the temperature used. It is hardly possible to hold that milk after being subjected to such process will cease to be milk.

(16) In the result, all the four writ petitions are without merit and are dismissed with costs.

N. K. S.

Before S. S. Dewan, J.

AVTAR SINGH—*Petitioner*

versus

STATE—*Respondent.*

Criminal Revision No. 59-R of 1975.

June 12, 1978.

Code of Criminal Procedure (V of 1898)—Section 540—Scope of—Power to summon court witness—Circumstances under which such power can be exercised.

Held, that by the very nature of the subject dealt with by section 540 of the Code of Criminal Procedure 1898, the action to be taken by the court thereunder must necessarily depend upon the facts of each case and it is not possible to formulate a general rule applicable to all cases determining when and under what circumstances power under the section should be exercised. It is necessarily so because the provisions of the section are intended to subserve the interests of justice and not the interest of either the prosecution or the accused before the Court. What is just in a given set of facts and circumstances may be clearly unjust in another set of facts and circumstances. Any attempt, therefore, to limit the amplitude of power or to formulate rules to govern the exercise of the Court's discretion in respect of it can never be totally free from the possibility of making the court powerless to render justice in the peculiar circumstances of a particular case. The only limitation which can be placed on that power are those which the judicial conscience of the Court may prescribe in the facts and circumstances actually before it. When the Court comes to entertain an opinion that the evidence of any person is essential to the just decision of the case, the section itself makes it obligatory for the court to summon and examine that person. (Para 3).

Case reported under section 428 Cr. P.C. by Shri K. L. Wason, Addl. Sessions Judge, Ambala, dated 14th March, 1974 for revision of

the order of the court of Shri M. S. Nagra, Judicial Magistrate, 1st Class, Ambala Cantt, dated 1st February, 1974 questioning the legality of an order passed under section 540 of the Code of Criminal Procedure, 1898.

J. S. Malik, Advocate as Intervener, *for the Petitioner.*

H. S. Gill, D.A. Haryana, *for the Respondent.*

ORDER

S. S. Dewan, J.—The accused-petitioner having filed a revision petition before the Sessions Judge, Ambala, questioning the legality of an order, dated 1st February, 1974, passed by the Judicial Magistrate, 1st Class, Ambala Cantt., under section 540 of the Code of Criminal Procedure, 1898, the learned Additional Sessions Judge, Ambala, has, made this reference, recommending that the Judicial Magistrate's order may be quashed.

(2) The said order was made by the trial Magistrate allowing an application moved on behalf of the Prosecuting Sub-Inspector that he may be permitted to file an affidavit of Constable Bhoop Singh, so as to establish that he had taken the sample of opium from the police station to the office of Chemical Examiner, Haryana, Chandigarh. The proceedings before the Magistrate arose like this. The accused-petitioner was in conscious possession of 2 K-700 gms. of opium without any valid permit or license. The evidence of the prosecution was closed on 14th January, 1974 and the case was posted for defence evidence. On 29th January, 1974, the accused made a statement in the trial Court that he did not like to produce any evidence in defence. On the same day, the arguments were also concluded and the case was posted for orders on 31st January, 1974. On that day, an application was moved by the Prosecuting Sub-Inspector under section 540 of the Code of Criminal Procedure, praying that the prosecution may be directed to file fresh affidavit of Constable Bhoop Singh or in the alternative the said constable may be examined as Court witness. This application was allowed by the trial Magistrate which was challenged in revision by the accused. In his reference to this Court, the learned Additional Sessions Judge recommended that the order of the trial Magistrate be quashed.

(3) I have heard Shri H. S. Gill, the learned counsel for the State and Shri J. S. Malik, Advocate appearing as an Intervener.

Shri Malik has vehemently contended that the impugned order is greatly prejudicial to the interest of the petitioner as Constable Bhoop Singh has been summoned to fill in lacunae in the case of the prosecution. In support of his contention, he has cited *Jamatraj Kewalji Govani* v. *State of Maharashtra* (1), *Basant Lal* v. *The State of Haryana* (2), *and Didar Singh* v. *The State of Punjab* (3). It is unnecessary to make any detailed reference to these several cases cited by the learned counsel because all the High Courts are agreed that by the very nature of the subject dealt with by the said section, the action to be taken by the Court thereunder, must necessarily depend upon the facts of each case and it is not possible to formulate a general rule applicable to all cases determining when and under what circumstances the power under the section should be exercised. It is necessarily so because the provisions of that section are intended to subserve the interests of justice and not the interest of either the prosecution or the accused before the Court. If this high purpose of the section is borne in mind, one cannot fail to appreciate the reason for the legislature having employed language giving the widest amplitude to the power which it confers upon the Court. What is just in a given set of facts and circumstances may be clearly unjust in another set of facts and circumstances. Any attempt, therefore, to limit the amplitude of the power or to formulate rules to govern the exercise of the Court's discretion in respect of it, can never be totally free from the possibility of its making the Court powerless to render justice in the peculiar circumstances of a particular case. The only limitations which can be placed on that power are those which the judicial conscience of the Court may prescribe in the facts and circumstances actually before it. It should be remembered that when the Court comes to entertain an opinion that the evidence of any person is essential to the just decision of the case, the section itself makes it obligatory for the Court to summon and examine that person.

(4) It has no doubt been argued by Mr Malik on the basis of the aforesaid decided cases that a person, who is an essential witness for the prosecution but whom the prosecution has for some reason or the other omitted to cite and examine as a witness on its behalf, is

(1) A.I.R. 1968 S.C. 178.
(2) 1973 C.L.R. 666.
(3) 1977 CLR 60.

not a person who could properly be examined by the Court in exercise of its power under section 540 and that such power ought not to be exercised for the purpose of what is described as filling up the loopholes or the lacunae in the prosecution evidence. These arguments, in my opinion, are of relevance only if the matter is to be examined from the point of view of the conduct of the prosecution or persons incharge of the prosecution and can scarcely be available when one considers the exercise in the interest of justice of its powers by the Court which can never be described as a partisan of either prosecution or the defence. The exercise of the power by the trial court under section 540 of the Code of Criminal Procedure to the extent it affect its ultimate decision of the case is undoubtedly open to correction in appeal or revision as the case may be. In the majority of cases, the question whether such power has been rightly or wrongly exercised by the trial Court can be fully and properly examined and correctly decided after the conclusion of the trial rather than at an interlocutory stage.

(5) In case *Balinder Parshad* v. *The State of Haryana* (4), it was held that:—

> "It is, therefore, clear that the Court has jurisdiction to act under section 540 *ibid* at any stage of enquiry, trial or other proceeding under the old Code. The trial comes to an end by pronouncement of a judgment though the judgment itself may not be a part of the trial.
>
> Section 540 *ibid* gives wide powers to the Court to take action under that section before the case has been decided even though the parties have concluded the evidence and argued the case.
>
> In the present case, the learned Magistrate is of the definite view that the evidence of Sant Ram is essential to the just decision of the case. Thus, he has rightly exercised his powers under the second part of section 540 *ibid* in summoning him for his examination, more especially when he has already said that the accused would be allowed adequate opportunity of assailing the statement of

(4) 1977 C.L.R. (Pb. and Har.) 147.

Sant Ram and, as such, he would not feel prejudiced in any manner. He has further observed that recording of the statement of Sant Ram, which was essential to the just decision of the case, would not amount to filling up of the gap in the evidence. Thus, the impugned order does not call for any interference."

(6) Similar view was taken in *Gengal Singh* v. *The State of Haryana* (5).

(7) Now in the case before me, the detailed order of the Judicial Magistrate discloses that he has applied his mind, considered both sides of the matter presented to him on behalf of the prosecution as well as the accused and has come to entertain a definite opinion that the evidence of Constable Bhoop Singh Singh is essential for the just decision of the case. It is not possible at the stage for a Court sitting in revision to entertain a different opinion and still be quite certain that the interests of justice will not suffer.

(8) The reference is declined.

K. T. S.

Before S. S. Sandhawalia, A.C. J. and S. S. Dewan, J.

SAROJ MEHTA, ASSOCIATE PROFESSOR (DR.)—*Petitioner.*

versus

THE POST-GRADUATE INSTITUTE OF MEDICAL EDUCATION & RESEARCH, and others—*Respondents.*

Civil Writ Petition No. 3036 *of* 1977

July 17, 1978.

The Post-Graduate Institute of Medical Education and Research Act (51 of 1966)—*Constitution of India* 1950—*Article* 226—*Meeting of a selection committee—No quorum prescribed—Presence of majority of its members—Whether necessary to validate the proceedings.*

---

(5) 1977 C.L.R. (Pb. and Hary.) 169.