

**Ashok Kumar Vs. State**

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**Court :** Delhi

**Decided On :** Dec-14-1972

**Reported in :** ILR1973Delhi822

**Judge :** M.R.A. Ansari and; D.K. Kapur, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 251A and 540

**Appeal No. :** Criminal Revision Appeal No. 326 of 1972

**Appellant :** Ashok Kumar

**Respondent :** State

**Advocate for Pet/Ap. :** I.D. Ahluwalia and; R.N. Dixit, Advs

**Judgement :**

**M.R.A. Ansari, J.**

(1) A challan was filed against petitioner Ashok Kumar in the Court of the Judicial Magistrate, 1st Class, Delhi, for an offence under Section 326 Indian Penal Code . The case had to be tried by the procedure prescribed under Section 251-A Criminal Procedure Code . The learned Magistrate, after perusing the documents referred to in Section 173 Cr.P.C. and after hearing the counsel for the prosecution as well as for the defense, pasted the following order on 3-6-1972:--

'CASE called. Accused present. I have perused all the documents mentioned in the report under Section 173 Criminal Procedure Code . and have heard the learned defense counsel and the learned prosecutor at great length. It has been argued by the learned defense counsel that there is absolutely nothing on record to connect accused Ashok Kumar with the commission of the offence. In the statement of complainant Subhash Chander the person who is said to have assaulted Harish Chander is named as Nanhe. It is urged that Ashok Kumar is not Nanhe. The police has erroneously given the alias name of Ashok Kumar ?s Nanhe. deem it to be just in the interest of the proper decision of the case that Subhash Chander and Harish Chander should be examined before arriving at a decision whether a charge against the accused has to be framed or not. therefore, they be summoned under Section 540 Criminal Procedure Code . To come up on 13-7-1972.'

(2) The petitioner thereupon filed a revision petition in the Court of Session and contended that the question of either framing a charge against him or of discharging him had to be considered by the learned Magistrate only on the basis of the documents referred to in Section 173 Criminal Procedure Code . and that it was not open to the learned Magistrate to examine any witnesses at that stage. This contention was accepted by the learned Additional Sessions Judge and he has submitted a report to this Court with a recommendation that the order passed by the learned Magistrate be quashed and the petitioner be discharged.

(3) This petition was first heard by one of us sitting singly, namely, Ansari, J. As there was divergence of opinion between some of the High Courts on the point which arises for determination in the present case and as there was no decision of the supreme Court directly on the point, it was felt by him that it was desirable that this question should be examined by a larger Bench. This is how this case has come before us.

(4) The learned counsel for the petitioner, Shri Ahluwalia, has raised two contentions before us, namely,-

(I) that the provisions of section 540 Criminal Procedure Code . could not be invoked for examining any witnesses before framing a charge against the

petitioner, and (ii) that even if the Court had the power under Section 540 Cr.P.C. to examine witnesses at this stage, this power had been improperly invoked by the learned Magistrate in order to fill up a lacuna in the prosecution case. We shall first consider the first contention raised by the learned counsel.

(5) The petitioner was being tried under the procedure prescribed by Section 251-A Criminal Procedure Code . The relevant provisions of Section 251-A are sub-sections (1), (2), (3) and (6) which are reproduced below :-

'251.-A(1)When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in section 173 have been furnished to the accused, and if he finds that the accused: has not been furnished with such documents or any of them. he shall cause them to be so furnished. (2) If, upon consideration of all the documents referred to in Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard. the Magistrate considers the charge against the accused to be groundless, he shall discharge him. (3) If, upon such documents being considered. such examination, if any, being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter. which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. (6) If the accused refused to plead, or does not plead, or claims to be tried, the Magistrate shall fix a date for the examination of witnesses.'

(6) According to the procedure prescribed by the foregoing provisions, no witnesses are ordinarily examined before a charge is framed and in the normal course, the Magistrate has either to frame a charge or to discharge the accused on a consideration of all the document? referred to in Section 173 Criminal Procedure Code . Bat the question is whether Section 540 Cr.P:C. enables a 'Magi8trate to examine any witnesses before a charge is framed.Section 540 reads 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.'

(7) Although a trial in its strict sense refers to the proceedings in a criminal Court after the charge is framed, it has been held by the Madras High Court in *In re : Pakkirisamy Pillai* : AIR1962 Mad142 that the word 'trial' has been used in sub-sec.(1) of S.251-A in the sense of a proceeding of the nature of an 'enquiry' commencing from the appearance of the accused. therefore, the language of Section 540 Criminal Procedure Code . is sufficiently wide in its scope so as to empower a Magistrate holding a trial under the provisions of Section 251-A Criminal Procedure Code . to examine a witness even before framing a charge against the accused. The question for consideration is whether there is any valid reason for restricting the scope of Section 540 Criminal Procedure Code . within limits which are not warranted by the language of the section.

(8) The learned counsel for the petitioner seeks to reply upon a decision of the Mysore High Court in

(1)'The procedure prescribed by sub-ss.(2) and (3) is the procedure which every Magistrate trying a warrant case instituted on a police report, must adopt either for the purpose of discharging the accused under sub-s. (2) or for the purpose of framing a charge under sub-sec.(3). The materials on which a discharge could be ordered under sub-sec.(2) and those on which a charge could be framed under sub-sec.(3) are the materials referred to in those sub-sections, and it would not be permissible for a Magistrate to depend upon any other materials than those specified in those two sub-sections, either for discharging the accused or for framing a charge.'

(2)'Those two sub-sections are a complete code in the matter of the procedure to be followed for the purpose of discharging the accused or for framing a charge against him and that procedure, it is clear, cannot be disregarded by invoking the power conferred by s.540 of the Code.'

(3)'Section 540 of the Code appears to me to be plainly controlled by sub-sections (2) and (3) of section 251-A, and that view which I take in this case receives full support from the other sub-sections of section 251-A.

(4)'I am of the view that section 540 of the Code of Criminal Procedure cannot be used by a Magistrate trying a warrant case, instituted on a police report, before a date is fixed by him for the examination of witnesses under sub-section (6). The words at any stage of any inquiry, trial or other proceeding under this Code, occurring in section 540 do not refer to a stage antecedent to the stage at which a date is fixed under sub-section (6) of section 251-A for the examination of witnesses.'

(9) The learned counsel for the petitioner has also referred to another judgment of the same High Court in Manjoorkhan v. State of Mysore reported in the same volume at page 106,. This judgment is also that of a Single Bench of that High Court. In this case, it was held that while framing the charge, the material which the statute expressly requires the Magistrate to consider consists principally of the documents referred to in section 173, Cr.P.C. This decision did not deal with the question of the scope of section 540 Cr.P.C. vis a vis the provisions of section 251-A Cr.P.C. The learned counsel has also referred to a decision of the Kerala High Court in Sabarimuthu Ismalias & others v. Arunambalam reported in 1969 K.L.T. 874. This is also a judgment by a Single Bench of that High Court and it merely follows the decision of the Mysore High Court in Manjoorkhan's case, referred to above. The Kerala High Court also did not have occasion to consider the scope of section 540 Cr.P.C. in the light of the provisions of section 251-A Cr.P.C. The learned counsel also seeks to rely upon the decision of the Madras High Court in re: Pakkirisamy Pillai's case already referred to. The question before the Madras High Court in that case was whether the District Magistrate-had jurisdiction under section 436 Cr.P.C. to set aside an order of discharge made under section 251-A(2) Cr.P.C. While holding that the District Magistrate had jurisdiction, the Madras High Court considered the word 'trial' in sub-section (1) of section 251-A Cr.P.C. as a proceeding of the nature of an inquiry. That High Court was not called upon to consider the effect of section 540 Cr.P.C. on the provisions of section 251-A Cr.P.C. and, therefore, that decision will be of no help to the

learned counsel for the petitioner in support of his present contention. The only case that really supports his contention is that of the Mysore High Court in K.D. Appachu's case and it is the correctness of the view of that High Court in that case which we have to examine.

(10) In *State of West Bengal v. Sardar Bahadur Singh and others* (AIR 1969 Calcutta 551)(5) a Single Bench of the Calcutta High Court has expressed the view that section 251-A(2) does not control section 540 and that the expression 'at any stage of the proceeding under this Code' appearing in section 540 includes the stage of framing or not framing a charge. The accused in that case were prosecuted for offences under sections 3 and 5 of the Suppression of Immoral Traffic in Women and Girls Act, 1956. After perusing the documents referred to in section 173 Cr.P.C. the Magistrate discharged the accused under section 251-A(2) Cr.P.C. This order was challenged before the High Court on the ground that the Magistrate's power was not restricted to a perusal of documents referred to in Section 173 Cr.P.C. but extended to the perusal of the case diary and the examination of any witnesses for elucidating points which were material for the purpose of doing justice and that if the Magistrate had examined the case diary and also examined witnesses, there was sufficient material for framing a charge. This contention was upheld by the Calcutta High Court with the following observations :-

'NO doubt, under Section 251-A sub-s.(2), 'a Magistrate's consideration in the matter of framing or not framing a charge, is to rest on :- (a) all the documents referred to in section 173: the police papers, (b) the examination, if any, of the accused men, and (c) the hearing of the prosecution and the accused. The last material: the hearing of the prosecution and the accused: does not mean the hearing of arguments only. It is but a 'species of the genus which is 'hearing'. So this material includes the hearing of evidence as well if needed, xx. xx. xx. xx. xx. xx .xx .xx. xx. This is one consideration. There is still another: Sec.251-A, sub-section (2), S. 178, sub-section (2), and S. 540 co-exist, supplementing one another. Not that S. 251-A, sub-section 2 controls S. 178, sub-s 2, and Sec. 540 where the significant expression that occurs is : at any stage of inquiry or trial or other proceeding under this Code. So, the fact that the stage of the trial here was

the stage of framing or not framing a charge matters little. It does come under the compendious expression: 'any stage'. Section 251-A does not control either the Magistrate's obvious powers to look into his own record.'

(11) In *Namatraj Kewaiji Govani v. State of Maharashtra* : 1968 CriLJ231 , the Supreme Court considered the effect of section 540 Cr.P.C. on the trial of a case under sections 252 to 258 of the Code. In that case, after the prosecution had closed its evidence and the accused had also been examined under section 342 Cr.P.C., the prosecution applied to the Court for the examination of another witness under section 540 Cr.P.C. The accused objected to the examination of the witness at that stage, but the objection was over-ruled and the witness was summoned and examined. The accused was convicted. The accused thereupon appealed to the High Court against his conviction and one of the grounds on which he challenged his conviction was that the evidence of the witness examined under section 540 Cr. P.C. could not properly be received by the Magistrate. This contention was rejected by the High Court and the conviction was upheld. The accused filed, an appeal in the Supreme Court by special leave. Para 8 of the reported judgment contains the contentions urged before the Supreme Court and they may be reproduced:-

'IT is submitted that the powers under Section 540, however wide, must be reconciled with the mandatory requirements of Chapter 21 laying down the procedure of trial of warrant cases by Magistrate. It is pointed out that the trial had gone through the stage of taking evidence for the prosecution (section 252), framing of the charge (section 254), recording of the plea (section 255) and the defense (section 256) of the accused and as Govani did not wish to lead evidence (section 257) , it had reached the stage of Section 258 and the Court could either acquitlor convict him. It is, therefore, submitted that the Magistrate had really allowed the prosecution to fill a gap in the case which had the effect of dispensing with the burden which was on the prosecution to prove the case under section 135(a) and (b) of the Customs Act and of placing the burden upon Govani to rebut the presumption that the goods were smuggled. This, it is said, is not only unfair but unjust and cannot be regarded as falling within the powers of the Court, however wide the language of the section. We shall consider these objections and

refer to the rulings which were cited before us in support of them.'

(12) These contentions were rejected by the Supreme Court with the following observations:-

'TO begin with, we do not accept as sound the argument that Chapter 21 must limit the powers under Section 540. Offences under the Code of Criminal Procedure are tried in different ways according to their gravity. There are thus trials of summons and warrant cases by Magistrates, trials before High Courts and Courts of Session and summary trials. All these trials have their procedure laid down from one step to another till the stage is reached for acquittal or convictions. If the argument advanced on the basis of the procedure laid down in Chapter 21 is accepted there would be no room for the exercise of the power under Section 540 because it would always be impossible to fit it into any chapter without doing violence to the sequence established there. Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly established this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is [clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.]'

(13) The above observations of the Supreme Court, in our view, are of general application to cases tried under the procedure prescribed by Chapter 21 of the Code including cases tried under the procedure prescribed by section 251-A Cr.P.C. and are not restricted to cases tried under the procedure prescribed by

sections 252 to 258 of the Code. The contention that was urged before the Supreme Court was to the effect that sections 252 to 258 Cr.P.C. lay down the entire procedure for the trial of warrant cases instituted on a private complaint and that this procedure cannot be deviated by invoking section 540 Cr.P.C. To the same effect is the contention urged by the learned counsel for the petitioner in the present case and to the same effect is the reasoning adopted by the Mysore High Court. in K. D. Appachu's case already referred. Such a contention has not been accepted by the Supreme Court and, therefore, with respect, we are unable to agree with the view expressed by the Mysore High Court. We see no justification for restricting the applicability of section 540 Cr.P.C. to a stage after the framing of the charge and to exclude its operation at a stage prior to the framing of the charge. The use of the words 'at any stage of any inquiry, trial or other proceeding' appearing in section 540 Cr.P.C. does not, in our view, justify the placing of such restrictions. Chapter 21 prescribes the procedure for the trial of warrant cases. Similarly, there are other Chapters in the Code prescribing the procedure for the trial of summons cases, summary cases and cases exclusively triable by the Court of Session. There are, however, other Chapters of the Code containing general provisions which apply to all cases. Chapter 24 contains such general provisions. Chapter 46 which contains section 540 Cr.P.C. is also a Chapter which contains such general provisions. Such provisions are supplementary to the specific provisions governing the procedure in respect of different classes of cases. These general provisions apply to all cases in addition to the specific provisions which are applicable to different classes of cases. For instance, section 539 B Cr.P.C. enables a Judge or Magistrate at any stage of the inquiry, trial or other proceeding to make a local inspection of the scene of offence. Simply because the specific provisions governing the different classes of cases do not enable a Judge or Magistrate to make a local inspection of the scene of offence, it cannot be said that the Judge or Magistrate has no such power ; nor can it be said that such power can be exercised only at a particular stage of the inquiry or trial. Similarly on the basis of the specific provisions governing the trial of different classes of cases, it cannot be said that section 540 Cr.P.C. cannot be invoked at all at any stage of the trial or inquiry or that it should be invoked at a particular stage. We cannot, therefore, subscribe to the view that the provisions of section 251-A over-ride the

provisions of section 540 Cr.P.C. and that section 540 cannot be invoked at any stage during the trial of a case governed by the provisions of section 251-A or that it can be invoked only at a stage after the framing of the charge. A Court trying a case under the procedure prescribed by section 251-A Cr.P.C. may at any stage either before or after the framing of the charge examine any witness under section 540 Cr.P.C. The Court may do so even for the purpose of considering whether the charge ought to be framed against the accused or whether the accused should be discharged.

(14) The second contention of the learned counsel for the petitioner is that the provisions of section 540 Cr. P.C. have been improperly invoked by the learned Magistrate for the purpose of filling a lacuna in the prosecution evidence as contained in the documents referred to under section 173 Cr.P.C. This contention requires the examination of facts and does not involve any question of law. We therefore think that it is not necessary for this Bench to consider this' contention and that this contention maybe properly left for the consideration by a Single Bench. We therefore send back this case to a Single Bench for deciding it in the light of the principle of law laid down by us on the scope Of section 540 Cr.P.C.

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