

(1957) 11 BOM CK 0008

In the Bombay High Court

Case No : Criminal Reference No. 170 of 1957 (with Criminal Application No. 496 of 1957)

State

APPELLANT

Vs

Fundan Lakhanmal and Others

RESPONDENT

Date of Decision : 13-11-1957

Acts Referred:

Bombay Police Act, 1951 — Section 124, 411
Constitution of India, 1950 — Article 14, 20(3)

Citation : AIR 1960 Bom 377 : (1958) 60 BOMLR 403 : (1960) CriLJ 1186

Hon'ble Judges : Dixit, J;Badkas, J

Bench : Division Bench

Advocate : Crl. Ref. No. 170 of 1957, Y.V. Chandrachud, Asst. Govt. Pleader, H.N. Ramchandrani, Criminal appln. No. 496 of 1957, H.N. Ramchandrani, Y.V. Chandrachud, Asst. Govt. Pleader, for the Appellant;

Judgement

Dixit, J.

(1) These two matters raise a common question about the validity of S. 124 of the Bombay Police Act, 1951, and the question arises in this way.

(2) On the 10th of June, 1955 at about 6-30 P. M. four accused persons were believed to be in possession of "takas" of 251 1/2 yards of cloth worth in all Rs. 503/- on a public thoroughfare near barrack No. 826, Section No. 17, Kalyan Camp No. 3, Ulhasnagar. The Police became suspicious, and when they saw the accused persons, they approached them. On being approached, the accused failed to account for their possession. It was alleged that under those circumstances, they had contravened S. 124 of the Bombay Police Act, 1951. The facts were explained to the accused and they were asked as to what they had to say about the facts alleged against them. In reply, they stated that they did not admit the facts as alleged against them. At this stage, their Advocate intervened and he contended that the did not admit the facts as alleged against them. At this stage, their Advocate intervened and he contended that the prosecution

under S. 124 was ultra vires the Indian Constitution. The learned Magistrate, before whom the accused persons were put up for trial, was of the opinion that the case, he was dealing with, raised a question about the validity of S. 124, which, according to him, militated against Art. 20(3) of the Indian Constitution. He said that the determination of the question was necessary for the disposal of the case. He was of the opinion that S. 124 of the Bombay Police Act was void, invalid and inoperative, and, as according to him, the question had not been previously raised before this Court, he was inclined to make a reference to this Court through the Sessions Judge, Thana. The learned Sessions Judge, accordingly, has therefore submitted the record and proceedings in the case in order that this Court may decide the question.

(3) In Criminal Application No. 496 of 1957, the facts are these. Two persons including one Saduram, who is the applicant in this application, were charge-sheeted, the allegation against them being that they, at Bombay on the 18th of June, 1956, were found in possession of two gunny bags containing scrap, lead, copper wire, white wire and scrap brass collectively valued at Rs. 300/-, which was reasonably believed to be stolen property and for which they could not account satisfactorily and so they had committed an offence punishable u/s 124. Saduram has, therefore, applied under Article 226 of the Constitution challenging the legality of his prosecution for an offence u/s 124.

(4) The question is whether Section 124 of the Bombay Police Act, 1951 is invalid, having regard to Article 14 and Article 20(3) of the Constitution of India. Section 124 is as follows:

"Whoever has in his possession or conveys in any manner or offers for sale or pawn, anything which there is reason to believe is stolen property or property fraudulently obtained, shall if he fails to account for such possession or to act to satisfaction of the Magistrate, on conviction, be punished with imprisonment for a term, which may extend to three months or with fine which may extend to one hundred rupees or with both."

Article 14 provides:

"The State shall not deny to any person equality before the law or equal protection of laws within the territory of India."

Then, Article 20(3) provides:

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

It may also be relevant to refer to Article 13(1) which says:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void."

(5) Mr. Ramchandrani, who appears for the accused, contends that Section 124 is

void both in view of Article 14 and in view of Article 20(3) of the Constitution, and it would be necessary to separately examine the validity of his contention. Before I deal with Article 14 and Article 20(3), it would be necessary, first, to understand the provisions of Section 124. Section 124 makes possession of property of which no satisfactory account is given an offence punishable under that Section. u/s 124, what is to be proved is, firstly, that the accused person is in possession of property and secondly, that there is reason to believe that he is in possession of stolen property. Therefore, it is necessary for the prosecution to prove first that the accused was in possession of property, and that there was reason to believe that the property, which was found in his possession, was stolen property. But Mr. Ramchandrani contend that Section 124 contains a third ingredient, and that ingredient is that the accused must fail to account for such possession. In other words, his contention is that there are three ingredients constituting an offence u/s 124. It is evident that the words "if he fails to account for such possession, which means that it is for the accused to explain his possession. Now, if the accused is to explain his possession, it is difficult to accept the contention that that is something, which the prosecution is required to prove. On the footing that the two ingredients are first proved, accounting for possession is something within the exclusive knowledge of the accused. It is obvious that that is a fact which the prosecution cannot prove and is not required to prove. Now, when an accused person is called upon to explain his possession, he is asked to explain as to how he accounts for the possession of property, which is in his possession, and which is believed to be stolen property; and it is difficult to accept the contention that in such a case when the accused person is called upon to explain his possession, that is a fact which the prosecution is required to prove affirmatively as though it is a fact necessary for the successful prosecution of the accused. What the parenthetical clause really means is that upon the prosecution proving the two facts first, the accused is called upon to merely explain his possession. As I have pointed out, that fact the prosecution is not required to prove & cannot prove, because that is a fact within the exclusive knowledge of the accused & he is called upon to explain his possession. I am not, therefore, prepared to agree with the contention of Mr. Ramchandrani that accounting for possession is a necessary ingredient for the commission of an offence u/s 124. But Mr. Ramchandrani argues that this interpretation would seem to be opposed to Article 20(3) of the Constitution. The general principle of criminal jurisprudence is that an accused person is presumed to be innocent until the 20(3) , in effect, affirms and emphasizes that principle. An accused person cannot be compelled to give evidence. He may, if he is inclined to, give evidence on his behalf. In this connection, reference may be made to S. 342A of the Criminal Procedure Code, 1898 as amended, which provides:

"Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that-

- (a) he shall not be called as a witness except on his own request in writing; or
- (b) his failure to give evidence shall not be the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial."

So that under S. 342A of the Criminal Procedure Code, it is provided that an accused person shall be a competent witness for the defence and he may give evidence on oath, subject to the limitation that he shall not be called as a witness except at his own request in writing, which suggests that an accused person cannot be compelled to be witness against himself. There is also another salutary provision, which is that if an accused person fails to give evidence, it shall not be made the subject of any adverse inference against the accused person. Article 20(3) says something different. What it says is that a person accused of an offence will not be compelled to be a witness against himself. Now, so far as S. 124 of the Bombay Police Act, 1951, is concerned, all that it provides is that an accused is asked to account for his possession. Surely, this is not making him a witness against himself. What S. 124 does is to tell an accused that he should explain the circumstance which appears against him which is that he is found in possession of property, upon the prosecution proving that he was in possession, and there was reason to believe that he was in possession of stolen property.

(6) The scope and effect of Art. 20(3) of the Constitution was considered in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, . In that case, their Lordships of the Supreme Court were considering the provision contained in S. 96 (1) of the Code of Criminal Procedure in relation to Art. 19(1) (f) and Art. 20(3) of the Constitution. At p. 1083 (of SCR) : (at p. 302 of AIR) of the Report, Mr. Justice Jagannadhas observed :

"Article 20 (3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its constitution."

So what is prohibited under Art. 20(3) is the compulsion of an accused person to incriminate himself. Far from an accused person incriminating himself, an accused person is according to S. 124 called upon to explain his possession and the possession is to be explained, because the prosecution says that the accused was found in possession of certain property and that there was reason to believe that the property was stolen property. When an accused is, therefore, asked to explain his possession within Section 124, there can be no question of the accused person being compelled to incriminate himself. The position would be precisely the same if an accused were asked to explain his possession under S. 342 of the Code, the Court may, at any stage of any enquiry or trial, question the accused to explain any circumstance appearing in the evidence against the accused person. Under S. 124, the circumstance, which an accused person has to

explain, is the circumstance that he was found to be in possession of certain property, which was believed to be stolen. The position, therefore, under S. 124 is in no way different from the position arising under S. 342. When, under S. 124, an accused is asked to account for his possession, that is, to explain his possession, the accused person is not asked to incriminate himself, but what the accused person is asked to do is to tell the Court as to what he has to say about his possession. In our view, therefore, the contention raised on behalf of the accused that S. 124 is invalid in view of Art. 20(3) of the Constitution is not a sound contention and must be rejected.

(7) But Mr. Ramchandrani argues that Section 124 is invalid in view of Article 14 of the Constitution. In this connection, he calls in aid the provisions of Section 411 of the Indian Penal Code. Section 411 provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. It may be pointed out that the punishment for an offence u/s 124 is a punishment which may extend to 8 days' imprisonment or a fine which may extend to fifty rupees or both. It is plain, I think, that an offence under Sec. 124 is an offence of a minor character, while an offence contemplated by section 411 is an offence of a serious nature. The ingredients constituting an offence under S. 124 are, firstly, that an accused person must be in possession of property; and secondly there must be reason to believe that the property was stolen property. u/s 411, the two essential things which are required to be proved are (1) dishonest receipt or retention of stolen property and (2) knowledge at the time of receipt that the property was obtained in one of the ways specified in that section. It is evident that the facts, which are required to be proved u/s 124, are not the self-same facts, which are required to be proved u/s 411.

(8) Mr. Ramchandrani argues that a discretion, which is absolute, uncontrolled, and, if I may use another expression, untrammelled, is given to the prosecution either to charge an accused person u/s 124 or u/s 411. For this submission there is nothing either in Section 124 or Section 411 to support it. Mr. Ramchandrani argues that on the self-same facts an accused person may be put up for trial u/s 124 or u/s 411 according to the sweet will of the Police. I fail to see where & how the sweet will of the Police comes in. There is no section which gives the Police a discretion either to charge u/s 124 or Section 411. What happens is that a certain set of facts exists, and upon the set of facts existing, it is for the police to put up an accused person for a trial under an appropriate charge. Surely, if an offence falls within Section 411, it hardly stands to reason that the Police would charge the accused u/s 124. The question whether section 124 makes a distinction between an accused person and an accused person, will have to be considered by sole reference to Section 124, and there is nothing in Section 124 to support the contention that the Section, in itself, and, in terms, makes any such distinction. One fails to see how section 124 makes any discrimination between an accused person and an accused person, and in order to make Article

14 applicable, that would be necessary to be proved. In this connection, it will be sufficient to refer to a case decided by their Lordships of the Supreme Court in *Sakhawat Ali Vs. The State of Orissa*, . There their Lordships were considering the effect of Section 16(1)(ix) of the Orissa Municipal Act, 1950. The provision, which was impugned, states that no person shall be qualified for election to a seat in a Municipality, if such person is employed as a paid legal practitioner on behalf of the Municipality or as practitioner against the Municipality. The contention taken was that the disqualification prescribed u/s 16(1)(ix) of the Act violated the appellant's fundamental rights guaranteed to him under Article 14 and Article 19(1)(g) of the Constitution. In examining the question of the validity of Section 16, their Lordships pointed out that merely because certain categories which would stand on the same footing as those which were covered by the legislation were left out, would not render legislation discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution. With regard to Article 14 of the Constitution, it has now been well settled that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. Therefore, the rule contained in Article 14 is not absolute, that is to say, that where a classification is made, the classification can be supported provided it is a reasonable classification. That position does not arise in this case at all. There is no question of certain categories being included in Section 124, while at the same time certain categories are sought to be excluded. That being so, it is not possible to accept the contention that Section 411 of the Indian Penal Code is a Section which occurs in a Central Act. There is no suggestion that the respective provisions. Section 124 and Section 411 contemplate different set of circumstances and the ingredients constituting the two offences are distinct and different: and the provisions in Section 124 or Section 411 will apply accordingly as whoever comes within the ambit of section 124 will be guilty of that offence and whoever comes within the ambit of Section 411 will be held to be guilty of that offence. It is futile to institute an analogy between Section 124 and Section 411 for the purpose of establishing that there is a discrimination made, which is repugnant to Article 14. What we have to see is whether Section 124, in itself, and, in terms, makes any discrimination, and as we read Section 124, there is no such discrimination. The result of the aforesaid discussion would be as follows:

(9) In Criminal Reference No. 170 of 1957, our answer will be that Section 124 of the Bombay Police Act is not void and does not offend Article 20(3) of the Constitution. The papers will, therefore go back to the learned Magistrate, who will dispose of the case in accordance with law.

(10) In Criminal Application No. 496 of 1957, the application fails and the rule is discharged.

(11) In Criminal Application No. 1068 of 1957, which is an application for stay of further proceedings, the Rule will be discharged and the stay will be vacated.

(12) Order accordingly.