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MOHAN LAL SHAMLAL SONI

v.

UNION OF INDIA AND ANOTHER

FEBRUARY 22, 1991

B [S. RATNAVEL PANDIAN AND K. JAYACHANDRA REDDY, JJ]

Code of Criminal Procedure 1973—Section 311 (Corresponding to section 540 of the old code)—Summoning of person as witness—Recall or re-examine of such person—Jurisdiction of Court—To be dictated by exigency of situation and fair play.

C

Appellant's business and residential premises were raided by the Customs Department as a result whereof gold ingots with foreign marks, gold ornaments silver bricks, coins and a cash of Rs.79,000 was seized. The Assistant Collector of Customs filed two separate com-

D **plaints relating to the said incident against the appellant before the Judicial magistrate, one for violating the provisions of Customs Act, 1962 and the other under the Gold Control Act, 1968. In the trial, after the close of evidence by both sides, prosecution as also defence, arguments were advanced on behalf of the accused appellant. The prosecution at that stage before commencing its arguments filed two applications in**

E **both the cases, under Section 540 of the Old Code (corresponding to section 311 of the new Code) requesting the trial court to recall one witness viz., the Seizing officer, and issue summons to two more witnesses for examination either as prosecution witnesses or as court witnesses. The trial magistrate rejected both the applications and the revision petitions preferred by the respondents against that order failed before**

F **the Sessions Judge. The Union of India thereupon preferred two revision applications before the High Court. The State of Gujarat also preferred separate revision applications before the High Court. The High Court allowed the revision petitions and directed examination of the three witnesses sought to be summoned. Being aggrieved the appellant has filed these appeals after obtaining special leave against the**

G **decision of the High Court, in the revision applications filed by the Union of India. No appeal has been filed against the order passed by the High Court in the revision applications filed before it, by the State of Gujarat. The main contention of the appellant is that the High Court erred in allowing the second revision application in view of the provisions of section 397(3) of the new Code thus permitting the prosecution**

H **to fill up the lacuna and plug the loopholes in its case which is prejudicial to the appellant.**

Dismissing the appeals, this Court,

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HELD: Though Section 540 (Section 311 of the new Code) 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, that power is circumscribed by the principle that underlines section 540, B namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. The aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capricicously or arbitrarily. Due care should be taken by the court while exercising power under this section and it must not be used for filling up the C lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. [721B-E] D

Whenever any additional evidence is examined or fresh evidence is admitted against the accused, it is absolutely necessary in the interests of justice that the accused should be afforded a fair and reasonable opportunity to rebut that evidence brought on record against him. [725E] E

The Criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court and must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of F justice command the examination of any person which would depend on the facts and circumstances of each case. [724C-D]

The facts and circumstances of the case require the examination of these three witnesses for a just decision of the case as held by the High Court. [726G] G

Jamatraj Kewalji Govni v. *State of Maharashtra*, [1967] 3 SCR 415; *Rameshwar Dayal* v. *State of U.P.*, [1978] 2 SCC 518; *State of West Bengal* v. *Tulsidas Mundhra*, [1963] 2 S.C.J. 204 at 207; *Masalti* v. *State of U.P.*, AIR 1965 S.C. 202; *Rajeshwar Prosad Misra* v. *State of West Bengal and Anr.*, [1966] 2 S.C.R. 178; *R.B. Mithani* v. H

A *Maharashtra*, **AIR 1971 S.C. 1630;** *Channu Lal* **v.** *R.*, **AIR 1949 All 692;** *Rengaswami Naicker* **v.** *Muruga Naicker*, **AIR 1954 Mad 169;** *Shugan Chand* **v.** *Emperor*, **AIR 1925 Lah 531 and** *The Queen* **v.** *Assanoolah*, **13 SWR (Crl.) 15, referred to.**

Mir Mohd. Omar and Others **v.** *State of West Bengal,* **[1989] 4** B **SCC 436, distinguished.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 4 & 5 of 1979.

From the Judgment and Order dated 21.3.1978 of the Gujarat High Court in Criminal Revision Application Nos. 98 and 97 of 1978.
C

S.K. Kulkarni and P.C. Kapur (NP) for the Appellant.

Arun Jetley, Additional Solicitor General, Ms. Indu Malhotra, M.N. Shroff, P. Parmeshwaran, Ms. A. Subhashini, Ms. Ayesha D Karim and P.K. Mullick for the Respondents.

The Judgment of the Court was delivered by

S. RATNAVEL PANDIAN J. These criminal appeals by special leave granted under Article 136 of the Constitution of India are prefer- E red by the appellant questioning the correctness of the judgment of the Gujarat High Court in Criminal Revision Application Nos. 98 and 97 of 1978 whereby the High Court set aside the judgment and orders dated 2.1.1978 of the Sessions Judge, Kutch at Bhuj made in Criminal Revision Application Nos. 46 and 45 of 1976 confirming the orders dated 19.6.76 passed by the Judicial Magistrate, First Class, Kutch in F Application Exh. Nos. 94 and 98 in Criminal Case Nos. 929 and 930 of 1973 respectively. The factual matrix that have relevance to the questions, raised and canvassed at the hearing may be briefly stated.

A raid conducted by the officers of the Customs Department in the business-cum-residential premises of the appellant on 17.9.1971 G resulted in the seizure of some gold Lagadis bearing foreign marks, primary gold, gold ornaments and silver bricks, coins etc. to the value of about Rs.8,48,422. During the said raid a sum of Rs.79,000 was also seized. In respect of this incident, the Assistant Collector of Customs filed two separate complaints on 26.11.1973 against the appellant in the court of the Judicial Magistrate, First Class, Anjar, being criminal H cases Nos. 929 and 930 of 1973 for offences punishable (1) under the

provisions of the Customs Act 1962 and (2) under the Gold Control Act 1968. After examination of the prosecution as well as the defence witnesses and recording of the statements of the appellants under Section 342 of the old Code of Criminal Procedure (hereinafter referred to as the 'Code') arguments were advanced on behalf of the appellant/accused. The prosecution at this stage before commencing its arguments filed two applications in both the cases under Section 540 of the old Code (corresponding to Section 311 of the new Code) requesting the Trial Court to recall Mr. Mirchandani (the Seizing Officer) for further examination and to issue summons to two more witnesses, namely, Mr. K.K. Das, Assistant Collector of Customs and the Deputy Chief Officer (Assayer) of Mint Master, Bombay for examination either as prosecution witnesses or as court witnesses as cotemplated under the said provision. The learned Judicial Magistrate passed two orders rejecting the applications which orders, on revision by the respondents were confirmed by the Sessions Judge. On being aggrieved by the said revisional orders, the Union of India (the first respondent herein) preferred two Criminal Revision Applications Nos. 97 and 98 of 1978. The second respondent, namely, the State of Gujarat also preferred two other Criminal Revision Application Nos. 124 and 125 of 1978. The High Court by its Common Judgment, though heavily criticised the conduct of the prosecution for its deplorable and lethargic attitude in not carefully and promptly conducting the proceedings allowed all the Criminal Revisions for the reasons assigned therein holding thus:

> "In view of what has been stated above, I accept the four petitions filed in this court by the Union of India, and the State of Gujarat, and direct the Union of India to examine the aforesaid three witnesses within a period of fortnight after the receipt of the order of this court to the trial court. After the Union of India examines the aforesaid three witnesses as aforesaid, it will be open to the accused to cross-examine all the witnesses examined by the Union of India before the learned Magistrate."

Feeling aggrieved by the judgment of the High Court, these two appeals are preferred by the appellant. In this context, it is pertinent to note that the appellant has not directed any appeal against the judgment of the High Court in allowing the two other Revision Application Nos. 124 and 126 of 1978 filed by the Gujarat Government which were also allowed by the High Court.

A The learned counsel appearing on behalf of the appellant vigorously challenged the legality of the impugned judgment *inter-alia* contending that the High Court has gravely erred in allowing the second revision petitions filed by the respondent by ignorning the weighty reasons given by the Trial Magistrate and the Sessions Judge (before whom the first revision was filed) and thereby in permitting the B respondent—the Union of India—to examine the three witnesses as prayed by it, notwithstanding that the case was pending before the Trial Court for considerable length of time and the defence argument was concluded and that the High Court, by the impugned order has permitted the prosecution to bolster up its case by filling up the lacuna and plugging the loopholes which if carried out would be detrimental and prejudicial to the appellant.

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The next legal submission made on behalf of the appellant is that the entertainment of the second revision by the High Court is in violation of sub-sections (2) and (3) of Section 397 of the new Code since the order passed by the Magistrate was an interlocutory order and that D even assuming that it was not so, the second revision by the same affected party is not entertainable.

Before adverting to the arguments advanced on behalf of the appellant, we would examine in general the scope and intent of Section 540 of the old Code (corresponding to Section 311 of the new Code).

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Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading "Miscellaneous'. But the present corresponding Section 311 of the new Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'. Section 311 is an almost verbatim reproduction of Section 540 F of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old Section. This section is mainfestly in two parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Code and enables it 'at any stage of enquiry, trial or other proceedings' G under the Code to act in one of the three ways, namely,

(1) to summon any person as a witness or

(2) to examine any person in attendance, though not summoned as a witness, or

H (3) to recall and re-examine any person already examined.

The second part which is mandatory imposes an obligation on the Court— A

(1) to summon and examine, or

(2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. B

The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice C require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case. D

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the E Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidene which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that F arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a G Court must discharge its statutory functions—whether discretionary or obligatory—according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any H

A Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter B in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

There are various other provisions in the new Code corresponding to the provisions of the old Code empowering the court specified therein to recall any witness or witnesses already examined or summon C any witness, if it is felt necessary in the interest of justice at various stages mentioned in the concerned specific provisions.

A Judge under Section 236 (Section 310 old Code) or a Magistrate under Section 248(3) (Section 251-A(13) and 255-A old Code) is D empowered to take evidence in respect of the previous convictions of the accused person concerned if he is charged with the previous conviction under sub-section (7) of Section 211 and if he does not admit the previous conviction. Under Section 367 (Section 375 old Code) if, when sentence of death passed by the Court of Sessions is submitted for confirmation to the High Court under Section 366(1) (Section 374 E of the old Code), the High Court thinks that a further enquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session.

F Under Section 391 (Section 428 old Code) the Appellate Court while dealing with any appeal under Chapter XXIX, if thinks additional evidence to be necessary, may after recording its reasons either take such evidence itself or direct it to be taken by a subordinate Court as the case may be. Under Section 463(2) (Section 533 old Code) if any Court of Appeal, Reference and Revision before which confession or G other statement of an accused recorded or purporting to be recorded under Section 164 or Section 281 (Section 364 of the old Code) is tendered, or has been received in evidence, finds that any of the provisions of either such sections have not been complied with by the Magistrate recording the statement, the Court may notwithstanding anything contained in Section 91 of the Indian Evidence Act take H evidence in regard to such non-compliance and may, if satisfied that

such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such evidence.

Analogous to the above provisions of the Code of Criminal Procedure there are various provisions in the Civil Procedure Code also enabling the civil Court to summon witnesses and examine them in the interest of justice. Under Order X Rule 2 of the Civil Procedure Code, the Court at the first hearing of the suit or at any subsequent hearing may examine any party appearing in person or present in Court or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied. Under Order X Rule 14 the Court *may of its own motion* summon as a witness any person including the party to the suit for examination and the said Rule is under the caption "Court may of its own accord summon as witnesses strangers to suit" and Order XVIII Rule 17 empowers the Court to recall any witness who has been examined and may subject to Law of Evidence for the time being in force put such questions to him as it thinks fit. The powers of the Court under this Rule 17 are discretionary and very wide.

Besides the above specific provisions under the Cr. P.C. and C.P.C. empowering the criminal and civil courts as the case may be, to summon and examine witnesses, a Judge in order to discover or to obtain proof of relevant facts is empowered under Section 165 of the Indian Evidence Act to exercise all the privileges and powers subject to the proviso to that section which power he has under the Evidence Act. Section 540 of the old Code (Section 311 of the new Code) and Section 165 of the Evidence Act may be said to be complementary to each other and as observed by this Court in *Jamatraj Kewalji Govani* v. *State of Maharashtra*, [1967] 3 SCR 415 "these two sections between them confer jurisdiction on the Judge to act in aid of justice."

The second part of Section 540 as pointed out albeit imposes upon the Court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. Though any party to the proceedings points out the desirability some evidence being taken, then the Court has to exercise its power under this provision—either discretionary or mandatory—depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the

A requirements of justice. In this connection we would like to quote with approval the following views of Lumpkin, J. in *Epps* v. *S.*, 19 Ga, 118 (Am), which reads thus:

> ". . . . . it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly . . . . . .
> . . . . . .
> Counsel seek only for their client's success; but the judge must watch that justice triumphs."

C The law is clearly expounded in the case of Jamatraj Kewalji Govani (referred to above) wherein Hidayatullah, J as he then was, while speaking for the Bench about the unfettered discretionary power of the court as envisaged under Section 540 of the Code has stated thus:

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> "It is difficult to limit the power under our Code to cases which involve something arising ex-improviso which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judi-
> E cial legislation. Cases that go far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides . . . . . .
> . . . . . .
> F . . . . . .
> It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court pro-
> G vided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has
> H acted without the requirements of a just decision, the

> action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

The next important question is whether Section 540 gives the court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) 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, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a *just decision of the case* by getting at the truth by all lawful means. Therefore, it shold be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

Fazal Ali, J in *Rameshwar Dayal* v. *State of U.P.*, [1978] 2 SCC 518 while expressing his views about the careful exercise of its power by the court has stated:

> "It is true that under Section 540 of the Criminal Procedure Code the High Court has got very wide powers to examine any witness it likes for the just decision of the case, but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise .....
> The words, "Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play."

In *State of West Bengal* v. *Tulsidas Mundhra*, [1963] 2 S.C.J. 204 at 207, it has observed:

A "It would be noticed that this section confers on criminal Courts very wide powers. It is no doubt for the Court to consider whether its power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to the just decision of the B case, it is its duty to take such evidence. The exercise of the power conferred by section 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case."

At the risk of repetition it may be said that Section 540 allows the court to invoke its inherent power at any stage, as long as the court C retains seisin of the criminal proceeding, without qualifying any limitation or prohibition. Needless to say that an enquiry or trial in a criminal proceeding comes to an end or reaches its finality when the order or judgment is pronounced and until then the court has power to use this section. The answer to the question like the one that has arisen in D the present case is whether the court would be justified in exercising its power under Section 540 is found in *Kewalji's* case (*albeit*). In that case the appellant was prosecuted on two counts under Section 135(a) and (b) of the Customs Act. The appellant did not lead any evidence on his behalf but filed a written statement, claiming *inter-alia* that no offence had been disclosed against him, since no witness had deposed that the E contraband had been seized from him under the Act in the reasonable belief that they were smuggled goods. The day after the statement was filed the prosecution applied for examination of the customs officer who was incharge of the search as a court witness in the interest of justice. The Magistrate ordered the examination of the officer under Section 540 of the Code rejecting the objections raised by the appel- F lant. Though an opportunity was given to the appellant to lead defence evidence, the appellant stated that he had nothing further to add and no evidence to lead. The Trial Court convicted the appellant who being aggrieved by the judgment of the Trial Court preferred an appeal to the High Court which dismissed the appeal. Before this Court it was contended that the evidence of the officer was improperly G received. That contention has been repelled by this court observing "This power is exercisable at any time and the Code of Criminal Procedure clearly so states" and thereafter concluded "it cannot be said that the Court had exceeded its jurisdiction in acting the second part of Section 540 of the Code of Criminal Procedure."

H Gajendragadkar, J. speaking for the Bench in *Tulsidas Mundhra*

(cited supra) has pointed out as follows:

> "Section 540 in terms applies at any stage of any enquiry, trial or other proceeding under this Code. This section is wide enough to include a proceeding under section 207-A and so, it would be unreasonable to contend that the scheme of section 207-A makes section 540 inapplicable to the proceeding governed by section 207-A. The power of the Court under section 540 can be exercised as much in regard to cases governed by section 207-A as in regard to other proceedings governed by the other relevant provisions of the Code."

(It may be noted that section 207-A of the old Code in Chapter XVIII under the caption "Enquiry into cases triable by the court of Session or the High Court" dealt with the procedures to be adopted in proceedings instituted on police report and this provision is omitted in the new Code.)

This Court in *Kewalji's* case (*albeit*) held that Chapter XXI of Cr. P.C. (old) under the heading "Of the Trail of Warrant—cases by Magistrates" does not restrict the powers of criminal court under Section 540.

In *Masalti* v. *State of U.P.*, AIR 1965 S.C. 202 wherein the defence did not opt to examine some witnesses who have been left out by the prosecution on the *bona fide* belief that those witnesses had been won over and the court also after due deliberation refused to exercise its power under Section 540; this Court while examining a submission that the Trial Court should have exercised its power under Section 540 and examined those witnesses expressed its opinion that "that is one aspect of the matter which we have to take into account"—that is in considering whether the accused were prejudiced or not.

It has been held by this Court in *Rajeswar Prosad Mitra* v. *State of West Bengal & Anr.*, [1966] 1 SCR 178 while dealing with the ample power and jurisdiction of the court in taking additional evidence as follows:

> "Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature

A has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial."

The above view has been reiterated in *R.B. Mithani* v. *Maharashtra,* AIR 1971 S.C. 1630.

C The principle of law that emerges from the views expressed by this court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the D situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.

What falls for determination now is whether the person indicated E should be given an opportunity to rebut the evidence of the witness or witnesses summoned and examined under Section 540. This question came for determination in *Rameshwar Dayal's* case and this court answered that question thus:

F "It was argued by counsel for the State that there is no provision in the Criminal Procedure Code which requires the court to allow the appellant an opportunity to rebut the evidence of witnesses recommended under Section 540 Cr. P.C. This argument, in our opinion, is based on a serious misconception of the correct approach to the cardinal principles of criminal justice. Section 540 itself incorporates a rule of natural justice. The accused is presumed to be innocent until he is proved guilty. It is, therefore, manifest that where any fresh evidence is admitted against the accused the presumption of innocence is weakened and the accused in all fairness should be given an opportunity to rebut that evidence. The right to adduce evidence in rebuttal is one of the inevitable steps in the defence of a case by

the accused and a refusal of the same amounts not only to an infraction of the provisions of the Criminal Procedure Code but also of the principles of natural justice and offends the famous maxim *audi alteram partem* .....

.....

A careful perusal of this provision manifestly reveals that the statute has armed the Court with all the powers to do full justice between the parties as full justice cannot be done until both the parties are properly heard the condition of giving an opportunity to the accused to rebut any fresh evidence sought to be adduced against him either at the trial or the appellate stage appears to us to be implicit under Section 540 of the Cr. P.C."

See also *Kewalji's* case (*cited above*). This was the view taken by various High Courts such as in *Channu Lal* v. *R.*, AIR 1949 All. 692; *Rengaswami Naicker* v. *Muruga Naicker*, AIR 1954 Mad. 169; *Shugan Chand* v. *Emperor*, AIR 1925 Lah 531 and *The Queen* v. *Assanoollah*, 13 SWR (Crl.) 15.

The views expressed in the above judgments of the various High Courts have been approved by this Court in *Rameshwar Dayal's* case. We are in full agreement with the above view of Fazal Ali, J and hold that whenever any additional evidence is examined or fresh evidence is admitted against the accused, it is absolutely necessary in the interest of justice that the accused should be afforded a fair and reasonable opportunity to rebut that evidence brought on record against him.

With this legal background let us now turn to the challenge posed by the appellant in these appeals. The Trial Court and the First Revision Court rejected the request of the prosecution on three grounds, namely, first that the prosecution has attempted to fabricate evidence at a belated stage to fill up the lacuna in the prosecution case and secondly that the request of the prosecution for taking additional evidence was after the closure of the defence and thirdly a substantial prejudice would be caused to the appellant if the prosecution is allowed to adduce fresh evidence. As pointed out by the High Court in its impugned order, gold, silver and ornaments of the value of Rs.8,48,482 and currency notes of Rs.79,000 have been seized from the premises, searched on the strength of the search warrant issued by Shri K.K. Das. What the appellant now contends is that the order of the High Court permitting the prosecution to recall one of the witnesses already examined and to summon two other new witnesses to prove

A the foreign markings on the lagadis is in violation of the principle underlying Section 540. We waded through the entire records inclusive of the copies of depositions, search warrant and the application filed by the prosecution under Section 540 which are available in the file, forwarded by the High Court though those documents are not annexed with the SLP. The prosecution filed the petition for examination of the B three witnesses stating that foreign ingots (lagadis) have been seized from the possession of the appellant and that warrant for search of the premises of the appellant/accused was issued in this regard by the Assistant Collector of Customs, namely Shri K.K. Das and hence fresh evidence is necessary for a just decision of the case. After perusing the depositions of the witnesses already examined that are found on the file, we think that the appellant/accused cannot be said to be pre- C judiced in any way by examination of these three witnesses. PW-2 who was then working as Superintendent of Customs in the office of the Assistant Collector of Customs at Adipur during the relevant period has stated that Shri K.K. Das who was the then Assistant Collector of Customs issued the warrant dated 7.9.1971 authorising Shri Mirchan- D dani, Superintendent of Customs, Adipur to search for the prohibited and dutiable goods and documents in the premises mentioned in the warrant. It is elicited from the same witness in the cross examination that the gold ornaments were seized since the seizing authority doubted that they are smuggled gold and procured by contravening the Gold Control Act. It is seen from the evidence of PW-3 that he and E others inclusive of Superintendent Mirchandani went to the house of the appellant and they seized the gold ornaments Dhalia, that is, primary gold under Panchnama and search list Exts. 24 and 25. Therefore, the appellant's grievance that he has been taken by surprise on the request of the prosecution for taking fresh evidence; that the evidence sought to be obtained is only for filling up the lacuna and the F judgment, impugned is prejudicial to him cannot be countenanced. Of the three witnesses, permitted to be summoned and examined on the side of the Union of India, the Mint Master is only an assayer. In our considered opinion, the facts and circumstances of the case require the examination of these three witnesses for a just decision of the case as held by the High Court.

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In the light of the proposition of law which we have derived in the preceding portion of the judgment there is no illegality in summoning the witnesses after the closure of the defence arguments. It is seen from the order of the Trial Court that the argument of the prosecution has not yet begun. Since we feel that any further observation of ours in H justification of this order may prejudice the defence of the appellant

before the Trial Court, we are not inclined to discuss the evidence any further. A

A decision of this Court in *Mir Mohd. Omar and Others* v. *State of West Bengal,* [1989] 4 SCC 436 was relied upon to show that after the examination of the accused under Section 313 of the new Code (corresponding to Section 342 of the old Code) the prosecution should not move the Trial Judge for recalling a witness already examined, but the observation made in that decision has no application to the present case because in that case the said observation was made in a different context by this court while examining the plea of the prosecution in making corrections of the evidence already recorded under Section 272 of the Code and that decision does not deal with the ambit of Section 540 of the Code. B C

The other contention raised on behalf of the appellant is that the order of the Magistrate rejecting the application of the prosecution under Section 540 is not a revisable order under Section 397(1) as it being an interlocutory order and even if it is not so, the second revision by the same party—i.e. Union of India is not entertainable in view of the statutory bar under Section 397(3) of the new Code as the Union of India has already availed the revision under Section 397(2) before the Session Judge. We may straightaway reject this plea on the simple ground that the prosecution in the present case was launched under the old Code and as such the only provisions of the old Code have to be applied as per Section 484 of the new Code. The fervent plea of the appellant is though the prosecution was instituted under the old Code he should not be denied the benefit and advantage of Section 397(2) and (3) of the new Code. We are afraid that we could accede to this inexorable request of the appellant for two reasons, namely, that the appellant has not challenged the maintainability of the second revision, filed and heard after the commencement of the new Code before the High Court, claiming advantage of Section 397(3) of the new Code and secondly he participated in the revision proceedings throughout under the old Code. Having failed in the revision he has no justification to raise this point before this Court, especially when the proceedings under the old Code are saved by Section 484 of the new Code. D E F G

As far as the question whether an order under Section 540 of the old Code is an inerlocutory order or a final order, need not be gone into as that question does not arise in these proceedings. We would like to point out before parting with this judgment that though the High Court by its impugned judgment directed the Union of India to H

examine the three witnesses, in fact it has allowed all the four revision applications inclusive of the revision application Nos. 124 and 125 of 1978 filed by the State of Gujarat seeking the same prayer as that of the Union of India. The appellant as we have pointed out in the prefatory portion of this judgment that that part of the judgment of the High Court allowing the two revisions filed by the State Government remains unchallenged. Further we would like to point out that the High Court in its concluding paragraph of its judgment instead of using the words "I ..... direct" ought to have used the words "I ..... permit".

For all the reasons stated above, we hold that the judgment of the High Court does not suffer from any illegality or perversity calling for an interference at the hands of this Court and as such the appeals are liable to be dismissed as devoid of any merit. However, we direct the Trial Court to afford a fair opportunity to the appellant/accused to cross-examine the witnesses sought to be examined by the Union of India and also to lead rebuttal evidence if the appellant so desires. Accordingly these two appeals are dismissed.

Y.L. Appeals dismissed.