

(1978) 01 OHC CK 0014

In the Orissa High Court

Case No : O.J.C. No. 961 of 1977 and Criminal Revision No. 397 of 1977

Smt. Nandini Satpathy

APPELLANT

Vs

P.L. Dani and Another

RESPONDENT

Date of Decision : 30-01-1978

Acts Referred:

Companies Act, 1956 — Section 138
Constitution of India, 1950 — Article 20, 20(2), 20(3), 32
Criminal Procedure Code, 1973 (CrPC) — Section 1(2), 160, 160(1), 161, 161(2)
Evidence Act, 1872 — Section 24, 25, 27
Penal Code, 1860 (IPC) — Section 109, 119, 120B, 121, 161
Prevention of Corruption Act, 1988 — Section 5(1), 5(2)

Citation : (1978) 45 CLT 253

Hon'ble Judges : S.K. Ray, C.J.;N.K. Das, J

Bench : Division Bench

Advocate : G. Rath, R.K. Rath, N.C. Panigrahi and P.K. Mohanty, for the Appellant; B.M. Patnaik, General, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, C.J.—The Petitioner in both these cases in the Ex-Chief Minister of Orissa against whom vigilance Police Case No. 22 of 1977 has been instituted u/s 5(2) read with Section 5(1)(d) and (e) of the Prevention of Corruption Act and under Sections 161/165/120-B/109, Indian Penal Code on the basis of an F.I.R. lodged by I.O., Shri Dani, D.S.P., Vigilance "Opp. party No. 1. at the Cuttack Vigilance Police Station. She I was granted anticipatory ball by the Sessions Judge on 15-9-1977 on condition that she would attend the Court of the Chief Judicial Magistrate, Cuttack and would appear at the vigilance Police Station for interrogation when called upon to do so. This order was passed when the Petitioner was on tour in. Europe. On her return she was arrested at New Delhi on 17-9-1977 and was released on bail. Opp. Party No. 1, the I.O. wrote to the Petitioner on 8-10-1977 directing her to attend the Vigilance Police Station for interrogation. The Petitioner replied on 10-10-1977 that this requirement to

attend the Police Station was contrary to law, but, nevertheless, she was willing to attend the Police Station, but pleaded that she was not inclined to make any statement whatsoever. The Petitioner was further asked to appear on 11-10-1977 at the Police Station for further interrogation in relation to the Case under the Prevention of Corruption Act. The Petitioner appeared at the Police-station on 13-10-1977 but refused to make any statement claiming privilege under Article 20(3) of the Constitution of India. She also handed over a letter on the same day to the I.O. reiterating her stand on Article 20(3) of the Constitution that she should not be coerced to answer the question. Thereupon O.P. No. 1 filed a complaint u/s 179, Indian Penal Code against the Petitioner for declining" to answer his questions in the Court of the Sub-Divisional Judicial Magistrate, Sadar, Cuttack. This complaint was registered as Complaint case No. 2(c) 388 of 1977 and the Magistrate took cognizance and issued summons against her by his order dated 1-11-1977.

2. The Petitioner being aggrieved by that order of the Magistrate has filed the aforesaid writ application and the Criminal Revision, both of which were heard together and will be governed by this judgment.

3. Mr. Rath, the learned Counsel for the Petitioner, has raised three main contentions:

(a) The Petitioner being a person accused of an offence in Vigilance Police Case No. 22 of 1977 is not under any legal obligation u/s 161, Code of Criminal Procedure to answer truly all questions relating to such case, put to her by the I.O., The ingredients of Section 179, Indian Penal Code "being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant", are therefore, not satisfied in the present case. The impugned order of the Magistrate issuing summons u/s 179, Indian Penal Code is therefore, liable to be quashed.

(b)The prosecution of the Petitioner u/s 179, Indian Penal Code constituted gross infringement of Article 20(3) of the Constitution which provides that "No person accused of any offence shall be compelled to be a witness against himself" inasmuch as, the consequence of such prosecution is to compel the Petitioner to speak the truth before the I.O. which is prohibited by the aforesaid Article.

(c)Conceding for the sake of argument that Section 161(2), Code of Criminal Procedure casts an obligation on the Petitioner to answer questions put by the police, a plea of constitutional protection under Article 20(3) of the Constitution constitutes a reasonable excuse for not answering the questions. As such, there is no mens rea and no Intensional violation of any law. Similarly, if questions are not answered on the plea of incrimination, there is also no violation of Section 161(2), Code of Criminal Procedure and no offence can be said to have been committed. It was the duty of the Magistrate before taking cognizance to apply his mind to the defence plea as expressly stated in the complaint petition and his

omission to do so amounts to improper exercise of jurisdiction and abuse of process of Court.

1. The first contention is now taken up for consideration. It must be stated at the outset that the Petitioner has not impeached the constitutional validity of Section 161, Code of Criminal Procedure or of Section 179, Indian Penal Code and there is no prayer to declare those sections or any part thereof as ultra vires the Constitution. There is also no dispute that an accusation has been levelled against the Petitioner in the F.I.R. Dated 3-9-1977 (Vigilance Police Case No. 22 of 1977) and that she was arrested in connection with that case on 17-9-1977 and was released on bail. Nor is there any controversy that the Petitioner claimed constitutional protection under Article 20(3) of the Constitution in declining to answer questions put to her by the I. O. relating to the Criminal Charges against her. The principal question for adjudication is interpretation of Section 161, Code of Criminal Procedure with particular reference to the meaning and Import of the expression "any person" contained therein. Mr. Rath's contention is that the expression "any person" in Section 161, Code of Criminal Procedure does not include an accused person and only refers to "witnesses" as is indicated in the original note to that section.

Section 161, Code of Criminal Procedure is extracted herein below:

161. Examination of witnesses by Police: (1) Any police officer making an investigation under this Chapter, or any police Officer, not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions, the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Mr. Rath's contention substantially is that the controlling key to the meaning of Section 161, Code of Criminal Procedure its marginal note which must be referred to in construing the section. The law is well settled by the highest Court of the land as also by the Privy Council that the marginal Note to a section in the Statute "cannot control the plain words of the statute but they may explain ambiguous words. If there is any doubt in the interpretation of the words in the section the heading certainly helps the Court to resolve that doubt". See the case of *Bhinka and Others Vs. Charan Singh*, . The Privy Council in the case of *Thakurani Balaraj Kunwar v. Rae Jagatpal Singh* 31 I.A. 132s, said:

It is well settled that marginal notes to the section of any Act of Parliament

cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English act of Parliament.

The language of the different Sub-sections of Section 161, Code of Criminal Procedure is very plain and there does not appear to be any ambiguity therein. Accordingly, in deriving the meaning of different clauses of that section" resort cannot be had to the marginal note or heading. The expression "any person" is of wide and generic import. In the absence of anything in the Section itself or any other external compelling reasons the, expression "any person" cannot be construed narrowly so as to exclude an accused person from its ambit.

The provision of this section had come for judicial interpretation in a string of cases of various High Courts in India as also the Privy Council and of the Supreme Court. The consensus is in favour of the view that the expression "any person" includes an accused person as will be shown by a discussion of various cases hereunder.

5. In the case of Syamo Maha Patro and Anr. v. Emperor AIR 1962 Mad. 891 (F.B.), their Lordships were considering the question as to whether the expression "statement made by any person" in Sub-section (1) of Section 162, Code of Criminal Procedure would include a person accused of an offence under investigation. While discussing that question, they also dealt with Section 161 and construing both these sections in their plain literal meaning, they concluded that the expression "any person" would include an accused person as well as a witness. They repelled the contention so far as Section 161 was concerned that its meaning is controlled by the marginal note which mentions the expression "examination of witnesses"s only, by relying upon high authorities that no Court is entitled to refer to marginal note for interpretation of a section when there is no ambiguity about the words used in the section. Their lordships construed Sections 161, 162 and 163 of the Code of Criminal Procedure in just a position and were of opinion that all of them apply to an accused person. Sundaram Chetty, J., a member of the Full Bench of the Madras High Court, in his separate judgment said:

...It seems to me that to expression any person in Section 161 does not exclude a person suspected or accused of an offence. There is nothing repugnant is supposing such a person to be acquainted with the facts and circumstances of the case....

In the case, of Pakala Narayana Swamy v. Emperor (1939) 6 C.L.T. 25 their Lordships of the Judicial Committee while construing Section 162, Code of Criminal Procedure also expressed the true meaning of Section, 161. The expression "any person who... appears to be acquainted with the facts and circumstances of the case" occurs in Section 160(1) of the Code of Criminal Procedure. The expression "any person" supposed to be acquainted with the

facts and circumstances of the case" occurs in Sub-section (1) of Section 161, Code of Criminal Procedure, Sub-section (2) thereof refers to that person as "much person", Section 162, Code of Criminal Procedure begins with the words "No statement made by any person to a Police Officer in course of an investigation under this Chapter. This Chapter means Chapter 14 in which Sections 160 and 161 also occur. After conferring power on police officers to investigate in Section 156 this Chapter proceeds in Section 160 to give power to them to require, by an order in writing, attendance of any persons who appears to be acquainted with facts and circumstances of the case and similarly confers power on a Police Officer in Section 161 to require attendance of any person supposed to be acquainted with facts and circumstances of the case for being examined orally. Their Lordships in view of the scheme held that both Sections 161 and 162 were drawn in the same general way relating to "any person". It is worth while to extract the discussion of the matter by their lordships in their own words:

The reference in the section to "this Chapter" is to the group of sections beginning with Chapter 14 forming Part 5 of the Code entitled "Information to the Police and their powers to Investigate", After giving powers to certain Police Officers to investigate certain crimes the Code proceeds in Section 160 to give power to any Police Officer making an investigation by any order", in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By Section 161 any police man making an investigation under the Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those the answers to which may tend to incriminate him, Then follows the section in question (162) which is drawn in the same general way relating to "any person", That the words in their ordinary meaning would include any person though he may thereafter the accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom as may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused....

Their Lordships of the Privy Council gave their stamp of approval to the decision of the Full Bench of the Madras High Court in the aforesaid Syamo Maha patro's case A.L.R. 1932 Mad. Thus, AIR 1939 47 (Privy Council) is a binding authority for the proposition that the expression "any person" in Section 161 includes an accused person.

The Supreme Court in the case of Mahabir Mandal and Ors. v. State of Bihar 1972 S.C.D. 533, has given its full approval to the portion extracted from Pakala Narayana Swami's case" above, which means that Section 162, Code of Criminal Procedure has been drawn in the same general way relating to "any person" as

its preceding Section 161 and that the expression "any person" in its ordinary meaning would include an accused person.

Section 163, Code of Criminal Procedure reinforces the aforesaid conclusion of the Privy Council. Sub-section (1) thereof prohibits a police officer or other person in authority from offering or making or causing to be offered or made, any inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act. Sub-section (2) prohibits a Police Officer or other person from perverting, by caution or otherwise any person from making in the course of investigation under the Chapter any statement which may be disposed to wake of his own free will. Proviso to that Sub-section clearly indicates that "any person" referred to in Sub-section (2) is an accused person. Thus an accused person may voluntarily make a statement in course of investigation, under this Chapter, to a Police Officer. The only stage in this Chapter where such an opportunity would occur to an accused person would be at the stage of Sections 160, 161 and 162. It follows, therefore, that an accused person may be questioned by a police officer u/s 161, which gives him power to do so, and such person is bound to answer the questions, except those which would have a tendency to expose him to a criminal charge.

In the case of *Jaladhar Sahu Vs. The State*, ., this Court also accepted the Privy Council decision in the case of AIR 1939 47 (Privy Council) as laying down that in Sections 160, 161 and 162 the marginal notes shall not control the plain literal meaning of the sections and according to plain meaning of those sections "any person" would include an accused person.

The Kerala High Court in the case of *Velu Viswanthan and Others Vs. State Etc.*, , relying upon AIR 1939 47 (Privy Council) held that "any person" in Section 161, Code of Criminal Procedure includes an accused person. In another part of the judgment their Lordships have, however, held that the same expression in Section 160, Code of Criminal Procedure does not include an accused person. With great respect, the part of the decision, however, is not acceptable being based upon person faulty reasonings and appears to run counter to the decision of the Privy Council in AIR 1939 47 (Privy Council) .

Kerala High Court in a subsequent decision in the case of *Mathew Zacharish v. State of Kerala and Ors.* 1974 Cri.L.J. 1189, has endorsed and followed its own view given in the earlier case referred to above that the words "any person" in Section 161(1), Code of Criminal Procedure include an accused person.

6. Even conceding for the moment for the sake of argument that the marginal note shall govern Section 161, Code of Criminal Procedure it must be noticed that the word "witness" in the marginal notes is not used in any technical sense or in the sense of being a witness before the Court." "Witness" here would mean a person who has heard, seen, perceived or is otherwise acquainted with any fact, event or situation relating to the offence committed. Understanding the word "witness" in the general sense, an accused person would be a witness This

appears to be the view taken by Hidayatullah, J. in the case of State of U.P. Vs. Deoman Upadhyaya, , as will appear from the passage extracted hereinbelow from his judgment in that case:

when an offence is committed and investigation starts, the police have two objects in view. The first is the collection of information and the second is the finding of the offender. In this process, the police question a number of persons, some of whom may be only witnesses and some who may later figure as the person or persons charged. While questioning such person, the police may not caution them and the police must leave the persons free to make whatever statements they wish to make. There are two checks at this stage. What the witnesses or the suspects say as not to be used at the trial, and a person cannot be compelled to answer a question which answer may incriminate him. It is to be noticed that at that stage though the police may have suspicion against the offender, there is no difference between him and other witnesses, who are questioned. Those who turn out to be witnesses and not accused are expected to give evidence at the trial not accused are expected to give evidence at the trial and their former statements are not evidence. In so far as those ultimately charged are concerned, they cannot be witnesses, save exceptionally, and their statements are barred u/s 162 of the Code and their confessions, u/s 24 of the Indian Evidence Act. Their confessions are only relevant and admissible if they are recorded as laid down in Section 164 of the Criminal Procedure Code, after due caution by the Magistrate and it is made clear that they are voluntary. These rules are based upon the maxim, *Memo tenetur prodere seipsum* (no one should be compelled to incriminate himself)....

7. Mr. Rath, the learned Counsel for the Petitioner, tried to distinguish the case of AIR 1939 47 (Privy Council) on the ground that the person whose statement was held not to be barred u/s 162, Code of Criminal Procedure was not, at the relevant time of examination by the Police, an accused, though subsequently he became one. The distinction sought to be made is without any substance. The Privy Council construed the scheme of Chapter 14 forming part 5 of the Code with special reference to the group of Sections 160, 161 and 162 and came to the conclusion that Sections 161 and 162 have been drawn in the same general way relating to "any person" which would include a person suspected to be the accused at the time of examination and also a person who may eventually be an accused and ultimately charged. This analysis of "any person" in Section 162 is attracted also to Section 161 which is drawn in the same general way. It will be seen that their lordships of the Privy Council have made a distinction between a person suspected of having committed a crime and a person eventually an accused in the sense of being ultimately charged with an offence by submitting a charge sheet. A person named in the F.I.R. may be nomenclatured as an accused for certain purposes but he is merely a person who is suspected of a crime by the police during investigation and he becomes eventually an accused in the true sense when in charge sheet is submitted against him. In view of the distinction which was made in AIR 1939 47 (Privy Council) the extracted passage from it

leaves no room for doubt that a person, whether an accused or not or suspected of a crime or not, can be examined by the Police at the stage of 161 until he is ultimately charged, which is a stage after investigation is completed, that is to say, after the stages of 160, 161 and 162 are over.

8. The legislative history of Section 162 of the Code of Criminal Procedure, 1973 would also indicate that what Privy Council decided in AIR 1939 47 (Privy Council) was that "any person" in Section 162 of Code of Criminal Procedure, 1898 would include an accused person, Sections 119 and 121 of the Code of 1872 contained provisions analogous to Section 162 of the present Code Section 119 of 1872 Code provided that "No statement so reduced in writing shall be signed by the person making it nor shall be treated as a part of the evidence recorded". Section 121 of the said Code provided. "No Police Officer shall record any statement or any admission or confession of guilt which may be made before him by a person accused of an offence." Proviso to this section read: "Nothing in the section shall preclude a Police Officer from reducing any such statement or admission or confession into writing for his own information or guidance or giving evidence or any dying declaration. Thus, under 1872 Code the Police were authorised to reduce into writing admission or confession of the accused, though it prohibited its use at the trial. Then came 1882 Code. Section 162 of that Code for the first time provided that "Nothing in the section shall be deemed to" affect the provisions of Section 27 of the Indian Evidence Act. "This was omitted from Sub-section (2) of Section 162 of the Code of Criminal Procedure, 1898. When the law stood thus, the Privy Council rendered its decision in the aforesaid AIR 1939 47 (Privy Council) . The effect of the decision was that any statement made by an accused u/s 27 of the Evidence Act was hit by Section 162, Code of Criminal Procedure and could not be admitted into evidence. This consequence also was noticed by the Privy Council when they said:

...The words of Section 162 are in their Lordships' view, plainly wide enough to exclude any confession made to a Police Officer in course of investigation whether a discovery is made or not. They may therefore protanto repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that Section 27, Evidence Act, is a "special law" within the meaning of Section 1(2), Code of Criminal Procedure, and that Section 162 is not a specific provision to the contrary. Their lordships express no opinion on this topic for whatever be the right view it is necessary to give to Section 162 the full meaning indicated.

This passage categorically clarifies the position that an accused person comes within the ambit of the expression "any person" in Section 162, and therefore, also of Section 161(1), Code of Criminal Procedure. Whether Section 27 of Evidence Act would be saved as a special law within the meaning of Section 5 of the Code of Criminal Procedure or not having been left open, the legislature stepped in and amended Sub-section (2) of Section 162 by introducing therein the words, "or to affect the provisions of Section 27 of that Act." This amended

provision of Section 162(2) made it clear beyond any doubt that the expression "any person" in Sub-section (1) of Section 161 included an accused person. If the expression "any person" in that section did not include an accused person, the provision in Sub-section (2) of Section 162 that nothing in the section shall be deemed to affect the provisions of Section 27 of the Indian Evidence Act would be redundant. It is a well known principle of construction that a statute should not be construed so as to render any word redundant. Therefore, from the aforesaid amendment carried out in Sub-section (2) of Section 162 in consequence of the Privy Council decision in *Pakala Narayana Swami's case* 6 (1939) C. L. T. 25 : the intention of the legislature was clear that "any person" in Sub-section (1) of Section 161 included an accused person.

The absence of such a provision in Section 162 between the years 1898 and 1934 led to a conflicting judicial decisions. Twelve such decisions were referred before the Privy Council, nine of whom held that "any person" in Section 161 did not include an accused person, while three other High Courts including Full Bench of the Madras High Court already referred to, hold that the words "any person" would include accused persons. Their Lordships considered one representative case from each category and upheld the view expressed by the Madras Full Bench by saying:

...they have come to the conclusion that the words of the section lead to the conclusion that the statement is not admissible even when made by the person ultimately accused.

9. Mr. Rath, the learned Counsel for the Petitioner, relies upon the case of *State of Gujarat v. Shyamlal Mohanlal Choksi* AIR 1965. S.C. 1251, in support of his contention that "any person" in Section 161, Code of Criminal Procedure cannot include an accused person. That is a case where Section 94 of the Code of 1898 came in for construction which provides in Sub-section (2) thereof that "any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same". Construing the expression "any person" their lordships held that it would not include an accused person. Mr. Rath wants to extend the same logic to the construction of Section 161. It is not permissible to do so when the Privy Council has expressly construed Section 161 in a different manner and that Privy Council decision has also been considered and accepted by subsequent decisions of the Supreme Court. That apart, *Shyamlal's case* AIR 1965. S.C. 1251, is also distinguishable because their lordships reached the conclusion that "any person" in this section would not include any accused person because-

...there are indications that the legislature did not intend to include an accused person. The words "attend and produce" are rather inept to cover the case of an accused person. It would be an odd procedure for a Court to issue a summons to an accused person present in Court "to attend and produce" a document. It would be still more odd for a police officer to issue a written order to an accused

person in his custody to "attend and produce" a document.

Further, their lordships were also influenced by certain unfortunate consequences which they envisaged would follow if "any person" were to include an accused. This case, therefore, cannot be caned m aid in the construction of Section 161 which is completely bare of any internal indication in support of Mr. Rath's contention. On the contrary, their lordships in para 29 of their judgment seems to say that where in any section of the Code of 1898 a general expression of ."any person" is intended to include an accused person, safeguard has been provided compelling such person from answering questions which would incriminate him. By illustration they have- referred to Section 175 of 1898 Code. Section 343 and 337 of the Code of 1898 also indicate that at any stage of investigation any person supposed to have been directly or indirectly concerned in or privy to an offence may be questioned as to whether he was willing to make true disclosure of the whole of the circumstances within his knowledge relating to the offence, subject to the condition that no influence by himself or any threat or promise or otherwise shall be used. That, we, think, demolishes Mr. Rath's general contention that the accused person cannot be questioned at any stage for any purpose during the investigation.

10. From the aforesaid discussion the following conclusions are inevitable:

(1) The police making an investigation under Chapter XII (equivalent to Chapter 14 of 1898 Code) is conferred power to examine orally any person including an accused person supposed to be acquainted with the facts and circumstances of the case and that such person is bound to answer truely all questions relating to such case put to him by such officer.

(2) There is no difference between an accused and other witnesses who can be questioned u/s 161.

(3) It follows from the decision in Pakala Narayana Swami's case 6 (1939) C. L. T. 25 : that an accused person who is liable to be examined by the police officer u/s 161 is a person supposed to be acquainted with the facts and circumstances of the case.

(4) To protect the accused when questioned u/s 161 from being compelled to incriminate himself two checks have been provided. Firstly, any statement made by the accused cannot be used at the trial and secondly, he cannot be compelled to answer a question which answer may tend to expose him to a criminal charge or a penalty or forfeiture.

(5) The accused person while being interrogated by police officer u/s 161 cannot give a blanket refusal to answer any question put by the I.O., whether the said question tends to expose him to a criminal charge or not.

11. The accused is entitled to refuse to answer questions when such answers would be self-incriminatory. As held in the case of State of Bombay v. Kathi Kalu Oghad AIR 1911 S.C. 1808, in order that the testimony by an accused person

may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself". Thus, it is clear that it is not permissible to an accused under interrogation to make a blanket refusal. The possibility of an answer which is innocuous in nature considered by itself being used as a stepping stone for further investigation which may ultimately lead to discovery of incriminating evidence, cannot be a ground for refusal to answer.

12. We propose to proceed to the second contention, namely, that the prosecution of the Petitioner u/s 179, Indian Penal Code amounts to constitutional infringement of Article 20(3) as in consequences of such prosecution the Petitioner will be compelled to speak the truth. The Investigating Officer even though authorised to interrogate an accused u/s 161(1), Code of Criminal Procedure can not demand answers from the accused person against her volition as she cannot be compelled to answer truly in which case she will incriminate herself. Section 162(2), Code of Criminal Procedure does not cast any obligation on the accused to answer truly. Referring to Sections 163, 162, 313, 315 and 316, Code of Criminal Procedure and Sections 24 and 25 of the Evidence Act it is argued that the legislature could not have intended to recast Section 161 of the Code so as to bring about a direct conflict with the scheme of the Code and the basic principle of Criminal jurisprudence as contained in the Code of Criminal Procedure and the Evidence Act referred to above. The fundamental principle of Criminal jurisprudence as has been embodied in Article 20(3) and Section 161, Code of Criminal Procedure must be so interpreted as to be consistent with Article 20(3) of the Constitution. Any construction which conflicts with that Article must be discarded, as otherwise that section will become unconstitutional. Reliance, in this connection, has been placed on the decisions of the Supreme Court in the case of *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, *State of Bombay v. Kathi Kiu* AIR 1911 S.C. 1808 and *State of Gujarat v. Shyamlal Mohanlal Ohoksi* AIR 1965 S.C. 1251 Article 20(3) of the Constitution of India, which provides a guarantee against testimonial compulsion, runs as follows:

No person accused of any offence shall be compelled to be a witness against himself.

The question for consideration, therefore, is whether the protection under Article 20(3) of the Constitution can be invoked during investigation of a crime and, if so, to what extent.

In the case of *Maqbool Hussain Vs. The State of Bombay*, their Lordships considered the present question in the context of Article 20(2). This is what their Lordships have said:

The words "before a Court of law or judicial tribunal" are not to be found in Article 20(2). But if regard to be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of Law or a tribunal, required by law to decide the matter in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein "convicted" "commission of the act charged as an offence" "be subject to a penalty". "Commission of the offence", "Prosecuted and punished", accused of any offence "would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

This case was affirmed by the Supreme Court in the case of S.A. Venkataraman Vs. The Union of India (UOI) and Another, . In the latter case Mukherjee, J., as he then was, who delivered the judgment of the Court referring to the effect of Maqbool Hussain Vs. The State of Bombay, , observed:

...the language of Article 20 and the words actually used in it afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a Court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try the matter judicially and on legal evidence....

These two decisions considered the general scope of Article 20 though both of them were concerned directly with the construction and application of Article 20(2) alone, and seem to lay down that protection under Article 20(3) can be Invoked in a proceeding before a Court of law or in a judicial proceeding.

Article 20(3) was considered in the case of M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , in an application filed under Article 32 of the Constitution. In this case F.I.R. was lodged by the Registrar of Joint Stock Companies against the accused-Petitioners. The lodging of F.I.R. was preceded by an investigation into the affairs of the Petitioners' company which had been ordered by the Central Government u/s 138 of the old Companies Act and the resultant report showed that the Petitioners had made an attempt to embezzle or misappropriate funds of the company. On receipt of the F.I.R. the District Magistrate ordered investigation into the offence and issued search warrants at various places. The Petitioners contended that the search warrants were illegal being in violation of Article 20(3) and should be quashed. This plea was ultimately rejected and the Supreme Court observed that a compelled

production of incriminating documents by a person against whom F.I.R. has been lodged amounts to testimonial compulsion within the meaning of Article 20(3) of the Constitution. But a search and seizure of a document under the provisions of Sections 94 and 96, Code of Criminal Procedure, 1898 do not amount to compelled production thereof within the meaning of that Article. It was observed:

Broadly stated the guarantee in Article 20(3) is against testimonial compulsion. The protection afforded to an accused in so far as it relates to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.

In this case, the Supreme Court indicated that protection under Article 20(3) can be claimed even outside the Court room or judicial tribunal by saying that it may extend to compelled testimony previously obtained.

In the case of Raja Narayanlal Bansilal Vs. Maneck Phiroz Mistry and Another, the principle regarding Article 20(3) enunciated in the aforesaid case was accepted and it was reiterated that for Invoking constitutional rights against the testimonial compulsion guaranteed under Article 20(3) the tests to be applied are about the character of the proceeding and the forum where the proceedings were initiated; in other words, it must appear that a formal accusation has been made against the party invoking the guarantee and that it relates to commission of an offence which in the normal course may result in prosecution.

In Kathi Kalu Oghad's case AIR 1961 S.C. 108, the Supreme Court accepted the view expressed in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , that protection under Article 20(3) can be claimed outside the proceedings in a Court or before a tribunal by saying:

To be a witness means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

"To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear wider meaning namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

This observation also was accepted in Ramesh Chandra's case AIR 1970 S.C. 240,.

Sinha, C.J. speaking for the majority in Kathi Kalu Ogha's case AIR 1961 S.C. 108, said:.

To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he had made the statement. It is not enough that he should become an

accused, any time after the statement has been made.

This passage relating to meaning of "an accused" seemed to run counter to M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, and Raja Narayanlal Bansilal Vs. Maneck Phiroz Mistry and Another, , where the Supreme Court in describing the person accused used the expression against whom a formal accusation had been made," It was argued before the Supreme Court in Romesh Chandra Mehta Vs. State of West Bengal, , that Kathi Kalu Oghad's case AIR 1961 S.C. 108 overruled M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , and Raja Narayanlal Bansilal Vs. Maneck Phiroz Mistry and Another, , on the point as to the state when a person may be said to be an accused of an offence. But that was rejected and it was ruled that in Kathi Kalu Oghad's case AIR 1961 S.C. 108, the Court merely set out the principle in the light of the effect of a formal accusation against a person vit., that he stands in the character of an accused at the time when he made his statement.

From the series of Supreme Court decisions referred to above two principles have emerged, namely:

(a) The protection under Article 20(3) of the Constitution is not merely in respect of testimonial compulsion in Court but may as well extend to compelled testimony previously obtained from an accused outside Court

(b) person against whom an F.I.R. has been lodged alleging commission of offence is also entitled to the protection of Article 20(3) of the Constitution.

Relying upon the first principle enunciated in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , Mr. Rath contends that no question can be put by the Police officer at the investigation stage. This contention will have validity if statements made to police under interrogation amounted to "compelled testimony previously obtained", If there was scope for admitting such statements as testimony against the accused subsequently in Court during trial then those statements could be regarded as testimony previously obtained. Conceding that possibility of prosecution u/s 179, Indian Penal Code is an over present element of compulsion it relates to only such statements of the accused which are not self-incriminatory. Compelled self-incriminating statements are expressly prohibited from being collected during the stage of investigation by express prohibition in Section 161(2), Code of Criminal Procedure. Such statements can only be volunteered by the accused but cannot be extracted under threat of prosecution u/s 169, Indian Penal Code. Further, any self-incriminating statement obtained from the accused, unless it is a confession recorded u/s 164, Code of Criminal Procedure or a statement u/s 27 of the Evidence Act, is absolutely inadmissible. That being so, the guarantee embodied in Article 20(3) is not violated by putting questions answers to which are not self-incriminatory and it is not open to an accused to refuse to answer question put by the I.O. who is specially empowered to interrogate the accused.

A balance has been struck by the legislature between the protection of social security and protection of the fundamental right of the accused under Article 20(3) in Section 161(2), Code of Criminal Procedure. A blanket refusal of the Petitioner to answer questions put by the police officer cannot be protected under Article 20(3). This view seems to receive considerable support from the decision of the Supreme Court in the case of Ramanlal Bhogilal Shah and Anr. v. D.K. Guha 1973 S.C. 487. In this case it was held that though a person accused of an offence is entitled to protection under Article 20(3) and he cannot be compelled to be a witness against himself nevertheless, that does not mean that he need not give information regarding matters which do not tend to incriminate him. Reliance in this connection was placed on Kalu Oghad's case AIR 1961 S.C. 108, as regards what is self-incriminatory and what is not. In that view, their Lordships of the Supreme Court rejected the petition and directed that the Petitioner must answer such questions as do not tend to incriminate him.

13. We will not proceed to consider the last contention of Mr. Rath, namely, that the defence plea disclosed in the complaint petition constitutes a reasonable and lawful excuse and shows absence of mens rea and that, in the facts and circumstances of the case, there was no violation of Section 161(2), Code of Criminal Procedure. The Magistrate had a duty in law to consider the defence plea at the time of deciding to issue summons and he having failed to do so has acted illegally and without jurisdiction in passing the impugned order summoning the accused to appear.

14. The order of the Magistrate shows that he had read the complaint petition in its entirety before deciding to issue summons. If he failed at that time to appreciate the contentions raised now here, or appreciated them wrongly, it would not effect his jurisdiction to pass the order. The Magistrate may be said to have decided wrongly but cannot be said to have acted without initial jurisdiction. Therefore, the Magistrate's order is not liable to be quashed on the sole ground of lack of jurisdiction. If Mr. Rath on the other hand succeeds in convincing us that no criminal case is made out u/s 179, Indian Penal Code accepting all the averments in the complaint petition, then he would certainly be entitled to ask for quashing of the Magistrate's order.

The complaint petition shows that the Vigilance Case has been lodged against the Petitioner u/s 5(1)(d) and (e) read with Section 5(2) of the Prevention of Corruption Act and u/s 161/165/190-B/109. Indian Penal Code u/s 5(1)(d) of the prevention of Corruption Act mere obtaining for herself or for any other person any valuable thing or pecuniary advantage is not an offence. It would be an offence if such things were obtained by corrupt or illegal means or by otherwise abusing her position as public servant. Thus a question as to whether a particular thing had been obtained by her or not is not likely to evoke an answer which would by itself be incriminatory. u/s 5(1)(e) of the Prevention of Corruption Act mere possession of any pecuniary resources or property is not an offence unless the person in possession fails to account satisfactorily of his pecuniary resources

or that the property in his possession is proportionate to his known sources of income. Therefore, prima facie, questions as to whether the Petitioner was in possession of certain pecuniary resources or of certain properties are not likely to elicit answers which by themselves would be self-incriminatory. Section 161, Indian Penal Code makes it an offence for a public servant to accept or obtain or agree to accept or attempt to obtain.

from any person, for himself or for any other person, any gratification whatever as a motive or reward for doing or for bearing to do any official act or for showing at for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State, or with any local authority, corporation or Government company, or with any public servant, as such. Therefore mere obtaining any gratification without presence of the other ingredients of the offence would not constitute an offence under this section. Therefore, answer to a simple question as to whether the Petitioner obtained certain things from certain persons may not by itself be self-incriminatory in nature. Section 165, Indian Penal Code makes it an offence for a public servant to accept or obtain, or agree to accept or attempt to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any preceeding or business transacted or about to be transacted by such public servant. A number of ingredients have to be proved before an offence can be said to have been established under this section, Therefore, answers to questions as to whether a particular thing was obtained from a particular person or whether such a thing was obtained for consideration, or if obtained for what amount, are not likely to be self-incriminatory. Sections 120-B and 109, Indian Penal Code are offences of conspiracy to commit and abetment of offences under the aforesaid sections of the Prevention of Corruption Act and of the Penal Code. The complaint petition discloses that the Investigating Officer explained to the Petitioner that she was an accused at the offences enumerated above and that he was going to give her an opportunity to explain her possession of properties which, prima facie, appeared to him to be disproportionate to her known sources of income and th at she was legally bound to state the truth in relation to the allegations in tbe F.I.R. in the vigilance case as otherwise she would be liable to prosecution u/s 179, Indian Penal Code. The questionnaire appended to the complaint-petition also shows a number of questions which are relevant to the facts in issue. On going through the questionnaire we are not certain that all of them are of such a nature that answers to them would have a tendency to expose the Petitioner to a criminal charge or to a penalty or forfeiture. We, however, refrain from expressinll further opinion in regard to questions catellorically, as such opinion might influence the Magistrate during trial. We must, however, say that a blanket refusal to answer any question put by the I.O. without taking a positive stand with regard to each

question that her answer will be self-incriminatory would not be proper for an accused white being interrogated u/s 161(2), Code of Criminal Procedure whether such refusal was on the basis of reasonable or bona fide claim of constitutional protection under Article 20(3) is not a question which could be answered either way on the basis of complaint petition. For its determination certain facts have to be ascertained. Consequently, it was impossible for the Magistrate to reach a conclusion at this stage before issuing summons that there was absence of mens rea or that there was a lawful and bona fide excuse for refusing to answer any or all of the questions put by the I.O. These defence pleas are open for the Petitioner to adopt during trial when the Magistrate is bound to consider them and to acquit the Petitioner if such pleas are substantiated adequately and to the satisfaction of the Magistrate. The stand of the Petitioner which was also thoroughly canvassed by Mr Rath that she is entitled to keep mum being protected by Article 20(3) of the Constitution, for the reasons already stated above while considering his earlier contention, is not well founded not only for the reasons given while dealing with those contentions but also on account of Section 438(2)(i) which expressly envisages that an accused person can be interrogated by the police as and when required. The power on the police to interrogate an accused, as has been already indicated, has been conferred u/s 161 and that is the power which is referred to u/s 438(2)(i). Code of Criminal Procedure. It is clear that having regard to the scheme of the Code of Criminal Procedure in the context of the constitutional protection conferred on an accused, the accused is not entitled to refuse to answer questions which are quite innocuous and answers to which do not have a tendency to expose the accused to a Criminal charge or to a penalty or forfeiture. If the stand of Mr. Rath were accepted the dual objects of investigation, namely collection of information and finding of the offender would be completely frustrated. The provision like Section 161(2) has been specifically retained not only to preserve the constitutional protection conferred on an accused under Article 20(3) but also to facilitate investigation. For the aforesaid reason this last contention of Mr. Rath must be rejected.

14. In result, the writ application and the criminal revision are both dismissed. The order of stay of further proceeding in Complaint case No. 2(c) 388 of 1977 is accordingly, vacated. The Magistrate is directed to proceed in accordance with law. There will, however, be no order as to costs.

N.K. Das J

I agree.

Appeal dismissed.