THE SUPREME COURT REPORTS

STATE OF WEST BENGAL

v.

TULSIDAS MUNDHRA

(P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.)

Criminal Procedure—Proceeding on Police report—Accused if entitled to lead evidence—Power of court to examine person as court witness—Magistrate, if bound to examine accused person—Code of Criminal Procedure, 1898(Act V of 1898), ss. 207A, 540.

Although an accused person is not entitled to lead evidence in his defence in a proceeding under s. 207A of the Code of Criminal Procedure, that does not affect the wide powers a Criminal Court has under s. 540 of the Code to summon and examine persons as court witnesses where it considers such examination essential for a just decision of the case. Section 540 of the Code is wide enough to include a proceeding under s. 207A of the Code and its operation is not excluded by the scheme of s. 207A of the Code.

Arunachalam Swami v. *State of Bombay*, A.I.R. 1956 Bom. 695 referred to.

Sub-section (6) of s. 207A of the Code does not make it incumbent on the Magistrate to examine an accused person unless he thinks it necessary to do so.

Consequently, in the present case, where the Magistrate in a proceeding under s. 207A of the Code rejected the application of the accused persons for examination of witnesses in defence not because he had no power under s. 540 of the Code to do so but on the ground that the application was vexatious and was intended to delay the proceeding and the High Court in revision on an erroneous view of the Magistrate's order set it aside and directed examination of the accused person under s. 342 of the Code.

Held, that the order of the High Court must be set aside.

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 88 of 1962.

Appeal by special leave from the judgment and order dated November 30, 1961, of the Calcutta High Court in Cr. R. No. 1117 of 1961.

D. R. Prem, R. N. Sachthey and *R. H. Dhebar,* for the appellant.

A. S. R. Chari, Ravinder Narain, J. B. Dadachanji and *O. C. Mathur,* for the respondent.

1962. September 11. The Judgment of the Court was delivered by

Gajendragadkar, J.

GAJENDRAGADKAR, J.—The principal point which the appellant, the State of West Bengal, has raised for our decision in the present appeal, is whether the provisions of section 540 of the Code of Criminal Procedure apply to a case tried by the Magistrate under section 207A of the Code. That question arises in this way. On the 7th July, 1960, a charge-sheet was submitted under s. 173 of the Code by Inspector Bhuromal of the Special Police Establishment, New Delhi, in the Court of the Chief Presidency Magistrate, Calcutta, against Hari Das Mundhra, accused No. 1, and the respondent Tulsidas Mundhra, accused No. 2, under section 120B/409 and sections 409 and 477-A of the Indian Penal Code. On the 5th August, 1960, both the accused persons appeared before the learned Chief Presidency Magistrate and furnished bail. Thereafter, the case was transferred to M. Roy, the Presidency Magistrate 5th Court for further proceedings.

On the 10th October, 1960, copies of the documents were furnished to the accused persons, and since the record was voluminous, the hearing of the case was adjourned to the 7th December, 1960. On the 1st March, 1961, parties were heard and in view of the nature of the offences and the amounts involved,

the Magistrate took the view that the proper course to follow would be to adopt the commitment proceedings as laid down in s. 207A of the Code. Subsequently, the procedure prescribed by the said section was followed. It appears that accused No. 1 who had in the meanwhile been convicted in another case was undergoing a sentence of imprisonment in the District Jail at Kanpur and so, he could not be produced before the Magistrate until the 7th July, 1961. That is why the case had to be adjourned on some occasions and effective hearings did not make a material progress until the 7th July.

On the 6th July, 1961, the respondent filed a petition before the Magistrate alleging that amongst the documentary evidence sought to be relied upon against him by the prosecution were included three cheques and the prosecution case was that the writing on the cheques was in the handwriting of the respondent. The respondent disputed this allegation and prayed that he should be allowed an opportunity to examine defence witnesses to prove that the impugned handwriting was not his.

On the 7th July, 1961, when the case was taken up for hearing before the Magistrate, he first considered the application made by the respondent to call defence witnesses and on the merits, he rejected the said application. Then he proceeded to make an order of commitment. In rejecting the application of the respondent for examining defence witnesses, the Magistrate took into account the fact that the application had been deliberately made at a very late stage in order to prolong the proceedings in his Court and so, that was one reason why he thought that an unconsciousably delayed petition which had been made solely with the object of gaining time should not be granted. He also held that the application was misconceived. It was urged before the Magistrate that he could examine the said witnesses and in support of this argument, reliance was placed on a

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decision of the Bombay High Court in the case of *Arunachalam Swami* v. *State of Bombay* (1). The learned Magistrate took the view that the said decision was distinguishable on facts. Whilst the learned Magistrate was delivering this order, an application was made before him that the respondent wanted to move the higher Court for a transfer of the case, and though the learned Magistrate felt that this application also was intended merely to prolong the proceedings in his Court, he adjourned the case because under s. 526(8) it was obligatory on him to do so. That is why he adjourned the hearing of the case to the 20th July, 1961, for passing the remaining portion of the final order in case the respondent failed to obtain from the higher Court the necessary order of transfer.

This order was challenged by the respondent by moving the Calcutta High Court in its criminal revisional jurisdiction. The High Court took the view that s. 540 applied to cases tried under s. 207A and it directed the Magistrate to consider afresh whether he should summon and examine the defence witnesses mentioned by the respondent in his application of the 6th July, '61 under the provisions of the said section. Incidentally, the High Court also observed that the accused persons had not been examined under s.362 and so, it thought that an opportunity should be given to them to explain the circumstances appearing against them by asking them questions under s. 342. This observation was made even though the High Court did not think it necessary to decide the general question whether in a commitment enquiry, examination of the accused under s.342 is compulsory or not. In the result, the order passed by the Magistrate on the 7th July, 1961, was set aside and the matter was sent back to his Court for disposal in accordance with law. It is against this order that the appellant has come to this Court by special leave and on its behalf

(1) A. I. R. 1956 Bom. 695.

Mr. Prem has contended that the High Court was in error in holding that s. 540 of the Code applied to proceedings under s. 207A. In the alternative, he has argued that the Magistrate had himself considered the question as to whether the witnesses should be examined in the light of his powers under s. 540 and so, even if his first point failed, he was entitled to contend that the High Court was not justified in sending the case back to the Magistrate. There is no point, he argues, in asking the Magistrate to consider the question once again.

There is no doubt that the new provisions under s.207A have been introduced for the purpose of expediting the commitment proceedings so as to shorten the duration of criminal cases which are exclusively triable by the Court of Session or High Court. Section 206, *inter alia*, confers powers on the Magistrates specified in the section to commit any person for trial to the Court of Session or High Court for any offence triable by such Court. Under s.207, it is provided that in regard to a case which is triable exclusively by a Court of Session or High Court, or which, in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate shall : (a) in any proceeding instituted on a Police report follow the procedure specified in s.207A; and (b) in any other proceeding, follow the procedure specified in the other provisions of this Chapter. Thus, s. 207A is applicable to proceedings in respect of offences which are exclusively triable by the Court of Session or High Court, or which, in the opinion of the Magistrate, ought to be tried by such Court. This section consists of 16 sub-sections which, in a sense, constitute a self-contained Code which has to be followed in dealing with cases under the said section. Sub-section (2) authorises the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing. Under sub-section (3), the Magistrate has to satisfy himself that

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the documents referred to in section 173 have been furnished to the accused and if they are not so furnished, he has to cause the same to be so furnished. Sub-section (4) then deals with the stage where the Magistrate proceeds to take evidence of such perons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and it adds that if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also. By sub-section (5), the accused is given liberty to cross-examine the witnesses examined under sub-section (4). Sub-section (6) then lays down that if evidence is recorded under sub-section (4) and the Magistrate has considered all the documents referred to in s.173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, he shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless he thinks that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. Sub-section (7) deals with a case where on considering the evidence and the documents produced and after giving opportunity to the prosecution and the accused to be heard, the Magistrate is of opinion that the accused should be committed for trial, "he shall frame a charge under his hand, declaring with what offence the accused is charged". Sub-section (8) then lays down that as soon as the charge has been framed, it shall be read and explained to the accused and a copy thereof given to him free of cost. Under sub-section (9), the accused shall be required at once to give in, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on

his trial. There is a proviso to this sub-section which entitles the Magistrate in his discretion to allow such list to be given later, but we are not concerned with that proviso in the present appeal. The rest of the clauses are not relevant for our purpose.

It will thus be seen that before the Magistrate decides either to discharge the accused person, or to direct that he should he tried by himself or by any other Magistrate, or to commit him to the Court of Session or High Court, he has to consider the evidence recorded before him under sub-section (4) and the documents referred to in s. 173. It is open to him to examine the accused person also if he thinks it necessary to do so for the purpose of enabling him to explain circumstances appearing against him in the evidence. He has, of course, to hear the prosecution and the accused person before making the order. The scheme of s. 207A thus does not appear to provide for a defence witness to be examined before an order is passed either under sub-section (6) or sub-section(7), and that may be because it was thought by the Legislature that in dealing with criminal cases instituted on a police report, it may ordinarily not be necessary to prolong the enquiry by allowing the accused person to lead evidence in defence and so, no provision in that behalf has been made. Even the examination of the accused person has been left to the discretion of the Magistrate under sub-section (6). Sub-section (7) also shows that the examination of the accused person is in the discretion of the Magistrate. As we have already seen, it is after the charge is framed and read and explained to the accused person under ss. (8) that the stage is reached for him to give in a list of persons whom he wants to examine under ss.(9).

This position shows a striking contrast to the relevant provisions of s. 208. Section 208 deals with cases where proceedings are instituted otherwise than on a police report, and it provides that when the accused

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person is brought before the Magistrate, he shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate. Section 208 (3) provides, *inter alia*, that if the accused applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so. In other words, in regard to the proceedings tried under s. 208, an accused person is entitled to lead evidence in defence and the Magistrate is bound to allow such evidence to be led, except, of course, where he comes to the conclusion that such evidence need not be led in which case he has to record his reasons for coming to that conclusion. When we consider the relevant provisions of s. 207A and contrast them with the corresponding provisions of s. 208, it becomes clear that an accused person has no right to lead evidence in defence in proceedings governed by s. 207A, whereas he has a right to call for such evidence in proceedings governed by section 208.

This position, however, does not affect the question as to whether s. 540 applies even to the proceedings governed by s. 207A. Section 540 gives power to the Court to summon material witness or examine a person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the section specifically provides that 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. It would be noticed that this section confers on criminal courts very wide powers. It is no doubt for the court to consider whether its power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to

the just decision of the case, it is its duty to take such evidence. The exercise of the power conferred by s. 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case. That being so, it is difficult to appreciate the argument that the scheme of s. 207A excludes the application of s. 540 to the proceedings governed by the former section. It is true that s.207A does not give an accused person a right to lead evidence in defence, and so, he would not be entitled to make an application in that behalf; but that is very different from saying that in proceedings under s. 207A the Magistrate has no jurisdiction to examine a witness by exercising his powers under s. 540. The denial to the accused person of the right to lead evidence in defence has no material bearing on the question as to whether the Magistrate can exercise his powers under s. 540. We do not think that the scheme of the special provisions contained in s. 207A legitimately leads to the inference that the applicability of s. 540 is thereby excluded. Sometimes, if a statute contains a special or particular provision dealing with a special or particular case or topic and also includes a general provision dealing with the said special or particular topic or case as well as others, the particular or the special provision excludes the application of the general provision in respect of the topic or case covered by the former. That, however, is not the position in the present case, because section 207A suggests, by necessary implication, for the exclusion of the accused person's right to lead evidence, whereas s. 540 does not refer to the right of the accused person or the prosecution to lead any evidence, but deals with the court's power to examine witnesses as court witnesses in the interest of justice. Section 540 in terms applies at any stage of any enquiry, trial or other proceeding under this Code. This section is wide enough to include a proceeding under s. 207A and so, it would be unreasonable to contend that the scheme of s.207A makes section 540 inapplicable to the proceedings

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governed by s. 207A. The power of the court under s. 540 can be exercised as much in regard to cases governed by s. 207A as in regard to other proceedings governed by the other relevant provisions of the Code. Therefore, we are satisfied that Mr. Prem is not justified in arguing that the Magistrate had no jurisdiction to examine witnesses as court witnesses even if he had held that the examination of such witnesses would be essential to the just decision of the case.

The alternative argument urged by Mr. Prem still remains to be considered. The High Court seems to have thought that in rejecting the application of the respondent for examining defence witnesses, the Magistrate took the view that he had no power to do so in the present proceedings because his jurisdiction was circumscribed by the provisions of s. 207 A. That appears to be the sole basis of the decision of the High Court in reversing the order of the Magistrate and sending the proceedings back to his court. In our opinion, the High Court was in error in assuming that the Magistrate had not considered the question on the basis of the applicability of s. 540. In fact, as we have already pointed out, when the Magistrate's attention was drawn to the decision of the Bombay High Court in the case of *Arunachalam Swami*(1) he observed that the case was distinguishable on facts; he did not say that the case was irrelevant because s.540 was inapplicable to the proceedings before him. If he had taken the view that s.540 did not apply at all, the Magistrate would obviously have said that the Bombay decision had no relevance. The reason given by the Magistrate that the case was distinguishable on facts postulates that s.540 was applicable, but in his opinion, the particular decision was of no assistance to the respondent, having regard to the difference of facts between the case before the Magistrate and the Bombay case. Therefore, the order passed by the Magistrate cannot be successfully challenged on the ground that the

(1) A. I. R. 1956 Bom. 695.

Magistrate did not consider the question under s. 540 of the Code.

It appears from the order passed by the learned Magistrate that he took the view that having regard to the voluminous evidence adduced by the prosecution, there was no substance in the allegation of the respondent that the evidence of the witnesses whom he proposed to examine was material or would be decisive. He has observed that the documentary evidence adduced by the prosecution was voluminous and it clearly showed a *prima facie* case against both the accused persons. In that connection, he has also commented on the conduct of the respondent. The photostat copies of the disputed cheques had been given to both the accused persons nearly nine months before the 6th July, 1961. Arguments in respect of these documents were urged before the Magistrate nearly two months before the said date. At no stage was it ever suggested to the Magistrate that the respondent wanted to lead evidence to show that the writings on the cheques were not in his handwriting and that the said fact, if proved would materially affect the prosecution case. The conclusion of the Magistrate was that the application made by the respondent was vexatious and so, was intended merely to delay the proceedings in his court. In view of the reasons given by the learned Magistrate in rejecting the application of the respondent, it is very difficult to sustain the view taken by the High Court that the Magistrate was inclined to hold that s.540 did not apply to the proceedings in the present case.

The High Court has also referred to the fact that the accused persons have not been examined under s.342 of the Code, and it has apparently asked the Magistrate to examine the accused persons under that section, without considering the question as to whether it was necessary that the Magistrate should

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examine them at this stage. We have already referred to the relevant provisions of s.207 A (6). Sub-section (6) provides that the Magistrate can examine the accused if he thinks it necessary to do so. Besides, even according to the judgment of the High Court, the failure to examine the accused persons under s.342 did not amount to a material irregularity and could not by itself, therefore, justify the reversal of the order passed by the learned Magistrate.

The result is, the appeal is allowed, the order passed by the High Court is set aside and that passed by the learned Magistrate on the 7th July, 1961, is restored. It is to be regretted that the proceedings taken by the respondent in the High Court and those taken by the appellant after the decision of the High Court have added to the length of the life of this criminal case; and so, it is desirable that the Magistrate should proceed to pronounce his final orders as expeditiously as possible and the case should thereafter be tried by the Court of Session without unnecessary delay.

Appeal allowed.