

HIGH COURT OF ORISSA : CUTTACK

CRLMC NO.2680 OF 2010

In the matter of an application under section 482 of the Criminal Procedure Code.

Akshaya Kumar Patra Petitioner

-Versus-

State of Orissa Opp. Party

For Petitioner : M/s S.K. Sahoo, G. Sahoo,
B. Dash, M.K. Mallik,
D.P. Pattnaik, B.P. Mohanty &
A. Mohanty

For Opp. Party : Additional Government Advocate

P R E S E N T :

THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY.

Date of hearing:05.01.2011 Date of Judgment : 30.08.2011

I. Mahanty, J. This application under Section-482 Cr.P.C. has been filed by the petitioner-accused seeking to challenge the order dated 13.09.2010 passed by the learned Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006 arising out of Athagarh P.S. Case No.49 of 2000, whereby, an application under Section 311 Cr.P.C. to summon one Palu @ Ajaya Kumar Barik, the

younger brother of deceased Kalu @ Bijay Kumar Barik filed on behalf of the prosecution, came to be allowed.

2. Mr. Sangam Kumar Sahoo, learned counsel for the petitioner has sought to assail the impugned order dated 13.09.2010, on the ground that the impugned order suffers from error of record and non-application of judicial mind to the ratio of various cited decisions, in the context of the facts and circumstances of the present case and, therefore, is liable to be set aside.

Mr. Sahoo, submitted that the petitioner is facing trial for the alleged offence under Section 302/34 I.P.C. in the court of Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006. During trial, the prosecution has examined 12 witnesses and the defence has examined one witness. After conclusion of evidence from both the sides, arguments were heard and case was posted for judgment on 13.08.2010. On that day i.e. 13.08.2010 the Additional Public Prosecutor prayed for time to argue the case and the case was adjourned to 18.08.2010. Thereafter it was adjourned again to 23.8.2010. On 23.08.2010, a petition under Section 311 Cr.P.C. was filed by the prosecution seeking to summon one Palu @ Ajay Kumar Barik, to record his evidence. The accused-petitioner filed their objections to such petition. The trial court allowed the petition under

Section 311 Cr.P.C. vide order dated 13.09.2010 which is the subject matter of challenge in the present petition.

Mr. Sahoo strenuously urged that neither in course of investigation before the investigating agency nor during trial before the trial court, any material evidence has been brought on record to indicate that, Palu @ Ajaya Kumar Barik was ever a witness to the occurrence or that, he had ever disclosed any relevant facts before any witness. Hence, in the absence of any evidence obtained either in course of investigation or in course of the trial indicating as to whether the said Palu @ Ajaya Kumar Barik had any relevant knowledge, either of the occurrence or of any fact connected thereto, the application filed by the prosecution under Section 311 Cr.P.C. and the impugned order dated 13.08.2010 allowing that application, at such a belated stage, when arguments were already made, highly prejudicial to the interest of the defence. He further submitted that the trial court in the impugned order observed that, it is best known to the erring investigating officer as to why he neither examined a material witnesses such as Palu @ Ajaya Kumar Barik under Section 161 Cr.P.C., nor cited him as a charge-sheeted witness in this case, whose evidence was essential for the just decision of the case. None of the witnesses have stated anything before the investigating officer in course of investigation nor in course of trial before the trial court as to

whether Palu @ Ajaya Kumar Barik was ever a witness or that he had ever disclosed anything before them about possessing any knowledge regarding the alleged occurrence. Hence Mr. Sahoo, submitted that without such evidence, any direction to permit the prosecution to examine Palu @ Ajaya Kumar Barik is clearly an attempt to allow the prosecution as a second innings at trying to lead evidence in support of their case, that too at the fag end of the trial of the case. He further submitted that at this stage of the case, the prosecution as well as the defence have already revealed their respective stands during evidence in course of the trial and permitting the prosecution another opportunity to introduce a new witness at such stage, is wholly unknown to law as well as highly prejudicial to the defence of the accused.

3. The case of the prosecution is that Urmila Pradhan (P.W.2) had adopted Bijayalaxmi as her daughter about 25 years ago and had arranged her marriage with one Biswanath Barik. Bijayalaxmi had given birth two sons, namely, Kalu @ Bijaya Kumar Barik (deceased) and Palu @ Ajaya Kumar Barik (witness sought to be summoned). Though Bijayalaxmi was married and staying in her matrimonial house, her deceased son Kalu @ Bijaya Kumar Barik was staying in the house of his maternal grand mother, namely, Urmila Pradhan (P.W.2) at Deulasahi. It is the further case of the prosecution that

Urmila Pradhan had some land situated in the village-Machhia and she had given the said land to Laxman Patra (father of the present petitioner) for carrying out agricultural operation. Laxman Patra's grand son, namely, Abhaya Patra (absconding accused) was staying in the house of Urmila Pradhan since his childhood but since he had become wayward, Urmila Pradhan was very much dissatisfied with him. Urmila Pradhan wanted to sell the land which was being cultivated by Laxman Patra in order to obtain funds to purchase a vehicle for the deceased (Kalu @ Bijaya Kumar Barik), for which reason, she had approached Laxman Patra to return those lands in order to enable her to sell the same to another person. The petitioner and the absconding accused-Abhaya Patra protested to the said proposal and wanted to purchase the same land and since they could not arrange the necessary funds to purchase the land from Urmila Pradhan, Urmila Pradhan was looking for some other purchasers and, therefore, the petitioner-Akashaya Kumar Patra and the absconding accused, Abhaya Kumar Patra were dissatisfied with Urmila Pradhan over this issue.

4. It is the further case of the prosecution that on the date of occurrence i.e. 21.4.2000 while Urmila Pradhan was not in her house, the petitioner Akshaya Kumar Patra and the absconding accused-Abhaya Kumar Patra came and called the deceased, Kalu @ Bijaya

Kumar Barik and took him on a scooter but the deceased never returned to his house on that day. On the following day Kalu @ Bijaya Kumar Barik was found in an unconscious state and in severely injured condition on the riverbed of river Mahanadi near Pateni Gaon and was shifted to S.C.B. Medical College & Hospital, Cuttack for treatment, where he ultimately succumbed to his injuries.

5. Mr Sahoo, learned counsel for the petitioner filed a memo in Court enclosing the deposition of all the prosecution witnesses as well as the copies of the statement recorded under Section-161 Cr.P.C. by the Investigating Officer along with the charge sheet submitted in the present case.

Mr. Sahoo further contended that on a reading of paragraph- 3 of the impugned order, it is noted therein by the learned Additional Sessions Judge (F.T.C.), Athagarh, that P.W.2, Urmila Pradhan, P.W.8, Bijayalaxmi Barik (mother of the deceased), one Adikanda Pradhan, husband of P.W.2 and Biswanath Barik (father of the deceased) had stated during investigation about the presence of the deceased and the summoned witness, i.e. Palu @ Ajaya Kumar Barik in the house of Urmila Pradhan on 21.4.2000. It is further noted that in the Court Urmila Pradhan (P.W.2) and Bijayalaxmi barik (P.W.8) have also stated about the presence of the deceased and summoned witness Palu @ Ajaya Kumar Barik in the house. The trial court has further noted that

P.W.2, Urmila Pradhan had stated that when she returned home Palu @ Ajaya Barik disclosed that the petitioner and the absconding accused-Abhaya Patra had taken the deceased in their scooter to inspect a vehicle. Therefore, it is clear therefrom that the trial court acted on a presumption that the summoned witness Palu @ Ajaya Kumar Barik could throw light upon the last scene theory of the deceased being in the company of the petitioner and absconding accused Abahaya Kumar Patra, for which reason the petition came to be allowed.

6. Learned counsel for the petitioner vehemently submitted that neither of the statement recorded under Section 161 Cr.P.C. nor any deposition in Court supported the findings of the learned trial court as indicated hereinabove.

7. Mr. Kishore Kumar Mishra, the learned Additional Government Advocate on behalf of the State vehemently submitted that the findings of the trial court regarding the evidence of P.W.2, Urmila Pradhan alone is sufficient to justify the impugned order. Therefore, he placed reliance on the evidence of P.W.2, Urmila Pradhan and submitted that the statements of P.W.2 are adequate for the purpose of allowing the prosecution's application under Section 311 Cr.P.C. He further asserted that the allegation that the petition under Section 311 Cr.P.c. has been filed at a belated stage, is of no

consequence since such power is vested in the trial court to exercise the same at “any stage” of the trial and, therefore, objection raised by the petitioner’s counsel regarding the stage at which the petition is filed, ought not to be entertained. Apart from the above, the learned counsel for the State placed reliance on a judgment of the Hon’ble Supreme Court in the case of **Jatin Mohapatra @ Mallick v. State of Orissa**, (2009), Vol-42 OCR, 47 and submitted that it was the obligation of the trial court to ascertain the truth and, therefore, in course of the trial, the trial court having concluded that the summoned witness Palu @ Ajaya Kumar Barik’s presence at the time of P.W.2 came home is established in course of her evidence in court, no challenge to the order summoning such witness who may throw light on the truth of the allegation ought to be entertainable.

8. Learned counsel for the petitioner, on the other hand, submitted that the reliance placed by the trial Court in the case of **Jatin Mohapatra @ Mallick (Supra)** was not applicable to the present case, inasmuch as, in paragraph-18 of the said judgment it is held that though P.W.4 who is a witness to the occurrence and had lodged the F.I.R. but not shown as a charge-sheeted witness, he could be examined by the court. In the present case, Palu @ Ajaya Kumar Barik was not a witness to the occurrence nor had lodged the F.I.R. and,

therefore, the present case is clearly distinguishable from the case relied upon and referred to by the trial court.

Insofar as the ratio of the decision in the case of **Rajendra Prasad v. Narcotic Sale**, 1999 (vol.2) S.C.C.(Criminal), 1062 is concerned, learned counsel for the petitioner asserted that the same is not applicable to the present case as the said case has been dealt with the question of “re-summoning” of a particular witness i.e. P.W.21. The present case is not a case of re-summoning of witness already examined.

Insofar as the ratio of the decision in the case of **P.Chhaganlal Daga v. M.Sanjay Shaw**, (2004) 28 O.C.R. 813, is concerned, learned counsel for the petitioner submitted that the said judgment was in the context of application seeking recalling of the complainant to prove the postal receipt in a case arising out of under Section 138 N.I. Act but the fact of the present case is clearly distinct and have no bearing to the said judgment.

Insofar as the ratio of the decision in the case of **Zahira Habibulla H. Sheikh v. State of Gujarat**, 2004 S.C.C. (Criminal) 999 is concerned, learned counsel for the petitioner asserted that the said judgment is also not applicable to the present case as the summoned witness Palu @ Ajaya Kumar Barik is neither a material witness for the prosecution nor has been proved so during the investigation or trial.

9. He also submitted that Palu @ Ajaya Kumar Barik has never been examined during investigation nor mentioned in the charge sheet as a witness and more importantly, the defence had already examined one witness to negative the last scene theory propounded by the prosecution and the argument from the side of the defence had already been concluded and the case was posted for judgment, whereafter it was reopened for argument on the prayer of the Additional Public Prosecutor. At such a stage, the Additional Public Prosecutor filed an application under Section 311 Cr.P.C. to fill up the lacuna of the prosecution case and also to bring rebuttal evidence on record. Hence it is submitted that the petitioner would be seriously prejudiced as he has placed his entire defence before the trial court and at the fag end of the trial, if such a petition is allowed, then not only it would prolong the conclusion of the trial but also the very purpose of the fairness of the criminal trial would be frustrated.

Learned counsel for the petitioner submitted that it is the settled principle of law that ordinarily when a witness, who supposed to be a vital one and yet has not examined by the police at all, although he was all along available for such purpose, his evidence has to be considered with greatest caution and it would not safe to be relied upon as the sole basis of conviction. For such purpose, reliance

is placed on a judgment of this Court in the case of **Gadadhar Mohapatra v. State of Orissa** vol-32 (1990) O.J.D. 11 (Criminal).

10. In the light of the contentions advanced by the learned counsel for the rival parties hereinabove, it is now become imperative to consider to the findings of the learned trial court, particularly in paragraph-3 thereof. Insofar as the materials collected during investigation is concerned, the trial court has noted that P.W.2, Urmila Pradhan, P.W.8, Bijayalaxmi Barik (mother of the deceased), Adikanda Pradhan, husband of P.W.2 and Biswanath Barik (father of the deceased) have stated about the presence of deceased-Bijaya Kumar Barik and the proposed witness Palu @ Ajaya Kumar Barik in the house of Urmila Pradhan(P.W.2) on 21.4.2000.

On perusal of the statement recorded under Section 161 Cr.P.C. of the aforesaid witnesses, the relevant portions are quoted hereinbelow:

P.W.2(Urmila Pradhan):- on her return from village Machhia, she enquired from his husband-Adikanda Pradhan the whereabouts of the deceased-Kalu @ Bijaya Kumar Barik and had been informed by him that Kalu & Palu, the two brothers were sleeping inside the house on 21.4.2000 but from 11.00 A.M. to 12 noon, Kalu was absent from her house.”

Adikanda Pradhan:- On 21.4.2000 he along with Kalu and Palu were present in the house. He was

sleeping earlier after taking his meal and when he awakens came to know from Palu that Kalu was leaving the house from 11 A.M.”

Bijaya Laxmi Barik:- On 21.4.2000 when her husband came to Deulasahi to see his two sons, he came to know that Kalu @ Bijaya Kumar Barik was not present there.

Biswanath Barik : On 21.4.2000 when he came to Deulasahi to see his sons, he found that his father-in-law and Palu @ Ajaya Kumar Barik was present there.

11. It is the further finding of the trial court noted in paragraph-3 that in the court P.W.2 and P.W.8 have also stated about the presence of the deceased and Palu @ Ajaya Kumar Barik in the house when P.W.2 left to village Machhia. In the deposition of Urmila Pradhan (P.W.2), she has stated that on her return to the house, Ajaya Barik (summoned witness) disclosed that the accused persons, namely, Akshaya Kumar Patra and Abhaya Kumar Patra had taken the deceased on their scooter to inspect a vehicle. Insofar as Urmila Pradhan (P.W.2) is concerned, in her deposition in court, she has stated as follows:

“On my enquiry Palu informed me that accused Akshaya Patra and the other accused (absconding) Abhaya Patra had taken Kalu in a scooter to inspect a vehicle”

Insofar as Bijayalaxmi Barik (P.W.8) is concerned, in her deposition she has stated as follows:

“Prior to 4 days of the death of Bijaya my younger son Ajaya was also staying with him in the house of my mother P.W.2.”

12. Insofar as the statement under Section 161 Cr.P.C. is concerned, the investigating officer noted that P.W.2, Urmila Pradhan on her return from village Machhia enquired from his husband- Adikanda Pradhan the whereabouts of the deceased-Kalu @ Bijaya Kumar Barik and had been informed by him that Kalu & Palu, the two brothers were sleeping inside the house on 21.4.2000 but from 11.00 A.M. to 12 noon, Kalu was absent from his house. In the charge sheet Adikanda Pradhan, husband of Urmila Pradhan, had been cited as a charge-sheeted witness but had not been examined by the prosecution in course of trial. Similarly although Biswanath Barik (father of the deceased-Kalu @ Bijaya Kumar Barik) had also been cited as a charge-sheeted witness, as a witness to the occurrence but had also not been examined by the prosecution in course of the trial. Therefore, no reliance on the 161 statement of Biswanath Barik or Adikanda Pradhan could have been relied upon or never been examined by the trial court to reach his conclusion.

Insofar as P.W.8, Bijayalaxmi Barik is concerned, the findings of the trial court that P.W.8, Bijayalaxmi Barik (mother of the deceased) had stated about the presence of the deceased and Ajaya Kumar Barik (summoned witness) is not borne out from records and appears to be an error of record. Therefore, on perusal of the statement recorded under Section 161 Cr.P.C., as well as the evidence recorded in court, except- P.W.2-Urmila Pradhan, no one has spoken a word about the presence of Palu @ Ajaya Kumar Barik in the house when the accused persons are supposed to have come and taken the deceased Kalu @ Bijaya Kumar Barik with them. Further in the face of this statement and when verified with the statement of P.W.2 recorded under Section 161 Cr.P.C., where she has not uttered a single word regarding the presence of Palu @ Ajaya Kumar Barik and had instead stated that she had queried her husband, Adikanda Pradhan regarding the whereabouts of Palu @ Bijaya Kumar Barik and later on in the evening learnt from other witnesses that, Kalu had been last seen in the company of the accused-petitioner as well as the absconding accused. There is no whisper about the summoned witness-Palu @ Ajaya Kumar Barik being present in the house at the time when the accused came to meet the deceased or informed any witness regarding any knowledge of any occurrence.

In other words, this is a clear attempt made by the prosecution to try and introduce a new witness into the proceeding, a witness about whom there is no reference whatsoever by any of the prosecution witnesses, in course of their evidence in the trial.

13. At this juncture, it would be appropriate to take note of the judgment of Our High Court in the case of **Karam Chand Mukhi and others v. Santosh Pradhan and another**, (2004) 28 OCR-773. In the said judgment, Hon'ble Justice P.K.Tripathy (as His Lordship the then was) dealt with the similar circumstances which arises for consideration in the present case and held as follows:

“13. The above position of law does not authorize either the prosecution, the informant/complainant or the Court to add to the list of witnesses as and when they like in the absence of a convincing reason to invoke the provision in Section 311 of the Code. Whether it is applied to be invoked by the prosecution, informant/complainant or the Courts suo motu, it must be supported by materials available on record to qualify to the term employed in Section 311 that “his evidence appears to it to be essential to the just decision of the case”. Thus, this Court finds that contention of the learned Standing Counsel in seeking for invoking the provision in Section 311 by the Trial Court is not incorrect on principle. Beyond that there is a big vacuum in as much as no evidence or materials available in the Trial Court's record has been put forth before this Court to show or suggest that the examination of these three petitioners or any of them is necessary in the above context.

14. It is stated at the Bar that, Investigating Officer has already been examined. At the stage of examination of the Investigating

Officer, if not earlier during examination of other prosecution witnesses, the prosecution should have brought out relevant evidence justifying examination of the petitioners as witnesses to the occurrence. If there is negligence or mischief by the Investigating Officer in omitting the names of the petitioners from the list of charge-sheet witnesses, then that should have been specifically put to him by the prosecution in the shape of leading questions, if permitted by the Trial Court, so as to provide circumstances for consideration of the Trial Court if such additional witnesses should be examined. As noted above, since nothing of that sort have been done either by the prosecution or the complainant and when there is no positive circumstances available to indicate that the three petitioners are eye-witnesses to the occurrence and willing to be examined as such, therefore, merely by filing statements of the petitioners in the shape of affidavits, they do not get the credential to be examined as additional witnesses. For the said reasons, this Court finds that the application of the petitioners was rightly rejected by the Courts below.”

14. In the light of the circumstances that arises for consideration in the present case as noted in the aforementioned judgment held that law does not authorize either the prosecution, the informant/complainant or the Court to add to the list of witnesses as and when they so like in the absence of a convincing reason to invoke the provision in Section 311 of the Code. Whenever an application is made under Section 311 Cr.P.C., the same must be supported by the materials available on record qualifying the requirement of Section 311 Cr.P.C., i.e.

“his evidence appears to it to be essential to the just decision of the case”.

Thus, I am of the considered view that the contention of the learned counsel for the State seeking to justify the invocation of the provision of Section 311 Cr.P.C. by the trial court, cannot be held to be correct on principles of law. As noted hereinabove, no evidence or material is available on the trial court’s record to show or suggest that the examination of Palu @ Ajaya Kumar Barik is necessary in the above context.

It is equally important to note herein that in the present case evidence on the side of the prosecution had been concluded, defence had also concluded their evidence, arguments from both the sides had also been concluded. It is at such a stage that the prosecution sought time to advance further arguments and it is only after three adjournments thereafter, that the present petition under Section 311 Cr.P.C. came to be filed. Clearly neither at the stage of examination of the Investigating Officer nor during the examination of any of the prosecution witnesses did the prosecution bring about any relevant evidence justifying the examination of Palu @ Ajaya Kumar Barik as a witness. As held in the case of **Karam Chand Mukhi and others** (supra), if it was the case of the prosecution that there is negligence or mischief by the Investigating Officer in omitting the name of Palu @ Ajaya Kumar Barik from the list of

charge-sheeted witness, then such a question should have been specifically put to the Investigating Officer by the prosecution in the shape of leading questions, if permitted by the trial court, so as to provide circumstances for consideration of the trial court in the event any such additional evidence is sought to be examined. Admittedly, in the present case nothing has been done by the prosecution and, therefore, when there is no positive circumstances available to indicate that Palu @ Ajaya Kumar Barik is a witness to the occurrence (pre or post), this Court finds that the application of the prosecution under Section 311 Cr.P.C. ought to have been rejected by the court below.

15. Accordingly, the present application under Section 482 Cr.P.C. is allowed and the order dated 13.09.2010 passed by the learned Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.33 of 2006 arising out of Athagarh P.S. Case No.49 of 2000 is set aside and the trial court is directed to conclude the hearing of the case at an early date.

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I.Mahanty,J.