

State Vs. S.B. Saxena

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SooperKanoon Citation : sooperkanoon.com/758724

Court : Rajasthan

Decided On : Aug-04-1972

Reported in : 1972WLN642

Judge : L.S. Mehta, J.

Appeal No. : S.B. Criminal Revision-Petition No. 870 of 1972

Appellant : State

Respondent : S.B. Saxena

Disposition : Application dismissed

Judgement :

L.S. Mehta, J.

1. S.B. Saxena, functioned as Income tax Inspector under the Income-tax Officer, C Ward Ajmer, with effect from March 17, 1971. In that capacity he was required to make inquiries into sundry complaints of evasion of tax. A complaint was made by Salig Ram Mittal against one Ram Chand, son of Sunder Das. Chand Baori, Ajmer, about evasion of income tax. Income-tax Officer, C Ward, Ajmer, entrusted the enquiry to accused S.B. Saxena. The accused contacted Ram Chand on April 26, 1971, at his shop situate on Palace Road, Ajmer. Saxena undertook to hush up the complaint provided Ram Chand agreed to pay him Rs 100/, as illegal

gratification. Ram Chand expressed that he being indigent was unable to pay Rs. 200/-. He, however, agreed to part with Rs. 100/-. Ram Chand then made a written complaint to T.B. Singh, Inspector, Special Police Establishment, Jaipur, (camp Ajmer). Thereafter on April 30, 1971, a trap was arranged and laid by T.B. Singh, assisted by two Inspectors of the Special Police Establishment, Amar Singh and Ganesh Lal. Two independent witnesses J.B. Sengar, Deputy Post-Master, Ajmer and R.K. Banerji Inspector, complaints- P & T. Ajmer were also associated with the onset. At 6 p.m., on April 30, 1971, accused Saxena approached Ram Chand at his shop and demanded peremptorily Rs. 100/-, from him. Ram Chand gave him 0 O C. notes of the denomination of Rs. 10/-, each. Soon after T.B. Singh made a raid. The currency notes were recovered from the possession of S.B. Sexena from the pocket of his bush-shirt. After necessary investigation and after having obtained requisite sanction from the Commissioner, Income-Tax Department, Rajasthan, Jaipur, in accordance with the provisions of Section 6(1)(c), Prevention of Corruption Act, 1947, the Special Police Establishment, Ajmer, submitted a challan to the court of the Special Judge for Rajasthan, Jaipur. The accused was charged by learned Special Judge, on December 7, 1971, of the offence punishable under Section 161 I.P.C. read with 5(2)/5 (1)(d), Prevention of Corruption Act, 1947, to which he pleaded not guilty & claimed trial. In support of its case the prosecution examined 9 witnesses. The accused was interrogated under Section 342, Cr. P.C. In his defence he examined 4 witnesses. Arguments, though not completed, were heard on March 29, 1972. Thereafter some more dates were fixed. On April 29, 1972, an application was moved by the Public Prosecutor, Special Police Establishment, under Section 540, Cr. P.C.

(a) Summon Sub-post Master, Assembly Hostel, post-office, Jaipur, along with relevant register;

(b) recall D W 4 Surendra Singh, Sub Post-master Nagra, Ajmer, with despatch register of the Nagra post-office for April and May, 1971;

(c) summon dealing clerk of the Ajmer G.P O with duty roster of April 30, 1971 and leave record for April, 1971, of D.W. 3 Vadhupal as also dealing clerk with Postal Union meeting proceedings of April 30, 1971;

(d) recall P.W. 6 Ram Chand along with his radio repair register for April and March, 1971.

On the above application the following order was passed by learned Special Judge:

The case had been practically argued on behalf of the accused on 29 3-72. Thereafter three adjustments were made for one reason or another. The prosecution by this application wants to take second inning to plug the loopholes of its case and lapses of cross examination after having heard the defence case. It is far from bonafide. The allegations made in the application are mere allegations and not supported by any documents. It is not the purpose of the provision of Section 510, Cr. P.C. to give an additional opportunity to the prosecution to which full opportunity had already been given. For these reasons this application does not merit acceptance. It is hereby rejected.

2. Against the above order the present revision petition has been filed by the State. The contention of learned Counsel for the applicant is that the lower court has erred in law in not accepting the prosecution prayer, made under Section 540, Cr. P.C. and that such rejection is likely to result in miscarriage o' justice. The court below should have, counsel adds, apt lied its judicial mind to the phrase 'at any stage', appearing in Section 540 Cr. P C. This phrase includes the stage even when evidence of both the sides has been closed and the case has been adjourned for judgment. The production of the postal record, as prayed for, would have falsified the defence plea raised by the accused Under the second part of Section 540, Cr. P.C. it was mandatory for the trial court to summon or examine or recall the witnesses along with the connected record. Learned Counsel, in support of his arguments, cited State v. Jamna Das AIR 1958 NUC30, Ranjeet v. The State : AIR1968 All430 , and Shreelal Kajaria v. The State AIR 1864 Bom 186. The contention of learned Counsel for the State was opposed with unusual emphasis by Mr. M.B.L. Bhargava, representing accused S.B. Saxena.

Section 540, Cr. P.C. reads as under:

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 section confers powers upon the Court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers on the court a wide discretion to act as the exigencies of justice require. Another aspect of this power is available in Section 165, Evidence Act. The relevant portion of that section is in the terms following:

The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

These two sections are intended to arm the Court with extensive powers required for the purpose of getting at the truth. Their effect is that in order to get to the bottom of the matter the court will be able to look at and inquire into every fact whatsoever. Mr. Edmund Burke, while arguing Mr. Warren Hastings trial urged:

It is the duty of the Judge to receive any offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance or corrupt collusion should not bring it forward

See report of the Committee on Hastings' Trial 31 Part List 348.

In Article 784, Wigmore on Evidence, it has been laid down that:

The sporting theory of the common law in which litigation was a, game of skill to us conducted according to specific rules and to be., decided by the combined effects of skill, strength and luck, tended to place the Judge primarily in the position of the

Umpire of a game and whose duty it was to interfere only so far as needed to decide whether: the rules of the game had been violated.

Sir James Pitjames Stephen said;

It is absolutely necessary that the Judge should only hear that is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue.

(See Speech of the Hon'ble Pitjames Stephen made on March 12, 1872)

Similarly in Chamberlayne's Evidence Section 554, it is mentioned:

The Judge is not only justified but required to elicit a fact wherever these interests of truth and justice would suffer, if he did not.

It should, however, be borne in mind that courts must act within the limits which the law places upon their power in dealing with cases before them. Just as it is not open to a court in civil litigation to compel a party to make a particular kind of pleading or to amend his pleading, so also it is beyond its competence to virtually oblige a party to produce and examine any particular witness. It is no doubt the duty of the court not only to do justice but to ensure that justice is done. It has to bear in mind that it must act only in accordance with law and not otherwise: vide *Bombay Corporation v. Pancham* AIR 1065 SC 1008.

3. Offence under the Code of Criminal Procedure are tried in different ways. There are trials of summons and warrant cases by Magistrate as given in Chapters XX and XXI of the Code of Criminal Procedure respectively. Again, there are trials which can be conducted before the High Court and the Court of Sessions, in accordance with the provisions laid down in Chapter XXIII of the Code of Criminal Procedure. The Code also provides separate provisions for summary trials. They contain in Chapter XXII,

4. Section 540, Criminal Procedure Code, quoted supra, consists of two parts. The first part gives a discretionary power to the court, The latter part is mandatory and

it imposes an obligation on it. The use of the word 'may' in the first part shows that it is permissive and the court may act in one or the three ways;-

(a) summon any person as a witness;

(b) examine any person in attendance, though not summoned as a witness; or

(c) re-examine or re-call any person already examined.

The second part is obligatory. It compels the court to act in the above mentioned three ways provided it is essential for him to do for the just decision of a case. As the language of the second part of Section 540, Cr. P.C. speaks, there is no limitation on the power of the court rising from the stage to which the trial may have reached; provided the court is bonafide of the opinion that for just decision of the case it is necessary for it. to act. The requirement of the just decision of the case holds good not only in favour of the accused but also for the benefit of the prosecution. As has been observed by their Lordships of the Supreme Court in *Jamatraj v. State of Maharashtra* : 1968 CriLJ231 , there are the aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be permitted to rebut the defence evidence unless the accused brings forward something suddenly and unexpectedly. Secondly, the power of the court which is to be exercised should have a bearing on the Just decision of the case. This principle has been discussed by Tindal C J. in *Reg v. Frost* (1840) 4 St. Tr. (HC) 85 (as cited in *Jamatraj's* case). The following words of Tindal C.J are often quoted:

There is no doubt that the general rule is that where the Crown brings 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 defence begins; but if any matter arises eximproviso, which no human ingenuity can for see, 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.

In *Rex v. Bora Harris* 1927 (2) K B. 587 (P. 594), Avory J. observed:

A judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests or 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 for the defence is closed except in a case where a matter arises ex-improviso, which no human ingenuity can foresee, on the part of the prisoner.

In a case where a witness is called by a Judge after the case for the defence is closed, Avory J. states that the practice should be limited to a case where the matter arises ex-improviso which no human ingenuity can foresee on the part of a prisoner otherwise injustice would ensue. In *Reg v. Kaynes* (1869) 1 P. and F. 686 Bramwell B refused to allow fresh evidence to be gone into after the close of the whole case.

5. It is hardly necessary to deal with the cases cited on behalf of both the parties in the course of arguments. These cases more or less illustrate the general principle laid down by (sic) in *Dora Marri's case* (supra), in *John McKenna* (1956) 40 CAR 65 it was held that a Judge has complete discretion whether a witness, who has given evidence, shall after the prosecution has closed its case and a submission that there is no case to go to the jury has been made by the defence. The Court of Criminal Appeal will not interfere with the exercise of such discretion unless it appears that thereby no injustice has resulted.

6. In our criminal jurisprudence statutory law, as laid down in Section 510, Cr. P.C. confers extensive powers upon the court to summon or re-examine or recall any witness. This has been left to the discretion of the Court. The second part of Section 540, Cr. P.C. compels the court to summon and examine or recall and re-examine a witness if it is essential for it to do so for the just decision of the case. In the present case the Court of Special Judge, Jaipur, was not moved to exercise powers under the first part of Section 540, Cr. P.C. Moreover, the exercise of such power has been left at the discretion of the court. It is not meant to be used for the purpose of enabling the prosecution to fill up any lacuna in its evidence. As for the second part the Court did not observe that to summon and examine or to re-call

and re-examine witnesses was necessary for the just decision of the case. The court on the other hand said:

The prosecution by this application wants to take second inning to plug the loopholes of is case and lapses of cross-examination after having heard the defence case. It is far from bonafide.

7. The plea of the accused in his defence that he has sold his radio to DW 3 Vadhupal through radio-dealer Ram Chand, DW 6 has been consistent. When the accused was examined under Section 251 A., Cr. P.C. he raised this plea in the following words:

I had sold my radio set through Ram Chander. He paid me the balance price of the radio amounting to Rs. 100/-. It was not bribe money.

Again, when he was examined under Section 342, Cr. P.C. on March 24, 1972, he raised similar plea. It cannot, therefore, be said that the prosecution was taken by surprise in that circumstance, it can well be assumed that the prosecution by making an application under Section 540 Cr. P.C. for recording additional evidence virtually wants to rebut the defence evidence In that context without laying down that in no case can an additional witness be called by the judge at the close of the trial after the case for the defence has been closed. I am of opinion that in this particular case the course that was adopted -by the prosecution was irregular and was calculated to do injustice to the accused. As laid down by their Lordships of the Supreme Court in Jamatraj's case (supra), the prosecution cannot be allowed to rebut the defence evidence unless the defence brings is something suddenly and unexpectedly and that is not the situation here.

8. In the result, this application having no force stands dismissed.