ALLAHABAD HIGH COURT

Ram Jeet

Vs.

State (Allahabad)

Cri. Revn. No. 52 of 1957

(B.R. James and J.N. Takru, JJ.)

12.12.1957

JUDGMENT

B.R. James, J.

1. This revision raises two important questions with regard to the scope of section 540 of the Code of Criminal Procedure. The facts are briefly these. Ramjeet and others were tried before the Sessions Judge of Jaunpur for riot, murder and allied offences. In accordance with the recent amendment in the Code, the trial was by the Judge sitting alone. After the entire evidence had been recorded, arguments were heard and concluded on the 10th November, 1956, and the learned Judge fixed the 21st November, 1956 for the pronouncement of judgment. But when he sat down to prepare the judgment and gave a thorough consideration to the evidence on the record it appeared to him that for the just decision of the case the evidence of certain persons who had not been examined hitherto was essential. Hence on the 21st November the date originally fixed for the delivery of judgment he decided to summon and examine those persons under Section 540, Criminal Procedure Code. The defense counsel objected that this could not be done under that provision of the Code, whereas the Public Prosecutor argued the reverse, and both learned counsel cited decisions in support of their respective view points. The learned Judge after considering the rival arguments held that Section 540 gave him jurisdiction to act in the manner that he had done, and accordingly he re-affirmed his order for the examination of the witnesses concerned. Aggrieved by that order the accused persons came to this Court in Revision, and before the learned single Judge the contentions advanced before the Sessions Judge were repeated. Finding that there was a conflict of judicial authority on the controversial point the learned Judge referred the case to a Division Bench. It is now before us for decision.

2. Two points have been raised on behalf of the accused applicants: first, that the examination of fresh evidence was tantamount to making good lacunae in the prosecution case hence was not justified under the provisions of Section 540 Criminal Procedure Code; second, that the trial

terminated with the conclusion of the arguments, hence under that section the Court had no power to call fresh evidence.

3. The contention that Section 540 of the Code cannot be used for filling loopholes left by the parties is not infrequently found contained in judgments of subordinate Courts and in submissions made from the Bar, but is nonetheless a misconceived one. Section 540 is in these words:-

> "Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined: and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case".

The section is manifestly in two parts, and what I should like to emphasize is that whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to the criminal Court and enables it at any stage of an enquiry, trial or other proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded: on the other hand, the second part is mandatory, and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion; it binds the Court to examine fresh evidence, and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge.

4. The misconception instinct in the applicant's argument is made evident by this analysis of the terms of Section 540 and springs from a disregard of the second part of the section. This part, as should be plain, casts on the Court the duty of calling fresh evidence whenever such evidence "appears to it essential to the just decision of the case". That is to say, the paramount consideration should be the doing of justice in the case, and whenever the Court finds that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes thought to be the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account.

5. Experience shows that subordinate Courts in exercising their powers under Section 540 Criminal Procedure Code confine themselves to its first part, viz., the discretionary part, but seem almost unaware of its second part, viz., the mandatory part, so that while dealing with their judgments this Court often comes across some such criticism as "so and so was a necessary

witness for the prosecution (or defense, as the case may be) but has not been produced", and the Court concerned then proceeds to draw inferences adverse to the party concerned. No doubt, illustration (g) to Section 114 of the Evidence Act entitles the Court to presume that evidence which could be and is not produced would, if produced, be unfavorable to the person withholding it. Nevertheless, Section 114 notwithstanding, for the benefit of subordinate Courts I should like to stress that in the trial of criminal cases it should not be necessary for them to rely on mere presumptions when the second part of Section 540 of the Code obliges them to summon the witness in question, and at least criminal Courts (unlike civil Courts, for the analogous provision of Order 16, Rule 14 of the Code of Civil Procedure gives the civil Court merely discretionary authority) are not entitled to level the type of criticism just referred to.

6. Reverting to the instant case, the Sessions Judge on a thorough consideration of the evidence before him came to the conclusion that the statements of certain witnesses who had not been examined by either party were essential to the just decision of the case and accordingly ordered them to be summoned and examined. His order was fully in accordance with the second part of Section 540, Criminal Procedure Code, and cannot be legitimately objected to. It has been objected that he decided to summon the witnesses at the suggestion of the Public Prosecutor. I do not consider that the objection is valid, and I am firmly of opinion that the learned Judge was entitled to call the fresh evidence irrespective of the source which inspired him to do so.

7. I turned to the second and more controversial point raised in the Revision. The accused-applicants contend that the trial terminated with the conclusion of the arguments hence the Sessions Judge had no power to utilise the provisions of Section 540 of the Code, whereas the learned State counsel argues that the trial extended to the delivery of judgment, hence fresh evidence could be examined any time before that. The issue depends on what exactly the term "trial" means in Section 540. On this matter there has been some conflict in judicial opinion, but to my mind the conflict can be easily resolved if we bear in mind the fundamental principle of interpretation of statutes with regard to specific words or expressions used by them. If any word or expression is found defined in the statute it must be given that meaning wherever it occurs in that statute, and in this matter there can be no compromise. But in *Shamrao Vishnu Parulekar v. Dist. Magistrate of Thana*[1], their Lordships of the Supreme Court affirmed the views of Craies and Maxwell that although it is reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act, the presumption is not of much weight, and that if sufficient reason can be assigned the same word or phrase may be used in different senses in the same statute, and even in the same section.

8. Now, the Code of Criminal Procedure of 1872 defined a "trial" as meaning "the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender". But the definition was excluded from the Codes of 1882, 1898 and 1923, nor was any included in the amendment of 1955, so that from the present Code the definition of the word "trial" is missing. Nor is the word found defined in the General Clauses Act. From the fact that in 1872

the legislature defined the term "trial" but omitted the definition from subsequent amendments, we can legitimately presume that they in their wisdom did not intend to assign a constant meaning to "trial" in the various provisions of the present Code.

9. This is precisely what judicial opinion holds. A Division Bench of the Calcutta High Court in *Jiban Molla v. Emperor*[2], held that the word

[1] AIR 1957 SC 23 2 AIR 1933 Cal 551

"trial" has no fixed or universal meaning and must be construed with regard to the particular context in which it is used and with regard to the scheme and purpose of the measure concerned. This was approved by the Federal Court in *Piare Dusadh v. Emperor*[3], The decisions of the Madras High Court in *Venkatachennaya v. Emperor, AIR 1920 Madras 337 (FB)*, and of this Court in *Inayat v. Rex*[4], subscribe to the same view. It is therefore evident that "trial" in the Code was not intended by the Legislature to have a constant meaning and that the meaning has to be determined in the context and intendment of each individual section in which the term is found used.

10. I turn now to address myself to the question in controversy before this Bench: does a trial under the Code terminate with the argument or does it extend to the delivery of judgment? The answer would depend on the purpose and intention of Section 540. Now, this section authorizes the Court to take fresh evidence if it considers it to be necessary for the just decision of the case it is trying. An illustration will show how the object of this section would be defeated were the trial thought to stop with the arguments. After hearing arguments the Magistrate or Judge sits down to prepare his judgment, and for this studies the police case-diary; he finds that it contains some essential evidence which the prosecution have withheld; the defense have naturally no means of knowing what the diary contains. Shall we then hold that the Magistrate or Judge is debarred from calling that essential evidence? If he is so debarred, a just decision of the case would manifestly not be possible. But keeping in mind the object of Section 540 we must hold that he is not debarred. It follows that he can take evidence under Section 540 up to the time of delivery of judgment.

11. This is what has been held in two Division Bench cases of this Court, *Chunnu Lal v. Rex*[5], both arising out of evidence recorded under Section 540 subsequent to the conclusion of arguments. In the former case the Bench held:

> "The Code does not lay down the point of time when a trial is to be deemed to be concluded. To our mind a trial continues till the judgment is delivered. Even though at one stage the evidence of the parties is concluded and arguments have been heard, the Court before delivering judgment is entitled in the interest of justice to examine of its own motion any witness, provided, of course, the interests of the accused are not prejudiced thereby. Section 540 in our opinion empowers a Court to take such evidence".

12. It is worth noting that in the later case, that of *Inayat v. Rex*, not only was the order for summoning fresh evidence made after the conclusion of arguments but subsequent to the taking of the opinion of the assessors. The Bench held that the word "trial" had not been used throughout the Code in the same sense, and they fortified this conclusion by a reference to the history of the law relating to criminal procedure and pointed to the omission of a definition of the term in Codes subsequent to that of 1872. Approving the decision in *Chunnu Lal v. Rex*, it observed as follows:.

> "The object of Section 540 Criminal Procedure Code is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence in the case, which is necessary for a just and proper disposal of the case.....The Court examines this evidence neither to help the prosecution nor to help the accused. The evidence is examined in the interest of justice. There seems to be no reason why it should have been intended by the legislature that the Court should berobbed of this power or should be absolved of its duty of ascertaining the truth before a case has been decided but after the parties have concluded the evidence or argued the case. If the provisions were intended for the benefit of the parties, it may have been possible to argue that a party, having exhausted all the opportunities allowed to it, should not be permitted to introduce further evidence. The provision has not been, as already stated, inserted for the benefit of a party. It is often that after the parties have led all the evidence and the Court has given a thorough consideration to that evidence, the Court feels the necessity of examining some evidence which has not been brought before it.

[3] AIR 1944 FC 1
[4] AIR 1950 All 369
[5] AIR 1949 All 692, and AIR 1950 All369

The Code does not specify when a trial ends, and even if we accept the arguments of the learned counsel for the applicants that a judgment is no part of a trial, there is nothing to hold that a trial comes to an end before a judgment has been pronounced. In our opinion a trial is terminated by the pronouncement of a judgment, and so long as a judgment has not been pronounced a trial is not terminated, even though the judgment itself may not be a part of the trial". With great respect, I am wholly in agreement with these observations.

13. A similar view has been held by the Calcutta High Court in *Ananda Chunder v. Basu*[6], and *Mofizuddin v. Sekandar*[7], by the Madras High Court in In re. P. C. Parumal, AIR 1924 Madras 587 (2), by the Patna High Court in *Ram Chandra Prasad, v. Emperor*[8], by the Nagpur High Court in *Mohamad Akbar v. Emperor*[9], by the Lahore High Court in *Mangat Rai v. Emperor*[10], and by the erstwhile Oudh Chief Court in *Gur Bakhsh Tewari v. Emperor*[11], , all cases dealing with the recording of fresh evidence under Section 540 subsequent to the conclusion of arguments.

14. I would also refer to the opinion of the learned authors of the AIR commentary on the Code

of Criminal Procedure, Vol. IV, 5th Ed., appended under section 540:-

> "The powers conferred by this section can be exercised at any stage of the enquiry or trial. An enquiry or trial comes to an end when the judgment or order is pronounced and until then the Court has power to act under this section. Thus, a fresh witness can be summoned and examined even where the evidence on both sides is closed and the case is posted for judgment".

Judicial opinion thus overwhelmingly favours the view that a "trial" extends up to the time of delivery of judgment and that fresh evidence under Section 540. Criminal Procedure Code can be taken at any time up to that stage.

15. There are two Division Bench cases of this Court, *Bakshi Ram v. Emperor*[12],

[6] *ILR 24 Calcutta 167* [8] *AIR 1937 Pat246,* [10] *AIR 1928 Lah 647*
[7] *AIR 1934 Calcutta 133* [9] *ILR 1948 Nag 308 : (AIR 1948 Nag 209)* [11] *AIR 1918 Oudh 142*
[12] *AIR 1938 All 102*

and *State v. Jai Singh*[13],
an unreported case which express a contrary opinion and which have been strongly relied on by the applicants. In the former case it was held that "the trial of a case includes those stages of the proceedings of the case in which the parties thereto are entitled to take part. The trial therefore extends to the recording of evidence and to the hearing of arguments". It is necessary to recall the facts which gave rise to that decision. The decision of the question referred to the Bench depended on the interpretation of the word "trial" occurring in Section 408, Criminal Procedure Code. The presiding officer had been an Assistant Sessions Judge till the conclusion of arguments, but had been made an Additional Sessions Judge when he delivered the judgment, and since the sentences were below the limit of four years' imprisonment the question was whether the appeal lay to the Sessions Judge or to the High Court. The Bench relying on sections 366 and 497 (4) of the Code and certain rulings held that the judgment is no part of the trial and. is outside the scope of a trial as contemplated by the Code of 1898. The Bench did not address itself to the question whether or not the word "trial" in the Code has a constant or variable meaning, nor did it examine the sense in which it is used in Section 540. In my opinion its decision is only an authority for deciding the question of the forum of appeal under Section 408, and, with great respect, I am unable to utilize it for purposes of Section 540.

16. The case of *State v. Jai Singh*, is more to the point, for in it the question was whether under Section 540 the Sessions Judge could take the evidence of any witness after he had recorded the opinions of the assessors and discharged them, and before he had pronounced judgment. The

Bench considered the decisions in both *Bakshi Ram v. Emperor*, and *Inayat v. Rex*, Supra and holding that they were not inclined to agree with the view expressed in the latter that the trial terminates with the delivery of judgment, preferred the view expressed in Bakshi Ram's case. In conclusion it observed as follows :-

> "In view of the various provisions of the Code of Criminal Procedure, specially those relating to the trial of Sessions cases with the aid of assessors or jury it appears to us that for the purposes of Section 540, Criminal Procedure Code, the stage of trial comes to an end after the evidence has been recorded, arguments heard and the opinion of the assessors or the verdict of the Jury has been taken. There is no provision in the Code of Criminal Procedure which empowers the Sessions Judge to revive the trial after re-summoning the assessors or the Jury.....the ultimate limit of a trial is when there is no more participation of the assessors or the Jury in the trial of the case, and this stage comes when the opinion of the assessors or the verdict of the Jury has been recorded".

17. No exception can be taken to this view so far as a Jury trial is concerned, for in such a trial the charge to the jury takes the place of the judgment, and as soon as the

[13] Cri. Appeal No. 871 of 1951 D/d. 05-03-1953 (All)

verdict of the Jury has been given nothing remains to be done except acquitting the accused or passing sentence on him (unless of course the Judge decides to submit the case to the High Court under Section 307 Criminal Procedure Code) But with profound respect, I am unable to agree with the Bench so far as a trial with the aid of assessors is concerned, for there was no provision in the Code for discharging the assessors after recording their opinion, so that no question of reviving the trial after their discharge can possibly arise. Besides, the question of a trial with the aid of assessors has now become a matter of mere academic importance for such trials have been abolished by the recent amendment to the Code.

18. I might add that there is a decision of a Division Bench of the Lahore High Court *Santa Singh v. Emperor*[14], which expresses the same opinion as *State v. Jai Singh,* namely, that the trial ends with the recording of the opinion of the assessors, hence evidence under Section 540 cannot be taken after their opinion has been recorded. But no reasons are found given for this view, which purports to follow two earlier cases of the late Chief Court of Punjab. *Santa Singh v. Emperor*, is therefore of no assistance to me. Besides, in the later case of *Mangat Rai v. Emperor*, which has been referred to earlier the Lahore High Court held a contrary view.

19. Two other cases, *Alex Pimento v. Emperor*[15], and *Natabar Ghose v. Adya Nath*[16], relied on by the applicants are really of no help to them: the first did not relate to Section 540, while the second case was based on the particular facts of the case.

20. In view of the foregoing discussion the conclusion I arrive at is that for purposes of Section 540 of the Code a trial terminates with the pronouncement of the judgment or the charge to the

Jury and so long as the judgment has not been pronounced or the Jury charged the trial is not terminated. Consequently a Magistrate, or a Judge sitting alone, is entitled to call fresh evidence up to the stage of delivering judgment. Similarly, a Judge sitting with a Jury can take fresh evidence until the stage of his charge to the Jury.

21. Both the points raised on behalf of the applicants are thus found to fail. I would therefore uphold the impugned order of the Sessions Judge of Jaunpur, dismiss this Revision and remit the record to the learned Judge for proceeding with the trial of Ramjeet and his co-accused according to law.

22. J. N. TAKRU J.:- I agree and have nothing to add.

Revision dismissed.

[14]35 Cri LJ 1002
[15] AIR 1920 Bom 339
[16] AIR 1923 Cal 690