

IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLMC No.2752 of 2022

Rudra Narayan Sahu

....

Petitioner

Mr. Devashis Panda, Advocate

-Versus-

State of Odisha

....

Opposite Party

Mr. Sitikanta Mishra, ASC

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT: 11.11.2022

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner assailing the impugned order dated 17th September, 2022 passed in S.T. Case No.27/502 of 1996 by the learned 2nd Additional Sessions Judge, Bhubaneswar whereby an application under Section 311 Cr.P.C. moved by him to recall and cross-examine a prosecution witness was declined on the grounds inter alia that the same is untenable in law and hence deserves to be interfered with and set aside with a consequential direction in that regard.

2. Heard Mr.Devashis Panda, learned counsel for the petitioner and Mr. Sitikanta Mishra, learned ASC for the State.

3. In the instant case, the petitioner and two other accused persons are currently facing trial for a charge Section 302 read with 34 IPC. In fact, the petitioner and three other accused persons (one of whom died and the case as against him stood abated) were chargesheeted under the alleged offence in the year 1996 for having been involved in a triple murder. As it appears from the photocopies of the order sheets received from CRLMC No.2752 of 2022

the learned court below, the prosecution evidence was closed and thereafter, the case was posted for recording of the statements of the accused persons under Section 313 Cr.P.C. which was closed in the year 1997 and ever since then, it is pending for defence evidence. It is further revealed that three other co-accused persons had earlier filed an application to summon some witnesses in the year 1999 but the same was disallowed challenging which Criminal Misc. Case No.2004 of 1999 was filed and therein the proceeding pending before the court below was stayed which finally came to be disposed of on 17th July, 2020. According to the learned court below, when the case was pending at the stage of argument, the order in Criminal Misc. Case No.2004 of 1999 was produced, wherein, this Court directed to summon the witnesses of the lists dated 15th April, 1999 and 19th April, 1999 and to provide opportunity to the accused persons to examine them and lead defence evidence. At that time, the petitioner said to have filed the application under Section 311 Cr.P.C. to recall P.W.6 who was examined, cross-examined by other accused persons and discharged in 1996. The learned court below considering such a request of the petitioner and after hearing the prosecution declined to recall P.W.6 principally on the ground of delay which is more than 25 years and that too for being at the fag end of the trial by passing the impugned order under Annexure-1.

4. It is made to reveal from Annexure-1 that the other three accused persons had filed a similar application to recall P.W.6 on 26th March, 1999 to further cross-examine him but the same was rejected on the ground that said witness before being discharged was cross-examined at length. It is made to suggest that said rejection of plea for recall of P.W.6 was not challenged thereafter. In so far as the petitioner's request is concerned, learned court below is of the view that there has been

inordinate delay and since he remained silent, there is no justification to recall P.W.6 which has purposefully been contemplated to delay the disposal of the case. While reaching at such a decision, the learned court below relied on the decisions, such as, **State of Haryana Vrs. Ram Meher and Others (2016) 65 OCR (SC) 289**; **Vinod Kumar Vrs. State of Punjab (2015) 3 SCC 220**; **Gurnaib Singh Vrs. State of Punjab (2013) 7 SCC 108**; and **Babu Singh Vrs. State of U.P. AIR 1978 SC 527** which has dealt with the Constitutional guarantee and frame work for speedy trial.

5. Mr. Panda, learned counsel for the petitioner would contend that P.W. 6 was cross-examined by other accused persons and not the petitioner which is evident from the order dated 16th December, 1996, as on the said date, the conducting counsel appearing for him was absent due to illness. It is further submitted that the proceeding was stayed from 1999 till 2020 when Criminal Misc. Case No.2004 of 1999 was disposed of and as such, there was no occasion for the petitioner to seek recall of P.W.6. From the deposition of P.W.6, Mr. Panda further submits that the involvement of the petitioner is clearly alleged. The nature and extent of involvement of the petitioner during and in course of the incident has been described by P.W.6 and while claiming so, Mr. Panda refers to his deposition. It is contended by Mr. Panda that in such a situation, delay should not defeat the interest and rights of the petitioner which is the settled position of law and in that connection, the decision of the Apex Court in **Manju Devi Vrs. State of Rajasthan and Another (2019) 6 SCC 203** is relied upon. Apart from the above citation, Mr. Panda, learned counsel for the petitioner referred the following decisions in **State Represented by The Deputy Superintendent of Police Vrs. Tr. N. Seenivasagan AIR 2021 SC 2441** and another of

this Court in the case of **Pidika Sambaru Vrs. State of Odisha and Another 2022 CriLJ (NOC 248) 87.**

6. On the other hand, Mr. Mishra, learned ASC submits that there has been unexplainable delay on the part of the petitioner to approach the court below with a request for recall and cross-examination of P.W.6 and therefore, it was rightly declined vide the impugned under Anenxue-1. It is contended by Mr. Mishra that any such recall at this point of time would further delay in disposal of the case. In other words, the impugned decision of the learned Sessions court disallowing the prayer of the petitioner to recall P.W.6 has been justified by the State.

7. The learned court below cited the decision in **Ram Meher** (supra), wherein, the Apex Court held that generosity or magnanimity should not be shown for recalling a witness which cannot also be based on the foundation of any fanciful notion. In fact, the liberal approach of the courts in such matters has been deprecated by the Supreme Court in the aforesaid decision. It has been further held therein that there should not be a liberal approach leaving aside all the parameters which are to be kept in mind while exercising discretion under Section 311 Cr.P.C. What the duty of the courts and how to avoid delay in trial and the role and responsibility of a court has been discussed in **Vinod Kumar** case. On similar lines, the other two decisions in **Gurnaib Singh** and **Babu Singh** (supra) discuss the role of the courts which cannot be a mute spectator while conducting trial. In all fairness, the Court is of the view that the above are the principles in relation to trial which are to be sincerely followed by the courts except in **Ram Meher** (supra) which deals with recall of witness with a word of caution against liberal approach. However, it does not mean that in all circumstances even where there is a need and necessity to recall a material witness, the Court is to close its eye and deny the same with the anxiety that it would

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result in delay in disposal of the case. Where a recall should be allowed or denied depends on factors which include the competing interests of the prosecution as well as defence which should not be lost sight of and in a case where discretion is needed to be exercised, it must be resorted to despite some delay which has occasioned thereby.

8. In the instant case, the trial was commenced in 1996 and stood concluded in 1999 and thereafter, defence evidence was started. Three other accused persons applied the trial court to issue process to some witnesses which was in 1999 but the same was disallowed for which Criminal Misc. Case No.2004 of 1999 was filed wherein the proceeding was stayed till 2020 and unfortunately, the learned court below received a copy of the said order in the month of September, 2022. There has been a stay of the trial at the defence evidence stage for nearly 21 years and a further delay of two years since the order in Criminal Misc. Case No.2004 of 1999 reached late by the trial court i.e. 15th September, 2022. In the aforesaid background, the question is, whether the petitioner's plea for recall of P.W.6 should have been allowed which was declined by the learned Sessions court? There is no denial to the fact that delay has taken place in the closure of trial which is pending since 1999. The case is of the year 1996 for an incident leading to the murder of three individuals allegedly in the hands of the petitioner and three other accused persons whose involvement has been claimed by the prosecution and deposed to by P.W.6. The fact of participation of the petitioner is alleged by P.W.6 which is conspicuously discernable from his deposition. The said witness was cross-examined on 16th December, 1996 and from the order of the learned trial court, it is made to reveal that the conducting counsel for the petitioner was either absent or he declined to cross-examine P.W.6. Mr. Panda submits that the engaged

counsel of the petitioner could not be present on the date fixed and the other defence counsel cross-examined P.W.6 and thereafter, he was discharged, hence, it was shown as declined. Admittedly, P.W.6 was declined to have been cross-examined from the side of the petitioner. Whether the defence counsel for the petitioner was absent on 16th December, 1996 or was present but declined to cross-examine P.W.6 is not revealed from the order of the court below. It is simply made to understand that the learned defence counsel except the engaged counsel of the petitioner being present participated in the trial and two witnesses, namely, P.W.6 and P.W.7 were examined and after being cross-examined, they were discharged. If the defence counsel for the petitioner was present but declined to cross-examine P.W.6, on the aforesaid date, it should have been supported by a memo obtained from him and reflected in the order itself. It does not appear to be quite natural to expect that the defence counsel would decline to cross-examine a prosecution witness, who has deposed against the accused for whom he is supposed to defend. Considering the above facts, it appears that the plea of absence of the defence counsel for the petitioner on 16th December, 1996 is more probable than his presence which is claimed by the prosecution again not having been supported by any evidence.

9. Now the next consideration is, whether, recall of P.W.6 should be allowed or not. The Court proceeds on the premise that the defence counsel engaged by the petitioner at the relevant point of time was absent. On a bare reading of the deposition of P.W.6, it would unfailingly suggest that he has alleged the involvement of the petitioner and direct participation in the incident being an ocular witness to it. The defence counsel for other three accused persons did not miss the opportunity to cross-examine P.W.6. Not to cross-examine said

witness by the petitioner despite having incriminating evidence against him does not appeal to commonsense. Had the defence counsel been present on 16th December, 1996, he would have readily availed of the opportunity to cross-examine P.W.6 on behalf of the petitioner. In view of such evidence of P.W.6, one would definitely support recall and his cross-examination since he has alleged the involvement of the petitioner during the entire incident. The learned court below appears to have refused to recall P.W.6 on the ground of delay and that the petitioner would not be prejudiced since he was cross-examined by other accused persons which in the considered view of the Court cannot be countenanced. An invaluable right of the defence cannot be abridged upon or frustrated on such a ground as has been concluded by the learned court below when there has been direct evidence against him so deposed by P.W.6. The delay in approaching the court for recall cannot entirely be said to have been contributed by the petitioner, inasmuch as, it resulted when the other accused persons knocked the doors of this Court in 1999 in Criminal Misc. Case No.2004 of 1999 whereby the trial was stayed until 2020 which again allowed the prayer for examination of defence witnesses for which the learned court below summoned them and fixed the trial on 27th September, 2022 for their appearance and evidence. In **Manju Devi** (supra), the Apex Court held that the summoning of material witnesses for examination in exercise of discretionary power under Section 311 Cr.P.C. should not be defeated on account of delay or age of a case, by itself cannot be decisive of the matter. Of course, in the said case, delay was of 8-9 years, whereas, herein, it is about more than 25 years including the period of stay from 1999 to 2020, the year when Criminal Misc. Case No.2004 of 1999 was disposed of. It can also be claimed that why the petitioner did not apply for recall till 1999 when P.W.6 was examined and discharged in 1996 but that cannot be a solitary ground to deny

him the opportunity as thereby he would be prejudiced. The other two decisions in **Tr. N. Seenivasagan** and **Pidika Sambaru** (supra) are not directly related to the subject matter in issue especially dealing with the delay aspect. So, when there has been a long period of stay, a fact which is not in dispute and also evident from the impugned order itself, the petitioner, whose involvement is attributed by P.W.6 being a material and ocular witness to the incident, does have a right to recall and cross-examine him or else it would lead to miscarriage of justice. Said right cannot be denied to the petitioner merely on the ground that the other three accused persons who are similarly situated cross-examined P.W.6 and further cross-examination at their instance was later declined by the learned court below and the same remained unchallenged and that apparently covered the interest and rights of the petitioner.

10. It would be apposite to make a mention the following observations of the Apex Court in the case of **Natasha Singh Vrs. CBI (2013)5 SCC 741** which is to the effect that Section 311 Cr.P.C. empowers the court to summon a material witness to examine him at 'any stage' of 'an enquiry' or 'trial' or 'any other proceeding' or to recall and reexamine any person, who has already been examined, if his evidence appears to it to be essential to reach at a just decision of the case and furthermore, such wide discretionary power is to be exercised judiciously and not arbitrarily. It has also been held therein that such a move under Section 311 Cr.P.C must not be allowed only to fill up a lacuna in the case of the prosecution or defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the counterpart and additional evidence must not be received as a disguise for retrial, or to change nature of the case and in that regard, the power to be exercised to examine a witness germane

to the issue involved, an opportunity of rebuttal, however, must be given to the other side.

11. Considering the totality of the facts and circumstances of the case, it would not be unjustified to reach at a conclusion that the learned court below was although conscious of its role for speedy trial, however, over jealously guarded the interest of the prosecution being oblivious of the rights of the petitioner against whom there has been incriminating evidence spoken to and deposed by P.W.6 and in so far as the delay is concerned, it was predominantly on account of stay of the trial by the orders of this Court in Criminal Misc. Case No.2004 of 1999.

12. Accordingly, it is ordered.

13. In the result, the petition stands allowed. As a necessary corollary, the impugned order dated 17th September, 2022 passed in S.T. Case No.27/502 of 1996 by the learned 2nd Additional Sessions Judge, Bhubaneswar is hereby set aside. Consequently, recall and cross-examination of P.W.6 is allowed with a direction to the court below to accomplish it on the date of examination itself without entertaining any adjournment for the said purpose.

(R.K. Pattanaik)
Judge