
(1938) 02 CAL CK 0029
In the Calcutta High Court

Superintendent and Remembrancer of Legal Affairs

APPELLANT

Vs

Isabali

RESPONDENT

Date of Decision : 02-02-1938

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 109(b), 119, 55

Citation : AIR 1938 Cal 409

Hon'ble Judges : Patterson, J; Jack, J

Bench : Full Bench

Judgement

Jack, J.—This rule was issued on the opposite party calling upon him to show why the order u/s 119, Criminal P.C. discharging him should not be vacated and an order u/s 109 (b), Criminal P.C. passed binding him over for good behaviour for a period not exceeding one year or such other order or further orders made as to this Court may seem fit and proper. The order which was drawn up against the accused opposite party is as follows:

Whereas I am satisfied from the report of the Officer-in-charge, Munshigunj Police Station that the person noted in the margin (the opposite party) was taking precautions to conceal his presence within the local limits of my jurisdiction and that there were reasons to believe that he was taking such precautions with a view to commit crimes and that he has no ostensible means of subsistence nor can he give any satisfactory account of himself, it is hereby ordered that the said marginally noted person (the opposite party) do show cause on 3rd May 1937 why he should not be ordered to execute a bond of Rs. 100 with two sureties of like amount each for being of good behaviour for a period of one year.

2. The circumstances under which the accused was produced before the Magistrate are as follows: At about 10 P. M. on 16th April 1937, when two ladies of the house of Narendra Chandra Nandi of village Panchasher were engaged in cleansing utensils at the ghat of their tank, some one directed a torchlight on them from the eastern bank of the tank. The ladies thereupon retired to the

house and informed Narendra and their servant Jagannath. Jagannath and Naren at once ran to the place with lights. Finding no one there, they proceeded towards a deserted hut in an orchard near the tank and, after a chase, arrested the opposite party who ran out of the hut as they approached. When questioned he said he was going from Nateswar to Munshigunj and, immediately after correcting himself, said that he was going from Munshigunj to Nateswar and had entered the hut to take rest. He further admitted that he had come there with two other persons for the purpose of committing theft and that his two companions had gone away to select a house for the purpose, leaving him in the hut. He denied that he had any torch with him but admitted that his companions had directed a torchlight from the eastern bank of the tank. When the hut was searched, a Sindh cutter and a gunny bag were found there. The opposite party was thereupon produced at the Munshigunj Police Station. The Sub-Inspector made an enquiry and subsequently produced him before the Magistrate who drew up proceedings u/s 109, Criminal P.C. On taking evidence u/s 117, the Magistrate held that neither Clause (a) nor Clause (b) of Section 109 was applicable to the circumstances of the case. As regards Clause (a) he held that the word "concealing" in Section 109, Criminal P.C. does not bear the crude meaning of "hiding" but really refers to one who is not revealing his identity, and that Clause (a) refers to continuous behaviour and not to an isolated act of concealment. He finds authority for this view in *Reshu Kaviraj v. Emperor* AIR (1918) Cal 887 and *Sheikh Piru Vs. King-Emperor*, . Accordingly, purporting to follow the principles enunciated in this Court from time to time he finds that Clause (a) of Section 109, Criminal P.C. does not apply to the accused. He also finds that Clause (b) of Section 109 is not applicable as he holds that the accused gave a satisfactory account of himself on his apprehension by witnesses Nos. 1 and 2 for the prosecution, and that this is not a case of lack of ostensible means of subsistence.

3. The grounds on which this Rule was issued are that the learned Magistrate erred in law in holding (1) that Clause (a) of Section 109, Criminal P.C. did not apply to the facts of the present case and (2) that the word concealing does not bear the crude meaning of "hiding" in its use in Section 109, Criminal P.C. but refers only to one who is not revealing his identity and that clause (a) refers to continuous concealment and not to an isolated act, and (3) that the opposite party had given a satisfactory account of himself within the meaning of Clause (b) of Section 109, Criminal P.C.

4. The first question before us is whether Section 109 (a) refers to continuous concealment or may refer to an isolated act of concealment by a person taking precautions to conceal his presence within the jurisdiction of the Magistrate. The ordinary meaning of the words favours the former view. That is also the view adopted by this Court, and we are asked to refer the matter to a Full Bench on the ground that the view adopted by this Court is not correct and this Court may have been influenced by the decision of the Allahabad High Court in the case in *Emperor Vs. Bhairon and Others*, which has since been overruled by the Full

Bench decision of the same Court in *Emperor Vs. Phuchai and Another*. Two of the Allahabad Judges who were in the Full Bench held the view adopted by this Court. The chief point in favour of the opposite view appears to me that it fits in with the terms of Section 55, Criminal P.C. which entitles a police officer to arrest or cause to be arrested any person found taking precautions to conceal his presence within the limits of the police station under circumstances which afford reason to believe that he is taking precautions with a view to committing a cognizable offence. It is contended that this may refer to isolated as well as continuous acts of concealment. The Legislature apparently intended to provide by Section 109, Criminal P.C. that such persons could be bound over to be of good behaviour, and Section 109 (a) should therefore be interpreted to include isolated as well as continuous acts of concealment. But this would be rather straining the language of the section and I prefer the view adopted by Boys J. [in the Allahabad Full Bench case that persons arrested u/s 55 do not necessarily come u/s 109 (a) but may come under the provisions of Section 109 (b) and that in interpreting Section 109 (a) the ordinary meaning of the words should be followed. My own view accordingly is that in the present case no question of Section 109 (a) arises since the opposite party did not attempt to conceal his presence within the jurisdiction of the Magistrate as he at once gave out his identity and was living openly at the address given by him.

5. I think however that the learned Magistrate was not correct in not applying part 2 of Clause (b) of Section 109 to the case of the accused on the ground that he had not failed to give a satisfactory account of himself. Here again we have different views of what is meant by the expression "has failed to give a satisfactory account of himself" : one view being that it means a satisfactory account of himself generally, the other view being that it means a satisfactory account of his presence at the place and in the circumstances in which he was found. My view agrees with that of the Allahabad Full Bench in *Emperor Vs. Phuchai and Another* the circumstances of which were somewhat similar. There certain persons were found abroad in possession of house-breaking instruments on a dark night. It was held that inasmuch as they had not given a satisfactory explanation of their presence there at that time with house-breaking implements in their possession, they had failed to give a satisfactory account of themselves. This view has also been adopted by the Patna High Court in *Sukhan Ahir Vs. Emperor*, and *Emperor v. Bishi Sahara* AIR (1935) Pat 69.

6. Three cases have been referred to in support of the other view. In *Gagan Chandra De and Another Vs. Emperor*, only Section 109 (a) was dealt with and the case in *Gobra Badia and Others Vs. Emperor*, was decided also chiefly on the interpretation of Section 109 (a), though the question whether the accused had failed to give a satisfactory account of themselves was very shortly dealt with in that case. The learned Judge held that it was difficult to say that the facts found against the accused were stronger than in *Reshu Kaviraj v. Emperor* AIR (1918) Cal 887 where the accused who was a Kaviraj was found at midnight in association with two others who had in their possession house-breaking

implements. On being discovered he fled and when arrested remained silent and the explanation he subsequently gave to the Magistrate of his presence at the time and place in question was false. Even in this case the learned Judges do not seem to have adopted the view that the account given by the accused must necessarily be of general conduct apart from the circumstances in which he was found. In *Victor Vs. Emperor*, it was held that if proceedings u/s 109 (b) are taken against a person because he cannot give a satisfactory account of himself, the Magistrate would not be justified in passing an order u/s 118, Criminal P. C, merely because he is unable to prove that he spends his time or at least his leisure hours in a satisfactory way. It was held further that in such cases the prosecution must satisfy the Magistrate that suspicion that he is living dishonestly attaches to the accused because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, for example if he fails to account for being found in the company of persons living a dishonest or criminal life or detected in some place where he has no legal right to be. Thus, it was not held that the explanation must be unsatisfactory as to the conduct of the accused generally apart from the circumstances in which he was arrested. The learned Magistrate has apparently adopted that view, and no doubt recitals in the judgments of the three cases referred to support it. With all due deference to these opinions, in my view, the words of the section should be taken as they stand, and there is no reason to limit the application of the section where it directs that the accused may be asked to show cause why he should not execute a bond for good behaviour if he cannot give a satisfactory account of himself. Surely, where a man is arrested in extremely suspicious circumstances, and fails to give any reasonable explanation as to how he came to be in that position, he cannot be said to have given a satisfactory account of himself. In the present case the learned Judge has apparently accepted his first explanation that he merely halted there to rest on his way. But he has failed to consider the significance of the Sindh cutter and of the admissions which the accused is said to have made. There are four witnesses to these admissions, viz. (1) P. W. 1 Jagannath Roy, who says:

On being further pressed he (the accused) said that he with Khedamia and Hirachand had come there for the purpose of committing theft and that after leaving him there Hira Chand and Khedamia had gone out to select a house for the purpose. He said that he had no torch but his companions had focussed one from the eastern bank of the tank;

(2) P. W. 2 Narendra Chandra Nandi, who says:

On being further questioned accused said that Khedamia and Hira Chand had brought him for the purpose of committing a theft and had left him there and had gone to select a house for the purpose;

P.W. (3) Haridas Mukerji, who says:

On being further questioned accused said that he had come with Khedamia and

Hira Chand for the purpose of committing a theft and after leaving him there they had gone out to select a house for the purpose;

and (4) P. W. 4 Phani Bhusan Mukerji, who says:

On being further questioned accused said that he had come with Hira Chand and Khedamia who asking him to wait there had gone out to select a house for the purpose of committing a theft.

7. There was no cross-examination of these witnesses as to these statements. Another witness Renu (P. W. 6) says that people do not pass along that road at that late hour of night (10 P. M.). For the defence it is urged that probably the accused was unrepresented when the deposition of the first witness was taken as he was not cross-examined. The other witnesses were however very shortly cross-examined and their cross-examination was confined to other points. The suggestion in cross-examination appears to be that the accused was passing by the place on his way to his home at Nateswar and was attracted there by the presence of the young unmarried girl Renu. Unfortunately when examined the accused was not questioned (as he should have been) as to his alleged statements at the time of his arrest. He was merely asked whether he had heard the evidence adduced? To this he replied : "Yes I have." The only other question put to him was : "What is your defence" to which he merely replied "I am innocent." The learned Magistrate does not say anything about these admissions nor about the finding of the Sindh cutter in the hut. In these circumstances we think that he can hardly be held to have properly considered this evidence in coming to the conclusion that the accused has given a satisfactory account of himself. On a search near the banks of the tank in the complainant's garden after the torchlight incident he was found running out of a deserted hut to avoid being caught. In the hut were found a Sindh kati and a gunny bag. He said he was on his way to his house at Nateswar and had gone there for a rest but on being further questioned admitted that he had come there with two others in order to steal from some house to be selected, and that the Sindh kati and gunny bag belonged to them. In view of these admissions and in view of the finding of a Sindh cutter and the circumstances in which he was arrested, we think that he must be held to have failed to give a satisfactory account of himself, and therefore we think that he has rendered himself liable to be called upon u/s 109 (b) to execute a bond for good behaviour.

8. We therefore send the case back to the learned Magistrate and direct him, in the circumstances of the case and in view of our opinion that the accused opposite party has failed to give a satisfactory account of himself as required u/s 109 (b) and in view of the time which has elapsed since his arrest, to consider whether he should be directed to execute a bond for good behaviour under the provisions of Section 118,, Criminal P.C. We think it unnecessary to decide in these proceedings whether the terms of Section 109 (a) are applicable to the present case. Meantime the opposite party will continue on the same bail as before.

Patterson, J.

9. I agree with my learned brother in holding that the opposite party has failed to give a satisfactory account of himself within the meaning of Section 109 (b), Criminal P.C. and I concur in the order which he proposes to make. As regards. Section 109 (a), Criminal P.C., I am inclined to agree with the views expressed by the majority of the Judges of the Allahabad Pull Bench in Emperor Vs. Phuchai and Another and it appears-to me that some of the former decisions of this Court may require further consideration. It is however not necessary to discuss the matter in detail, in view of the decision we have arrived at regarding the applicability of Section 109 (b) to the facts of the present case.