In Re: Llewelyn Evans

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Court : Mumbai

Decided On : Jun-30-1926

Reported in : (1926)28BOMLR1043; 97Ind.Cas.801

Judge : Fawcett and ;Madgavkar, JJ.

Appeal No. : Criminal Application No. 183 of 1926

Appellant : In Re: Llewelyn Evans

Judgement :

Fawcett, J.

1. The Commissioner of Police through the Government Pleader now informs us that he agrees to allow any member of the petitioners' firm, or any representative appointed by them, reasonable access to the accused Llewelyn Evans, from time to time, so long as the said Llewelyn Evans remains remanded in Police custody, and in accordance with the corresponding Rule 995 of the Jail Manual, Part I, as to an interview between an unconvicted prisoner and his legal adviser, that is to say, it should take place within sight, but out of hearing, of a Police Officer. This satisfies Mr. Kemp for the petitioners.

2. In the circumstances, it is unnecessary for us to deliver judgments such as would have been necessary, if the refusal of the Commissioner of Police had been persisted in, But, the question being one of general importance, I may say that, we

have come to the conclusion that the Police cannot legitimately claim that in no circumstances should an unconvicted prisoner, who has been remanded to their custody, be allowed to see his legal adviser, until they choose to permit this,

3. In the present case, it was contended that the legal adviser should not have access to the accused until the Police investigation is complete. That practically amounts to saying that, until there had actually been a report made to the Magistrate committing the accused, under Section 74 of the City of Bombay Police Act IV of 1902, the prisoner should not have an opportunity of communicating with his legal adviser, if he desired to do so. That is a principle which, I think, cannot be upheld in the present day. The days have long since gone by, when the State deliberately put obstacles in the way of an accused defending himself, as, for instance, in the days when he was not allowed even to have counsel to defend him on a charge of felony. The present day trend is quite in the opposite direction, as was shown by the recent report of what was known as the Eawlinson Committee in England, In that case there had been some obstruction to the accused, who had been arrested, communicating at once during the night with his friends or legal advisers; and I think I am correct in saying that, on the Report of the Rawlinson Committee, steps were taken to lay down definitely that no obstruction should be put in the way of an unconvicted prisoner communicating with his legal adviser. In India we have the provisions of Section 340, Criminal Procedure Code, which, as amended in 1923, extend to the case, not only of a person accused of an offence in a criminal Court, but to the case of any person against whom proceedings are instituted under the Code in any Court, That section certainly contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also implies that he should have a, reasonable opportunity, if in custody; of getting into communication with his legal adviser for the purpose of preparing his defence, The same policy is shown in Section 40 of the Prisons Act IX of 1894, which lays down that, subject to proper restrictions, an uncon-victed prisoner should be allowed to see his legal adviser in jail, And, so far as the question arises in regard to Police custody, speaking generally, it seems to me that the same principle should ordinarily be followed,

4. But, of course, there are other considerations that legitimately arise. The main object of remanding an accused into Police custody is that the Police should get some help towards their Investigation, It may, for instanoe, be necessary that the accused should be identified by certain witnesses ; the Police, therefore, should have him at hand so that they can arrange for an identification parade, or any other necessary steps for getting proper evidence as to identification. Again, it must be remembered that the investigating officer has to decide whether there are, or are not, sufficient grounds to commit the accused to a Magistrate's Court, and, therefore, it is reasonable that the Police, who may not have time to do this in twenty-four hours, should be able to get the explanation of the accused regarding any charge against him, and that this explanation should be considered before the officer decides whether there are, or are not, sufficient grounds. Therefore, while on general principles, especially those embodied in Section 340, Criminal Procedure Code, the legal adviser should have access to an accused person, yet obviously that should not be abused. For instance, a pleader cannot insist on going to see an accused person at any time that suits him, for that would hamper the Police investigation. Also, if the Police have reason to believe that a particular pleader has abused his liberty of access, for instance, by tampering with witnesses, then, of course, they would be quite justified in objecting to that particular pleader having access to the prisoner. But this Court has, I believe, consistently upheld the view that no undue obstacles should be put in the way of an accused preparing his defence. Thus, so long ago as 1863, in In the matter of the petition of Shaik Dadabh aee (1863) I B. H. C. R. 16 it was laid down that prisoners and others ought to have fullest opportunity for giving Vakalatnamas to whomsoever they pleased. The High Court there disapproved of difficulties being put in the way of the prisoner executing a Vakalatnama that his friends had arranged for, And, in Queen Empress v. Wasudev Hari (1899) 1. Bom. L.R. 856 where the investigating Magistrate had refused to allow the pleaders appointed by the wife of the accused to see the accused, so that they might get a Vakalatnama signed by him, and take instructions from him for his defence, Mr. Justice Parsons described this as ' improper conduct, ' and said the duty of the Magistrate was to have afforded the accused and his friends every opportunity of making his defence. Consequently, I think, the high claim that is put forward on behalf of the

Police cannot be sustained, unless there are exceptional circumstances which do not exist in this case ; and I am glad that the Police Commissioner has seen fit to withdraw his objection in the manner I have stated.

5. As regards jurisdiction, I may say that I have come to the conclusion that this Court would have power under Section 561A, Criminal Procedure Code, to interfere, inasmuch as this would be necessary to prevent an abuse of the process of a Court. In the present case, the Third Presidency Magistrate has passed orders, under Section 70 of the City of Bombay Police Act, remanding the accused to Police custody. That is a process of that particular Court, for ' process ' is a general word, meaning in effect anything done by the Court; and it would, I think, in the present case, be an abuse of that process, if the Police were to take advantage of it to prevent the accused's legal advisers having the access to the accused, that they would be allowed, under Section 40 of the Prisons Act, if the accused were in jail. Accordingly, I would have been prepared to pass orders in favour of the petitioners to the extent contained in the con-gent order,

Madgavkar, J.

6. The two questions which arise in this application are:

Firstly, whether this Court is competent to order that a person arrested for a cognizable offence and remanded by the Magistrate into Police custody should have access to his legal advisers ?

Secondly, if this Court is be competent, what order should be passed in this case ?

7. On the second point, it-is not necessary to enter at length in view of the modified attitude on behalf of the Police this morning, consenting to such access, in contrast with their opposition yesterday. It suffices to say that the accused Evans was arrested at Aden about fourteen days ago and was brought down to Bombay under arrest on a charge of criminal breach of trust. The Magistrate has granted a remand up to July 10, in Police custody. The Police have refused his legal adviser access to him and the Magistrate has held that he has no jurisdiction to order access. An urgent application to this Court was made on his behalf

yesterday, and was opposed for the police yesterday. Today, just as we were about to deliver judgment, the Police have expressed their willingness to give him the access sought.

8. The first question, however, is important, and no decision was cited to us in arguments. I deem it, therefore, necessary to record my considered opinion.

9. It was argued for the petitioners that this Court had jurisdiction under Section 561A, Criminal Procedure Code, and our attention was also invited to the provisions of Section 40 of the Prisons Act IX of 1894.

10. On behalf of the Police it was contended that the accused was in exclusive Police custody within the meaning of Section 3, Clause (1) (a), of the Prisons Act IX of 1894, and the Act, therefore, did not apply ; that he was under remand under Section 70 of the City of Bombay Police Act (IV of 1902), as in the case of Emperor v. Ponde : (1925)27BOMLR612 ; and that this Court had no jurisdiction even under Section 561A of the Code of Criminal Procedure.

11. The terms of Section 561A are, perhaps from their very nature, wide. ' Inherent jurisdiction,' ' to prevent abuse of process,' 'to secure the ends of justice,' are terms incapable of definition or enumeration, and capable at the most of test, according to well-established principles of criminal jurisprudence. The results of such tests might in certain cases be doubtful or indecisive, as, for the matter of that, they may be, in the case of medico-legal tests by more exact sciences such as chemistry. Nevertheless, in the absence of any other method, we have no choice left in the application of this section except such tests, subject to the caution to be exercised in the use of our inherent jurisdiction and the avoidance of interference in details, usually best left to the Executive.

12. What then are the ' ends of justice ' To the particular result in any particular case justice is indifferent The end of justice is no more conviction than acquittal, It is justice, by the ascertainment of the truth as to the facts on a balance of evidence on each side. If so, do the ends of justice require, or do they not, that the accused person from the moment of his arrest should have reasonable access to his legal advisers; or does it suffice that this access should commence under the

Prisons Act IX of 1894 from the time when the exclusive Police custody has ceased To this question, the answer is, in my opinion, clear. If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice-advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very State, which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance.

13. Further, it is to be observed that the Courts are not debarred of jurisdiction until the investigation is complete, the charge sheet is sent up, and the exclusive Police custody has ceased. Sections 497 and 498 of the Criminal Procedure Code, for instance, give the Court ample authority to release the prisoner on bail from exclusive Police custody. Section 498, Criminal Procedure Code', in particular, gives, and has been construed by the Courts, as giving to this Court unfettered judicial discretion in the exercise of this power. A fortiori, it appears to me that, if access of his legal adviser to the accused is necessary, as it normally is, for the ends of justice, which require the point of view to be taken, not merely of the prosecution, but also of the accused, then this Court has, under Section 581A, Criminal Procedure Code, ample powers to secure that end and to see that such access is not prevented. Where the ends of justice so require, the accused must forfeit his liberty from the moment of his arrest. But, unless the ends of justice so require, he must not, merely because of his arrest and custody, lose or be prejudiced in his defence and its preparation by deprivation of legal advice.

14. Moreover, Section 340, Criminal Procedure Code, in terms gives the accused person a right to be so defended. And this right begins from the moment that any person is 'accused of an offence before a criminal Court or against whom proceedings are instituted under this Code in any such Court'. An application by the Police for remand falls under Section 167, Criminal Procedure Code, and can be held to be a proceeding instituted under this Code in that Court. Therefore, at least from the moment after the twenty-four hours of arrest that he appears before the Court, this right, in my opinion begins. His legal advisers can appear, oppose

the remand, offer bail, or make any other legal application on his behalf, He is an accused and appears as such before that Court, and he does not become so only when the charge sheet is sent up. I am of opinion, therefore, that even under Section 340, Criminal Procedure Code, the law contemplates that such access should be allowed before and irrespective of the charge sheet, And cases are conceivable where, under legal advice, such evidence for the accused could be placed before the Police, and the latter decide under Section 169 not to prosecute or send up a charge sheet.

15. A remand is, in essence, time granted to the Police to complete their investigation and decide either to release the accused under Section 169, or, under Section 170, Code of Criminal Procedure, to send him up with a charge sheet, before the Court begins its inquiry. Whether, meanwhile, the accused should be released on bail or not, and if ha is not released but is retained in custody, whether that custody should be exclusively Police or should be the custody of the Magistrate in the circumstances of each case, are matters in which this Court does not ordinarily interfere : Emperor v. Ponde : (1925)27BOMLR612 . It does not follow that a remand necessarily implies exclusion of legal assistance.

16. As a matter of fact, as far as I am aware, such access is usually allowed in practice, the only exception being where there is reason to believe that the ends of justice might suffer or be defeated by such access. But this can hardly be assumed in the case of members of a profession of the status of the legal profession. The presumption should rather be that the ends of justice would not be defeated but, if at all, be furthered.

17. For these reasons, I am of opinion that this Court is competent to pass the order prayed for by the petitioner.

18. On the second point, little need be said in view of what has fallen this morning from the learned Government Pleader, But yesterday, in answer to an express question of mine, he mentioned three days as the period within which possibly the investigation might be completed. It appeard to me, if the alleged offence regarded amounts, suspected to have been misappropriated over a period of five years, and, therefore, involved unravelling of the accounts of an important Bank, for this

period, that this period of three days was a pious hope rather than a confident expectation, and might be considerably prolonged. However, it appears that the Police are now willing to allow his legal advisers access to Evans. And, speaking for myself, I am glad that the Police, on reconsideration, have modified their previous attitude, even at the eleventh hour, and have now taken up a position more in accord with the law.