State (Delhi Administration) vs Pali Ram on 26 September, 1978

Equivalent citations: 1979 AIR 14, 1979 SCR (1) 931, 1979 CRI. L. J. 17, 1978 SCC (CRI) 561, (1979) SCCRIR 76, 1978 (4) SCC 425, AIR 1979 SUPREME COURT 14, (1979) 1 SCR 931, 1979 (3) MAH LR 161, ILR (1979) 1 KANT 1, (1979) SC CR R 76

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, O. Chinnappa Reddy

PETITIONER:
STATE (DELHI ADMINISTRATION)

Vs.

RESPONDENT:
PALI RAM

DATE OF JUDGMENT26/09/1978

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
REDDY, O. CHINNAPPA (J)

CITATION:
1979 AIR 14 1979 SCR (1) 931
1979 SCC (2) 158
CITATOR INFO :
D 1980 SC 791 (7)

ACT:
Indian Evidence Act, 1872-Section 73-Scope of.

HEADNOTE:
Section 73 of the Indian Evidence Act provides that in order to ascertain. whether a writing is that of the person by whom it purports to have been written any writing admitted or proved to the satisfaction of the court to have been written by that person may be compared with the one which is to be proved, although that signature, writing has not been produced or proved for any other purpose. Para 2 of the section provides that the court may direct any person present in court to write in words or figures for the

purpose of enabling the court to compare words or figures alleged to have been written by such person.

In the course of criminal proceedings before a magistrate the prosecution alleged that one of the basic documents which was of vital importance to establish the case against the accused was in the handwriting of the accused but it could not be compared by the handwriting expert with any specimen writing of the accused because the latter avoided to give any specimen writing and that in the interest of justice the court should direct him to give his specimen writing. Exercising the court's power under s. 73 of the Evidence Act the Magistrate directed the accused to give his specimen handwriting to have it examined by a handwriting expert.

Revision preferred by the accused was dismissed by the Sessions Judge. The High Court, in the revision petition filed by the accused, held that the only purpose for which a court may direct any person present in the court including the accused person) to write words is to enable the court to compare the words and figures with any words and figures alleged to have been written by such person but where the purpose is to enable any of the parties to have the words so written compared from a handwriting expert of that party, the second paragraph of s. 73 would have no application. The High Court therefore held that the order of the Magistrate was beyond the scope of s. 73.

Allowing the appeal,

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HELD: The Magistrate did not act beyond the scope of s. 73 of the Evidence Act or in a manner which is not legal.

1. The two paragraphs of s.73 are not mutually exclusive, but complementary to each other. The sample writing taken by the Court under the second paragraph of s. 73 is in substance and reality, the same thing as "admitted writing" within the purview of the first paragraph of s. 73. The first paragraph does not specifically say by whom such comparison may be made but such comparison may be made by a handwriting expert (s. 45), or by one familiar with the handwriting of the person concerned (s. 47) or by the court. The section should be read as a whole in the light of s. 45. Thus

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read it is clear that a court holding an enquiry under the Code of Criminal Procedure in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under s.73 if in the interests of justice it directs an accused person to give his simple writing to enable the same to be compared by a handwriting expert chosen or approved by the court, it is immatrial whether the expert's name was suggested by the prosecution or the defence because even in adopting this course the purpose is to enable the court to compare the disputed writing with his admitted writing and to reach its own conclusion with the assistance

of an expert. [942G-H]

In the instant case the circumstances which weighed with the Magistrate in making the order, included the contumacious conduct of the accused and the resiling of the material witness. It was apparent from the record that the accused was playing the game of hide and seek with the process of law. The Magistrate therefore had good reason to hold that the assistance of the Government Expert was essential in the interests of justice to enable the Magistrate to compare the sample with the questioned writing with expert assistance. Although the specimen handwriting was sought to be used for comparison by the expert the ultimate purpose was to enable the court to compare that specimen writing with the disputed one. [943E-F]

2. The fact that the Magistrate's order might result in filling up of loop holes in the prosecution case, as alleged by the accused, is a purely subsidiary factor which must give way to the paramount consideration of doing justice. [944B]

3. Moreover, s. 165 of the Evidence Act and s. 540 of Cr.P.C. 1898 invest the court with a wide discretion to call and examine anyone as a witness if the court is bona fide of opinion that his examination is necessary for is a just decision of the case. In passing the order the Magistrate was well within the bounds of this principle. [944D]

4. In the matter of comparing the handwriting the judge should not take upon himself the task of comparing the admitted writing with the disputed one to find out whether the one agrees, with other. A prudent course is to obtain the opinion and assistance of an expert. [944F]

5. So far as the handwriting expert is concerned his real function is to put before the court all the materials together with the reasons which induce him to come to a conclusion. It is for the Court and the jury to form a judgment by their own observation of the materials. On receiving expert evidence the court should compare the handwriting with its own eyes for a proper assessment of the value of the total evidence. It is, therefore, not wrong to say that when a court seized of a case directs the accused person to give his specimen writing such direction is for the purpose of enabling the court to compare the writing so written with the writing alleged to have been written by such person within the contemplation of s. 73. [944G-H]

Fakhruddin v. State of Madhya Pradesh, AIR 1967 SC 1326 referred to.

6. Even where no expert is cited or examined by either party, the court may in the interests of justice call an expert witness, allow him to compare the sample writing with the alleged writing and thus give his expert assistance to enable the court to compare the two writings and arrive at a proper conclusion [946A-B]

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 336 of 1976.

Appeal by Special Leave from the Judgment and Order dated 18-2-1975 of the Delhi High Court in Crl. Revision No. 46 of 1973.

H. S. Marwah and R. N. Sachthey for the Appellants. D. B. Vohra for the Respondent.

The Judgment of the Court was delivered by SARKARIA, J.-This appeal by special leave, directed against a judgment dated February 18, 1975, of the High Court of Delhi, involves a question with regard to the scope of the powers of Court under Section 73, Evidence Act to direct an accused person to give his specimen writings. It arises out of these circumstances:

> Pali Ram, respondent along with Har Narain and 8 others was challenged by the police in respect of offences under Section 120B/ 420/477A/467/471, Penal Code, before the Additional Chief Judicial Magistrate, Delhi. The case being exclusively triable by the Court of Session, the Magistrate started inquiry proceedings under Section 207A, Chapter XVIII of the Code of Criminal Procedure, 1898. After most of the prosecution evidence had been recorded, an application dated December 11, 1970, was submitted on behalf of the prosecution. It was stated in the application that one of the basic documents (Ex. PW. 21/F) tendered in evidence was, according to the prosecution, in the handwriting of Pali Ram: but it could not be got compared by a handwriting expert with any specimen writing of Pali Ram because the latter was absconding and had avoided to give any specimen writing. It was further stated that this document is a very vital link to establish the case against the accused and in the interest of justice, the Court should direct Pali Ram accused to give his specimen writings, and forward the same along with the original documents marked P. 21/F to the Government Expert of Questioned Documents "with a view to have the necessary comparison". This application was strenuously opposed on behalf of the accused. After hearing arguments, the Magistrate on May 20, 1972, allowed that application. Since the construction of that order has a bearing on the problem before us, it will be appropriate to extract its material portion, in extenso, as under:-
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> "It was argued on behalf of Pali Ram accused..... that the power of the Court is limited to the extent only where the Court itself is of the view that it is necessary for its own purpose to take such writing in order to compare the words or figures so written with any word or figure alleged to have been written by such person and that this power does not extend to permitting one or the other party before the Court to take such writing for the purpose of its evidence or its own use. A.I.R. 1957 Bom. 207 was cited in this connection. It was further argued that Section 73 Indian Evidence Act did not entitle the Court to assist a party to the proceedings. It entitled the Court only to assist itself for a proper conclusion in the interest of justice. I have applied

> this test to the present case before me. It is true that here it is the prosecution which has made this request. But the observation contained in this ruling cannot be stretched to the extent, the defence wants me to do it. Ex. PW. 21/F was stated by Tekchand to be in Paliram's handwriting when he made statement before the Police. In his statement during committal proceedings he resiled from it. This document is undoubtedly a vital link. It has an important bearing on the case as Pali Ram himself happens to be an accused. In this peculiar situation it becomes necessary to take recourse to the Court's power under Section 73 in the interest of justice and to ask Pali Ram to give specimen handwriting (to have it examined by handwriting expert) and then to decide about it. Under these circumstances, I think it fit to allow the request of the prosecution in this regard."

(emphasis supplied) Feeling aggrieved by this Order, Pali Ram preferred a revision to the Court of Session. The revision was dismissed by the learned Additional Sessions Judge on December 7, 1972. Against this dismissal, Pali Ram preferred a revision petition (C.R. No. 46 of 1973) in the High Court. The revision petition first came up for hearing before R. N. Agarwal J, who felt that the case involved an important question of law which was not free from difficulty. He therefore referred it to a larger Bench, although he did not formulate any specific question.

The matter then came up for consideration before a Division Bench consisting of Jagjit Singh and R. N. Agarwal. JJ. The Division Bench gathered from the referring order "that the matter requiring consideration is, whether the second paragraph of Section 73 of the Indian Evidence Act empowers a Court to direct an accused to write in words or figures by way of specimen writings for enabling the prosecution to send the specimen writing to a handwriting expert for purposes of comparison with the writing of a disputed document alleged to be in the handwriting of that accused person."

After referring to certain decisions, Jagjit Singh J., who delivered the judgment of the Bench, answered the question posed, thus:

> "There is no ambiguity or confusion in the phraseology used in the second paragraph of the Section. There fore, the only purpose for which a Court may direct any person present in the Court (including an accused person) to write words or figures is to enable the Court to compare the words and figures so written with any words or figures alleged to have been written by such person. Where the purpose of directing a person present in Court to write any words or figures is not to enable the Court to compare the words or figures with any words or figures alleged to have been written by such person but is to enable any of the parties to have the words or figures so written compared from a hand-writing expert of that party, the second paragraph of Section 73 would have no application."

In the result, the High Court held that "the order of the learned Additional Chief Judicial Magistrate dated May 20, 1972, insofar as it related to disposal of the application filed on December 11, 1978, was not legal and was beyond the scope of Section 73 of the Evidence Act. To that extent, the said order and the order of the Additional Session Judge dated December 7, 1972, by which the revision

was dismissed, are set aside and the revision filed by Pali Ram is accepted".

Hence, this appeal by the State (Delhi Administration). We have heard Shri Marwah appearing for the appellant- State. None has appeared on behalf of the respondent, despite notice.

In the course of his elaborate arguments, Shri Marwah has tried to make out these points: (i) The expression "any person" in Section 73 includes a person accused of an offence. (ii) The word "court" in Section 73 includes the Court of the Magistrate competent to try the offence or hold an enquiry in respect thereof against such accused person under the Code of Criminal Procedure. (iii) Section 73 does not offend Article 20(3) of the Constitution, because by giving a direction to an accused person to give his specimen handwriting the Court does not compel that accused "to be a witness against himself". State of Bombay. v. Kathi Kalu Oghad(1) has been relied upon. (iv) There is nothing in Section 73 which prohibits the Court from sending the specimen writing obtained by it from the accused to a handwriting expert for opinion after comparison of the same by him with the disputed writing, even if that expert happens to be the Government Expert of Questioned Documents. A court is fully competent under Section 73, to make an order directing the accused to write down words or figures if the ultimate purpose of obtaining such specimen writing is to enable the Court trying the case, or inquiring into it, to compare that specimen writing with the disputed one to reach its own conclusion, notwithstanding the fact that, in the first instance, the Court thinks it necessary in the interest of justice to send that specimen writing together with the disputed one, to an expert to have the advantage of his opinion and assistance. (v) The specimen writings taken from an accused person by the Court under the second paragraph of Section 73 are, to all intents and purposes, "admitted writings" within the purview of the first paragraph of the Section which read with illustration (c) of Section 45, Evidence Act, clearly indicates that such specimen writings can legally be used for comparison with the disputed writing by a handwriting expert also, irrespective of whether such expert is examined as a witness by any of the parties, or as a Court witness by the Court acting suo motu or on being moved by the prosecution or the defence. (vi) The Government Expert of Questioned Documents is supposed to be a high officer of integrity who is not under the influence of the investigating officer and he is expected to give his opinion truthfully about the identity or otherwise of the two sets of writings on objective, scientific data. The mere fact, therefore, that in the instant case, he has been summoned as a prosecution witness, will not prejudice the accused, particularly when the Court, in the circumstances of the case, thinks it necessary to take the assistance of the expert for reaching its own conclusion on this point. (vii) The order of the Magistrate, construed as a whole shows that, in substance, the ultimate purpose of directing the accused to give his specimen writings is that the Magistrate himself wants to compare the specimen thus obtained, with the disputed writing, to form a just opinion about its identity, after availing himself of the advantage of the expert's opinion. (viii) This course was adopted by the Magistrate in the interests of justice taking into account the conduct of the accused who had been absconding for a long time and was declared a proclaimed offender, and thus avoided to give his admitted or specimen writings at the investigation stage, and later (it is contended) tampered with the prosecution witness (Tek Chand) who was expected to prove the disputed writing, and who in consequence of the tampering by the accused, resiled from his police statement during the proceedings in Court. In such a situation, even on the principle underlying Section 540 Cr.P.C. of 1898, which governs these proceedings, and is analogous to the principle underlying Section 73,

Para (2), the Magistrate was competent to use the specimen writing thus obtained, for securing the opinion and evidence of the Government Expert, with a view to assist himself (Magistrate) in forming his own opinion with regard to the identity of the disputed writing, Ex. PW. 21/F. (ix) the action of the Magistrate inasmuch as it sought the specimen writing of the accused to be sent, in the first instance, to the Government Expert for his opinion and evidence, far from being prohibited, was consistent with the principle enunciated by the Bombay High Court in Rundragonda Venkangonda v. Basangonda,(1) which received the imprimatur of this Court in Fakhruddin v. State of Madhya Pradesh(2). This principle is to the effect, that comparison of the handwriting by the Court with the other documents not challenged as fabricated, upon its own initiative and without the guidance of an expert is hazardous and inconclusive.

Points (i) and (iii) are well-settled and beyond controversy.

For points (iv) to (ix), Shri Marwah relies on Gulzar Khan v. State(3) and B. Rami Reddy v. State of Andhra Pradesh(4). Shri Marwah further maintains that the view taken by a learned Judge of the Calcutta High Court in Hira Lal Agarwall's case(4) followed in the impugned judgment by the Delhi High Court, and also by the Bombay High Court in State v. Poonam Chand Gupta(5) inasmuch as it is held therein, that the second clause of Section 73 limits the power of the Court to obtain the specimen writing of the accused, exclusively for its own purpose viz., for comparison with the disputed writing by the court itself, is too narrow and incorrect.

The question that falls to be determined in this case is:

> "Whether a Magistrate in the course of an enquiry or trial on being moved by the prosecution, is competent under Section 73, Evidence Act, to direct the accused person to give his specimen handwriting so that the same may be sent along with the disputed writing to the Government Expert of Questioned Documents for examination, "with a view to have the necessary comparison" ?
>
> There appears to be some divergence of judicial opinion on this point. In Hira Lal Agarwalla v. State (supra), a learned Single Judge of Calcutta High Court took the view that Section 73 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 interest of justice. It is not open to the Magistrate to send the specimen writing obtained from the accused for examination to an expert who is a prosecution witness." It was, however, conceded that "it is perfectly open to the court to call its own photographer, take the enlargements under its own supervision. study them, and if necessary call its own expert as a court witness in order that it might be assisted to a proper conclusion".

The dictum in Hiralal Agarwala's case (supra) was followed by a learned Single Judge of the Bombay High Court in State v. Poonam Chand Gupta, (supra) wherein it was held that the second clause of Section 73 limits the power of the court to direct 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 by such person. The power does not

extend to permitting one or the other party before the court to ask the court to take such writing for the purpose of its evidence on its own case.

In T. Subbiah v. S. K. D. Ramaswamy Nadar,(1) Krishnaswam Reddy, J. of Madras High Court adopted a similar approach in coming to the conclusion that section 73, Evidence Act gives no power to a Magistrate at the pre- cognizance stage or in the course of police investigation, to direct an accused person to give his specimen handwriting. K. Reddy, J. was careful enough to add that the court for the purpose of comparison can take extraneous aid by using magnifying glass, by obtaining enlargement of photographs or by even calling an expert-all these to enable the Court to determine by comparison. There is no basis for the view that the court cannot seek extraneous aid for its comparison: but on the other hand, there is indication in Section 73 of the Evidence Act itself that such aid might be necessary". (emphasis added).

As against the above view, a Full Bench of Patna High Court in Gulzar Khan v. State,(supra) held that a Magistrate has the power under Section 73, Evidence Act to direct, even before he has taken cognizance of the offence, an accused person to give signatures, specimen writing, finger prints or foot-prints to be used for comparison with some other signatures, handwritings, finger prints or foot prints which the police may require in the course of investigation. It was remarked that in Section 73, the word 'Court' must be equated with the court of the Magistrate in a case triable by him or before it is committed to Sessions in a case triable by the Court of Session. As a matter of fact, in every case where the accused is arrested and required to give his specimen handwriting or signature, or thumb impression etc., he is arrested under a warrant which must be issued by a Magistrate, or when the police arrest without a warrant in a cognizable offence under Section 60 of the Code of Criminal Procedure, he must be produced before a Magistrate without unreasonable delay and the procedure under Sections 60 to 63 of the Code as also under Article 22 of the Constitution has to be followed and that attracts the provisions of Section 73 of the Evidence Act.

In taking this view, the Patna High Court sought support from the decision of this Court in State of Bombay v. Kathi Kalu Oghad & Ors., (supra) wherein the police had obtained from the accused three specimen handwritings to show whether a chit, Exhibit 5, was in the handwriting of the accused, in the course of police investigation of the case, and it was held to be inadmissible by the Bombay High Court, for a different reason viz., on the ground that it was hit by Article 20(3) of the Constitution. This Court had held that those specimen writings were admissible.

In B. Rami Reddy v. State of Andhra Pradesh, (supra) the High Court of Andhra Pradesh took a similar view. Following the ratio of Gulzar Khan v. State of Bihar (supra), it was held that the Court does not exceed its powers under the Section in directing an accused to give his thumb-impression to enable the police to make investigation of an offence as even in such a case the purpose is to enable the Court before which he is ultimately put up for trial to compare the alleged impressions of the accused with the admitted thumb-impression.

At the outset, we may make it clear that the instant case is not one where the Magistrate had made the impugned order in the course of police investigation. Here, the Magistrate had taken cognizance of these two companion cases. The evidence of most of the prosecution witnesses has been recorded.

The problem before us is, therefore, narrower than the one which was before the Patna, and Andhra Pradesh High Courts in the aforesaid cases. All that we have to consider is, whether the High Court was right in holding that the order dated May 20, 1972, of the Magistrate calling upon the accused before it, to give his specimen handwriting, was "beyond the scope of Section 73, Evidence Act".

Before considering the scope of Section 73, it will be appropriate to have a look at the legislative background of this provision. Section 73 like many other provisions of the Indian Evidence Act, is modelled after the English law of evidence as it existed immediately before the enactment of the Indian Evidence Act in 1972.

The English Law on the subject, as amended by the English Acts of the years 1854 and 1865, was substantially the same as incorporated in Section 73 of Indian Evidence Act. Section 48 of the English Act II of 1855 was as follows:

> "On an inquiry whether a signature, writing or seal is genuine, any undisputed signature, writing or seal of the party whose signature, writing or seal is under dispute may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause."

Section 48 was repealed and the Criminal Procedure Act, 1865 was passed by British Parliament. Section 8 of that Act, which still holds the field, provides:

> "Comparison of disputed writing with writing proved to be genuine: Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

This Section applies in both Civil and Criminal Courts by virtue of Section 1 of the Act.

Apart from this Section, it was well settled that the Court in the case of a disputed writing, was competent to obtain an exemplar or specimen writing. In any case, the Court was competent to compare the disputed writing with the standard or admitted writing of the person in question. The position, as it obtained after the passing of the Criminal Procedure Act 28 and 29 Vict. C. 18, has been summed up by Taylor as follows:-

> "Under the Statutory Law, it seems clear.....that the comparison may be made either by the witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves (Cobbett v. Kilminister), or in the event of there being no jury, by the Court.... It further appears that any person whose handwriting is in dispute, and who is present in Court, may be required by the Judge to write in his presence, and that such writing may be compared with the document in question. Doed Devine v. Wilson, (1855) 10 Moore P. C. 502, 530; 110 R.R. 83; Cobbett v. Kilminister (1865) 4

F & F 490- (See Taylor on Evidence by Johnson & Bridgman, Vol. 2, paragraphs 1870 and 1871, page 1155).

Let us now compare it with Section 73 of the Indian Evidence Act, which runs as under:

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. 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 so written with any words or figures alleged to have been written by such person.. "

It will be seen that the first paragraph of Section 73 is, in substance, a combined version of Section 48 of the English Act II of 1855 and Section 8 of the English Criminal Procedure Act, 1865. The second paragraph of Section 73 is substantially the same as the English Law condensed by Taylor in the above-quoted portion of paragraph 1871.

Just as in English Law, the Indian Evidence Act recognises two direct methods of proving the handwriting of a person:

(1) By an admission of the person who wrote it. (2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

(i) By the evidence of a handwriting expert.

(Section 45)

(ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47).

(iii) Opinion formed by the Court on comparison made by itself. (Section 73) All these three cognate modes of proof involve a process of comparison. In mode (i), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (ii), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or

exemplar obtained by it from the person concerned.

A sample writing taken by the Court under the second paragraph of Section 73, is, in substance and reality, the same thing as "admitted writing" within the purview of the first paragraph of Section 73, also. The first paragraph of the Section, as already seen, provides for comparison of signature, writing, etc. purporting to have been written by a person with others admitted or proved to the satisfaction of the Court to have been written by the same person. But it does not specifically say by whom such comparison may be made. Construed in the light of the English Law on the Subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert (Section 45) or by one familiar with the handwriting of the person concerned (Section 47) or by the Court. The two paragraphs of the Section are not mutually exclusive. They are complementary to each other.

Section 73 is therefore to be read as a whole, in the light of Section 45. Thus read, it is clear that a Court holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under Section 73 if, in the interests of justice, it directs an accused person appearing before it, to give his sample writing to enabling the same to be compared by a handwriting expert chosen or approved by the Court, irrespective of whether his name was suggested by the prosecution or the defence, because even in adopting this course, the purpose is to enable the Court before which he is ultimately put up for trial, to compare the disputed writing with his (accused's) admitted writing, and to reach its own conclusion with the assistance of the expert.

In the instant case, the Magistrate, as the extract from his Order dated May 20, 1972, shows after considering the peculiar circumstances of the case, and recalling the observation of the Calcutta High Court in Hira Lal Agarwalla v. State (ibid) to the effect that Section 73 entitled "the court to assist itself for a proper conclusion in the interest of justice", expressly "applied this test to the present case". The peculiar circumstances which weighed with the Magistrate in directing the accused to execute sample writing to be compared, in the first instance, by the Government Expert of Questioned Documents, included the contumacious conduct of the accused and the resiling of the material witness, Tek Chand, which, according to Mr. Marwah, was possibly due to his having been suborned or won over by the accused. It was apparent from the record that the accused was playing hide and seek with the process of law and was avoiding to appear and give his sample writing to the police. The Magistrate therefore, had good reason to hold that the assistance of the Government Expert of Questioned Documents was essential in the interest of justice to enable the Magistrate to compare the sample and the question writings with the expert assistance so obtained and then to reach a just and correct conclusion about their identity. Although the order of the Magistrate is somewhat inartistically worded, its substance was clear that although initially, the specimen writing sought from the accused was to be used for comparison by the Government Expert, the ultimate purpose was to enable the Court to compare that specimen writing with the disputed one, Ex. PW. 21F, to reach a just decision.

In the Revision Petition filed by the accused before the High Court a grievance is sought to be made out that the Magistrate's order will work prejudice to the defence and enable the prosecution to fill

gaps and loopholes in its case. This contention was devoid of force. Once a Magistrate in seisin of a case, duly forms an opinion that the assistance of an expert is essential to enable the Court to arrive at a just determination of the issue of the identity of the disputed writing, the fact that this may result in the filling of loopholes" in the prosecution case is purely a subsidiary factor which must give way to the paramount consideration of doing justice. Moreover, it could not be predicted at this stage whether the opinion of the Government Expert of Questioned Documents would go in favour of the prosecution or the defence. The argument raised before the High Court was thus purely speculative.

In addition to Section 73, there are two other provisions resting on the same principle, namely, Section 165, Evidence Act and Section 540 Cr. P.C., 1898, which between them invest the Court with a vide discretion to call and examine any one as a witness, if it is bona fide of the opinion that his examination is necessary for a just decision of the case. In passing the order which he did, the Magistrate was acting well within the bounds of this principle.

The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.

It is not the province of the expert to act as Judge or Jury. As rightly pointed out in Titli v. Jones(1) the real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence.

In this connection, the observations made by Hidayatullah, J. (as he then was) in Fakhruddin v. State of Madhya Pradesh (ibid) are apposite and may be extracted :

> "Both under Sections 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case, the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to

> verify the premises of the expert in one case and to appraise the value of the opinion in the other case. The comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way, the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness."

Since even where proof of handwriting which is in nature comparison, exists, a duty is cast on the Court to use its own eyes and mind to compare, the admitted writing with the disputed one to verify and reach its own conclusion, it will not be wrong to say that when a Court seised of a case, directs an accused person present before it to write down a sample writing, such direction in the ultimate analysis, "is for the purpose of enabling the Court to compare" the writing so written with the writing alleged to have been written by such person, within the contemplation of Section 73. That is to say, the words 'for the purpose of enabling the Court to compare' do not exclude the use of such "admitted" or sample writing for comparison with the alleged writing of the accused, by a handwriting expert cited as a witness by any of the parties. Even where no such expert witness is cited or examined by either party, the Court may, if it thinks necessary for the ends of justice, on its own motion, call an expert witness, allow him to compare the sample writing with the alleged writing and thus give his expert assistance to enable the Court to compare the two writings and arrive at a proper conclusion.

For all the foregoing reasons, we are of opinion that in passing the orders dated May 20, 1972 relating to the disposal of the applications dated December 11, 1970, the learned Additional District Magistrate did not exceed his powers under Section 73, Evidence Act. The learned Judges of the High Court were not right in holding that in directing the accused by his said Order dated May 20, 1972, the Magistrate acted beyond the scope of Section 73 or in a manner which was not legal.

Accordingly, we allow this appeal, set aside the judgment of the High Court, and restore the order dated May 20, 1972, of the Magistrate who may now repeat his direction to the accused to write down the sample writing. If the accused refuses to comply with the direction, it will be open to the Court concerned to draw under Section 114, Evidence Act, such adverse presumption as may be appropriate in the circumstances. If the accused complies with the direction, the Court will in accordance with its order dated May 20, 1972, send the writing so obtained, to a senior Government Expert of Questioned Documents, named by it, for comparison with the disputed writing and then examine him as a Court witness.

Since the case is very old, further proceedings in the case shall be taken with utmost expedition.

P.B.R. Appeal allowed.