JAMMU AND KASHMIR HIGH COURT

State

Vs.

Sheikh Mohamad Abdullah

Criminal Revn. Nos. 185 and 185 of 1963

(S. Murtaza Fazl Ali, J.)

09.11.1963. 31.12.1963

JUDGMENT

S. Murtaza Fazl Ali, J.

1. These two petitions arise out of two orders passed by the learned Additional Sessions Judge, Jammu, trying the "Kashmir Conspiracy Case". As the orders are inter-connected, I propose to decide them by one common judgment. In fact, the main order which has been assailed by the State is the one passed in criminal revision No. 185 of 1963 being the order of the learned Additional Sessions Judge dated 9.11.1963. The other revision is against the order which has been passed in consequence to the order .passed in Revision No. 185 of 1963.

2. The facts giving rise to the present petitions may briefly be summarized as follows :-

In what is known as "Kashmir conspiracy case" a witness for the prosecution Mohamad Sultan Gaznavi was produced on 19.10.1963 and his evidence was concluded on 13.11.1963. The witness was examined for the purpose of proving the charge of conspiracy levelled against that accused. The witness generally stated in his evidence that he was a manager of a paper called "Khalid-i-Jadeed" and was in close association with the accused particularly the accused Kh. Ali Shah and Sheikh Mohamad Abduliah and others who incited him to indulge in subversive activities against the State. In the course of his deposition the witness also stated that he had received certain letters in this connection. The witness was also examined before the Committing Magistrate but the letters were neither produced before the Committing Magistrate, nor were they included even in the additional list of documents and witnesses supplied by the prosecution before the Sessions Court, nor even at the time when the witness was being examined by the Court. The witness was examined at great length and the defense put it number of questions in order to impeach his credit and to show that there was no association of the kind alleged by the prosecution between him and the accused. No question, however, was specifically put in cross-examination regarding the letters which the witness deposed to have received from the accused Sheikh Mohamad Abdullah, Kh, Ali Shah and Sofi

Mohamad Akbar. After the evidence of the witness was concluded, he was discharges. On 6th November 1953 the witness appeared before the Court and filed an application producing certain letters and prayed that those letters may be admitted in evidence.
The prosecution had not made any application before for taking those letters in evidence. But when the witness made the application, the prosecution at once enforced the prayer of the witness and prayed to the court that the letters be allowed to be produced and proves. The learned Judge allowed the parties to file their objections and after hearing the objections refused to allow the letters to be produced and to be taken in evidence. When another witness Aftab Ram was being examined by the court a prayer was made by the prosecution that it may be allowed to get the signatures on the letters proved by the witness. The learned Judge disallowed this prayer because he had held previously that these letters should not be allowed to be produced. This order is the subject-matter of Criminal Revision being No. 185 oft 1963.

3. The learned Judge has written a very elaborate judgement and has given cogent reasons for not exercising his discretion in allowing the letters to be put in evidence. The learned Judge has pointed out that no regular application was filed by the prosecution asking the court to exercise its powers under Section 540 Criminal Procedure Code. The learned Judge has also commented on the conduct of the prosecution in not producing these letters if they thought them to be very material in the case either before the Committing Magistrate or at the opening of the trial.

4. Before me, however, the Advocate General has confined his argument only to the question that the learned Judge has failed to exercise his powers under Part (2) of Section 540 Criminal Procedure Code which he was bound to do it he was satisfied that the documents were essential for the just decision of the case. Thus the central point for consideration in this case is the interpretation and the application of Section 540 Criminal Procedure Code to the facts of the present case.

5. Section 540 of the Code of Criminal Procedure runs thus :-

> "Any court may, at any stage of any inquiry, trial or other proceedings 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."

An analysis of this Section shows that the Section consists of two independent parts. Under the first part the court has a discretion to summon or recall any witness at any stage of the case. The discretion is, no doubt, very wide and unlimited but the wider the discretion the more cautious should be the exercise of it. As regards the first part, of this Section, since the learned Judge has given cogent reasons for refusing to exercise his discretion under this Section, the matter cannot be agitated in revision. The Advocate General, therefore, invited me to consider the question as to whether or mot the learned Judge had refused to exercise the statutory duty imposed on him by virtue of second part of Section 540, Criminal Procedure Code. The second part of Section 540

Criminal Procedure Code no doubt imposes a statutory dirty on a court to summon, examine, recall or re-examine any person, if the following conditions are satisfied :-

i. If the evidence is essential.
ii. It is essential to the just decision of the case.

6. The Statute by using the word "essential" and by qualifying the word "decision" to an adjective "just" has clearly indicated that the powers should be exercised very cautiously and only where the Court thinks the evidence to be absolutely necessary in the interest of justice. In other words, the Statute arms the court with powers to take any evidence it likes ex debito justiciae. The words "just decision" do not necessarily imply that the decision should be either in favour of the prosecution or the defence. They merely confer a duty on the Court to proceed under this Section, where it finds it necessary to do so in order to arrive at the truth. At the same time, however, by the mention of word "just" the Court is cautioned against taking any action which may result in injustice either to the accused or to the prosecution. This seems to me to be the purport and ambit of the second, part of Section 540 of the Code; of Criminal Procedure. The duty imposed is one of the court and the court is not to allow itself to be converted into an instrument either by the prosecution or by the defence. The entire responsibility for taking the evidence lies on the court and the court alone. It will be indeed very difficult to lay down a general rule as to what in the circumstances of a particular case would be essential evidence necessary for the just decision of the case. But a few practical instances may be given in order to show the nature of jurisdiction, possessed by a court under this Section. There may be cases where a very material witness for instance, in a case of a riot the sole eye witness was not produced by the prosecution, the court in such circumstances may examine such a witness to find out the truth. Again there may be instances where a very material document which conclusively decides the case one way or the other or clinches the issue has been overlooked and in such circumstances, it is the duty of the court to call for the document and admit it into evidence. In *Ramchandra Prasad v. Emperor*[1], Rowland J. observed as follows :-

> "It seems to me that Section 540 is expressed in the widest possible terms and the intention is not to limit the discretion of the trying court in any way. At the same time, the courts ought to remember that the purpose of Section 540 is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a late stage, but to enable the court to act in the interest of justice when it considers such action necessary."

Thus his Lordship held that the power under Section 540 Criminal Procedure Code could not be exercised by a court to fill up gaps deliberately left by one of the parties to the case. While this may be an important consideration for the court to bear in mind in applying the provisions of Section 540 Criminal Procedure Code, if that court finally comes to the conclusion that a particular evidence is essential to the just decision of the case, the mere fact that the examination, of such a witness has the effect of filling up gaps would not deter or debar it from examining the witness

[1] AIR 1937 Pat 246

because, the Statute imposes a mandatory duty on the court to examine such a witness once the conditions laid down in the second part of Section 540, Criminal Procedure Code are fulfilled. The scope of Section 540 Criminal Procedure Code was very recently discussed by a Division

Bench of the Allahabad High Court, reported in *Ram Jeet v. State*[2], where, on a consideration of a number of authorities, their Lordships made the following observations :-

> "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.

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."

Similarly in a previous decision of the same High Court, reported in *Channu Lal v. Rex*[3], their Lordships made the following observations :-

> "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."

With great respect to these decisions, I fully agree with the interpretation given by their Lordships regarding the provisions of Sea 540 Criminal Procedure Code. Thus it appears that the paramount consideration for the court for applying Section 540 Criminal Procedure Code is to determine as to whether or not the evidence sought to be given is essential for the just decision of the case. In the instant case, the learned Judge has not given any clear finding on this question although he has generally expressed his view that the documents concerned were not essential to the just decision of the case an the present stage. Learned counsel appearing for the accused submitted that since the entire matter is before this court I should decide this question in order to avoid further delay, trouble and expense particularly when the case has had la very protracted career. The Advocate General also agrees to this course being

[2] AIR 1953 All 439

[3] AIR 1949 All 692

adopted. I would, therefore, now embark on an enquiry as to whether or not the documents concerned were essential to the just decision of the case, and were rightly rejected by the learned Sessions Judge. Before, however, going to the contents of the said letters, I may state certain undisputed facts. In the first place, the witness was examined toy the police before the Committing Court. But nowhere did he give any indication regarding the existence of these letters although he must have been aware of the presence of these letters which were with him all

the time since he deposed regarding them in his evidence before the Sessions Court. The dramatic fashion in which the witness suddenly appears a week after his evidences is concluded and asked the court to take these letters in evidence is a fact which speaks for itself. Secondly, the object mentioned in the application, given by the witness for admitting the letters in evidence is not that the letters are essential to the just decision of the case but is that they should be proved in order to show that what the witness is stating is true and that his credit has been wrongly impeached by the accused in his cross-examination. To allow such a prayer would be to introduce a new and dangerous practice leading to serious injustice to the accused and inordinate delay in the trial. If such a prayer is acceded to, the result will be that every witness will be given an opportunity of producing documents in order to destroy the effect of cross-examination. I understand that there are about 200 more witnesses to be examined by the prosecution and if every witness is given this concession, it will take a long time before the trial comes to an end because every time the accused also will have to be given an opportunity to rebut the new evidence introduced. Thirdly, the letters produced by the witness are by no means admitted documents because the alleged signatures of the accused on these documents are not admitted by the accused to be genuine ones. Thus if the documents are introduced, as evidence an expert will have to be examined and the case will have to be re-opened. I have mentioned these facts because they have to be taken into consideration for to purpose of showing whether the exercise of power under Section 540 Criminal Procedure Code is necessary in the interest of justice which I have said is the paramount consideration for the Court to bear in mind.

7. Now coming to the contents of the letters, I find that they do not make any reference to any unlawful or subversive activities which the witness is directed to indulge by virtue of the directions contained in the letters. Three of the letters produced deal with certain domestic matters, one of them narrates a sort of a religious sermon cautioning the witness to discharge his duties for the cause of truth. Another letter which is alleged to he signed by Sheik Mohamad Abduliah is in the nature of a printed pamphlet and gives the aims and objects of the paper "Khalid-i-Jadeed". The last document is a telegram which is alleged to have been given by the General Secretary requesting the witness to attend a particular convention. It will indeed be difficult for the prosecution to prove that the telegram was given by the accused because the name of the sender is not given in the telegram; only the designation "General Secretary" has been given. Moreover, any person can give a telegram like this and it will be very difficult to fix the identity of the sender with one of the accused. The Advocate General, however, argued that the letters have been couched in concealed language and the objects are obscure which could be understood only by the witness who would be able to explain the hints and symbols mentioned in the letter. Assuming that this is so this would not show that the documents are essential to the just decision of the case. The letters themselves do not show that they were in any way concerned with the subversive activities alleged against the accused and if we have to depend on the evidence of the witness for this purpose, then the evidence is already there. The letters would not improve his evidence. Even on this question we will have the only "word" of the witness for what is really concealed behind the contents of the letters. Thus in any case, the letters by themselves do not appear to be relevant much less essential for the purpose of proving the charges framed against the accused.

8. The Advocate General submitted that the letters would show at least that the witness was in correspondence with some of the accused and had, therefore, a close association with them. I am, however, unable to agree with this contention. The letters do not show any association of the kind

alleged by the prosecution and the mere fact that the witness entered into certain correspondence with the accused would not be material for the purpose of proving the charges framed against that accused when the contents of the letters by themselves do not appear to be incriminating.

9. The Advocate General finally submitted that the letters would at least go to corroborate the evidence of the witness who is in the nature of an approver. This contention is also based on a serious misconception, it is 'nobody's case that the witness was an approver. He was never arrested by the police. Nor was any pardon given to him as required by the provisions of the Code of Criminal Procedure. It is difficult to assume that the witness is an approver only for the purpose of introducing these documents as evidence in the case. Thus the position is that if the witness is believed, he would be believed on the basis of the intrinsic evidence given by him and not because of the letters. If on the ether hand the witness is disbelieved by the court, the letters would not lend greater credit to his testimony. Thus in any view of the matter, the letters do not appear to me to be material for the purpose of deciding the issues involved in the case.

10. For these reasons, therefore, I am satisfied that the letters are not essential for the just decision of the case and the learned Judge was right in refusing to allow the letters to be produced in evidence. Having regard to the circumstances mentioned above, it will be, in my opinion, a serious abuse of the powers of the court if these letters are allowed to be produced. Since I have held that the learned Judge was right in not allowing these letters to be taken as evidence in the case, it follows, that no question regarding these documents can be allowed to be put to any witness examined by the prosecution. Only such documents can be shown to the witness or proved by him which are produced by the prosecution and which form part of the record. It is not open to the prosecution to spring a surprise on the accused by putting in some documents to the witness which do not form part of the record and which the prosecution has not produced or has not been allowed to produce. The learned Judge was, therefore, right in disallowing the prosecution to put these letters to the witness Aftab Ram.

11. For these reasons, the applications are dismissed and the rule is discharged.
Applications dismissed.