

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.2723 of 2017

<i>Nirakar Behera and others</i>		<i>Petitioners</i>
	<i>versus-</i>	
<i>State of Odisha</i>		<i>Opposite Party</i>

CORAM: JUSTICE S. PUJAHARI

ORDER

09.02.2022

Order
No.

06.

1. This matter is taken up through hybrid mode.
2. This application under Section 482 of Cr.P.C. has been filed by the Petitioners with a prayer to quash the order dated 12th September, 2017 passed by the learned Sessions Judge, Nuapada in C.T. Case No.42 of 2013 wherein the petition under Section 311 of Cr.P.C. to recall P.W. Nos.1 to 4 for cross examination has been rejected.
3. Heard the learned counsel for the Petitioners and the learned counsel for the State. No one appears on behalf of the Informant.
4. It appears from the order that the Petitioner sought for adjournment on the date the witnesses were present for cross-examination on the ground of illness of his conducting counsel, but the same having been rejected and no cross-examination having been done, it was ordered that cross-examination was declined. Thereafter, many witnesses have been examined in

the meanwhile and two years after a petition having been filed to recall the said witnesses for cross-examination, the Court rejected the same on the delay and laches and inconvenience of the witnesses. However, the self-same counsel is still continuing to represent the Petitioners-accused as stated.

5. The Petitioners are facing trial in an offence which is heinous and serious in nature and also prescribed stringent punishment of imprisonment for life, still then the cross-examination of the witnesses was not done on the date they remain present. But, later on a recall petition was filed. Judicial notice can be taken note of the fact that in many cases triable by the court of sessions when witnesses remain present an adjournment is sought for, particularly by defence or no instruction memo is filed by the defence counsel. Such no instruction memo filed by counsel at the last moment is not permissible and an unethical practice which has been deprecated by the Apex Court. Furthermore, in some cases, after examination-in-chief, an adjournment is sought for to cross-examine the witnesses at a later date. The Court have also in spite of the repeated mandates of this Court as well as Apex Court and also Section 309 of the Code of Criminal procedure entertain such petitions liberally in spite of the fact that in a sessions cases when witnesses remain present his or her evidence has to be recorded on day-to-day unless some exceptional circumstances for which the witness is unable to depose or unforeseen incident take place which unable the

accused to cross-examine the witness. But, the same is observed more in breach. Aforesaid liberal approach of the trial court has embolden the defence to return the witnesses in one pretext to other, even though the accused is facing trial in a heinous and serious offence. The aforesaid practice is nothing but to fiddle with the evidence of witnesses. In other words, to buy times to gain over the witnesses somehow or other. Thereafter, when the accused succeeds in such effort, a petition is file to recall witness for his further cross-examination, even though his cross-examination is declined. Therefore, the trial court in such cases must remain on guard and see that the witnesses, who remain present in such cases, are not return from the court without completion of their examination, cross-examination and reexamination, if any, unless there are justifiable reasons, i.e., incapacity of witnesses while deposing to remain in the witness box and depose or the situation beyond the control of the accused to cross-examine the witnesses for some unforeseen reasons. Adjournment should not be granted for cross-examination, even examination-in-chief in a routine manner and recall of such witness also.

6. Here in this case, as it appears, four material witnesses though remain present and their cross-examination-in-chief was recorded, but during cross-examination, adjournment was sought for on the ground of inconvenience of the conducting counsel. After that when many witnesses were examined and after many years a petition for recall was filed. The Court

taking note of the fact and circumstances, especially the fact that the Petition was filed at a belated stage and inconvenience of the lawyer is no ground when there cross-examination had been declined, refused to recall the witnesses.

7. Learned counsel appearing for the Petitioners would submit that for the laches on the part of the counsel, the accused should not suffer, especially when he is facing the criminal trial prescribing a stringent sentence of imprisonment for life. It is also submitted that the grounds on which the petition under Section 311 of Cr.P.C. was rejected is no ground, as Section 311 of Cr.P.C. mandates that a witness already examined can also recalled for further cross-examination, if the court feels that the same is essential for just decision of the case at any stage of the proceeding. The learned trial court without addressing the petition on the said ground rejected the same assigning the reasons which are not germane for consideration of the prayer under Section 311 of Cr.P.C. Hence, the same is liable to be quashed.

8. Learned counsel appearing for the State, however, defenced the order of the trial court to be just and proper inasmuch as the petition was filed at a belated stage, which was nothing, but with a design to fiddle with the evidence of the witnesses already examined. The same is moreso in view of the fact that the counsel for whose laches, the Petitioners submits

that for the laches of their counsel they should not suffer, they still continuing as the conducting counsel.

9. To appreciate the contention of the parties, it would be apposite to mention here that the Court is not bereft of jurisdiction to exercise the power under Section 311 of Cr.P.C. at any stage of the proceeding which consist of two parts. The first part is discretionary whereas the second part is mandatory for the Court to recall a witness on a prayer made, if it appears to this Court that recording of evidence on such witnesses on recall for cross-examination or re-examination of a witness is essential for just decision of the case. However, the Petitioner has not satisfied the court whether the evidence of the aforesaid witnesses was essential for just decision of the case. No doubt, it is contended that the aforesaid witnesses are material witnesses, but their cross-examination is already declined. The petition is filed at a belated stage. Therefore, the Court has every reason to believe that the aforesaid petition was filed at a belated stage to fiddle with the evidence already adduced by the prosecution, as accused declined for cross-examination them when they appeared.

10. As such, I am not inclined to interfere with the order impugned even though reasons given are appears to be not germane for the purpose.

11. Accordingly, the CRLMC stands dismissed.

12. But, liberty is given to the Petitioners to approach the trial court by filing a fresh petition and if the court feels that such cross-examination of the witnesses is essential for just decision of the case, shall address such petition in the light of the evidence adduced and also attending circumstances as well as the mandate of Section 311 of Cr.P.C. as early as possible, preferably within two weeks of receipt of the certified copy of this order.

(S. Pujahari)
Judge

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