

return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian." Having regard to the special circumstances of the case before us to which we have made a reference above, we are not prepared to hold that it is a case where the wife of the applicant left him or was removed from his custody. The fiction referred to above may be applicable or may be enforced in cases where the dispute is as regards the custody of a minor child removed from the custody of his parents. But it will be wrong to apply that rule to a case between husband and wife. In our opinion it will be unfair and unjust in a case of this description to pass an order that the husband should be allowed to take custody of the wife, when we know that under the decree which he has obtained for restitution of conjugal rights he will not be able to get that privilege. In any case as the matter is discretionary we would not exercise our discretion in his favour. In these circumstances we are of opinion that this appeal should be allowed. For the reasons given above we allow this appeal and set aside the order passed by the learned District Judge.

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 FULL BENCH
 

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Collister*

EMPEROR v. DEOKINANDAN\*

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*Evidence Act (I of 1872), section 25—Confession—"Police officer"—Village chaukidar—Confession made to a chaukidar inadmissible in evidence—N.W. P. Village and Road Police Act (XVI of 1873), sections 5, 6—Police Act (V of 1861), sections 7, 47—Police Regulations, paragraphs 371, 373.*

*Held, by the Full Bench (SULAIMAN, C. J., dubitante), that a village chaukidar appointed under Act XVI of 1873 is a police officer within the meaning of section 25 of the Evidence Act,*

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\*Criminal Appeal No. 155 of 1936, from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 6th of February, 1936.

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and, therefore, a confession made to a village chaukidar is inadmissible in evidence.

The term "police officer" in section 25 of the Evidence Act is not to be construed in any technical sense, with reference to the classification of officers and men which may be implied from the various provisions of the Police Act and which is limited to administrative purposes only, but in accordance with its more comprehensive and general sense. Act XVI of 1873, under which chaukidars are appointed, read with paragraph 371 of the Police Regulations, makes it clear that chaukidars, though they are appointed under a special enactment and according to a particular procedure as to nomination therein provided, are an integral part of the police force. A chaukidar has a certain function or office, however humble, which he fills; and *qua* such office he is an "officer". The word "officer" in this connection should be understood in its etymological sense and not as implying a person of a superior rank. A chaukidar, therefore, being a member of the police force is a police officer within the meaning of section 25 of the Evidence Act.

*Ghunnai v. Emperor* (1), overruled.

Mr. *Triloki Nath Madan*, for the appellant.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

SULAIMAN, C.J.:—The question referred to this Full Bench is whether a village chaukidar appointed under the Act XVI of 1873 is a police officer within the meaning of section 25 of the Indian Evidence Act. Now obviously there are two views which are open. As the word "police officer" has not been defined in the Evidence Act, one may understand by it what is understood in common parlance as indicating an officer belonging to the police force, or one may refer to the Police Act and police regulations for the purpose of ascertaining who is a police officer. Under Act XX of 1856 a body of persons called chaukidars were those whose number and grade of salary had to be fixed by Magistrates and whose appointments were made by Magistrates under the control of the Commissioner. Their appointment, suspension and dismissal were not in the hands of the

superior police authorities. Act V of 1861 defined the word "police" as including all persons who were enrolled under that Act. The superior officers were mentioned in section 4, and then section 7 provided that the appointment of all officers, other than those mentioned in section 4, shall rest with the Inspector-General, Deputy Inspector-General, Assistant Inspector-General and Superintendent of Police. Section 21 made the Act inapplicable to any hereditary or other village police officer unless enrolled under the Act. In these sections the officer was described as a police officer. In the last section 47 there was a provision that the local Government may declare that any authority exercised by the District Magistrate over "any village watchman or other village police officer" shall be exercised by the District Superintendent of Police. This last section indicated that a village watchman may well be a village police officer, but the words used were "village police officer" and not simply police officer. Section 21 drew a distinction between hereditary or other village police officer and police officers. The former could not be enrolled as members of the police without their consent and the consent of those who had the right to nominate them. The Police Regulations, part III, paragraph 371, laid down that the police force consists of (a)(i) Provincial police, civil, armed or mounted, (ii) Government Railway police; appointed and enrolled under Act V of 1861; and (b) village chaukidars appointed under Act XVI of 1873 and not so enrolled.

Paragraphs 372 and 373, however, expressly show that village chaukidars are not regarded as *officers* of the force, who come down up to the grade of constables only. In section 45 of the Code of Criminal Procedure, Act V of 1898, village headman, village accountant, village watchman, village owner or occupier of land and the agent of any such owner or occupier of land are bound to communicate to the nearest Magistrate or officer in charge of a police station information as regards

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certain particulars. The section as it stands would seem to suggest a distinction between a village watchman and a village police officer.

The scheme of these Acts also shows that a village watchman is nominated by the zamindars or the lambar-dar of the village, and then appointed by the Magistrate. Of course the nomination may not be accepted, but no one who has not been so nominated can be appointed a village watchman by the Magistrate. On the other hand, police constables are appointed by the superior police authorities and not by the Magistracy. There is accordingly a distinction and the two belong to two different grades. It is also a fact that ordinarily a village watchman is a resident of the village who would be well known to the inhabitants and with whom they may well be familiar and intimate, with the result that they would not be afraid of him to the same degree as they would be of a police constable or police sub-inspector coming from the police station to make an investigation. It also appears that although the duties of the village watchman are like those of the other persons mentioned in section 45 of the Criminal Procedure Code, his powers also are in no sense wider than those conferred on such other persons. He is certainly not invested with other powers conferred upon police officers by the Code of Criminal Procedure. The Indian Evidence Act was passed in 1872, after the Police Act of 1861 was passed and the earlier Code of Criminal Procedure of 1861 was in force. The contention of the learned Government Advocate that the words "police officer" in the Evidence Act should be understood in their technical meaning as disclosed by the Police Act, the Police Regulations and the Code of Criminal Procedure is not without some force.

On the other hand, the preponderance of authority appears to be in favour of the view that the words "police officer" in the Indian Evidence Act should be

given a more liberal interpretation and a wider meaning than that indicated by their technical sense.

The authority for the latter view is the case of *Queen v. Hurribole Chunder Ghose* (1), in which GARTH, C.J., held that the confession made in the presence of a Deputy Commissioner of police and two inspectors of police was not admissible in evidence. On the facts of that case there could not have been the least doubt. The confession was recorded not only by the Deputy Commissioner of police, but actually in the presence of two inspectors of police, one of whom had reduced the confession to writing. It also appears that the Deputy Commissioner of police concerned was in fact a police officer, being a Superintendent of Police in the mofussil, although he was also a Deputy Commissioner in the city of Calcutta where the confession was actually recorded. Although, therefore, he had not the jurisdiction of a Superintendent of Police within the limits of the presidency town, he was certainly a member of the police force within the meaning of the Bengal Act. It is no wonder, therefore, that the learned CHIEF JUSTICE held that a confession made to him in the presence of two inspectors of police was inadmissible in evidence. But this case has been to some extent extended in subsequent cases and has been understood to lay down that the words "police officer" used in the Evidence Act have not been used in their technical sense at all, but have a much wider scope.

In the case of *Queen-Empress v. Salemuddin Sheik* (2) the above view was expressed, but unfortunately an earlier case of the same High Court reported in *Queen-Empress v. Bepin Behari Dey* (3) was not referred to as it was perhaps not cited at all. The Oudh Court in *King-Emperor v. Pancham* (4) and *Jangli v. Emperor* (5) has held that a village chaukidar is a police officer within the meaning of section 25 of the Evidence Act.

(1) (1876) I.L.R., 1 Cal., 207.

(2) (1899) I.L.R., 26 Cal., 569.

(3) (1897) 2 C.W.N., 71.

(4) (1933) I.L.R., 8 Luck., 410.

(5) A.I.R., 1934 Oudh, 19.

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The other cases relied upon by the learned advocate for the accused do not appear to be directly applicable. The case of *Queen-Empress v. Bhima* (1), related to a police *patel* who is strictly speaking not a village *chaukidar* but according to Wilson's Dictionary "the headman of a village having the general control and management of the village affairs as well as the head of the police and also exercising to a limited extent the functions of a Magistrate." The cases of *Ah Foong v. Emperor* (2) and *Nanhoo Sheikh Ahmed v. Emperor* (3) related to excise officers and not to a village *chaukidar*.

Unfortunately in these cases the relevant sections of the Police Act and the Code of Criminal Procedure were not considered in detail presumably because it was thought that section 25 of the Evidence Act should be interpreted irrespectively of the technical meaning given to the words "police officer" in other Acts. On the other hand, a Full Bench of the Patna High Court in *Radha Kishun Marwari v. King-Emperor* (4), has come to the conclusion that an excise officer is not a police officer within the meaning of the section.

In *Ghunnai v. Emperor* (5) it was remarked by a Bench of this Court, of which one of us was a member, that a confession to a *chaukidar* is not a confession to a policeman within the meaning of section 25 of the Evidence Act. The point was not absolutely necessary for the decision of that case, as there appeared to be plenty of evidence even independently of the confession. Nor does it appear that the point was argued at the Bar at any length. At any rate, there is no reference in the judgment to any of the earlier rulings.

It seems to me that the question is not free from difficulty, and a reasonable view to take may well be that in order to understand the meaning of the word "police officer" in the Evidence Act one must have recourse

(1) (1892) I.L.R., 17 Bom., 485. (2) (1918) I.L.R., 46 Cal., 411.

(3) (1926) I.L.R., 51 Bom., 78. (4) (1932) I.L.R., 12 Pat., 46.

(5) [1934] A.L.J., 143.

to the Police Act, the Police Regulations and the Code of Criminal Procedure which were in force at the time the Evidence Act was passed. On the other hand, a more liberal interpretation of the section would be in the interest of accused persons and would avoid the danger which was apprehended by the legislature if confessions made to a police officer were admitted in evidence. As my learned brother COLLISTER, J., has come to the conclusion that on reconsideration it must be held that the view expressed in *Ghunnai v. Emperor* (1) was not correct, I am not prepared to dissent. The preponderance of opinion appears to be in favour of the more liberal interpretation of the section, and with some hesitation I would agree with that view.

NIAMAT-ULLAH, J.:—As one of the Judges making this reference to Full Bench I have already briefly indicated my views on the question under consideration. In spite of the persuasive argument addressed to us by the learned Government Advocate and after carefully considering the doubts expressed by the learned CHIEF JUSTICE, I feel no difficulty in holding that the term "police officer" in section 25 of the Indian Evidence Act has not been used in any technical sense.

It is a well known rule of interpretation that if a term has not been defined by an enactment in which it occurs, or by the General Clauses Act, it should be construed in its ordinary sense, with due regard to the context, and surrounding circumstances which would include the definition of that term in cognate enactments. The expression "police officer" in its etymological sense and as understood by English speaking people means a person holding an office in the police force which is a well ascertained body of public servants. Ordinarily there can be little difficulty in finding out whether a particular individual admittedly or demonstrably belonging to the police force is also a "police officer". Cases of difficulty may arise where a person

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not belonging to the police force is invested with the duties or functions of a police officer. The case of excise officer, as to whom there is some difference of opinion, is in point; see *Nanhoo Sheikh Ahmed v. Emperor* (1) and *Radha Kishun Marwari v. King-Emperor* (2). But as already said there can scarcely be any doubt in the case of a member of the police force. Every public servant, including one belonging to the police force, has some office (in the sense of function) assigned to him. As holder of such office he is an officer.

If a question arises as to whether a particular class of public servants is or is not a branch of the police force it is permissible to refer to the Police Act and the Police Regulations under which the force has been constituted. There is, however, no warrant for the assumption that the term "police officer" used in the Indian Evidence Act is to be construed with reference to the classification of officers and men said to be implied in the various provisions of the Indian Police Act. I do not consider it necessary to examine the contention of the learned Government Advocate that the framework of that Act implies a definite classification of the kind already mentioned and that the chaukidars, though they belong to the police force, cannot be regarded as those falling within the category of "police officers". All other ranks, including constables, are police officers according to the classification contended for. I am prepared to assume that such classification can be inferred from the Police Act examined as a whole. But to my mind it is limited to the administrative purposes contemplated by the Act, and the restricted sense in which the term is used in the Police Act is not to be imported into all legislative enactments in which the term may have been used for totally different purposes and in different contexts. To hold otherwise is to give the Police Act

(1) (1926) I.L.R., 51 Bom., 78.

(2) (1932) I.L.R., 12 Pat., 46.



the force of the General Clauses Act in this particular respect.

I am unable to accept the view that because the Indian Evidence Act was passed several years after the Indian Police Act the framers of sections 25 and 26 of the Indian Evidence Act must have examined the structure of the Police Act and must have used the term "police officer" in those sections in the identical sense in which it is said to be used in the Police Act. The two Acts were drafted at different times and by different draftsmen and are in no way interdependent. Nor do I think that there is anything in the Criminal Procedure Code which justifies the construction of the term "police officer" in any technical sense. It seems to me that a reference to other enactments beyond what I have already indicated is apt to confuse the comparatively simple point which we are called upon to determine. As a matter of fact, one can avoid reference to the Police Act altogether, as it is conceded that a chaukidar is a member of the police force. Even if it were otherwise, Act XVI of 1873 under which chaukidars are appointed and maintained, read with the Police Regulations, leaves no doubt on the point. Paragraph 371 of the Police Regulations, which have been made by the local Government under statutory authority, sets out the composition of the police force which includes "Provincial civil, armed, mounted and Government Railway police, village chaukidars appointed in Agra under Act XVI of 1873 and in Oudh under Act XVIII of 1876". It will be seen that chaukidars, though appointed under a special enactment and according to a particular procedure as to nomination therein provided, are an integral part of the police force. A chaukidar has a certain function or office, however humble, which he fills. *Qua* such office he is an officer. The word "officer" in this connection should be understood in its etymological sense and not as implying a person of a superior rank. It is not without interest to analyse the

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term "chaukidar" and to compare it with "thanadar", the sub-inspector. "Chauki" is used to indicate an out-post and "dar" the person in charge thereof, just as "thana" is used to indicate a police station and "dar" the person in charge thereof. Each has powers and duties assigned to him and to that extent he is a police officer. Every chaukidar has a defined circle and specified duties and powers, e.g., to report the commission of cognizable offences, to keep surveillance of bad characters and to arrest certain offenders.

The case law bearing on the point has been referred to by the learned CHIEF JUSTICE, and, as he has pointed out, the preponderance of authority is in favour of the view I am taking. Except in the judgment of AGARWALA, J., in *Radha Kishun Marwari v. King-Emperor* (1), in no other decision, in which the question was considered, is any reference made to the Police Act which was impliedly treated as more or less irrelevant. The other learned Judges who wrote separate judgments in that case did not rely on the Police Act in arriving at their conclusions. The question for decision in that case was whether an excise officer, who has powers of a police officer in certain respects, should be deemed to be a police officer where he exercises those powers. The remarks of AGARWALA, J., so far as they relate to a chaukidar, are in the nature of *obiter dictum*. I find myself in entire agreement with the view expressed by GARTH, C.J., in *Queen v. Hurribole Chunder Ghose* (2), which was followed in *Queen-Empress v. Salem-uddin Sheik* (3), namely that the term "police officer" in section 25 of the Indian Evidence Act should not be read in a strict technical sense, but according to its more comprehensive and popular meaning. It seems to me that the whole purpose underlying that and cognate sections of the Indian Evidence Act is in accord with this view and is apt to be frustrated in certain cases if

(1) (1932) I.L.R., 12 Pat., 46.

(2) (1876) I.L.R., 1 Cal., 207.

(3) (1899) I.L.R., 26 Cal., 569.

the other view be accepted as correct. Once the desirability of excluding confessions made to police officers is conceded it will be a great anomaly that confessions made to higher police officers are excluded while those made to the lower ranks who are more prone to misuse their powers should be admissible. Accordingly I hold that a chaukidar is a police officer within the meaning of section 25 of the Indian Evidence Act.

COLLISTER, J.:—I have had the advantage of hearing the judgments of the learned CHIEF JUSTICE and my learned brother NIAMAT-ULLAH, J., and I am in agreement with the views which have been expressed by the latter. I have not much to add.

It is of course a fact that a chaukidar appointed under Act XVI of 1873 is a member of the village community and may in that capacity be a cultivator of land or engage in any other occupation in the village, and from that point of view it can be argued with some plausibility that he would not ordinarily be interested in the conviction of a fellow villager; but he is also a servant of Government and as such he wears a uniform and draws a salary. He is thus an official as well as a villager, and in practice he is in close association with the local police station. Under section 8(c) of Act XVI of 1873 he was given the power of arrest, but this power does not find place in section 45 of the Criminal Procedure Code.

It is pointed out to us that under sections 5 and 6 of Act XVI of 1873 the appointing authority for chaukidars is the District Magistrate, whereas the appointing authority for members of the regular police (other than officers of the higher ranks) is the Inspector-General of Police or his immediate subordinates; vide section 7 of Act V of 1861. This is true enough, but in the view which I now take of "police officers" I do not think that a difference of identity in the person of the appointing authority can affect the determination of the question before us. Moreover, it is to be observed that the

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authority which the District Magistrate exercises over chaukidars for the purposes of police may be delegated to the Superintendent of Police; vide section 47 of Act V of 1861. In the Act of 1873 a chaukidar is referred to as a village policeman, while in section 47 of Act V of 1861 we find the words "village watchman or other village police officer". The word "other" indicates that a chaukidar was regarded as a village police officer. I do not think that there is any magic in the word "officer" and I can see no essential difference between a "policeman" and a "police officer" of un-gazetted rank. Paragraph 371 in part III of the Police Regulations of the United Provinces makes it clear that a chaukidar appointed under Act XVI of 1873 is a member of the police force; and when once this fact is conceded—as has of necessity been conceded before us today—I think it follows logically that he is a police officer within the plain and ordinary meaning of those words, i.e., a person holding a police office; and I hesitate to accept the view that in section 25 of the Evidence Act the words should be interpreted in a narrow and technical sense, the expression being restricted to those persons only who are appointed as police officers by the Inspector-General of Police under section 7 of Act V of 1861. It is true that a chaukidar is not included in the list of non-gazetted officers in paragraph 373 of the Police Regulations, but that paragraph is apparently concerned with the regular force only. In any case, for the reasons which I have given, I find it impossible to avoid the conclusion that a member of the police force is a police officer. In my opinion the words "police officer" in section 25 of the Evidence Act cannot exclude a "village police officer" or a "village policeman", in other words a chaukidar.

In the case of *Ghunnai v. Emperor* (1), decided by a Bench of which I was a member, no authorities appear

(1) [1934] A.L.J., 143.

to have been cited before the Court and paragraph 371 of the Police Regulations was obviously not considered. The decision of the point was not essential in that case as there was abundant evidence *aliunde* to support the conviction. Upon a reconsideration of the whole matter and upon a review of the authorities which have been referred to in the judgments of the learned CHIEF JUSTICE and my learned brother NIAMAT-ULLAH, J., I am of opinion that the case of *Ghunnai v. Emperor* (1) does not express a correct view of law as regards section 25 of the Evidence Act.

In my judgment a confession made to the chaukidar of a village is barred by the provisions of section 25 of the Evidence Act.

BY THE COURT:—The answer to the question referred to us is in the affirmative.

## APPELLATE CRIMINAL

Before Mr. Justice Allsop and Mr. Justice Ganga Nath

EMPEROR *v.* BADALWA AND OTHERS\*

*Opium Smoking Act (Local Act II of 1925), section 9—Search warrant issued by Magistrate—Trial by same Magistrate—Jurisdiction.*

A Magistrate who had issued a search warrant under section 9 of the U. P. Opium Smoking Act can legally try the case of the persons arrested in consequence of the search, for offences under the Act.

Under the Gambling Act the issue of a search warrant gives rise to certain presumptions against the accused, and as the Magistrate who issued the warrant is a possible witness on the important question whether it was properly issued, it may not be advisable for him to try the case himself; but there is no such consideration under the Opium Smoking Act, as the presumption under section 5 of the Act arises quite irrespective of the issue of a search warrant under section 9, and the question whether it was properly issued is not relevant at the trial.

\*Criminal Appeal No. 75 of 1936, by the Local Government, from an order of Fariduddin Ahmad Khan, Sessions Judge of Fatehpur, dated the 14th of October, 1935.

(1) [1934] A.L.J., 148.

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