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**(1989) 06 OHC CK 0001**  
**In the Orissa High Court**

Binod Bihari Mishra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

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**Date of Decision :** 23-06-1989

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161  
Penal Code, 1860 (IPC) — Section 307, 34, 364

**Citation :** (1989) CriLJ 2458 : (1989) 2 OCR 373

**Hon'ble Judges :** S.C. Mohapatra, J

**Bench :** Single Bench

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**Judgement**

S.C. Mohapatra, J.—Accused No. 3 is the petitioner in this Criminal Revision.

2. Accused persons were committed for their trial in the court of Sessions under Sections 307 and 364/34, I.P.C. They have been released on bail. Session case has been transferred to the Court of Additional Sessions Judge for trial.

3. Mr. N. Misra, Advocate was representing the petitioner and moved his application for bail. Later, Investigating Officer recorded his statement u/s 161, Cr.P.C, and cited him as a witness in the charge-sheet. On the charge-sheet being filed Mr. N. Misra refused to accept the brief to defend the accused person expressing that he would be willing to defend the accused persons, if he is not examined as a witness. Accordingly, a petition was filed through their Advocate Mr. G. D. Nanda on 2-8-1988 to allow the accused persons to engage Mr. N. Misra, Advocate and not to examine him as a witness him as a witness. When the application was to be taken up for consideration on 3-8-1988, Mr. Nanda endorsed no instruction and did not move the petition. Accordingly, learned Additional Sessions Judge rejected the petition as not moved and engaged a counsel for defending accused person including petitioner at State expense. Being aggrieved by the order, this revision application has been filed.

4. Mr. H.S. Misra, learned Counsel for the petitioner submitted that on perusal of statement of Mr. N. Misra u/s 161 Cr.P.C, it would be seen that statement even accepted as a whole would not be relevant in the trial of the accused persons.

Accordingly to Mr. Misra, learned Counsel for the petitioner, Mr. N. Misra has been cited as a witness mala fide to deprive petitioner to engage him for defence.

5. No provision in law excepting the conduct rules for Advocates under the Advocates Act has come to my notice prohibiting an Advocate to appear where he is cited as a witness. Court has no power either to direct or deprive an Advocate to appear in a case. Mr. N. Misra, Advocate on whom petitioner has confidence, himself knows if he is a witness having relevancy in the trial. He can decide himself whether he would be misconducting himself to appear for the accused. In case a disciplinary proceeding is initiated against him alleging misconduct, he can satisfy the State Bar Council that he has been cited as a witness by the investigating officer mala fide and Bar Council is to adjudicate the same to consider if the Advocate has misconducted by appearing in a litigation where he has been cited as a witness. If in such circumstances, an Advocate himself becomes unwilling to appear for a party Court ought not to pave the way for him to facilitate his appearance.

6. There is no doubt that Court has discretion to examine if a person cited as witness ought to be summoned. Such discretion should however, be rarely exercised. If this power is exercised liberally, trial cannot begin since Court would be busy in examining at the initial stage whether a person is to be summoned and pass orders assailable in revision necessitating stay of the proceeding. Once a revision is entertained, principle of natural justice is to be followed to call for record, serve notice on opposite party. In such matters, unless grave prejudice is caused, wrong orders of Court ought not to be entertained for examination of its correctness. While considering the question of summoning a person cited as witnesses, mala fide is not to be inferred. It is to be kept in mind that provision has been made in the Cr. P.C., 1973 giving scope for further investigation even after filing charge-sheet. Besides, getting clue from evidence of other witnesses, prayer can be made to Court to summon a person to be a witness.

7. Mr. H.S. Misra however, is justified to submit that the learned Additional Sessions Judge has not judicially considered the petition to reject the same. In case, Mr. Nanda had no instruction and he did not appear, petitioner could have been given opportunity to move the petition. The same ought not to have been rejected merely on the ground that none appeared to press the petition. Impugned order is accordingly, vulnerable.

8. In (his case, date of occurrence as alleged in 2-3-1987. Trial has sufficiently been delayed. In case petitioner has substance in his submission with regard to engaging Mr. N. Misra, Advocate to defend him, he having raised the question from the initial stage, can challenge the order, in the event of his conviction, in appeal on the ground of violation of the principle of natural justice and appellate court can consider the weight of the grievance of petitioner. There are other accused persons who have not assailed the order. In the circumstances, learned Judge to try the accused persons shall take steps for completion of the trial expeditiously.

9. In the result, Criminal Revision is allowed. Send back the lower court records at once.