

CONFESSIONS, POLICE OFFICERS AND § 25 OF THE INDIAN EVIDENCE ACT, 1872

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The Indian Evidence Act, 1872, made significant derogations from common law on the topic of confessions. § 25, which makes confessions to police officers inadmissible, is an illustration of this. It has been regularly examined by courts for interpretative and clarificatory purposes. Thus, a vast body of judicial dicta today exists on how to construe this provision. Sifting through this, one notices persistent confusion with respect to a precondition for applying this exclusionary rule, i.e., who is a police officer. This paper undertakes a systematic review of decisions to trace changing judicial techniques for determining who a police officer is for the purposes of § 25. This enables a holistic critique of the current position of the Supreme Court on the matter which, it is argued, thwarts the legislative object behind the provision and is bad in law. It is concluded that an unequivocal statement of legislative intent through an amendment is the only solution to this.

I. INTRODUCTION

Few today dispute the dubious distinction of the Indian Police establishment, with excesses by the khaki-donning officers being well-documented by the press.¹ These tendencies were prevalent even in the 1860s and presented Sir James Fitzjames Stephen with a significant challenge in formulating rules of evidence governing statements made to police officers.² Since voluntariness is a fundamental premise behind accepting testimony of an individual in court, how could law admit confessions made by accused persons in an environment notorious for extorting statements? The ‘mischief’ was addressed by deviating from common law; § 25 of the Indian Evidence Act thus

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¹ Mihir Desai, *Red Herring in Police Reforms*, 44 (10) EPW 10 (2009).

² SIR JAMES STEPHEN, INTRODUCTION TO THE EVIDENCE ACT 171, as cited in *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338, at 356 (*Per* Subbarao J.:

“I may observe, upon the provisions relating to them, that sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody”).

made confessions by an accused person to police officers inadmissible.³ Its contours have since been incessantly questioned – courts are asked to decide what amounts to a confession, who is an accused person, and who qualifies as a police officer.

This paper is solely concerned with the last issue of this trinity. The first part of this paper provides a detailed review of judicial engagement with the term ‘police officer’ within § 25. Beginning with *R v. Hurribole*⁴ of 1876, judicial dicta will be traced up until the Supreme Court decision in *Nirmal Singh v. Inspector, Customs*⁵ of 2011. The point of this exercise is not without question as several commentaries provide a repository of decisions.⁶ However, as the primary concern of these commentaries is comprehensiveness as against clarity, the presentation of such voluminous and often contradictory decisions in these books begets confusion. Rather than lump together decisional law, I present the same in a manner aimed at discovering broad shifts in judicial outlook that have occurred over the course of § 25’s chequered 140-year history. In doing so, it is hoped that the current deficit of clarity in the field is mitigated.

At this point, one may validly pose the question: since the concerns of this paper are *res integra* no more following the many Supreme Court decisions, why engage in this exercise? The reason is simple; mere coherence on a point of law does not signal its correctness. The second part of this paper, accordingly, sets out to analyse the interpretive strategy adopted by the Apex Court. This reveals that the settled approach of the Court to determine who a police officer is for the purposes of § 25 is inconsistent with the legislative intent behind the provision. I conclude by suggesting that the best possible solution out of the current rigmarole lies in legislative intervention by amending the law.

II. THE CHEQUERED HISTORY OF § 25 OF THE INDIAN EVIDENCE ACT, 1872

Despite multiple references to the term ‘police officer’ in the Indian Evidence Act (‘the Evidence Act’), 1872, a definition remains conspicuously absent. Perhaps this was on account of the Police Act, 1861. However, the latter only informs us that ‘Police’ includes all persons enrolled under this Act.⁷ The lacuna, therefore, persists in statutory law, requiring us to search

³ The Indian Evidence Act, 1872, § 25 (The section was imported from the Criminal Procedure Code of 1861, where it was present as § 148. It reads as follows: “No confession made to a police officer shall be proved as against a person accused of any offence”).

⁴ *R v. Hurribole*, (1876) ILR 1 Cal 207.

⁵ *Nirmal Singh Pehlwan v. Inspector, Customs* (2011) 12 SCC 298.

⁶ See, e.g., SARKAR, *LAW OF EVIDENCE*, 683-705 (17th ed., 2011).

⁷ The Police Act, 1861, § 1 (State legislation is not of much help either. For instance, Bombay Police Act, 1951, § 2(11) defines a police officer as “any member of the police force appointed

elsewhere for a definition. Black's Law Dictionary defines a police officer as someone "responsible for preserving public order, promoting public safety, and preventing and detecting crime".⁸ The Supreme Court has also on occasion consulted the Oxford Dictionary for this task which defined police as a "department of government which is concerned with the maintenance of public order and safety, and the enforcement of the law; the extent of its functions varying greatly in different countries and at different periods."⁹

The dictionary definitions adopt a functional approach to understanding who a 'police officer' is. Indeed, given that § 25 was specifically inserted to address the malpractice of resorting to torture for confessions¹⁰, it is likely that Sir Stephen was motivated by such a functional understanding of the term when inserting the exclusionary rule contained in § 25. Opportunities to inflict torturous harm to extort confessions would flow from these powers and functions rather than the specific department an officer belongs to.

It is in this context we engage with the Calcutta High Court decision in the case of *R v. Hurribole* ('Hurribole')¹¹, delivered soon after the enactment of the Evidence Act. An easy measure of its immense importance lies in how the judgment of Garth C.J. still forms the starting point for any analysis by subsequent courts on how to construe the term police officer present in § 25. Holding the Deputy Commissioner of Police to be a police officer for the application of § 25, the Chief Justice observed,

"Its [§ 25] humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th. [...] In construing the 25th section of the Evidence Act of 1872, I consider that the term "police officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning."¹²

This paragraph has been thoroughly broken down and analysed by courts in various decisions to discern the connotation of the comprehensive and popular meaning. The more salient of these will be discussed subsequently.

or deemed to be appointed under this Act, and includes a special or an additional police officer appointed under Section 21 or 22").

⁸ BLACK'S LAW DICTIONARY 1178 (12th ed., 1999).

⁹ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338, at 357.

¹⁰ *Queen Empress v. Babu Lal*, (1899) ILR 6 All 509.

¹¹ *R v. Hurribole*, (1876) ILR 1 Cal 207.

¹² *Id.*, ¶ 3, 5.

A. *TIMES OF UNCERTAINTY 1877-1959*

The broad phrasing of the test adopted by Garth C.J. in *Hurribole* appears well-suited to address the problems Sir Stephen had considered. Any inclusive test, however, has necessary limits read into itself. The decades following the decision in *Hurribole* witnessed courts struggling to define the limits of the test provided therein. Too broad an understanding would exclude an ever-greater quantity of possibly clinching evidence (as confessions often are) thereby reducing convictions. Too narrow an understanding would fail to fulfil the intent reflected in § 25.

During the years before independence, this line-drawing exercise occurred *vis-à-vis* two questions: would *every* police officer be within the sweep of § 25, and would confessions to officers with powers and duties similar to the police be hit by the prohibition? Thus courts were called on to decide whether confessions made to Police *Choukidars*¹³ and Police *Patels*¹⁴ (primarily attendants in the force) were rendered inadmissible or not. Further, questions arose over the status of officers who had been conferred powers originally vested in police officers by state legislation, such as the Bombay *Abkari* Act of 1878.¹⁵ Would such officers fall within the “more comprehensive and popular meaning” alluded to in *Hurribole*? While courts tended to apply § 25 in the first class of cases, they refused to bring excise officers and the like within its ambit.¹⁶

Thus, in applying § 25 to the entirety of the organised police force, courts adopted an inherently formalist approach in answering the underlying definitional question. Even though Excise and *Abkari* officers had powers of investigation and arrest, they were not considered ‘police officers’. The Bombay High Court deviated from this formalist approach in *Nanoo Sheikh Ahmed v. Emperor* (‘Nanoo Sheikh’)¹⁷. It was held therein that “it is not merely the name given to an officer that should determine whether he is a Police-officer, but the substantial fact whether he exercises the powers of a Police officer conferred

¹³ Queen Empress v. Salemuddin Sheik, (1899) ILR 26 Cal 569.

¹⁴ Queen Empress v. Rama Birapa, (1878) ILR 3 Bom 12; Emperor v. Akia, AIR 1927 Nag 222.

¹⁵ Abkari Act, 1878, § 41 (The section provides:

“(1) Every Abkari officer not below such rank as Government may prescribe shall within the area for which he is appointed have power to investigate all offences punishable under this Act.

(2) Every such officer shall in the conduct of such investigation exercise the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence [...].”)

¹⁶ Ah Foong v. Emperor, AIR 1919 Cal 696; Rokun Ali v. Emperor, (1918) 19 Cri LJ 524; Raphael Pereira v. Emperor, (1926) 28 Bom LR 674; Harbhanjan Sao v. Emperor, 102 IC 547; Tura Sardar v. Emperor, AIR 1930 Cal 710; Ibrahim Ahmed v. Emperor, AIR 1931 Cal 350; Matilal Kalwar v. Emperor, AIR 1932 Cal 122 (Whether an Excise Sub-Inspector is a “police officer”).

¹⁷ Nanoo Sheikh Ahmed v. Emperor, AIR 1927 Bom 4.

upon him by law"¹⁸, thereby holding excise officers to be police officers since they possessed the same powers of investigation as an officer in-charge of a police station.

The tussle between the formalist and functional approaches was now gaining prominence. After Nanoo Sheikh, two full bench decisions, one of the Patna High Court¹⁹ and the other from the Calcutta High Court²⁰, considered the same issue but adopted contrasting approaches to interpret the term 'police officer'.

Terrell C.J., in *Radha Kishun Marwari v. Emperor* ('Radha Kishun') believed the now-famous words of Garth C.J. had been misunderstood and become a source of error.²¹ He was of the opinion that the interpretation shorn of this error was to construe the popular meaning as expanding the scope of the term to include *all kinds* of police officers²², and the other judges concurred.²³ Fazl Ali J. delivered a separate opinion, bringing to the fore the material distinction between "a person who is nothing but a police officer and one who is primarily not a police officer but merely invested with the powers of a police officer"²⁴. According to him, bringing the latter within the fold of § 25 would unduly enlarge its scope, and blur distinctions between the police and other officials such as revenue officers.²⁵ It might also lead the judiciary down a seemingly endless road, deciding inherently ambiguous questions such as what minimum functions are necessary to make a police officer.²⁶

¹⁸ *Id.*, ¶ 27 (The words of Shah J. merit reproduction in full:

"It seems to me a perfectly fair interpretation of Section 25 to say that the Police officer within the meaning of that section is an officer who exercises the powers of police conferred upon him by law, whether he is called a Police officer or he is called by any other name and exercises other functions also under other provisions of law. He is a Police officer within the meaning of Section 25, if, in the investigation of offences under a particular Act, he exercises the powers of an officer in charge of a police station for the investigation of a cognizable offence conferred upon him by that Act. Section 25 of the Indian Evidence Act embodies an important rule, which is to be given effect to as a matter of substance and not as a mere matter of form. It is not merely the name given to an officer that should determine whether he is a Police officer, but the substantial fact whether he exercises the powers of a Police officer conferred upon him by law should determine it").

¹⁹ *Radha Kishun Marwari v. Emperor*, AIR 1932 Pat 293.

²⁰ *Amin Shariff v. Emperor*, AIR 1934 Cal 580.

²¹ *Radha Kishun Marwari v. Emperor*, AIR 1932 Pat 293, ¶ 2.

²² *Id.*, ¶ 4.

²³ *Id.*, ¶ 10-13 (*per* Fazl Ali J.); ¶ 18-21 (*per* Aggarwala J.).

²⁴ *Id.*, ¶ 10.

²⁵ Fazl Ali J. believed that the juxtaposition of revenue officers with police officers in § 125 of the Evidence Act, 1872, was material in deciding whether excise officers, primarily understood as revenue officers, would fall within the ambit of § 25.

²⁶ *Radha Kishun Marwari v. Emperor*, AIR 1932 Pat 293, ¶ 13.

Two years later, the Calcutta High Court came to the opposite conclusion. The judges in *Amin Shariff v. Emperor* (“Shariff”)²⁷ held excise officers to be police officers under § 25, departing from the general trend of Calcutta decisions. Accusations of misunderstanding Hurrbole made in Radha Kishun were now levelled against the decision of the Patna High Court itself; the approach therein seen as far too restrictive to fulfil the purpose behind § 25.²⁸ The majority appreciated the different categories highlighted by Fazl Ali J.,²⁹ but it did not believe that turning to necessary minimum functions to understand who could be a police officer was an approach riddled with problems. Mukerji J. thus proceeded to identify two primary duties – prevention of crime and detection of crime – as the mainstay of police work.³⁰ He further observed,

“[A]lthough it may be that different grades of policemen have different powers in the matter of apprehension or of detention, if the person concerned belongs, to a body whose duty it is to prevent the commission of offences as well as to detect offenders, that person, whatever his own powers, individually speaking, may be fulfils the requirements of the idea conveyed by the expression “Police Officer.” [...] It was in this state of the law that in 1872 the Evidence Act was enacted, and in that Act the legislature did not consider it necessary to indicate what special meaning, if any, was to be attached to the word “police officer,” with regard to confessions made to whom a most imperative rule of evidence was enacted. The only reason why they omitted to do so, in my view, was that at that time it was intended to express by that term all officers other than Magistrates who were entrusted with the duty of preventing and detecting crimes and specially the latter. It is the nature of the duties, performance of which was likely to give occasion for improper influence being exercised or felt, and not any particular aversion for a particular department of public service that must have moved the legislature in enacting the provision.”³¹

²⁷ *Amin Shariff v. Emperor*, AIR 1934 Cal 580 (Costello J. delivered a dissenting opinion).

²⁸ *Id.*, ¶ 7.

²⁹ *Id.*, ¶ 9.

³⁰ *Id.*, ¶ 17 (*per* Mukerji J.).

³¹ *Id.*, ¶¶ 18-23 (Costello J. in his dissent relied on the logic advanced by the Patna High Court in Radha Kishun, adding that the deeming fiction must not be extended to stigmatise excise officers as being of untrustworthy character. It was also mentioned that the legislature would have amended the section if confessions to excise and other officers were also to be excluded. There was little discussion by the majority on the former, but it turned the latter argument on its head by suggesting this lack of amendment could be seen as tacit consent by the legislature to the expansive approach of courts, since the section also contained the phrase “any offence”, and several “offences”).

Although Nanoo Sheikh and Shariff arrived at the same conclusions, subtle differences exist in their respective approaches. Where courts remained steadfast in the view that confessions before *any* member of the police were hit by § 25³², we can see how their position with respect to officers beyond the force itself changed. The decisions in Nanoo Sheikh and Shariff acknowledged that some specialised officers can also investigate cases and broadened the scope of the prohibition within § 25. However, how ‘investigation’ came to be viewed in these decisions depicts again the dichotomy between form and functional.

The Bombay High Court undertook a comparison between the statutory powers of investigation conferred upon the specialised officer against the powers of the police under the Criminal Procedure Code, 1898 (‘the Cr.P.C., 1898’). It stated, “[h]e is a Police officer within the meaning of Section 25, if, in the investigation of offences under a particular Act, he exercises the powers of an officer in charge of a police station [...]”³³ Besides Jack J.,³⁴ each judge of the majority in Shariff went beyond comparing the statutory powers and considered whether powers conferred would further fulfilment of the two primary duties of prevention and detection of crime which characterised the police.³⁵ In a country where specialised officers were conferred different powers under the particular state legislation, adhering to a strict statutory comparison would encourage shallow distinctions being drawn.³⁶ However, the comparative ease with which this test could be administered provided clear advantages against delving deep into the particular duties of different officers in each case.

B. INTERVENTION BY THE SUPREME COURT

With the establishment of the Supreme Court of India in 1950, the dissident voices across High Courts reduced³⁷ as the issue presented itself to the

³² Emperor v. Mallangowda Parwatgowda, AIR 1917 Bom 130, ¶ 2; Radha Kishun Marwari v. Emperor, AIR 1932 Pat 293, ¶ 13.

³³ Nanoo Sheikh Ahmed v. Emperor, AIR 1927 Bom 4, ¶ 27.

³⁴ Amin Shariff v. Emperor, AIR 1934 Cal 580, ¶ 61.

³⁵ *Id.*, ¶ 17.

³⁶ Consider the approach of the High Court of Madras across the decisions in Public Prosecutor v. Marimuthu Gounden, AIR 1938 Mad 460; *In Re: Mayilvahanam*, AIR 1947 Mad 308; *In Re: K. Venkata Reddi*, AIR 1948 Mad 116. The Madras High Court thus consistently distinguished Bombay and Calcutta decisions based on the extent of powers conferred under different state laws, to hold confessions made to excise officers in Madras beyond the scope of § 25. This continued till the Madras Legislature amended the law, conferring upon officers powers akin to their Bombay counterparts, as seen in the decision reported as Public Prosecutor v. C. Paramasivam, AIR 1953 Mad 917.

³⁷ The last few notable decisions across High Courts were as follows: In 1952, the Calcutta High Court in *Fernandez v. State*, AIR 1953 Cal 219, had to decide whether confessions to customs officers were hit by § 25. While the Court referred to the decision in Shariff, in the instant case officers assumed powers under the Sea Customs Act, 1878 which did not confer similar powers to investigate. A refusal to apply the ratio in Shariff would imply that a statutory comparison was the governing test to decide an officer’s status for § 25. The Court emphatically

Apex Court whose word was law.³⁸ A three-judge bench of the Supreme Court delivered the first of many decisions in 1961³⁹, in a case concerning the status of customs officers under the Sea Customs Act, 1878, for the purposes of § 25. Subbarao J. offered a definition to solve the quandary: “An officer, by whatever designation he is called, on whom a statute substantially confers the powers and imposes the duties of the police, is a police officer within the meaning of [§] 25 of the Evidence Act.”⁴⁰ The majority disagreed. Speaking for the majority, Dayal J. said that mere similarity of investigative powers was insufficient; there must be a similarity in the *purpose* behind such conferral of powers. For someone to be considered a police officer, investigative powers must be conferred with the purpose of detecting and preventing crime in society. Since customs officers were conferred these powers to check smuggling of goods and evasion of duties, possessing similar powers as the police did not make them police officers.⁴¹ Furthermore, the judicial functions of customs officers under the Act made it impossible to call them police in the same breath.⁴²

In *Raja Ram Jaiswal v. State of Bihar* (‘Jaiswal’)⁴³, Dayal and Subbarao JJ. were two of the three judges who considered whether confessions to Excise Officers under the Bihar & Orissa Excise Act, 1915, would fall within the ambit of § 25. Dayal J. remained consistent with his opinions in *State of Punjab v. Barkat Ram* (‘Barkat Ram’)⁴⁴; however on this occasion, he was in dissent.⁴⁵ Mudholkar J., speaking for the majority, said that the Court need not burden itself with inquiring the purpose behind conferral of powers upon the officer. The simple question was this: would the powers conferred upon him facilitate in obtaining a confession from the suspect?⁴⁶ It is the power of inves-

rejected this argument for there was never a restriction under § 25 that police officers need be ones who can investigate. In 1958, the Punjab High Court followed this view in *Gopal Dass v. State*, AIR 1959 P&H 113, whereas in 1959 the Mysore High Court in *Issa Yacub Bichara v. State of Mysore*, AIR 1961 Kant 7, chose to differ.

³⁸ The Constitution of India, Art. 141.

³⁹ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338.

⁴⁰ *Id.*, at 365.

⁴¹ *Id.*, at 343-347.

⁴² *Id.*, at 351 (Reiterating the opinion of some High Courts, Dayal J. also believed that to expand contours of § 25 and include every class of officers within its fold, an express amendment was necessary).

⁴³ *Raja Ram Jaiswal v. State of Bihar*, [1964] 2 SCR 752.

⁴⁴ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338.

⁴⁵ *Raja Ram Jaiswal v. State of Bihar*, [1964] 2 SCR 752, at 779.

⁴⁶ *Id.*, at 766 (*Per* Mudholkar J.:

“In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a ‘police officer’ for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a ‘police officer’ for the purpose of s.25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an office in charge of a police station establish a direct or substantial relationship with the prohibition enacted by s. 25, that is, the recording of a confession. In our words,

tigation which establishes a direct relationship with the prohibition enacted in § 25⁴⁷, and this had been conferred upon excise officers under the aforesaid Act, as against customs officers who under the 1878 law could only make enquiries but not investigate an offence under § 156 of the Cr.P.C., 1898.⁴⁸ Thus, confessions made before excise officers were inadmissible.

Not for the first time, a court adopted a simpler test to administer, as opposed to engaging itself with purposive inquiries when deciding the ambit of § 25. However, conflicting decisions by co-ordinate benches made it imperative for a bench of higher strength to settle the issue. This opportunity presented itself in *Badku Joti Savant v. State of Mysore* ('Badku')⁴⁹, when five judges decided the status of central excise officers under the Central Excise and Salt Act, 1944. Unanimously, these officers were held to not be police officers.⁵⁰ Certainly with an eye to finally put the issue to rest, the judges rejected arguments of "purpose"⁵¹ and sought to provide a definitive test. The judges compared the set of statutory powers conferred upon central excise officers with the police and found the crucial ingredient was missing: the power to file a charge-sheet⁵², as under § 173 of the Cr.P.C, 1898 on which cognizance could be taken by a Magistrate.⁵³ Thus, only those officers who had been conferred this power could appropriately be called police officers for § 25.

The subtle shift, from looking at "powers of investigation" to specifically, the power to file a charge-sheet, provided an easy way to apply a thumb-rule to determine the issue of whether an officer was a police officer for § 25. The court's position was cemented by two five-judge bench decisions of 1969 concerned with applicability of § 25 to confessions made before Customs Officers rendered within a span of 10 days from each other.⁵⁴ The Court expressly stated⁵⁵,

the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question may as to what other powers he enjoys.").

⁴⁷ *Id.*, at 768.

⁴⁸ *Id.*, at 764-65.

⁴⁹ *Badku Joti Savant v. State of Mysore*, [1966] 3 SCR 698 (On this occasion, neither Dayal J. nor Subbarao J. was on the bench).

⁵⁰ *Id.*, at 705.

⁵¹ *Id.*, at 702.

⁵² The term charge-sheet is used interchangeably with the term '173 Report' and 'police-report' in criminal law jargon in India, and it has been used interchangeably in the paper as well.

⁵³ *Badku Joti Savant v. State of Mysore*, [1966] 3 SCR 698, at 703 (Importantly, the Court did not overrule Jaiswal; it was held that § 7(2) of the Bihar & Orissa Excise Act, 1915, was materially different from § 21 of the Central Excise & Salt Act 1944).

⁵⁴ *Romesh Chandra Mehta v. State of West Bengal*, [1969] 2 SCR 461; *Illias v. Collector of Customs*, [1969] 2 SCR 613 (The two decisions addressed the question under both, the repealed Sea Customs Act, 1878, and the Customs Act, 1962).

⁵⁵ *Romesh Chandra Mehta v. State of West Bengal*, [1969] 2 SCR 461, at 469.

“... [T]he test for determining whether an officer of customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure.” [Emphasis supplied]

C. EDGING TOWARDS CERTAINTY?

Perhaps for the first time one could perceive a genuine measure of certainty about § 25. The problems about its applicability to officers with seemingly analogous powers to the police had been resolved through the rather easy and specific test distilled in *Badku* by the Constitution Bench. The number of cases reaching the Apex Court thus noticeably decreased in the decades to follow. Of these, the only notable decisions were the two on classification of Railway Protection Force officers, the first in 1974⁵⁶ and second in 1980.⁵⁷ The test was used to hold § 25 inapplicable to confessions made before these officers.⁵⁸

The issue gained a new lease of life due to the Narcotic Drugs and Psychotropic Substances Act, 1985 (‘the NDPS Act’), and § 53 therein which conferred powers of an officer in-charge of a police station upon officers of the Department of Revenue Intelligence (‘the DRI’). In 1990, the Supreme Court decided *Raj Kumar Karwal v. Union of India* (‘*Karwal*’)⁵⁹, wherein the admissibility of confessions made to such officers was challenged. After surveying the broad scheme of powers conferred by the Act, the Court returned to the comfortable territory of precedent. It reiterated that the “important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under [§] 173 of the Code.”⁶⁰ Thus, since all powers under Chapter XII of the Code of Criminal Procedure, 1973 (‘Cr.P.C.’) had not been conferred upon DRI officers, they certainly could not be considered police officers for § 25.

*Abdul Rashid v. State of Bihar*⁶¹ saw confessions made before the Superintendent of Excise, acting under the Bihar & Orissa Excise Act, 1915, rendered inadmissible, making clear that the decision in *Karwal* was restricted to the particular cadre of officers in question and did not extend to all other

⁵⁶ *State of Uttar Pradesh v. Durga Prasad*, (1975) 3 SCC 210.

⁵⁷ *Balkishan Devidayal v. State of Maharashtra*, (1980) 4 SCC 600.

⁵⁸ *Id* (This decision is notable for engaging in a detailed comparative study of the two categories of officers, and not merely relying on the test provided for by the Court. Interestingly, here, the Court accepted the merit behind arguments challenging the soundness of this test, but observed the application of binding precedent to do anything further).

⁵⁹ *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409.

⁶⁰ *Id.*, ¶ 22.

⁶¹ *Abdul Rashid v. State of Bihar*, (2001) 9 SCC 578.

officers involved in NDPS matters. Even on the subject of confessions made to DRI officers, the Court in 2006 upheld the conclusions of Karwal, but went on to observe that such confessions required more scrutiny than others.⁶² In 2008, the ratio of Karwal was extended to officers recording confessions by virtue of powers under § 67 of the NDPS Act as well.⁶³

In *Noor Aga v. State of Punjab* ('Noor Aga')⁶⁴, a two-judge bench of the Court struck a note of dissent in the same year, dealing with facts similar to Karwal, only this time the confessions were made before customs officers. The lower courts had reasoned on the basis of *Barkat Ram and Badku*, which did not extend § 25 to these circumstances. The reasons behind this one might recall were *firstly*, a difference in purpose behind the powers conferred and *secondly*, the absence of power to file a charge-sheet. With respect to the first leg, the Apex Court distinguished these decisions on facts to depart from their previous conclusions. While in those cases power was exercised under the Customs Act, here it was under the NDPS Act, and it observed that "[w]hen, however, the custom officers exercise their power under the Act, it is not exercising its power as an officer to check smuggling of goods; it acts for the purpose of detection of crime and bringing an accused to book."⁶⁵ On the second leg, the Court opined that customs officers must be deemed to be police officers here as a special statute invested them with powers of an officer-in-charge of a police station. Since legal fiction must be given full effect, § 25 must be applicable to confessions made before such officers as well.⁶⁶

In 2011⁶⁷, the Court went back to the position in Karwal, stating that § 53 alone would be insufficient to hold officers of the Narcotics Bureau as police officers since it did not confer the *necessary* power of filing a charge-sheet.⁶⁸ However, the judicial see-saw turned to favour the conclusions of Noor Aga over the earlier position of Karwal in November itself.⁶⁹ There has been no decision on the issue since, completing the rather long and arduous history of § 25 and the judiciary. The latter half of the paper examines the fragile nature of the current position. However before we proceed further, it would be prudent at this stage to recall some essential features of the interpretation by the Apex Court (barring exceptions). *First*, on the issue of who among police officers does the section apply to, the Court has been clear that it applies to *all* officers,

⁶² Francis Stanly v. Intelligence Officer, Narcotics Control Bureau, Thiruvananthapuram, (2006) 13 SCC 210.

⁶³ Kanhaiyalal v. Union of India, (2008) 4 SCC 668 (§ 67 of the NDPS Act operates in conjunction with § 42 of that Act, conferring upon officers referred to in § 42 the power to call any person for information as to whether there has been a contravention of the provisions of the NDPS Act).

⁶⁴ Noor Aga v. State of Punjab, (2008) 16 SCC 417.

⁶⁵ *Id.*, ¶ 72.

⁶⁶ *Id.*, ¶¶ 76-77.

⁶⁷ Ram Singh v. Central Bureau of Narcotics, (2011) 11 SCC 347.

⁶⁸ *Id.*, ¶ 8.

⁶⁹ Nirmal Singh Pehlwan v. Inspector, Customs, (2011) 12 SCC 298.

regardless of whether they possess powers of investigation or not. *Second*, as regards its applicability to officers holding powers analogous to police officers, § 25 has been applied when the concerned officer has powers of investigation as detailed in Part XII of the Cr.P.C., specifically the power to file a charge-sheet.

III. THE CURRENT POSITION

The history mapped out makes it evident that focusing on powers of investigation to determine the status of officers for § 25 was not a novel approach devised by the Supreme Court. It had been utilised as early as 1926 by the Bombay High Court.⁷⁰ This, however, did not constitute the dominant view across High Courts, by any means. Indeed, there was an equally strong trend to refrain from placing great reliance on investigative powers vested in officers. The argument ran simple. Since there was no discrimination between police officers on this basis when considering the admissibility of confessions made to them, why should it assume such significance when considering the status of officers similar to the police?⁷¹

It is important to pause here and deconstruct the issues arising from the current approach, for they exist at two levels which can easily be conflated. At the first level, we have questions on the propriety of relying on powers of investigation as the definitive test for determining when § 25 can be extended to officers beyond the ordinary khaki-donning police force. The second level raises a deeper concern flowing from the first; should the court judge the status of an officer on the basis of the powers conferred upon him as detailed in the power-conferring statute, or should it ascribe to the requirements of a different statute altogether?

D. THE COST OF CONVENIENCE

Decisions prior to independence pointedly questioned the logic behind considering investigative powers as the sole factor to determine the application of § 25, but the Supreme Court has reversed that logic and has gone ahead to only consider the power to file a charge-sheet as determinate. In doing so, it necessarily implies that this is what characterises the work of the police force; therefore, officers with apparently analogous powers *must* be able to perform this function. Certainly, investigation is one of the most fundamental duties of the police, and the means to fulfil the dual responsibility of preventing

⁷⁰ Nanoo Sheikh Ahmed v. Emperor, AIR 1927 Bom 4.

⁷¹ Emperor v. Mallangowda Parwatgowda, AIR 1917 Bom 130, ¶ 2; Radha Kishun Marwari v. Emperor, AIR 1932 Pat 293, ¶ 13 (It is important to remember that Aggarwala J. in Radha Kishun held that § 25 ought not to be extended beyond the ordinary police force, and considered tests such as this arbitrary because of the abovementioned reason).

and detecting crime has been identified by courts. The Malimath Committee Report took a step further to recognise investigation a duty in itself.⁷²

All this may well be correct, but this argument does little to advance the purport of § 25. The fear latent here is abuse of power by the police to extort confessions. Such abusive exercise of power is in no way *determinate* on investigative powers of the police – in fact, it would logically have a higher correlation with powers of arrest, detention and questioning. This is why the Calcutta High Court in *S. Fernandez v. State* was so explicit in its disapproval of considering the power of investigation as the governing test in applying § 25⁷³; similar thoughts were echoed by Subbarao J. in his dissent in *Barkat Ram*. Where powers of arrest, detention, search and seizure are conferred upon officers, but the entire catalogue of investigative powers of police officers are not, a refusal to extend § 25 to such circumstances patently defeats the object of the provision.

Assuming there is some merit in focusing on investigative powers, there is much to be said about the further step taken by the Supreme Court to single out one power above the rest – the power to file a charge-sheet. A charge-sheet enables a Magistrate to take cognizance and ultimately begin trial. Therefore, for the Apex Court, all other powers of investigation made little difference if the power to prosecute is absent.⁷⁴ Apart from the obvious certainty ushered in by such a test, I believe it provides little value otherwise. Two strands of criticism follow.

First, adhering steadfastly to such a rigid notion of who can be a police officer makes the Court ignorant to obvious legislative conferrals of power. *Karwal* presents a good example. Here, § 53 of the NDPS Act invested an officer with powers of a station house officer for investigation of offences. The Court did not consider this sufficient to apply § 25, as the power to file a charge-sheet was found wanting.⁷⁵ This went directly against a line of authority which held such express conferrals of power sufficient⁷⁶, including the earlier Supreme Court decision in *Jaiswal*. It is accepted that legal fiction, once created, must be given the fullest effect.⁷⁷ Thus, conferral of powers of a station house officer upon another must come with all attendant consequences flowing

⁷² DR. JUSTICE V.S. MALIMATH COMMITTEE, *Report of the Committee in Reforms of Criminal Justice System*, VOL. I, 87 (March, 2003).

⁷³ *S. Fernandez v. State*, AIR 1953 Cal 219, ¶ 6.

⁷⁴ *Badku Joti Savant v. State of Mysore*, [1966] 3 SCR 698; *State of Uttar Pradesh v. Durga Prasad*, (1975) 3 SCC 210; *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600; *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409; *Ram Singh v. Central Bureau of Narcotics*, (2011) 11 SCC 347.

⁷⁵ *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409 : AIR 1991 SC 45, ¶¶ 22-23.

⁷⁶ *Amin Shariff v. Emperor*, AIR 1934 Cal 580, ¶ 63; *In Re: Someshwar H. Shelat*, AIR 1946 Mad 430.

⁷⁷ *R. v. Norfolk County Council*, (1891) 60 LJQB 379.

from such a conferral. It was on these grounds that the more recent decision of Noor Aga departed from the views of Karwal in applying § 25.⁷⁸

Second, this has led the Court to place form over substance, creating a conflict with the accepted basic premise that a functional approach is necessary while applying § 25. This is reflected in how the requirement under revenue laws and the NDPS Act for cognizance of offences only to be taken upon a complaint filed by the officer concerned⁷⁹, has been construed by the Court in contradistinction to filing a charge-sheet under § 173 of the Cr.P.C. Therefore, § 25 has not been extended to confessions made before these officers.⁸⁰ Both charge-sheet and private complaint enable a Magistrate to take cognizance of an offence under § 190 of the Cr.P.C.⁸¹, and nothing therein places the different modes on a different footing. The differences are seen later. Chapter XV of the Cr.P.C. requires the Magistrate to examine the complaint before issuing process⁸² to an accused whereas no such additional requirements exist when cognizance is taken on a police report. This ‘verification’ is mandatory, in order to ascertain the veracity of complaints to prevent vexatious cases from being instituted.⁸³ Thus, a complaint cannot *per se* initiate proceedings, which lends some support to the interpretation of the Court. With due respect, it would appear the judges failed to look at the proviso to § 200 of the Cr.P.C., which does away with the requirement to examine the complaint if it is made by “a public servant acting or purporting to act in the discharge of his official duties.”⁸⁴ Thus, no difference in consequences arises when cognizance is taken on the basis of such a complaint as against a charge-sheet, for the Court to treat the two differently, and systematically exclude the application of § 25 to one set of circumstances.

⁷⁸ Noor Aga v. State of Punjab, (2008) 16 SCC 417, ¶ 104.

⁷⁹ See, e.g., NDPS Act, 1985, § 36(d) (A Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial).

⁸⁰ Romesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940, ¶ 6; Balkishan A. Devidayal v. State of Maharashtra, (1980) 4 SCC 600 : AIR 1981 SC 379, ¶ 39; Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409 : AIR 1991 SC 45, ¶ 22; Ram Singh v. Central Bureau of Narcotics, (2011) 11 SCC 347 : AIR 2011 SC 2490, ¶ 8.

⁸¹ The Code of Criminal Procedure, 1973, § 190(1) (It reads as follows:

“Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –

- a. Upon receiving a complaint of facts which constitute such offence;
- b. Upon a police report of such facts;
- c. Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed”).

⁸² The Code of Criminal Procedure, 1973, § 204.

⁸³ Nirmaljit Singh Hoon v. State of West Bengal, (1973) 3 SCC 753 : AIR 1972 SC 2639, ¶ 21.

⁸⁴ The Criminal Procedure Code, 1973, § 200.

E. IS THE POLICE REALLY UNIQUE?

The *second* level of the argument concerns the standpoint from which the Supreme Court has proceeded to determine the position of various officers for the purposes of § 25. It adopts a comparative technique with two broad variants. In *Barkat Ram*, the Court noted that although there was substantial similarity between powers conferred upon customs officers and the police, the purpose for which these were used made a substantial difference to the situation.⁸⁵ Even before *Badku* laid down the test, the Court was comparing powers of investigation vested in such officers with the specific provisions of Chapter XII of the Cr.P.C. It is argued that both variants of the comparative approach are an improper method to evaluate the issues.

Relying on the purpose behind the exercise of powers conferred to distinguish between officers betrays a latent confusion. The Court seems to believe there is some measure of permanence in recognising these officers as police officers, and therefore looks at the purpose behind their powers. There is no such permanence when the Court rules on the status of such officers for the purposes of § 25. Indeed, *Jack J. in Shariff* was perceptive of such confusion arising and was at pains to specify that applying § 25 did not convert these officers into police officers *per se*.⁸⁶ Customs officers can extort confessions by virtue of their powers without being responsible for “effective prevention and detection of crime in order to maintain law and order”.⁸⁷ If they were entrusted with these primary duties, they would be police officers and not customs officers to begin with. Consider the following paragraph:

“The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of good and safeguarding the recovery of customs duties. He is more concerned with the goods and customs duty, than with the offender”⁸⁸

The Court refuses to acknowledge that smuggling goods itself is a serious offence, punishable with imprisonment.⁸⁹ To this limited extent, there is no doubt a customs officer is also concerned with the prevention and detection of offences. The decision in *Noor Aga* moved away from looking at the purpose, and instead turned to the seriousness of offences covered by the power conferring Act as a distinguishing factor. Thus, customs officers acting

⁸⁵ *State of Punjab v. Barkat Ram*, AIR 1962 SC 276, ¶ 10, 12.

⁸⁶ *Amin Shariff v. Emperor*, AIR 1934 Cal 580, ¶ 67.

⁸⁷ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338, at 343.

⁸⁸ *Id.*, at 345.

⁸⁹ The Sea Customs Act, 1878, § 167(81) (This was punishable with a term not extending two years' imprisonment).

under the NDPS Act occupied a different position for the Court from those under the Customs Act. This is nothing but an illusory and arbitrary ground for distinction. Offences under both laws attract imprisonment, and the law could not create a situation where a person could possibly go to jail on the basis of an extorted confession for an offence under one statute and not another.

The same criticism extends to assessing powers conferred upon officers by special statutes from a Cr.P.C. perspective. Consider Karwal, where the Court stated that anyone “on whom power to investigate under Chapter XII is conferred can be said to be a ‘police officer’, no matter by what name he is called.”⁹⁰ Another instance of this (and the previous line of criticism) is the decision in *State of Gujarat v. Anirudh Singh* (‘Anirudh Singh’)⁹¹, where, following Karwal, the Court observed that,

“It would, thus, be clear that a senior reserve police officer appointed under the SRPF Act, though is a police officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquillity in the society and the powers of investigation envisaged in Chapter XII of the Cr. P.C. have not been invested with him.”⁹²

Cases such as *Anirudh Singh* portray the limits of judicial obduracy that have been experienced because of the test laid down in *Badku*, for these emphatic pronouncements hold little water when one turns to the Cr.P.C. § 5 overrides Cr.P.C. procedure when a special procedure is prescribed by any enactment.⁹³ Thus, *Anirudh Singh* brings an ‘anomalous position’ rendering § 25 “otiose in respect of officers on whom specific and incontrovertible police powers are conferred.”⁹⁴ Shorn of the prose, it clearly ignores applicable law and is *per incuriam*.

Thus, the Supreme Court has evidently succeeded in eliminating doubts over the scope of § 25, which were rife before its decision in *Badku*. The calm at the surface, however, hides the simmering tension which lies beneath. At the expense of efficiency, the current position leaves us with more questions than answers. But this is not all. The basis for sustaining this position is highly artificial and depends upon rather illusory distinctions. It distances us further

⁹⁰ *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409 : AIR 1991 SC 45, ¶ 22.

⁹¹ *State of Gujarat v. Anirudh Singh*, (1997) 6 SCC 514.

⁹² *Id.*, ¶ 19.

⁹³ The Code of Criminal Procedure, 1973, § 5 (It reads as follows:

“Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force”).

⁹⁴ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338, at 365.

from the intent behind § 25 by indirectly *permitting* the forcible extraction of confessions by persons who are very nearly police officers, but not quite so.

IV. CONCLUSION

The deviation from common law in § 25 was intended to prevent infliction of torture by the police in an attempt to extract confessions. To further this intent, an expansive understanding of the term police officer was needed according to the Calcutta High Court in *Hurribole*. Ever since, we have seen a judicial pell-mell regarding which officers ought to be considered as falling within this category. With repeated questions raised over the terms of § 25 since 1876, one wonders why the Parliament has not intervened to help clarify and explain the law.

Judicial review of legislation presents an opportunity for meaningful dialogue between judiciary and legislature, helping promote mutual institutional supervision, essential for a democratic state.⁹⁵ The engagement of courts with § 25 over time presents a classic case of judicial cues to the legislature, upon which the latter has unfortunately failed to act. The most direct of these was given by Costello J. in *Shariff* who after observing the confusion prevalent at the time specifically requested the legislature to intervene⁹⁶; the legislature itself has changed during the interregnum but the attitude of inaction remains constant. As of now, there has never been any attempt to amend § 25.

Perhaps, the absence of any amendment could be read to support a conclusion one might suggest. However, the rather equivocal nature of this exercise becomes apparent upon considering judicial references to the same over time. Fawcett J. in *Nanoo Sheikh*, understood this as tacit approval by the legislature of the expansive approach to applying § 25 adopted by him⁹⁷, as did Ghose J. in *Shariff*.⁹⁸ However Fazl Ali J. in *Radha Kishun*⁹⁹ and Jack J. in *Shariff*¹⁰⁰ believed an express amendment *was* needed to bring revenue officers within its ambit. When the matter first came to the Supreme Court in *Barkat Ram*, Dayal J. was critical of tacit acceptance arguments, believing the section would have been drafted differently to accommodate revenue officers.¹⁰¹ Thus, little can be asserted by arguments relying on legislative failures to act in this regard, which only strengthens the need for an express amendment to the law.

⁹⁵ AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 236 (2008).

⁹⁶ *Amin Shariff v. Emperor*, AIR 1934 Cal 580, ¶ 59.

⁹⁷ *Nanoo Sheikh Ahmed v. Emperor*, AIR 1927 Bom 4, ¶ 30.

⁹⁸ *Amin Shariff v. Emperor*, AIR 1934 Cal 580, ¶ 73.

⁹⁹ *Radha Kishun Marwari v. Emperor*, AIR 1932 Pat 293, ¶ 11.

¹⁰⁰ *Amin Shariff v. Emperor*, AIR 1934 Cal 580, ¶ 61-68.

¹⁰¹ *State of Punjab v. Barkat Ram*, [1962] 3 SCR 338, at 348-349 (He reiterated these opinions in *Raja Ram Jaiswal v. State of Bihar*, [1963] 2 SCR 752, at 805-806).

Rules of evidence governing admissibility of confessions and their construction are forever an attempt to balance the “desirability of a fair trial after fair police investigation against the undesirability of acquitting someone who is almost certainly guilty of the crime with which he is charged.”¹⁰² § 25 and the interpretive exercises about it are no different, and the paper has well-illustrated the infirmities abounding the current test employed by the Supreme Court. The certainty has not stemmed the flow of cases – the Supreme Court decided the last matter as late as October 2013,¹⁰³ and High Courts continue to deliver judgments almost every month.¹⁰⁴ With burgeoning criminalisation (or over-criminalisation) of activity coupled with further devolution of police powers by statutes upon officers not enrolled in the force, this will only exacerbate. The abeyance of the legislature has only fuelled ambiguity, and made matters worse. It cannot possibly remain ignorant of the vast swathes of judicial time and energy invested in resolving the interpretative dispute, with the liberty of thousands hanging in the balance. An added explanation to the section, if done properly, could put to rest the controversy which has enveloped the section since its introduction to the law of evidence. In fact, it perhaps presents the *only* real solution available out of this legal quandary.

¹⁰² Rupert Cross, *Confessions and Cognate Matters: An English View*, 66 (1) COLUM. L. REV. 79 (1966).

¹⁰³ Tofan Singh v. State of Tamil Nadu, (2013) 16 SCC 31.

¹⁰⁴ Gurua Naik v. State of Orissa, (2014) 2 MWN (Cri) 1 (Ori) (FB); Makhan Thakur v. State of West Bengal, Cri. App. 513 of 2009 (Cal HC) (Unreported).