

## CRIMINAL REFERENCE.

*Before Mr. Justice Murphy and Mr. Justice Broomfield.*

EMPEROR v. LAXMAN PUNDLIK BHANDARI.\*

*Criminal Procedure Code (Act V of 1898), section 495 (4)—Excise Officer—Whether police officer within the meaning of the section—Bombay Abkari Act (Bom. Act V of 1878, as amended by Bom. Act XII of 1912), section 45 (c).*

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An excise officer is not a police officer within the meaning of section 495 (4) of the Criminal Procedure Code, 1898.

*Nanoo v. Emperor*,<sup>(1)</sup> considered and distinguished.

*Emperor v. Charles Stanley Wilson*,<sup>(2)</sup> applied.

CRIMINAL REFERENCE made by K. M. Kumathekar, Sessions Judge of Kanara.

Two persons were being prosecuted under section 45 (c) of the Bombay Abkari Act before the First Class Magistrate of Karwar town. The Abkari Inspector of Karwar sent a charge sheet and the prosecution was undertaken by him. At the commencement of the trial an objection was raised on behalf of the accused, to the Abkari Inspector conducting the prosecution on the ground that he was a police officer within the meaning of section 495 (4) of the Criminal Procedure Code and therefore not competent to conduct the prosecution. The objection was overruled by the trying Magistrate who observed as follows :—

“The Commissioner of Excise has fully discussed this question in his letter No. 82-6-30 dated 6th February 1931 to the District Magistrate, Nasik, a copy of which has been received in this office through the District Magistrate, Kanara. In the case of *Imperator v. Shaik Ahmad*, 1926, the High Court have decided that an Excise officer investigating an offence is a police officer for the purposes of section 25, Indian Evidence Act, only. In that case no decision is given that such an Excise officer is a police officer within the meaning of section 495 (4), Criminal Procedure

\*Criminal Reference No. 109 of 1932.

<sup>(1)</sup> (1926) 51 Bom. 78.

<sup>(2)</sup> (1919) Cri. Appeal No. 418 of 1919 decided by Shah and Hayward JJ. on August 6, 1919 (unrep.).

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Code. The Commissioner of Excise further quotes from the case *Imperator v. C. S. Wilson*, 1919. Mr. Justice Hayward is reported to have said as follows :—

‘ It is again unnecessary to decide whether Excise officers could be included under the specific term “ police officers ” as used in section 495 of the Criminal Procedure Code. Excise officers are certainly not so included in a great number of other sections in the Code, and it would require very clear indication to justify the conclusion that there was a different intention in respect of them in the use of the words “ police officers ” in section 495 of the Code.’

“ In view of these rulings quoted above, I don’t think that Excise officers are police officers for the purposes of section 495 (4) of the Criminal Procedure Code.”

The original accused No. 2 preferred an application to the Sessions Judge praying that the Court may be pleased to call for the record and proceedings under section 435 and to report the matter to the High Court for final orders.

The Sessions Judge made a reference on the following ground :—

“ Now the main point in this case is whether the Abkari Inspector should be considered as a police officer for the purposes of section 495 (4) of the Criminal Procedure Code. The present case itself is a petty case. But the matter is of general importance. It goes at the root. The question is whether the Abkari Inspector should be allowed to conduct the prosecution when he has taken part in the investigation into the offence with respect to which the accused was being prosecuted. In this case it is to be determined whether the order of the learned Magistrate, rejecting the accused applicant’s application and allowing the Abkari Inspector to conduct the case on behalf of the prosecution, was legal or proper. I find, taking into consideration the spirit of section 495, that the Abkari Inspector, who had investigated into the offence, comes within the definition of a police officer under this section. I find that he should not be permitted to conduct the prosecution. On this point I would like to refer to the case reported in 28 Bom.L.R. at page 1196. No doubt in that case, this point was not considered. But the Abkari Inspector was considered to be a police officer so far as section 25 of the Indian Evidence Act was concerned. But I find that the same principle applies here also.”

The reference was heard.

*P. B. Shingne*, Government Pleader, for the Crown.

No appearance for the accused.

MURPHY J. This matter arises out of a reference which has been made by the learned Sessions Judge of Kanara on the following facts.

Two persons were being prosecuted in the Court of the City Magistrate, Karwar, under section 45 (c) of the Bombay Abkari Act. At the commencement of the case, the prosecution was undertaken by the Abkari Inspector, and the accused objecting to this procedure, the learned Magistrate made an order against them and directed that the prosecution should proceed as already started. One of the accused applied to the learned Sessions Judge under section 435 of the Criminal Procedure Code, and the Judge has referred the matter to this Court, his opinion being that under section 495 (4) of the Criminal Procedure Code, the Abkari Inspector is not competent to conduct the prosecution, as he comes within the connotation of the expression "an officer of police" in that sub-section.

There is no direct authority for the view adopted by the learned Sessions Judge, the reference having been made on the grounds of the analogy of the expression used in section 495 with that used in section 25 of the Indian Evidence Act, which excludes confessions made to a police officer, and a ruling of this Court in *Nanoo v. Emperor*,<sup>41</sup> in which a full bench consisting of five Judges held that a confession made to an Excise officer, who under the Abkari Act exercises all the powers of a Sub-Inspector of Police in charge of a police station in excise cases, is an officer of police within the meaning of section 25 of the Indian Evidence Act. There is no definition of the expression "an officer of police" that we have been referred to, nor have we been able to find any. It does not appear to have been defined in the General Clauses Act, but in the Police Act, Act V of 1861, the definition is that the word "police" shall include all persons who shall be enrolled under that Act, and in the Bombay District Police Act, Act IV of 1890, the definition is, "police officer" means any member of a police force appointed under that Act; and in the Bombay City Police Act, Act IV of 1902, the definition is, "any member of the police force for the

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City of Bombay appointed under that Act". It is clear that an Abkari Inspector does not come within any of these definitions.

There has been a considerable conflict of decision on the point, as it arises under section 25 of the Indian Evidence Act. The original view held by the Calcutta High Court was that an Excise officer was not a police officer within the meaning of section 25 of the Indian Evidence Act. Next came the Bombay decision, which decided the point in the contrary sense, since when one bench of the Calcutta High Court in *Ibrahim Ahmad v. King-Emperor*<sup>(1)</sup> followed the Bombay ruling, holding that the term "police officer" should be read, not in any strict sense, but according to a more comprehensive one, and that on principle also, the position of a police officer could not 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. In a later case, which is not officially reported, but is to be found in *Matilall Kalwar v. Emperor*,<sup>(2)</sup> another bench decided that an Excise Sub-Inspector was not a police officer within the meaning of section 25 of the Indian Evidence Act. The latest decision is one of the Patna High Court in *Radha Kishun v. Emperor*,<sup>(3)</sup> and the finding of the special bench of that Court was that an Excise officer under the Bihar and Orissa Excise Act is not a "police officer" within the meaning of section 25 of the Indian Evidence Act, and therefore, that a confession made to an Excise Inspector who, under the Dangerous Drugs Act (II 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 learned Chief Justice, who delivered the principal judgment

<sup>(1)</sup> (1931) 58 Cal. 1260.<sup>(2)</sup> [1932] A. I. R. Cal. 122.<sup>(3)</sup> (1932) 34 Cr. L. J. I, s. E.

in that case, discussed the Bombay ruling and said that, with great respect, he was in complete disagreement with the arguments which found favour in that case, thinking that there were two fundamental fallacies underlying the conclusion : one was that the learned Judges had misunderstood the Calcutta decision in *Queen v. Hurribole Chunder Ghose*,<sup>(1)</sup> and the second, that an erroneous canon of construction of statutes had been applied. In his view 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.

All these rulings are as to the proper interpretation of section 25 of the Indian Evidence Act and not of the section in the Criminal Procedure Code with which we are now concerned. The only case directly on that section, we have been able to find, is an unreported decision of this Court in *Imperator v. Charles Stanley Wilson*,<sup>(2)</sup> the judgments in which were delivered by the late Mr. Justice Shah and Mr. Justice Hayward. In that case Shah J. remarked :—

“ The other point raised in this appeal is that the investigating Excise officer was allowed to conduct the prosecution contrary to the provisions of sub-section 4 of section 495. Assuming, without deciding, that the investigating officer who was allowed to conduct the prosecution was an officer of police within the meaning of sub-section 4, I do not think that the irregularity can affect the result in this case. As pointed out in *Emperor v. Tribhovandas*,<sup>(3)</sup> such an irregularity would be covered by the provisions of section 537 of the Code of Criminal Procedure, and in the absence of an indication of any prejudice to the accused or failure of justice resulting from such an irregularity we cannot reverse the finding or interfere with the order of the lower Court in appeal. I think, however, that there is force in the contention that the trial Magistrate should not have permitted the investigating officer to conduct the prosecution in this case for the reasons underlying the provisions of section 495, sub-section (4). If an officer who may not be an officer of police, but who has to do duty similar to that of a police officer with reference to the investigation of an offence under the Opium Act, has taken part in such investigation, it would be desirable not to permit him to conduct the prosecution, particularly if he is likely to be a witness

<sup>(1)</sup> (1876) 1 Cal. 207.

<sup>(2)</sup> (1919) Criminal Appeal No. 418 of 1919, decided by Shah and Hayward JJ., on August 6, 1919 (Unrep.)

<sup>(3)</sup> (1902) 26 Bom. 533.

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in the case. That, however, is a matter for the trial Magistrate to take into consideration at the time of exercising his discretion under section 495, sub-section (1), and granting the necessary permission."

The relevant portion of Hayward J.'s judgment on the point is as follows :—

"It is not necessary to have recourse to the statements hardly amounting to confessions which have been alleged to have been made by the accused to the Excise officers. It is not necessary therefore to consider whether Excise officers should or should not be classed as police officers for the purposes of section 25 of the Indian Evidence Act. It is again unnecessary to decide whether Excise officers could be included under the specific term 'police officer' as used in section 495 of the Criminal Procedure Code. Excise officers are certainly not so included in a great number of other sections in the Code and it would require very clear indication to justify the conclusion that there was a different intention in respect of them in the use of the words 'police officer' in section 495 of the Code. But in any case the conduct of the prosecution by the Excise officer, though possibly indiscreetly permitted, would not appear to have resulted in material prejudice and therefore it would be at most an irregularity cured by section 537 of the Criminal Procedure Code."

It will be noticed that the learned Judges did not specifically decide the point, which was not directly in issue before them, for the decision turned on the merits of that case, though they seem to have been inclined to the opinion that, as a rule, the conduct of the prosecution by an investigating Abkari officer should not have been allowed. We think, however, it was a matter for the exercise of the Magistrate's discretion, and this discretion, we find, is no longer there, for, by a Notification, No. 6601 of December 13, 1932, excise-officers not lower in rank than Sub-Inspectors have been authorised to conduct prosecutions in such cases in this Presidency by Government. This is all the help that we have been able to derive from authority on the point. It will be noticed that all but one of these cases do not interpret section 495. The learned Judge's argument is, generally, that the reasoning which is applicable to the cases under section 25 of the Indian Evidence Act in support of the view taken by the full bench of this High Court as to the meaning of the expression "officer of police" in that section, applies with exactly similar force to the same expression as used

in section 495 of the Criminal Procedure Code. We think, however, that the cases are not really as analogous as they appear to be at first sight. The prohibitions under section 25 of the Indian Evidence Act and section 495 (4) of the Criminal Procedure Code cannot really have been enacted on exactly similar grounds. One concerns a matter of evidence, the other, one of procedure. The first excludes a certain kind of evidence on the general principle underlying all rules of exclusion, that such evidence is too dangerous to use. If one may speculate, the second is based on a fear that an investigating officer may prove to be an unfair prosecutor. The former is a weightier reason for exclusion than the latter, and the analogy between a confession made to a police officer and one made to an Excise officer is far closer than in the case of prosecutors. There is, therefore, a far more compelling reason for including Excise officers, though not expressly mentioned, in the expression "officer of police" as used in section 25 of the Indian Evidence Act, than there is for adopting the same interpretation in the case of section 495 (4) of the Criminal Procedure Code. Moreover, the Criminal Procedure Code was extensively amended in 1923 at a time when the powers of investigation exercised by Excise officers were in full force, these having been conferred by an amendment of the Abkari Act in 1912, and it is not reasonable to presume that the fact that these officers were exercising these powers of investigation could have escaped the notice of the authorities responsible for the amendment of the Code, and that there would not have been a consequential amendment to that effect in section 495, i.e., the words necessary to include them, such as "or other officers exercising similar powers", had the prohibition been intended to apply to such officers also.

On the whole, therefore, I am of opinion that "Excise officers" are not impliedly as they are not expressly included in the expression "officer of police" in section 495 (4) of the Criminal Procedure Code, and that the papers

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should be returned to the Sessions Judge with our opinion to this effect. The Magistrate's order will, therefore, stand.

BROOMFIELD J. The question in this reference is whether an Inspector in the Excise department is a police officer within the meaning of section 495 (4) of the Criminal Procedure Code. As pointed out by my learned brother, there has been a recent resolution of Government dated December 13, 1932, by which Government, in exercise of the powers conferred by section 495 (1), has empowered Excise officers of a certain standing to conduct prosecutions. This resolution was issued after the orders of the Magistrate and the Sessions Judge in the present case, but it is a matter which we have to take into consideration. A Government resolution cannot, of course, override the law, and if Excise officers are to be regarded as police officers, they are debarred from conducting the prosecution in cases which they have themselves investigated. On the other hand, if they are not police officers within the meaning of clause (4) of section 495, they can, by virtue of the Government resolution, conduct the prosecution in any case and the Court would not have the power to prevent them doing so on the ground that they had investigated the case.

Apart from authority the matter seems to me to be fairly simple. There is no definition of a "police officer" in the Criminal Procedure Code, but *prima facie* a police officer should mean a member of a police force, a person enrolled or appointed for police duty, and not a member of some service or department appointed primarily for other duties altogether but exercising powers similar to those of police officers for certain purposes connected with their duties. Excise officers since 1912 have been given certain powers of investigation which are almost identical with those given to police officers under the Criminal Procedure Code. But that does not convert them into police officers.



The only authority directly in point is an unreported case of this High Court in *Imperator v. Charles Stanley Wilson*,<sup>(1)</sup> decided by Shah and Hayward JJ. The point was not really decided there, but Mr. Justice Hayward seems to have been rather inclined to the view that an Excise officer is not a police officer according to the strict construction of section 495 (4). The material parts of the judgment in this case have been cited by my learned brother, who has also pointed out that in view of the Government resolution there is no longer any question of policy to be considered. It is not now a matter for the discretion of the Magistrate and it is necessary to decide the question of law whether an Excise officer is or is not a police officer within the meaning of section 495 (4).

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The real difficulty is caused by the full bench decision in *Emperor v. Nanoo*.<sup>(2)</sup> The actual point decided in that case was different. The Court had there to consider whether the term "police officer" in section 25 of the Indian Evidence Act includes an Excise officer, and it was held that it does. It would not necessarily follow that an Excise officer is a police officer for the purpose of section 495 (4) of the Criminal Procedure Code. But if, as the learned Sessions Judge thinks, the reasoning on which the full bench decision was based applies with equal force in the case of section 495 (4), it would be difficult for us to say that we are not prepared to follow it. The full bench decision is, of course, binding upon us so far as it goes, whatever view may be taken of it by other High Courts.

Part of the *ratio decidendi* in *Emperor v. Nanoo*<sup>(2)</sup> does undoubtedly apply here. Marten C. J. says (p. 1206):—

"Now, what was the object of section 25 of the Evidence Act? It was, I take it, to prevent the abuse of their powers by the police in this country in extorting confessions from persons in their custody; and I take it that one of the most important periods, during which the accused persons were intended to be protected

<sup>(1)</sup> (1919) Cr. App. No. 418 of 1919, decided by Shah and Hayward JJ., on August 6, 1919. (Unrep.)

<sup>(2)</sup> (1926) 28 Bom. L. R. 1196, 51 Bom. 78, F. B.

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by the legislature, was when the case was being investigated by the Police-officers and when the accused were perhaps solely in police custody and not allowed to see any other person. Therefore, so far as the spirit of the Act is concerned, we have the same possibilities of evil when an Excise officer investigates a case, as we should have in the case of an investigation by Police-officers in charge of a Police-station under the Criminal Procedure Code."

Similarly, Shah J. observes (p. 1211) :—

"In taking this view of section 25, it is essential and quite proper to bear in mind the purpose of the section. That purpose has been already stated. It has been discussed in *Queen-Empress v. Babu Lal*.<sup>(1)</sup> In the words of Oldfield J. (page 513). 'The broad ground for not admitting confessions made to a Police-officer is to avoid the danger of admitting false confessions.' That ground would apply as much to an Excise-officer exercising the powers conferred upon him by section 41 of the Abkari Act as amended as to a Police-officer."

If it is open to us to speculate as to the spirit and object of the Act and as to the reason for the enactment of this provision (namely, section 495 (4) of the Criminal Procedure Code), it must presumably have been that it was thought undesirable that a person responsible for the investigation of a case, and therefore in a sense interested in the result, should be allowed to conduct it in person. That has obviously nothing to do with the designation an officer may bear. The learned Government Pleader, who has appeared to oppose this reference, also suggested that another reason may have been that it is frequently necessary and desirable to call investigating officers as witnesses. But that of course will be equally so whether the investigating officer is a police officer or an Excise officer exercising police powers. That particular point was taken before the First Class Magistrate who was dealing with this case and he pointed out that there was nothing to prevent the Excise Inspector giving evidence, although he was proposing to conduct the case. So far then, I think, the reasoning in the full bench case may be said to apply here. But this was not the sole basis of the decision. It seems to me that the Court was obviously influenced by other considerations which do not apply in the present case at all. Thus Fawcett J., after

<sup>(1)</sup> (1884) 6 All. 509, F. B.

referring to the leading case, *Queen v. Hurribole Chunder Ghose*,<sup>(1)</sup> observes as follows (p. 1211) :—

“The view . . . that the term ‘Police-officer’ in section 25 of the Evidence Act should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, is one which was arrived at only four years after the Evidence Act was enacted. That construction has been followed by this Court, as well as other High Courts; and, if the legislature had considered that that was a wrong construction to put upon the term ‘Police-officer’ in section 25 of the Evidence Act, the probability is that the section would have been amended so as to overrule such a construction. Therefore, when the learned Advocate-General contends that section 25 of the Evidence Act does not cover a Revenue-officer, or any other officer on whom by statute certain powers of the police are conferred, and that to say it does cover such an officer is to read the section as if it said ‘including officers who can reasonably be regarded as Police-officers’, then the answer is that we are merely acting on a construction adopted by the Courts long ago and tacitly accepted by the legislature.”

Kemp J. was clearly influenced by considerations of the same kind. He says (p. 1212) :—

“It will be noted that, prior to the Bombay Amending Act XII of 1912, any confession made to a Police-officer in charge of a Police-station in the course of his investigation of any offence was disallowed. The Local Government could not have intended, by delegating the investigation of offences under the Abkari Act to an Abkari Inspector, to deprive a person accused of an offence under the Abkari Act of the protection he enjoyed under section 25 of the Evidence Act before Bombay Act XII of 1912 was passed. To hold otherwise would be to cut down the protection intended to be afforded by section 25 of the Evidence Act, which is an Act of the Government of India, to accused persons.”

Now it is to be noted that there is no course of decisions to the effect that an Excise officer is a police officer within the meaning of clause (4) of section 495 of the Criminal Procedure Code. The only direct authority on the point, so far as we are aware, is the unreported case of this Court to which reference has already been made, and, so far as it goes, that would seem to be an authority the other way.

Then, at page 1209, Marten C. J. laid emphasis on another point :—

“I should mention an argument addressed to us on section 125 of the Evidence Act to the effect that, as the legislature distinguishes there between Police-officers and Revenue-officers a similar distinction should be made in construing section 25. I think the answer to that is given by Mr. Coelho. The Evidence Act was passed in 1872, and this particular provision in section 125 was passed in 1887, and, therefore,

<sup>(1)</sup> (1876) 1 Cal. 207.

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before the present amended sections of the Bombay Abkari Act came in force. For instance, the police powers given by the present sections 41, 41A, 41B and 41C, were conferred by section 25 of the Bombay Abkari (Amendment) Act, 1912 (Bom. Act XII of 1912). It may, therefore, be that, since the amending Act of 1912, certain Excise-officers in Bombay are Police-officers as well as Revenue-officers under section 125. On the other hand, it does not follow that every Revenue-officer under section 125 is also a Police-officer. It will depend on whether he has had conferred upon him the exceptional powers referred to in the Abkari Act."

Here and in the other passages in the judgment stress was laid on the fact that the Indian Evidence Act was passed in 1872 when Excise officers had no more than a limited power of arrest and could not be regarded as standing in the same position as police officers. But the Criminal Procedure Code was completely revised and amended in 1923, eleven years after the amendment of the Abkari Act by which the powers of investigation in question were conferred upon Excise officers. So that, assuming that it is permissible to interpret an Act prospectively as it were and to adapt it to meet the changes in other legislation, there is no analogous reason for interpreting "a police officer" in section 495 (4) in a sense which would include an Excise officer. The legislature in 1923 had no excuse for supposing that police officers, strictly so called, are the only persons empowered to investigate offences, or for supposing that the Courts in interpreting section 495 (4) of the Criminal Procedure Code would not interpret the expression strictly, but would apply it to Excise officers also. The full bench decision is only binding on us if it is quite clear from the line of reasoning adopted that the Court would have held an Excise officer to be a police officer under section 495 (4) of the Criminal Procedure Code as well as under section 25 of the Indian Evidence Act, if that point had been before it for decision. For the reasons which I have indicated, I do not consider that that is by any means clear. I, therefore, agree with the order proposed by my learned brother in this case.

*Order accordingly.*

J. G. R.