1964 *Present :* **Alles, J.**

K. MAILVAGANAM and others, Petitioners, *and*
T. KANDIAH (Sub-Inspector of Police), Respondent

S. C. 136/64—Application for Revision in M. C. Mallakam, 8309

Commission of cognizable offence—Report of police officer to Magistrate—Specimen handwriting of suspect—Power of Magistrate to compel suspect to give the specimen on application of prosecuting officer—Stage at which such application may be made—Criminal Procedure Code, ss. 121 (2), 148 (1)—Evidence Ordinance, s. 73 (2).

After a police officer has filed a report in terms of section 121 (2) of the Criminal Procedure Code that he has reason to suspect the commission of a cognizable offence, it is open to the prosecuting officer, by virtue of section 73 (2) of the Evidence Ordinance, to move the Court to consider whether it is necessary to exercise its power to compel the suspects to give specimens of their handwriting for the purposes of comparison. The application may be made by the prosecuting officer even before the commencement of proceedings under section 148 (1) of the Criminal Procedure Code.

APPLICATION to revise an order of the Magistrate's Court, Mallakam.

K. Sivasubramaniam, for the Petitioners.

J. G. T. Weeraratne, Senior Crown Counsel, with *Shiva Pasupati*, Crown Counsel, for the Respondent.

Cur. adv. vult.

September 8, 1964. ALLES, J.—

On the 4th of November, 1963, the respondent to the present application filed a report under section 121 (2) of the Criminal Procedure Code in the Magistrate's Court of Mallakam to the effect that he had inquired into the complaint of the Assistant Commissioner of Co-operative Development, Jaffna West, made on 7th March, 1963, that the 1st petitioner, the Manager of the Multi-Purpose Co-operative Society, Pallai, Veemankamam, had misappropriated the funds of the Society involving a sum of Rs. 11,516·84 and that offences under Sections 386, 391 and 467 of the Penal Code were disclosed. He also moved Court for notices on the petitioners to appear in Court and give specimens of their handwriting to be forwarded to the Examiner of Questioned Documents along with the ledger, pass books and receipt books alleged to have been maintained by the 1st petitioner when he was employed as Manager of the Society.

On this application the Magistrate issued notices on the petitioners to appear in Court on 8th November, 1963. On 8th November the petitioners appeared in Court and Counsel appearing on their behalf objected to the suspects being compelled to give specimens of their handwriting and asked for a date to make his submissions. Submissions were made by Counsel on subsequent dates and the Magistrate by his order of 28th March, 1964, over-ruled the objections of Counsel and directed the suspects to appear in Court on 11th April, 1964, for the purpose of obtaining their handwriting in Court.

On the same day, Proctor for the petitioners forwarded an application to this Court praying that this Court do revise the order of the Magistrate directing the petitioners to give specimens of their handwriting in Court before proceedings were instituted by the police under Section 148 (1) of the Criminal Procedure Code.

Counsel for the petitioners made two submissions before me. His first submission was that under Section 73 (2) of the Evidence Act it was not open to the Court to direct the suspects to give specimens of their handwriting on the application of the police. In the alternative he contended that even if his submission on this point failed it was not open to the police to make such an application before the commencement of proceedings under Section 148 (1) of the Criminal Procedure Code.

With regard to the first submission, he contended that when the Court entertained the application of the police it was tantamount to the Court taking a part in the police investigations—a procedure which, he submitted,

was not warranted by law. According to him, under Section 73 (2) the Court should act *ex mero motu* and not at the instance of the parties. He did not argue, and indeed it was not open to him to do so in view of the plain language of the section, that the Court had no right to compel the suspects to give specimens of their handwriting in Court. This right is one that has been recognised both under the English Law and our law (Vide Taylor on Evidence, Vol. 2, 12th Edn., paragraph 1871, Phipson on Evidence, 9th Edn., page 117, and *King v. Suppiah* [1]).

It seems to me that whether the Court acts *ex mero motu* or is moved to do so at the instance of one of the parties the same result is contemplated. In either event the Court has to consider whether it is necessary that the handwriting of the suspects should be obtained for the purposes of comparison and if the Court is so satisfied a direction must be made by the Court. Does it matter then, whether the Court comes to that conclusion *ex mero motu* from an examination of the police report or is moved to do so on the application of the police ?

Section 73 (2) of the Act reads as follows :—

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

The words of the section are very wide and gives the Court the power to compel any person present in Court, including an accused person, to give a specimen of his handwriting for the purpose of enabling the Court to compare the handwriting of the suspect with the impugned writing. It seems to me that the section lays emphasis more on the power of the Court to compel a suspect to give his handwriting rather than the right of the parties to seek the intervention of Court. If the Court considers that action under Section 73 (2) is not called for in the particular circumstances of the case it will refrain from taking action, whether the application is made by the parties or not. This is precisely what was held in the case of *State v. Poonamchand* [2], on which Counsel strongly relied in support of his contention that it was not open to the Court to act under Section 73 (2) on the application of the parties.

In the Bombay case proceedings were instituted under a special trying Magistrate in respect of offences committed by 48 persons between 1.1.45 and 1.4.56. After 222 witnesses were examined the prosecution led the evidence of a handwriting expert, Mr. M. B. Dixit. After his examination was terminated, the prosecution tendered an application on 14 4.56 in the following terms :—

> " Witnesses have been examined in order to prove the signatures and also the handwriting. Number of such witnesses have deliberately avoided to prove such handwriting and signatures. It has hence become very necessary to secure the attendance of all the accused in

[1] *(1930) 31 N. L. R. 435.* [2] *(1958) A. I. R. (Bombay) page 207.*

Court and then to direct them to write over their signatures as well as writings for the purpose of comparison. And after such signatures and writings are secured, the witness Shri M. B. Dixit may be asked to examine the writings and signatures and then depose about the result of such examination . . . . "

To this application the accused took strong objection. Apart from grounds of delay and alleged harassment of the accused, they stated that the application was not maintainable in law, was against the principles of natural justice, and that the accused could not be called upon at that stage to sign or write anything in the presence of the Court. The trying Magistrate allowed the application, but the Additional Sessions Judge recommended to the High Court of Bombay that the order of the Magistrate should be set aside. It was urged before the Additional Sessions Judge and the High Court that Section 73 (2) could not be used in the manner in which the trying Magistrate had used it and that the power could only be used by the Court itself and not at the instance of the prosecution.

Counsel for the petitioners before me relied on the following observations of the High Court in support of his submission :—

" It appears to me ", said the Judge, " that in terms, this clause (Section 73 (2)) limits the power of the Court to directing a person present in Court to write any words or figures only where the Court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have been written by such person. The power *does not extend to permitting one or other party before the Court to ask the Court to take such writing for the purpose of its evidence or its own case.* "

The learned Judge of the Bombay High Court in support of this proposition cites the following observation of Mr. Justice Mookerjee of the Calcutta High Court in the case of *Hiralal Agarwalla v. The State*[1] :—

" Section 73 of the Indian Evidence Act does not entitle the Court to assist a party to the proceedings. It entitles the Court to assist itself to a proper conclusion in the interests of justice. "

It was argued on behalf of the prosecution in that case that as the order was one which the trying Magistrate himself had passed he must have been satisfied that the order was necessary. The High Court, however, was of the view that the facts strongly militated against this argument. Having reiterated all the relevant facts, the Court came to the conclusion " that the circumstances did not indicate that the Court was independently asking for the handwritings to be taken in order to enable it to do justice, but on the contrary they indicate that the order was passed in aid of the prosecution and on their application of 14.4.56. "

[1] *61 Cal. W. N. 691.*

It seems to me that in the particular circumstances of that case it was apparent that the *Court* had not independently considered whether the application under Section 73 was necessary. That application was made not to enable the Court to compare the handwriting of the suspects with the impugned handwriting, but to enable the *prosecution* to do so and obtain an opinion from the handwriting expert. If the citation is authority for the proposition that in every case an application under Section 73 (2) cannot be made by a party to the proceedings but must be made *ex mero motu* by the Court, I would respectfully disagree. I am, therefore, of the view that the authority cited by learned Counsel for the petitioners has no application to the facts of the present case.

Secondly, Counsel submitted that even if the Court was entitled to deal with an application under Section 73 (2) at the instance of a party to the proceedings it was premature to make such an application before proceedings were instituted under Section 148 (1) of the Criminal Procedure Code. There is nothing in the section which specifies the stage at which an application should be made and in the absence of any such reference it will be open to the Magistrate to compel any person to give his handwriting in Court either before or after proceedings are instituted under Section 148 (1).

As Counsel for the Crown submitted in the argument before me the appropriate stage at which such an application should ordinarily be made is before the institution of proceedings in Court. Sometimes the evidence elicited under Section 73 (2) may inure to the benefit of the suspect. For instance, if the main evidence depends on the comparison of handwriting and the report is favourable to the suspects the necessity for action under Section 148 (1) might never arise. When a report is made by the police under Section 121 (2) of the Criminal Procedure Code the Court is seised of the offence and the alleged offenders and it is the duty of the Court to assist the police in the course of the investigation whenever that assistance is needed. The Court has ever to be vigilant against the exercise of arbitrary authority by the police and it is for that reason that there are salutary provisions of the law which require the police to seek the intervention of the Court where there is a possibility of an encroachment on the rights of the subject. For instance, the intervention of the Court is necessary for the issue of a search warrant (Section 68), or where the police consider it necessary to search any place (Section 124 (1)), or where the investigation cannot be completed within 24 hours (Section 126A). Under Section 419 of the Criminal Procedure Code, the seizure of property suspected to be stolen or found under circumstances which create a suspicion of the commission of any offence must be forthwith reported to the Magistrate. These are all steps taken before the institution of proceedings under Section 148 (1) of the Criminal Procedure Code.

The entire scheme of the Criminal Procedure Code makes it incumbent on the investigating authorities, once it has made a report to the Magistrate having jurisdiction regarding the commission of a cognizable

offence, to keep in close touch with the Magistrate at every stage of the investigation. The Magistrate is required to give every assistance to the police in accordance with the provisions of the law, and at the same time to ensure that the rights of the subject are not unnecessarily infringed by the arbitrary exercise of the powers of the police. In a non-summary case there has to be close co-operation between the police and the Magistrate until the case is committed for trial. (Vide Section 392 of the Criminal Procedure Code.)

When one examines the provisions of Section 73 (2) of the Evidence Act, it provides for the handwriting of a suspect to be taken before the Court. Although there is no objection in law to a police officer obtaining a specimen of the suspect's handwriting outside Court, a prudent police officer would always seek the assistance of Court for such a purpose and the stage at which such an application may be made with advantage would be prior to the institution of proceedings in Court. There is a mistaken belief that when a suspect's handwriting is taken in Court that it would tend to incriminate him. That is not the case. As Lyall Grant J. said in *King v. Suppiah* " it is not a question of a confession or statement by the accused, it is one of identification ". The same view was taken by the Full Bench of the Burma High Court in *King Emperor v. Tun Hlaing*[1]. There is therefore nothing objectionable in an application being made by the prosecution under Section 73 (2) of the Evidence Act. The prosecuting officer does so in order that the Court may, after considering the merits of the application and being satisfied in the interests of justice that the application should be granted, compel a suspect to give a specimen of his handwriting in Court. I am, therefore, of the view that both submissions of learned Counsel for the petitioners are not entitled to succeed and that the Magistrate was right in over-ruling the objection of Counsel.

Before I conclude I wish to state that as a result of the present application, which in my view is without merit, the proceedings before the Magistrate have been delayed for nearly five months. The offences are alleged to have been committed prior to 1960, the complaint to the police was made on the 7th of March, 1963, and the preliminary inquiry has not yet commenced. The offences are serious ones involving the loss of a large sum of money belonging to the public funds. I have dealt with the present application as expeditiously as possible and I trust that the police and the Magistrate will exercise the same expedition in bringing the preliminary inquiry to a speedy conclusion.

The application in revision is dismissed.

Application dismissed.

[1] *(1926) 26 Cr. Law Journal Reports, page 108.*