

MANU/BH/0074/1932

Equivalent Citation: AIR1932Pat293, 140Ind. Cas.283

**IN THE HIGH COURT OF PATNA
SPECIAL BENCH**

Decided On: 02.09.1932

Appellants:**Radha Kishun Marwari**
Vs.
Respondent:**Emperor**

Hon'ble Judges/Coram:

Courtney Terrell, C.J., Saiyid Fazl Ali and C.M. Agarwala, JJ.

JUDGMENT

Courtney Terrell, C.J.

1. The question for decision in this case is whether an Inspector of Excise acting in the course of his duties is a "Police Officer" within the meaning of Section 25, Evidence Act, and whether a confession made to him is admissible. The trend of the decisions in Bengal, with one exception to which I shall refer has been to answer this question in the negative but a difficulty has arisen owing to a judgment of a Full Bench of the Bombay High Court in the case of Nanoo Sheikh Ahmed v. Emperor MANU/MH/0326/1926 : AIR1927Bom4 in which the learned Judges arrived at the opposite conclusion. With the greatest respect to the Bombay High Court I find myself in complete disagreement with the arguments which found favour in that case and have been presented before us and I think the fallacy is attributable to two causes.

2. In the first place a judgment of Sir Richard Garth in the case of The Queen v. Hurribole Chunder Ghose [1876] 1 Cal. 207 has been misunderstood and this misunderstanding has been the source of frequent error. The facts in that case were of a very simple character. The Deputy Commissioner of Police for Calcutta who was also a Magistrate had issued a warrant for the arrest of the accused Hurribole. He was brought before the Deputy Commissioner at his private residence over the Police Office and there made a confession in the presence of the Deputy Commissioner and of two Inspectors of Police. One of the said Inspectors reduced the confession to writing and it was signed and acknowledged by Hurribole as correct in their presence. It was argued that the Deputy Commissioner was not a member of the Calcutta police force It was admitted that he was a Police Officer but although a Superintendent of Police in the mofussil he was a Deputy Commissioner only in Calcutta where the confession was recorded and the confession was recorded before him as a Magistrate.

3. The Court held that although the Deputy Commissioner of Police in Calcutta was not a member of the police force within the meaning of Bengal Act (4 of 1866) that he was nevertheless a Police Officer quite as much as the more ordinary members of the force. In other words Sir Richard Garth held that the term "Police Officer" in the Evidence Act, included all Police Officers and not merely a member of the police force within the meaning of the Bengal Act. He said:

I consider that the term "Police Officer" should be read not in any strict

technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words, "Police Officers" quite as much as the more ordinary members of the force, and although in the case of a gentleman in Mr. Lambert's position there would not be of course the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe its widest and most popular signification.

4. This very sound decision that the term "Police Officer" in Section 25, Evidence Act, includes all kinds of Police Officers has been misunderstood as a decision that the term includes not only Police Officers but any one on whom is conferred the powers of a Police Officer, although it has nowhere been decided what minimum aggregation of functions will constitute any person a police officer within the meaning of the section. The fact is that the term "police officer" is sufficiently well understood to allow of its use without any precise definition. Thus it is well recognized that different countries and States confer upon their respective police officers different powers. Nevertheless it is not difficult to decide whether any particular individual is, or is not, a police officer in any particular country and it has been held that a confession made to a police officer of a foreign force in the country where he is in fact a police officer is not admissible in an Indian trial.

5. Another source is the adoption of an erroneous canon of construction of statutes, that is, the consideration of what is supposed to be the object of this section of the Evidence Act and the adoption as an initial hypothesis of the theory that that object was to make inadmissible confessions made before persons possessing the power of investigation, search and arrest so that whereas a Sub-Inspector of Excise had been given these functions he came within the term "police officer." Now in the first place Courts of justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view, but any section as ultimately enacted may well be the result of compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all of the objects of the promoters is defeated. In cases therefore where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section those words must be followed.

6. There is one case, that of Ibrahim Ahmad v. Emperor MANU/WB/0206/1931 : AIR 1931 Cal 350 , in which a Bench of the Calcutta High Court, while affirming a conviction upon other grounds, excluded a confession made to an excise officer on the basis of the Bombay decision; but strangely enough notwithstanding the former decisions of the Calcutta High Court, the question was not referred to a Full Bench. The decision has been treated as obiter dictum in a subsequent case before the same Court and in any case it contains what I consider to be the same errors apparent in the Bombay decision. Indeed the learned Judge who delivered the opinion of the Bench introduced a curious test which I have not seen suggested in any other case. He said:

On principle also, the position of a police officer cannot be distinguished from that of an excise officer, with regard to an offence under the Excise Act, because an excise officer is also interested in the conviction of the accused and in a position to dominate him. Outwardly also there is hardly anything to distinguish the one class of officers from the other, for they wear uniforms which are not dissimilar and take part in the investigation in the same way.

7. In other words the learned Judge suggests that if a man looks like a police officer then he is a police officer according to law. The position of persons in authority who are not police officers is amply dealt with by Section 24. Such persons, for example as Magistrates and those deputed by Magistrates under Section 202, Criminal P.C., to inquire into complaints, these have many of the powers of police officers, but certainly are not police officers in any accepted sense, and are not affected by Section 25, Evidence Act.

8. It is unnecessary to consider the numerous cases cited in the course of the argument. The question is really a simple one. The confession in this particular case which is, in my opinion, admissible is sufficient to justify the conviction and I would reject the petition for revision.

Saiyid Fazl Ali, J.

9. I agree. The question to be decided in this case is whether a confession made before an Excise Inspector who under the Dangerous Drugs Act (2 of 1930) not only has the power to arrest and search but has also been invested by the Local Government with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence. The view which prevails in the Calcutta High Court is that a confession made before an excise officer is admissible: see *Rukumali v. Emperor* [1918] Cri. L.J. 524, *Ah Foong Chinaman v. Emperor* [1918] 46 Cal. 411, *Harbhanjan Sao v. Emperor* MANU/WB/0200/1927 : AIR 1927 Cal 527 and *Matilal Kalowar v. Emperor* MANU/WB/0032/1931 : AIR1932Cal122 . A Full Bench of the Bombay High Court has however decided that an abkari officer who exercises the powers conferred by the Code of Criminal Procedure on an officer in charge of a police station for the investigation of a cognizable offence is a police officer within the meaning of Section 25, Evidence Act, and any confession made to such an officer in course of his investigation under the Abkari Act or the Code of Criminal Procedure is inadmissible in evidence. In view of this decision which represents the views of no less than five eminent Judges of the Bombay High Court and is undoubtedly entitled to great weight it becomes necessary to examine the question before us with care.

10. The term "police officer" has not been defined anywhere, but there can be no doubt that Section 1, Police Act, is not exhaustive and the term is wide enough to include not only the persons enrolled under the Police Act, but also such persons as the police officers of the Indian States and possibly a police patel of the Bombay Presidency. It seems to be now well settled that as was pointed out in *Queen Empress v. Haribole Chandra Ghosh* [1876] 1 Cal. 207 the term "police officer" should not be read in any technical sense but in its more popular and comprehensive meaning. In its popular meaning a police officer is certainly a different person from a revenue officer, and it was conceded before us in course of the argument that an excise officer is primarily a revenue officer and not a police officer. It is however contended that a confession made before him would be inadmissible, because he is vested by law with the powers of a police officer for certain purposes. It appears to

me that the distinction between a person who is nothing but a police officer and one who is primarily not a police officer but merely invested with the powers of a police officer is material and cannot be ignored for the purpose of construing Section 25, Evidence Act. It may be noticed that it is not only certain revenue officers such as officers of the excise and salt departments who are sometimes invested with the powers of a police officer in charge of a police station, but a private individual may also under certain circumstances be invested with such powers; for instance under Section 202, Criminal P.C., if an inquiry or investigation under that section is delegated to a private person, such person is to exercise all the powers conferred by the Code of Criminal Procedure on an officer in charge of the police station except that he is not to have the powers to arrest without warrant.

11. Are we then to suppose that such a private individual should also be regarded as a police officer within the meaning of Section 25, Evidence Act ? To take this view would, in, my opinion, be to ignore the popular meaning of the term "police officer" and enlarge unduly the scope of the section. There was nothing to prevent the framers of the Evidence Act from saying expressly that confessions made to a police officer as well as those persons who are for the time being and for certain limited purposes invested with the powers of a police officer are inadmissible in evidence. The section however is limited merely to a police officer and we cannot read into it words which it does not contain. In the Evidence Act itself the terms "police officer" and "revenue officer" have been used to connote two different classes of officers as is evident on reading Section 125 of the Act. It is true that Section 125, Evidence Act, was inserted in the Act subsequently, but that should not in my opinion make any difference, as both the sections are now part of the same Act and we cannot construe certain words used in one section in one way and the same words as used in the other in a different way.

12. It is argued before us, and apparently this was also one of the arguments used before the Full Bench of the Bombay High Court, that the object of Section 25 Evidence Act, must have been to prevent the police officers in this country from abusing their extensive powers in extorting confessions from persons in their custody and as there are the some possibilities of evil when an excise officer investigates a case, Section 25 should be extended to include such an officer also. There is however nothing before us to lead us to suppose that in enacting Section 25 the framers of the Evidence Act had any other class of officers in view than the police officers as they are understood in popular language and we cannot extend the provisions of that section merely because we feel that it should have been wide enough to cover all persons, whether they be police officers or not who are in a position to extort a confession from an accused person, It appears to me that it is one thing to say that it is desirable to have a certain provision in the Evidence Act and another that such a provision already exists.

13. The matter may be looked at from another point of view. What seems to have greatly weighed with the learned Judges of the Bombay High Court was that in the particular case which they had before them the abkari officer had the power to investigate like a police officer in charge of a police station. But is that to be the real test for excluding a confession ? A police constable has generally no power to investigate a criminal offence but nevertheless a confession made before him would be inadmissible because he is a police officer. Such would also be the case if a confession is made before a police officer who though invested with the powers of investigation within his own jurisdiction is not engaged in the particular investigation in the course of which the confession is made. Again if a confession is to be made

inadmissible merely because the person before whom it is made is in a position to extort it from the accused, why should not Section 25 be extended to those persons who have the power to arrest and detain an accused person for some time and yet have not the power to investigate the offence with which he is charged ? Thus once it is held that Section 25 refers not only to those who are popularly known as police officers but also to persons who have certain powers ordinarily exercisable by a police officer, it becomes material to consider what is the minimum power or powers to be exercised by such persons so as to make Section 25 applicable of being answered in more than one way and this fact by itself would introduce an element of great uncertainty and confusion in administering the law.

14. As I have already indicated the question is not altogether free from difficulty, but the view that I have formed on a consideration of the numerous authorities cited before us is that Section 25 was intended to apply to police officers and police officers alone and that if the framers of the Act did not have in view, at the time of framing the section any class of persons other than the police officers, we cannot read the term "police officers" as including men who are provisionally and for a limited purpose only invested with some of the powers of police officers. Under the Evidence Act as it stands Section 25 and Section 24 are to be read together both being exceptions to the general rule laid down in Section 21 that admissions maybe proved as against the person who makes them. Section 25 was intended to apply to police officers and must be applied to police officers alone. Section 24 relates to a confession made before any person in authority provided that the confession appears to have been caused by any inducement threat or promise, having reference to the charge against the accused person.

15. The framers of the Evidence Act were therefore not unmindful of those cases in which a confession made before a person other than a police officer may have to be excluded from evidence. It is contended that at the time when the Evidence Act was framed excise officers had not the powers which are now conferred upon them. But this appears to me to support the view that the framers of the Evidence Act could not have intended that a confession made before an excise officer should be made inadmissible. The language used in Section 25 is so comprehensive that it covers not only the police-officers of smaller rank but also police-officers of the highest rank who cannot be suspected of using any unfair means for the purpose of extorting a confession. This also would go to show that the real test is not merely whether a person is in, a position to abuse his powers but whether he is really a police officer or not. On the whole therefore I am inclined to follow those decisions of the Calcutta High Court where it has been held that a confession made before an excise officer is admissible and respectfully differ from the view taken in *Nanoo Sheikh Ahmad v. Emperor A.I.R. 1927 BOM. 4* I have refrained from referring to the case of *Ibrahim Ahmad v. King-Emperor MANU/WB/0206/1931 : AIR1931Cal350* , which is the only case of the Calcutta High Court in which a discordant note was struck and it was suggested that a confession made before an excise officer during investigation was inadmissible in evidence. The learned Judges who decided that case did not refer the matter to a Full Bench and their view did not find favour with another Division Bench of the Calcutta High Court in a later case, *Mati Lal Kalwar v. Emperor MANU/WB/0032/1931 : AIR1932Cal122* .

C.M. Agarwala, J.

16. The petitioner has. been convicted under Section 14(a), Dangerous Drugs Act, 1930, and sentenced to rigorous imprisonment for a year and a fine of Rs. 100. On a

previous occasion he was convicted and sentenced for an offence under Section 47(a), Bihar and Orissa Excise Act, 1915. On the present occasion the petitioner was arrested by an inspector of Excise at the Purabsarai Railway Station while alighting from a train from Calcutta. When the Inspector announced his intention of searching the person of the petitioner, the latter untied a handkerchief which was wound round his thigh and produced therefrom a paper packet saying that it contained cocaine. A search list was immediately prepared by the Inspector and signed by the persons whom he had produced for the purpose of witnessing the search. The petitioner wrote on the search list an endorsement to the effect that the packet had been recovered from him and contained cocaine worth Rs. 100 and signed the endorsement. The Inspector sealed the packet in the presence of the search witnesses. Unfortunately the contents of the packet have not been analyzed by the Chemical Examiner. The Inspector's explanation with regard to this is that owing to pressure of work he put it in a box at his residence which was stolen before he was able to send the packet for analysis. At the trial therefore the only evidence that the packet contained cocaine was the statement of the accused made to the Inspector at the time of his arrest. The defence objected to the admissibility of this evidence, but the objection was overruled. At the trial the defence of the accused was that the packet contained boric powder and not cocaine. In his examination under Section 342 he admitted having made the endorsement on the search list, but in a written statement, which he filed subsequently, he said that the endorsement had not been made voluntarily. It has not been contended before us that the admission made to the Magistrate that the accused made the endorsement on the search list amounts to an admission that the packet contained cocaine.

17. In revision the petitioner contends that the evidence on which the prosecution relied to prove the contents of the packet in this case was inadmissible by reason of Section 25, Evidence Act, which renders inadmissible a confession made to a police officer. It is contended that the Excise Inspector is a "police officer" within the meaning of that section. The argument in support of this proposition is of a twofold nature. In the first place it is urged, on the authority of an observation in *Queen v. Hurribole Chunder Ghose* [1876] 1 Cal. 207 and on certain observations in cases which have followed that decision, that the terms "police officer" in Section 25 should be construed in its widest and popular sense, and that in this sense, "police officer" connotes any person possessing some of the attributes of a police officer and popularly supposed to be a police officer. The second branch of the argument is that an Excise Inspector, by reason of the powers conferred on him, is in fact a police officer while exercising those powers. In the case reported in *Queen v. Hurribole Chunder Ghose* [1876] 1 Cal. 207, the prosecution sought to put in evidence a confession made by the accused to the Deputy Commissioner of Police at the police office and recorded by police officer and attested by the Deputy Commissioner of Police in his capacity of a Magistrate. It was contended on behalf of the accused that the Deputy Commissioner of Police was a police officer and that a confession made to a police officer under any circumstances is inadmissible in evidence. With the latter part of this contention the learned Judges, Garth, C. J., and Pontifex, J., agreed. Garth, C. J., however held that the Deputy Commissioner of Police was not a police officer within the meaning of the Calcutta Police Act, 1866. With regard to Section 25, Evidence Act however he said:

But in construing Section 25, Evidence Act, 1872 I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

18. Speaking for myself I should have thought that in its popular sense the term "police officer" connotes nothing more or less than a "member of the police force," and I do not think that the observation of Garth, C. J., was intended to go beyond that. It is true that the learned Judges who decided the case reported in *Queen v. Hurribole Chunder Ghose* [1876] 1 Cal. 207, considered that the Deputy Commissioner of Police was not technically a member of the police force, But the officer whose status was there being considered, if not enrolled in or appointed to the force recruited under the Calcutta Police Act, was at least a person who, by a notification in the Calcutta Gazette of 24th July 1872, had been appointed as Superintendent of Police in the moffusil, and it may well be that when a person is a Superintendent of Police in one part of the Province and is appointed as a Deputy Commissioner in another part of the Province that he may popularly be supposed to be a police officer. I do not think that Garth, C. J., ever intended that a person totally unconnected with the police force is a police officer within the meaning of Section 25 merely because he is popularly supposed to be a police officer. The officer to whom the confession was made in the present case is in no way connected with the, police force. He is an officer of the Excise Department and in my opinion no popular misconception as to his status can suffice to make him police officer within the meaning of Section 25.

19. A number of later cases have been referred to at the Bar, in which the learned Judges who decided these cases have purported to base their decisions on the observations of Garth, C. J., quoted above. With great respect, to those learned Judges I am unable to agree that the observations of Garth, C. J., go further than I have indicated above. In particular reference was made to the decision in *Queen-Empress v. Salemuddin Sheikh* [1899] 23 Cal. 569, in which the observation of Garth, C. J., was quoted and in which it was held that a confession made to a chowkidar is excluded by Section 25. In the judgment of that case no reference is made to an earlier decision by a Division Bench of the same Court in *Queen-Empress v. Bepin Behari Dey* MANU/WB/0275/1897 : 2 C. W. N. 71, that Section 25 does not exclude a confession made to a chaukidar. The conflict of judicial opinion in the Calcutta High Court on this point was commented on in *Nazir Jharudar v. Emperor* 9 CWN 474. Section 47, Police Act, 1861 empowers the Local Government to declare that:

an authority which now is or may be exercised by the Magistrate of the district over any village watchman or other village police officer for the purposes of police, shall be exercised subject to the control of the Magistrate of the district, by the District Superintendent of Police," and at least with respect to some of the districts in this Province such a declaration has been made (vide B. & O. Statutory Rules and Orders). But para. (1), Section 21 of the Act, provides as follows:" Nothing in this Act shall affect any hereditary or other village police officer unless such officer shall be enrolled as a police officer under this Act. When so enrolled, such officer shall be bound by the provisions of the last preceding section. No hereditary or other village police officer shall be enrolled without his consent and the consent of those who have the right of nomination.

20. This appears to me to make it quite clear that a village police officer, even in a district in respect of which a declaration has been made under Section 47, cannot be enrolled in the police force without his own consent and the consent of those who have the right of nomination, and that until so enrolled, he is not a member of the police force any more than an ordinary private individual is a member of that force

unless and until he volunteers for appointment and is appointed under Section 7 or is appointed to be a special constable under Section 17. I do not understand how a person can be said to be a police officer within the meaning of one Act of the legislature when his enrolment in the police force is expressly prohibited by another Act of the legislature, unless the conditions which operate to bar the prohibition exist.

21. In my opinion no person is a police officer unless he is enrolled in, or appointed a member of, the police force or is declared by statute to be a member of that force. This brings me to the second branch of the contention of the petitioner. It is argued that an Excise Officer is a police officer by reason of the fact that some of the powers of a police officer have been conferred upon him by the Bihar and Orissa Excise Act 1915, and reliance is placed on the decision in Ibrahim Ahmad v. King-Emperor MANU/WB/0206/1931 : AIR1931Cal350 and Nanoo Sheikh Ahmad v. Emperor MANU/MH/0326/1926 : AIR1927Bom4 , where it was held that a confession to an Excise Officer is excluded by Section 25, Evidence Act. In the Calcutta High Court there have been a number of decisions in which the contrary view has been taken, and with those decisions I respectfully agree. It will suffice to mention Ah Foong v. Emperor [1918] 46 Cal. 411, Harbhanjan Sao v. Emperor MANU/WB/0200/1927 : AIR1927Cal527 and Tura Sardar v. Emperor MANU/WB/0104/1930 : AIR1930Cal710 . The Bombay case is a decision of a Full Bench overruling a previous decision of a Division Bench of the same Court. The question referred to the Full Bench of the Bombay High Court was as follows:

Is an Abkari-officer, who in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Code of Criminal Procedure 1898 upon an officer in charge of a police station for the investigation of a cognizable offence, a police officer within the meaning of Section 25, Evidence Act.

22. The Full Bench answers this question in the affirmative. The observations of Garth, C. J., in Queen v. Hurribole Chunder Ghose [1876] 1 Cal. 207 and the decisions in Queen-Empress v. Salemuddin Sheilch MANU/WB/0275/1897 : 2 CWN 71 (ubi sup) were quoted with approval. The decision in Ah Foong v. Emperor [1918] 46 Cal. 411 however, was distinguished by Marten, C. J. from the case before the Full Bench on the ground that the powers of Excise Officers in Bombay are far more extensive than in Calcutta. The learned Chief Justice said:

In Bombay the Opium Act has been expressly amended so as to confer upon abkari officers certain wide police powers, which are very similar to those conferred on them as regards offences under the Abkari Act, e.g., the same powers of investigation as those possessed by an officer in charge of a police station.

23. If I read the judgment of the learned Chief Justice of Bombay aright, the possession of powers of investigation is, in his opinion, an important element in the constitution of a police officer. Fawcett, J., expressed a similar view in the same case where his Lordship said:

I think an important fact to be borne in mind is that, prior to the amendment of the Abkari Act by Bombay Act 12 of 1912, an Excise Officer, after arresting a person has forthwith to send him to the nearest police station and the investigation was then conducted by police officers, whereas now, an Excise

Officer, if empowered under Section 41 can exercise police powers of investigation which cover a certain amount of detention of the accused while the investigation is going on, so that he has similar opportunities of extorting a confession from an accused. This is an all-important difference which distinguishes this case from that of *Ah Foong v. Emperor* [1918] 46 Cal. 411, as has been pointed out by my Lord the Chief Justice.

24. It may be observed, however that there are officers who have no powers of investigation under the Criminal P.C., e. g. police constables, and yet such officers are nevertheless "police officers" within the meaning of Section 25, Evidence Act. The mere possession of certain of the powers of a police officer, even though those powers include the power of investigation under the Code, do not suffice, in my opinion, to convert into a police officer one who has no other claim to that status, e.g., Section 202, Criminal P.C., empowers a Magistrate receiving a complaint to direct an inquiry or investigation to be made by any Magistrate subordinate to him or by a police officer, or by such other person as he thinks fit but it is not arguable that if such an investigation is directed to be made by a person other than a police officer, such person would be converted into a police officer even, while engaged in making the investigation.

25. In my view an Excise Officer under the B. & O. Excise Act is not a "police-officer" within the meaning of Section 25,. Evidence Act. I would therefore dismiss this application.

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