**BOMBAY HIGH COURT**

Shreelal Kajaria

Vs.

State (Bombay)

Criminal Revn. Appln. No. 570 of 1963

(Gokhale, J.)

08.07.1963

**JUDGMENT**

**Gokhale, J.**

1. This revision application is against an order made by the Additional Sessions Judge, Bombay, by which he directed certain witnesses to be examined as Court witnesses under Section 540 of the Criminal Procedure Code. The petitioner is the accused before the learned Additional Sessions Judge. The allegation of the prosecution is that the petitioner entered into a contract on the 5th of September 1959 with the State Trading Corporation of India Ltd. for the supply of 7000 tons of Manganese Ore to be exported through the said State Trading Corporation of India Ltd. to Messrs. Ironsides Ltd., London, through their agents in India. The first installment of about 3000 tons of Manganese Ore was brought in the port premises in the year 1959, and after the petitioner received the intimation to lift the load, it was actually loaded in the month of July 1960, in a ship specially assigned for the purpose. The prosecution allegation further is that the petitioner received part payment on the strength of the letter of credit opened for that purpose. Some dispute arose between the State Trading Corporation and the Petitioner on the ground that the goods were encumbered with the Tokyo Bank. It was also alleged that the goods, which the petitioner had shifted, were not of proper specification. The petitioner states in the present petition that the State Trading Corporation wrongfully reduced the rate of payment, and in spite of an arbitration clause in the agreement, a sum of about Rs. 67,000/- was withheld by the Corporation, although it was promised as due on certain previous supplies. With regard to the remaining 4000 tons of Manganese Ore, the prosecution further alleges that on the pretext that this quantity was declared to be ready for being loaded sometime in February 1960, and after filling all the necessary documents, as no ship was assigned for lifting the Ore within 60 days in accordance with the terms of the contract, payment to the tune of 95% of the total value of the goods was appropriated by the petitioner. In April 1961, first information of this alleged offence was lodged in which it was stated that there was no unencumbered stock of 4000 tons of

Manganese Ore as declared by the petitioner, and the petitioner, in withdrawing Rs. 5,70,000/- purporting to be in accordance with the Letter of Credit, had committed the offence of cheating. It was also alleged that a certain report purporting to be the report of a Chemical analyzer in respect of the 4000 tons of Manganese Ore was a forged document, and the petitioner had used that document knowing it to be forged.

2. The defense was of denial. On these allegations, the Petitioner was committed to sessions and is at present being tried by the learned Additional Sessions Judge, Bombay.

3. In this petition, the petitioner alleges that in the charge-sheet, which was filed by the prosecution, names of 19 witnesses were mentioned as prosecution witnesses, but the prosecution, in fact, examined only 10 witnesses from this list. It is also alleged that at a subsequent stage, the learned Judge allowed the prosecution to examine 13 more witnesses whose names were not mentioned in the charge-sheet. I am, however, not concerned in this petition with these allegations, since no specific grievance has been made in this petition or during arguments at the bar with regard to the permission granted by the learned Additional Sessions Judge to examine the additional 13 witnesses. The prosecution evidence was completed; the defense also led evidence; and it appears that the examination of the accused under Section 342 of the Code of Criminal Procedure, had also been exhaustively done. It was practically after the entire case was over, that an application was made by the prosecution that it should be allowed to examine certain more witnesses in support of the prosecution case. It was stated in that application that on the information received by the prosecution, some documents, which have come to light, required investigation, and on that ground, 4 additional witnesses should be allowed to be examined to rebut the evidence led by the defense. The attempt was to show that certain weighment slips, to which reference was made by the defense, were false, and for that purpose, it was necessary to examine some person from the office of the Regional Transport Officer, and through him to get certain documents, produced before the Court. The learned Additional Sessions Judge has rejected the application made by the prosecution and has field that the prosecution was not entitled to lead any evidence in rebuttal of the defense case after the prosecution case was closed, and in this case, even after the defense evidence was led. The learned Additional Sessions Judge, however, thought that even though permission could not be granted to the prosecution to lead evidence in the nature of rebuttal, examination of certain witnesses was necessary in the interest of justice. He, therefore, passed the order, which is impugned in the present revisional application, directing certain witnesses to be examined as court-witnesses under Section 540 of the Criminal Procedure Code. It is to challenge this order of the learned Additional Sessions Judge, Bombay, that the present revision application is filed by the petitioner, original accused.

4. Mr. Peerbhoy appearing for the petitioner contends that although the learned Judge has rejected the application of the prosecution for examining witnesses in rebuttal of the defense case, by directing the very same witnesses to be examined under Section 540 of the Cri. Pro.

Code, the learned Judge, has, in fact, done what the prosecution wanted to do. He contends that the powers under Section 540, Cri. Pro. Code, are wide, but they cannot be exercised to fill in the gaps of the prosecution case and so as to help the prosecution in completing its case against the accused, which it had failed to do before the prosecution case was over. He says that the order made by the learned Additional Sessions Judge itself shows that he has decided to call certain witnesses under Section 540 Cri. Pro. Code ostensibly for the same reasons for which the application was made by the prosecution for examining these witnesses. His further contention is that in this case the prosecution had ample latitude in leading its evidence, and the use of powers under Section 540 by the learned Addl. Sessions Judge was improper. He pointed out that by permitting 13 witnesses to be examined even though their names were not mentioned in the charger sheet, the learned Judge had already shown enough latitude to the prosecution, and the defense, to that extent, had been considerably prejudiced. But the further order of permitting certain witnesses to be examined as court witnesses, even after the entire case was closed, is beyond the powers of the learned Judge under Section 540 of the Criminal Procedure Code.

5. In order to appreciate these contentions made by Mr. Peerbhoy, it is necessary to refer, in brief to the circumstances in which the learned Judge has directed these witnesses to be examined under Section 540. It appears that one Daga was examined as a prosecution witness. In the course of his evidence, certain weighment slips were got produced. These weighment slips, it is alleged, refer to certain managnese ore being transported by the accused in trucks. The weighment slips give the weight of the managnese ore carried and the number of the vehicle in which it is carried. The attempt was to show that the accused had manganese ore and he in fact transported it in the truck referred to in the weighment slips produced by the witness. I am not concerned here with the evidence of Daga or the value of these weighment slips. I have referred to them only for the purpose of showing that it was an attempt to show that the prosecution allegation that the accused had no manganese ore which was unencumbered was false. I am told that even in the course of the evidence which was led by the defense the defense had produced evidence to show that these allegations of the prosecution were false, and in support of this documentary evidence, such as the stock-book, cash-book, etc., were produced. In the order that the learned Judge has made, he has observed as follows :

> "A very broad feature of the defense evidence is that the important persons connected with the sale of 7000 tons, the taking of delivery of 7000 tons, the weighment of that ore, and those connected with the shifting of that ore from one place to another, are not before the Court at all as witnesses. Their writings have come before me and these are proved as writings of these persons by other witnesses who are conversant with their handwriting."

With regard to the evidence relating to the shifting of the ore from one place to another, the learned Judge came to the conclusion that it was necessary to examine some persons from the office of the Regional Transport Officer, who would give evidence to show as to whether the vehicles referred to in the various weighing slips were in fact used by the accused, or whether the

vehicles referred to in the weighing slips were capable of being used as vehicles for carrying manganese ore. It was argued before the learned Additional Sessions Judge, as it was argued before me also, the reference of vehicle numbers in the weighing slips was susceptible to many mistakes being committed, and this evidence would be of no use whatsoever to establish the prosecution case, nor would it negative the defense case. The learned Judge has observed that there would always be the possibility of some mistakes occurring, but the substance of the matter would depend on whether or not some of these mistakes are genuine mistakes, and whether the number of mistakes is so large that he should come to the conclusion that the weighment slips are of no use. As to what will be the effect of this evidence after it is led before the court, is a matter for the decision of the learned Additional Sessions Judges, and it is not for me, at this stage, to consider whether the evidence, which the learned Judge desires to be led before him, will serve the purpose which was intended to be served. But what is material is that the learned Judge himself came to the conclusion that apart from the right of the prosecution to examine any witnesses in rebuttal of the defense case, it was necessary in the interest of justice, that certain evidence should be permitted to be led, and that certain documents should be brought before the Court.

6. The important question, therefore, that arise for decision is whether the Court had the power to direct the evidence to be brought by examination of witnesses as court witnesses after practically the entire case was over. It is not disputed that the prosecution case was closed, nor is it disputed that the defense evidence was complete. It is common ground that the statement of the accused was also taken under Section 342 Cri. Pro. Code. Section 540 of the Criminal Procedure Code is as follows :

> "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".

Now, on the face of it, the section is couched in very wide terms. The section is in two parts. It would appear that the first part relates to the discretion given to the Court in the matter of examining witnesses as court witnesses; whereas, the second part imposes an obligation on the court to examine certain witnesses under certain circumstances. The obligatory part arises when it appears to the Court to be essential that the evidence of certain witnesses should be recorded for the just decision of the case. When the court comes to the conclusion that the examination of certain witnesses is essential to the just decision of the case, the exercise of any discretion by the Court does not arise. The latter part of the section makes it a requirement of justice that when it appears that the summoning and examining or recalling and re-examining any person is essential to the just decision of the case, the Court shall summon and examine or recall and re-examine such a person. The Court may act under the first part of Section 540 where an application is

made by the prosecution or defense and may exercise its discretion either in favor or against the prosecution or defense, depending on the facts and circumstances of the case, but that discretion does not exist when once the court comes to the conclusion that the examination or re-examination of any witnesses is essential to the just decision of the case. The learned Judge, in his order, has observed as follows :

> " ..... I am inclined to think that the way evidence is led, the way evidence is collected in investigation and also from the material that is placed by the accused before me in defense, it is in the interest of justice that I should satisfy myself about the correctness or otherwise of some of the positive evidence led by the accused."

The Court in this case has, therefore, acted on being satisfied that interest of justice required that for the just decision of the case, the evidence of certain witnesses should be brought before the Court, and for that purpose, certain witnesses should be called as witnesses of the Court under Section 540 of the Code of Criminal Procedure. Now, can it be said that when the court exercises its power under the latter part of Section 540, when it feels that it is obligatory on itself to examine certain witnesses in the interest of justice for the just decision of the case, the Court has exceeded its powers under Section 540 of the Criminal Procedure Code ? In my view, it would result in an unwarranted curtailment of the powers of the Court and it would fetter the Court's powers to call witnesses at any stage of the trial, if the Court comes to the conclusion that, for the just decision of the case, and in the interest of justice, recording of the evidence of certain witnesses is necessary.

7. Mr. Peerbhoy invited my attention to *The King v. Dora Harris*[1]In that case, the Recorder had called the prisoner, Benton, as a witness when the defense case had been closed, and the question, which came for consideration before the Court, was whether that course taken by the learned Recorder was in accordance with law. Avory, J. in dealing with the first question, as to the correctness of the course taken by the Recorder, observed as follows :

> "It is true that in none of the cases has any rule been laid down limiting the point in the proceedings at which the judge may exercise that right. But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case we adopt the rule laid down by Tindal, C.J. in *Reg. v. Frost*[2]*,* where the Chief Justice said :
> 'There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defense begins; but if any matter arises, ex improvise, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improvise may not be answered by contrary evidence

on the part of the Crown.'

That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the Judge after the case for the defense is closed, and that the practice should be limited to a case where a matter arises ex improvise, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue." Avory, J. then again referred to *Reg v. Haynes*[3], and observed that even as great a Judge as Bramwell, J. approved of the rule that it would be inexpedient to allow fresh evidence to be gone into after the close of the whole case. After laying down his general approval of the rule laid down by Tindal C. J. in (1839) 4 St. Tr. (NS) 86, Avory, J. referred to the particular facts of the case. In that case, the appellant, Dora Harris, was tried together with four other persons before the Recorder of the Liverpool City Sessions. The two male prisoners, Benton and Meaghee were charged for the theft of certain goods and the other three prisoners (including Dora Harris) were charged with receiving the stolen goods knowing them to be stolen. Benton pleaded guilty to the charge of theft but Dora Harris pleaded not guilty to the charge of receiving stolen property. The case had to proceed against Dora Harris, but Benton continued to remain in the dock as he had not been sentenced. After completion of evidence by the prosecution, Dora Harris led evidence in the defense. Her Evidence was that she had bought the goods not knowing

[1] (1927) 2 KB 587 [3](1859) 1 F. and F. 666

[2](1839) 4 State Tr. (N.S.) 86

them to be stolen. After the defense case was closed, the Recorder asked Benton, whether he was prepared to give evidence to which Benton replied in the affirmative. After Benton's evidence was over, the case against Dora Harris was much stronger than it was before. The appellant Dora Harris was not, however, asked whether she would like to go back in the witness box to give further evidence; no opportunity was given to her to contradict the evidence of Benton. Ultimately Dora Harris was convicted and sentenced. The prisoner, whose evidence was sought to be recorded, was a thief who was present in Court in the dock during the whole of the trial of the appellant. He had pleaded guilty but he was not sentenced. Avory, J. thought that when he was invited by the Recorder to give evidence, he would have understood that he was being invited by the Recorder to supplement the case against the appellant, Dora Harris. The learned Judge observed that Benton, who was convicted but not sentenced, had everything to expect from doing something which he thought would be pleasing to the Judge who had invited him to give evidence. Avory, J. also observed that no suggestion seemed to have been made that the appellant, Dora Harris, should go back into the witness box, after Benton had given his evidence, in order to give further evidence if she so desired, and that no opportunity to contradict the evidence of Benton was given to her. In the background of these circumstances, the learned Judge finally observed as follows :

> "In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defense has been closed, we are of opinion that in this particular case the course that was adopted was irregular,

and was calculated to do injustice to the appellant Harris."

Thus the ultimate decision of the case entirely turned on the circumstances of that case, and the learned Judge pointedly observed that he was not laying down that in no case can an additional witness be called by a Judge at the close of the trial after the case for defense has been closed. Even in approving the rule laid down by Tindal C.J., he had observed that he was adopting the rule for the purposes of the case he was deciding, because he thought that the course which was adopted was so irregular that it was calculated to do injustice. The question, therefore, whether or not, after the entire evidence is over, the Court should permit further evidence to be led, will depend on the facts of each case. It cannot be laid down as a general rule that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defense had been closed. The very fact that the section is couched in wide terms required a Judge to exercise caution in using his powers under Section 540 of the Criminal Procedure Code. It is, therefore, imperative that before using his powers, the Judge has to take into account the circumstances and decide whether the course of examining witnesses after the entire case is closed would be so irregular that it may be injustice to the accused. I do not think that the mere fact that evidence is directed to be taken after the entire case is over is in itself in excess of the powers of the learned Additional Sessions Judge. If in the circumstances of the case, the learned Judge came to the conclusion that it was necessary to call additional evidence in the interest of justice, the learned Judge could do so, within the framework of the wide terms of the powers given to the Court under Section 540 of the Criminal Procedure Code.

8. In In re, K.V.R.S. Mani, AIR 1951 Madras 707, Somasundaram, J. observed as follows :

> "The discretion that is given under the section, as already stated, is very wide and the very width requires a corresponding caution in using the power given to a Court under the section. By its very nature, the discretion to be exercised under Section 540, Criminal Procedure Code, depends on the facts of each case. It is indeed difficult to lay down a general rule as to when and under what circumstances the discretion ought to be exercised."

On the facts of that case, the learned Judge held that the course adopted of examining witnesses under Section 540 was improper, because it amounted to filling up a gap in the prosecution case. From the discussion to which the learned judge has adverted in his judgment, it appears that he was of the view that the prosecution could have reasonably foreseen the necessity of examining those witnesses who were later examined as court witnesses. In the circumstances of the case with which he was dealing, the learned Judge came to the conclusion that the course adopted by the trial Court was wrong, but he affirmed the principle that there was no limitation on the power of the Court under Section 540 to call evidence even at so late a stage as after the entire evidence was over.

9. Mr. Peerbhoy referred to *Ramchandra Prasad v. Emperor*[4], The question as to the

circumstances in which the powers under Section 540, Criminal Procedure Code should be exercised did not come up directly for consideration in that case. The main grievance, which was made on behalf of the accused, was that in spite of examining certain witnesses as court witnesses after the entire evidence was over, the learned judge had failed to question the accused again under Section 342 of the Criminal Procedure Code. In the lower Appellate Court, it was held that the failure to examine the accused again under Section 342 was an error and vitiated the trial. Rowland, J. who delivered the judgment, did not accept that contention and held that even in the absence of a fresh examination under Section 342, Criminal Procedure Code, the trial cannot be said to be vitiated in every case. The question whether the trial stands vitiated would depend on whether or not any prejudice, in the facts and circumstances of the case, was caused to the accused. The main question, therefore, which fell for consideration was the effect on the trial of the failure on the part of the trial Judge to question the accused under Section 342 once again after the evidence was led by calling a witness as a court witness. On the extent of the powers of the Court under Section 540, however, the learned Judge observed that the section is expressed in the widest possible terms, and the intention is not to limit the discretion of the trying court in any way. There is no doubt that the object of the section is not to enable any one or the other party before the Court to fill in the gaps of its case. The section is not to be used to enable the prosecution either to improve its version at a late stage or to enable it to fill in its gaps. The sole criterion in each case would be whether exercise of powers under Section 540, Criminal Procedure Code is necessary in the interest of justice. I do not think that the case, referred to by Mr. Peerbhoy can be of any assistance. In In re, N. Krishnaswamy, AIR 1956 Madras 592, the same learned Judge has observed that the test to be borne in mind in allowing evidence to be led under Section 540 would be to ascertain whether the matter has arisen ex improviso. If it was a matter that has arisen ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there should: be no reason why such evidence should not be permitted. But it must be noted that the learned Judge was concerned in that case with the question as to whether the prosecution should be

[4] AIR 1937 Pat 246

permitted to lead evidence after the defense evidence was closed and to rebut the defense evidence. The Court was not considering the question whether the Court should examine witnesses, if it appeared to the Court itself that for the just decision of the case, examination of certain witnesses was necessary in the interest of justice. It is difficult to construe the observations of the learned Judge so as to limit the powers of the Court in the matter of examination of witness, in cases where such a course was necessitated in the interest of justice, merely on the ground that the evidence which was sought to be led had not arisen ex improviso. In *Alex Pimento v. Emperor*[5], a Division Bench of this Court considered the scope of Section 540, Criminal Procedure Code. The question which arose for consideration was whether or not the prosecution was entitled to lead evidence after the defense case was over. It was not clear on the record of that case whether the evidence was called by the Court under Section 540, Criminal Procedure Code, or whether it was led by the prosecution in rebuttal of the defense case. Shah, J. observed that in the state of the record as it was before the Court it must be taken for the purpose

of the point which had been urged before them that the evidence was adduced on behalf of the prosecution and not called for by the Court under the powers vested in the Court under Section 540, Criminal Procedure Code. It was observed as follows :

> "In the present case the procedure, applicable was that provided for the trial of warrant cases by Magistrates and the scheme of the provisions relating to such trials must be followed subject to the special provisions of Section 540, Criminal Procedure Code. The special powers under Section 540 may be exercised under proper circumstances. But I do not think that the recording of evidence on behalf of the prosecution after defense evidence is closed can be justified. It is undoubtedly an irregularity; and, though in this particular case it is condoned under Section 537, Criminal Procedure Code, it is desirable to remember that it is an irregularity, which may at times necessitate a retrial and which ought to be avoided."

From these observations, it is obvious that even on the assumption that the evidence was led by the prosecution for rebutting the defense evidence, a Division Bench of this Court was of the view that the adoption of such a course would be an irregularity curable under Section 537, Criminal Procedure Code. On the facts of the case before them, the learned Judge observed that there was no prejudice, and the irregularity was cured. He, however, uttered a word of caution and said that such a course being undoubtedly an irregularity, which may in certain circumstances necessitate a re-trial. It should be avoided. But all this was with reference to the evidence led by the prosecution in rebuttal of the defense case. In fact, the learned Judge in terms referred separately to the powers of the Court under Section 540 and said that those powers may be exercised by the Court in proper cases. The observations do not relate to the very wide powers of the Court under Section 540, but relate to prosecution evidence being led in rebuttal of the defense case after the entire case was closed. I am of the view that far from supporting the proposition, which Mr. Peerbhoy has attempted to make before me, this case in fact lays down that the powers of the Court under Section 540 being wide can be exercised at any time in proper cases. In *Mahadu Raghavji v. Emperor*[6], Patkar, J., who delivered the Judgment of the Division Bench, specifically observed :

[5] AIR 1920 Bom 339

[6] AIR 1928 Bom 388

> "Under Section 540, a Magistrate can examine any of the witnesses after the evidence on both the sides has been taken and the case adjourned for judgment, inasmuch as the case is still a pending case where such evidence is taken."

The question, however, which arose before the Division Bench was whether it was obligatory on the magistrate to question the accused once again under Section 342 Criminal Procedure Code, after the recording of the new evidence. I am not concerned with that proposition in this case.

10. Mr. Peerbhoy, however, pointed out that the facts of this case are somewhat different in the sense that here the prosecution itself was attempting to examine these very witnesses who are

now called as witnesses by the Court. His argument was that even though the Court has rightly come to the conclusion that the prosecution was not entitled to lead evidence in rebuttal of the defense evidence, by passing the order under Section 540, the Court has done exactly what it did not want the prosecution to do. This is, says Mr. Peerbhoy, a circumvention of the well known principle of Criminal law that there should be no rebuttal after the entire prosecution case is over and by the exercise of the powers under section 540, the learned Judge has, in effect, given a go by to that well known principle. It is difficult to accept this proposition in the very wide way in which it is put, because it appears to me that the most paramount principle underlying Criminal Procedure is to meet the requirements of justice, and it is specifically to meet such eventualities that Section 540, is on the statute book. Section 540 is, as I have stated, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised. In fact, there will be a failure of duty on the part of the Court in not calling witnesses when once it comes to the conclusion that the examination of witnesses is necessary for the just decision of the case. Whether or not the attention of the Court has been invited to the necessity of certain evidence by the prosecution or the defense is immaterial so long as the satisfaction is of the Court. The mere fact, therefore, that in this case the prosecution did make an application for examination of these witnesses will not affect the powers which the Court had for examining certain witnesses in the interest of justice.

11. The order of the learned Judge shows that despite his refusal to sanction the application made by the prosecution, he decided to call these witnesses, because he thought that it was necessary in the interest of justice. After this evidence is taken by the learned Judge, it will be for the defense to consider whether any additional evidence was necessary to be led on their behalf, and it would be at that stage for the learned Judge to consider whether the interest of justice requires such evidence to be permitted. That is a stage which has not yet reached, and I do not express any opinion with regard to the same.

12. In the view which I have taken, the learned Additional Sessions Judge was right in passing the impugned order. I, therefore, confirm it and discharge the rule.

Rule discharged.