

PATNA HIGH COURT

Gulzar Khan

Vs

State (Patna)

Criminal Ref. Nos.16, 116 of 1958 and 32 of 1960

(S.C. Misra, K. Sahai and N.L. Untwalia, JJ.)

24.01.1962

JUDGMENT

Misra, J.

1. These three Criminal references have been heard together, as they give rise to indetical questions of law regarding the power of the Magistrate to ask the accused to give specimen handwriting, signature, thumb impression, finger-print, palm print or foot print for comparison, in course of investigation of the case, by a police officer.

2. Criminal Reference No.16 of 1958 relates to the case of *Gulzar Khan, Ahmad Khan and Daulat Khan v. State, that is¹*, in which the learned City Magistrate of Jamshedpur directed the accused on the 13th November, 1957, to appear before Golmuri police station for giving their finger-prints and foot-prints for the purpose of comparison on the prayer made by the investigating Officer by his petition dated the 23rd October, 1957. These accused persons, had, however, been granted bail by the learned Sessions Judge on the 7th October, 1957. The accused made a grievance of the order of the learned Magistrate. Accordingly, an application was made on their behalf in the Court of the learned Sessions Judge for setting aside the order of the Magistrate, as the order operated as an infringement of the privileges conferred on them under Article 20 (3) of the Constitution of India. The learned Sessions Judge accepted the application and made a reference to this Court for setting aside the order of the learned Magistrate.

3. Criminal Reference No.116 of 1958 relates to the case of *Shiba Prasad Mukherji v. State* under section 379 read with sections 411 and 414 of the Indian Penal Code, pending before the City Magistrate, Jamshedpur, in G.R. Case No.59-A of 1958. On the 17th March, 1958, the learned Magistrate ordered the accused to appear before the Sub-Inspector of Sakchi police station on the 25th March, 1958, to give specimens of his signature for the purpose of comparison on a petition filed by the investigating police officer. The accused filed an application before the learned Sessions Judge, who has referred the case to this Court for setting aside the order of the learned Magistrate on the ground that the order of the learned City Magistrate amounts to an infringement of the privileges conferred on the accused under Article 20 (3) of the

Constitution.

4. *relates to the case of State v. D.J². Minwalla and others* under sections 420 and 120-B of the Indian Penal Code, in which the learned Sub-divisional Officer of Ranchi Sadar ordered the accused persons to appear before the Magistrate to give specimen handwritings and thumb-impressions by the 10th September, 1959, by his order dated the 10th August, 1959. The accused filed a petition before the learned Judicial Commissioner of Chota Nagpur for quashing the order of the learned Sub-divisional Officer, and the learned Judicial Commissioner, by his order dated the 2nd September, 1959, dismissed the application for reference to this Court and made certain observations which purported to accept the points raised on behalf of the petitioners before the learned Judicial Commissioner to the effect that the order of the learned Sub-divisional Officer amounted to an infringement of the privileges conferred upon them under Article 20(3) of the Constitution and, as such, it was fit to be set aside. The learned Sub-divisional Officer, by his order dated the 10th November, 1959, recalled his previous order dated the 10th August, 1959. The State moved the learned Judicial Commissioner again, challenging the propriety of this order of the learned Sub-divisional Officer dated the 10th November, 1959. The learned Judicial Commissioner has referred this matter to this Court, stating that the previous order passed by him (Sub-divisional Officer) on the 10th August, 1959, was a correct order and the order passed by him on the 10th November, 1959 recalling his previous order was incorrect. He has further stated that, though the direction by a Magistrate to an accused person to give his specimen handwriting and his thumb impression under section 73 of the Evidence Act was illegal, such direction to the accused for giving specimen writings and thumb impressions under the Identification of Prisoners Act does not amount to an infringement of the privileges conferred on him under Article 20 (3) of the Constitution of India.

5. Criminal Reference Nos.16 and 116 of 1958 were placed before a single Judge for decision. They were, however, referred to a Division Bench by the learned Single Judge in view of the importance of the points involved in these references, and, the Division Bench had to consider a decision of another Division Bench of this Court in the case of *Anwar Mian v. Md. Quamruzama*³, which took the view that such directions by a Magistrate conflicted with the privileges conferred upon the accused persons under Article 20 (3) of the Constitution of India. My learned brothers, Sahai and Untwalia, JJ., who constituted the Division Bench, however felt doubt about the correctness of the view taken in the above case, and, on a consideration of a large number of cases of various High Courts, referred the cases before them to a larger Bench to have the point authoritatively settled.

6. Criminal Reference No.32 of 1960 was placed before Sahai, J., for decision, and in view of the order passed by the Division Bench of which the learned Judge himself was a member in Criminal Reference Nos.16 and 116 of 1958, he felt that the proper course to be adopted would be to have this case also heard along with the above two cases. Accordingly, this case was also placed before us.

7. At the time these cases were placed before the Division Bench and heard, it was not brought to the notice of that Bench that several cases from various States involving this particular point were pending before the Supreme Court. This fact, however, was brought to our notice and it was suggested that the decision of the Supreme Court be awaited to avoid the accused persons going to the Supreme Court in case the order would be passed against them by this Bench. Now,

it appears that their Lordships have decided this particular point in the case of *State of Bombay v. Kathi Kalu Oghad*⁴, The view of the Full Bench of the Supreme Court in that case includes the view of the ruling Judges, that is, of Sinha, C.J., Imam, Gajendragadkar, Subba Rao, Wanchoo, Dayal, Ayyangar and Mudholkar, JJ., and that of three other Judges, namely, Das, Sarkar and Das Gupta, JJ., who pronounced a different opinion from that of the majority of the Bench. As the conclusion of Das, Sarkar and Das Gupta, JJ., was the same as that given in paragraph 16 of the report by the majority of the Bench stated by Sinha, C.J., it is not necessary for me to refer to the opinion of the minority of the Bench. All the learned Judges have come to the same conclusion on this point, although the minority have given some different reasons for coming to that conclusion. It is unnecessary for me now to refer to an earlier decision of the Supreme Court in the case of *M.P. Sharma v. Satish Chandra*⁵, in regard to the interpretation put by Jagannadhadas, J., on the expression "to be a witness" in Article 20(3) of the Constitution. The position is settled now beyond controversy that the direction by a Magistrate to accused persons to give signature, specimen writings, thumb impressions, finger print or foot prints to be used for comparison with some other signatures, hand-writings, thumb impressions, finger prints or foot prints, which the police may require in the course of investigation will not amount to compelling the accused persons to be witnesses against themselves. We are, therefore, of the view that the order of the learned Magistrate in all these three cases directing the accused persons to give specimen writings, thumb-impressions, finger prints and foot prints was not hit by Article 20 (3) of the Constitution.

8. Mr. S.N. Sahay, appearing in Criminal Reference No.32 of 1960, however, raised the question that the decision of the Supreme Court in the case reported in AIR 1961 SC 1808 did not support the order of the learned Sub-divisional Officer, Ranchi, dated the 10th August, 1959, whereby his client D.J. Minawalla and others were asked to give their specimen handwritings and thumb impressions before the Magistrate. Learned counsel has urged that such an order by the Magistrate could not be justified under section 73 of the Evidence Act only for the purpose of investigation by the police, and he has asked us to make it clear that the Court was not justified or warranted in giving directions to the accused to give specimen writings or thumb impression under the provisions of section 73 of the Evidence Act. The order, therefore, of the learned Sub-divisional Officer before taking cognizance of the case directing the accused during investigation to give their specimen hand-writing and thumb impressions is not in accordance with the terms of section 73 of the Evidence Act. The argument cannot be acceded to. Even in the aforesaid decision of the Supreme Court, in Criminal Appeal No.146 of 1958 filed by the State of Bombay, (see AIR 1961 SC 1808) the police obtained from the accused three specimen handwritings to show whether a chit, Exhibit 5, was in the handwriting of the accused in course of the investigation of the case, and it was held to be inadmissible by the Bombay High Court, for a different reason from the one contended for by Mr. S.N. Sahay. The Supreme Court held it to be admissible and that is a complete answer to the ground advanced by learned counsel that the order of the Magistrate of the subsequent date should be upheld. The position appears to be similar in the Punjab case inasmuch as the investigating police officer obtained from the accused impressions of the palms and fingers of the accused for comparison with the palm and finger impressions left on the glass panes and phials in the burgled house in presence of a Magistrate. It was only in the Calcutta case - all the three cases having been disposed of by one common judgment - that the accused was produced before a Magistrate and released on bail. In none of the three cases, however, was the order passed by the Court when trial had begun as appears to be the contention of Mr. S.N. Sahay based apparently on paragraph

2 of section 73 of the Evidence Act. Apart from this decision as well, there is no warrant for this line of reasoning as, so far as giving of thumb-impression, finger print or palm print is concerned, it is covered clearly by the terms of section 5 of the Identification of Prisoners Act (Act 33 of 1920) which refer to a Magistrate and not to Court. But, even in regard to section 73 of the Evidence Act, the word 'Court' therein must be equated with the Court of the Magistrate in a case triable by him or before it is committed to Sessions in a case triable by the Court of Session. As a matter of fact, in every case where the accused is arrested and he is required to give his specimen handwriting or signature, or thumb impression etc., he is arrested under a warrant which must be issued by a Magistrate or when the police arrest without a warrant in a cognizable offence under section 60 of the Code of Criminal Procedure, he must be produced before a Magistrate without unreasonable delay and follow the procedure under sections 60 to 63 of the Code as also under Article 22 of the Constitution of India and that attracts the provisions of section 73 of the Evidence Act. In none of the numerous cases, has this point been specifically raised on this account and this contention also fails accordingly.

9. Learned counsel has urged further that the order passed in this case by the learned Sub-divisional Officer was also to the effect that it was not necessary now for the accused persons to give their specimen handwritings and thumb impressions as directed by his order dated the 10th August 1959. It will, therefore, not be proper to set aside the order of the learned Sub-divisional Officer dated the 10th November, 1959, even if the reference by the learned Judicial Commissioner be accepted. It appears, however, that the order in question was passed by the learned Sub-divisional Officer because of the observation by the learned Judicial Commissioner in his order dated the 2nd September, 1959. In fact, this observation created doubt in his mind as to the propriety of the observation. Since, however, the observation was made by the learned Judicial Commissioner, there was possibility of another application being again made before him, and hence the learned Sub-divisional Officer recalled his order dated the 10th August, 1959. The learned Judicial Commissioner, accordingly, made a reference to this Court for quashing the order of the learned Sub-divisional Officer dated the 10th November, 1959. If, therefore, the view that we have taken of the effect of the decision of the Supreme Court in the case reported in AIR 1961 SC 1808 be correct, the proper order to be passed would be to quash the order of the learned Sub-divisional Officer dated the 10th November, 1959. I, therefore, hold that the order of the learned Sub-divisional Officer dated the 10th August, 1959, was a correct order and the order dated the 10th November, 1959, reversing the previous order was incorrect. The result, therefore, is that the reference made by the learned Judicial Commissioner is accepted and the order of the learned Sub-divisional Officer dated the 10th November, 1959, must be quashed. The case before him must now proceed in due course.

10. It follows, further, that the references made by the learned Sessions Judge of Dhanbad-Singhbhum in Criminal Reference Nos.16 and 116 of 1958 cannot be accepted. These two references are, accordingly, discharged.

Sahai, J.

11. I agree.

Untwalia, J.

12. I agree.

Order accordingly.

Cases Referred.

¹ G.R. Case No.790 of 1957

² Criminal Reference No.32 of 1960

³ Cri. Revn. No.240 of 1960, D/-9-8-1960

⁴ AIR 1961 SC 1808

⁵ AIR 1954 SC 300