
(1923) 06 CAL CK 0017
In the Calcutta High Court

Government of Assam

APPELLANT

Vs

Sahebulla and Others

RESPONDENT

Date of Decision : 11-06-1923

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 90
Penal Code, 1860 (IPC) — Section 498

Citation : 75 Ind. Cas. 129

Hon'ble Judges : Lancelot Sanderson, C.J.; Thomas Richardson, J.; Panton, J.; N.R. Chatterjea, J.; Buckland, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This is a Reference by two learned judges of this Court sitting as a Criminal Appeal Bench, and the question referred is—"If a Court u/s 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?"

2. In my opinion it is necessary, and, at all events, advisable to state the facts which gave rise to this Reference. One Saifaiuddin took criminal proceedings against certain persons u/s 498 of the Indian Penal Code, alleging that such persons had enticed away Sanaka Bibi, who was alleged to be the complainant's wife. A warrant was issued by the Extra Assistant Commissioner, who was a First Class Magistrate, for the arrest of Sanaka Bibi in order that she might be brought before the Court as a witness in these proceedings. The warrant was in the following form:

To--The Police Officer in charge of thana Salmora.

3. Whereas complaint has been made before me that Kancha Sheik of Dimatola has committed the offence u/s 498, Indian Penal Code, and it appears likely that Sanaka Bibi of Dimatola can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that she will not attend as a witness on the hearing of the said complaint unless compelled to do so:

4. This is to authorise and require you to arrest the said Sanaka Bibi and on the 15th May to bring her before this Court. You will be competent to enlarge the witness on bail of Rs. 50 to make her appear in Court on the date fixed, to be examined touching the offence complained of.

5. Given under my hand and the seal of the Court this the 27th day of April 1922.

Sd, D. Sarma, Magistrate, First Class. 6. When the Police Officers went to execute the warrant at the house of Sahebulla, who was the father of the woman Sanaka, it was alleged that an attack was made upon the Police Officers by Sahebulla and others. Consequently, proceedings were instituted u/s 149, Indian Penal Code, against 29 persons; and the common object of the Unlawful assembly alleged was to resist the execution of legal process, viz., the warrant.

7. The learned Commissioner who tried the case discharged accused Nos. 13 to 29 u/s 253 of the Code of Criminal Procedure.

8. After the evidence, in the case had been finished the learned Pleader for the defence, in concluding his argument, took the point that the Magistrate who issued the warrant did not record his reasons in writing before he issued the warrant and relied upon the decision in Sukheswar Phukan v. Emperor 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186. The learned Pleader argued that the process was illegal and that consequently the offence charged against the accused had not been committed. The Magistrate was of opinion that he must hold, in view of the High Court decision to which I have already referred, that the process was invalid and that the accused had not committed the offence of being members of an unlawful assembly the common object of which was resistance to legal process.

9. Thereupon, the Government of Assam appealed to this Court.

10. The appeal was dismissed as regards 11 of the respondents, but it was admitted against one, namely, Sahebulla. The course was taken, as we were informed by the learned Advocate-General, for the purpose of raising the point which is now in issue.

11. My learned brothers, who were then sitting as the Criminal Appeal Bench, disagreed with the decision in the case of Sukheswar Phukan v. Emperor 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186, and consequently they referred the matter to the Pull Bench.

12. Those are the facts which I think it is necessary for the purpose of my judgment to state.

13. Section 90 of the Criminal Procedure Code provides as follows:

A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest.

(a) If, either before the issue of such summons, or after the issue or the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) If at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

14. The form of the warrant is given in Schedule V, form 7, and the warrant in this case, to which I have already referred, followed the form given in the Schedule.

15. The form in the Schedule, in my opinion, was obviously framed in such a way as to cover all the contingencies contemplated in Section 90; and it might be argued that the Magistrate by signing the warrant thereby recorded his reasons in writing; for, it must be obvious that the Magistrate had signed the warrant before it was issued. The warrant is good and valid on the face of it, and, in my opinion, it is sufficient to inform the person against whom it was issued of the reason for its issue; and, assuming as I do, that in this case the Magistrate was in fact justified in issuing the warrant on the materials before him, I am not prepared to hold that a warrant in such a form would be invalid merely by reason of the fact that the Magistrate did not record in writing on the order-sheet of the case the reason for its issue which might be the same as that which he had stated in the warrant itself, and for which he made himself responsible.

16. The learned Advocate-General has referred to Section 555 of the Code of Criminal Procedure and argued that the provisions thereof were sufficient to absolve the learned Magistrate from doing anything more than signing the warrant in the form prescribed. I am not prepared to accept that argument. In my judgment Section 555 deals with the form of the warrant itself and nothing more, and the words of Section 555, in my opinion, are not intended to supersede the provisions of Section 90.

17. The main ground, however, upon which the learned Advocate-General relied was, that the material word, namely, "after recording its reasons in writing" are not imperative but merely directory and that by reason of the omission of the Magistrate to record his reasons otherwise than in the warrant, the warrant was not invalid.

18. I have already said that, for the purpose of this Reference. I assume that the learned Commissioner had materials before him which would justify the issue of a warrant instead of a summons and that he applied his judicial discretion in the matter.

19. On the question whether the material words are imperative or directory I do not think much assistance, if any, can be obtained from considering the many decisions given on this matter.

20. The principle which ought to be applied in considering whether the provisions

of a Statute or an Act are imperative or directory cannot be better stated, in my judgment, than in the passage which is to be found in the judgment of Lord Penzance in the case of *Howard v. Bodington* (1877) 2 P.D. 203--the passage to which I refer is to be found at page 211: There, Lord Penzance said this:

Mr. Jeune was good enough to refer me to Sir Bonson Maxwell's book "On the Interpretation of Statutes," and to quote a number of cases from it (Maxwell on the Interpretation of Statutes, Chapter XII, Section 3, pp. 330-345). Since the matter was argued I have been very carefully through these cases, but upon reading them all the conclusion at which I am constrained to arrive is that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Borough Bank v. Turner* (1860) 2 De G.F. & J. 502 : 30 L.J. Ch. 379 : 7 Jur. (N.S.) 150 : 3 L.T. (N.S.) 494 : 9 W.R. 292 : 129 R.R. 172 : 45 E.R. 715. Lord Campbell was then sitting as Lord Chancellor in an appeal from the Vice-Chancellor, and in giving judgment, his Lordship said:--"No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the Statute to be construed.

I believe, as far as any rule is concerned, you cannot safely go further than that; in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

21. I adopt that as the principle which ought to be applied in this case; and I do not believe that by searching through the numerous cases which have been decided upon different Statutes and upon different words, we will get any assistance upon such a quest on as the present.

22. The learned Vakil, who argued the appeal on behalf of the respondent and to whom we are much indebted, inasmuch as he took upon himself to argue the case at the request of the Court, submitted that the object of the material words in Section 90 was two-fold: first, to ensure that the Magistrate should exercise his judicial discretion and satisfy himself upon the materials before him that it was right and proper to issue a warrant instead of a summons; and, secondly, to give the person against whom the warrant was issued an opportunity of knowing on what grounds the warrant had been issued, and if necessary testing the legality of the warrant.

23. I am prepared to assume that both of those objects might have been in the

minds of those who were responsible for the drafting of this Act. I think, it is quite possible that they intended to draw attention to the fact that a warrant ought not to be issued, where a summons would suffice, and that care should be exercised by the Court to satisfy itself, upon the materials before it, that it was really necessary to issue a warrant which, of course, might result in the arrest of the person against whom it was directed. Further, it might have been intended that there should be a record in writing, otherwise than in the warrant itself, of the reasons, which induced the Court to issue the warrant, in order that the person affected by it might have no doubt as to the grounds on which the warrant had been issued, in case he or she desired to test the validity of it.

24. But these arguments, to my mind, are not conclusive upon the point; for, it seems to me that if the Magistrate in this case had written upon the order-sheet the reason which was included in the warrant itself, namely, that he had good and sufficient reason to believe that the person, against whom the warrant was issued, would not attend as a witness on the hearing of the complaint unless compelled to do so, it would have been difficult to hold that he had not complied with the section; and, I fail to understand how, if this had been done, the person, against whom the warrant was issued would have been in a better position, if she wished to test the validity of the issue of the warrant, than she would be by reading the warrant itself.

25. Further, in my judgment, in considering the general scope of the section one must have regard to the consequences which might follow upon our holding in favour of the learned Vakil's argument.

26. Our attention was drawn to a passage in Maxwell on the Interpretation of Statutes which is taken from the case of *Margate Pier Company v. Hannam* (1819) 3 B. & Ald. 266 : 22 R.R. 378 : 106 E.R. 661. The judgment in the case was delivered by Abbot, C.J., who was considering what was the effect of a warrant issued by a Justice of the Peace, who had not taken the oath at a general sessions in accordance with the Statute. The learned Chief Justice pointed out what serious consequences might result if it were held that a warrant issued by a Justice of the Peace, who had not complied with the Statute by taking the oath, was invalid. The learned Chief Justice said:

It is obvious that if the act of the Justice issuing a warrant be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority: a constable who arrests, and a gaoler who receives a felon will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these Statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction.

27. The principle which is stated in that Judgment, to my mind, may be applied to this case. This was a warrant, good and valid on the face of it, signed by the Magistrate, sealed with the seal of the Court, addressed to a Police Officer with reference to a person, whose attendance as a witness was desired. The warrant itself stated that the Magistrate had good reason to believe that the person in question would not attend as a witness unless compelled to do so.

28. If we were to hold that such a warrant was invalid merely by reason of the fact that the Magistrate had omitted to record the reason for the issue of the warrant otherwise than in the warrant itself, it might lead to very serious consequences, such as those indicated by Abbot, C.J., and such a construction of the section ought not to be placed upon it, if it will admit of any other reasonable interpretation.

29. I have said enough to show that, in my judgment, the words in Section 90, now under consideration are not imperative but directory and consequently I am not prepared to hold that in a case in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion and in which the warrant was good and valid on the face of it and stated the reason upon which the Magistrate relied, the warrant was invalid merely by reason of the fact that the Magistrate omitted to record in writing, otherwise than in the warrant, the reasons which actuated him in issuing the warrant.

30. In my judgment, therefore, with the above mentioned reservations and upon the above mentioned assumptions, the question contained in the Reference should be answered in the affirmative.

31. Before parting with this case, we think it desirable to state distinctly that Magistrates should record their reasons specifically in writing before issuing a warrant and should not be satisfied with signing their names to warrants in the form given in the schedule. In the future they will follow the clear provisions of the section they will save the High Court a great deal of time and trouble.

32. The result is that we direct the acquittal to be set aside and remand the case to the learned Judges, who referred the case to the Full Bench, for disposal.

N.R. Chatterjea, J.

33. The question referred to the Full Bench is as follows:--If a Court under Section 90, Criminal Procedure Code issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

34. Section 90 of the Criminal Procedure Code lays down that a Court may, in any case in which it is empowered by the Court to issue a summons for the appearance of any person other than a juror or assessor, issue after recording its reasons in writing, a warrant for his arrest--(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his

appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

35. The normal course is to issue summons in the first instance. The Court can, however, issue a warrant in either of the cases mentioned in Clauses (a) and (b) of the section. But in either case the Court can do so after stating its reasons in writing. The question is whether a warrant issued without complying with the said provision is a valid and legal warrant. Form 7 of Schedule V prescribes the form for a warrant u/s 90 and it states (to quote the material portion): "Whereas I have good and sufficient reason to believe that he will not attend as a witness on the bearing of the said complaint unless compelled to do so." It is contended by the learned Advocate-General that the signing of this warrant is sufficient compliance with the provision of the Statute, and that it does not matter whether the same reasons which are recorded in the form of the warrant are or are not again recorded on another paper on the record. I think, however, that this contention is not correct. The form does not state the reason. It merely says that the Court has "good and sufficient reason to believe," and words to that effect appear in Clause (a) of Section 90. But that is merely a statement that the Court has reasons. It is not stating what those reasons are. Section 90 requires not merely the statement in the form of the warrant that the Court has good and sufficient reasons but those reasons should be stated. I think, therefore, that the mere signing of the warrant which states that the Court has reason to believe is not sufficient compliance with the law. If it were so, it would have been wholly unnecessary to state in the body of the section that the Court after recording its reasons in writing may issue a warrant.

36. Then, the question arises whether a warrant issued by a Court without recording its reasons in writing is an illegal process. The words "after recording its reasons in writing" show that it must be done before issuing the warrant. The Legislature had some object in view in making the provision. The objects it seems to me, are, first, to insure deliberation on the part of the Magistrate before issuing the warrant, and, secondly, that the person to whom the warrant is issued may know the reasons why it is issued so that such person may come before a higher Court and show that it has been wrongly issued. Somewhat similar words are used in Section 25 of the Indian Arms Act. That section provides for the search and seizure of arms by the Magistrate: and the third paragraph of that section lays down as follows: "Such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms...are or is to be found. "The words "having first recorded the grounds of his belief" have been judicially construed in the case of *Clarke v. Brojendra Kishore Roy Chowdhury* 2 Ind. Cas. 436 : 36 C. 433 : 9 C.L.J. 298 : 3 C.W.N. 458 : 5 M.L.T. 367. In that case Maclean, C.J., observed as follows, at page 447 Page of 36 C.--[Ed.] :--"These words must have been inserted in the

section with an object and the object probably was to protect the public against searches being inconsiderately directed and to ensure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is mandatory and what is merely directory in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action." Harington, J., observed (at page 451 Page of 36 C.--[Ed.]) as follows; "It is admitted that the defendant did not record the grounds of his belief in this case, but it is urged that the provision that he should do so is merely directory, and that his entry on the premises is justified as he had good grounds for his belief that arms were stored in the Cutchery notwithstanding his failure to record these grounds. I do not agree with this, and I think that where a Statute authorises the doing of an act, which is prima facie a wrong to an individual, the doer must comply strictly with the condition imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection." The decision of the majority of the Court of Appeal was reversed by the Judicial Committee. See *Clarke v. Brojendra Kishore Roy* 16 Ind. Cas. 501 : 39 I.A. 163 : 39 C. 953 : 16 C.L.J. 231 : (1912) W.N. 760 : 12 M.L.T. 171 : 10 A.L.J. 193 : 16 C.W.N. 865 : 23 M.L.J. 32 : 14 Bom. L.R. 717 : 13 Cri. L.J. 693 (P.C.). But so far as the particular question was concerned their Lordships observed at page 176: Page of 39 I.A.--[Ed.] "Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute." It is contended that the question before the Privy Council was whether Mr. Clarke, not having complied with the provisions of the Statute, could claim protection under the Arms Act, and that it is a totally different thing from saying that the search was illegal. It is urged that, although the Magistrate issuing the process may, by not complying with the provisions of a Statute, make himself liable for damages, it does not follow that the process is illegal. But I have referred to this case to show that the recording of the grounds of belief was held to be an essential preliminary to the search being made. The Judicial Committee distinctly stated that it was a preliminary condition for the section to be taken under the Act. It appears, therefore, that although the Magistrate may have perfectly good grounds of belief for making a search, it would not be legal unless he first records the grounds of his belief, because if it were legal notwithstanding the omission to record the grounds of his belief, there is no reason why he could not defend his action under the Statute. Two of the learned Judges of this Court, as stated above, were of opinion that the provision that the Magistrate "after

having first recorded the grounds of his belief" is mandatory and not directory, and if the Judicial Committee were of opinion that it was merely directory, their Lordships would not have held that the Magistrate not having complied with the preliminary condition could not defend his action under the Arms Act. In this connection I may refer to the case of *Shankar Baksh v. Bulwant Singh* 27 I.A. 79 : 27 C. 333 : 4 C.W.N. 203 : 2 Bom. L.R. 596 : 7 Sar. P.C.J. 686 : 14 Ind. Dec. (N.S.) 220 (P.C.), where in laying down that although reasons should be recorded by the Judge u/s 626 of the CPC when granting an application for review, their absence is not a ground for special leave to appeal, Lord Hobhouse observed: "It is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it." In *Clarke's case* 16 Ind. Cas. 501 : 39 I.A. 163 : 39 C. 953 : 16 C.L.J. 231 : (1912) W.N. 760 : 12 M.L.T. 171 : 10 A.L.J. 193 : 16 C.W.N. 865 : 23 M.L.J. 32 : 14 Bom. L.R. 717 : 13 Cri. L.J. 693 (P.C.) on the other hand, the judicial Committee were of opinion that the recording of reasons is a preliminary condition. These two cases illustrate the ground of distinction between the two classes of cases.

37. It is said that it would make no difference to the person for whose arrest the warrant is issued, whether the reasons were or were not stated in the record. But would it have made any difference to person whose house was searched [*Clarke's case* 16 Ind. Cas. 501 : 39 I.A. 163 : 39 C. 953 : 16 C.L.J. 231 : (1912) W.N. 760 : 12 M.L.T. 171 : 10 A.L.J. 193 : 16 C.W.N. 865 : 23 M.L.J. 32 : 14 Bom. L.R. 717 : 13 Cri. L.J. 693 (P.C.)], whether the grounds of belief of the Magistrate were or were not first recorded before the search was made. Then again, how would the absence of a seal on a warrant (otherwise good) affect the person to be arrested? But it was held in *Mahajan Sheikh v. Emperor* 28 Ind. Cas. 672 : 42 C. 708 : 19 C.W.N. 224 : 16 Cri. L.J. 336 that u/s 75 the affixing of the seal of the Court is essential to the validity of a warrant, that an arrest under a warrant duly signed, but not sealed is, therefore, illegal, and that a conviction u/s 225B of the Penal Code is bad in law.

38. The learned Advocate-General has referred to certain passages from Maxwell on the Interpretation of Statutes, 6th Edition. At page 664 it is stated. "The usual provision in the Commission on the Peace that no Justice named in it shall be capable of acting or authorised to act unless he shall have taken the oaths required by law, would lead to intolerable inconvenience and injustice if it were imperative, and struck with invalidity every act of an unqualified justice. If his acts were held void, it was pointed out by the King's Bench all persons who acted in the execution of a warrant issued by him, would act without authority; a constable who arrested, and a gaoler who received the arrested person, under it, would be trespassers. Resistance to them would be lawful; everything done by them would be unlawful; and a constable, and the persons aiding him might become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity of which they were wholly ignorant." But the omission to take oath by a Justice does not stand on the same footing as an omission to comply with the

provisions of a Statute enacted on grounds of public policy--as some sort of guarantee that the Court should carefully consider the circumstance which is involved in writing out the reasons for issuing a process affecting the liberty of a person.

39. Another passage is cited from page 650, which runs as follows: "When a public duty is imposed, and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative."

40. The question of inconvenience and injustice will be considered later, but I may here refer to a passage from the book (page 657): "The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the Statute, but a duty imposed on a Court or public officer in the exercise of the power conferred on him; when no general inconvenience or injustice calls for a different construction. The 5 Eliz C 23 requiring that the writ De Contumacy Caprendo shall be brought into the Queen's Bench and there opened in the presence of the Judges, the omission of this apparently idle ceremony was deemed fatal to the validity of an arrest made in pursuance of the writ, though it had been enrolled in the Crown Office. An enactment which provided that every warrant issued by a Court should be under its seal, was equally imperative, and not only was a commitment under an unsealed warrant invalid, but the person who had obtained it without taking care that the Court performed its duty of sealing it was liable in damage to the person arrested under it. This was hard on the former, but it was essential for the latter that the warrant should be duly authenticated."

41. As pointed out by Lord Campbell, L.C. in the case of the Liverpool Borough Bank v. Turner (5). "No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed."

42. It is contended that if a warrant which is, on the face of it, valid, is to be treated as unlawful because of the omission to record reasons for issuing it, it may result in serious consequences to the person executing the warrant who may have no means of knowledge of such omission. But the question of inconvenience or consequences should be considered not only with reference to the person executing the process, but also with reference to the person who is to be affected by the process and for whose benefit the provision is made. A warrant may be issued for the arrest of a respectable purda nashin lady, and if the provision for recording reasons is made on grounds of public policy with the

object of insuring deliberation on the part of the Magistrate so that he may apply his mind to, and take into consideration all the circumstances of, the case, the observance of the condition precedent laid down by the Statute before issuing the process should not be held to be directory merely because inconvenience may otherwise result to the person executing it. If the process is unlawful, can it be held to be lawful merely because the person executing it may have no means of knowing the defect in the process where it affects the liberty of the person affected by the process? The consequence of taking such a view would be to deprive the person for whose benefit the salutary provision is made by the legislature. In cases affecting the liberty of the subject there is weighty authority for holding, that even in matters of form, every form and every step in the process be followed with extreme precision. See Dale's case (1881) 6 Q.B.D. 376 at p. 463 : 50 L.J.Q.B. 234 : 43 L.T. 769.

43. The learned Advocate-General referred to two Bull Bench decisions u/s 145 of the Criminal Procedure Code, viz.--Sukh Lal Sheikh v. Tarn Chand 33 C. 68 : 2 C.L.J. 241 : 9 C.W.N. 1046 : 2 Cri. L.J. 618, and Khosh Mahomed Sirkar v. Nazir Mahomed 33 C. 352 : 2 C.L.J. 259 : 9 C.W.N. 1065 : 2 Cri. L.J. 637 (F.B.). The first dealt with the question whether the omission to publish a notice u/s 145(3) of the Code of Criminal Procedure at some conspicuous place at or near the subject of dispute is an illegality which deprives the Magistrate of his jurisdiction. It was held that the omission did not affect the jurisdiction of the Magistrate, that the provision was merely directory and not a condition precedent. In the second case it was held that an initiatory order u/s 145 was not defective because it was not self-contained and did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed when such grounds appeared in the Police report on which the order was founded and to which it made reference in express terms. These cases, therefore, do not help the appellant.

44. Reference was also made to some passages from Mayne's Criminal Law where the learned author deals with the question of resistance to processes of the Court with reference to English authorities. But, as pointed out by Buckland, J., in the referring order, the procedure in this country is governed by the Code of Criminal Procedure, and it is to that Code alone that one must refer for matters for which it provides. It is to be noted that in this reference we are not concerned with the legality or otherwise of the manner in which the warrant was executed which may involve the application of Section 99 of the Indian Penal Code.

45. The only reported decision of this Court u/s 90 of the Criminal Procedure is that of Sukheswar Phukan v. Emperor 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186, in which the Court held the omission to record the reasons in writing rendered the warrant illegal. A similar view was taken in In re Karuthan Ambalam 33 Ind. Cas. 308 : 38 M. 1088 : 17 Cri. L.J. 132, where it was held that the recording of reasons is a necessary preliminary to the exercise of the jurisdiction. In the Allahabad Court Mahar Singh v.

Emperor 59 Ind. Cas. 415 : 18 A.L.J. 1149 : 22 Cri. L.J. 111, Gokul Prasad, J., did not follow Sukheswar Phukan's case 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186 on the ground that Section 537, Criminal Procedure Code, had not been referred to in that case. But, as pointed out by Buckland, J., in the referring order, Section 537 has no application to a case like the present. Sukheswar Phukan's case 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186 has been followed in the Punjab Chief Court [see Bela Singh v. Emperor 44 Ind. Cas. 971 : 7 P.W.R. 1918 Cr. : 50 P.L.R. 1918 : 19 Cri. L.J. 443].

46. For all these reasons, I regret I am unable to agree with the view taken by the learned Chief Justice, and I would answer the question referred in the negative.

Richardson, J.

47. The question referred is--"If a Court u/s 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

48. I will not again read Section 90. It is sufficient to observe that the two Clauses (a) and (b) are in the alternative. Provision is made for the issue of a warrant against a witness in two contingencies, (I) under Clause (a), in the first instance, no summons having been issued, if the Court sees reason to believe that a summons will not be obeyed, and (II) under Clause (b), as a remedial measure, if the witness has already failed to appear in answer to a summons duly served. The Code says that in either of these contingencies the Court may, after recording its reasons in writing, issue a warrant.

49. A form of warrant for use u/s 90, will be found in Schedule V of the Code (Form No. VII). This form with letters substituted for most of the blanks is as follows:

Whereas complaint has been made before me that A. B. of Z has committed the offence of N and it appears likely that C. D can give evidence concerning the said complaint: and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorise and require you to arrest the said C, D and on (a day to be stated) to bring him before this Court to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this (date to be stated),

Signature. 50. It will be observed that the form is so framed as to be applicable in either of the contingencies above-mentioned.

51. As to the signature, u/s 75 of the Code every warrant of arrest issued by a Court under the Code must be in writing signed by the Presiding Officer and bear

the seal of the Court A warrant Bo signed and sealed remains in force until it is cancelled by the Court which issued it, or until it is executed.

52. Further, Section 80 of the Code provides that "the Police Officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant."

53. As to the forms in Schedule V, it is laid down generally in Section 555 of the Code, that subject to certain powers conferred on the High Courts "the forms set forth in the Fifth Schedule, with such variations as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient."

54. Lastly, as to the word "writing" which occurs in Sections 75 and 90 u/s 3(58) of the General Clauses Act (X of 1897), "Unless there is anything repugnant in the subject or context expressions referring to writing" shall be construed as including references to printing, lithography, photography and other modes of representing or re-producing words in a visible form."

55. Regard being had to the meaning so given of the term "writing" it has been contended that when in a particular case the Presiding Officer of a Court, for instance a Magistrate, signs a warrant in the statutory form stating that he has good and sufficient reason to believe that the witness C D will not attend unless compelled to do so, the Magistrate has sufficiently complied with requirements of Section 90 as to recording his reasons in writing before the issue of the warrant. The warrant of course is not issued until after the Magistrate has signed it.

56. The case, however, has been argued before us on the footing which I adopt, that the mere signature by the Magistrate of a stereotyped form is not a sufficient compliance with Section 90. Mr. Mukherjee who has been good enough to appear at our request as amicus curiae to present the case for the respondent, urged that the reasons contemplated by the Legislature should or must show that the Magistrate has applied his mind to the facts of the particular case and should or must show whether the Magistrate is acting under Clause (a) or under Clause (b) or the section. That argument is material not only on the question whether the warrant is itself a sufficient compliance with the section but on the further question with which I am about to deal. I will only say now that I do not think the Legislature could have intended that the Magistrate should record his reasons at any length. It may be a matter of urgency the warrant should be issued with all possible despatch. The witness may be intending to leave the jurisdiction. His train or his ship may be about to start, and time waits for no man, while he is setting out reasons at length.

57. On the footing indicated, that some record of the Magistrate's reasons is required apart from the warrant, the main controversy is whether the words "after recording his reasons in writing," are mandatory or directory. The terms are familiar and useful but in *R. v. Justices of the County of London* (1893) 2 Q.B. 476 : 63 L.J.Q.B. 148 : 89 L.T. 682 : 42 W.R. 1, Lord Bowen is reported to

have said: "Now It seems to me that the truth lies rather between the two, and that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical decision which exhausts every possible class of section. You must look at each Act of Parliament and at each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all."

58. In other words, it may not always be possible to bring a statutory enactment of the kind now in question wholly under the category "mandatory" or wholly under the category "directory." In the present case I hesitate to say that the material words of Section 90 are "mandatory" and obligatory at one pole or "directory" and permissive at the opposite pole.

59. If the law requires a record of the Magistrate's reasons and the attention of the Magistrate is drawn to the law, it is not for him to decide whether he will record his reasons or not. He is bound to make the record. He has no choice in the matter. Nor can neglect on the Magistrate's part of such a duty be regarded as immaterial or a matter of no substance, to be lightly passed over. The superior Courts have no dispensing power.

60. Accordingly, it might be no answer to an application by a witness under arrest or in custody for a direction of the nature of a habeas corpus, that the provision requiring the Magistrate to record his reasons was merely directory. So, too, putting aside the Judicial Officers Protection Act (XVIII of 1850) such a plea might be of no avail to a Magistrate against whom a suit was brought for damages for unlawful arrest or false imprisonment.

61. On the other hand, if inadvertently or wilfully, the Magistrate omits to record his reasons, I am not prepared to say that the warrant in the hands of a Police Officer, though, on the face of it, a perfectly valid warrant, is wholly void, issued without jurisdiction, nothing more than a piece of waste paper, so that the Police Officer, if he attempts to execute it, may be resisted by force, possibly injured the more severely the more he tries to do what he thinks it his duty, and may in addition be amenable for trespass or assault and battery. If such were the law, the Police Officer, if anyone could be found to be a Police Officer, would no doubt have to make the best of it. But the consequences at least justify a doubt whether such is the law. And if the policy of the law be in question, we have not yet reached an age when the services of Police Officers are no longer requisite, and it is not in the public interest that men of self respect, common prudence, and common sense should be deterred from undertaking Police duties.

62. If the execution of the warrant might be lawfully resisted, not only if it turned out that the Magistrate had not recorded his reasons but also as Mr. Mukherjee suggested if it turned out that he had not recorded his reasons sufficiently, the consequences would be still more serious. Mr. Mukherjee was driven to make the

suggestion to meet the point that the statement of the reasons in the warrant was a sufficient compliance with Section 90. And if the record of the reasons is essential to the jurisdiction it is hardly possible to stop short of saying that jurisdiction also depends on the reasons being sufficiently recorded. Under such a construction of the law, resistance would be countenanced to an extent subversive of the power conferred on Magistrates to compel the attendance of recalcitrant witnesses. Recalcitrant witnesses would be encouraged to risk continuing in their recalcitrance and the position of Police Officers would be still more intolerable.

63. What I have said, as it appears to me, furnishes an answer to the argument founded on the observation of their Lordships in one of the concluding paragraphs of their judgment in the case of *Clarke v. Brojendra Kishore Roy* 16 Ind. Cas. 501 : 39 I.A. 163 : 39 C. 953 : 16 C.L.J. 231 : (1912) W.N. 760 : 12 M.L.T. 171 : 10 A.L.J. 193 : 16 C.W.N. 865 : 23 M.L.J. 32 : 14 Bom. L.R. 717 : 13 Cri. L.J. 693 (P.C.). There the respondent had brought a suit claiming damages for trespass on the allegation that Mr. Clarke, then District Magistrate of Mymensingh, had illegally searched his Cutchery. u/s 25 of the Indian Arms Act, 1878 a Magistrate "having first recorded the grounds of his belief" may cause a search to be made of premises in which he believes that arms are stored for some unlawful purpose. Mr. Clarke had caused the plaintiff's Cutchery to be searched for arms by the Police in his presence and under his personal direction. Nothing incriminating had been found. At page 176 Page of 39 I.A.--[Ed.] of the report their Lordships said "that they were disposed to agree with the majority of the Court of Appeal (in India) that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute." In saying that, their Lordships were dealing with a suit against the Magistrate and not with (sic) a case as the present.

64. In order to determine whether Section 90 is mandatory or directory for the purpose no material, the section must be read with the other provisions of the Code relating to warrants, including the form in Schedule V and the provision in Section 555. To read Section 90 does not, in my opinion, lead to the result for which Mr. Mukherjee in his very able and concise address contended.

65. The Code of Criminal Procedure confers powers on Courts (including Magistrates) for the purposes of the general administration of criminal justice. In connection with the exercise by Magistrates of their general jurisdiction, the Code, inter alia, confers powers on Magistrates to issue warrants of arrest and one of the classes of warrants are warrants for the arrest of witnesses which may be issued u/s 90. As a safeguard, introduced, no doubt, for the protection of witnesses, the law requires that the Magistrate should record his reasons before exercising this particular power. The object may be to ensure due deliberation on the part of the Magistrate or the object may be to give the witness after his arrest the opportunity of acquainting himself with the Magistrate's reasons and possibly of removing the Magistrate's belief that he would not have attended in

obedience to a summons. Possibly the Legislature had both these objects in view. But whatever the object of Legislature may be, and however important it may be that a Magistrate who desires to inspire confidence in his administration of justice should comply with the requirements of the Code and follow strictly the procedure therein indicated, in my opinion the omission of the Magistrate to record his reasons will not invalidate the warrant in the hands of the Police Officer.

66. I can find nothing in the Code inconsistent with the reasonable view or principle that when a Magistrate, having general jurisdiction over the subject-matter or the case pending before him, issues a warrant in a statutory form, as to which the Code itself provides that, if used, it shall be sufficient, the warrant is a valid warrant and neither the Police Officer to whom the warrant is delivered for execution nor the witness whose arrest is ordered, nor his friends are at liberty to treat it as invalid. At that stage it must be assumed that the Magistrate has done his duty.

67. The conclusion, therefore, at which I arrive is that where, as in this case, a warrant is issued in the statutory form the omission of the Magistrate to record his reasons (apart from the statement in the warrant) does not go to the Magistrate's jurisdiction to the extent of making the warrant null and void in the hands of the Police Officer or deprive him of the authority to execute it. I differ, therefore, with respect, from the learned Judges who decided the case of *Sukheswar Phukan v. Emperor* 11 Ind. Cas. 593 : 38 C. 789 : 12 Cri. L.J. (sic) : 15 C.W.N. 1001 : 15 C.L.J. 186. Those learned Judges had not the benefit of any argument for the Crown or of the close examination to which the provisions of the Code have been subjected on the present occasion.

68. On the authority of Mayne (Criminal Law of India, 2nd Edition, pp. 439 and 440), I apprehend that the view I take is consistent with English Law on this topic. "It is sufficient," says the learned author, "if the process itself be legal in the frame of it, and issue in the ordinary course of justice from a Court of person having jurisdiction in the case. He continues, "No error or irregularity in the previous proceeding will affect it or excuse the party killing the officer in the execution of it from the guilt of murder." If, therefore, in the present case, the Police Officer had been killed in attempting to arrest the witness, it seems that under the English Law his assailants would have been guilty of murder and the attempt to arrest would not have been regarded as provocatives reducing the crime to man-slaughter. Further on, the learned author adds, "So, although the cause be not expressed with sufficient particularity, the officer is justified if enough appear to show that the Magistrate had jurisdiction over the subject-matter. This must, however, be understood of a warrant containing all the essential requisites of one..."

69. The warrant before us fulfils the conditions thus laid down. It was issued in proper form, with all the requisites and marks of a valid warrant by a Magistrate having general jurisdiction over the subject-matter or the case which was pending before him.

70. An examination of the Code has led me to the view that resistance to such a warrant is unlawful and, in my opinion, that view is in accord with the interests of justice at large and of accused persons as well as complainants in criminal cases.

71. It may be said that if a Magistrate stops to record his reasons, he may not issue the warrant at all. But if a remedy be required for such neglect of duty on the part of Magistrates, it must be sought in other directions, for instance, in the provision of a penalty or in some amendment of the Judicial Officers Protection Act. The law, as I understand it, furnishes no excuse for resistance to the warrant.

72. The present case must, of course, be distinguished from cases where the warrant, on the face of it, is defective in form or where the Police Officer does not follow the procedure laid down for him. If the warrant is not signed and sealed in the prescribed manner or if the Police Officer does not notify the substance of it to the person to be arrested, obviously different considerations may arise.

73. In the course of the argument, mention was made of two cases in which their Lordships of the Privy Council held that words requiring reasons to be stated by the Court in connection with a step taken in the progress of a cause were not mandatory. In one of those cases their Lordships dealt with a provision in the CPC of 1859, corresponding with Order XLI, Rule 27(2) of the present Code: *Ganga Gobind Mundul v. Collector of 24-Pergunnahs* 11 M.I.A. 345 : at p. 368 : 7 W.R.P.C. 21 : 1 Suth. P.C.J. 676 : 2 Sar. P.C.J. 284 : 20 E.R. 131. The other case related to a provision in the Code of 1882, which has now been omitted: *Shankar Baksh v. Bulwant Singh* 27 I.A. 79 : 27 C. 333 : 4 C.W.N. 203 : 2 Bom. L.R. 596 : 7 Sar. P.C.J. 686 : 14 Ind. Dec. (N.S.) 220 (P.C.). In those cases, however, no question of the liberty of the subject was involved and there is a general agreement that the question whether a particular enactment is mandatory or directory depends little, if at all, on the form of the words but rather on the whole scope of the Statute to be construed: *Howard v. Bodington* (1877) 2 P.D. 203. *Craies' Statutory Law*, 2nd Edition, p. 251. On the other hand, it seems to me that, generally speaking, a requirement that reasons should be recorded will rather be directory in its nature than mandatory. If the jurisdiction depends on reasons being recorded, it would seem, as already stated, that it must also depend on reasons being sufficiently recorded and probably it would not be the intention of the Legislature to make a requirement as to which so much doubt might arise, a condition precedent to the exercise of the jurisdiction.

74. Some reference was made to the observation of Brett, L.J., in *Dale's case* (1881) 6 Q.B.D. 376 at p. 463 : 50 L.J.Q.B. 234 : 43 L.T. 769. With great deference, the actual decision in that case seems to me to have carried the law to an extreme point, but, so far as I may, I will adopt for the present purpose every word which the learned Lord Justice uses in the passage referred to and will only add that he was not dealing with resistance to a warrant in proper form issued by a Court having jurisdiction over the subject-matter and delivered to a

Police Officer to execute.

75. Before concluding, I desire to say that I agree with the learned Judges who made this Reference that the question at issue is not in any view of it governed by Section 99 of the Penal Code. If the warrant was an invalid warrant issued without jurisdiction, the act of the Police Officer in attempting to make the arrest cannot properly be described as "an act not strictly justifiable by law." It was a wholly unauthorised act. On the other hand, if in the hands of the Police Officer the warrant was a valid warrant, there is no occasion for recourse to Section 99.

76. Similarly, as regards the second clause of Section 141 of the Penal Code, if the view I take is right, the warrant was a "legal process" within the meaning of that Clause

77. With these observations, I concur in the answer to the question referred, proposed by the learned Chief Justice.

Buckland, J.

78. I agree that the question referred should be answered in the affirmative for the reasons given in the judgments of my learned brethren in support of that conclusion, in addition to those which I have already expressed.

Panton, J.

79. I agree with my Lord the Chief Justice.