
(1991) 08 OHC CK 0017

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1008 of 1991

Mukunda Dev Baral

APPELLANT

Vs

Sanjib Baral and Others

RESPONDENT

Date of Decision : 19-08-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311

Citation : (1992) 73 CLT 292 : (1992) CriLJ 3048 : (1991) 2 OLR 550

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : B. Panda and D. Panda, for the Appellant; B.K. Sahu, D.K. Sahu and A. Jena (for opp. party Nos. 1 to 3) and Additional Standing Counsel (for opp. party No. 4), for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—The informant assails correctness of the order passed by the learned Assistant Sessions Judge, Cuttack, refusing to recall a doctor who was examined as PW 5 in the case.

2. The case of the informant in support of the application is that the doctor had examined injured PW 6, and the X-ray plates, bed-head tickets and the discharge certificate were not seized by the Investigating Officer (PW 8) and therefore, those were not brought on record Prayer was made by the prosecution in terms of Section 311 of the Code of Criminal Procedure, 1973 (in short "the Code") to recall to the doctor 10 bring on record those documents and materials. Accused persons resisted the prayer on the ground that the same was belated and was intended to fill in lacuna in the prosecution case.

The learned Assistant Sessions Judge refused the prayer primarily on the grounds that; (a) the clinic of the doctor in question was a private one; and possibility of fabrication of records and papers at his level cannot be ruled out; (b) the doctor and the Investigating Officer were examined long back, and the

time gap was such that steps could have been easily taken by the prosecution to bring the materials on record earlier; and (c) the Investigating Officer left out certain lacuna in Investigation which will be filled in if PW 5 is recalled and the materials are permitted to be brought on record.

3. The petitioner characterises the order to be result of non application of mind and non-consideration of relevant aspects. The accused pp. party Nos. 1 to 3, however, question the maintainability of the petition at the instance of the informant and also support the order on the ground that the same does not suffer from infirmity to warrant any interference.

4. Coming to the question of maintainability of the petition at the instance of the informant, it is true that the interest of the informant is subordinate to that of the State when a case is instituted on the basis of an investigation by the Police; but it cannot be said that the informant has no interest in the matter. If there is an acquittal, the informant can move the Court for interference with the order of acquittal. The Supreme Court has observed in *State of Bihar Vs. Nathu Pandey and Others*, AIR 1972 SC 1788 : *K.Chinnaswamy Reddy v. State of Andhra Pradesh and Anr.*, *Amar Chand Agarwalla Vs. Shanti Bose and Another*, etc., ; and *Pakalapati Narayana Gajapathi Raju and Others Vs. Bonapalli Peda Appadu and Another*, , that revision is maintainable at the instance of aggrieved private party even if prosecution was instituted by police and not on the basis of a complaint. Similar view was expressed by me in Criminal Revision No. 482 of 1987 : *R. Jagadish Murty v. Balaram Mohanty and Ors.*, disposed of on 5-8-1991. If any material aspect is left out at trial the challenge to the order of acquittal by the informant may be an exercise in futile. Therefore, the limited scope for interference in application challenging acquittal notwithstanding the informant is not to be a silent spectator to irregular and/or inadequate participation in trial by the prosecution. Therefore, challenge by the informant to an order of refusal by a Court to recall a witness is maintainable.

5. For application of the provisions of Section 311 it is to be considered whether evidence of the concerned witness is essential for a just decision in a case. Where the evidence of any person appears to the Court to be so, the Court may exercise Its discretionary power in any of the three ways mentioned in the first part of the section, i. e., (i) summon any person as witness; (ii) examine as witness any person present in Court though not summoned; (iii) recall and re-examine a witness who has already been examined. (See *Jamatraj Kewalji Govani Vs. The State of Maharashtra*,). The test of just decision is not limited to something necessary in the interest of the accused only. It is equally applicable to the case of the prosecution. As observed by the Supreme Court in *Jamatraj's* case (supra), where the Court is satisfied that the examination or re-examination of a witness is essential for a just decision of the case, its action cannot be challenged as excess of jurisdiction because it has been done after the defence has closed its case. That would be negation of fairplay and equity. In the instant case, merely because the manner of investigation was deficient, it cannot

certainly be a ground for refusal of the prayer to recall a witness. The learned Asst. sessions judge has also resorted to flights of fancy in surmising that because the doctor owned a private clinic, the possibility of fabrication on records and papers at his level was not ruled out. There was no material to come to such a conclusion. The conclusion was touching upon the professional etiquette, dignity and honour of a doctor. Therefore, on the presumptuous conclusion about possibility of fabrication without any material being placed, the refusal to recall the witness does not appear to be reasonable. Further, exception has been taken for not taking steps to recall PW 5 at an earlier stage. If the prayer could have been accepted by the learned Asst. Sessions Judge had it been made at an earlier stage, merely because the motion was made belated, should not have formed basis of refusal. If the prayer could have been accepted, had the motion been made earlier, the conclusion of the learned Assistant Sessions Judge relating to possible fabrication of documents also does not stand to reason. If the latter was the basis, then the former was of no consequence. The reasons indicated by the learned Assistant Sessions judge for refusal of the prayer to recall PW 5 are legally indefensible. The prayer for recalling PW 5 is to be accepted. Since the trial has reached the fag end, a short date be fixed for recalling PW 5, with all opportunities to the accused-opposite parties to cross-examine him further, if they so choose.

The revision application is accordingly allowed. Send back the lower Court records immediately.