

K.T. Advani Vs. the State

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Court : Delhi

Decided On : Feb-13-1984

Reported in : 1985CriLJ1325

Judge : H.L. Anand, J.

Appellant : K.T. Advani

Respondent : The State

Judgement :

ORDER

H.L. Anand, J.

1. These petitions Cr. M(M) 205/83, Cr. M(M) 251/83 with Cr. 504/83 and Cr. M(M) 622/83 by K. T. Advani and Cr. M(M) 1054/83 Cr. 2056/83 Cr. M. 2113/83 and Cr. M. 2120/83 by Rajinder Singh Graver, under Section 482 of the Code of Criminal Procedure, raised common questions of considerable importance, and of some difficulty, with regard to the rights, privileges and of procedural safeguards for a person,* who has been granted bail in a case involving violation of the Foreign Exchange Regulation Act, pending investigation/enquiry by the authorities under the Act into his conduct, f and dealings, even through a formal complaint of the offence, if at all, is still to be filed. The proceedings against these two persons are distinct and independent but the petitions are being dealt with by a common order as the controversies are common.

2. Both the petitioners were granted anticipatory bail by the learned Addl. Sessions Judge, after he was satisfied that, according to the authorities under the Foreign Exchange Regulation Act, their dealings and conduct involving contravention of certain provisions of the Foreign Exchange Regulations Act were under investigation. Both the petitioners were directed to present themselves for interrogation before the concerned authority. Some of their records had also been earlier seized by the authorities. Both of them participated in the course of the aforesaid proceedings and either made oral statements to the officers entrusted with the proceedings or gave a written statement purporting to answer questions put to them in the course of interrogation. In the course of proceedings certain controversies arose with regard to the rights, privileges and procedural safeguards to which they may be entitled at that stage and since some of these were denied to them primarily on the ground that they had not until then been formally accused of an offence, they moved the Court which had admitted them to anticipatory bail for a determination of the questions as to the extent of these rights, privileges and safeguards. The court turned down their pleas and that is how they have moved this Court. Pending hearing of the petitions, certain interim orders were made by this Court, inter alia, allowing the petitioners to the presence of counsel in the proceedings provided the counsel would not in any manner interfere with the course of interrogation or enquiry or be otherwise responsible for its delay or adjournment.

3. Learned Counsel for the petitioners raised the following contentions:

a) Petitioners are entitled to the presence of counsel of their choice in any enquiry or investigation under the Foreign' Exchange Regulation Act in the same manner as a person accused of an offence in the course of investigation under the Code of Criminal Procedure in terms of the decision of the Supreme Court in the case of Nandini Satpathy : 1978 CriLJ968 ,

b) The petitioners have a right to silence and are in any case entitled to the protection of the rule against self-incrimination, even though not formally accused by the institution of a complaint and notwithstanding the provisions of Section 40 of the Foreign Exchange Regulation Act;

c) The petitioners could not be compelled to write any statement in their own handwriting and any such compulsion would be tantamount to a procedure which was neither just, fair nor reasonable;

d) The petitioners could not be required to produce any document which may eventually be used against the petitioners in any trial for any offence;

e) The petitioners are entitled to copies of any statement that may have been made by them orally or in writing or that may henceforth be made against any reasonable charges so as to prevent the petitioners being possibly trapped in self-contradictory statements as a result of lapse of memory, confusion and other unfavorable environment, particularly, if the petitioners could be legitimately bound in law to state the truth and can be said to be guilty of an offence if they made a statement which was not true.

4. In the case of Rajinder Singh Grover, a further contention was raised that the petitioner could not be called upon to produce his passport to the authorities under the Foreign Exchange Regulation Act.

5. I have heard learned Counsel for the parties at considerable length. While counsel for the petitioners, by and large, relied on the doctrine of 'due process' embodied in the United States Constitution and interpreted in the United States as guaranteeing to an accused person, fair procedure at the investigation, enquiry as well as trial stages and sought the extension of the safeguards available to a person accused of an offence in the course of investigation governed by the provisions of the Criminal P. C. and otherwise as an emanation of the doctrine of 'just, fair and reasonable' procedure, enunciated by the Supreme Court in the case of Maneka Gandhi : [1978]2SCR621 , in interpreting Articles 14,19, and 21 of the Constitution to the present investigation, these safeguards were sought to be denied to the petitioners on the ground that in the absence of a formal accusation against the petitioners the petitioners were not entitled either to the constitutional protection against self-incrimination nor to the other safeguards available to an accused in an investigation, governed by the Criminal P. C. as also because the provisions of the Foreign Exchange Regulation Act represented a deliberate departure from the ordinary procedural law because of the peculiar nature of the

offences involved, their wide ramifications and impact on the economy of the country,. Counsel for the petitioner, however, urged that the various decisions of the Supreme Court with regard to the rights, privileges and safeguards, as also the content and scope of personal liberty, and the extent of right of silence of a suspect in the course of any investigation, must be read, and if necessary, be read down, in the light of more recent developments in judicial thought embodied in the recent decisions of the Supreme Court in cases like *Maneka Gandhi : [1978]2SCR621* (supra) and *Nandini Satpathy : 1978 CriLJ968* (supra), which, it was claimed, had enlarged the scope and content of personal liberty, the equal protection of the laws and expanded the horizon of judicial control of legislative action beyond the traditional area of legislative competence by the application of the test of 'just, fair and reasonable' procedure. It was further urged that by the application of this test, these rights, privileges and safeguards must be read even in the provisions of Foreign Exchange Regulation Act, otherwise, some of these provisions may be liable to be struck down as authorising a procedure, which was neither just nor fair or reasonable.

(a) Presence of Counsel

6. The question as to the presence of counsel in an enquiry or investigation under the Foreign Exchange Regulation Act has three distinct facets. One facet is the right of the suspect to the presence of counsel of his choice either as of right, privilege or part of a procedural safeguard flowing from or based on any constitutional or statutory mandate. The other aspect of the presence of counsel at such a stage, which would be independent of any constitutional or statutory right either of the suspect or of the counsel, but is based on an extension of the requisite of a 'just and fair' procedure in the conduct of any such enquiry or investigation and may partake the nature of a judicial concession, as it were, to a suspect in file anxiety to ensure that while the suspect must assist in the process of enquiry or investigation, appropriate safeguards must be built into any such obligation which may at the same time ensure that the suspect is dealt with in a human manner, strictly in accordance with the letter and spirit of the law and is not subjected to physical or mental torture, harassment, inconvenience, pressure or to any other adverse circumstances which may create an adverse environment for

the enquiry or investigation and enable the State to take undue and unfair advantage of the legal constraint in which the law places the suspect. The third facet has relation to the right or prerogative of a legal practitioner, as distinct from the right of a person whom he may represent to appear in any Court or in any judicial proceedings or before any officer charged with the duty to hold an enquiry or investigation.

7. Article 22 of the Constitution, inter alia, guarantees to a person who is arrested of right to consult, and to be defended by a legal practitioner of his choice while the right to be defended may have relation to the proceedings at a trial, in a court of law, or departmental adjudication, the expression 'right to consult' appears to be much wider in its amplitude than the right to be defended and would include the right to the presence of a counsel in the course of an enquiry or investigation because how does one ensure the right to consult a legal practitioner if the suspect is not entitled to his presence when he would need to consult him. Such a right is also not dependent on a formal accusation, a condition read into Clause (3) of Article 29, because of the use of the expression 'accused of any offence' in that Article. The expression used in Article 22 is 'person who is arrested' and a person who is arrested on the ground that he is charged with the contravention of the provisions of Foreign Exchange Regulation Act would be within the terms of the Article. A person who is liable to be arrested but has obtained anticipatory bail on the ground that he is required in connection with an enquiry or investigation and who, but for anticipatory bail, would have been arrested, would also be within the terms of the said Article. The benefit of the Article could not, however, be claimed by a person who is neither arrested nor is he required in connection with the enquiry or investigation and the enquiry or investigation is at a stage where the authorities are still to determine if there are grounds to believe that he has committed any such offence for which he may be arrested. The constitutional protection of the Article would, therefore, be not available in the strict terms of the Article if the person is suspected and an enquiry or investigation is in progress but he has neither been arrested nor is there a formal accusation made against him either in a first information report or in a complaint of the commission of an offence.

8. In the case of Nandini Satpathy : 1978 CriLJ968 (supra), Krishna Iyer J. who spoke for the Court, pointed out that the language employed in Article 22(1) did not mean that the persons, who were not under arrest, or custody can be denied the right to consult counsel and that the spirit and sense of the Article is that it is fundamental to the rule of law that the service of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation'. The expression 'accused' was apparently used in the judgment in the sense of a suspect because the expression 'accused' does not occur in Article 22, and there are a number of situations in which a person may be arrested, without being formally accused, and Section 35 of the Foreign Exchange Regulation Act is one of them. The corresponding provisions of the Customs Act is another. In that case, the court examined the right to the presence of counsel at the time of interrogation in the context of Article 2(X3) and Article 22(1) where investigation was regulated by the provisions of the Criminal P. C. The protection of Article 20(3) of the Constitution no doubt would not be available to a suspect in an enquiry or investigation under Section 40 of the Foreign Exchange Regulation Act until he has been formally accused and that is what the Supreme Court has held in a number of cases, Ramesh Chandra v. State of W.B. : 1970 CriLJ863 , on a narrow construction of the expression 'person accused of any offence', used in the said Article. The Court quoted with approval the observations of Dasgupta, J. in his dissenting opinion in the case of Kathi Kalu Oghad : 1961 CriLJ856 , and observed that 'Third degree' is an easy temptation where the pressure to detect is heavy, the cerebration involved is hard and the resort to torture may yield high dividends.' These observations were made in the context of a rule against self-incrimination but would be equally relevant in construing Article 22(1) of the Constitution. It is no doubt true that the observations of the Supreme Court in the case of Nandini Satpathy : 1978 CriLJ968 (supra) and the guidelines laid down by the Court in relation to the presence of counsel at the stage of investigation were made in a case governed by the Code of Criminal Procedure but I see no distinction between the provisions of the Code of Criminal Procedure and of the Foreign Exchange Regulation Act in the matter of right to presence of counsel. If a suspect is entitled to presence of counsel in an investigation, governed by the Code of Criminal Procedure there is nothing in the provisions of the Foreign

Exchange Regulation Act, which purport, explicitly or impliedly, to oust such a right. If the right to the presence of counsel be fundamental to the rule of law, it makes little difference if the investigation is one under the Code of Criminal Procedure or independently of it.

9. A contention was raised that in the case of Nandini Satpathy (*supra*), no right to presence of counsel was found and that the presence of counsel was not the court's 'mandate' but was only strongly 'suggested'. This contention, to my mind, is based on an incorrect reading of the judgment. In para 58, the Court clearly interpreted Article 22(1) as the foundation of the right to consult counsel. What was not mandated but merely strongly suggested was the procedure to be followed where a lawyer was not available and this is mentioned in para 63 of the judgment. These are two distinct matters. If it was not a mandate and a mere suggestion, however strong, it would be doubtful if it would qualify as law declared by the Supreme Court under Art 141 of the Constitution. If the court did not find a right in law but desired a certain concession, privilege or benefit or even a safeguard to be conferred on a person, however, strongly it felt about it, it would be a difficult question if what the Court said would be 'law' declared by the Court and binding on all Courts under Article 141 of the Constitution, even though undoubtedly it would nevertheless be entitled to the highest respect, not only in all the courts but also by the executive and the legislative arms of the State. It is, however, unnecessary for me to examine this aspect because as I read the judgment, a right to presence of counsel is spelt out of Article 22(1) of the Constitution. This is a right which cannot, therefore, be denied to a suspect, even though the counsel's presence would not imply a right of hearing or entitle the counsel to interfere in the course of investigation or to entitle the suspect to cause delay or obstruction of proceedings, merely because the counsel may not be available at a particular point of time,

10. But even apart from Article 22(1) of the Constitution and in situations to which the Article does not, in terms apply, there is no doubt a right to presence of counsel in an enquiry or investigation under the Foreign Exchange Regulation Act on the simple ground that in the absence of any provision to the contrary in the Act, such a right would naturally flow from the duty of the authorities under the Act

to follow only such procedure in a matter which may involve the deprivation of personal liberty which is 'just, fair and reasonable'. The divergent procedure of investigation provided by the Foreign Exchange Regulation Act, which has the effect of divesting a suspect of certain rights, privileges and safeguards, which are available in a corresponding investigation under the Code of Criminal Procedure would, in itself, provide a further justification for the right to the presence of counsel in proceedings under the Foreign Exchange Regulation Act,. Apart from the constitutional protection by way of right to presence of counsel, to deny to such a suspect the right to consult counsel and to the presence of counsel at the stage of investigation, where the investigatory procedure marks a departure from the normal procedure, and deprives such a suspect of a number of rights, privileges and safeguards, would open such procedure to a justifiable criticism of being 'unjust, unfair (and unreasonable'. If the enquiry or interrogation in camera could be justifiably carried out under the Act, without some of the fundamental safeguards provided for such interrogation in the Code of Criminal Procedure, and if any statement that may be made by the suspect, whether of a confessional nature or otherwise could be used as evidence against the suspect in an eventual trial and where a suspect is under a statutory duty to speak the truth in answer to all questions that may be put to him in the course of interrogation and if he can be eventually given stringent punishment not only for the offences under the Act but also if he failed to state the truth in the course of interrogation, I would have no difficulty in holding that to deny such a suspect the right to consult counsel and to the presence of counsel at the time of interrogation would be antithesis of a just, fair and reasonable procedure. I am not unaware of the peculiar nature of the offences under the Foreign Exchange Regulation Act, the deleterious effect that the violations of the Act tend to have on the national economy and of numerous difficulties in the detection of this variety of crime but none of these, to my mind, would justify denial of the basic right of a suspect in any situation to consult the counsel and to the presence of counsel to ensure that he is dealt with in accordance with law. It is not possible to ignore in this context that in the detection of crime in India, the archaic police methods of 'hits' rather than 'wits' and 'brawns' rather than 'brains' by and large continue to be employed even though perhaps in a lesser degree by authorities other than the police. The presence of counsel more

than anything lends an assurance that the authorities would deal with him strictly in accordance with law, and where the system is pervaded by the rule of law, there can be no relaxation of the rule even in the case of worst criminals. It is difficult to ignore that the manner in which a society or a system deals with its dissenters, as also its criminals, is a true measure of its civilisation and reasonableness.

11. As for the right of counsel to appear in the enquiry or investigation, the question has also to be answered in the affirmation. S .30 of the Advocates Act entitles an Advocate to practise, inter alia, before any Tribunal of 'person legally authorised to take evidence'. Sub-section (4) of Section 40 no doubt provides that 'every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860)'. The marginal heading of the section runs thus : 'Power to summon persons to give evidence and produce documents'.

It is, however difficult to ignore that section 33 to section 40 of the Foreign Exchange Regulation Act provide for preliminary enquiry and investigation intended to collect material in aid of any possible departmental adjudication or institution of a complaint for trial of a person for contravention of any of its provisions and are, therefore, essentially investigatory in nature. The use of the expression 'evidence' in the marginal note does not change the position and the deeming provision in Sub-section (4) does not make the proceedings 'judicial proceedings' for purposes other than the two sections specified in the sub-section. The deeming provision, by its very nature, is indicative of the character of the proceedings because a deeming provision merely incorporates a legal fiction. Proceedings which are judicial proceedings don't have to be deemed as such; they are judicial proceedings. Sub-section (4) itself starts with the expression 'every such investigation' and this expression highlights the nature of the proceedings which, by a legal fiction, are made judicial proceedings for the purpose of attracting the penal provisions of Sections 193 and 228 of the Indian Penal Code for the obvious purpose of ensuring-that the suspect adheres to the truth, as enjoined in Sub-section (3) and does not offer any obstruction to the authority conducting the investigation. The nature of the proceedings, however, is not determinative of the right of an Advocate to appear. Section 40 undoubtedly

empowers the officer concerned to summon any person whose attendance he considers necessary 'either to give evidence or produce a document' and according to Sub-section (3) of this Section 'all persons so summoned shall be bound to attend either in person or by authorised agents as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required'. There is no indication in the Section that the expression 'evidence' has been used in the narrow sense in which the expression is defined by the Evidence Act. In fact, the provisions of the Evidence Act are not applicable to proceedings before an officer under the Foreign Exchange Regulation Act because the Evidence Act extends to all judicial proceedings 'in or before any court'. The expression 'evidence' used in Section 40 must, therefore, be given its ordinary meaning of oral or written statement and documents. There is, therefore, no escape from the conclusion that an Advocate would be entitled, as of right, to practice before any person who is legally authorised to take evidence. It is no doubt true that Section 40 does not empower the officer concerned to administer oath nor are the provisions of the Oaths Act attracted to such proceedings, as held by the Supreme Court in the case of Hira H. Advani : 1971 CriLJ5 but that, to my mind, would not make any difference because Sub-section (3) of that Section imposes a statutory duty to state the truth and any variation from the truth, as indeed any obstruction to the compliance of the summons is made punishable under Sections 193 and 228 of the Indian Penal Code. If the person so summoned be held bound to make a statement, prima facie he would also be liable Under Section 170 of the Indian Penal Code, if he refused to make a statement. It would thus appear that an Advocate would be entitled, as of right to appear before an authority Under Section 40 of the Act even independently of the right of the suspect to counsel, even though in actual practice it may be difficult to de link the two distinct rights.

(b) Right to Silence and Rule Against Self-Incrimination.

12. 'Maunam Pandita Lakshanam', Say the scriptures. It means : silence is an insignia of a wise man. Elsewhere, I have said how golden is the rule of silence for an Arbitrator because a non-speaking Award is beyond judicial scrutiny. Absolute

right to silence could perhaps hold out prospect of near immunity from the law for a suspect. Law leans towards the suspect but for overriding public purpose is not all that indulgent. There is, therefore, no absolute right to silence for a person suspected of having committed a crime. The reason is not for to seek. Crime and punishment is a theme which is older than Dostovoesky. Majority of crimes are not even detected, much less punished. There is a perennial race for supremacy between crime and detection. In almost all civilised societies, crime outstrips detection. In the detection, trial and punishment of crime, there are conflicting imperatives, the imperatives of the procedural safeguards to which the criminal is entitled and the overriding social objective that crime is detected, as indeed, appropriately punished.

13. While voluntary confession by its very nature is considered best evidence, compelled testimony of a suspect has invariably been frowned at right from the times of the court of star chambers and courts have time and again warned of the danger of third degree methods to extract true or false confessional statements to spare the investigating authority the rigour of hand investigative work. In this context, it is good to recall the danger of an incentive for those in charge of enforcement of law 'to sit comfortably in the shade rubbing red pepper into a poor devils eyes rather than go about in the sun hunting up evidence', to which Stephen in his 'History of Criminal Law' p. 442, called attention.

14. A person 'accused of an offence' including a person though not formally accused but who may be suspected of the commission of an offence or who may otherwise be examined in the course of investigation and may eventually be accused of an offence, is entitled to a number of safeguards, rights and privileges in the course of any investigation, which are considered fundamental to our system of criminal law. These safeguards, rights and privileges can be traced to some of the important constitutional guarantees, the Code of Criminal Procedure and certain provisions of the Evidence Act, Article 20 of the Constitution, inter alia, provides that no person accused of any offence shall be compelled to be a witness against himself. While the expression 'person accused of any offence' has been narrowly construed to mean a person against whom a formal accusation has been made either in a first information report or in a complaint made to a Magistrate, the

expression 'Witness against himself has been widely construed to bring within its mischief not only the evidence at the trial but statement or other material obtained at the stage of investigation as well. A series of decisions of the highest court have denied the protection of the rule against self-incrimination where the person, who is sought to be examined, was not formally accused of an offence although such an accusation may be imminent, and the person may even be arrested and be in detention. An attempt was made in the case of Nandini Satpathy : 1978 CriLJ968 (supra) to widen the area of protection so as to bring within the rule, 'potential accuse', 'suspect accused' or a person, who having regard to the circumstances was described as a 'candidate for an accusation'. Krishna Iyer, J. who spoke for a three-Judge Bench in that case, referred to the earlier decisions of the Supreme Court, giving a restricted meaning to the expression 'person accused of an offence', pointed out that 'It was plausible to argue that, where realism prevails over formalism and probability over possibility, the enquiries under criminal statutes with quasi-criminal investigations are of an accusatory nature and are sure to end in prosecution, if the offence is grave and the evidence, gathered good'. It was pointed out that 'to deny the protection of a constitutional shield designed to defend a suspect because the enquiry is preliminary and may possibly not reach the court is to erode the substance while paying hollow homage to the holy verbalism of the article'. The Court, however, felt that in view of the decision of larger Benches, giving a restricted meaning to the expression, they were not free to go against the 'settled view of this Court'. It was further pointed out that in that case, the Court was not directly concerned with this facet of the Article. The Court, however, did not conceal its unhappiness at the earlier decisions which set the tone and temper of the silence clause and bind us willy nilly. (Emphasis supplied) Even so, the protection of the rule against self-incrimination was conceded to the suspect in that case in relation to matters with reference to which she had not as yet been formally accused but without disturbing the earlier decisions of the court. Resort to Article 20(2) was, however, unnecessary in that case because the investigation was proceeding under the Code of Criminal Procedure, and the protection against self-incrimination could be and was justified on the basis of section 161 (2) of the Code of Criminal Procedure.

15. Chapter XII of the Code of Criminal Procedure deals with information to the police and their 'powers to investigate'. The Chapter consists of Sections 154 to 176. Section 157 is entitled : 'Procedure of Investigation', and empowers the police 'to investigate the facts and circumstances of the case, and if necessary to take measure for the discovery and arrest of the offender'. Section 160, according to its marginal note, deals with 'Police Officer's power to require attendance of witnesses' and, inter alia, empowers the police officers making any investigation to 'require the attendance before himself of any person', who 'appears to be acquainted with the facts and circumstances of the case.' Such person, according to the Section 'shall attend as so required'. Section 161 which, according to its marginal note, deals with 'examination of witnesses by Police' and empowers, a police officer concerned to 'examine orally any person supposed to be acquainted with the facts and circumstances of the case.' Sub-section (2) of this Section provides that 'such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.' (Emphasis supplied). Sub-section (3) of this section empowers the police officer concerned to reduce into writing any statement made to him in the course of examination under the section. This is followed by Section 162 which, according to its marginal note, deals with 'statement to police not to be signed : use of statement in evidence'. This section provides that no statement made by any person to a police officer in the course of an investigation 'under this Chapter' shall be signed by the person making it and restricts the use of the statement only for the purpose of contradicting a witness at the trial. Sub-section (2) of this section excepts from the operation of Sub-section (1) of Section 32 of the Evidence Act and save the provisions of Section 27 of that Act, Section 163 bars any inducement, threat or promise as is mentioned in Section 24 of the Evidence Act. Section 164 provides for recording of confessions and statements and, 'inter alias provides that a Magistrate before recording any confession, shall 'explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him and the Magistrate shall not record any such confession unless upon questioning the persons making it, he has reason to believe that it is being made voluntarily'. Until the year 1939, it was

generally understood that even though an accused person could be interrogated in the course of investigation, presumably Under Section 157 of the Criminal P.C. Section 160 and Section 161 had nothing to do with a person who was accused of an offence and were intended to empower the police to deal with 'witnesses' even though including persons who had not been the accused or suspected at that time but may eventually be suspected or accused of an offence. There was, however, considerable controversy if Section 162 of the Code was wide enough to cover the statement of a person who was either suspected of the commission of an offence or accused of it at the time the statement was recorded or subsequently the conflict was resolved by the decision of the Privy Council in the case of Pakala Narayana Swami . The Privy Council held that giving the expression 'any person' in Section 162 its ordinary meaning, it would include 'any person though he may thereafter be accused'. It was further observed that 'investigation into crime often includes the examination of a number of persons, none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must, therefore, apply to a statement made by a person possibly not then even suspected but eventually accused.' The Privy Council was not concerned with the construction of Section 160 or 161 of the Code. While an accused person could be interrogated by virtue of the power of investigation conferred under Section 157 of the Code, a witness could be summoned only under Section 160 of the Code and be examined under Section 161 of the Code. Section 162 is, however, a composite Section, which unlike the two sections preceding it, does not refer in its marginal note to attendance or examination of witnesses but deals with all statements 'made by any person to a police officer in the course of an investigation under this chapter'. The expression 'under this chapter' is also wide enough to take in section 157 of the Code. Prima facie, therefore, Section 162 covers not only statements of witnesses, recorded under Section 161, who were summoned under Section 160 but also the result of interrogation of an accused person pursuant to power under Section 157 of the Code, and that is probably the reason that the Privy Council found Section 162 to be wide enough to cover all the statements so long as they were statements made to a police officer in the course of an investigation under chapter XII. Section 162

is not confined to statement made under section 161 only. Following this decision, the Code was amended in the year 1941 to give effect to the observations of the Privy Council with regard to the admissibility of statements under Section 32(1) and to save the effect of Section 27 of the Evidence Act. Sub-section (2) of Section 162 is the result of the addition. Interestingly enough, neither Section 160 nor Section 161 of the Code was amended, either in the marginal notes, or in the elaboration of the expression 'any person' occurring in these two sections so as to extend the scope of these sections to an accused person. The aforesaid decision of the Privy Council was followed by the Supreme Court in the case of Mahavir Mandal : 1972 CriLJ860 . In that case also, the Supreme Court was concerned with Section 162 but not with Section 161. In the case of Nandini Satpathy (1978 Cri LJ 968) (supra), however, the Supreme Court relied on the aforesaid decision of the Privy Council and of the Supreme Court in the case of Mahabir Mandal (supra) to hold that 'any person in Section 161 Criminal Procedure Code would include persons then or ultimately accused,' The court found a two-fold justification for this holding. One was the amendment of the Code in 1941 referred to above, following the decision of Privy Council, and the second, the fear that 'to hold otherwise is to fold up investigative exercise since questioning suspect is desirable for detection of crime and even protection of the accused.' The Supreme Court however was not called upon to examine why the legislature did not amend Sections 160 and 161 of the Code, after the decision of the Privy Council and as to why the accused could not be legitimately interrogated by virtue of powers conferred under Section 157 of the Code without the aid of Section 161 of the Code. There can be no doubt that interrogation of an accused is essential, both in public interest as also in the interest of the accused. It is, however, a question to be considered if the aid of section 160 or 161 of the Code was at all necessary for the purpose. I am, however, bound by the decisions of the Supreme Court, and I say so with utmost respect.

16. Article 21 provides that no person shall be deprived of his life or personal liberty, except according to procedure established by law. Recent developments in the law and constitutional interpretation have considerably widened the scope and content of personal liberty by recognising an interaction between the mandate of Articles 14, 19 and Article 21 of the Constitution. It has, therefore, been held that

the expression 'procedure established by law' must mean not any procedure sanctioned by law but a procedure which is 'just, fair and reasonable' and that such procedure must be procedure established by a 'valid' law (Maneka Gandhi v. Union of India : [1978]2SCR621). It has further been held that reasonableness is an attribute of right to equality guaranteed by Article 14 of the Constitution. It has further been recognised that any law which authorises the deprivation of life or personal liberty must be a valid law in that it not only satisfies the requirements of the other fundamental rights but also embodies a procedure which is just, fair and reasonable. This approach widens, to an extent, the horizon of judicial control of legislative action beyond the traditional test of vires.

17. Certain safeguards are provided by the Evidence Act. Section 24 of the Evidence Act makes a confession, caused by inducement, threat or promise irrelevant in criminal proceedings, in certain circumstances, Section 25 provides that no confession to a 'police officer' can be proved against a person accused of any offence, Section 26 provides that no confession made by any person, while he is in custody of a police officer, be proved against a person unless it be made in the immediate * presence of a Magistrate. Section 27 is a proviso to the section and makes such part of the confession relevant which relates distinctly to the fact thereby discovered. Section 132 of the Evidence Act provides that a witness shall not be excused from answering any question as to any matter relevant to the matter (in?) issue in any proceedings, including criminal proceedings upon the ground that answer to such question will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind 'provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.'

18. It is not in dispute that most of the safeguards, rights and privileges, to which an accused is entitled in the course of investigation under the Code of Criminal Procedure, whether founded in the constitutional provisions or provided for in the Code of Criminal Procedure and the Evidence Act have been denied, by judicial interpretation or legislative departure, to a person whose conduct or dealings are

subject-matter of investigation under the provisions of the Foreign Exchange Regulations Act, 1973, as indeed, under the Customs Act, 1962, before a formal accusation has been made against him, either by a first information report, or a complaint to a court. Such a person has thus been held to be outside the protection of Clause (3) of Article 20 of the Constitution on the ground that such a person would not qualify to be 'person accused of any offence' since these words carry the connotation of a formal accusation and that a formal accusation is made against such a person, having regard to the scheme of these Acts, only when a complaint has been filed in a court against him, even though he may be proceeded against departmentally and may even be in detention or on bail by an order of a court. Such a person has also been denied the several safeguards provided in Chapter XII of the Code of Criminal Procedure and referred to above, including the qualified right to silence, the rule against self-incrimination embodied in Sub-section (2) of Section 161, the bar against use of any statement recorded in the course of investigation embodied in Section 162, and the salutary provisions contained in Section 164 with regard to confessions. This exclusion is based on the obvious reason that the investigation into the conduct of such a person does not attract at that stage the provisions of the Code of Criminal Procedure and that these provisions are, therefore, not applicable to him by virtue of the fact that the two special statutes provide a different procedure and would, therefore, except such investigation from the operation of the Code by virtue of Sub-section (2) of Section 4 thereof. Such a person would also not be entitled to the protection, even at the trial, of Sections 25 & 26 on the ground that the officers under these two statutes are not 'police officers' in that, even if they have some of the powers of a police officer, and certain other attributes of a police officer, they do not enjoy the power to make a report on the conclusion of investigation Under Section 173 of the Code. Such a person would also be not entitled to claim the protection of Section 132 of the Evidence Act when called to appear before an officer to make a statement because the Evidence Act, in terms would not be applicable to investigation or enquiry under these statutes. According to Section 1 of the Evidence Act, the Evidence Act applies to all 'judicial proceedings in or before any court'. While proceedings or enquiry or investigation before the authorities under these statutes have been made 'judicial proceedings' by a legal fiction, embodied

in Section 40 of the Foreign Exchange Regulations Act, and Section 108 of the Customs Act, those proceedings are neither in nor before any 'court' at that stage. Such a person would nevertheless have the protection of Article 14 as well as Article 21 of the Constitution, as well as Article 22 of the Constitution. At the same time, such a person, when summoned to the evidence and produce documents either Under Section 40 of the Foreign Exchange Regulations Act or Section 108 of the Customs Act, which are identical in terms, is not only bound to 'attend' but is also bound 'to state the truth upon, any subject respecting which they are examined or make statements and produce such documents as may be required'. Sub-section (4) of each of these sections further provides that every such investigation or proceeding still be deemed to be a 'judicial proceeding within the meaning of Sections 193 and 228 of the Penal Code.' A clear effect of the provision is that such a person, though suspected of the commission of an offence, is not only bound to state the truth but would also be liable to be punished if he makes a false statement or offers any obstruction, which is what Sections 193 and 228 of the Penal Code provide. On one reckoning, such a person would be bound to make a statement and if he failed to do so he may render himself liable to being punished for offence Under Section 179 of the Penal Code. Since Article 20(3) of the Constitution does not protect such a person and the bar of Sub-section (2) of Section 161 and the provision of Section 162 are not available and he cannot call in aid any of the provisions of the Evidence Act referred to above, the statements, that such a person may make, pursuant to the summons, whether of a confessional nature or otherwise, whether partly self-incriminating or wholly self-incriminating, could be used as evidence against him in the departmental proceedings as also at the trial, if any. Such person would nevertheless be entitled to call in aid Section 24 of the Evidence Act if and when the matter goes to a court and if the making of the statement, if it amounts to a confession, appears to the court to have been caused by any inducement, threat or promise proceeding from a person in authority and sufficient in the opinion of the court to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage and avoid any evil of a temporal nature in reference to the proceedings against him. If the conditions of this section are satisfied, such a self incriminating statement would be excluded.

19. There is an aspect of right to silence, (2) independently of the constitutional protection, under Section 40 of the Act which presents some difficulty. This is how the Section runs:

40. Power to summon persons to give evidence and produce documents. (1) Any gazetted officer of enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under the Act.

(2) A summons to produce documents may be for the production of certain specified documents or for the production of all documents of certain description in the, possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such Officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under the section.(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

According to Sub-section (3), all persons summoned are bound to attend and 'shall be bound to state the truth upon any subject respecting which they are examined or make statements.' It is a possible way to look at the Sub-Section that the person so summoned is not bound to make a statement but if he chooses to make a statement, he is bound to 'state the truth', irrespective of its effect on his future fortunes in any proceedings under the Act, whether before any authority under it or in any court of law. This view finds some support from the fact that the expression 'bound to answer truly' used in Sub-section (2) of Section 161, Cr. P.C., was not carried into Section 40. It is interesting to notice in this context that Sub-section (2) as it originally stood require the person to answer truly and the expression 'truly' was dropped on the recommendations of the Law Commission.

Subsequently, it was restored and that too on the recommendation of the Law Commission. The reason for deleting the expression and restoring it had their genesis in the fear that the provision in its original form may perhaps be misused by the Police, having regard to some of the questionable methods commonly attributed to police officers before court's and which have been repeatedly frowned upon by the courts. Another way to look at the sub-section would be that the obligation to 'state the truth' is a composite obligation, including the duty to state i.e. to make a statement and secondly, the duty that what he states is the truth and in that sense this part of the phraseology of Sub-section (3) of Section 40 would convey the same sense as does the first part of Sub-section (2) of Section 161. This interpretation finds some support from the fact that under Section 175 of the Penal Code, any one legally 'bound to 'state the truth' renders himself liable to punishment if he 'refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal power of such public servant.' The expression 'legally bound to do' used in section 179, however, raises some doubts because this expression has been defined by Section 43 of the Penal Code as being that 'what it is illegal in him to omit.' This would be open to the interpretation that the suspect would be liable under Section 179 only if independently of Section 179, it was illegal for him to omit to state the truth. This would appear to envisage that there must be some provision in the Foreign Exchange Regulations Act which makes it illegal for a suspect to omit to state the truth. The failure to state the truth has not been made penal by the Foreign Exchange Regulations Act itself nor has the omission to make a statement been made penal by that statute. Section 33 empowers the authorities to call for information, which the person who is called upon to furnish is bound to give, and failure to comply with this also has not been made penal by this provision but Section 48 of this Act makes penal a false statement given while complying with a direction under Section 33, or with any requirement under Section 43 of the Act. That probably is the reason why Sub-section (4) of Section 40 has been inserted to assimilate the proceedings under the section to 'judicial proceedings' for the limited purposes of Sections 193 and 228 of the Penal Code. Section 193 provides for punishment for false evidence and Section 228 makes penal intentional insult or interruption to public servant sitting in judicial proceedings. The position that

emerges on a review of the decided cases is not helpful either. In the case of Percy Rustamji Basta : 1971 CriLJ933 a two judge Bench of the Supreme Court was called upon to consider if Section 24 of the Evidence Act was a bar to admissibility in evidence of a statement made by a person to customs officer on summons issued under Section 108 of the Customs Act, which is analogous to Section 40 of the Foreign Exchange Regulations Act. The question was answered in the negative. The reason for the holding was that such a person was not an accused person within the meaning of Section 24. A further question arose if the compulsion to speak the truth was tantamount to a threat under Section 24 of the Evidence Act from the person in authority or not. It was held that the person summoned was told by the statute itself that under threat of criminal prosecution, 'he is bound to speak what he knows and state it truthfully.' It was further pointed out that a compulsion to speak the truth even though it may amount to a threat emanates in this case not from the officer who recorded the statement but from the provisions of the statute itself. It was further observed that if such a person 'does not answer, he would render himself liable to be prosecuted under Section 228, I.P.C.' This decision may be an authority for the proposition that a person summoned was bound to make a statement and also to state it truthfully. It may also be taken as an authority for the proposition that if such a person does not answer he would render himself liable to be prosecuted Under Section 228 of the Penal Code, as if he was causing 'obstruction' to an officer conducting judicial proceedings. In the same volume at page 44, is a report of another decision of the Supreme Court in the case of Hira H. Advani (1971 Cri LJ 5). This is by a larger Bench. The question before the court was as to the admissibility in evidence against the maker of a statement Under Section 171-A of the Sea Customs Act, corresponding to section 108 of the Customs Act, in criminal proceedings. The Court also considered the applicability to proceedings under the Customs Act of Sections 4 and 132 of the Evidence Act. A contention was raised on behalf of the appellant that the object of an enquiry Under Section 171-A was to find out and establish the 'jural liability of the person making the statement' i.e. whether he had committed an offence or not and as such the enquiry was judicial proceedings. This contention was repelled and it was observed that 'at the stage envisaged by Section 171-A a Custom officer is given the power to interrogate any person in

connection with the smuggling of any goods which it is his duty to prevent. Such a person may have nothing to do with the smuggling of any goods although he may know where such goods are or who has or had them. Sub-section (3) of Section 171A does not compel any person to make a statement but if he makes a statement, he has to state the truth so as to avoid punishment Under Section 193, I.P.C.' (Emphasis supplied). Sub-section (3) of Section 171-A is analogous to Sub-section (3) of Section 108 of the Customs Act and Section 40 of the Foreign Exchange Regulations Act. It appears that two Benches of the Supreme Court have differently read the provisions. In neither of these cases, the Court was called upon to consider the interaction between the duty to state the truth and the provisions of Section 179 of the Indian Penal Code. In the case of *Nandini Satpathy* : 1978 CriLJ968 (supra), one of the questions was as to the limit of the right of silence and the interaction between Sub-section (2) of Section 161 of the Code and Section 179 of the Penal Code. It was held that the suspect was bound to answer truly all questions to the point of self incrimination beyond which there is a protection. The decision in that case, however, could be legitimately distinguished on the ground that Sub-section (2) of Section 161 uses the expression 'bound to answer truly' clearly implying a duty to 'answer' besides the duty to state the truth even though subject to the protection of the latter part of the sub-section, apart from the constitutional protection.

20-21. In my view, the expression 'state the truth', in Sub-section (3) of Section 40 is a composite one binding the person not only to be truthful but also to make a statement and the expression appears to be *pari materia* with the corresponding expression "answer truly", used in Sub-section (2) of Section 161. To hold to the contrary would frustrate the object of the provision itself and would defeat the purpose for which the sub-section was intended. That the duty to state the truth would also imply the duty to answer any question demanded of a person is amply supported by the phraseology of Section 179 of the Penal Code, irrespective of whether it would be attracted or not, if there is a refusal to answer a question, and this is a question which has not arisen in the present cases. The Supreme Court, with respect, appears to have rightly held in the case of *Persi Rustamji Basta* (1971 Cri LJ 933) (supra) that such a person is bound to answer and if he made a false statement, he would be liable to be punished Under Section 193 of the Penal

Code. I am, however, not concerned with the question if refusal to answer would render such a person liable to be prosecuted Under Section 228 of the Penal Code, a view also expressed by the Court in that case. The decision to the contrary in the case of Advani (1971 Cri LJ 5) (supra) is by a larger Bench of the Supreme Court and ordinarily I would be bound to follow that decision but the decision in the case of Basta (supra) is fully reinforced by a more recent decision in the case of Nandini Satpathy by a Bench of three Judges even though dealing with the language of Sub-section (2) of Section 161. If the two expressions be, however, *pari materia*, I see no reason why that decision does not reinforce the earlier decision of the Supreme Court in the case of Basta : 1971 CriLJ933 (supra). In the case of Nandini Satpathy : 1978 CriLJ968 (supra) the Court also ruled on the interaction between Section 161(2) of the Code and Section 179 of the Penal Code but that being in the context of the Code of Criminal Procedure would not necessarily apply to a refusal to answer in proceedings Under Section 40 of the Foreign Exchange Regulations Act. I am also not concerned with this aspect and need not, therefore, deal with it.

22. There can, therefore, be no doubt that in the existing dispensation, such a person is not entitled to invoke the rule against self-incrimination and there is no option but to hold that the legislature in its wisdom, apparently having regard to the peculiar characteristics and problems of smuggling and preservation of Foreign Exchange, thought that such cases constitute a peculiar class by themselves which would justify a differential treatment and, therefore, made a deliberate departure in providing more stringent and unfavorable procedure to arrive at satisfaction if the person suspected of the commission of offences under these statutes had in fact been involved in their violation or not. There can, therefore, be no escape from the conclusion that the privileges, rights and safeguards which have specifically or by necessary implication been denied by the legislature to such persons, would not be available to them, whatever may be the other consequences of providing a completely divergent procedure. A faint attempt was made on behalf of the counsel for the petitioners to urge that inasmuch as the safeguards, privileges and rights of an 'accused person' in the course of investigation under the Code of Criminal Procedure were extended by the Supreme Court in the case of Nandini Satpathy : 1978 CriLJ968 (supra) even to a

'suspect' or what they described as a 'candidate for such accusation' with reference to allegations, which did not then form part of the first information report but in respect of which a case may eventually be registered, such a protection should be extended to a suspect under these statutes even before a formal accusation. It is no doubt true that in relation to these allegations, the petitioner in that case stood in the same position as a person against whom no formal accusation had been made but the protection against self-incrimination was not conceded in that case in relation to these allegations on the basis of the constitutional guarantee against self-incrimination but on the basis of clear provision of Sub-section (2) of Section 161, and this section makes no distinction if a person is a mere witness, a suspect or an accused or a person though then a mere witness or a suspect who may eventually be accused. The protection of Sub-section (2) of Section 161 would, however, obviously not be available to the petitioners in the present case because at the present stage of investigation under the Foreign Exchange Regulations Act, the Code is inapplicable, except to the limited extent it has been made applicable by that Act for the purpose of remand and/or bail, a question with which I am not concerned in the present case and which has otherwise presented considerable difficulty and led to an anomalous position.

22A. However, taking his cue from the concept of justness, fairness and reasonableness of a procedure as a necessary condition for its validity, enunciated by the Supreme Court in the case of *Maneka Gandhi* : [1978]2SCR621 (supra) and reiterated by it in subsequent cases, counsel urged that the divergent procedure provided by Sections 40 and 108 of these two statutes and the near total deprivation of the fundamental safeguards, rights and privileges, open to an accused in the course of investigation in the context of the procedure known to ordinary criminal law, tainted the special procedure provided by these statutes with the vice of being unjust, unfair, and unreasonableness, particularly where even an explicit duty had not been cast on the authorities to warn the suspect that he was not bound to make the statement or that if he made the statement, he was bound to state truth and that such statement could be used as evidence against him in any trial unless it was excluded as being the result of any promise, inducement or duress as provided in Section 24 of the Indian Evidence Act.

23. It is no doubt true that the various safeguards, rights and privileges, to which a person accused has been held entitled, are time-honoured and basic and have been regarded as essential concomitants of a system governed by the rule of law and were not whittled down by the Raj in the worst of times even in relation to grave offences, like waging war against the King, but it is equally true, and courts have repeatedly drawn attention to it, that the phenomenal increase in the incidence of smuggling and violation in respect of foreign exchange, their powerful patronage and their deleterious effect on the economy of the country, their special characteristics and attributes, as indeed peculiar difficulties in their detection, singled such cases as a distinct class entitled to special treatment. It is, therefore, not surprising that the legislature, which was aware of the normal procedure to be followed in the investigation of offences, made stringent provisions representing a deliberate departure, apparently keeping larger public purpose in view even to the point of restricting some, if not all these safeguards, rights, and privileges. The adoption of special procedure would imply that the legislature thought that such divergent procedure was in the peculiar circumstances, just, fair and reasonable.

24. In the constitutional scheme obtaining in India, and as an essential ingredient of the concept of rule of law embodied in it, State action is by and large subject to judicial review and legislative action is no exception. It is also well recognised, as an essential attribute of rule of law, that all state action must not only conform to the constitutional and statutory constraints but it must also be 'just, fair and reasonable'. In this sense, judicial control of legislative action is not confined to the traditional limit of legislative competence but extends to a judicial examination of the reasonableness of legislative action. In the context of Articles 14 and 21 of the Constitution, any procedure prescribed for deprivation of personal liberty must satisfy the constitutional requirement of being just, fair and reasonable. Whether a procedure prescribed by law is just, fair and reasonable in the context of the over all circumstances, is in the ultimate analysis, to be judicially ruled, even though the legislative view with regard to the criteria would not be substituted by the court for its own if it is based on a possible view of, the matter. It is no doubt true that some of the basic safeguards, rights and privileges of an accused person should not be dispensed with, however grave may be the charge forming subject-matter of any enquiry, investigation or trial and courts have since the days of the courts of star-

chamber zealously guarded and preserved these safeguards, rights and privileges, even at the worst of times. At the same time, courts have not lagged behind in Realizing the deleterious effect of smuggling and violations of foreign exchange on the national economy and the peculiar difficulties and problems in tracking down smugglers and those involved in the violation of foreign exchange laws. Time and again, courts, including the highest court, have given expression to the peculiar problems of this class of offences and have justified departure from the normal law in dealing with this class of people. Courts have thus found valid and justified some of the unusual provisions in one or the other of these statutes, whether with regard to onus proof or with regard to departure from the normal law with regard to admissibility of confessional statements, constitutional protection against self-incrimination, and certain other matters, when the legislature in its wisdom introduced divergent procedures making a complete departure from the then established norms in the ordinary criminal law, it would be presumed that in the totality of the circumstances, the legislature thought such procedure to be just, fair and reasonable in the peculiar circumstances, even though not necessarily so in the context of the known criteria. While there is no doubt that the provisions in question put a suspect in a disadvantageous position, as compared to a person accused of any other offence, the legislative inference that the procedure is nevertheless just, fair and reasonable would be a possible view to take and if that be so, the court would be reluctant to interfere whatever may be the court's own inclinations. Where the question is a procedure embodied in a statute is just, fair or reasonable or not in the totality of a given situation, it is neither possible nor proper for the court to weigh the possible view in a fine scale and to substitute court's own view for that of the legislature. For all these reasons, it would not be possible to either void the provision or to read into it the safeguards, rights and privileges, which have been impliedly denied to a suspect. It would however, be reasonable to read into the provision an implied duty to warn the suspect who is sought to be examined, that if he made a statement, it could be used against him.

(c) Compulsion to make a written. statement:

25. There is nothing in Section 40 of the Foreign Exchange Regulations Act which may-bind a person summoned under Sub-section (3) of that section to make a

statement in writing. Such a person is bound to 'state the truth' upon any subject respecting which he is 'examined' or 'makes statement'. The expression 'examined' has reference to the interrogation or questions that may be put to such a person and 'make statements' has reference to what he may have to state either in answer to the questions or on his own. Such a person no doubt would be at liberty to write out a statement, if he so chooses, but there is nothing in the Section which may compel a person to make a statement in his own handwriting. To require a person to write a statement in his handwriting would be tantamount to asking him to 'prepare a document' as distinct from 'producing a document'. The person can be required to produce a document but there is no power to require him to compile a document. It is no doubt true that the authorities prefer a statement in the hand of the suspect so as to guard against an eventual defense that the statement was not voluntary but there is no warrant for such a procedure. It is equally true that a suspect may insist on making a written statement to guard against any possible tampering with record of his interrogation but that is a matter of choice for him. The provision contains no words of compulsion in that behalf. The only provision which empowers the authorities to call for written information is in section 33 of the Act. It is, therefore, not open to the authorities to compel anyone to reduce his own statement in writing, should he choose to answer orally questions commanded of him.

(d) Production of Documents:

26. The power to require a suspect to produce documents in an investigation or proceedings Under Section 40 of the Foreign Exchange Regulations Act was challenged on the ground of the rule against testimonial compulsion but in view of the way I have looked at the application of the rule against self-incrimination above, this contention does not survive. If the constitutional protection against testimonial compulsion is not available until a formal accusation and a person is bound to state the truth when summoned Under Section 40, there is no escape from the further conclusion that he is bound to comply with a summons to produce documents, so long as the documents be 'useful' for or 'relevant' to the investigation or the proceedings, and this duty is not in any way affected merely because of the likelihood that such documents may eventually be used at the trial

for any offence under the Act. In terms of Sub-section (3) of Section 40, when required the suspect is bound to produce the documents, so long as the documents satisfy the requirement of being relevant to the matter under investigation.

(e) Right to copies of statements:

27. There is no basis for the right to be supplied with copies of the statements made by a suspect under section 40 of the Act, except at the stage of department adjudication or on the trial of a complaint, if any. The statement that a suspect makes to the authority under section 40 cannot be said to be his property. Likewise, it is not the property of the officer, who records the statement; it forms part of the official records. The right to obtain copies of these statements when he is formally charged, either in adjudication proceedings or in a court of law flows from the right of an accused to a fair trial and the right to receive copies of all such statements at that stage could not be denied to an accused even where such a right may not necessarily flow from the provisions of the Code of Criminal Procedure. Thus, a right to receive copies of statements was conceded in the case of *Satyan Bhowmic* : 1981 CriLJ341 even though it was a case of a complaint, under the provisions of the Official Secrets Act, and the provisions of Section 207 of the Code of Criminal Procedure was not attracted. On the same principle, the right to receive copies had been conceded when a show cause notice had been issued to the suspect. But there is no such right in the course of investigation. Section 76 of the Evidence Act no doubt enjoins that the Public Officer having the custody of a public document, which any person has a right to inspect, shall give on demand a copy of it but as pointed out earlier, Evidence Act applies to all 'judicial proceedings in or before any court' and until the proceedings are in or before any court, the provision of this section also could not be invoked. It is no doubt true that the provisions of section 40 are rather stringent and the possibility of a suspect making conflicting statements out of sheer confusion could not necessarily be excluded, and since the proceedings are deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Penal Code, such conflicting statement could create some difficulty for the suspect but the suspect is always entitled either to keep a note of the statement that he makes or instruct his

counsel, who is entitled to be present to make such a note. The suspect would also be entitled if necessary, to make a reference to the earlier statements, when called upon to make a supplementary statement. It is, however, not possible to support any right to copies of these statements at the stage of investigation.

(f) Production of passport:

28. That leaves for consideration the question if Grover could be required to produce his passport. Passport is no doubt not the property of the passport-holder. It continues to be the property of the Central Government and that is what section 17 of the Passport Act, 1967 says. The procedure for its seizure, production, as indeed impounding, etc. is laid down in that Act. Officers exercising power under the Foreign Exchange Regulation Act do not have any power under that Act. They are no doubt entitled to seize that passport if such a seizure would be otherwise justified or to take it into possession when a suspect is arrested, on his personal search. The officers are also entitled to require the suspect to produce any document but such documents must have relevance to the matter under investigation. If any entry in the passport or the passport itself is relevant for the purpose of investigation or proceedings under the Act, the officers conducting the investigation or the proceedings would certainly be entitled to require the suspect to produce the passport. But the mere anxiety of the authorities that the suspect should not be able to leave the country would not entitle them to require the suspect to produce the passport under Section 40 of the Act, even though the appropriate authorities under the Passport Act, as indeed, the Court which grants bail to the suspect, would be entitled to make appropriate orders in relation to it in accordance with law.

29. In the result, Cr. M(M)205/83 succeeds. Cr. M(M) 1054/83 succeeds in part. Petitioners are entitled to the presence of counsel in the course of investigation. Petitioners cannot be compelled to write statement in their own hand. Grover cannot be compelled to produce the passport except by the authorities under the Passport Act or the Court which admitted him to bail. He can be directed to produce the passport by the authorities under the Foreign Exchange Regulations Act only if the production of the passport is considered by them to be useful and

relevant to the investigation. Cr. M(M) 251/83 Cr. M. 504/83 and Cr. M 2129/83 fail and are hereby dismissed. Petitioners are not entitled to copies of their statements at this stage even though they are entitled to take their notes by themselves or through counsel when they make the statements and may refer to the earlier statements, if required to make supplementary statements. Cr. M.2056/83 fails and is also dismissed. Petitioners are bound to produce documents summoned from them if they are relevant to the investigation, Cr. M. 622/83 is dismissed as infructuous as the amount of surety has already been reduced and the order is made absolute. Cr. M. 2113/83 is dismissed as infructuous. Petitioners are bound to answer' truly all questions commanded, of them in relation to matters under investigation and are not entitled to the benefit of rule against self-incrimination. The authorities are, however, under an implied duty to warn the petitioner before examination that if they made a statement, it could be used against them. The impugned orders of the learned Additional Sessions Judge are modified accordingly.

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