CRIMINAL REVISION.

Before Jack and Patterson JJ.

LEGAL REMEMBRANCER, BENGAL

v.

ISAB KHARATI.*

1938

Feb. 2.

Security—Security for good behaviour, when can be demanded—Code of Criminal Procedure (Act V of 1898), s. 109.

Per JACK J. Clause (*a*) of s. 109 of the Code of Criminal Procedure refers to continuous concealment and not to an isolated act by a person taking precautions to conceal his presence within the jurisdiction of the Magistrate. This clause has no application to a case where a person on being questioned at once gives out his identity and is living openly at the address given by him.

Per PATTERSON J. The views expressed by the majority of the Judges in the Allahabad Full Bench case of *Emperor* v. *Phuchai* (1) contain the correct interpretation of cl. (*a*) of s. 109 and some of the former decisions of the Calcutta High Court may require further consideration.

Per Curiam. The expression "has failed to give satisfactory account of himself" in cl. (*b*) of s. 109 of the Code of Criminal Procedure does not mean giving a satisfactory account of himself generally, but means a satisfactory account of his presence at the place and in the circumstances in which he is found.

A man was arrested at night in a deserted hut in an orchard. He attempted to run away at the time of arrest to avoid being caught. In the hut were found a *sindh*-cutter and a gunny bag. He admitted that he had come there with two others in order to commit theft from some house and that the *sindh*-cutter and gunny bag belonged to them,

held that cl. (*b*) of s. 109 applied to the circumstances of the case.

Emperor v. *Phuchai* (1); *Emperor* v. *Bhairon* (2); *Sukhan Ahir* v. *Emperor* (3) and *Emperor* v. *Bishi Sahara* (4) referred to.

Reshu Kaviraj v. *King-Emperor* (5); *Victor* v. *Emperor* (6); *Gaganchandra De* v. *King-Emperor* (7) and *Gobra Badia* v. *King-Emperor* (8) distinguished.

*Criminal Revision No. 765 of 1937, against the order of A. H. M. Wazir Ali, Magistrate, First Class of Munshiganj, dated June 14, 1937.

(1) (1928) I.L.R. 50 All. 909.
(2) (1926) I. L. R. 49 All. 240.
(3) [1930] A. I. R. (Pat.) 497.
(4) [1935] A. I. R. (Pat.) 69.
(5) (1917) 22 C. W. N. 163.
(6) (1926) I. L. R. 53 Cal. 345.
(7) (1929) I. L. R. 57 Cal. 949.
(8) (1929) 50 C. L. J. 181.

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CRIMINAL REVISION by the Legal Remembrancer, Bengal.

The material facts of the case appear sufficiently from the judgment.

The Advocate-General, Sir A. K. Roy, and *Anil Chandra Ray Chaudhuri* for the Crown. With regard to cl. (*a*) of s. 109 of the Code of Criminal Procedure two questions arise, namely, (i) whether on a proper construction of the clause it applies to cases where a person is taking precaution to conceal the *fact* of his being present within the jurisdiction of the Magistrate, so that if it be found that the person has a known residence within that jurisdiction the clause would not apply, and (ii) whether that clause refers only to cases of continuous course of conduct or applies also to isolated efforts at concealment. Different views have been held in different cases and the arguments both in favour and against each particular view are fully discussed in *Emperor* v. *Phuchai* (1). The really controlling factor in that clause is the purpose for which the precautions to conceal are taken, namely, to commit an offence. If this purpose be established and the concealment is within the jurisdiction of the Magistrate, this clause should apply. To put a narrower construction would render the section useless for all practical purposes in the majority of cases where preventive measures under this section are necessary and desirable. It would also lead to various anomalies. Thus, when a police officer arrests a person under cl. (*a*) of s. 55(*1*) of the Code of Criminal Procedure and produces him before a Magistrate, the latter would be compelled to release him if the person establishes that he has a known residence within another police station but within the jurisdiction of the Magistrate. Thus the arrest by the police would be legal but futile. With regard to the question of continuity of conduct, it considerably limits the scope of the clause without

(1) (1928) I. L. R. 50 All. 909.

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any justification and there is nothing in the language used to support such an interpretation.

The Calcutta cases do not consider the question in all its aspects but really follow the case *Emperor* v. *Bhairon* (1), which has since been overruled by the Full Bench case of *Emperor* v. *Phuchai* (2).

[Discussed *Sheikh Piru* v. *King-Emperor* (3); *Reshu Kaviraj* v. *King-Emperor* (4); *Victor* v. *Emperor* (5); *Gobra Badia* v. *King-Emperor* (6); *Gaganchandra De* v. *King-Emperor* (7); *Emperor* v. *Phuchai* (2); *Sukhan Ahir* v. *Emperor* (8) and *Emperor* v. *Bishi Sahara* (9).]

With regard to cl. (*b*) it is difficult to see why it would not apply to the present case. No doubt a person is not bound to explain satisfactorily as to how he spends his leisure time, but it is certainly going too far to say that a person, who is arrested under extremely suspicious circumstances with house-breaking implements in his possession and who on his own admission at the time of the arrest had gone to the place to commit theft, cannot be dealt with under this clause. The satisfactory account referred to in cl. (*b*) does not necessarily refer to the man's conduct generally and does not exclude a case where a person so arrested cannot give a satisfactory explanation of the suspicious circumstances surrounding his conduct at the time of such arrest. There is nothing in the clause to warrant such a narrow interpretation which would render the section nugatory for exactly the cases for which it is meant. Most of the Calcutta cases were really cases under cl. (*a*) of the section, wherein observations in the nature of *obiter dicta* were made with regard to cl. (*b*). *Gaganchandra De.* v. *King-Emperor* (7) and *Gobra Badia* v. *King-Emperor* (6).

(1) (1926) I. L. R. 49 All. 240.
(2) (1928) I. L. R. 50 All. 909.
(3) (1925) 41 C. L. J. 142.
(4) (1917) 22 C. W. N. 163.
(5) (1926) I. L. R. 53 Cal. 345.
(6) (1929) 50 C. L. J. 181.
(7) (1929) I. L. R. 57 Cal 949.
(8) [1930] A. I. R. (Pat). 497.
(9) [1935] A. I. R. (Pat) 69.

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The cases of *Reshu Kaviraj* v. *King-Emperor* (1) and *Victor* v. *Emperor* really turn on the facts of those cases and they are not authorities for such a wide proposition as the learned Magistrate thought. For this purpose it is not necessary to refer the matter to the Full Bench. Of course, if it be held that the finding of the Magistrate amounted to acceptance of the defence version *in toto*, namely, that the accused was taking rest in the hut on his way to his native village, then neither cl. (*a*) nor cl. (*b*) would apply, because the accused would not be at the place to commit an offence, nor could it be said that he failed to give a satisfactory account of his presence there. The finding, however, is far from being clear and the Magistrate entirely omitted to consider the conduct of the accused in attempting to run away, the recovery of house-breaking implements near him and his own admission that he went there to commit theft. The order of discharge was unjustified and should be reversed.

Suresh Chandra Talukdar and *Jogesh Chandra Singha* for the opposite party. The finding of the Magistrate really amounted to acceptance of the defence version. He says that the accused had sufficiently explained his presence at the place where he was arrested. The spot has been proved to be on the route to his own house and it was quite natural that he would be taking rest in a deserted hut by the roadside. The cases have been fully discussed by the learned Advocate-General. The facts of the cases of *Reshu Kaviraj* v. *King-Emperor* (1) and *Victor* v. *Emperor* (2) are exactly the same as in the present case. Therefore, the accused cannot be ordered to furnish security without a reference to the Full Bench. It has been definitely held in those cases that a single act of concealment does not come under cl. (*b*). The evidence of so-called admission is really of no importance. The Rule should be discharged.

(1) (1917) 22 C. W. N. 163. (2) (1926) I. L. R. 53 Cal. 345.

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JACK J. This Rule was issued on the opposite party calling upon him to show why the order under s. 119 of the Code of Criminal Procedure, discharging him, should not be vacated and an order under s. 109 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, Munshiganj 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 May, 3, 1937, why he should not be ordered to execute a bond of Rs. 100 with two sureties of like amomnt each for being of good behaviour for a period of one year.

The circumstances under which the accused was produced before the Magistrate are as follows: at about 10 p.m. on April 16, 1937, when two ladies of the house of Narendra Chandra Nandi of village Panchasher were engaged in cleansing utensils at the *ghât* of their tank, some one directed a torch light 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 Nateshwar to Munshiganj, and, immediately after, correcting himself, said that he was going from Munshiganj to Nateshwar 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 torch light from the

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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 Munshiganj Police Station. The Sub-Inspector made an enquiry and subsequently produced him before the Magistrate, who drew up proceedings under s. 109, Code of Criminal Procedure. On taking evidence under s. 117 the Magistrate held that neither cl. (*a*) nor clause (*b*) of s. 109 was applicable to the circumstances of the case. As regards cl. (*a*), he held that the word "concealing" in s. 109 does not bear the "crude" meaning of "hiding", but really refers to one who is not revealing his identity, and that that cl. (*a*) refers to continuous behaviour and not to an isolated act of concealment. He finds authority for this view in the cases of *Reshu Kaviraj* v. *King-Emperor* (1) and *Sheikh Piru* v. *King-Emperor* (2). Accordingly, purporting to follow the principles enunciated in this Court from time to time he finds that cl. (*a*) of s. 109, Code of Criminal Procedure, does not apply to the accused. He also finds that cl. (*b*) of s. 109 is not applicable as he holds that the accused gave a satisfactory account of himself on his apprehension to witnesses Nos. 1 and 2 for the prosecution, and that this is not a case of lack of ostensible means of subsistence.

The grounds on which this Rule was issued are that the learned Magistrate erred in law in holding (i) that cl. (*a*) of s. 109 of the Code of Criminal Procedure did not apply to the facts of the present case and (ii) that the word "concealing" does not bear the crude meaning of "hiding" in its use in s. 109, but refers only to one who is not revealing his identity and that cl. (*a*) refers to continuous concealment and not to an isolated act; and (iii) that the opposite party had given a satisfactory account of himself within the meaning of cl. (*b*) of s. 109.

The first question before us is whether s. 109(*a*) refers to continuous concealment or may refer to an

(1) (1917) 22 C. W. N. 163. (2) (1925) 41 C. L. J. 142.

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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 of *Emperor* v. *Bhairon* (1), which has since been overruled by the Full Bench decision of the same Court in the case of *Emperor* v. *Phuchai* (2). 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 be that it fits in with the terms of s. 55 of the Code of Criminal Procedure 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 such precautions with a view to committing a cognisable offence. It is contended that this may refer to isolated as well as continuous acts of concealment. The legislature apparently intended to provide by s. 109 that such persons could be bound over to be of good behaviour, and s. 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 under s. 55 do not necessarily come under s. 109(*a*), but may come under the provisions of s. 109(*b*) and that in interpreting s. 109(*a*) the ordinary meaning of the words should be followed. My own view, accordingly, is that in the present case no question under s. 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

(1) (1926) I. L. R. 49 All. 240. (2) (1928) I. L. R. 50 All. 909.

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identity and was living openly at the address given by him.

I think, however, that the learned Magistrate was not correct in not applying part two of cl. (*b*) of s. 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 *Phuchai's* case (*supra*) 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* v. *Emperor* (1) and *Emperor* v. *Bishi Sahara* (2).

Three cases have been referred to in support of the other view. In the case of *Gaganchandra De* v. *King-Emperor* (3) only s. 109(*a*) was dealt with and the case of *Gobra Badia* v. *King-Emperor* (4) was decided also chiefly on the interpretation of s. 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 the case of *Reshu Kaviraj* v. *King-Emperor* (5) where the accused, who was a *kabirâj*, was found at midnight in association with two others who had in their

(1) [1930] A. I. R. (Pat.) 497.
(2) [1935] A. I. R. (Pat.) 69.
(3) (1929) I. L. R. 57 Cal. 949.
(4) (1929) 50 C. L. J. 181.
(5) (1917) 22 C. W. N. 163.

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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 the case of *Victor* v. *Emperor* (1) it was held that if proceedings under 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 under s. 118 of the Code of Criminal Procedure 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

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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.*, (i) P. W. 1, Jagannath Ray, who says :—

> On being further pressed, he (the accused) said that he with Kheda Miya and Hira Chand had come there for the purpose of committing theft and that, after leaving him there, Hira Chand and Kheda Miya 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 ;

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

> On being further questioned accused said that Kheda Miya 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 ;

(iii) P. W. 3, Hari Das Mukherji, who says :—

> On being further questioned, accused said that he had come with Kheda Miya 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 (iv) P. W. 4, Phani Bhushan Mukherji, who says :—

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

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 Nateshwar 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-kâti* 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-kâti* 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 under s. 109(*b*) to execute a bond for good behaviour.

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 under 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 s. 118 of the Code of Criminal Procedure. We think it unnecessary to decide in these proceedings whether the terms of s. 109(*a*) are applicable to the present case.

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Meantime the opposite party will continue on the same bail as before.

PATTERSON J. 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 s. 109(*b*) of the Code of Criminal Procedure, and I concur in the order which he proposes to make.

As regards s. 109(*a*) of the Code of Criminal Procedure, I am inclined to agree with the views expressed by the majority of the Judges of the Allahabad Full Bench in *Emperor* v. *Phuchai* (1) 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 s. 109(*b*) to the facts of the present case.

Rule absolute, case remanded.

A. C. R. C.

(1) (1928) I. L. R. 50 All. 909.