

State Vs. Nandkishore and anr.

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Court : Rajasthan

Decided On : Feb-19-1965

Reported in : AIR1967Raj228; 1967CriLJ1369

Judge : C.B. Bhargava, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 540, 251A, 251A(7), 251A(8), 251A(9), 251A(10) and 251A(11)

Appeal No. : Criminal Appeal Nos. 666 and 667 of 1963

Appellant : State

Respondent : Nandkishore and anr.

Advocate for Pet/Ap. : H.N. Kalia, Adv.

Judgement :

C.B. Bhargava, J.

1. Since these two appeals by the State raise a common question of law, they are being disposed of by this one judgment.
2. In appeal No. 666 of 1963, respondent Nandkishore was prosecuted under Section 279 of the Indian Penal Code. It was alleged that the respondent while driving truck No. RJA 165 rashly and negligently caused injuries with it to a cow

which fell down on the ground and died two days after. Since the case was instituted on a police report, the learned Magistrate first Class Rajgarh adopted the procedure as is provided under Section 251 -A of the Code of Criminal Procedure. A charge was framed against the accused on 19th October, 1962. The accused did not plead guilty and claimed to be tried. The case was fixed for recording evidence of the prosecution witnesses on 4-12-1962, 15-1-63, 12/3/1963 and 19/3/1963, but the prosecution failed to produce any witness. The learned Magistrate closed the prosecution evidence and observed that there was no duty of the Magistrate to issue summons to the prosecution witnesses because there was no such provision under Section 251A of the Code of Criminal Procedure. In this connection he also referred to a decision of the Calcutta High Court in *Sm. Jyotirmoyee Bose v. Birendra Nath Prodhan*, AIR 1960 Cal. 263 and another judgment of the Allahabad High Court in *State v. Ram Lal*, 1961 (2) Cri LJ 331 (All). He, therefore, acquitted the accused on 19th March, 1963.

3. In Criminal Appeal No. 667 of 1963, accused Harpholi on the report of the police was prosecuted under Section 54 of the Rajasthan Excise Act. A charge was framed against the accused on 3rd July, 1962. Thereafter the case was fixed for recording evidence of the prosecution witnesses on 11-12-1962, 21-5-63, 26/3/63 and 21/5/1963. The prosecution did not produce any evidence on the aforesaid dates. The learned Magistrate acquitted the accused on the same grounds as were mentioned by him in the case of Nandkishore. The State has now come up in appeal against these orders of acquittal. The respondents despite service of notice of appeal on them have not appeared in this Court.

4. The main question for decision in these appeals is whether the learned Magistrate was right in acquitting the accused even though the prosecution remained negligent in producing its witnesses at the trial, The contention of the learned counsel appearing for the State is that the Magistrate should not have refused to issue summons to the witnesses when such request was made to him on behalf of the prosecution and at any rate even if the prosecution had failed to produce its witnesses it was the duty of the Magistrate as well as to have summoned and examined the witnesses under Section 540 of the Code of Criminal Procedure for the just decision of the case. In support of his contentions

learned counsel has relied on *State of Orissa v. Sib Charan Singh* AIR 1962 Orissa 157, *Nathuram Darjee v Pannalal Agarwala*, AIR 1961 Assam 97, *State of Bihar v. Polo Mistry*, AIR 1964 Pat. 351, *Public Prosecutor v. M. Sambangi Mudaliar*, AIR 1965 Mad. 31, and *State v. John Abraham*, 1961 (2) Cri LJ 92 (Ker).

5. In my view the contentions raised by the learned counsel are not without force.

6. Before the amendment of the Code of Criminal Procedure by Act No. XXVI of 1955, no separate procedure was provided for the trial of cases instituted on a police report. By the Amending Act, Section 251-A was inserted in the Code of Criminal Procedure which provided procedure for the trial of cases instituted on a police report. Section 251-A is a self-contained section and lays down the procedure for the trial of cases instituted on a police report. The object underlying Section 251-A was to provide speedy disposal of warrant cases so that the accused may either be discharged or the trial is brought to a speedy end in the conviction or acquittal of the accused as the case may be.

Before Section 251-A was inserted in the Code, the procedure for the trial of such cases was provided in Sections 252 to 258. Under Sub-section (2) of Section 252 after the evidence produced by the complainant had been taken the magistrate was required 'to ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and to summon such of them as he thought necessary for giving evidence before him.' There is no analogous provision in Section 251-A. Under Sub-section (3) of Section 251-A 'the Magistrate is required to frame a charge against the accused if after considering the documents referred to in Section 173 and after hearing the accused he is of opinion that there is a ground for presuming that the accused has committed an offence, which such Magistrate is competent to try.' Under Sub-section (6) 'if the accused refuses to plead, or does not plead, or claims to be tried, the Magistrate shall fix a date for the examination of witnesses'. Under Sub-section (7), on the date so fixed, 'the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution'. The Magistrate is further empowered to permit the cross-examination of any witness to be deferred until any other witness or witnesses

have been examined and to recall any witness for further cross-examination. Under Sub-section (11) 'if, in any case under this section in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The learned Magistrate seems to think on the language of Sub-section (7) that it is the sole duty of the prosecution to produce its witnesses and the court has no authority to secure the attendance of the witnesses even if so requested by the Prosecuting Sub Inspector.

7. Ordinarily, the witnesses should be bound over by recognisances to appear and give evidence in the matter of the charge against the accused at the trial by 'Police Officers (Section 170 (2) Cr.P.C.). In case they fail to appear the court can issue a warrant against them to secure their attendance (Section 92 Cr.P.C.). But difficulty arises in cases where no such recognisances are taken by the police officers from the witnesses and the prosecutor finds himself unable to produce them and applies to the court to issue summons to them. Can the Court refuse to do it in such a situation is the real question? There is no provision in the Code which empowers the prosecutor to secure the attendance of witnesses through his own agency after the case has gone to the court. The only course therefore, left to him is to apply to the court to issue summonses to the witnesses for their attendance. There is nothing in Section 251A(7) which precludes the court from issuing summonses to the witnesses if so required by the prosecution. The word 'Produced' in Sub-section (7) includes the bringing forward of the witnesses by the prosecution at its own instance or through the process of the court whom it desires to examine at the trial. Similar view was taken in AIR 1964 Pat. 351 and AIR 1962 Orissa 157. In Orissa case it was held that :

'The word 'produce' in Sub-section (7), Section 251A cannot be given any restricted meaning as to saddle the prosecution with the entire responsibility of producing the evidence. A duty also is cast upon the Courts for enforcing attendance of witnesses by the process provided in the Criminal Procedure Code. The Courts are not therefore absolutely powerless when the parties fail to produce evidence relevant in a case. On the other hand the power of the Court in this respect is very wide and the Court may at any stage of the proceeding summon any witness in order to determine the truth or otherwise of the facts of a case

under trial before it.'

In the Calcutta case referred to by the learned Magistrate, it was held that :

'Sub-section (6) of Section 251-A does not enjoin upon the Magistrate any duty to compel the attendance of any witness unless it was applied for. In a case tried under Section 251-A of the Code, the Magistrate is not compelled as he is if the case is tried as a warrant case instituted other than on the police report to proceed in terms of Sections 256 and 257 of the Code.'

Therefore, the view of the Calcutta High Court is also this that the court can compel the attendance of the witnesses if the prosecution applies for it. In the Allahabad case, no doubt it was held that :

'Under Section 251-A no power has been given by the court to ask for the issue of summons and compel the attendance of prosecution witnesses and does not authorise the Magistrate to issue such summons.'

However, in my view, Section 251-A does not in any way limit the general powers of a court to issue summons to witnesses if such request is made on behalf of the prosecution.

8. Besides in the administration of criminal justice a duty is also cast upon the court to arrive at the truth by all lawful means though the primary responsibility of prosecuting cognizable offence is on the executive authorities. Section 540 Criminal Procedure Code gives ample power to a court to summon any person as a witness or recall or re-examine any person already examined at any stage of enquiry or trial even though the prosecution has failed to produce such persons for evidence. It is also the duty of the court to summon and examine any persons if Ms evidence appears to it essential to the just decision of the case. Looking to the scheme of Section 251-A it is clear that the stage of passing an order of acquittal under Sub-section (11) is reached only when compliance with the other Sub-sections i.e., (8), (9) and (10) has been made. Under section 251A the Magistrate can discharge the accused if after perusing the documents referred to in Section 173 he finds the charge to be groundless. But in case he finds that there is ground

for presuming that the accused has committed an offence he has to frame a charge against the accused. It would be defeating justice if in cases where a charge has been framed against the accused by the Magistrate, he is to be acquitted merely on this ground that the prosecution has failed to produce any evidence in the case.

The Magistrate should not feel himself helpless in such situation and should exercise his inherent powers under Section 540 of the Code to summon such witnesses as he thinks necessary for the ends of justice. If the prosecution by its negligence or otherwise fails to discharge its responsibility in producing witnesses it is incumbent upon the courts to examine such witnesses as it considers necessary in the ends of justice. I am supported in this view by the following decisions in AIR 1965 Mad. 31, AIR 1962 Orissa 157 and 1961 (2) Cri LJ 92 (Ker). I am, therefore, of the view that Section 251A does not limit the powers of the Magistrate to issue process to the witnesses for their attendance if such request is made on behalf of the prosecution and secondly if the prosecution does not produce any witnesses it is the duty of the court to examine such witnesses as are necessary for the ends of justice before proceeding to act under Sub-section (11). The order of acquittal passed without examining any witness in the case in my opinion, is not warranted by Sub-section (11) of Section 251A.

9. I, therefore, accept both these appeals and set aside the order of acquittal passed by the learned Magistrate and send the case back to that court for issuing process against the accused and the witnesses for their appearance and to decide the case in accordance with law.