

(1965) 10 KL CK 0023
High Court Of Kerala
Case No: Criminal R. P. 365 of 1965

Aloysious John

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Oct. 8, 1965

Acts Referred:

- Constitution of India, 1950 - Article 20(3), 22
- Criminal Procedure Code, 1898 (CrPC) - Section 156, 157, 60, 60, 61
- Evidence Act, 1872 - Section 45, 47, 73
- Identification of Prisoners Act, 1920 - Section 5, 6

Citation: (1965) KLJ 950

Hon'ble Judges: P. Govinda Menon, J; Anna Chandy, J

Bench: Division Bench

Advocate: George Varghese Kannanthanam, for the Appellant; Thomas V. Jacob
Government Pleader, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Govinda Menon J.

1. This revision petition raises the question regarding the power of the Magistrate to direct an accused person to appear in court and give specimen hand-writing and signature in the course of investigation of a case by the police. The petitioner is the second accused in crime 9 of 1965 registered by the crime branch C. I. D. Trivandrum for offences of cheating, forgery, etc. The petitioner appeared before court on 4-5-65 and was enlarged on bail. Subsequently on 25-6-65 the investigating officer presented a petition before the Additional First Class Magistrate, Pathanamthitta that as the hand-writing and signature of the accused have to be sent to the Examiner of Questioned Documents for comparison and opinion, the court may summon the petitioner and take the specimen writing and signature both

in English and Malayalam in 10 different slips of paper. When summons was received the petitioner appeared through counsel and opposed the application on the ground that u/s 73 of the Evidence Act the court can direct any person present in court to write words or figures to enable the court to compare the same with words or figures alleged to have been written by such person and, this stage would be reached only after charge sheet had been filed and the trial had started. The objection was over-ruled and the Magistrate passed orders directing the petitioner to appear in court, on 15-7-65 for the purpose of taking his specimen hand-writing and signature as sought for by the police. The question that arises here for decision is not whether the direction given by the court infringes the fundamental right enshrined in Art. 20(3) of the Constitution as that question has already been settled by the Supreme Court in the case in [The State of Bombay Vs. Kathi Kalu Oghad and Others,](#) , where it was held that there is no infringement of Art. 20 (3) if an accused person is directed u/s 73 of the Evidence Act to give his specimen hand-writing and signature. The question before us is whether the Magistrate has powers u/s 73 of the Evidence Act to direct an accused who is on bail to appear in court and give specimen signature and hand-writing for the purpose of investigation of the case by the police.

Sections 5 and 6 of the Identification of Prisoners Act (Act XXXIII of 1920) would not apply. Section 5 authorises a Magistrate to direct any person to allow his measurements or photograph to be taken if he is satisfied that it is expedient for the purpose of any investigation or proceeding under the Code of Criminal Procedure to do so. "Measurements" include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate u/s 5 of the Act to allow his measurements or photograph to be taken resists or refuses to allow the taking of measurements or photograph it has been declared lawful by Section 6 to use all necessary means to secure the taking of the required measurements or photographs. But taking specimen hand-writing would not come within this Act and we have to go to Section 73 of the Evidence Act.

2. That section reads:

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions.

3. The words "any person" in this section are wide enough to cover an accused person also. If the legislature intended to exclude accused persons from the category of persons contemplated u/s 73 there is no reason why it would not have stated so. This is the view taken in the Full Bench decision of the Rangoon High Court in *King Emperor v Tim Hiding* (1923 I. L. R. 1 Rang. 759); and in *Emperor v Ramrao Mangesh* (1932 I. L. R. 56 Bom. 304) and by a Full Bench of the Travancore-Cochin High Court in *State v Parameswaran Pillai* (1952 K. L. T. 310).

We are in respectful agreement with the view taken in these cases. This position is also not disputed.

4. So Section 73 permits a Magistrate to direct an accused person in court to write any words or figures for the purposes of enabling the court to compare the words or figures so written with any words or figures" alleged to have been written by such person, with a view to enable the court to form its own conclusion and in order that it might do complete justice between party and party. The Magistrate is entitled to satisfy himself whether a particular piece of disputed writing was in the hand of the accused and for that purpose besides the provisions contained in sections 45 and 47, special provision is made in Section 73 of the Evidence Act. The ordinary methods of proving hand-writing are by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the hand-writing by virtue of Section 47, but provision is made in Section 73 for comparison by the court. The occasion for such direction by the court will arise only when the court finds that it is necessary in the interests of justice to make such a comparison with his own eyes or magnifying glass for the purpose of coming to a conclusion along with the other Evidence in the case. Section 73 is an enabling provision under which the court may direct any person present in court to write in his presence. In this case the learned Magistrate has not stated whether he considered it necessary to take specimen writing to enable the court to compare. He could not obviously have felt that need, because that stage had not yet been reached. It will be useful to remember that the words used are "for the purpose of enabling the court". So the occasion for such a direction can arise only when the court feels that it is necessary for its own use. No doubt after taking the writing if the Magistrate wants further assistance in the shape of enlargement of the writing it is perfectly open to the court to call its own photographer, take the enlargements under its own supervision, study them, and if necessary call its own expert as a court witness in order that it might be assisted to a proper conclusion.

5. This view finds support in the decision in *Hiralal Agarwalla v The State* (A. 1. R. 1958 Cal. 123). In that case in the course of the committal enquiry after several witnesses had been examined in support of the charges, the public prosecutor made a request that the petitioner may be directed to give his specimen hand-writing for the purpose of comparison with the petitioner's disputed writing and for sending the same to the hand-writing expert attached to the Criminal

Investigation Department, Government of West Bengal. The High Court held that Section 73 cannot be construed as an instrument or a device to be used for the advancement of any party, either the prosecution or the accused. It is one of those sections where large powers are given to the court with the obvious object of enabling the court to find out the truth and to do complete justice between party and party and any other use of it would be wholly unjustified.

6. To the same effect is the decision in [State Vs. Poonamchand Gupta and Others](#), . In that case also after a large number of witnesses were examined the prosecution wanted the court to direct the accused to give their specimen hand-writing and signature for the purpose of sending it on to the expert for comparison. Objection was raised that Section 73 of the Evidence Act cannot be used in the manner in which the trying Magistrate had used it and that the power could be exercised by the court itself and not at the instance of the prosecution and relying on the Calcutta case referred to above it was held:

In terms this clause limits the power of the court to directing a person present in court to write any words or figure only where the court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have been written by such person. The power does not extend to permitting one or the other party before the court to ask the court to take such writing for the purpose of its evidence or its own case.

7. In a recent decision of the Gujarat High Court in *Trikamalal v State* (1964-1 Cr. L. J. 94), a similar question, as we have here, came up for consideration. - That was a case where an accused who was on bail was directed to go to the police station to give his specimen signature and hand-writing. The objection raised was over-ruled by the Magistrate. When the matter was taken up to the High Court it was held:

S. 73 gives the court a power to direct any person present in the court to write any words or figures for the purpose of enabling the court to compare the words or figures so written, with any words or figures alleged to have been written, by such a person. Therefore, if an accused person is present in court, then powers given under the section can be used by the court. But where the accused is not before the court and is let on bail pending investigation of the case against him the Magistrate has no power to ask the: accused person to go to the police and give specimen of his signature and hand-writing.

Magistrates and police officers can exercise only those powers which are prescribed under various laws and those powers cannot be enlarged. If there is no provision in the law for the exercise of a power that power cannot be exercised by a police officer, or by a Magistrate or by a Judge. The police have got wide powers of investigation under sections 156 and 157 Cr. P. C, but that does not mean that the police can compel an accused person to give his specimen signature and

hand-writing in exercise of such powers against the express provisions of S. 73 of Evidence Act.

8. Learned State Prosecutor has referred us to the decision of the Patna High Court in [Gulzar Khan and Others Vs. State](#), , where a contrary view was taken. It was held in that case:

Such a direction can be given by the Magistrate under S. 73 of the Evidence Act even before he has taken cognizance of the offence. So far as giving of thumb-impression, finger print or palm print is concerned, it is covered clearly by the terms of S. 5 of the Identification of Prisoners Act which refer to a Magistrate and not to court. But, even in regard to S. 73 of the Evidence Act, the word "court" therein must be equated with the court of the Magistrate in a case triable by him or before it is committed to sessions in a case triable by the court of session. As a matter of fact in every case where the accused is arrested and he is required to give his specimen hand-writing or signature or thumb impression, etc., he is arrested under a warrant which must be issued by a Magistrate or when the police arrest without a warrant in a cognizable offence, under S. 60 of the Code of Criminal Procedure he must be produced before-a Magistrate without unreasonable delay and the procedure under sections 60 to 63 of the Code as also under Art. 22 of the Constitution of India has to be followed and that attracts the provisions of S. 73 of the Evidence Act

For reasons given by us we find ourselves unable to subscribe to this view.

9. Our attention was drawn to a decision of this court in P. V. G. Nair v State of Kerala (1963 K. L. T. 1132). There the question that was pressed was only the infringement of Art. 20(3). One of us (Govinda Menon J.) relying on the decision in [The State of Bombay Vs. Kathi Kalu Oghad and Others](#), confirmed the order of the Magistrate directing the accused to appear at the police station on the ground that a direction by a Magistrate to give specimen hand-writing and signature will not amount to compelling the accused person to be a witness against himself and hence does not infringe the fundamental right enshrined in Art. 20(3) of the Constitution. The question as to the power of the Magistrate to take specimen hand-writing and signature under the provisions of Section 73 of the Evidence Act for the purpose of investigation by the police was neither argued nor considered. Thus on a careful consideration of the section and the decisions bearing on this question, which had been placed before us, we are of the view that the learned Additional First Class Magistrate had no powers, at that stage, to issue the direction to the accused to appear in court for the purpose of giving specimen hand-writing and signature at the request of the police.

The order of Magistrate is, therefore, set aside