

(1985) 07 MAD CK 0023

In the Madras High Court

Case No : Criminal Petition No. 4114 of 1985 in Criminal M.P. No. 3682 of 1985

Jagir Singh and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 19-07-1985

Acts Referred:

Constitution of India, 1950 — Article 20(1), 22, 226

Citation : AIR 1986 Mad 183

Hon'ble Judges : Sengottuvelan, J

Bench : Single Bench

Advocate : K.A. Panchapakesan, for the Appellant; E.D. Dakshinamurthi, Government Advocate, for the Respondent

Judgement

1. The petitioners, who are said to have been involved "in an offence of smuggling sandalwood from the Reserve Forests have filed this application

for permission to have their lawyer by their side in the course of investigation in the above said crime registered as O.R.No.3 of 1985-86 on the

file of the Assistant Conservator of Forests, Nilgiris circle. In the application, it is stated that if they are not accompanied by their counsel, they are

likely to be subjected to harassment and coerced to make incriminating statements. The granting of such a relief is opposed by the respondent on

the ground that the investigation into an offence should necessarily be kept confidential till a charge sheet is filed.

2. The point for determination is whether the petitioners are entitled to the presence of their advocate when they are interrogated during the

preliminary investigation by the Assistant Conservator of Forests prior to the filing of the charge-sheet. Learned counsel for the petitioners relied on

Art. 22(l) of the Constitution, which is as follows -

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

It is also the contention of the petitioner's learned counsel that the presence of a lawyer will ensure that no confession is extorted forcibly and also relied upon Art. 20(3) of the Constitution which states (hat no person accused of any offence shall be compelled to be a witness against himself.

Relying upon these two constitutional provisions, it is contended that the right of the petitioners herein to have their advocate by their side when they are questioned is one guaranteed under the Constitution. In support of his contention, reliance is placed upon the case reported in Nandini

Satpathy Vs. P.L. Dani and Another, , where Krishna Iyer, J. after referring to the above stated two provisions of the Constitution, observed as

follows : -

The right to consult an advocate of his choice shall riot be denied to any person who is arrested. This does not mean that persons who are not

under arrest or custody can be denied that right. The spirit and sense of Art. 22(1) is that it is fundamental to the rule of law that the services of a

lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. Moreover, the observance of

the right, against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

Lawyer's presence is a constitutional claim in some circumstances in our country, also, and, in the context of Art. 2(1), is an assurance of

awareness and observance of the right to silence. The Miranda (1966-384 US 436) decision has insisted that ii an accused person asks for

lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Art. 22(3)

and Art. 22(1) may, in a way be telescoped by making it prudent for the Police to permit the advocate of the accused, if there be one, to be

present at the time he is examined. Over-reaching Art. 20(3) and S. 161(2) will be obviated by this requirement. We do not lay down that the

Police must secure the services of a lawyer. That will lead to "Police-Station lawyer's system" an abuse which breeds other vices. But all that we

mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied,

without being exposed to the serious reproof that involuntary self-criminations secured in secrecy and by coercing the will, was the project.

Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or

otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is

attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police,

but may help his client and complain on his behalf, although his very presence will! ordinarily remove the implicit menace of a police station.

We realise the presence of a lawyer is seeking for the moon in many cases until a public defender system becomes ubiquitous. The police need no

wait more than a reasonable while for an advocate's arrival. But they must invariably warn and record that fact about the right to silence against

self-incrimination; and where the accused is literate take his written acknowledgment.

Later, in the course of the judgment, the Supreme Court observed as follows -

Our purpose is not to sterilise the police but to clothe the accused with his proper right of silence. Art. 20(3) is not a paper tiger but a provision to

police the police and to silence coerced crimination. The dissenting words of Mr. Justice White bear quotation in this context -

"The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice

is to respect the inviolability of the human personality and to require government to produce the evidence against the accused by its own

independent labours More than the human dignity of the accused are involved; the human personality of others in the society also be preserved.

Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight."

The obvious underpinning of the Court's decision is a deep seated distrust of all confessions. As the Court declares that the accused not be

interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused

to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral and certainly nothing unconstitutional in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent. (See *Escobedo v. Illinois*, (1964) 12 Law Ed 977. Until today the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence". *Brown v. Walker* (1895) 40 Law Ed 819, see also *Hopt v. Utah* 1841 28 Law Ed 262. Particularly, when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. However, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation. This is not to say that the value of respect for the inviolability, of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat".

The Supreme Court concluded as follows -

A final note on the actual case on hand. While some aspects of Art. 20(3) have been authoritatively expounded, other aspects have remained obscure and unexplored. A flash flood of demands against self-incriminatory interrogation has risen now when very important persons of yesterday have got caught in the criminal investigation coils of today. And when the big fight forensic battles the small gain by the victory, if any. The fact that the scope of the protection against self accusation has not been clarified before in this area makes it necessary for us to take a gentler view in this case, in the interest of justice. Moreover, on our interpretation, the Magistrate,

trying the case under S 179 I.P.C. and in a setting where the accused allegedly has a number of other offences to answer for, will be thrown into a larger enquiry than the simplistic and ordinarily needed;

We have declared the law on the thorny Constitutional question where the amber light from American rulings and beacon beams from Indian

precedents have aided us in our decision. It is quite probable that the very act of directing a woman to come to the police station in violation of S.

160(I) Cr. P.C. may make for tension and negate voluntariness. It is likely that some of the questions are self criminatory. More importantly, the

admitted circumstances are such that the trying Magistrate may have to hold an elaborate enquiry about other investigations, potential and actual, to

decide about the self-accusatory character of the answers. And, finally, the process of proving proneness for self incrimination will itself strike a

blow on the very protection under Art. 20(3)...

This case has been referred to in a subsequent Supreme Court. decision reported in Ashadevi Mehta (Detenu) Vs. K. Shivraj, Addl. Chief

Secretary to the Govt. of Gujarat and Another, . In the said case, the question whether the refusal to permit an advocate to be present when the

accused Was interrogated is one that Ought to have been brought to the notice of the detaining authority for the purpose of satisfaction, was

considered and the Court came to the conclusion that it is one of the material facts in ascertaining the value of the alleged confession on which the

order of detention is passed and the failure to bring to 1ie notice of the detaining authority the retraction on the part of the accused is an irregularity.

Mohan J. in W.M.P. 6671 of 1983 (K. Srinivasan v. Collector of Customs, Madras) has occasion to refer to Nandini Satpathy Vs. P.L. Dani and

Another, , while discussing the question of permitting an advocate to be present while the accused was being interrogated. The learned Judge

observed as follows -

On a consideration of the above I am of the view that the petitioner cannot be granted injunction. What is sought to be done is mere investigation

and nothing prevents the petitioner from appearing before the concerned officer and making a statement. As and when he becomes an accused, he

could ask for the assistance of a counsel, which is the purport of the ruling reported in Nandini Satpathy Vs. P.L. Dani and Another, and Ashadevi

Mehta (Detenu) Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Another, , which dealt with the case of an accused person as

well as detenu. On the contrary, by a reading of Romesh Chandra Mehta Vs. State of West Bengal, , head notes C and E, it is very clear that the

principle of representation by a counsel cannot be extended at this stage when an investigation is being done by the Customs department. The

same principle has come to be adopted in Bharvad Bhikha Valu and Others Vs. The State of Gujarat, .

In W.A. 114 of 1985 etc. (reported in 1935 (2) Mad U 46) (Anil G. Merchant v. Director of Revenue Intelligence, Madras) a Bench of this Court

observed as follows -

Though the Supreme Court quoted the passage in Nandini Satpathy Vs. P.L. Dani and Another, , which we have extracted above and said that

owing to some misconception of the legal position the request for the presence/consultation of a lawyer was turned down, it did not hold that there

was a constitutional guarantee even during interrogation under S. 108 of the Customs Act, to have the presence of a lawyer; but that the detention

order is vitiated, by the fact that this vital fact of refusal to permit the presence of a lawyer during interrogation should have been communicated to

the detaining authority, because that had a bearing on the question whether the statement could be treated as voluntary or given under duress on

the acceptance or rejection of the statements or the answers given during interrogation. We are therefore of the view that there is no fundamental

right to a person who is summoned under S. 108 to give evidence or to have a lawyer of his choice during examination or interrogation. However,

it is advisable for the department to permit the presence of the lawyers during such examination or interrogation taking such precautionary

measures as may be considered necessary to keep the confidential nature of the statement and the secrecy of the enquiry. They should also keep in

view that if the presence of a lawyer during examination or interrogation is refused, the ultimate statements recorded themselves will become

questionable as not voluntary or were statements which were obtained under duress and thereby making them not reliable statements in any

proceeding.

To the same effect is the view expressed by a single Judge of the Delhi High

Court in the case reported in Ram Lalwani Vs. The State, . The relevant observation is as follows -

From a reading of the above observations in Nandini Satpathy Vs. P.L. Dani and Another, and Miranda (1966) 384 US 436 I feel that subject

to a few exceptions, S. 162 Cr. P.C and Ss. 24 to 30 of the Evidence Act do already take care of the constitutional rights by excluding from

evidence all self incriminatory statements whether voluntary or otherwise, and there was no need to give any directions. What the Court appears to

be concerned in Nandini is to sensitise the police to humanism and, therefore, it made it prudent for the police to allow a lawyer where the accused

wants to have one at the time of interrogation, if it wants to escape the censure that its interrogation is carried on in secrecy by physical and psychic

torture, That is why it cautioned that it was not a "mandate" but a "strong suggestion". I think it is correct to urge that the Supreme Court was not

laying down a binding direction but only prudent policy for the police.

3. We have to consider the other aspects before coming to a conclusion in this matter. One is the necessity to keep the investigation confidential

until the filing of the charge-sheet. Revealing details of investigation before the filing of the charge-sheet is likely to hamper the progress of

investigation. A single Judge of this Court in Muthuswami In Re 1982 Mad LW (Cri) 60, held as follows -

A plain reading of S. 50 would very clearly show that it only makes it obligatory that the person arrested without a warrant shall be communicated

with full particulars of the offence for which he is arrested or other grounds for such arrest. Nowhere does it say that a copy of the F. I.R. recorded

under S. 154 should be furnished to the accusedthe entire scheme of the Act is that the investigation into an offence should necessarily be kept

confidential and that copies to the accused could be furnished only after the charge-sheet is filed

4. The second aspect to be borne in mind is the provision of the Advocates Act 1961, which enables the Advocates the right of audience. Sec. 30

of the Act deals with the rights of Advocates to practise and the same is as follows -

Subject to the provisions of the Act, every Advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the

territories to which the Act extends -

- (i) in all Courts including the Supreme Court;
- (ii) before any tribunal or person legally authorised to take evidence; and
- (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

As per the above section, an investigating officer, being a person not authorised to take evidence, is not a forum before which all advocate has got

a right of audience. Learned counsel for the petitioners submits that it, is customary on the part of advocates to present bail applications etc. on

behalf of the accused and the right of advocate to appear before the police officers had become recognised. Whatever may be the practice, under

the Advocates Act, an advocate is not entitled to any right of audience before any forum other than those set out in S. 30. The Supreme Court in

Nandini Satpathy Vs. P.L. Dani and Another, , cautions that "police station lawyer" system is an abuse which breeds other vices. Considering the

two pronouncements of the Supreme Court and the subsequent judgments on the point, the only conclusion that can be arrived at is that the Forest

Official in this case, as and when an application is made to him for the presence of a lawyer when the petitioners are being questioned, will have to

adopt the following modus operandi:-

1. He is not bound to grant the request for the presence of a lawyer during the questioning;
2. But, at the same time, he must bear in mind that the presence of the lawyer will avoid any adverse criticism of any confession that may be made by the petitioner during interrogation.

Bearing these two aspects in mind, the Investigating Officer who is investigating the above offence is at liberty to come to his own conclusion on the

question whether to permit a lawyer at the time of questioning the petitioners. But, this court cannot give any direction in this regard. Hence, this

petition is dismissed with the above observations.

5. Petition dismissed.