
(1974) 01 PAT CK 0019
In the Patna High Court

Anirudh Prasad Singh and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-01-1974

Acts Referred:

Penal Code, 1860 (IPC) — Section 149, 302

Citation : (1975) CriLJ 1702

Hon'ble Judges : S.K. Jha, J

Bench : Single Bench

Judgement

S.K. Jha, J.—The petitioners have come up to this Court in revision against an order dated the 16th November, 1973, passed by the learned Additional Sessions Judge, 3rd Court, Patna, in Sessions Trial No. 50 of 1972 refusing the prayer of the petitioners to examine six persons either as prosecution witnesses or as Court witnesses.

2. Short facts for disposal of this application are as follows. These three petitioners, along with two others, are being tried in the aforesaid sessions case for offences punishable under Sections 302 and 302/149 of the Indian Penal Code, besides some minor offences, for causing the death of one Birendra Singh, a student of the Anugrah Narayan Singh College, Barh, near the gate of the College premises. The prosecution, according to the petitioners, has examined five eye-witnesses, who, according to them, either belong to village Berhna or in some way or the other are connected with the said village and, as such, all of them are said to be highly interested witnesses. According to the petitioners, during the course of trial, P. W. 9 stated that the reason for the alleged occurrence was a dispute between a student of Sahri which is overwhelmingly populated by Rajputs and a student of Berhna which is overwhelmingly populated by Bhumihar Brahmins. According to the petitioners' case, as set up in the application and as also urged by the learned Counsel for the petitioners, P. W. 3 Ram Ashis Das, a peon of the College, aforesaid, in his evidence, had stated "College-Gate Ke Sate Pachim Staff-Room Hai. Staff-Room Me do Khirkian Hai.

College gate Ke Samne Dakhin Men Pan Ke Dukan Hai. Larke Tatha Staff Ke Log Pan Ke Dukan Se Pan Khat Hai." Again a portion of the evidence of the Investigating Officer (P. W. 15) Shri Ganpati Choudhary has been quoted as follows : "Dinank 10-12-1989 Main Purab Barh College Pahucha. Maine Hohan Per Praadhyapak Mahesh Prasad Singh, Raghunath Prasad Singh, Sita Saran Sharma, Lakshmi Narain Singh, Sabhi Praadhyapak Uparyukta college me Hain Ka Beyan Liya. Uparyukta Pradhyapak Men Kishi Ne Mujhe Nahin Kaha Ke Unlogon Ne Ghatna Ko Nahin Dekha Hai". The further case of the petitioners is that they had reliably come to know that the Investigating Officer had examined during the course of the investigation several Professors of the College concerned, including Krishnanandan Prasad, the owner of the shop, referred to above. The petitioners assert as they had asserted before the learned Additional Sessions Judge that they had reasonable apprehension that these were material and independent witnesses who were deliberately being suppressed by the prosecution to be examined as prosecution witnesses in the sessions trial. In" the aforesaid circumstances, the petitioners filed an application u/s 540 of the Code of Criminal Procedure (hereinafter referred to as the Code) before the learned Additional Sessions Judge praying that either the prosecution be directed to call those persons as prosecution witnesses or the Court might summon them as Court witnesses. The learned Additional Sessions Judge, by his impugned order, has rejected the prayer of the petitioners at this stage observing that Section 540 of the Code imposes on the Court the duty of summoning witnesses who would not otherwise be brought before the Court and such a discretionary power is to be invoked only for the ends of justice and is to be exercised with caution and circumspection and such a power is not meant to be exercised in course of prosecution evidence. If the circumstances so demanded, provisions of Section 540 of the Code could be invoked after the evidence -both for the prosecution and the defence -had been closed at the sessions trial.

3. Mr. Braj Kishore Prasad No. II, learned Counsel for the petitioners, has vehemently urged that the learned Additional Sessions Judge has erred in law in holding that this was not the appropriate stage at which the discretionary powers of the Court u/s 540 of the Code should be invoked. Learned Counsel has placed reliance on a number of decisions with which I shall later deal. Before referring to the decisions relied upon by the learned Counsel. I think it fit to enunciate certain well-settled principles of law regarding the scope and applicability of Section 540 of the Code. It is well settled that it is undoubtedly the duty of the prosecution to lay before the Court all material evidence available to it which is necessary for unfolding its case; but, as has been held by the Supreme Court in Masalti Vs. State of U.P., , it would be unsound to lay down as a general rule that every witness must be examined even though his evidence might not be very material or even if it was known that he had been won over or terrorised. In such a case, it is always open to the defence to examine such witnesses as their witnesses; and the Court can call such witnesses in the box in the interest of justice u/s 540 of the Code which vested the Court with the powers to exercise a

judicial discretion. To the same effect is the pronouncement of the Supreme Court in *Darya Singh and Others Vs. State of Punjab*, and it is worthwhile to quote a passage from the aforesaid decision of the Supreme Court,

It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. If is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that it a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper ease, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the Court may even examine such witnesses by exercising its powers u/s 540....

This being the settled principle of law, two points emerge out of it. Firstly, that it is the bounden duty of the prosecutor, the graver the offence the heavier the duty, to bring before the Court all such witnesses who may have witnessed, the incident to unfold the whole story. It is not open to the prosecution to deliberately suppress or hold back from the Court any material independent witnesses merely on the ground that the story, which he may unfold, may not be quite favourable to the prosecution; and secondly, the discretion is solely conferred u/s 540 of the Code on the trying Court to see as to whether there has been any such deliberate suppression or holding back of witnesses or not. If the trial Court while considering the case at any stage feels convinced that any material independent witness has been deliberately suppressed by the prosecution and that the non-examination of any such witness may lead to a miscarriage of justice, then *ex debito justitiae*, the Court, in exercise of its judicial discretion, shall call such witness as a Court witness. But, from these principles, it does not emerge that the accused persons as of right can compel the Court to exercise such a discretion at any particular stage of the case. As has been held by a Division Bench of the Allahabad High Court in *Mohammad Shafi Vs. State and Others*, , which view I very respectfully endorse, Section 540 does not confer a right on any party to examine, re-examine or cross-examine any witness. He has also no right to claim under the section, It is entirely discretionary with the Court in the interest of justice to take or not to take action under the section. As a result of failure of the trial court to exercise such a judicial discretion as is conferred upon it by Section 540 of the Code, the accused

persons may eventually be given the benefit of such non-examination either by the trial Court itself or by the appellate Court or, if such an irregularity has not been challenged at a proper stage, it may lead to a condemnation of the procedure followed by the trial court by the appellate court, But that, in no manner, indicates that any party, either the prosecutor or the prosecuted, is entitled as of right to compel the trial Court to take resort to the provisions of section 540 of the Code at any stage of the trial. The discretion is solely with the trial court and such a discretion, as already held, above, must be exercised judicially and in the interest of justice. It would, therefore, be open in the facts and circumstances of the case to the learned Additional Sessions Judge to apply his mind at any subsequent stage to find out whether or not there has been any deliberate and motivated suppression of any material independent witness who could be said to be in a position to unfold the true story. And if the learned Additional Sessions Judge at any stage of the trial is satisfied that the case is of such a nature, then I am quite sure he will not decline to exercise his discretion u/s 540 of the Code.

4. Learned Counsel for the petitioners, in support of his contention that, at any stage, the defence can bring it to the notice of the Court such materials as to justify an action u/s 540 of the Code and that, in that event, the Court will be bound to exercise such a discretion at that very stage, has relied upon a number of decisions, The two decisions of this Court relied upon by the learned Counsel are Hari Gope and Others Vs. Emperor, . Both these decisions are similar in nature insofar as at the appellate stage the advantage was given to the accused-appellant on account of the failure of the prosecutor to examine some material witnesses by deliberately suppressing them and on account of the failure of the trial Court to exercise its discretion u/s 540 of the Code. To the same effect is a decision of the Supreme Court in Kirpal Singh Vs. State of Uttar Pradesh, on which learned Counsel for the petitioners has strongly relied. In the case of Kirpal Singh in the Supreme Court, their Lordships were laying down the principles on which a Magistrate was bound in duty to examine all such witnesses as may be produced by the prosecutor as witnesses as also his duty to see as to whether in the interest of justice it was necessary to record the evidence of other witnesses. In that connection, their Lordships laid down that a Magistrate failing to examine witnesses to the actual commission of the offence because they had not been produced, without considering whether it was necessary in the interest of justice to examine such witness failed in the discharge of his duties. The principle laid down by the Supreme Court in the above mentioned case is unexceptionable, as I have already held above, at any appropriate stage when the trial Judge is satisfied that there has been any deliberate and motivated suppression of any material witness he will certainly take resort to his powers u/s 540 of the Code. But it is very difficult to cull out the principles of law as enunciated by the learned Counsel for the petitioners from the case of Kirpal Singh. The case is not the authority for the proposition that irrespective of the satisfaction of the trial Judge it is open to the prosecuted party to bring to the

notice of the Court the omission of any material witness to be examined and that, in such cases, the Court, is bound to exercise its discretion at that stage. Learned Counsel also placed reliance on the case of In Re: Venugopal Mudaliar, This case is merely an authority for the proposition that, where the prosecution thinks fit not to examine an important and material witness and gives him up, it is the duty of the Court to call him and examine him as a Court witness in the case and there is BO restriction as to the stage at which a witness may be called by a Court. In my opinion, this decision rather reinforces the view that I have taken above, namely, that the stage at which the trial Judge would take resort to the provisions of Section 540 of the Code and the fitness and appropriateness of such a stage must be in the discretion of the trial Court. It is difficult for me sitting in exercise of my revisional jurisdiction to scan the evidence and to find out as to whether or not this is an appropriate stage at which the learned Additional Sessions Judge must be directed to exercise his discretion u/s 540 of the Code.

5. As I have already held above, if and when the learned Additional Sessions Judge at any stage in course of the trial will reel satisfied that the trial would result in miscarriage and failure of justice on account of any deliberate and motivated suppression of material and independent witnesses by the prosecution, he will certainly exercise the discretion conferred on him by Section 540 of the Code.

6. With the aforesaid observations, this application is dismissed.