

(1933) 10 BOM CK 0012

In the Bombay High Court

Case No : Criminal Application for Revision No. 261 of 1933

Emperor

APPELLANT

Vs

Joquim Alphonso

RESPONDENT

Date of Decision : 10-10-1933

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 517, 651A, 94, 96
Penal Code, 1860 (IPC) — Section 380, 420, 467, 471

Citation : (1934) ILR (Bom) 152

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Advocate : Bahadurji and Little and Co, for the Appellant; Jamshed Kanga, General, B.G. Rao, Officiating Government Pleader and G. Louis Walker, Government Solicitor, for the Respondent

Judgement

Broomfield, J.—This is an application for revision of orders purporting to have been passed under Sections 94 and 96 of the Code of Criminal Procedure by the Presidency Magistrate, Third Court, Bombay.

2. The relevant facts are few and simple. In a case which is now pending before the learned Magistrate the allegations of the prosecution are as follows: On May 25, 1933, the accused stole a blank cheque form belonging to the complainant, who has an account in the Chartered Bank of India, Australia and China. On this form he drew a cheque for Rs. 6,000 and forged the complainant's signature thereon. He then obtained a sum of Rs. 6,000 from the Chartered Bank in the form of six notes of one thousand rupees each. These notes he changed in the Currency Office into sixty notes of one hundred rupees. On May 29, he opened a savings bank account in Lloyd's Bank, Bombay, with Rs. 5,000 of this money. Subsequently on June 5 he withdrew Rs. 1,000 by a cheque leaving a balance to his credit of Rs. 4,000. He is being prosecuted for offences under Sections 380, 467, 471 and 420 of the Indian Penal Code. On July 7, 1933, the Police made an application to the Court requesting that the Manager of Lloyd's Bank should be ordered to produce Rs. 4,000, the balance to the credit of the accused in his

account with the Bank. On July 10 the Magistrate issued a letter of request to the Manager of the Bank asking him to depute a clerk to attend the Court and give evidence in the case on behalf of the prosecution and to produce Rs. 4,000, " the balance to the credit of the accused in his savings bank account out of Rs. 5,000 deposited by him on the 29th of May." The Bank objected that there was no property of the accused capable of production but only a credit entry. The Magistrate adjourned the matter for arguments and after a full discussion made the order, which is the subject of this revision application, on July 28, 1933. By this order Lloyd's Bank was given time until 2-30 p.m. on that day to produce the sum of Rs. 4,000 in Court failing which it was ordered that a search warrant should issue for the production of the same. The money was not produced, and the Magistrate then on the same day issued a search warrant authorizing the Police to search for " the amount of Rs. 4,000 in the Lloyd's Bank, Limited, and to produce the same forthwith before the Court." It appears that the Police Officer went to the Bank and called upon the Manager to produce Rs. 4,000. The Manager told his cashier to bring a sum of Rs. 4,000, and he did so in the form of four notes of one thousand rupees. No particular significance attaches to the form in which the money was paid, or rather the only thing that is significant is the absence of any significance. The money might just as well have been paid in small notes or in cash. It was simply a sum of Rs. 4,000.

3. In this revision application Mr. Bahadurji appears on behalf of the Bank, and contends that the orders of the learned Magistrate are not justified by the provisions of Section 94 of the Code. That Section provides that:

Whenever any Court. . . considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court . . ., such Court may issue a summons ... 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...

4. Mr. Bahadurji has adopted the very full argument which was placed before the learned Magistrate. Very briefly his contentions are that it cannot be said that any notes amounting to Rs. 4,000, not being the particular notes received by the alleged forger, could be necessary or desirable for the purposes of the investigation of the charges of theft,, forgery and cheating. These notes which have been produced can afford no assistance to the Court whatever. Moreover, there was no money in the possession of the Bank which could be claimed as the property of the depositor, i.e., the accused, or the complainant, or could be claimed as in any way connected with the case before the Court. On deposit of the money the Bank became the owner of it. The relationship between the Bank and its client is that of debtor and creditor. The learned Counsel referred to Grant on Banking, (Sic) and 3, and the cases there cited, also to Halsbury's (Sic) of England, 1st edition, Volume 1, Article 1192, and the (Sic) of *Foley v. Hill*. (1848) 2 H.I.C. 28. It is not necessary to refer to these authorities because the learned

Advocate General has conceded that the money deposited by the accused became the property of the Bank.

5. Mr. Bahadurji has also contended that the " thing " referred to in Section 94 must be some specific thing which may be evidence of the offence to be inquired into, or, at any rate, is in some way connected with the offence. He concedes that an order u/s 94 might be passed with reference to an order to be passed, by the Court u/s 517 disposing of the property produced before it. but as in this case the Court must in any event return the money to the Bank, no order u/s 94 with that object could be either necessary or desirable under the circumstances.

6. In my opinion, there is no satisfactory answer to these arguments. The learned Advocate General who has appeared for the Crown frankly concedes that he is unable to support the orders complained of. No doubt, the language of Section 94 is very wide. If it were to be taken quite literally, it might appear that anything whatever which is capable of being produced, i.e., anything tangible and moveable, might be ordered to be produced if the Court chose to consider its production necessary or desirable for the purposes of any proceeding before it. But no such absolute discretion can be contemplated. The Court's discretion must be exercised judicially. Anything which may reasonably be regarded as forming part of the evidence in the case may of course be ordered to be produced, and, that, I should say, is the primary object of these provisions. Some things not necessary for evidentiary purposes may also come within them if there is any direct connection between the thing and the subject-matter of the proceeding for instance, if the thing forms part of the proceeds (Sic). There is nothing to prevent an order being made (Sic) Section 94 for the production of a thing in (Sic) of an order to be made u/s 517 at the close of the trial, and there may be cases in which it is very proper to make such an order. But before doing so, the Court obviously ought to consider the nature of the order which it will be in a position to make u/s 517. It would be futile to order the production of a thing, not required as evidence for the purposes of the inquiry or trial itself, if the only order which the Court can make with respect to_ it will be that it should be returned to the person producing it. But what is the position in this case ? Neither the accused, nor the complainant through the accused, can possibly have any right to any particular sum of money lying in Lloyd's Bank. The accused has a credit for Rs. 4,000, an actionable claim for that amount. That claim can be proved--it has been proved by the production of the accounts--but it cannot be produced in Court. What has been ordered to be produced and has been seized is a part of the assets of the Bank. It has no value as evidence. It is not evidence of any fact except that the Bank possesses Rs. 4,000 which is irrelevant and anyhow may be taken for granted. The order in this case can only have been made with an eye to a subsequent order disposing of the money produced. But this money is obviously not part of the proceeds of the alleged offence. It has no real connection with the subject-matter at all. Whether the accused be convicted or whether he be acquitted, it cannot legally be disposed of except by ordering it to be returned to the owner, i.e., the Bank which produced it.

7. On general principles, therefore, apart from authority, the orders of the learned Magistrate cannot, in my opinion, be supported. He considered that the ruling in the case of *In the matter of the, complaint of H.H. the Nizam of Hyderabad v. A.M. Jacob* (1891) 19 Cal. 52. may be applied. I can find nothing in that decision or in the reasoning on which it was based which affords any warrant for the procedure adopted here. In the first place, there was no question there of ordering production of anything with a view to a subsequent order u/s 517: see the remarks of Mr. Justice Beverley at page 60, and of Mr. Justice Ameer Ali, at page 65. In the second place, the property there was held necessary for evidentiary purposes. It consisted in part of certain currency notes admittedly received by the accused in the course of what was alleged to be an offence. It also consisted in part of smaller notes into which some of the original notes had been converted. But the circumstances of the case were such that the Court could hold and did hold that all the notes were connected with the subject-matter of the charge and were part of the proceeds of the offence. That being so it is not necessary to discuss the case further. I shall only refer to the particular passages on which the learned Magistrate appears to have relied. He cites a remark of Mr. Justice Beverley at the foot of page 61 of the report:

Similarly, as regards the proceeds of the five notes that have been cashed, we are of opinion, upon the authorities cited, that if these proceeds can be reasonably connected with the subject-matter of the charge, the Magistrate has power to order their production in Court.

8. Naturally that would be so. The learned Magistrate goes on to say:

The large amount deposited with Lloyd's Bank by the accused and the close proximity of the dates of commission of the alleged offence and the deposit of the monies raised a very reasonable connection between the commission of the alleged offence and the deposit of the monies, that these are the very monies or the proceeds thereof which were obtained from the Chartered Bank as the result of a criminal offence.

9. Now, that in my opinion, is obviously not so. No doubt, it may be said that there is a connection between the offence and the deposit, but there is no connection whatever between the offence and these particular monies which were attached from the Bank. The learned Magistrate might just as well have ordered the Police to seize the furniture of the Bank of the value of Rs. 4,000.

10. The other passage on which the learned Magistrate has relied is in the judgment of Mr. Justice Ameer Ali at page 64. From there he cites the following observations:

The thing called for must have some relation to, or connection with, the subject-matter of the investigation or enquiry, or throw some light on the proceeding, or supply some link in the chain of evidence. It may be that the thing called for may turn out to be wholly irrelevant to the enquiry ; but so long as it is considered to be necessary or desirable for the purposes of the enquiry, the power is there.

Any other view of the scope and object of this Section will paralyse the administration of criminal justice, and render many enquiries into alleged offences wholly infructuous, for once the subject-matter of an offence has changed hands or has changed shape, the investigation must come to an end.

11. Now, with respect, I entirely endorse the observations in the first part of this passage. But here, as I have shown, the thing called for has no relation to or connection with the subject-matter of the investigation. It throws no light on the proceedings. It supplies no link in the chain of evidence. As regards the considerations referred to in the latter part of the passage, they have, in my opinion, no application here at all. There is no question of the administration of justice being paralysed or the inquiry being rendered infructuous. The primary object of criminal proceedings is the punishment of the offender. Restitution to the injured party is also no doubt a desirable thing, but the criminal Courts are not always in a position to deal with that. Rights of third parties may be involved. One point that the learned Magistrate does not appear to have considered is this. In spite of the attachment of this money, the accused might still draw on his account, and it is, to say the least, doubtful whether the fact that the Court had seized the money would afford any legal justification to the Bank for refusing to honour his cheque.

12. At the conclusion of the judgment there are the following remarks which, I think, probably contain the real reason for the learned Magistrate's order. He says:

If Mr. Baker's contention (i.e. the contention put forward on behalf of the Bank) were correct and were accepted it would lead to this impossible conclusion, namely, that any person in this city could obtain property or monies by a criminal offence. If goods convert the same into monies and on the monies being deposited in & Bank the criminal Courts in this city would have no jurisdiction to call upon the Bank which had received the proceeds of a criminal offence to produce the same. I am sure that this is an untenable position and cannot be correct.

13. Now the argument *ab inconvenienti* has always to be received with caution in the construction of statutes. It is not usually considered admissible unless there is some evident ambiguity. The language of Section 94 is very wide. But if it be reasonably construed, it is not capable, in my opinion, of the interpretation placed upon it by the learned Magistrate. Moreover, I do not consider that the dangers to which he refers are as serious as he apprehends. The money can only be withdrawn on an order of the accused himself. Once it be so withdrawn, it might be regarded as the proceeds of the forgery and might be seized. The powers of criminal Courts to recover fines from convicted persons are very wide and those powers are not exhausted by imprisonment in default. Then again any disposal of the money by the accused pending the decision of the trial might naturally affect the nature of the sentence to be imposed upon him in the event of conviction. The maximum punishment which might be imposed for the

offences for which the accused is being tried is transportation for life. Lastly, the relief which the complainant seeks to obtain by this procedure could certainly be obtained by civil process.

14. The learned Advocate General has suggested that it might perhaps be open to this Court to make an order u/s 561A of the Code of Criminal Procedure directing the accused not to operate upon his account pending the decision of the trial. On the occasion when this case was first heard the accused was not present, and we accordingly ordered a notice to issue to him in order that this matter might be considered. The accused has not appeared. But in the meantime we have considered the matter and are of opinion that this is not a case in which an order under that Section should be made. As the language of the Section shows, it confers no new powers on the Court. It merely provides:

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code (that could not apply here), or to prevent abuse of the process of any Court (that also could not apply) or otherwise to secure the ends of justice.

The use of extraordinary powers ought to be reserved as far as possible for extraordinary cases. They are not usually invoked when there is another remedy available, as there is here by a civil proceeding. There is no precedent for an order of the kind suggested being made by the High Court under its inherent powers. Orders in the nature of attachment before judgment are not altogether consistent with the spirit of criminal proceedings, in view of the presumption that the accused is innocent until he is found guilty. No doubt, the Code of Criminal Procedure does confer some purely preventive powers upon Magistrates and Police, and it may be desirable that criminal Courts should have power in a case like the present to prevent persons charged with offences against property from enjoying the fruits of the alleged crime pending the trial. But, in my opinion, these are matters for the Legislature rather than for the High Court acting u/s 561A. I consider it doubtful whether it can properly be said to be necessary to secure the ends of justice that the Court should make the order suggested, especially when, as I say, the necessary relief must be obtainable somehow or other from the civil Court. In any case I am of opinion that it is not desirable that we should make use of our inherent power to make the order.

15. Therefore, the only order we can make is to set aside the orders of the learned Presidency Magistrate in connection with this money and direct that the money be returned to Lloyd's Bank.