

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3619 of 2011

Agasti Kar

....

Petitioner

Mr. Samir Kumar Mishra, Advocate

-versus-

State of Orissa

....

Opposite Party

Mr. S.N. Das, Addl. Standing Counsel

**CORAM:
THE CHIEF JUSTICE**

ORDER

22.04.2022

Order No.

05. 1. The challenge in the present petition is to an order dated 26th September, 2011 passed by the learned Sub-Divisional Judicial Magistrate, Baripada in GR Case No.216 of 1997, allowing the plea of the Prosecution to re-examine the Prosecution Witness No.1 (PW-1) acceding to the application filed in that behalf under Section 311 of the Cr.P.C. read with Section 138 of the Evidence Act.
2. At the outset, it must be noted that the application filed by the Prosecution made two requests to the Trial Court. One was for re-examining PW-1 who was the victim and the informant in the above GR Case and the second was for marking a document, i.e., the writings in the village Punch.
3. Mr. Samir Kumar Mishra, learned counsel appearing for the Petitioner at the outset states that as far the second request is concerned the Petitioner has no serious objection in so far as it

has been allowed by the impugned order. However, he points out that by pressing for the first prayer for re-examining PW-1, the attempt by the Prosecution was to introduce a new case and therefore, and that such course was impermissible in law.

4. In her deposition before the Trial Court, PW-1 stated that the marriage with the accused had in fact taken place at a temple by exchanging of garlands and that "we accepted each other as husband and wife". In another place in the cross-examination, she makes a statement that "cohabitation of myself with the accused was done with mutual consent". While the final view on these statements will be formed by the Trial Court and nothing more needs to be said at this stage, a perusal of the applications filed by the Prosecution reveals that in Para No.1 it is said, "now it is learned that the consent of the victim was availed by the accused on promise of marriage. This fact is to be established by re-examining the witness".

5. Clearly, therefore, the attempt by the Prosecution is to introduce an element of "promise of marriage" when in fact the victim has clearly stated that both of them in fact had got married by exchange of garlands. The crucial phrase in Section 311 of the CrPC which permits a Trial Court to summon any person as a witness or to recall and re-examine a person already examined is that it should appear to the Court "to be essential to the just decision of the case". Under Section 138 of the Evidence Act, there can be re-examination for explaining the matter referred to in the cross-examination but with a new matter is to be

introduced, permission of the Court is necessary. These powers have to be exercised for valid reasons which have to be spelt out in the order to be passed by the Court.

6. It must be noted here that the accused had filed detailed objections to the application filed by the Prosecution for recalling PW-1 and examining her once again. A perusal of the impugned order dated 26th September, 2011 of the Trial Court reveals that these objections have not been dealt with at all. In fact there was no reference claiming to the reasons why the Prosecution sought recall of the witness. The Trial Court simply states "to do complete justice, this Court considers that re-examination is a statutory right of the person who calls the witness in support of its case" and then concludes that "this Court does not find any prejudice is caused to the accused if the petition filed by the Prosecution is allowed".

7. In the considered view of this Court, the Trial Court lost sight of the fact that there were two distinct matters prayed for in the petition, each of which required consideration. As far as the first request for recalling and re-examining of PW-1 was concerned, the Trial Court was expected to deal with the precise prayer of the Prosecution and the objection thereto by the accused and then determine whether in fact the wholly new case was sought to be introduced by the Prosecution. The Trial Court appears to have overlooked this requirement.

8. It does appear to the Court that the Prosecution, by making the above prayer for recalling PW-1, is indeed seeking to introduce a new element to the case which ought not to have been permitted giving the statements made by PW-1 in her deposition before the Court. Consequently, the impugned order of the Trial Court dated 26th September, 2011 to the extent that it permits recall of PW-1 for re-examination is hereby set aside. The remaining part of the order however is allowed to stay. The interim order is hereby vacated and GR Case No.216 of 1997 will now be proceeded with in accordance with law.

9. The present CRLMC is disposed of in the above terms. A copy be delivered forthwith to the District Court concerned

(Dr. S. Muralidhar)
Chief Justice

SK Jena/Secy