

**State Vs. Ulfatia**

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**Court :** Allahabad

**Decided On :** Dec-08-1971

**Reported in :** 1972CriLJ994

**Judge :** S. Malik, J.

**Appellant :** State

**Respondent :** Ulfatia

**Judgement :**

**S. Malik, J.**

1. This is an appeal by the State against the order dated 9-7-1968 passed by Shri R. S. Rastogi, Sub-Divisional Magistrate Sahaswan district Budaun, acquitting the accused who is the respondent before this Court in a case under Section 25(a) of the Arms Act.

2. The relevant facts are that after the charge had been framed by the Court below against the respondent, though some dates were fixed for prosecution evidence, the case could not be taken up for some reason or the other. Ultimately, 9-7-1968, the date on which the impugned order was passed, was fixed for the production of prosecution evidence. It appears from the order passed by the lower court that four prosecution witnesses were present but neither the Public prosecutor nor the Assistant Public Prosecutor appeared to produce the witnesses before the learned

Magistrate under Sub-section (7) of Section 251-A of the Code of Criminal Procedure. The learned Magistrate thereupon sent information to the Public Prosecutor but in spite of it no one put in an appearance for the prosecution and thereafter, the impugned order was passed discharging the witnesses and acquitting the accused. It may also be mentioned that it appears from an application on the record that while the order was being passed at about 4.05 P. M.. the learned Assistant Public Prosecutor appeared before the court and moved an application informing the court that he waited for sometime and as the case was not taken up, he had gone to another court to attend to some other case and so could not be present in the court of the learned Sub-Divisional Magistrate. This application was taken up by the learned Magistrate after the impugned order had already been passed. Therein the learned Magistrate observed that the case was taken up at 2.55 P. M-and as neither the Public Prosecutor nor the Assistant Public Prosecutor put in an appearance nor any information was sent to the learned Magistrate and the Assistant Public Prosecutor could not be found by the court staff, he passed the impugned order after waiting till 4-05 P. M.

3. It was argued on behalf of the appellant that a perusal of all the Sub-sections of Section 251-A of the Code of Criminal Procedure will show that after the court has framed a charge, it could not acquit an accused under Sub-section (11) of Section 251-A of the Code of Criminal Procedure which is the only sub-section under which an accused can be acquitted after the framing of charge, till the prosecution evidence has been produced, the witnesses examined by the prosecution have been cross-examined, the accused is called upon to enter upon his defence after he has been examined under Section 342 of the Code of Criminal Procedure and the Court has considered the evidence on the record including the defence evidence, if any. It was argued that in a case of this nature where the prosecution witnesses were present but no one was present on behalf of the prosecution to produce them before the court, the court could not acquit the accused and it was the duty of the court to examine the witnesses under Section 540 of the Code of Criminal Procedure in order to do justice in the case and to decide whether the charge framed against the accused has been made out or not. In support of the contention put forward the attention of this Court was drawn to the observations made by the Mysore High Court in the State of Mysore v. Kallilulla Ahmad Shariff

AIR 1971 Mys 60, by the Rajasthan High Court in State v Nandkishore 0043/1967 and by the Madras High Court in Public Prosecutor v. M. Sambangi Mudaliar : AIR1965 Mad31 . After considering the rulings cited I find myself with great respect unable to agree- with the reasons given therein.

4. It is one of the fundamental principles of criminal jurisprudence that an accused must be deemed to be innocent or not guilty till the contrary is proved. This proposition of law is applicable to all cases whether it is a warrant case triable under Section 251-A of the Code of Criminal Procedure or otherwise. Even after charge has been framed in a warrant case, this presumption must continue.

5. Moreover, Sub-section (7) of Section 251-A of the Code of Criminal Procedure lays down that the Magistrate shall take all such evidence as may be produced by the prosecution in support of its case. The mere presence of the witnesses in court does not amount to production of evidence or production of the witnesses in court. Witnesses had to be produced by the prosecution in court, so that their statements or evidence may be recorded by the court. If it is held that in case the prosecuting agency or the Assistant Public Prosecutor, as in this case, is absent even though there is no evidence upto that stage before the Magistrate, it becomes the duty of the Magistrate under Section 540 of the Code of Criminal Procedure to examine the prosecution witnesses in order to do justice. It would mean requiring the Magistrate to step into the shoes of the prosecution and himself become the prosecutor. The matter may have been different if there was some evidence already on the record and the Magistrate found it necessary to examine some witnesses in order to be able to do justice in the case. Where there is absolutely no evidence before the Magistrate as in this case and there is no one present to produce the witnesses on behalf of the prosecution, it means that there was no evidence before the Magistrate to prove the charge framed against the accused.

6. In this connection, the provisions of Section 540 of the Code of Criminal Procedure may be considered. Section 540 of the Code of Criminal Procedure lays down: '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.' The first part of the section obviously empowers a Court either to examine a witness or not to examine him and this discretion, no doubt, has to be judicially exercised, but the second part of the section is mandatory and the Court trying an accused has to take recourse to the second part of the section if it appeared to it that it was essential to examine a witness in order to be able to do justice in the case. It has to be considered, to my mind, as to whether the second part of Section 540 of the Code of Criminal Procedure which is a mandatory provision is applicable to a case of the nature before this Court. In my view, when there is absolutely no evidence before the Court, by no stretch of imagination it could be said that it would be essential for the Court to examine a witness in order to be able to do justice. When there is no evidence at all, there can be no difficulty in holding the accused not guilty and the charge not proved. Only when there is some evidence on the record and the Court finds that it is essential to take into account some other evidence to be able to do justice, the second part of Section 540 of the Code of Criminal Procedure becomes applicable.

7. Under the circumstances, after considering the relevant provisions I find that the intention of the Legislature could not have been that a Court should step into the shoes of the prosecutor and examine witnesses under Section 540 of the Code of Criminal Procedure when there is absolutely no evidence before the Court against the accused as in this case and there is no one present for the prosecution to produce evidence in support of the prosecution case.

8. To take a concrete case, though it may be unlikely to happen, the Magistrate could not have been expected to waste public time by waiting indefinitely day after day for the prosecuting agency to produce evidence though no one appeared on behalf of the prosecution for producing witnesses.

9. To my mind, the plain meaning of Sub-section (11) of Section 251-A of the Code of Criminal Procedure is that if there is any evidence produced by the prosecution under Sub-section (7), the Magistrate has to go through the provisions

of Sub-sections (8) to (10) of Section 251-A of the Code of Criminal Procedure and then pass an order under, Sub-section (11) if after considering the evidence before him, he came to the conclusion that the accused was not guilty. If, on the other hand, the prosecution failed to produce any evidence in support of the prosecution case, the Magistrate had no option but to acquit the accused under Sub-section (11) of Section 251-A of the Code of Criminal Procedure unless the learned Magistrate decided to adjourn the case or fix another date for production of prosecution evidence,

10. Moreover, it may be pointed out that the alleged incident when the unlicensed arms are said to have been recovered from the respondent, is said to have taken place on the 10th of March, 1968 more than 31/2 years ago. For no fault of the respondent the case has remained pending upto this day and I see no reason to order for a retrial after such a long time.

11. In view of the reasons discussed. I see no reason to interfere and dismiss the appeal.

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