
(1967) 08 KL CK 0022
In the High Court Of Kerala
Case No : Criminal R.P. No. 426/66

Hafisa and Another

APPELLANT

Vs

Food Inspector, Ernakulam Municipality and Others

RESPONDENT

Date of Decision : 18-08-1967

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 173, 252
Prevention of Food Adulteration Act, 1954 — Section 13, 13(2), 16(l)(a)(i)

Citation : (1967) KLJ 745

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : V. Rama Sheno and M. Sukumara Menon, for the Appellant; V. Narayana Menon, for the Respondent

Final Decision : Allowed

Judgement

K.K. Mathew, J.—This is an application for revising an order passed by the District Magistrate, Ernakulam, on a petition filed by the complainant on 19-7-1966 in C.C. No. 394 of 1965 u/s 13(2) of the Prevention of Food Adulteration Act, 1954, hereinafter referred to as the Act. The revision petitioners are the accused in the case. The complaint was that they committed offences punishable u/s 16(l)(a)(i) and (ii) of the Act in that they have sold lac dhall or kesari dhall. Pw. 1 after purchasing the dhall and dividing it into three parts sent one part to the Public Analyst. The report of the Public Analyst is Ex. P-6. In the report the Public Analyst found:

.....
..... I further certify that I have caused to be analyzed the
aforementioned sample, and declare the result of the analysis to be as follows:

Microscopic examination: The dhall is axe-shaped.

Microscopic examination (i) The starch granules are round, irregular, the hilum is prominent and the branching of the hilum and striations are not prominent, (ii)

The palisade cells of the tests are macroscleriosa (rod shaped) with branched lumen and with lateral branches (pits) and am of opinion that the said sample consists of lac dhal otherwise known as Kesari dhal (Lathyrus Sativus). The sale of lac dhal (Lathyrus Sativus) under any description is prohibited on account of the fact that its consumption is injurious to public health.

After the prosecution evidence was closed, the accused applied for examining the Public analyst and the Analyst was examined as Dw. 1. Thereafter when the defense evidence was over, the complainant applied u/s 13(2) of the Act for sending the sample of dhal retained by him, for examination by the Director of Central Food Laboratory for the reason that a better analysis of the sample is necessary in the interest of justice. That application was opposed by the accused on the ground that it is belated. They contended that the prosecution knew from Ex. P-6 certificate the nature of the analysis conducted by the Public Analyst and if they wanted the sample to be analyzed by the Director of Central Food Laboratory they should have applied for that purpose before the prosecution evidence was closed, and that the accused would be prejudiced if the application is allowed at this late stage.

2. The learned Magistrate over-ruled the objection and allowed the application by the order under revision.

3. Counsel for the petitioners submitted that the complainant ought to have made the application before the prosecution evidence was closed and as no unforeseen circumstances have arisen the Magistrate should not have allowed the application even under sec. 540 of the Crl. P.C. Counsel relied on the ruling in *Sital Singh v Dalganjan Singh* 12 Allahabad Law Journal 15 to support his contention. In that case the court observed:

I have gone into this matter fully because courts too often in the present day unconsciously lend themselves to the needless spinning out of proceedings whereby the time of the court is wasted and parties, specially witnesses, are needlessly harassed. u/s 252 the prosecution is given full opportunity of substantiating their whole case. But it is expected, and the expectation is a right and proper one, that the prosecution should come to court with their case fully prepared and thought out. After the witnesses produced in support of the prosecution are heard, it is the duty of the Magistrate to see that prosecutors are not allowed to set the court on to a roaming enquiry summoning persons in the hope that something may be elicited which would help their case, and cases which ought to be heard within a fortnight are spun out to a period of six weeks and more to the inconvenience of all concerned.....

In general no rule can be laid as to when and under what circumstances the discretion to summon a witness ought to be exercised. Although the power of the Court to examine a person as a court witness is governed by Sec. 540, Crl. P.C., such powers exist in the courts in England also and as our procedure is modeled mostly on the procedure of the courts in England, it will be instructive to consider

the English decisions on the nature and limitation of the power of the court to examine a witness after closing the evidence for the prosecution and the defense.

4. In *R. v Day* 1940-1 All. E.R. 402 the appellant before the Court was convicted of forging a cheque for ?5. The prosecution case depended entirely upon the evidence of an accomplice, who had been convicted previously of the theft of the cheque. The prosecution also relied upon two letter-cards. It was admitted that the handwriting upon these was the handwriting of the appellant, and, in answer to a contention of counsel for the appellant that there was no corroboration of the evidence, of the accomplice, it was submitted that corroboration was to be found in the letter-cards. Thereupon the appellant was called, and gave the only evidence for the defense, which consisted of a complete denial of the forgery. The case was then adjourned, and, at the resumed hearing the judge, on the application of counsel for the prosecution, admitted evidence of a handwriting expert to say that there were similarities between the known handwriting of the appellant and the handwriting of the signature on the cheque. It was contended by the appellant that this evidence was wrongly admitted. The court held that the evidence was wrongly admitted as it was not evidence upon any matter which arose *ex improviso*, or evidence the necessity for which no human ingenuity could have foreseen, but was evidence the necessity for which was obvious from the commencement of the proceedings. The Court observed at page 404.

We think that the law is now well decided. It is true to say that, if a question as to the time at which evidence is to be received arises in the course of the trial, it may be that the judge may be called upon to decide the appropriate time, and, in so doing, exercise a judicial discretion. However, this was not such a case. This was a case where all that was being done was to seek to remedy an obvious deficiency in the evidence in support of the case for the prosecution, not only after the case for the prosecution had been closed, but also after the evidence for the defense had been heard, and it was an endeavor to call that supplementary evidence, although the material upon which that evidence was to be given had been in the hands of the prosecution from the beginning. It was evidence upon one branch of the prosecution's case, upon which it must have been realized that they must give positive evidence.

5. In *R. v Harris* 1927-2 K.B. 587, 594 the Court said:

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 *R v. Frost* (14 Digest 362) where Tindal C.J., 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 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 seems to me no reason why that matter which so arose ex improviso 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.

6. In the recent case of Regina v. Cleghom 1967-2 W.R.L. 1421 Lord Parker C.J., had to consider the same question. The prosecution in that case was for the offence of rape. The evidence was that four persons, including the accused were present in a flat at the material time. The prosecution called and examined the complainant and one of the other persons present, and the defense called the accused alone. Thereafter the court called and examined the fourth person, who was cross-examined by the prosecution and defense and, consequently, the accused had to give further evidence, and two further defense witnesses who would otherwise not have been called gave evidence, and the trial took on a different aspect, and the accused was convicted. On appeal, it was contended that the court should not have called the witness after the end of the case for the defense, and it was held, allowing the appeal, that although a judge has a discretion in a criminal case to call a witness not called neither party, as a general rule of practice, the court should call a witness at the end of the case for the defense only when no injustice or prejudice would be caused to the accused and some matter arose ex improviso. In the course of the judgment Lord Parker C.J., said:

It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party.

and then he quoted the following observations of Avory J., in Rex v. Harris 1927 2- K.B. 587, 594.

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 on 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.

7. Section 540 CrI. P.C, consists of two parts; the first part gives very wide discretion to the court. Even then the question is whether the court should exercise the power for filling up the gaps in the prosecution case. In Narayana Nambiar v. Emperor AIR 1942 Mad 203 after referring to the English and Indian decisions Horwill J., pointed out as follows :

If, in the present case, the learned Magistrate had examined C.W. I for the sole purpose of contradicting D.W. 6. I might have been inclined to hold that he had not exercised his powers under S. 540, CrI. P.C., judicially.

Generally the failure of the prosecution to adduce evidence on which they propose to rely at the appropriate stage cannot be made up by the court exercising its power under Sec. 540 Crl. P.C. Needless to say that the court should not be made an agency for further investigation into the case. The evidence that is sought to be adduced here is only for the purpose of filling up the lacunae in the prosecution case. In *re-Krishnaswamy*, AIR 1956 Mad 592 the Court observed:

I am of the view that after the filing of the charge sheet under S. 173, Crl. P.C., there can be no further investigation into the case by the police and therefore any persons examined by them cannot be put forward before the court as witnesses for the prosecution in support of their case.

In *V. Mahadevan* In re. 1964-2 M.L.J. 581, 583. the Court observed:

Undoubtedly, the Magistrate has a discretion to call any witnesses at any time for any purpose; but such discretion must be held to be wrongly exercised when witness is called by the Court to enable the prosecution to cross-examine the witness, more especially after the case has been closed. This is the view expressed by a Bench of this Court in *Collect v. Emperor* (1929 M.W.N. 396). As pointed out in *King v. Dora Harris* (L.R.1927-2 K.B.587), a Judge at a criminal trial has a right to call a witness not called by either the prosecution or the defense, if in his opinion that course is necessary in the interest of justice. But in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case is closed except in a case where a matter arises *ex improviso* which no human ingenuity can foresee.

In *Ramchandra Prasad Vs. Emperor*, it is observed:

It seems to me that S. 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 S. 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 set in the interest of justice when it considers such action necessary, so that the question for the learned Sessions Judge would be whether in the state of the evidence as it stood on 21st May the Magistrate exercised his discretion properly in admitting additional evidence.

In *The State v. Prakashchand* AIR 1955 M.B. 209 the Court said that the power under Sec. 540 is not to be exercised to fill up gaps in the prosecution case.

8. The learned Public Prosecutor submitted that reading sub-section (2) of Sec. 13 of the Act it is clear that power has been given to the court to send the sample for examination by the Director of Central Food Laboratory at Calcutta, that the power can be exercised by the court at any stage of the proceedings, and that it is in the discretion of the court whether to exercise the power or not. He also contended that under Sec. 540 of the Crl. P.C. the Court can not only

examine witnesses but also send the same for analysis by the Director of Central Food Laboratory, and that it is not necessary that there should be an application for the purpose. In *Shreelal Kajaria Vs. The State*, cited by the Public Prosecutor the learned Judge has reviewed practically the entire case-law on the subject. The court has held:

The question, 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 judge has to exercise caution in using his powers under S. 540. 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. The mere fact that evidence is directed to be taken after the entire case is over is not in itself in excess of the powers under S. 540.

Section 540 is, 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 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 the prosecution did make an application for examination of witnesses will not affect the powers which the Court has for examining those very witnesses in the interest of justice. (See the headnote)

9. After considering the matter in all its aspects I am not satisfied that this is a case where the complainant should have been given an opportunity to adduce any further evidence. The prosecution knew from Ex. P6 certificate the infirmity, if any, of the new analysis conducted by the Public Analyst, and if they wanted further evidence on the matter in the form of a certificate from the Director of Central Food Laboratory they should have applied before the prosecution evidence was closed. A certificate by the Director of Central Food Laboratory would supersede Ex. P6 certificate. Since nothing unforeseen has arisen, I do not think that this is a case where the application should have been allowed. I am not satisfied that the power of the Magistrate under Sec. 540 CrI. P.C. is so wide as that. In a case where the prosecution and the defense have closed their evidence, it is necessary that the judge or the magistrate must come to the conclusion that in the interests of justice it is absolutely necessary that the evidence should, be made available. The English Courts have laid down that the only case where a witness can be examined by court when the prosecution and the defense have closed their evidence is where some circumstance which no human ingenuity could have foreseen has emerged. The ultimate criterion for

exercising the power under Sec. 540 is whether in the interest of justice it is necessary. I think, it is because of the vagueness of this concept that the English Courts have said that this reserve power can be exercised by court only when the matter arises *ex improviso*, which, no human ingenuity can foresee. Practical considerations also there are for limiting the discretion of the court under the section, Those considerations have been expressed in the decision in *Sital Singh v Dalghanjan Singh*¹ The fact that the public analyst was examined by the defense and that his evidence is not to the satisfaction of the prosecution is no reason why the Court should invoke its power under Sec. 540 of the Crl. P.C. In this view, it is unnecessary for me to consider the point raised by Mr. Sheno, that the court can only examine witnesses under Sec. 540 and not send the sample for analysis under Sec. 13(2) of the Act.

I quash the order of the Magistrate, and direct the Magistrate to proceed with the case.

The revision petition is allowed.