

(2000) 07 OHC CK 0017

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 2004 of 1999

Jitu alias Biswajit Das and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-07-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 233, 233(3), 243, 312
Orissa Criminal Court Witnesses (Payment of Expenses) Rules, 1963 — Rule 3
Penal Code, 1860 (IPC) — Section 302

Citation : (2000) 2 OLR 639

Hon'ble Judges : C.R. Pal, J

Bench : Single Bench

Advocate : D. Panda, D. Pr. Dhal and S. Mishra, for the Appellant; G.K. Mohanty, Additional Government Advocate, for the Respondent

Judgement

C.R. Pal, J.—In this petition u/s 482, Cr.P.C. the petitioners challenge the legality of the order dated 19.4.1999 passed by the learned Second Additional Sessions Judge, Bhubaneswar in S.T.Case No. 27/ 502 of 1996 debarring the petitioners to examine the defence witnesses as per the list submitted by them on 15.4.1999 and directing the petitioners to deposit Rs. 500/- towards the expenses of a witness and Rs. 150/-towards the cost of special messenger.

2. The petitioners are facing their trial in Sessions Trial No. 27/ 502 of 1996 before the learned Addl. Sessions Judge, Bhubaneswar. After the prosecution evidence was closed and as the petitioners were not acquitted u/s 232, Cr.P.C. they were asked to enter into their defence. At that stage the petitioners filing a list of witnesses whom they wanted to examine in their defence made a prayer to compel the attendance of those witnesses. On 19.4.1999 they filed another petition to summon one Prafulla Kumar Parida as a defence witness. On that date the learned Second Addl. Sessions Judge refused to summon the witnesses the list for which was filed on 15.4.1999 on the ground that the petitioners failed to file written process. The petition filed on 19.4.1999 was allowed with a direction to deposit Rs. 500/- towards the expenses of the witness and Rs. 150/- towards

the cost of Special Peon. Being aggrieved by the aforesaid order, the petitioners have filed this petition.

3. It is submitted by the learned counsel of the petitioners that under the provisions of the Criminal Procedure Code, the petitioners' prayer to summon any witness can only be rejected on the ground that the application is made for the purpose of vexation or delay or for defeating the ends of justice. Therefore, refusing to issue process against the witnesses as per the list submitted on 15.4.1999 on the ground of non-submission of written process is not according to law. In the above context, it is noticed that the petitioners are facing trial for the offences triable by the Court of Session. Chapter XVIII of the Cr.P.C. contains the procedure which are to be followed in a trial before a Court of Session. Section 233 of the said Chapter runs as follows :

"233. Entering upon defence -

(1) Where the accused is not acquitted u/s 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

Under Section 233, Sub-section (2) the petitioners upon entering on their defence are entitled to adduce the evidence in support of their case. Section 233, Sub-section (3) empowers the Court to refuse issue of process only when it appears to the Court that the petition is made for the purpose of vexation or delay or for defeating the ends of justice. Section 233, Cr.P.C. authorises the defence to make an application for the summoning of its witnesses and imposes a duty on the Court to summon such witnesses unless it considers that such application should be refused for any of the reasons specified in Sub-section (3) of Section 233 and the Court is bound to record the reason. Once the petition is allowed the Court is bound to issue summons to the witnesses. Here in the instant case the impugned order does not show that there existed any of the grounds mentioned in Section 233(3), Cr.P.C. justifying refusal to issue summons. Since the reasons on which a Court can refuse to summon a witness are embodied in Sub-section (3) of Section 233, Cr.P.C. and the reason assigned by the learned Addl. Sessions Judge for refusing to issue summons is not one of the reasons envisaged u/s 233(3), Cr.P.C, the impugned order refusing to summon the witnesses for non-filing of written process cannot be supported.

4. The next contention of the learned counsel of the petitioners is that in the absence of any provision requiring the petitioners to meet the expenses of the

witnesses and the special peons, the order passed by the learned Second Additional Sessions Judge requiring the petitioners to deposit the cost is illegal. The learned Additional Government Advocate, on the other hand, argued in support of the impugned order. The question arose whether in a trial under sessions procedure the accused can be asked to deposit the expenses of the witnesses summoned to adduce evidence in defence of the accused and the cost of the special peon. In the above context, it is noticed that though in the cases triable under warrant procedure discretion is available to the Court, as envisaged in Section 243(3), Cr.P.C. to direct the accused to deposit the reasonable expenses of the witnesses, no such provision is there under Chapter XVIII, Cr.P.C. which contains the procedure to be followed in trial before a Court of Session. Section 312, Cr.P.C. which appears in Chapter XXIV empowers the Criminal Courts to order payment by the Government of reasonable expenses of any complainant or witness attending the Court for the purpose of any enquiry, trial or other proceeding subject to any Rule made by the State Government. Section 312 of the Code runs 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 purpose of any inquiry, trial or other proceeding before such Court under this Code."

Section 312 Cr.P.C. corresponds to Section 544 of the Code of Criminal Procedure, 1898. Exercising the power available under that Section the State Government framed "The Orissa Criminal Court Witnesses (Payment of Expenses) Rules, 1963" for payment of expenses to witnesses appearing in the Criminal Courts. The said Rule still holds the field in view of the provisions of Section 484(2)(b) Cr.P.C. Rule 3 of the Orissa Criminal Court Witnesses (Payment of Expenses) Rules, 1963 is quoted below for better appreciation

"3. 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 interests of the public service; and

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

(b) witnesses in all cases in which they are summoned under the provisions of Section 540 of the Code."

Under Rule 3(a)(ii) of the said Rules Criminal Court is to make payment to the

witnesses of their expenses where the offence alleged is a non-bailable one. In view of the above position of law and as the offence for which the petitioners are facing their trial is an offence u/s 302 IPC which is non-bailable in nature, the order passed by the learned Second Additional Sessions Judge directing the petitioners to deposit the expenses of the witnesses and the cost of the special peon cannot be supported and as such the same is liable to be set aside.

5. In the result, the impugned order is set aside with the direction to the learned Second Additional Sessions Judge to summon the witnesses mentioned in the list dated 15.4.1999 and the witness for whose attendance the petitioners file the petition on 19.4.1999 and giving the petitioners opportunity to examine the witnesses to dispose of the case in accordance with law.

The Crl. Misc. Case is disposed of.