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**(1891) 08 CAL CK 0006**  
**In the Calcutta High Court**

H.H. The Nizam of Hyderabad

APPELLANT

Vs

A.M. Jacob

RESPONDENT

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**Date of Decision :** 28-08-1891

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 94

**Citation :** (1892) ILR (Cal) 52

**Hon'ble Judges :** Beverley, J;Ameer Ali, J

**Bench :** Division Bench

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**Judgement**

Beverley, J.—"This was a rule obtained by the Advocate-General in the case of His Highness the Nizam of Hyderabad v. Alexander Malcolm Jacob now under enquiry by the Chief Presidency Magistrate, calling upon the Magistrate to show cause why a certain order of his, by which he refused to direct the production in his Court of certain currency notes, &c, should not be set aside, and why an order should not be now made for their production. [His Lordship here stated the facts out of which the application arose.] It appears that on the 17th instant it was elicited from a witness in cross-examination that fifteen out of these seventeen notes had been produced by Jacob and his solicitor at the Bank that very morning for identification, for what purpose is not very clear nor very material. Upon this fact coming out in evidence, viz., that Jacob still had in his possession fifteen of the notes for Rs. 10,000 which were paid to him on the 27th July, an application was made to the Magistrate for an order for their production in Court, u/s 94 of the Code. The application was opposed by Mr. Inverarity, who appeared as counsel for Jacob, and who is said to have given the Magistrate to understand that Jacob did not intend to touch the said notes, but to preserve them intact to the end of the trial." The Magistrate accordingly refused the application. Mr. Geddes, in his affidavit, puts the matter somewhat differently, alleging that Mr. Inverarity stated "that Jacob was anxious, if he possibly could do so, to keep the notes till the end of the trial." Whatever were the exact words used, we think upon the materials before us that they were intended to be understood by the Magistrate, and were understood by him, as an implied

undertaking that the notes would not be dealt with during the pendency of these proceedings, and that it was in consequence of this implied undertaking that the Magistrate made no order regarding the notes on the 17th instant.

2. On the morning of the 19th the prosecution received intimation that five of the above notes had been cashed at the Currency Office that morning by Mr. Burder, of Bombay, and a fresh application was accordingly made to the Magistrate for an order, u/s 94, upon Jacob and Mr. Burder for the production of the said fifteen notes or their proceeds. An order was thereupon made for the production of the ten notes that had not been already cashed; but upon Mr. Burder appearing and objecting that he had a lien upon five of the notes, and declining to give them up, the Magistrate refused to make any order respecting them. The other five notes were apparently produced through Mr. Geddes, and are now, we understand, in the Magistrate's Court. The matter before us, therefore, has reference (1) to the five notes still held by Mr. Burder, and (2) to the proceeds of the five notes cashed by him on the 19th.

3. The Magistrate has written a letter explaining his action in the matter, and we have also heard Mr. Monmohun Ghose on behalf of Jacob. In his explanation the Magistrate states that as regards the five notes in Burder's possession be entertained doubts as to whether he had the power to compel their production, inasmuch as it appeared to him that Burder had a bona fide lien upon them for costs already incurred and to be incurred; and as regards the five notes that had been cashed, the Magistrate is of opinion that the proceeds, not being specific objects, do not fall within the terms of the section. The concluding portion of the Magistrate's letter is wholly outside the question now before us. It is not a question of the adequate protection of the Nizam's interests in the event of a conviction, but of the power and expediency of having brought into Court the subject-matter in respect of which Jacob is charged with criminal breach of trust; and we may add the Magistrate has to a certain extent admitted that power and expediency by insisting on the production of five notes through Mr. Geddes. Mr. Ghose has contended before us that the Magistrate had no power whatever to make any order for the production of the notes u/s 94; that that section has reference only to the production of documents or things required for purposes of evidence, and that it was never intended that it should be used for the purpose of bringing property into Court with a view to its being subsequently disposed of by an order u/s 517 of the Code. Mr. Ghose further questioned the power of this Court to interfere with the Magistrate's order, and challenged the other side to point out a single reported case in which this Court had ever interfered.

4. As regards this last point, we may at once say that Section 435 of the Code gives this Court ample power to interfere, should it see fit to do so, in any case where a Magistrate has either refused to exercise a discretion vested in him by law, or has exercised that discretion in an improper manner, or on improper grounds. That no precedent is to be found in the books may be, because up to this no case has occurred of sufficient importance to warrant the parties in

invoking the interference of this Court. It seems to us that even accepting Mr. Ghose's argument, it was open to the Magistrate to require the production of these notes for evidentiary purposes. The possession of the identical notes which were paid by the Bank on presentation of the cheque for Rs. 1,77,131-1-2 would be good evidence that Jacob received the proceeds of that cheque. It seems to be assumed that the production of the notes was required either in order to cripple Jacob's resources, or with a view to some order in the future u/s 517 or, as Mr. Ghose puts it, by way of attachment before judgment. We see no sufficient ground for this assumption upon the materials before us.

5. Putting aside, however, the question of evidence, we are of opinion that every Court is entitled to have before it, and to retain during the pendency of the proceedings, any property which forms the subject of a charge pending before it, as Patterson, J. said in *Rex v. O'Donnell* 7 C. & P. 138: "Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected in some way with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken". So in *Rex v. Burgiss* 7 C. & P. 488 where the prisoner was charged with having altered and cashed a forged promissory note for ₹26, and 28 sovereigns were found upon him, Littledale, J., said: "I have conferred with my brother PATTERSON, who says that if there is reasonable ground to suppose that these sovereigns are the proceeds of notes obtained by either of the alleged forgeries, they ought not to be given up. I think in the present case that it is not unreasonable to suppose that the ₹26 was part of the money obtained, and I think I cannot order that to be given back. The surplus must be restored". A similar order was made in *Rex v. Rooney* 7 C. & P. 515. Those were cases in which the money found in the possession of the accused could not be identified. In the present case these notes can be, and are, identified as having been paid to Jacob on the 27th July. We are of opinion, therefore, that they were connected with the subject-matter of the charge, and that the Magistrate was entitled and bound to compel their production. As regards Mr. Burder's objection that he had a lien on five of the notes, that, in our opinion, was no sufficient reason for the non-production of the notes. That was a matter to be dealt with subsequently, u/s 517 of the Code. The cases of *Empress v. Jogessur Mochi* ILR 3 Cal. 379 and *Ex parte Madavji Dharramsi* 12 Bom. H.C. 217 are instances in which an order has been made upon third parties to produce the subject-matter of the charge, irrespective of any order which might be made afterwards as to the disposal of the property. We are of opinion that Mr. Burder should now be required to produce the five notes which he admits are in his power.

6. 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. And in expressing this opinion we must not be understood to dissent in any way from the principles laid down in the case of *Empress v. Jogessur Mochi* ILR Cal. 379. That case decided a point wholly

different from that now before us. That was a reference in respect of an order made under the section of the Code then in force, corresponding to Section 517 of the present Code, and it had reference to the ultimate disposal of the property. That question is not now before us. We think, therefore, that the order of the Presidency Magistrate must be set aside, and we set it aside accordingly, and direct him to proceed according to law, having regard to the observations we have made.

Ameer Ali, J.

7. I entirely agree with the judgment of my learned colleague; but as the question raised for our decision is one of some importance, I wish to add a few observations. The learned Chief Magistrate, in refusing to make an order on Mr. Burder, seems to have acted on two grounds: (1) that Mr. Burder claimed a lien over five of the notes; and (2) that, as regards the notes into which he had converted the five others received by him from Jacob, it was unnecessary to make any order, for the Nizam was sufficiently secured, and he (the Magistrate) might possibly, in case Mr. Burder had converted them again, have to engage in a large collateral enquiry. This represents to my mind the sum and substance of the explanation submitted by the Magistrate. Neither of these considerations, however, touches the real question at issue. Mr. Jacob is charged with criminal breach of trust in respect of a large sum of money. Part of this money, it is stated, came into his hands in the shape of fifteen notes of Rs. 10,000 each, ten of which he made over to Mr. Burder. No claim of lien on the part of Mr. Burder can affect the character of those notes as the proceeds of an offence. For the purposes of this decision, upon the alleged facts, they are as much the proceeds of an offence as if the cheque which Jacob received from Kilburn and Company had been actually handed to him by the owner of the money. The case for the prosecution is that the twenty-three lakhs were placed under Jacob's disposal for a specified purpose; the right in the money was never parted with absolutely; that the cheque which he received represented the Nizam's money, and in cashing it and converting the proceeds thereof to his own use he committed the offence of criminal breach of trust. Upon that case the notes received by him would be the proceeds of the offence. Suppose a cheque payable to bearer is entrusted to a servant, and he, after receiving payment from the Bank, absconds. The notes, however, are deposited by him with a third person. Can it be contended that those notes are not the proceeds of an offence, as much a part of the corpus delicti as if they had been actually stolen from the master's box? Suppose a cheque is sent to a person with a direction to apply it to a certain purpose. Instead of so doing he cashes it and appropriates the money to his own use, as happened in the case of *Reg. v. Cronmire* 54 L.T. 580. Can it be said that the money received by him was not the proceeds of an offence, and if he had deposited it with a third person and it could reasonably be connected with the cashing of the cheque, that the Court is debarred from calling for its production for purposes of the enquiry? Or take another case. A horse is stolen by A and placed by him in a livery stable. The livery stable-keeper receives it

bona fide and claims a lien for its keep. Would that change the character of the stolen property or prevent the Magistrate from requiring its production? In the case of *The Queen v. De Banks* L.R. 13 Q.B.D. 29 Banks was convicted of larceny as a bailee in respect of a sum of money received by him for the price of a mare entrusted to him for sale; the money was the subject-matter of the larceny; and even if he had deposited it with a third person it would not have altered the character of the property in respect of which the offence was charged. Nor would the mere fact of Mr. Burder converting some of the notes into others of smaller value and holding them for himself or the accused affect the question. The reasons, therefore, assigned by the learned Magistrate do not seem to be valid, nor was any attempt made to support his order upon grounds on which he had based it. As a matter of fact, Mr. Ghose, who was heard for the accused, as well as generally on the case, impugned the reason given by the Magistrate as erroneous. Mr. Ghose took up a higher ground altogether. He contended that the Magistrate had absolutely no power to call either upon the accused or upon his bailee for the production of anything alleged to be connected with the offence. In the course of the argument, however, he modified this somewhat startling proposition, and admitted that under the section the Magistrate can call for documents or other things, though only for purposes of evidence in a pending proceeding. Now, the words of Section 94 are very large, and it seems advisedly so. It runs thus: "Whenever any Court or, in any place beyond the limits of the towns of Calcutta and Bombay, 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, enquiry or trial or other proceeding 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." Having regard to the words of this section, it seems to me a Magistrate has the power of calling upon any person to produce any document or "thing," in that person's possession or power, which has any connection with the offence which happens to be under investigation or enquiry. Of course he cannot call for anything and everything from anybody and everybody. 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. In the present case the notes in Mr. Burder's hands, if connected with the cheque which Jacob received and which he admittedly cashed, would seem to have an important bearing on the matter under enquiry before the Magistrate; and their production would no doubt be

desirable for the purposes of that enquiry. I have refrained from expressing any opinion on the question whether the order u/s 94, Criminal Procedure Code, can be made with a view to or in anticipation of a proceeding u/s 517, as it is unnecessary to discuss it for the purposes of this case. But I must not be supposed to assent to the proposition that a proceeding u/s 517 is wholly independent of, or unconnected with, the enquiry or proceeding referred to in Section 94. On the whole, I think that the learned Chief Magistrate in refusing to entertain the application u/s 94 of the Code acted upon an erroneous view of the law, and I concur in reversing his order.