

(1987) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 706 of 1987

Dhulipalla Veeraiah Choudary

APPELLANT

Vs

Kurra Veeraiah and Another

RESPONDENT

Date of Decision : 15-09-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 165, 200, 482, 91
Evidence Act, 1872 — Section 123, 124, 139, 73

Citation : (1987) 2 APLJ 426

Hon'ble Judges : G. Radhakrishna Rao, J

Bench : Single Bench

Advocate : C. Padmanabha Reddy, for the Appellant; T. Bali Reddy and Addl. Public Prosecutor, for the Respondent

Judgement

1. The Munsif Magistrate, Ponnur allowed CrI.M.P. No. 234/87 and issued summons to the accused for the production of the Fiat Car bearing No. ATG 666 before the court on or before 7-9-1987. The accused contended that the court has no power to issue the search warrant for production of the car. The Munsif Magistrate rejected the contention of the accused and allowed the petition. Against that, the present petition has been filed under S. 482, Cr.P.C. to quash the proceedings.

2. The facts leading to the filing of the petition before the Magistrate are as follows :

A private complaint has been filed under S. 200, Cr.P.C. against the accused (petitioner herein) for offences punishable under sections 420 and 406, IPC on 16-4-1987. The complaint was forwarded to the Superintendent of Police, Guntur, for investigation and report. The S.I. of Police, Ponnur registered the case in Crime No. 131/87 under sections 420 and 406 IPC on 13-8-1987 at 10-30 a.m. The FIR reached the Magistrate on 13-8-1987 at 5-45 p.m. After the receipt of the FIR, the same was informed to the complainant and the private complaint was closed. As summons have already been issued for the production

of the car, the accused filed CrI.M.P. No. 635/87 under S. 91, Cr.P.C. and also CrI.M.P. No. 636/87 under sections 91 and 93, Cr.P.C. In CrI.M.P. No. 635/87 the accused requested the court to drop the further proceedings in the matter. In CrI.M.P. No. 636/87 the accused requested the Court to vacate the ex parte orders passed in CrI.M.P. No. 234/87 directing the production of the car pending disposal of the case. All the three petitions were disposed of by the Magistrate holding that the court has got power under S. 91, Cr.P.C. to issue summons to the accused for the production of the car.

3. The case that is set up by the complainant is that he is having a driving licence and he purchased the car ATG 666 to ply it as a taxi. The accused entered into an agreement with him and agreed to pay Rs. 2,000/- per month for use of the car. The case of the accused is that due to some difficulty he could not take the vehicle in his name as the complainant is his relation and as he was also having a licence, the vehicle was taken in his name and he paid the instalments and the agreement set up by him is false and previously the matter was reported to the Police and the same has been closed on the advice of the APP Gr. II as the issue of a civil nature.

4. Sri Padmanabha Reddy contended that the direction given by the Magistrate for the issuance of summons to the petitioner (accused) for the production of the vehicle before Court on 7-9-1987 is illegal and without jurisdiction. It is also contended that the Magistrate did not take the complaint on file, but he referred the same to Police for investigation and report under S. 156(3), Cr.P.C. and since the court has not taken cognizance of the offence on the basis of the complaint, the jurisdiction to pass an order under S. 91, Cr.P.C. will arise only if the police filed a chargesheet. It is also contended that the investigating agency did not think it necessary or desirable to seize the vehicle and they did not file any application for issue of summons.

5. Whether the complaint as alleged is of a civil nature or not is not necessary for us to decide in this petition. The point involved in this case is when once the Magistrate has referred the private complaint under S. 156(3) Cr.P.C. has he got any power to issue summons under S. 91, Cr.P.C. to the accused for the production of the vehicle. In effect, the substance of the contention that has been raised is when there is no case pending before the Magistrate and when the Magistrate is aware of the fact that the matter has been under investigation by the Police in Crime No. 131/87, the court has no power under S. 91, Cr.P.C. to issue summons to the accused for the production of the vehicle.

6. Chapter VII of Cr.P.C. 1973, deals with the process to compel the production of things. Section 91, Cr.P.C. reads as under :-

"(1) Whenever any Court or 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 proceedings under this Code by or before such Court or officer such Court 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 of the causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this Section shall be deemed -

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872, or the Bankers' Books Evidence Act, 1891, or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

A perusal of S. 91, Cr.P.C. discloses that this section confers power on the court to summon any document or thing if it finds that the summoning of such document or thing is desirable in the interests of justice and that such power can be exercised even for the purpose of framing proper charge. The word "whenever" with which S. 91 begins indicates that the court is empowered to do so whenever the court finds it necessary or desirable to act upon that provision. It has been found that the accused is entitled to apply under S. 91 Cr.P.C. for summoning the documents on which he wants to rely even before charges are framed and the Magistrate is empowered to do so, provided that he deems it necessary or desirable. (See K.V. Rama Krishna Reddy Vs. The State, ; In Re: Somiah and Others, and In Re: Dr. Raghotham, .

7. The Supreme Court in Shyamlal Mohanlal Vs. State of Gujarat, while considering Art. 20(3) of the Constitution of India and S. 94, Cr.P.C. (Old) and S. 96, Cr.P.C. (Old) observed as follows :-

"We may mentioned that the question about the constitutionality of S. 94(1), Cr.P.C., was not argued before us, because at the end of the hearing on the construction of S. 94(1) we indicated to the counsel that we were inclined to put a narrow construction on the said section, and so the question about its constitutionality did not arise. In the course of arguments, however, it was suggested by Mr. Bindra that even if S. 94(1) received a broad construction, it would be open to the Court to take the view that the document or thing required to be produced by the accused would not be admitted in evidence if it was found to incriminate him, and in that sense S. 94(1) would not contravene Art. 20(3). Even so, since we thought that S. 94(1) should receive a narrow construction, we did not require the advocates to pursue the constitutional point any further.

Keeping the above consideration in mind, let us look at the terms of the Section. It will be noticed that the language is general, and prima facie apt to include an accused person. But there are indications that the Legislature did not intend to include an accused person. The words "attend and produce" are rather inept to

cover the case of an accused person. It would be an old procedure for a Court to issue a summons to an accused person present in Court "to attend and produce" a document.

The argument pressed on us that the "person" referred to in the latter part of S. 94(1) is broad enough to include an accused person does not take into account the fact that the person in the latter part must be identical with the person who can be directed to produce the thing or document, and if the production of the thing or document cannot be ordered against an accused person having regard to the general scheme of the Code and the basic concept of Criminal Law, the generality of the word "the person" is of no significance.

Mr. Bindra invited our attention to S. 139 of the Evidence Act, which provides that a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness. But this section has no application to the police officer and it will be noticed that S. 94 provides for two alternative directions; the first is "attend and produce" and the second directs him to attend and produce he cannot comply with the direction by causing a document to be produced.

If, after a thing or a document is produced, its admissibility is going to be examined and the document or thing in question is not going to be admitted in evidence if it incriminates the accused person, the order to produce the thing or document would seem to serve no purpose; it cannot be overlooked that it is because the document or thing is likely to be relevant and material in supporting the prosecution case that on most occasions the power under S. 94(1) would be resorted to, so that on the alternative view which seeks to exclude incriminating documents or things, the working of S. 94(1) would yield no useful result.

It is argued by Mr. Bindra that this construction of S. 94 would render S. 96 useless for no search warrant could be issued to search for documents known to be in the possession of the accused. This may be so but a general search or inspection can still be ordered. As far as the Police is concerned, he can use S. 165, Cri.P.C."

The Supreme Court finally arrived at the conclusion that S. 94 (Old) on its true construction, does not apply to accused person. The same view has been followed by a Division Bench of the Bombay High Court in *Vinayak Purushottam Kalantre Vs. Vikram Balwantrao Deshmukh and Others*, wherein it was held that where it is intended to require an accused person to produce a document which is incriminatory in nature, a summons cannot be issued.

8. Sub-section (1) of S. 91, Cr.P.C. which deals with summons to produce any document, merely the court to issue a summons to a person in whose possession or power such document is believed to be, requiring him to "attend and produce it, or to produce it, at the time and place stated in the summons". According to sub-section (2) a person required under the Section merely to produce a document shall be deemed to have complied with the requisition if he "causes

such document to be produced instead of attending personally to produce the same." There is nothing in the chapter to provide that the person who appears in the Court, in pursuance of its summons under sub-section (1) of S. 91, thereby becomes a witness and can be examined and cross-examined by the court although he has not been cited as a witness in the proceedings. It is also permissible for the Magistrate to order a search if it appears to him that the requirements of that Section had been fulfilled. But the Court has no power to issue summons to produce a document or thing by the accused which is incriminatory against him.

9. In this case, it is evident from the facts that the private complaint which has been filed by the complainant, has been referred to the Police and a case has been registered and the FIR has been communicated to the court. For all purposes after the registration of the case, the person against whom the allegation has been made, has to be treated as an accused. What S. 91 contemplates is whenever any court or any officer of a Police Station considers that the production of any document or thing is necessary or desirable in any inquiry, trial or other proceeding, they can direct issue of summons to produce such document or thing. It is left for the investigating agency only to seize the document or thing. For that, they can as well avail the provisions contained in S. 93, Cr.P.C. with regard to the issuance of search warrant.

10. In this context, the court should not lost sight of the provisions that have been made under diverse statutes compelling a person, including the accused to supply evidence against himself. For instance, by S. 73 of the Evidence Act, the Court is authorised in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, to direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. It has been held that this power extends to calling upon an accused person to give his writing in court and make it available for comparison by an expert : See *Emperor v. Nga Tun Hlaing* AIR 1924 Rang 115 : (1925) Cri LJ 108. Section 4 of the Identification of Prisoners Act, 1920, obliges a person arrested in connection with an offence punishable with rigorous imprisonment, if so required by a Police officer to give his measurements. Section 5 of the Act authorises a Magistrate for the purpose of any investigation, or proceeding under the Code of Criminal Procedure to order any person to be produced or to attend at any time for his measurements or photograph to be taken, by a police officer, Similarly u/s 129A of the Bombay Prohibition Act, 1949, the Prohibition Officer is authorised to have a person suspected to be intoxicated, medically examined and have his blood tested for determining the percentage of alcohol therein. Officer of resistance to production of his body or the collection of blood may be overcome by all means reasonably necessary to secure the production of such person or the examination of his body or the collection of the blood necessary for the test Section 16 of the Arms Act 11 of 1878 requires a person possessing arms, ammunition or military stores,

when such possession has become unlawful, to deposit the same at the nearest police station and S. 32 of the Act requires all persons possessing arms of which a census is directed by the Central Government to furnish to the person empowered such information as he requires. There are also provisions in the Motor Vehicles Act 4 of 1939 like Sections 87(1) and (2), 88 and 89 which require a person to furnish information even about his own complicity in the commission of an offence. Statutory provisions were also made compelling the person to produce information or evidence in any proceeding which may involve imposition of penalties against him. It is necessary to multiply instances which impose a duty to give information even if the giving of information may involve the person giving information to incriminate himself. No doubt, these provisions are, *prima facie*, inconsistent with the protection against self-incrimination as recognised under the common law of the United Kingdom or in the constitutional protection conferred by the Fifth Amendment of the American Constitution.

11. Barring the statutory provisions that have been made which compel a person to produce information or evidence which may involve or incriminate himself, we have to construe that under S. 91, Cr.P.C. when the matter is in the investigation stage, either on a private complaint referred by Court or on a case registered on a Police complaint, the court is not entitled to pass any order by issuing summons or warrant against the accused for the production of a document or thing that is in his custody which is incriminatory against him.

12. In this case, along with the private complaint, an application has been filed for the production of the Car ATG 666 and the same has been ordered. The order that has been made by the Magistrate invoking the provisions under S. 91, Cr.P.C. directing the accused to produce the vehicle which is incriminatory in nature, cannot be sustained.

13. In the result, the order of the Magistrate is quashed. The petition is allowed.

14. Petition allowed.