Supreme Court of India
Jamatraj Kewalji Govani vs The State Of Maharashtra on 4 April, 1967
Equivalent citations: 1968 AIR 178, 1967 SCR (3) 415
Author: Hidayatullah
Bench: Hidayatullah, M.

PETITIONER:
JAMATRAJ KEWALJI GOVANI

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT:
04/04/1967

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
SIKRI, S.M.
VAIDYIALINGAM, C.A.

CITATION:
1968 AIR 178 1967 SCR (3) 415
CITATOR INFO :
R 1973 SC 799 (18)

ACT:
Criminal Procedure Code, 1898, s. 540-witness called by court at instance of prosecution after defence case closed-witness deposing to reasonable belief necessary under s. 123, Customs Act, 1962, for offence under s. 135 that goods were smuggled-whether calling such witness at that stage permissible-whether essential for just decision in the case.

HEADNOTE:
Upon a warrant issued under s. 105 of the Customs Act, 1962, the appellants' shop was searched and a number of watches, clocks, etc., were seized. As he could not prove that the goods had borne the necessary customs duty, the appellant was prosecuted on two counts under ss. 135(a) and 13 5 (b) of the Customs Act, 1962. The appellant did not lead any evidence in his own behalf. He filed a written statement in which he claimed, inter alia, that no offence had been disclosed against him as under s. 123 of the Act the burden would have been on him to prove that the goods had be-en customed provided the goods had been seized under the Act in the reasonable belief that they were smuggled goods but no

witness had deposed to such belief. The day after this statement was filed, the prosecution applied for the examination of the Customs Officer who was in charge of the search as a court witness in the interest of justice. Although this application was opposed by the appellant, the Magistrate ordered the examination of the officer under s. 540 of the Code in the course of which he stated that he had seized the watches in the reasonable belief that they were smuggled. The appellant was thereafter examined again and was given an opportunity to lead defence evidence but he stated that he had nothing further to add and no evidence to lead. The, trial court then convinced the appellant under Sections 135(a) and 135(b). An appeal to the High Court against this conviction was dismissed.

In the appeal to this Court by special leave, the question for determination was whether the evidence of the officer was improperly received by the Magistrate and whether if excluded the conviction of the appellant could be supported.

It was contended an behalf of the appellant that the. powers under s. 540, however wide, must be reconciled with the mandatory requirements of Chapter 21 laying down the procedure of trial of warrant cases by Magistrates and that as the trial bad gone through the various stages and had reached the stages of s. 258, the court could either acquit or convict him; it was 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 ss. 135(a) and (b) of the Custom Act and of placing the burden upon the appellant to rebut the presumption that the goods were smuggled;

HELD : Dismissing the appeal,

The contention that Chapter 21 must limit the powers under Section 540 must be rejected. Offences under the Code of Criminal Procedure are

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tried in different ways according to their gravity. The trials in the Magistrate's courts the High Courts and Courts of Session as well as summary trials have their procedure laid down from one step to another till the state is reached for acquittal or conviction. If the argument advanced on the basis of the procedure laid down in Chapter 21 was to be accepted, there would be no room for the exercises of the power under s. 540 because it would always be impossible to fit it into any chapter without doing violence to the sequence established there. [419H-420B]

In the present case the trial Judge appeared to have exercised power conferred on him under the second part of section 540 i.e., to admit the evidence of the officer as essential to the just decision of the case. As die 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 steps authorised by the Section may be taken. [420D-E]
It was obvious that a just decision in the present case required finding whether the watches, etc., seized were smuggled or not. The circumstances already on record clearly established that some one must have seized the watches entertaining a belief that they were smuggled and this belief obviously was entertained by the Officer in charge of the search. This was not a case in which the prosecution was trying to fill a gap in its case. The court was right in thinking that a just decision of the case required that the nature and the plea underlying seizure should be before it on oath of the person making the seizure so that the appellant might be required, as the policy of the Customs Act, 1962 requires, to prove his innocent possession. [423F-H]
Case law discussed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 217 of 1966.

Appeal by special leave from the judgment and order dated September 16, 1966 of the Bombay High Court in Criminal Appeal No. 1349 of 1965.

R. Jethamalani, N. H. Hingorani and K. Hingorani, for the appellant.

D. R. Prem and S. P. Nayyar, for the respondent. The judgment of the Court was delivered by Hidayatullah, J. On November 16, 1964, the shop of the ap- pellant Govani situated in Suklaji Street, Bombay was searched by the Enforcement Branch of the Reserve Bank of India. Nothing incriminating from the point of view of the Reserve Bank was found in the shop but a large number of watches, clocks, cigarette lighters, cameras, transistors, tape recorders, etc., were found. The officers of the Enforcement Branch appear to have informed the customs authorities. The Assistant Collector of Customs thereupon issued a warrant for the search of the premises under S. 105 of the Customs Act, 1962. This warrant was made out in the name of Preventive Additional Chief Inspector R. C. Dutta, Preventive Inspector P. N. Ramchandani and Preventive Officers Ranade, Thakur and Menon. It was stated in the warrant that there were reasons to believe that prohibited and dutiable goods liable to confiscation and documents and things useful for and relevant to the proceedings were secreted in the shop. The officers were accordingly charged with the duty to search and seize such prohibited and dutiable goods, documents and things in the shop under S. 110 of the Act. The search was effected and the goods above mentioned were seized. Some of the watches were returned as they were old and given for repairs. The other watches were seized. Proceedings for the confiscation of the goods and for penalties were started by Dutta and a summons under s. 108 of the Act was issued to Govani. He could not prove that the goods had borne the necessary customs duties. The Additional Collector of Customs, Bombay thereupon sanctioned his prosecution under S. 135(b) of the Act.

The trial took place before the Presidency Magistrate (19th Court), Bombay. Govani was charged on two counts, under. 135(a) and S. 135(b) of the Customs Act, 1962. Two witness- es were examined at the trial. Preventive Officer, Customs, Ranade deposed to the seizure of the goods. As the search was under the direction of Dutta, Ranade admitted in cross- examination that he was told by Dutta that information had been received that Govani had secreted some contraband articles in his shop. He admitted that Dutta decided which of the watches were to be seized and which were to be released. Ranade, however, stated that he had asked Govani to produce bills regarding the watches but Govani produced none. He had also asked Govani to produce the account books but Govani again did not produce any. -The second witness Nanvani only proved the seizure of the contraband goods and the exhibits in the case. He was not cross-examined. Govani did not lead any evidence in his own behalf. He was examined under S. 342 of the Code of Criminal Procedure and admitted that he had neither imported the watches nor paid customs duty on them. He stated that he had purchased the watches from certain customers, sometimes one and sometimes two or three from the same customer. He had no defence evidence to lead but filed a written statement and claimed that no offence had been disclosed against him in the prosecution case as laid before the court. He analysed S. 135 of the Act and stated that the gist of the offence was that he should have known or have had reason to believe that the contraband goods had not been customed. He stated that under S. 123 of the Act, the burden would have been on him to prove that the goods had been customed provided the goods had been seized under the Act in the reasonable belief that they were smuggled goods but no witness had deposed to such belief. This statement was filed on July 15, 1965. The following day, the prosecution applied for the examination of Dutta, Inspector of Customs, Bombay as a court witness in the interests of justice.

This application was opposed by Govani. The Magistrate, however, by his order dated July 26, 1965, ordered the examination of Dutta under s. 540 of the Code. Dutta stated that he had seized the watches in the reasonable belief that they were smuggled. Govani was thereafter examined again and was given an opportunity to lead defence evidence. He stated that he had nothing further to add and no defence evidence to lead. The Magistrate. after considering the arguments, convicted Govani under ss. 135(a) and 135(b) of the Customs Act awarding him a sentence of one year's rigorous imprisonment and a fine of Rs. 2,000/- (in default, further rigorous imprisonment for six months) on each of the two counts. The watches were also ordered to be confiscated.

Govani appealed to the High Court. His main contention was that the evidence of Dutta was improperly received by the Magistrate and should be excluded from consideration. The High Court rejected these contentions and accepting the testimony of the witnesses on facts, upheld the conviction. Govani now appeals to this Court by special leave. The grant of special leave is limited to the questions whether the evidence of Dutta was improperly received by the Magistrate and whether, if excluded, the conviction of Govani can be supported.

The question falls to be considered under s. 540 of the Code ,of Criminal Procedure. That section is to be found in Chapter 46 of the Code among several others which have been appropriately described in the heading to the chapter as 'miscellaneous'. It provides :

> " s. 540 : 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 reexamine any such person if his evidence appears to it essential to the just decision of the case."

The section gives a power to the court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the COURT to act as the exigencies of justice require. Another aspect of 'his power and complementary to it is to be found in s. 165 of the Indian Evidence Act which provides:

> " s. 165 : 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 crossexamine any witness upon any answer given in reply to any such question These two sections between them confer jurisdiction on the Judge to act in aid of justice.

The Presidency Magistrate, Esplanade, in, dealing with the petition to call Dutta passed an order on July 26, 1965 in which he remarked that there was no gap or lacuna in the prosecution case to fill because Dutta was named as one of the witnesses and as the officer who had seized the watches. He held that the evidence of Dutta was necessary for the just decision of the case. He accordingly granted leave for the examination of Dutta. In view of the fact that he spoke in the language of the second part of s. 540, it is reasonable to think that he exercised the powers conferred on him under the second part although his order is not clear as to which part he had in mind. He, however, ruled that Govani would be further examined under s. 342 of the Code of Criminal Procedure and allowed to lead further evidence. This action of the Magistrate which was approved by the High Court, is challenged before us.

It is submitted that the powers under s. 540, however wide, must be reconciled with the mandatory requirements of Chapter 21 laying down the procedure of trial of warrant cases by Magistrates. It is pointed out that the trial had gone through the stage of taking evidence for the prosecution (s. 252), framing of the charge (S. 254), recording of the plea (S. 255) and the defence (S. 256) of the accused and as Govani did not wish to lead evidence. (S.

257), it had reached the stage of s. 258 and the court could either acquit or 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 S. 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. To begin with, we do not accept as sound the argument that Chapter 21 must limit the powers

under s. 540. Offences under .he Code of Criminal Procedure are tried in different ways according to their gravity. There are thus trials of summons and war5 Sup.C.I./67-13 rant 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 conviction. 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 S. 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 establishes 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 sum- moned, 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. There are, however, two aspects of the matter which must be distinctly kept apart, The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. This was laid down by Tindal, C.J. in. words which are oft-quoted :

> "There is no doubt that the general rule is that where the Crown begins 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 ex improviso, which no human ingenuity can foresee, 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." (Reg. v. Frost)(1).

There is, however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision. This power (1) 4 St. Tr. (N.S.) 85 at 386.

is exercisable at any time and the Code of Criminal Procedure clearly so states. Indeed as stated by Avory J. in Rex v. Dora Harris(1) :

> "The cases of Reg. v. Chapman (8 C & P. 558) and Reg. v. Holden (8 C & P. 606) establish the proposition that the presiding judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, if in his opinion this course is necessary in the interests of justice. It is true that in none of the cases has

any rule been laid down limiting the point in the proceedings at which the judge may exercise that right."

However the learned Judge points out that injustice is possible unless some limitation is put upon the exercise of that right and he adopts for that purpose the rule laid down by Tindal, C.J. in Reg. v. Frost(2) even in those cases where a witness is called by the Judge after the case for the defence is closed, and states, "that the practice should be limited to a case where the matter arises eximproviso, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue" and cites the case of Reg. v. Haynes(3) where Bramwell B. refused to allow fresh evidence to be gone into after the close of the whole case. In Dora Harris's(1) case, five persons were tried, two for stealing and they pleaded guilty and three others for receiving who pleaded not guilty. The first two remained in the dock and the trial proceeded against the other three. They gave evidence on their own behalf and the prosecution case was not quite strong. The Recorder then asked one of the other two accused to give evidence and allowed the prisoner Dora against whom the evidence went to cross-examine him but did not ask Dora to enter the box again to contradict the new evidence. This was held by the Court of Criminal Appeal to be a wrong exercise of the power of the Court. It was an extreme example of the exercise of the power.

Mr. Jethmalani relies strongly upon this case and cites several decisions of the High Courts in India in which this dictum was applied. In particular he relies upon In re K. V. R. S. Mani(4), Shreelal Kajaria v. The State(5) and In re V. Mahadevan(6). In these cases it is laid down that the powers under s. 540 of the Code of Criminal Procedure, wide though they may be, must not be exercised to the disadvantage of the accused, particularly after his defence is over.

There is nothing new in these cases. They follow in essence the decision in Reg. v. Frost(2) as applied in Dora. Harris(1) case.

(1) [1927] 2 K.B. 587 at 594. (2) 4St. Tr. (N.S.) 85 at

386. (3) [1859] 1 F. & F. 666. (4) I.L.R. [1951] Mad.

986. (5) 1,L.R. [1963] Bom. 698. (6) (1964) 2 M.L.J 581.

On the other side reliance is placed upon In re K. K. Narayanali Nambiar(1), State v. Sheikh Mohamad Abdullah and others,(2), Ratnakar Das v. The State and others(3) and Ramjeet and others v. State(4) among others in which a liberal interpretation in favour of the court's powers is placed upon the section.

It is not necessary to refer to the cases cited on either side. They illustrate the application of the general principle spoken to by Avory J. in the extract from Dora Harris(5) case and the condition laid down in Reg. v. Frost(6) Dora Harris and Reg. v. Frost cases involved rebuttal of the defence evidence. In neither case was there any unexpected move by the prisoner and the evidence was therefore, wrongly admitted. It is difficult to limit the power under our Code to cases which involve something arising eximproviso which no human ingenuity could foresee, in the course of the

defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go that far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides. Even in England where the rule in Dora Harris(5) case obtains, the powers of the Court have not been held to be wrongly exercised, when fresh evidence has been let in for a just decision. In William Sullivan(7) rebutting evidence was held to be properly called when the accused put forward a suggestion which could not have been foreseen and in John Mckenna(8) it was held that a judge had complete discretion whether a witness should be recalled and that the Court of Criminal Appeal would not interfere unless it was made to appear that injustice had been caused. In that case (like the one here) the defence had closed the case and the accused had submitted that there was no case to go to the jury.

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 to 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 inquiry 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 (1) A.I.R. 1942 Mad. 223.

(3) A.I.R. 1966 Orissa 102.

(5) (1927) 2 K.B. 587 at 594.

(7) (1922) 16 Cr. App. R. 121.

(2) [1964] 2 Cr. L.J. 88.

(4) I.L.R. [1958] All. 52.

(6) 4 St. Tr. (N.S.) 85 at 386.

(8) (1956) 40 Cr. App. R. 65.

if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.

In the present case the position is this. In 1955, by a notification under the Imports and Exports (Control) Act, 1947, the import of watches, clocks and parts thereof except under a licence was completely stopped [Notification No. 17/1955 dated December 7, 1955 known as Imports (Control) Order, [1955]. Govani was found on November 16, 1964 to be in possession of 305 watches of foreign make. The warrant of search issued by the Assistant Collector of Customs recited :

> "Whereas there are reasons to believe that prohibited and dutiable goods liable to confiscation .... are secreted in..... Premises of Shri G. K. Gowani, Shop No. 20, Suklaji Street, Bombay, etc."

The watches (among other articles) were seized by Dutta. He separated the old watches from the new and asked to see any document which would show that the watches were legitimately imported. Govani produced no document although a summons under s. 108 of the Customs Act, 1962 was served upon him. The watches were, therefore, seized. There was evidence to show that in 1963 1,300 watches were seized from Govani's locker in a safe deposit vault but the prosecution then had resulted in acquittal. The Magistrate and the High Court were of opinion that these circumstances might lead to a reasonable belief in the mind of the person seizing the watches, that they were smuggled. The prosecution examined Ranade, Prevention Officer, Customs who had assisted at the search but failed to examine Dutta who seized the watches and under whose direction the search was conducted. The question was why were the watches seized ? They were obviously not seized because they were stolen property or belonged to some other person. They were seized after search on a warrant which expressed the belief that they were smuggled and after affording Govani an opportunity by notice to explain his possession. It is obvious that the just decision of the case required a finding whether they were smuggled or not. The circumstances already deposed to by Mukund Ranade and otherwise on the record clearly established that someone must have seized the watches entertaining a belief that they were smuggled. This belief obviously was entertained by Dutta. This was not a case in which the prosecution was trying to fill a gap in the pro- secution case. The court was right in thinking that a just decision of the case required that the nature of the belief underlying the seizure should be before it on oath of the person making the seizure so that Govani might be required, as the policy of the Customs Act, 1962 requires, to prove his innocent possession. Govani had really no defence in view of the Control Order of 1955 and the gap of time between the promulgation of the order and the date of the seizures. He admitted this before and after Dutta's evidence. In these circumstances it cannot be said that the court had exceeded its jurisdiction in acting under the second part of s. 540 of the Code of Criminal Procedure. As Dutta's evidence was rightly taken and gone into, and as Govani had no defence beyond taking advantage of the inadvertent omission, the defence had no merit. The conviction was, therefore, rightly reached. The appeal fails and is dismissed.

R.K.P.S. Appeal dismissed.