Rex Vs. Ram Dayal

Rex Vs. Ram Dayal

SooperKanoon Citation : sooperkanoon.com/452423

Court : Allahabad

Decided On : Jul-05-1949

Reported in : AIR1950All134

Judge : Seth, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 55, 109 and 162; Evidence Act, 1872 - Sections 26

Appeal No. : Criminal Revn. No. 710 of 1948

Appellant : Rex

Respondent : Ram Dayal

Advocate for Pet/Ap. : Kanhaiya Lal Misra, Deputy Government Advocate

Disposition : Application dismissed

Judgement :
ORDER

Seth, J.

1. This is an application in revision by the Provincial Government against an order of the City Magistrate of Agra, declining to call upon the opposite party to furnish security for good behaviour under Section 109, Criminal P. C.

2. The case against the opposite party was that, in the very early hours of the morning of 8th May 1946, at about 1 o'clock, he was found in the city of Agra, concealing his presence with a view to commit an offence, that on being arrested and searched by constable Tota Ram, a jemmy, a lathi and a match box were recovered from his possession, that on being questioned about his name and address, he gave different names and different addresses, and that he had no ostensible means of livelihood. He was thus proceeded against on all the three grounds mentioned in Section 109, Criminal P. C., namely, (1) concealment of presence, (2) want of ostensible means of livelihood and (3) failure to give a satisfactory account of himself.

3. The opposite party denied the truth of these allegations and pleaded that he was a vegetable seller, that he used to sell cucumbers in mohalla Rawatpara, that constable Tota Ram used to take a cucumber from him every day, that he refused to give a cucumber to Tota Ram on 7th May 1946, whereupon Tota Bam took him to the Kotwali and shut him there. He denied that he was arrested in the night or that the aforesaid articles were recovered from his possession. He suggested that the proceedings were started against him due to his enmity with Tota Ram.

4. The learned Magistrate found that he was illegally arrested and illegally prosecuted, that Section 109, Criminal P. C. applies generally to person coming from outside the jurisdiction of the Magistrate, who takes precautions and that it relates to continuous conduct stretched over a period of time and not to an individual and isolated, short-lived temporary act. He also found that a case under the section should be established by evidence of general conduct studied and watched over a continous period of time. He concluded that these conditions were not satisfied in the present case and consequently the case was outside the scope of the section. The order of discharge is thus based on three grounds, namely, that the opposite party was illegally arrested, that he was illegally prosecuted and that the case against him does not fulfil the requirements of Section 109, Criminal P. C. All these findings have been attacked by the learned Additional Government Advocate.

5. This application is liable to dismissal on the preliminary ground that it has become in-fructuous. The opposite party was called upon, on 12th July 1946, to show cause why he should not be bound over for a period of one year. He was discharged on 17th December 1946. If the Magistrate had decided to bind him over instead of discharging him, he could not have been bound over for a period extending beyond 17th December 1947. Nothing has been said to satisfy me that necessity exists even now to take any preventive action against him. It is thus evident, whether the order of the Magistrate be right or wrong, that no further action is called for in the case and that the application has become infructuous.

6. Notwithstanding all this, I have been induced to enter into the merits of the case, as I am informed by Mr. Kanhaiya Lal Misra, the learned Additional Government Advocate, that considerable importance is attached to this application by the Provincial Government, because of the propositions of law formulated and followed by the Magistrate, which, in the submission of that Government, are not sound and which are likely to hamper proper administration of Section 109, Criminal P. C. It has been stated before me that the object of this application is not so much to secure an order against the opposite party, as to obtain a ruling of this Court on the disputed points of law for the guidance of the magistracy of these provinces.

7. Mr. Misra contends that the opposite party was neither illegally arrested nor illegally prosecuted, and that, even if it be assumed that there was any illegality in this behalf, it does not affect the validity of the proceedings and could not result in an order for discharge. He further contends that each one of the four propositions of law laid down by the Magistrate is unsound and deserves to be overruled.

8. The judgment under revision is remark, able in many ways. It does not contain a discussion of the evidence produced against the opposite party nor findings of fact on all the points involved in the case. It employs inappropriate language. It is more in the nature of a protest against a particular interpretation of Section 109, Criminal P. C., than in the nature of a judgment intended to decide a particular case. It is devoted, primarily to an exposition of the meaning and scope of the section and ignores and disregards the relevant case law. The language employed in the

judgment and the complete disregard of rulings, are the two objectionable features of the judgment, that cannot be allowed to pass unnoticed. They may properly be dealt with before the contentions of the. learned Crown counsel are taken into consideration.

9. The Magistrate has entirely misconceived the nature of proceedings under Section 109, Criminal P. C. He talks of 'prosecution? 'prosecution story and 'prosecuted the accused' and describes the opposite party as an 'accused' or as an 'accused person.' The final order passed in the case reads: 'I accordingly acquit the accused.' A person proceeded against under the preventive sections of the Code is not accused of any offence nor is he prosecuted. The proceedings against him do not, therefore, end in his 'acquittal' or 'conviction. These two words are properly applied to the result of a criminal trial. They are quite out of place when the result of proceedings under the preventive sections has to be described. If the learned Magistrate had taken the trouble to refer to Section 119 of the Code he would have discovered that the proper order to pass in such a case is to release the person proceeded against, if he be in custody, and to discharge him if he be at large. I have examined the order sheet of the case and it appears that the opposite party was on bail when the final order was passed in the case. That order is, therefore, in the eye of law, an order of 'discharge' though it has been misdescribed as an order of acquittal. The inapt language used by the Magistrate has not been barren of results. It misled the Government into filing an appeal, although an order under Section 119, Criminal P. C. is not appealable. The mistake Was discovered only when the appeal came up for hearing and then it was converted into a revision.

10. I feel satisfied that the absence of a reference to case law in the learned discussion by the Magistrate is not due to the fact that he was unaware of it. Nor does it appear to be due to the fact that he was too lazy to consult a commentary on the Code of Criminal Procedure. The order sheet shows that the case was adjourned more than once for the production of rulings. The order sheet dated 21st October 1946 shows further that rulings were produced before the learned Magistrate. The learned Additional Government Advocate suggests that the learned Magistrate has deliberately avoided reference to case law because he

wanted to decide the case in accordance with his own views in utter disregard of the interpretation put upon the section by this Court, that he wanted a clean slate to write on. That the learned Magistrate was not unaware of the interpretation put on the section from time to time, appears from the following passage in his judgment.

'I morally feel I must utilize this case to disburden myself of the heavy weight which I have felt from time to time when dealing with victims of an administratively minded interpretation and use of Section 109, Criminal P. C.

It is not possible for me to say that this suggestion is entirely baseless.

11. A Magistrate is bound to follow the authority of the High Court to which he is sub-ordinate. Whenever, therefore, he is called upon to decide a question of law it becomes his duty to ascertain whether any pronouncement of the High Court exists on the point. Omission to do so is as much dereliction of duty as omission to refer to sections of the statute. The disregard of authority is, however, something still more objectionable. It amounts to an act of insubordination. It is a matter of regret that it has become necessary to repeat the following observations made in Karam Husain v. Mohammad Khalil : AIR1946 All509 :

'It is the bounden duty of the Judges of Courts subordinate to this Court to implicitly follow the decisions pronounced by this Court and we deprecate any attempt on their part to criticise them or to refuse to follow them. The rule that every subordinate Judge is, in duty bound, loyally to accept the rulings of the High Court to which he is subordinate is a well recognized rule, to which attention has been called by this Court on a number of occasions. In the case of King Emperor v. Deni, 28 All. 62 : (2 Cr. L. J. 395), Stanley C. J. and Burkit J. had to consider the genesis of this rule, at some length and in the course of their judgment, they remarked that the Judge of a subordinate Court, however brilliant and well trained a lawyer he may he, is not entitled to assume the powers of an appellate Court or to refuse to follow the decision of the High Court to which his Court is subordinate, and that it is the duty of every subordinate Judge to accept loyally the rulings of this Court unless and until they have been overruled by a higher tribunal.'

'No authority is necessary for the proposition that a judicial precedent of a higher Court does not cease to be binding upon subordinate Courts merely because all the relevant reasons in support of or against the view taken by the higher Court are not mentioned in the judgment or the actual decision is based upon a reason which does not appeal to the subordinate Court.

12. The observations apply to the Magistrates to the same extent to which they apply to the Judges of the civil Courts. It is hoped that no necessity will arise in future to repeat them.

13. To revert to the contentions of the learn, ed Additional Government Advocate, the first point that calls for consideration relates to the arrest of the opposite party. According to the finding of the Magistrate, the opposite party was arrested in the night and not in the day time while selling cucumbers as alleged by him. There is evidence on the record to prove that he was carrying a jemmy, an implement of house breaking when he was arrested by constable Tota Ram. Section 54, Criminal P. C., authorises every police officer to arrest, without an order from a Magistrate or a warrant any person having in his possession, without lawful excuse an implement of house-breaking. Thus, unless the evidence, adduced to prove that the opposite party was carrying a jemmy, when he was arrested, is disbelieved, it cannot be held that he was illegally arrested. But the learned Magistrate has not disbelieved this evidence. The drift of his judgment rather indicates that he was, inclined to believe it. It, therefore, becomes difficult to discover the ground on which his finding is based. Some indication of how his mind worked may, however, be found in the following extracts from his-judgment:

'Had it been the intention of the law to bind for good conduct persons found concealing presence one specific night there would have been no sense in limiting the powers of arrest for provisions covered by Section 109, Criminal P. C. (reference 55 Criminal P. C.) to the Station Officer alone. The arrest must be effected by a Station Officer.'

14. The learned Magistrate seems to have been greatly influenced by the language of Section 55 of the Code and appears to be of the view that a person cannot be proceeded against under Section 109, Criminal P. C., if he is arrested

by any one other than an officer in charge of a police station. This view is clearly erroneous and is an outcome of confused thinking.

15. It is true that persons who may be arrested under Clauses (a) and (b) of Section 65, Criminal P. C. and the persons who may be proceeded against under Section 109, Criminal P. C., have been described in similar language, but it does not follow therefrom that a person must be arrested in accordance with the provisions of Section 55, Criminal P. C., before he can be proceeded against under Section 109, Criminal P.C., or that a person not arrested in accordance with the provisions of the former section cannot be proceeded against under the latter section. The two sections relate to different subjects and are independent of each other. The one deals with the authority to arrest, while the other deals with preventive action against certain persons, whether under arrest or not. A person illegally arrested may prosecute his arrestor under Section 220, Penal Code or recover damages from him for an illegal arrest in a civil suit, but there is no reason to suppose that he obtains immunity from being punished for an offence, if he is proved to have committed the offence for which he was arrested or from being bound over, if the other requirements of the preventive sections are satisfied. I, therefore, hold that the arrest of the opposite party was not illegal on the ground that it was not effected by the officer in charge of the Police Station. It is not necessary to enter into the question of fact, whether the opposite party was or was not possessed of a jemmy at the time of his arrest, because even if it be assumed that he was not possessed of it and his arrest was illegal, that fact does not affect the legality of the proceedings under Section 109, Criminal P. C.

16. The reason assigned by the learned Magistrate for holding that the opposite party was illegally prosecuted is that proceedings under Section 109, Criminal P. C., can be initiated only by a Magistrate and that they were initiated by the police in the present case. By their very nature, proceedings under Section 109, Criminal P. C., are incapable of being initiated by anyone other than a Magistrate. They do not start before a Magistrate, who, on receipt of certain information, decides to call upon the person against whom information is received to show cause why he should not be bound over. All that is done by the police before that, is in the nature of investigation or collection of evidence. This collection of evidence is no part of

the proceedings under the section. The arrest of the suspected person and the collection of evidence against him, are the only proceedings undertaken by the police in such cases and were the only proceedings taken by the police in the present case. The learned Magistrate lays stress on the point that in such cases the arrest should be effected by an officer in charge of a Police Station under Section 55 of the Code which obviously implies that it may be effected without an order from a Magistrate a without a warrant. He could not, therefore, have intended to hold that no arrest should be made before information has been laid before a Magistrate and before he decides to take action under the section, or that an arrest marks the initiation of proceedings under the section. I have already observed that collection of evidence does not form any part of the proceedings under the section. I therefore hold that proceedings were not initiated in this case by the police but were initiated by the Magistrate himself when the drew up an order under Section 112, Criminal P.C.

17. The Code contains express provisions relating to cases where the validity of proceedings depend upon their proper initiation, for example, it provides that no prosecution shall be started in respect of certain offences without sanction, or that no Court shall take cognizance of a certain offence except on a complaint by a particular person. No such provisions exist in respect of proceedings under Section 109, Criminal P. C. Therefore, even if it be assumed that the proceedings were initiated by the police, when they should have been initiated by the Magistrate, I fail to discover any ground for holding that their validity could be affected in any way.

18. The language of Section 109 (a), Criminal P.C., is ambiguous and has given rise to conflict of judicial opinion. According to one view it applies to persons who take precautions to conceal the fact that they are present within the local limits of the Magistrate's jurisdiction, and thus applies generally to persons coming from outside the jurisdiction, for persons residing within the jurisdiction are rarely found taking precautions to conceal the fact that they are present within the jurisdiction though they may be found concealing their whereabouts inside that jurisdiction. According to the other view, which is the view of the majority of the judges, constituting the Full Bench in Emperor v. Phuchai : AIR1929 All33 . Section 109

applies to persons who being or coming within the local limits of the Magistrate's jurisdiction take precautions to conceal their presence.

19. The finding of the Magistrate that Section 109, Criminal P. C., relates generally to persons coming from outside the Magistrate's jurisdiction, in so far as it relates to the application of Clause (a) of the section is dependent on the acceptance of the former view. We are, however, bound to follow the majority view in Emperor V. Phuchai : AIR1929 All33 (ubi Supra). I therefore set aside the finding of the Magistrate on this point, in so far as it relates to the application of clause (a) on the ground that it is opposed to the decision of the Pull Bench, which he was bound to follow.

20. There is no reason to suppose that persons found without ostensible means of livelihood or persons who cannot give a satisfactory account of themselves are generally those who come from outside the Magistrate's jurisdiction and are not generally those who are residing within it. The finding of the Magistrate on this point, in so far as it refers to the application of clause (b) of the section, is also erroenous, and is set aside.

21. I hold that Section 109, Criminal P. C., is not confined generally to parsons coming from outside the Magistrate's jurisdiction and that it applies as much to persons residing within it as to persona coming from outside. In fact the residence of persons against whom information is received is an absolutely irrelevant consideration in determining the scope of Section 109, Criminal P. C.

22. The learned Magistrate has considered the question of continuous conduct generally with reference to the entire section. It appears, however, that it is not capable of being so considered. It has obviously no reference to a case where action is taken on the ground that the person proceeded against has no ostensible means of livelihood. In such a case it is his source of livelihood rather than his conduct, continuous or otherwise which becomes the subject of enquiry. This conclusion, that the question has no reference to a class of persons mentioned in the section, supports the view that it cannot be considered generally with reference to the entire section but that it has to be considered separately with respect to each class of persons mentioned therein.

23. Judicial opinion is divided also on the point whether the second part of Clause (b) of Section 109, Criminal P. C. which deals with persons unable to give a satisfactory account of themselves, applies only to the case of persons, who are unable to explain their conduct generally or applies also to the case of a person who is unable to explain his conduct at a particular place, on a particular occasion, and in a particular situation. The question was mooted in Phuchai's case : AIR1929 All33 (ubi supra) but was not conclusively decided. Sulaiman A. C. J. and Banerji J. were of the opinion that it does not apply to the second class of cases while Boys and Kendall, JJ. took the opposite view. The fifth member of the Bench, Weir J., only stated that he did not dissent from the view of Boys J., but that he preferred to base his decision on another ground. Thus, it appears that, although the learned Judge was inclined to agree with Boys J. he desired to reserve his final opinion and to leave the question open for future decision by withholding his assent. Accordingly, the question is open to consideration although the weight of authority favours the view of Boys J. I do not express any opinion on this question as I have come to the conclusion that it is not necessary to do so for the decision of this case.

24. It has, however, to be decided whether continuity of concealment is a necessary condition for the application of Section 109 (a), Criminal P. C., for the order of the Magistrate appears to be based primirily on the ground that the act of concealment in the present case was not a continuous act of concealment.

25. Before entering into the merits of the question, it is desirable to notice that the expression 'a continuous act' when spoken of in connection with Section 109 (a), Criminal P. C., denotes three different conceptions. It may be used to denote that the act should be continuing when the information is received by the Magistrate. It may also be used to denote that the act should be such as has continued over a period of time and is not a short lived momentary act. It may even be used to denote the nature of the act, namely, that it is continuous in its nature, whether it has continued over a period of time or not. The single question relating to continuity thus resolves itself into the following three questions : (1) Is it necessary for the application of Section 109 (a), Criminal P. C., that the act of concealment should be continuing at the time when information is received by the Magistrate?

(2) Is it necessary for the application of that section that the act of concealment should have continued over a period of time and should not be an isolated, short lived momentary act? (3) Is it necessary for the application of that section that the act of concealment should be continuous in its nature ?

26. There are three cases relating to the first question. Reshu Kabiraj v. Emperor, 27 C. L. J. 382 : (A.I.R. (5) 1918 Cal. 887 : 18 Cr. L. J. 826) is the first case on the point wherein it was held by Shamsul Huda J. that Section 109 (a), Criminal P. C. does not apply to the case of a person brought under arrest for it cannot be said of such a person that he is taking precautions to conceal his presence. This view does not appear to have been followed in any other case. Reshu Kabiraj, 27 C. L. J. 382 : (A. I. R. (6) 1918 Cal. 887:18 Cr. L. J. 825) (ubi supra) has been followed or dissented from in several subsequent cases, but it has not been followed on this point in any one of them including Sheikh Piru v. Emperor : AIR1925 Cal616 . On the contrary it has been dissented from by Miller C. J. in Ram Birick Ahir v. Emperor, A. I. R. (13) 1926 pat, 569 : (27 Cr. L. J. 1128) and by Sulaiman A. C. J., Boys and Weir JJ. in Emperor v. Phuchai : AIR1929 All33 (ubi supra).

27. The view of Shamsul Huda J. is based upon the language of the section and emphasis appears to have been laid on the words 'is taking precautions.' The dissenting view has been greatly influenced by considerations of expediency and is based on the ground that a literal interpretation of the section would render it practically nugatory. Except Sulaiman A. C. J., none of the dissenting Judges have attached any importance to the language of the section. Miller C. J. and Boys J. have given no consideration to it and have simply ignored it. Weir J. has brushed it aside with the observation :

'It seems to me that in the two cases which I have cited too much stress was laid in the use of the present tense in section 109.'

28. The two cases cited by the learned Judge were Reshu Kabiraj, (27 C. L. J. 382 : A. I. R. (5) 1918 Cal. 887 : 18 Cr. L. J. 825) (ubi supra) and Sheikh Piru, (A. I. R. (12) 1925 Cal, 616 : 26 Cr. L. J. 842). (ubi supra). Sulaiman A.C.J. appears to have been alive to the difficulty that the language of the section cannot be entirely ignored in determining the scope of its application, for the learned Acting Chief

Justice says :

'I must consider that the use of the present continuous tense 'is taking' is unhappy. But I have no doubt that it is intended to be comprehensive enough to cover the present perfect tense 'has taken' or 'has been taking'.',

29. With profound respect to the learned Acting Chief Justice, I am unable to concur in this view. I fail to discover how it can be held that the legislature was intending to refer to a perfected act whether that act was perfected recently or in the remote past, when it was expressly providing for a continuous act. Moreover, if the words are taken to be comprehensive enough to cover the present perfect tense also, other difficulties will have to be faced. So interpreted, the section will apply also to a case where a person has voluntarily abandoned, though recently, the objectionable activity of taking precautions to conceal his presence with a view to commit an offence and has thus by his own conduct obviated the necessity of taking any preventive action. There seems to be no reason why the provisions of the section should be put in action against a person who has taken precautions or who has been taking precautions to conceal his presence but who has stopped taking precautions before the concealment is discovered and before any attempt is made to interrupt him in this activity.

30. I find, however, that it is unnecessary to do any such violence to the language of the section to arrive at the conclusion reached by Sulaiman, A. C. J., Boys and Weir JJ. It is obvious from the language of the section that while it speaks of a continuing act (I have purposely used the word 'continuing' and not 'continuous' it does not expressly specify the time with respect to which the continuity of the act of concealment is to be determined. The point of time might have been intended to be either : (1) the precise time when the information is received by the Magistrate, or (2) the time when the information is despatched to the Magistrate, or (8) the time when the act of concealment is discovered. The language of the section being ambiguous to this extent, it becomes permissible to presume that that point of time was intended by the legislature which is calculated most to serve the object aimed at by the legislation. Judged from this criterion, the first alternative is to be rejected for the reasons contained in the judgment of Sulaiman A. C. J., and Miller

C. J. in the cases of Phuchai : AIR1929 All33 and Ram Brich Ahir, (A. I. R. (13) 1926 pat. 569 : 27 Cr. L. J. 1128) already cited. As between the second and the third alternatives, it is the latter which is best calculated to serve the purpose and should, therefore, be presumed to have been intended. I would, therefore, interpret Section 109, Criminal P. C., to mean, that when it is found that a person is taking precautions to conceal his presence with a view to commit an offence and a Magistrate receives information to this effect he may take action against Lim under that section. A reference to Section 55 of the Code fortifies this conclusion. That section provides for the arrest of a person found taking precautions to conceal his presence with a view to commit an offence and Section 109, Criminal P. C., provides for preventive action being taken against such a person. I, therefore, hold in agreement with the majority view of the Pall Bench (which I am bound to follow whether I concur in it or whether I dissent from it) that Section 109, Criminal P. C., does not require that the act of concealment should be continuing at the time when the Magistrate receives information. I respectfully dissent from the view of Shamsul Huda J., that the section does not apply to the. case of a person brought under arrest.

31. The learned Magistrate has found that the entire Section 109 relates to the continuous conduct of the person proceeded against, and has given reasons in support of this conclusion. I have found that the first part of Section 109 (b), Criminal P. C., has no reference to the conduct of such a person and that, therefore, the Magistrate's conclusion about this part of Section 109 (b) is incorrect. I have reserved my opinion on the point whether the second part of Section 109 (b), Criminal P. C,, relates only to the continuous conduct of the person proceeded against. It remains however, to be considered how far the reasons given by the learned Magistrate justify his conclusion that Section 109 (a), Criminal P. C., relates only to continuous conduct of the person proceeded against, in other words, how far those reasons justify the conclusion that Section 109 (a) does not apply to isolated temporary acts or efforts at concealment.

32. The first reason given by the learned Magistrate, in support of his conclusion, is that Section 109, Criminal P.C., being a preventive section, is concerned with the future conduct of the person proceeded against and that, therefore, it has vital

links, with the history of his past conduct and not with what he did at a particular hour. I agree that Section 109 is a preventive section and as such, is concerned only with the future conduct, but I see no reason to hold that preventive action is dependent entirely on a continuous course of conduct in the past. Preventive action is taken because it is apprehended that the person proceeded against is likely to commit some offence in future or is continuing in some criminal activity. It is not taken on the ground that he has to be punished for something done in the past. This apprehension may arise as much from a continuous course of conduct. At any rate, this appears to be the view of the framers of the Code for preventive action under Sections 106 and 107 of the Code is obviously not dependent on any continuous course of past conduct.

33. The second reason assigned by the learned Magistrate is that when Section 109, Criminal P. C., is read with Section 110, Criminal P. C., of which it is a counterpart, it becomes manifest that it also relates to continuous conduct. In my opinion, the two sections considered together, lead to the opposite conclusion. The legislature has grouped various types of cases in which preventive action may be taken under Sections 107 to 110, Criminal P. C. Section 110 obviously refers to cases of continuous conduct. If it was intended that Section 109, Criminal P. C. should be confined to the cases of continuous conduct, it is not un. reasonable to expect that the cases mentioned therein also would have been included in Section 110, Criminal P. C., and not put under a separate section. The fact that they have been grouped under a separate section rather points to the conclusion that the section is not so limited in its application.

34. The learned Magistrate has entirely misconceived the nature and scope of preventive action in formulating the third reason for his conclusion, for he observes that the section 'intends to correct not a stray act of violation of law but a life not wholesomely lived.' Preventive action is not intended to correct either a stray act or a life unwholesomely lived. It is intended only to stop crimes in future. It should not be confused with reformative action.

35. Lastly, the learned Magistrate has tried to support his conclusion by a reference to the language of Section 55, Criminal P. C. This argument is based

upon the same misconception which forms the basis of his finding that the opposite party was illegally arrested. This matter has been discused in connection with that finding and it is needless to discuss it again. I find that the reasons advanced by the learned Magistrate do not justify his conclusions with regard to Section 109 (a), Criminal P. C. Incidentally it may foe observed that they do not justify his conclusions with regard to the rest of the section either.

36. There is nothing in the language of Section 109, Criminal P. C,, to indicate that it is confined in its application to cases where concealment has been continuing for a sufficient period of time. The application of Section 109 (a) has been made dependent on the nature of concealment (with a view to commit an offence) and not on the length of its duration. If it was intended that its application should be so confined the legislature would have said 'has been taking precautions' or 'has continued to take precautions' or 'has been continuously taking precautions' or 'has continued in taking precautions' or some such thing, instead of saying 'is taking precautions.' Preventive action is generally based on warning received from the past. Neither the language of the section nor the policy of legislation justifies the conclusion that short but powerful notes of warning, sounded by isolated acts of concealment with a view to commit an offence, were intended to be ignored, and that it was intended that attention should be paid only when the note of warning has continued to sound unintermittently for a sufficiently long period of time. A statute is to be construed as to suppress the mischief aimed at and to advance the remedy provided by it. Widest scope should be given to the language for this purpose. I am, therefore, unable to concur in the view that a restricted interpretation should be placed on the section and its scope needlessly limited, the more so when its language does not call for it. In conclusion, I find that Section 109 (a) is not referable to continuous acts of concealment only.

37. This conclusion is supported by the weight of authority. There is ample case law on the point. It is unfortunate that the opposite party was not represented at the hearing, but Mr. Misra has argued the case with extreme fairness and has tried to place before me all the available authorities, whether they favour his contention or controvert it. Indeed, some of the cases cited by him do not contain any decision on the point.

38. He has cited thirteen cases in all. Two of these cases, namely, Gagan Chandra De v. Emperor : AIR1929 Cal775 and Chhutai v. Emperor, A. I. R. (28) 1941 oudh 509: (42 Cr. L. J. 617) do not touch this question at all. Three others namely Sukhan Ahir v. Emperor, A. I. R. (17) 1930 pat. 497 : (31 Cr. L. J. 1125)(Emperor v. Bishi Sahara, A. I. R. (22) 1935 Pat. 69: (36 Cr. L. J. 846) and Ganpati v. Emperor, A. I. R. (25) 1938 Nag. 465: (39 Cr. L. J. 807) only notice the conflict of opinion without accepting or rejecting either view. Of the remaining eight cases Rashu Kabiraj v. King Emperor, 27 C.L.J.382: (A.I.R.(5) 1918 Cal. 887: 18 Cr, L. J. 825), Sheikh Piru v. King Emperor, : AIR1925 Cal616 , Gobra Badia v. Emperor, : AIR1929 Cal729 and Superintendent and Remembrancer of Legal Affairs, Bengal v. Isabali, I. L. R. (1938) 2 Cal. 221 : (A. I. R. (25) 1988 Cal. 409: 39 Cr. L. J. 647), uphold the view that Section 109 (a) refers to a continuous act of concealment, while Ram Birich Ahir v. Emperor, 6 pat. 177: (A. I. R. (18) 1926 rat. 569: 27 Cr. L. J. 1128), Emperor v. Phuchai : AIR1929 All33 per Sulaiman A. C. J.) Manik v. Emperor, A. I. R. (21) 1934 oudh 367: (35 Cr. L. J. 1272) and Ram Murti v. Emperor, 21 Luck. 251: (A. I. R. (33) 1946 oudh 230: 47 Cr. L. J. 642) support the opposite view, namely, that a continuous act of concealment is not necessary for the application of Section 109 (a), Criminal P. C., but that it applies to isolated acts of concealment also.

39. This review of the case law shows that the former view is confined to the Calcutta High Court alone, while the opposite view is shared by the Allahabad High Court, the Patna High Court and the Chief Court of oudh. It is a common feature of all the cases, in which the former view has been upheld that beyond lending the weight of their own authority, the learned Judges, who have decided them have given no reason in support of their view, nor have they indicated how the conclusion reached by them is supported by the language of the section. The opposite view is supported by reasons, at least in two of the cases, Emperor v. Phuchai : AIR1929 All33 (ubi supra) and Manik v. Emperor A. I. R. (21) 1934 Oudh 367: 35 Cr. L. J. 1272) (ubi supra). Thus both from the point of view of logic as well as from the point of view of the number of Courts in which it prevails, the weight of authority is in favour of the latter view. For the reasons already indicated I respectfully concur in this latter view.

40. As regards the third question, I am inclined to the view that the act of concealment should be continuous in its nature for there seems to be no reason why any preventive action should be needed when concealment is not intended to be continued. I am supported in this view by the observations of Weir J. in Phuchia's case : AIR1929 All33 (ubi supra).

41. I hold that in order to bring a person within the operation of Section 109 (a), Criminal P. C., it is not necessary to show that he has followed a continuous course of conduct in taking precautions to conceal his presence, although it is necessary to show that the act of concealment was intended to be continued.

42. The learned Magistrate has not, however, based the order of discharge on the ground that the act of concealment was not intended to be continued in this case but on the ground that the entire section refers to a continuous course of conduct. This conclusion has been found to be erroneous and for that reason his third ground of discharge also cannot be upheld. Thus the order of discharge cannot be supported on any one of the three grounds on which it is based. The learned Magistrate not having recorded all the necessary findings of fact it becomes necessary to inquire if the order of discharge can be supported on evidence.

43. The finding of the Magistrate about the nature of evidence required to establish a case under the section may properly be noticed be fore evidence is considered. This finding is naturally supported by his finding about the requirement of the section, and cannot stand when that finding is upset. It is, therefore, needless to discuss it except with regard to two observations made by the learned Magistrate. I consider that, even if it were necessary to prove a continuous course of conduct to bring a case within the operation of the section, there is no justification for the view that such conduct should be studied and watched over a continuous period of time. The second observation of the Magistrate that calls for comment is that the case should be established by evidence which should be independent of what is elicited from the examination of the persons proceeded against. The learned Magistrate seems to imply by this that the statement of such a person should be completely ignored from consideration, for he observes : 'A statement before a police officer cannot be proved against him.' As already observed, such a person

is not prosecuted for any offence so that the statement made by him is not confession, The statements made by him are therefore not affected either by Section 162, Criminal P. C., or by Section 26, Evidence Act. There seems to be no other provision of law which renders such statements inadmissible in evidence on the mere ground that they were made to a police officer. The deposition of a police officer intended to prove such a statement may not in a particular case, be found to be reliable but it cannot be ruled out as inadmissible.

44. Coming to the question of fact, left undetermined by the Magistrate, I find that constable Totaram is the only witness who deposes about the concealment. According to the Magistrate's record of statements, all that he says is:

'About two months ago at 1 a. m. I was on patrol duty. In Dhuliaganj when I reached the shop of Change Manihar I saw the accused concealing his presence there. Seeing us coming the accused hid himself behind the charpoy of Change Manihar, I enquired from Change as to who was under his charpoy. Thereupon the accused ran out.'

The witness thus deposes to two acts of concealment, the one, that the witness saw the opposite party on reaching Bazar Dhuliaganj, and the other that the opposite party concealed himself behind the cot of Change Manihar. So far as the first act of concealment is concerned, the witness does not give any details of his observation from which he inferred that the opposite party was concealing his presence. His statement is thus evidence of en inference made by him and is no evidence of what was observed by him. It is what is known as opinion evidence and is irrelevant for that reason. Whether a particular behaviour or conduct aims at concealment within the meaning of the section, is a matter for the decision of a Magistrate and not a matter for the opinion of a witness. In the absence of any evidence of behaviour or conduct in this case, I find that it hag not been proved that the opposite party was concealing his presence when Tota Ram saw him on reaching Bazar Dhuliaganj.

45. The alleged second act of concealment is proved, if Tota Ram is to be believed, but here again there is no evidence to prove that the opposite party concealed himself behind the cot with a view to commit an offence. It is more likely

that he did so to avoid arrest by Tota Ram. At any rate, the evidence being inconclusive on the point, the benefit of doubt should be given to the opposite party. He cannot, therefore, be bound over on the ground that he was found taking precautions to conceal his presence with a view to commit an offence.

46. There is no evidence on the record to prove that the opposite party has no ostensible means of livelihood, so he cannot be bound over on this ground either.

47. As regards the third ground under the section, viz., a failure to give a satisfactory account, I agree with the Magistrate that the section contemplates an account to Magistrate and not an account to a police officer. A person who is unable to give a satisfactory account of himself to an officer-in-charge of a police station may render himself liable to be arrested by him but he cannot be bound over unless he is unable to give a satisfactory account of himself to the Magistrate. In this case the opposite party was not at all questioned by the Magistrate on this point. So it cannot be held that the opposite party was unable to give a satisfactory account of himself, as required by the section. For this reason he cannot be bound over on this ground either.

48. The order of discharge is therefore maintained, though on grounds different from those assigned by the Magistrate.

49. This application in revision is dismissed.