded to. Accordingly, the Calcutta Court was dealing with a case where the officer at most had a limited power of arrest. It is urged by the pleader for the accused in his able argument, that this decision of the Calcutta Court was obiter, because the Court held that, in any event, the alleged confessions were not confessions within the meaning of Section 25 or Section 30, as they were really in the nature of exculpatory statements : see page 418. But I am not prepared to distinguish that case on that ground. The Court took the point as to Section 25 first and held that the alleged confessions were admissible under Section 25. Consequently, that was sufficient to dispose of the case, and they need not have gone in to the further point as to whether the alleged confessions could be taken into consideration against the co-accused under Section 30. The judgment of Sir Lancelot Sanderson does not deal in any detail with the point which we have to consider. Substantially, his judgment is contained in these words (p. 419):

I do not think it is possible that the Excise Officers in this case could be said to be Police Officers, and that the statements made by the first and the second accused were not admissible by reason of the fact that they were made to Police officers.

19. Next, we come to the decision of Sir Norman Macleod and Mr. Justice Crump, on April 7 last, in *Pereira v. Emperor*. This was another opium case, and the Court followed the above Calcutta decision. The learned Magistrate in the present case felt himself bound by this Bombay decision, and, accordingly, contrary to his own view, admitted the alleged confession of the present accused in evidence. It appears from the report that the learned Chief Justice considered that the point they had to consider was exactly the same point as in the Calcutta case ; for he says : "The same point was considered in *Ah Foong v. Emperor* [1918] 46 Cal. 411(Supra)." Then, after quoting the Calcutta decision he states: "In my judgment that judgment should be followed. We, therefore, dismiss the appeal."

20. Now, with great respect to the learned Chief Justice, it does not appear to have been made clear to him that in Bombay the powers of the Excise officers under the Abkari Act are far more extensive than in Calcutta. In Bombay the Opium Act has been expressly amended so as to confer upon Abkari officers certain wide police powers, which are very similar to those conferred on them as regards offences under the Abkari Act, e.g., the same powers of investigation as those possessed by an officer in charge of a police station. Under these circumstances, it seems to me that the Calcutta case is clearly distinguishable, and that in following that case, without referring to the important distinction which at present exists between the, powers possessed by the Calcutta and Bombay Excise officers respectively, the tamed Judges in the Bombay case fell into an error.

21. The result is, that there is no authority precisely in point in this case, and we have really to determine, a new point. After giving then my best attention to the arguments, which have been addressed to us, in my judgment we should hold that as the Bombay Legislature has deliberately conferred upon these Abkari officers substantially all the powers of a Police officer, they have thereby, in effect made them Police officers within the meaning of Section 25, and that, accordingly, any confession made, to such an officer in the course of his investigation under the Abkari Act, or the Criminal Procedure Code, is inadmissible in evidence.

22. In this connexion, I should like to point out that it was open to the Legislature or to Government to do one of two or three things. It could detach ordinary Police officers to investigate excise offences. Or, on the other hand, it could appoint other officers of Government or new officers to perform the duties of investigation and arrest and so on, which had previously been performed by ordinary Police officers. Whichever course was adopted, any alleged offence would, in effect, be investigated by persons in the position of policemen. In this very case it would appear that the effect of the above sections of the Abkari Act is that certain duties, which previously fell upon ordinary Police officers, are in fact now being carried out by the Abkari-officers, who have been given these particular police powers. We have even been told by counsel that persons arrested for Excise offences are not now taken to the ordinary police station, but are kept under arrest in the excise chowkies. Whether this is so or not I do not know. At any rate it is sufficient for present purposes to say that many extensive powers were thus conferred on Excise officers which previously could only have been exercised by ordinary members of the police under the Criminal Procedure Code. It seems to me, therefore, not to be an unduly wide construction of Section 25 to say that a Police officer there includes an officer of Government with such wide police powers as those we find here.

23. I should mention an argument addressed to us on Section 125 of the Evidence Act to the effect that, as the Legislature distinguishes there between Police officers and Revenue officers a

similar distinction should be made in construing Section 25. I think the answer to that is given by Mr. Coelho. The Evidence Act was passed in 1872, and this particular provision in Section 125 was passed in 1887, and, therefore, before the present amended sections of the Bombay Abkari Act came in force. For instance the police powers given by the present Sections 41, 41 A, 41 B and 410, were conferred by Section 25 of the Bombay Abkari (Amendment) Act; 1912 (Bom. Act XII of 1912). It may, therefore, be that, since the amending Act of 1912, certain Excise officers in Bombay are Police officers as well as Revenue officers under Section 125. On the other hand it does not follow that every Revenue officer under Section 125 is also a Police officer. It will depend on whether he has had conferred upon him the exceptional powers referred to in the Abkari Act.

24. On a careful consideration, then, of the whole case I would answer the question submitted to us in the affirmative and hold that the confession in question was inadmissible in evidence.

Shah, J.

25. I am of the same opinion, generally, for the reasons given by my Lord the Chief Justice. Having regard to the importance of the point, as also to the fact that in effect we are differing from the view taken by Macleod, C.J., and Crump, J., in *Pereira v. Emperor*, I desire to add a few words by way of further reasons for this conclusion.

26. Having regard to the reason of the rule laid down in Section 25 of the Indian Evidence Act, and having regard to the decisions which have been already referred to, it is clear to my mind that the term Police officer used in the section is not to be understood in any technical sense, but includes an officer who is vested with the powers of the police by law. In the present case the officer concerned has got certain powers under the sections of the Bombay Abkari Act. It is not necessary for me to refer to all the sections under which he has got certain limited powers of arrest and search. But it is important to note that, before the present Section 41 was enacted by the Amending Act (Bom. Act XII of 1912), under the old Section 41 he had practically no powers of investigation, and that, after an accused person was arrested it was part of his duty to send, him to an officer in charge of a police station. That section, as it stood before 1912, was altered by the Legislature and it has been provided in Sub-section (2) of Section 41 that: Every such officer [i. e. the officer referred to in Sub-section (1)] shall in the conduct of such investigation exercise the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence.

27. Taking the other sections of the Act under which he has got certain limited powers of arrest and search along with the powers contained in the Criminal Procedure Code, which a Police officer in charge of a police station is able to exercise, it is clear to my mind that the officer

contemplated by Section 41, Sub-section (1), is virtually in the same position as a Police officer with regard to the investigation of the offences under the Abkari Act. It seems to me a perfectly fair interpretation of Section 25 to say that the Police officer within the meaning of that section is an officer who exercises the powers of police conferred upon him by law, whether he is called a Police officer or he is called by any other name and exercises other functions also under other provisions of law. He is a Police officer within the meaning of Section 25, if, in the investigation of offences under a particular Act, he exercises the powers of an officer in charge of a police station for the investigation of a cognizable offence conferred upon him by that Act. Section 25 of the Indian Evidence Act embodies an important rule, which is to be given effect to as a matter of substance and not as a mere matter of form. It is not merely the name given to an officer that should determine whether he is a Police-officer, but the substantial fact whether he exercises the powers of a Police officer conferred upon him by law should determine it.

28. In taking this view of Section 25, it is essential and quite proper to bear in mind the purpose of the section. That purpose has been already stated. It has been discussed in *Queen-Empress v. Babu Lal*⁶ In the words of Oldfield, J., (p. 513):The broad ground for not admitting confessions made to a Police officer is to avoid the danger of admitting false confessions. 27. That ground would apply as much to an Excise officer exercising the powers conferred upon him by Section 41 of the Abkari Act as amended as to a Police officer.

29. I should add a word with regard to the case of *Pereira v. Emperor* . It is perfectly true, as appears from the judgment, that the learned Judges had before them Section 20 of the Opium Act as amended by Bombay Act II of 1923. But, it is not clear from the judgment as to whether they had before them the fact that Section 20 of the Opium Act was not so amended by any Bengal Act. However that may be the case shows that the learned Judges were prepared to hold that Excise officers exercising the powers, under Section 20 of the Opium Act as amended by the Bombay Act, would not be Police officers. With the utmost respect I am unable to accept that view, which does not appear to me to accord with the true "meaning of Section 25 of the Indian Evidence Act.

Fawcett, J.

30. I am of the same opinion. The view taken in the leading case. *Queen v. Hurribole Chunder Ghose [1876] 1 Cal. 207, (Supra)* that the term 'Police officer' in Section 25 of the Evidence Act should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, is one which was arrived at only four years after the Evidence Act was enacted. That construction has been followed by this Court, as well as other High Courts; and, if the Legislature had considered that that was a wrong construction to put upon the term 'Police officer' in Section 25 of the Evidence Act, the probability is that the section would have been

amended so as to overrule such a construction. Therefore, when the learned Advocate-General contends that Section 25 of the Evidence Act does not cover a Revenue officer, or any other officer on whom by statute certain powers of the police are conferred, and that to say it does cover such an officer is to read the section as if it said " including officers who can reasonably be regarded as Police officers, then the answer is that we are merely acting on a construction adopted by the Courts long ago and tacitly accepted by the Legislature.

31. I think an important fact to be borne in mind is that, prior to the amendment of the Abkari Act by Bombay Act XII of 1912, an Excise officer, after arresting a person, had forthwith to send him to the nearest police station, and the investigation was then conducted by Police officers, whereas now, an Excise officer, if empowered under Section 41, can exercise police powers of investigation, which, cover a certain amount of detention of the accused while the, investigation is going on, so that he has similar opportunities of extorting a confession from an accused. This is an all important difference which distinguishes this case from that of *Ah Foong v. Emperor* [1918] 46 Cal. 411, as has been pointed out by my Lord the Chief Justice.

Kemp, J.

32. I think the question should be answered in the affirmative. I consider, however, that the matter is not entirely free from doubt. It may, with some show of reason, be contended by the Crown that after all an Abkari Inspector is not a 'Police officer'. His pay, pension prospects, and the conditions of his service are different to those of a Police officer. So he is not as an actual fact a 'Police officer.' Moreover, it does not follow that because some of the duties of a particular officer are conferred on any other officer, the second officer thereby becomes a member of the service of the first officer. Nevertheless, I am of opinion that, under the circumstances of this case, the Abkari Inspector, invested with the powers of an officer in charge of a police station under the Criminal Procedure Code, should be regarded as a 'Police officer' under Section 25 of the Evidence Act. It will be noted that, prior to the Bombay Amending Act XII of 1912, any confession made to a Police officer in charge of a police station in the course of his investigation of any offence was disallowed.

33. The Local Government could not have intended, by delegating the investigation of offences under the Abkari Act to an Abkari Inspector, to deprive a person accused of an offence under the Abkari Act of the protection he enjoyed under Section 25 of the Evidence Act before Bombay Act XII of 1912 was passed. To hold otherwise would be to cut down the protection intended to be afforded by Section 25 of the Evidence Act, which is an Act of the Government of India, to accused persons. Although I agree that the term 'police officer' should not be construed as strictly as the Advocate-General contends, I do not, at the same time, agree that it is safe to lay down generally that the term should be construed in its popular and most comprehensive sense. The

popular meaning of the term when Queen v. Hurribole Chunder Ghose [1876] 1 Cal. 207 was decided may not be co-extensive with the popular meaning of the term at any time thereafter.

34. I do not consider it necessary to further discuss the cases. I arrive at my conclusion on the particular circumstances of this case. My answer to the question is in the affirmative.

Mirza, J.

35. I agree that the answer to the question submitted" should be in the affirmative.

Cases Referred.

- 1[1876] 1 Cal. 207
- 2[1892] 17 Bom. 485
- 3[1876] 1 Cal. 207
- 4[1899] 26 Cal. 411
- 5[1918] 46 Cal. 411
- 6[1884] 6 All. 509