

---

**(1994) 09 OHC CK 0052**

**In the Orissa High Court**

**Case No :** Criminal Miscellaneous Case No. 1331 of 1994

Sabar Mahabhoi and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

---

**Date of Decision :** 01-09-1994

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 231, 242, 244, 311

**Citation :** (1995) 2 ALT(Cri) 15 : (1994) 78 CLT 990 : (1994) 2 OLR 515

**Hon'ble Judges :** A. Pasayat, J

**Bench :** Single Bench

**Advocate :** R. Mohapatra, for the Appellant; D. Misra, ASC and S.B. Choudhury, for the Respondent

---

## **Judgement**

A. Pasayat, J.—Petitioners call in question legality of order dated 10-5-1994 passed by learned 2nd Additional Sessions Judge, Cuttack, accepting prayer made by the informant to issue summons to 5 persons who were not cited as witnesses in the charge-sheet. The learned Additional Sessions Judge accepted the prayer being of the view that though statements of these persons were not recorded u/s 161 of the Code of Criminal Procedure, 1973 (in short, "Code")-and were not examined by the Investigating Officer, they can be examined as witnesses in the case.

2. Learned counsel for petitioners submits that the application by informant was thoroughly misconceived as it did not breathe a whisper about reasons for which examination of five persons as witnesses was relevant for the purpose of just-decision in the case. According to him, lacuna in the prosecution version was being attempted to be bridged by summoning these strangers to be examined as witnesses. Mr. S. 8. Choudhury appearing for opp. party No. 2 (informant) submits that prayer was made to examine these persons to further ends of justice, and learned Additional Sessions Judge was justified in accepting the prayer.

3. Examination of witnesses cannot be confined to those whose statements were

recorded under Sec 161 of the Code. Sacs. 231, 242 and 244 of the Code deal with "Evidence for prosecution" in different types of trials. First relates to trial before Court of Session, while two relate to trial of warrant case by Magistrates. In the case at hand, the trial is before Court of Session. Section 231 of the Code enjoins on the Judge to take all evidence that may be produced in support of the prosecution. Language of Sub-section (1) of the section is purposely wide so as to enable the prosecutor to produce all such evidence as may be produced in support of the prosecution. The words "all such evidence" in the sub-section cannot be read as meaning only such evidence as relates to those persons who have been examined by the police. Even if a person is not cited in the charge sheet and/or was not examined during investigation and/or his statement was not recorded during investigation, his examination at a related stage would not be wholly illegal, though there may be cases where it would cause prejudice to the accused. If the facts disclosed in evidence or questions put in cross-examination necessitate bringing on record the evidence of a person. Court should not hesitate in summoning him as a prosecution witness, or even as a Court-witness in terms of Section 311 of the Code. While considering scope and ambit of Section 231 of the Code. Section 311 has to be kept in view.

4. List of witnesses given by the police in the charge sheet is a matter of practice and not under any provision of law. Such a desirable practice, however, does not disable prosecution from examining any other witness. There is nothing in law that prevents the prosecution from producing, or the Court from examining, as a witness in the case, a person whose name has not been included in the report made or whose statement has not been recorded or furnished. Sub-section (5) of Section 173 prescribes that where report is in respect of a case to which Section 170 of the Code applies, the police officer shall forward to the Magistrate along with the report the statements recorded under Sec 161 of all the persons whom the prosecution proposes to examine as its witnesses. "All such evidence" as referred to in Section 231 does not mean only such evidence as is referable to Sub-section (3) of Section 173 of the Code.

5. A cautious approach is, however, necessary. Bringing in of such evidence should be permitted if proper and suitable explanation is offered as to why it had not surfaced earlier. Section 311 of the Code gives power to the Court to summon material witness, or examine person present. The power to examine witnesses is not unfettered. If the Court is of the opinion that any matter has arisen improvising which could not have been contemplated by the prosecution, then certainly Court can exercise the power. The Court is empowered to summon any person as a witness at any stage of any inquiry, trial or other proceeding under the Code. The power is not limited to any particular class of persons. The power is conferred to further ends of justice. Holding the balance of scales of justice in its hand, Court keeps an open mind. Any party to the proceeding may point out to the Court the desirability of some evidence, and the Court has to weigh the pros and cons. By using the word "essential" and qualifying the word "decision" by the adjective "just"; Legislature has clearly indicated that the

power should be exercised judiciously and only where Court thinks that the evidence is necessary for just decision of the case.

6. From the application filed by the informant it appears that reference was made to certain correspondences handed over by the father of the informant (PW 14) to the then S.D.P.O. Athgarh. It was specifically stated that the police seized the letters from the possession of PW 14 during investigation. So far as other four persons are concerned, it was stated that they had occasion to see the dead body of the deceased. So far as question of examination of S.D.P.O. is concerned, it cannot be said that the direction given by the learned Additional Sessions Judge is erroneous and is maintained. But so far as others are concerned, the assertions are very vague and do not indicate as to for what purpose their examination was necessary. Direction by learned Additional Sessions Judge so far as it relates to them is indefensible and is vacated.

7. Learned counsel for the opposite party Mo. 2 states that a fresh application indicating the reasons necessitating examination of those four shall be filed. If such application is filed. the learned Additional Sessions Judge will deal with the same in accordance with law. and express no opinion in that regard.

The Criminal Misc. Case is disposed of.