

T. Bhashyam Vs. State

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Court : Chennai

Decided On : Jan-31-1975

Reported in : 1975CriLJ1715

Judge : Ratnavel Pandian, J.

Appellant : T. Bhashyam

Respondent : State

Judgement :

ORDER

Ratnavel Pandian, J.

1. The petitioner who is the accused before the V Presidency Magistrate, Egmore, in C. C. No. 12050 of 1973, has filed this revision petition, challenging the order of the staid Court, allowing the petition of the complainant for the recall of D.W. 1, the Salesman of the accused's firm under Section 540, Cr. P. C. for the purpose of filing the counterfoils of certain bills. The learned Assistant State Prosecutor has filed an application before the lower court on 28-2-1974, on behalf of the complainant, to recall D.W. 1 who had already been examined on 6-2-1974, for the purpose of marking certain bills in the bill book wherein Exs. P-2 and P-3 had already been marked. The said application was filed after the case was posted for judgment. It was resisted by the accused on various grounds. The learned Magistrate, allowed the application, observing as follows-

Notwithstanding the fact that the present application for the recall of D.W. 1 has been made rather belatedly, I do not think that the admission of the evidence now sought to be adduced will have the effect of filling up the gap in the prosecution case, for the simple reason that the evidence has already been adduced by the prosecution regarding the revised price of Flagyl. The bills now sought to be filed through D.W. 1 are only to lend support and corroboration to the evidence already on record.

Admittedly the bill book containing these bills now sought to be filed has already been seized by P.W. 1 even on 9-10-1973. But. I am not able to appreciate the observation of the learned Magistrate when he says that there was no occasion for P. W. 1 to scrutinise the bills after the examination or in the case on a private complaint, the complainant, is expected to go through all the documents which are in his possession pertaining to the issue and to be more vigilant during the time of the trial of the case. Under the circumstances of this case, I am of opinion that it cannot be said that P.W. 1 could not be expected to have foreseen the stand taken by the accused, in other words, the defence of the accused. In every criminal proceeding, the prosecution is expected to foresee the defence of the accused while proceeding with the trial. It is no doubt true that a Magistrate has a discretion to call any witness at any time for -any purpose. But, it should be in the interests of justice. At the same time, we have to bear in mind that the exercise of the powers under this section is not intended to give an unfair advantage to any one of the rival sides and to allow one of the parties to take rebutting evidence at each and every stage by recalling the witness, especially when a witness had already been examined.

2. Section 540, Cr. P. C. consists of two parts, (1) Giving a discretion to the court to examine the witnesses at any stage, and (2) the mandatory portion which compels a court to examine a witness, if his evidence appears to be essential to the just decision of the case. The discretion that is given under this section is very wide and the very width requires a corresponding caution in using the power given to a court under this section. By its very nature, the discretion to be exercised under this section depends upon the facts of each case. In *Jamatraj Kewalji Govani v. State of Maharashtra* : 1968 CriLJ231 , the Supreme Court while

exhaustively dealing with the scope and effect of Section 540, has observed at D. 96 (of Mad LJ Cri) : (at p. 235 of Cri LJ) as follows:

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 recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry 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 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 framers of the Code have not chosen to indicate the limits of the power-discretionary and obligatory- under both clauses which, as I have already pointed out, are very wide. But, in exercising the power under this provision, as a wide discretion is conferred on courts in summoning any person to be examined or recalling any person to be re-examined, any order under this section must be a judicial one based on principles of equity. In other words, the limits of the court's jurisdiction must obviously be dictated by the exigency of the situation and fair-play and good sense have to be the only safeguards. This power must be exercised only in suitable cases in the interests of justice. But, once the opinion of the court is justified on the above principles, there cannot be any restriction in the exercise of the powers and the jurisdiction is not fettered by any limits.

3. In the instant case, the documents now sought to be filed have been, as already pointed out, in the possession of the prosecution. As mentioned supra, the observations of the lower court, culled out above and underlined, give an impression that the Magistrate was satisfied that certain amount of evidence regarding the price of Flagyl had been let in by the prosecution. But, the learned Magistrate, in allowing the petition and thus enabling the prosecution to further cross-examine the defence witness D. W. 1, already examined, for the purpose of

taking corroborative evidence, in my view, cannot be said to have acted for a just decision of the case, especially after the case had been posted for judgment. There was ample opportunity for the prosecution to file this document even at the earliest opportunity. If this kind of petitions are allowed at each and every stage, viz., either to take corroborative evidence or to let in rebutting evidence, there may not be an end to these matters and the proceedings would be protracted, which ultimately may prejudice the accused in a criminal trial. Such kind of permissions to either party under the guise of Section 540 will amount to enabling them to fill up the lacuna.

4. For the reasons mentioned above, I allow this revision petition and quash the order of the lower court. I direct the Magistrate to proceed with the case with the available evidence already on record, uninfluenced by any observation made by me in justification of this order.