

# ORISSA HIGH COURT CUTTACK

## CRLREV NO.597 OF 2006

From an order dated 29.07.2006 passed by Shri S.K.Dhal, Sessions Judge, Cuttack in Criminal Appeals No.88 and 93 of 2005 (arising out of S.T. No.734/90 of 2002 of the court of Assistant Sessions Judge-cum-Additional Chief Judicial Magistrate (Special) Cuttack).

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Samsad Begum	.....	Petitioner
	Versus	
State of Orissa and others	.....	Opposite Parties

For Petitioner - M/s G.N.Mohapatra,  
P.K.Sahoo,  
S.K.Roul and  
G.Samal

For Opp.Party - Addl. Standing Counsel &  
M/s P.K.Mohapatra and  
N.Singh

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**PRESENT:-**

**THE HON'BLE MR. JUSTICE PRADIP MOHANTY**

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Date of judgment : 05.09.2006  
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**PRADIP MOHANTY, J.** This revision is directed against the order dated 29.07.2006 passed by the Sessions Judge, Cuttack in Criminal Appeals No.88 of 2005 rejecting the application filed by the informant to argue before that court.

2. The case of the petitioner is that the appellants have been convicted under sections 498-A and 307 IPC and under section 4 of the Dowry Prohibition Act by the Assistant Sessions Judge-cum-Chief Judicial Magistrate (Special), Cuttack in S.T. Case No.734/90 of 2005. They have been sentenced to undergo R.I. for two years and to pay a fine of Rs.2,000/-, in default to undergo R.I. for three months, for the offence

under section 498-A IPC, to undergo R.I. for three years and to pay a fine of Rs.5,000/-, in default to undergo R.I. for six months for the offence under section 307 IPC, and to undergo R.I. for one year and to pay a fine of Rs.1,000/-, in default to undergo R.I. for one month for the offence under section 4 of the Dowry Prohibition Act. Being aggrieved by the aforesaid order of conviction and sentence, two appeals have been preferred by the accused persons before the Sessions Judge, Cuttack, which have been registered as Criminal Appeal No.88 of 2005 and Criminal Appeal No.93 of 2005. The appeals were posted for hearing to 30.06.2006. On that day, the appeals were heard in part and were posted to 03.07.2006 for further hearing. The order-sheet dated 03.07.2006 reveals that on that day the matter was heard from the side of the appellants. Subsequently, a petition was filed by the informant Samsad Begum (petitioner herein) through Mr. G.N.Mohapatra, Advocate, praying for time. The matter was posted to 06.07.2006 for hearing from the side of the respondent. On that day, the respondent was heard and the appeals were posted for delivery of judgment to 19.07.2006. On 17.06.2006, the records were put up on the strength of an advance petition along with an application of the informant to allow her to argue the matter. On 19.07.2006, the case was posted for objection and hearing of the petition filed by the informant. The petition was heard on 29.06.2006 and was rejected. However, learned counsel for the informant was permitted to file written notes of argument after serving copies thereof on the counsel for the parties on or before 03.08.2006.

3. Mr. G.N. Mohapatra, learned counsel for the petitioner, submitted that the learned Sessions Judge has illegally rejected the application without considering the fact that he had taken part in the hearing before the trial court with the permission of the Public Prosecutor. Since appeal is the continuation of the trial, he should be allowed to argue the case. In the appeal also, the Associate Public Prosecutor has no objection to the informant's counsel taking part in hearing. Moreover, according to Mr. Mohapatra, he has got more years of practice than the Public Prosecutor in-charge of that case and so he can better assist the court. In support of his contentions, he placed reliance on **Adan Haji**

**Jama v. The King**, AIR 1948 PC 63; **Ratnakar Das v. The State**, AIR 1966 SC Orissa 102; and **Gouranga Charan Bhatta v. Basanta Kumar Swain**, Vol.39(1973) CLT 892.

4. Mr. Nayak, learned Additional Standing Counsel strenuously urged that all the sessions cases should be conducted by the Public Prosecutor appointed by the Government. In this connection, he drew the attention of the Court to the provisions of sections 301 and 302 Cr.P.C. He also placed reliance on **Shiv Kumar v. Hukam Chand and another**, 1999 SCC (Cri) 1277.

5. Mr. P.K.Mohapatra appearing for opposite parties 2 to 7 submitted that if a private lawyer is engaged on behalf of the informant, he has to assist the Public Prosecution and at best he can file written notes of submission. Questioning the maintainability of the revision, he submitted that the impugned order being interlocutory in nature, this revision is barred by section 397(2) Cr.P.C. Moreover, one revision has been filed challenging the common order passed in CrI. Appeals No.88 and 93 of 2005, which is not permissible.

6. Section 225 Cr.P.C. provides that in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor. In the old Code of 1898, identical provision was there under section 270. Section 301 Cr.P.C. speaks about appearance by Public Prosecutor. The said section runs thus:-

**“301. Appearance by Public Prosecutor. (1)**

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court ;in which that case is under inquiry, trial or appeal.

(2) If any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or the Assistant Public Prosecutor, and may, with the permission of the

Court, submit written arguments after the evidence is closed in the case.”

Section 302 Cr.P.C. is regarding permission to conduct prosecution. It says:-

**“302. Permission to conduct prosecution. (1)** any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector, but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

Perusal of the above provisions shows that section 302 Cr.P.C. is intended only for a Magisterial Court. It enables the Magistrate to permit any person to conduct the prosecution. The only rider is that the Magistrate cannot give such permission to any police officer below the rank of Inspector. But the above laxity is not extended to other courts.

7. In the instant case, at the time of argument, i.e., on 03.07.2006, a time petition was filed by the informant. Thereafter, the matter was adjourned to 06.07.2006. On conclusion of hearing, the appeals were posted to 19.07.2006 for delivery of judgment. But on 17.07.2006 a petition was filed by the informant along with an advance petition, on the strength of which the records were put up on that day. On 24.07.2006, the petition was heard and the matter was posted for orders to 29.07.2006. The above shows that on 03.07.2006 the informant's counsel was present while the matter was being heard. But no petition was filed by the informant to argue the matter. Only a time petition was filed. On 06.07.2007, after completion of hearing, the matter was posted for judgment on 19.07.2006. However, on 17.07.2006, a petition was filed by the informant to allow her to argue the matter. It is the well settled principle of law that the benefits of the accused in sessions trials (in India) can only be protected by the Public Prosecutor. The cardinal principle behind this provision is to maintain fairness to the accused to face the

prosecution. In other words, prosecution in sessions cases cannot be conducted by any one other than the Public Prosecutor. The intention of the legislature is that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle or conceal it. A private counsel, if allowed free hand to conduct prosecution, would focus on bringing the case to conviction even if it is not a fit case for such conviction. The above ratio has been decided by the apex Court in **Shiv Kumar's case** (supra) and is thus binding on all courts of the country. This being so, reference to any other decisions is not required.

8. In view of the above, without going into the question of maintainability, this Court is of the opinion that no illegality has been committed by the learned Sessions Judge in passing the impugned order. The revision is, therefore, dismissed. However, this Court observes that the learned counsel for the informant-petitioner may file a written notes of argument before the learned Sessions Judge within three days hence and in such event the learned Sessions Judge shall deal with the same in accordance with law.

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**Pradip Mohanty, J.**

Orissa High Court, Cuttack  
 September 5, 2006 / **Nayak**