
(2002) 07 OHC CK 0077

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 4905 of 1997

Jadumani Mohanty and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 31-07-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Dowry Prohibition Act, 1961 — Section 4
Penal Code, 1860 (IPC) — Section 302, 304B, 34, 498A

Citation : (2003) CLT 72 (Suppl CrI) : (2002) 2 OLR 382

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : D. Nayak, S. Swain, D.P. Pradhan, R.K. Pradhan and P.K. Mishra, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

P.K. Mohanty, J.—The accused-petitioners' application u/s 231(2) read with Section 311, Cr.P.C. to recall P.Ws. 1 and 2 for further cross-examination having been rejected by the learned Additional Sessions Judge, Khurda by order dated 6.12.1997, the petitioners have approached this Court in this petition u/s 482, Cr.P.C.

2. The petitioners were accused in a case punishable under Sections 498-A/304-B/302/34, IPC and u/s 4 of the Dowry Prohibition Act in Khurda P.S. Case No. 7 of 1996 corresponding to G.R. Case No. 29 of 1996 and presently pending in the Court Additional Sessions Judge, Khurda in S.T.No. 11/37 of 1997 for trial. The petitioners after examination of some prosecution witnesses, filed an-application u/s 231(2) read with Section 311, Cr.P.C. for recalling P.Ws. 1 and 2 for further cross-examination mainly on the ground that the counsel for the accused-petitioners was suffering from mental disturbance and severe headache on 1.9.1997 when P.W. 1-informant and his wife-P.W.2 were examined and as such could not make effective cross-examination on several material aspect to confront them with the FIR as well as the statements recorded by the police u/s 161, Cr.P.C.

3. The learned Additional Sessions Judge in his order dated 6.12.1997 has rejected the petition holding that perusal of the evidence of P.Ws. 1 and 2 discloses that the learned defence counsel has cross-examined those two witnesses at greater length and also confronted them with their statements before the Investigating Officer.

4. The learned counsel for the petitioners submitted that in the peculiar facts of the case when the learned counsel for the accused-petitioners in the Court below was in a mental disturbance and was suffering from severe headache, he was not in a physical mental state and able to effectively cross-examine these two witnesses and such ground should have weighed in the mind of the learned trial Judge and the application ought to have been allowed in the interest of justice specially when those witnesses who were father and mother of the deceased lady, deposed regarding the non-payment of dowry and consequential torture. The State counsel, however; submits that though a witness can be recalled at any stage in a criminal proceeding in terms of the aforesaid provision of law, such a procedure can be adopted only when the Court is satisfied that the same is essential for a just decision of the case.

5. The power of the Court u/s 311, Cr.P.C. is plenary to summon or even recall any witness at any stage of the case if the Court consider it necessary for a just decision. It is the settled position of law that the Court should not permit lacuna in prosecution evidence to be filled up by recalling a witness for further cross-examination. But then what is meant by lacuna in a prosecution case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The old proverb "to err is human" is the recognition of the possibility of making mistakes to which humans are susceptible. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. This principle is also equally applicable to the defence. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence or special circumstances, in putting relevant questions during cross-examination, the Court should be magnanimous in permitting such mistakes to be rectified. The function of the Criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. The apex Court in *Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi*, has laid down the principle which should weigh in the mind of a Judge, deciding such an issue.

6. The law is well settled that in order to enable the Court to find out the truth

and render a just decision, the salutary provisions of Section 311, Cr.P.C. are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute.

7. In the case at hand an application u/s 231(2) read with Section 311, Cr.P.C. was filed by the learned counsel for the defence mainly on two counts i.e. that the learned counsel himself was in a mental disturbance and was getting severe headache for which he could not concentrate on making effective cross-examination and that some material discrepancies and contradictions between the statements in the FIR as well as the statements u/s 161, Cr.P.C. and the evidence in Court could not be confronted because of such mental state of the learned counsel. The leading provision of Section 231, Cr.P.C. makes it clear that after the prosecution witnesses are examined, cross-examined by the accused and re-examination, if any, shall follow immediately in the order stated in Section 138 of the Evidence Act. Ordinarily examination and cross-examination are to be done in a continuous process. But Sub-section (2) of Section 231, Cr.P.C. empowers the Judge with a discretion to permit for sufficient reason the cross-examination of any witness to be deferred or recall prosecution witness for further examination. The Court may in its discretion allow a prosecution witness already cross-examined to be recalled for further cross-examination before closure of the prosecution when fresh materials for further effective cross-examination of a witness which were not already available and have come to the knowledge of the defence. Section 311, Cr.P.C. however, permits the Court at any stage of any enquiry, trial or proceeding under the Code to 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 re-examine any such person if his evidence appears to it to be essential to the just decision of the case. It is well settled that the discretion is vested in the Court in the interest of justice and for a just decision of the case. The law is equally well settled that the Court should not allow such application to enable one party or the other to fill up the gap or lacuna in his case and to improve it by new matter at a later stage, but to enable the Court to act if justice so requires. The case at hand appears to be peculiar, but learned counsel appearing for the accused-petitioners was not in a proper mental state because of the disturbance and the severe headache for which he could not effectively cross-examine these two vital witnesses specially in view of the serious nature of allegation against the accused persons. The specific plea was that the earlier statements made by these witnesses either in the FIR or in their statements u/s 161, Cr.P.C., recorded by the police could not be confronted fully. In such view of the matter, the learned Additional Sessions Judge ought to have considered the same in its proper perspective taking a lenient view of the matter specially when the plea was the state of mind of the accused-petitioners"

counsel and for that reason, he failed to confront them with earlier statements made u/s 161, Cr.P.C.

8. In that view of the matter, I set aside the impugned order dated 6.12.1997 of the learned Additional Sessions Judge. Khurda and direct him to allow the application and the prayer of the accused-petitioners to cross-examine by issuing summons to P.Ws. 1 and 2 only to the extent of confronting the earlier statements either made u/s 161, Cr.P.C. or in the FIR and not more. The trial is held up since 1997 during pendency of this application and, therefore, the learned Sessions Judge shall now proceed with the case with utmost expedition with the explicit understanding that the learned counsel for the accused-petitioners shall not pray for unnecessary adjournment on the date fixed inasmuch as further cross-examination of P.Ws. 1 and 2 shall be confined to confronting to their earlier statements only and no more. The trial may be conducted day to day with expedition and shall be concluded expeditiously, not later than end of December, 2002. Let the L.C.R. be transmitted to the Court below forthwith.