

(2017) 03 OHC CK 0018

In the Orissa High Court

Case No : Criminal Rev No. 193 of 2017

Ashok Bisoi

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 312

Citation : (2017) CriLJ 2774 : (2017) 67 OrissaCriR 92

Hon'ble Judges : S.K. Sahoo, J.

Bench : Single Bench

Final Decision : Disposed Off

Judgement

S. K. Sahoo, J.— Heard Mr. Soubhagya Ku. Dash, learned counsel for the petitioners and Mr. Deepak Kumar, learned Additional Standing Counsel for the State.

2. The petitioners have challenged the order dated 04.03.2017 passed by the learned Additional Sessions Judge-cum-P.O., Children's Court, Gajapati at Parlakhemundi in Criminal Appeal No.01 of 2017 in dismissing the criminal appeal and thereby confirming the impugned order dated 15.02.2017 of the learned Principal Magistrate, J.J.B-cum-Registrar, Gajapati at Parlakhemundi in J.R. Case No.10 of 2016.

3. It is the contention of learned counsel for the petitioners that the petitioners are juveniles and they are detained in observation home since 30.8.2016 as per the order of learned Principal Magistrate, Juvenile Justice Board-cum-Registrar, Gajapati at Parlakhemundi in connection with J.R. Case No.10 of 2016 for commission of offences under sections 376-D and 506 of the Indian Penal Code read with section 6 of the POCSO Act. It is further stated that during course of inquiry before the learned Principal Magistrate, Juvenile Justice Board, Gajapati, Parlakhemundi, two prosecution witnesses i.e. P.W.9 and P.W.10 were examined by the prosecution on 20.01.2017 and on that day, since the defence counsel

was not well, before recording of the evidence of P.W.9 and P.W.10, a time petition was filed by the defence to defer the cross-examination. After hearing both the sides, the Board held that the ground of illness of the conducting counsel is not justifiable and accordingly, time petition was rejected and direction was given to the defence counsel to get ready at 2.30 p.m. At 2.30 p.m. when on repeated calls, the learned counsel for the CCL did not appear before the Board, the evidence of P.W.9 and P.W.10 was recorded in presence of the CCL and the case was adjourned without cross-examination of the witnesses.

4. Learned counsel for the petitioners further submitted that immediately thereafter an application under section 311 of Cr.P.C. was filed by the defence counsel to recall P.W.9 and P.W.10 for cross-examination and the learned Trial Court though allowed such application vide order dated 15.2.2017 but directed the CCL to deposit a sum of Rs. 1000/- towards the expenses of the witnesses i.e. P.W.9 and P.W.10 in the J.J.B., SB Account No.32914216483. The petitioners preferred an appeal against the impugned order dated 15.2.2017 which was heard by the learned Addl. Sessions Judge-cum-Presiding Officer, Children's Court, Gajapati at Parlakhemundi in Criminal Appeal No.01 of 2017 and the learned Appellate Court rejected the criminal appeal and upheld the order passed by the Principal Magistrate, Juvenile Justice Board, Gajapati at Parlakhemundi.

5. Learned counsel for the petitioners contended that the imposition of cost of Rs.1000/- towards the expenses of witnesses is illegal and since the petitioners are juveniles and they have been detained in the observation home since 30.08.2016 and their family members are very poor to pay such an amount, the learned Court was not justified in imposing such amount.

6. Learned counsel for the petitioners further submitted that on the date when P.W.9 and P.W. 10 were examined, they could not be cross examined due to illness of the defence counsel and when cross examination is a valuable right of the accused persons and the learned Principal Magistrate allowed the petition for recall, he should not have imposed cost for such purpose.

Section 312 of Cr.P.C states as follows:-

312. Expenses of complainants and witnesses.-

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this code."

7. In exercise of the powers conferred by section 312 of Cr.P.C. and in supersession of the Orissa Criminal Court Witness (Payment of Expenses) Rules, 1963, the State Government enacted the Orissa Criminal Court witnesses (Payment Expenses) Rules, 2012 (hereafter "2012 Rules") which was notified by the Law Department on dated 11.09.2012 for regulating payment by the State Government of reasonable expenses of witnesses attending any Criminal Court in

the State for the purposes of any enquiry, trial or other proceeding under the Code of Criminal Procedure. Rule-3 of 2012 Rules states as follows:-

"3. (1) The Criminal Courts are authorised to pay at the rates specified in the Schedule to these rules the expenses of-

(a) witnesses, whether for the prosecution or for the defence,-

(i) in cases in which the prosecution is instituted, or carried on by, or under the orders of or with the sanction of the Government, or any Judge, Magistrate, or other public officer, or in which it shall appear to the Presiding Officer to be directly in furtherance of the interest of public service; and

(ii) in all cases entered as not bailable in Column 5 of Schedule II appended to the Code.

(b) witnesses in all cases in which they are summoned under the provisions of Section 311 of the Code unless otherwise directed.

(2) The Court may refuse payment of such expense to any witness, who without sufficient cause remains absent on any day fixed for hearing and whose presence has been secured through coercive process."

8. In view of the fact that the petitioners are juveniles and their family members are not financially sound and the learned Trial Court considering the petition filed by the petitioners under section 311 Cr.P.C. felt it necessary for recalling the two prosecution witnesses i.e., P.W.9 and P.W.10 for the purpose of cross-examination by the defence and there is no such deliberate laches on the part of the defence counsel for not cross examining the witnesses on the relevant day, the learned Principal Magistrate should not have directed the petitioners to deposit cost for recalling the witnesses in an arbitrary and fanciful manner without keeping in view the provisions under 2012 Rules. Discretion must be exercised honestly, fairly and in the spirit of the statute. I am of the view that the imposition of cost towards expenses of the witnesses is not proper and justified.

9. Accordingly, the impugned order dated 15.02.2017 passed by the learned Principal Magistrate, Juvenile Justice Board-cum-Registrar, Gajapati at Parlakhemundi in J.R. Case No.10 of 2016 and the judgment and order dated 04.03.2017 passed by the learned Additional Sessions Judge-cum-P.O., Children's Court, Gajapati at Parlakhemundi in Criminal Appeal No.01 of 2017 are hereby set aside. The learned Principal Magistrate, Juvenile Justice Board-cum-Registrar, Gajapati at Parlakhemundi shall summon P.W.9 and P.W.10 without insisting any cost from the petitioners and give every opportunity to the defence counsel to cross examine those witnesses in accordance with law.

10. With the aforesaid observation, the CRLREV is disposed of.