
(2005) 09 OHC CK 0032
In the Orissa High Court
Case No : CRLREV No. 647 of 2005

Kanhu alias Kanhei Gouda

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 30-09-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 185, 231(2), 239, 311
Penal Code, 1860 (IPC) — Section 302, 306, 307, 34

Citation : (2005) 100 CLT 735 : (2005) 2 OLR 718

Hon'ble Judges : N. Prusty, J

Bench : Single Bench

Advocate : S. Panda and S. Mohapatra, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

N. Prusty, J.—Even though the matter is listed for admission, on consent of the learned counsel for the petitioner as well as the learned counsel for the State, the same is taken up for final disposal at the stage of admission.

2. The petitioner, who is facing trial for commission of the alleged offence u/s 302/34 I.P.C. before the learned Additional Sessions Judge, Fast Track Court, Aska in Sessions Case No. 432 of 2004/72 of 2004 arising out of G.R. Case No. 11 of 2004 along with other accused persons, has filed the present application challenging the order dated 5.9.2005 whereby the learned trial Court has rejected the petitioner's prayer to recall a witness (P.W.6) for cross-examination.

3. The factual backdrop of the case is that the petitioner, who is brother of the informant, on 17.1.2004 at about 7 P.M. along with twenty others came to village Samantapali and dragged one Golapa, who is wife of the informant, to the river-bed. There, the petitioner caught hold of the informant's wife and other persons assaulted her by means of Tangi and Kati. On hearing hulla of his wife, the informant came to the spot and found the accused persons assaulting her. On seeing the same, the informant also raised hulla and for which the accused

persons left the spot. Due to previous enmity, this occurrence took place. The injured Golapa was taken to the hospital and later on shifted to M.K.C.G. Medical College and finally she succumbed to the injuries. Even though after receipt of the FIR, police registered a case under Sections 341: 306: 307/34 IPC, after death of the injured the case was registered u/s 302/34 IPC.

4. The petitioner initially engaged Shri Purnananda Sahu, Advocate, Aska to defend him in the case. In course of hearing, Baiya Gouda was examined by the prosecution as P.W.6. In his evidence/statement, he directly implicated the petitioner alone for commission of the alleged offence as he categorically stated :-

My daughter died about more than a year back being murdered by Kanhei Gouda. xxxxx Accused Kanhei is the son-in-law of accused Indra Gouda having married to his daughter. On the date of occurrence at about 7 P.M.I received information that my daughter Golapa has been murdered by her brother-in-law Kanhei Gouda. So I proceeded . to village Maharajpur and found my daughter was lying dead sustaining cut injury on her left shoulder left arm and on her chest.

5. Even though P.W.6 implicated the petitioner alone, so far as the allegation regarding commission of the offence is concerned, his counsel, Shri Sahu declined to cross-examine the witness. Hence P.W.-6 Baya Gouda was discharged on 16.4.2005 without being cross-examined. The petitioner is an illiterate person having no knowledge about the procedure of law. When he came to know about such action of his lawyer, he disengaged him and engaged one Shri L.M. Das as his Advocate on 1.9.2005 to conduct the case. Since Shri Das had not obtained consent of the previous counsel, Vakalatnama filed by Shri Das was not accepted and on that ground the petition filed by the petitioner through Shri Das for recalling P.W.6 for cross-examination was also rejected. Again the petitioner orally prayed to engage Shri G.C. Tripathy, Advocate to conduct his case and filed a petition to the effect, that is, to allow him to engage Shri Tripathy in place of his previous lawyer Shri Sahu. The said petition was allowed. The Vakalatnama filed by Shri Tripathy was accepted and on the very same day, the petitioner filed another application through his new counsel Shri Tripathy to recall P.W.6 for cross-examination mentioning therein the detail particulars as to how he shall be prejudiced in case P.W.6 is not recalled for cross-examination, since P.W.6 in his evidence directly implicated the petitioner alone for commission of the alleged offence.

6. Considering the submission made by the learned counsel for the petitioner as well as the learned Addl. Public Prosecutor, the learned trial Court rejected the petition filed by the petitioner to recall P.W. 6 for cross-examination keeping in view the order of this Court in BLAPL No. 3898 of 2005 fixing a target to complete the case by the end of September, 2005 as well as keeping in view the fact that the earlier counsel engaged by the petitioner had declined to cross-examine P.W.6.

7. In support of his contention, learned counsel has cited decisions of this Court in the case of Pradeep Kumar Agarwal Vs. State of Orissa, Jadumani Mohanty and Ors. v. State of Orissa 2002 (XI) OLR 382 and Ananda Mohan Nanda Vs. State of Orissa, .

In the case of Pradeep Kumar Agarwal (supra), on interpretation of the clauses of Section 311 Cr.P.C, it has been observed as follows :-

The object underlying Section 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The Section is not limited only for the benefit of the accused and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The Section is a general Section which applies to all proceedings, enquiries and trials under the Cr.P.C. and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. Sections 239: 185 and 311 Cr.P.C. coexist supplementing one another. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code." It is, however, to be borne in mind that whereas the Section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

Finally while departing, it has been held as follows :-

The objection of the Section 311 is to put discretion not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant.

In the Case of jadumani Mohanty and Ors. (supra) it has been observed as follows :-

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 lapses 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 to 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.

In the case of *Ananda Mohan Nanda (supra)*, it has been held that a petition u/s 311 Cr.P.C. cannot be rejected on the sole ground of delay since the application to recall the witness was filed after a lapse of five years.

8. A bare reading of Section 311 clearly indicates that it is the discretion of the Court to summon, examine or recall or re-examine any witness if his evidence appears to be essential for just decision of the case. It is the rule of law of evidence that the best available evidence should be brought before the Court, which is required for just decision of a case. Whether any evidence is essential or not depends upon the facts of that particular case and is to be determined by the Presiding Judge during the course of hearing of a matter. The right to cross-examine a witness, who is called by a Court, may arise since the Evidence Act gives a party right to cross-examine a witness, who is not his own witness. In that view of the matter the Court should give the right of cross-examination to the affected party. Sub-section (2) of Section 231 Cr.P.C. empowers a Judge with discretion to permit, for sufficient reason, the cross-examination of any witness to be deferred or recall prosecution witness for further examination. Even the Court in its discretion allows further cross-examination of a prosecution witness already cross-examined by recalling the witness before closure of the prosecution evidence, if any fresh materials for further effective cross-examination of a witness comes to the knowledge of the defence. Section 311 Cr.P.C. 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. The discretion is vested in the interest of justice and for a just decision of the case. In this regard the well settled principles of law also envisage

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.

9. In the instant case, an application filed by the defence mainly on the ground that the earlier counsel appearing on his behalf declined to cross-examine a witness, even though the witness in clear and categorical terms implicated the present petitioner in so far as it relates to commission of the alleged offence, the witness was discharged without being cross-examined, as such the statement made by P.W.6 could not be confronted due to inaction of his previous counsel and thereby the concerned lawyer did not discharge his duty properly; and when this matter came to the knowledge of the accused/petitioner, he filed application by engaging another counsel to defend his case. As such the case at hand is not a case wherein a party was trying to fill up the gap or lacuna in his case and to improve it by new matter at a later stage. Since a witness (P.W.6) has not at all been cross-examined, which is required for enabling the Court to arrive at a just decision of the case, it would be proper to recall that witness as it is required for the interest of justice. In other words, if the witness is not recalled, the accused-petitioner shall not have a chance to confront the witness with his statements and thereby he will definitely be prejudiced as well as the Court may not be able to arrive at a just decision/conclusion of the case.

10. Keeping in view the settled principles of law laid down with regard to the subject matter of the case at hand, interest of justice would be better served if the learned Addl. Sessions Judge, Fast Track Court, accepts the prayer made by the petitioner to issue summon to the witness (P.W.6) for his cross-examination. Even though the action of the learned Court is to be appreciated, since he tried his best for early disposal of the matter within the stipulated time as per the direction of this Court, but simultaneously the prayer should not have been rejected when it is prejudicial to the interest of an accused and allowing such petition would have helped the Court in arriving at a just and proper decision.

11. In view of the above, the impugned order dated 5.9.2005 is set aside and the learned Addl. Sessions Judge, Fast Track Court, is directed to recall Baya Gouda (P.W.6) by issuing summon for the purpose of his cross-examination, only to the extent of confronting the earlier statements made by him as expeditiously as possible and conclude the case as early as practicable.

The Criminal Revision is accordingly allowed.

No order as to costs.