

**THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLMC No. 947 of 2023**

(Application under Section 482 of Criminal Procedure Code, 1973 challenging the order dated 08.02.2023 passed in S.T. Case No. 27 of 506 of 1996 by the learned 2<sup>nd</sup> Addl. Sessions Judge, Bhubaneswar)

**AFR Rudra Narayan Sahu ..... Petitioner**

**-Versus-**

**State of Odisha ..... Opposite Party**

Advocate(s) appeared in this case:

For Petitioner : M/s. Devashis Panda, A.Mehta,  
A. A. Mishra, D.K. Panda &  
S. Panda, Advocates.

For Opp. Party : Mr. S.N. Das,  
Additional Standing Counsel

**CORAM:**

**JUSTICE SASHIKANTA MISHRA**

**JUDGMENT**

**15<sup>th</sup> March, 2023**

**SASHIKANTA MISHRA, J.**

The petitioner, who is one of the accused persons in S.T. Case No.27 of 502 of 1996 in the Court of learned 2<sup>nd</sup> Additional Sessions Judge, Bhubaneswar has filed the present application under section 482 of Cr.P.C. assailing order dated 08.02.2023 passed by the said Court in rejecting

his petition to recall the I.O. of the case for further cross-examination.

2. The brief facts, relevant only for deciding the present case, are that the petitioner and three other persons are facing trial in the aforementioned case, which is a case of triple murder. As many as twenty one witnesses were examined from the side of the prosecution, out of whom P.W.-19 is the Investigating Officer. He was cross-examined and discharged way back on 15.09.1997.

3. Be it noted here that because of filing of certain applications by the co-accused persons before this Court the trial remained stayed for a long time i.e. from the year 2000-2022. On 27.09.2022, the present petitioner filed a petition under Section 311 of Cr.P.C. to recall P.W.-19 for further cross-examination. It was, inter alia, stated in the petition that certain questions material to the defence could not be put to P.W.-19 as the lawyer, who was representing the petitioner was ill.

4. The Court below, by the impugned order rejected the petition on the ground that the same had been filed after expiry of more than twenty six years at the stage of defence

and that the intention of the accused was only to delay the disposal of the case.

5. Heard Sri D. Panda, learned counsel for the petitioner and Sri S. N. Das, learned Additional Standing Counsel for the State.

6. Sri Panda argues that a litigant cannot be allowed to suffer for the inability of his lawyer to cross-examine important witnesses at the relevant time because of the bonafide reason of his ill health. Sri D. Panda further submits that one N.N. Mishra was engaged as the defence counsel on behalf of the petitioner but on the date of cross-examination of P.W.-19, i.e. on 15.09.1997, the said counsel was absent because of a kidney ailment. As such, P.W.-19 was discharged after being cross-examined by the counsel appearing for the co-accused persons. But in so far as the present accused is concerned, the testimony of P.W.-19 has gone entirely unchallenged. According to Sri Panda, it affects the defence of the petitioner in the trial and also strikes at the principles of right to fair trial. Summing up his arguments, Sri Panda submits that the delay in disposal of the case, cannot in any manner, be attributed to the petitioner, inasmuch as the proceedings was stayed for a long

time as per orders passed by this Court. In any case, it is the settled position of law that if the cross-examination is required for a just decision of the case, mere delay in disposal of the case cannot be a ground to disallow the same.

7. Per contra, Sri S. N. Das contends that filing of the petition under section 311 of the Cr.P.C. by the accused-petitioner belatedly is nothing but a dilly-dallying tactic resorted by him to somehow delay the disposal of the case. Mr. Das further contends that the petitioner had filed a petition on 03.09.2022 seeking recall of P.W.-6, which was rejected by the Court below. Ultimately, the same was allowed as per order passed by this Court on 11.11.2022 in CRLMC No.2752 of 2022. Even otherwise, the petitioner has not come up with the list of questions proposed to be asked to the Investigating Officer.

8. Before proceeding to dwell upon the merits of the rival contentions as noted above, this Court would like to keep the law relating to recall of witness in the perspective.

Section 311 of Cr.P.C. reads as follows:

***“311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in***

*attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”*

Thus, adequate power has been conferred upon the Court to recall any witness at any stage of the proceeding but with the rider that such evidence must be essential to the just decision of the case. Obviously, there cannot be a straight jacket formula to hold as to what would be essential for just decision of the case as it would depend upon the facts and circumstances of each case. However, the Apex Court in the case of **Rajaram Prasad Yadav v. State of Bihar**, reported in (2013) 14 SCC 461 summarised the law in this regard by laying down the following principles:

*“17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

*17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

*17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

*17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

*17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and*

*circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*

**17.6.** *The wide discretionary power should be exercised judiciously and not arbitrarily.*

**17.7.** *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

**17.8.** *The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

**17.9.** *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

**17.10.** *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.*

**17.11.** *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

**17.12.** *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

**17.13.** *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

**17.14.** *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant*

*of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”*

9. Sri Panda has also relied upon several decisions of the Apex Court to buttress his contentions. But the law being as discussed above, this Court does not deem it necessary to refer to the said decisions rather, it would be proper for the Court to consider the case on the touchstone of law laid down in **Rajaram Prasad Yadav** (supra) viz-à-viz the facts of the case.

10. As already stated, P.W.-19 was cross-examined and discharged way back on 15.09.1997. Two more witnesses being, P.W.-20 and P.W.-21 were examined thereafter. The present petition was filed on 27.09.202 i.e., after a gap of nearly fifteen years. It is otherwise borne out from the record that the prosecution evidence was closed in the year 1997 and the accused statement was also recorded on 05.04.1999. Thereafter, the co-accused approached this Court in CRLMC No.2004 of 1999. Further proceeding of the case was stayed till 17.07.2020. The Court below, in the impugned order has held that the accused persons did not intimate the Court regarding disposal of the case. Further

one of the co-accused persons, namely, Samir Pradhan expired on 18.07.2022 for which the Court below called for the death report from the investigating agency. On the basis of report received, the case against co-accused, Samir Pradhan abated on 08.08.2022. So practically, there was no progress in the case till 23.08.2022 for reasons that cannot be attributed only to the accused persons.

11. Coming to the merits of the case, it is seen that two petitions for recall was filed, one on 27.09.2022 and the second, before disposal of the said petition with request to read both together. It is stated that the Investigating Officer could not be cross- examined as the lawyer appearing for the petitioner was suffering from acute kidney failure. In the additional petition, a reference has been made to the statement of the Investigating Officer regarding seizure of the weapon of offence and the statement of P.W.-6 on record regarding his statement made to the Investigating Officer about his residence, the statement of the Investigating Officer regarding involvement of other persons in the case, recording of discovery statement etc. While Sri Panda contends that these questions are absolutely essential to ensure a fair trial to the accused, the State counsel has vehemently opposed



such contention by submitting that it is nothing but a delaying tactic adopted by the accused, who is charged with a heinous crime like triple murder.

12. It is a fundamental proposition of criminal law that graver the crime, higher is the standard of proof required to establish it. True, the accused is charged with triple murder but the same by itself does not make him a triple murderer unless he is held so after conclusion of the trial. Prosecution still has to prove its case to the hilt before the accused can be treated guilty. Right to fair trial is one of the most fundamental tenets of criminal jurisprudence and a valuable right guaranteed by the Constitutional principle enshrined under Article 21 of the Constitution of India. Applying these salutary principles to the facts of the case, it is seen that during cross examination of the Investigating Officer by the co-accused persons, the present petitioner had gone unrepresented, which as stated earlier was because of a reason beyond his control. That apart, the questions proposed to be put to the witness on recall are, in the considered view of this Court, absolutely material to the defense of the accused-petitioner, as otherwise he would be definitely prejudiced.

13. In the final analysis thus, this Court finds that the Court below should not have been swayed away by considerations of delay only. This is a classic case where the question of belated justice is pitted against the right of the accused to a fair trial. Having regard to the fundamental principles enshrined in the Constitution of India, this Court would rather lean in favour of the latter than the former so that the end result i.e., of rendering of justice to the parties is actually realised. This Court therefore, holds that the impugned order cannot be sustained in the eye of law and is therefore, set aside.

14. In the result, the CRLMC is allowed. The impugned order is set aside. The court below is directed to pass necessary orders to recall P.W.-19 for further cross-examination subject to the following conditions:

(i) Only one opportunity shall be granted to the parties for the said purpose and in case the accused-petitioner does not cross-examine P.W.19 on recall on that date despite his attendance in Court, this order shall not operate.

(ii) The case shall not be adjourned under any circumstances.

(iii) The cross-examination on recall shall be limited to putting only four questions relatable to paragraphs-2, 3, 4 and 5 of the additional petition filed under Section 311 of Cr.P.C. and nothing more.

(iv) It shall also be permissible for P.W.19 to appear virtually for the purpose of being cross-examined, if situation so wants.

.....  
**Sashikanta Mishra,**  
**Judge**

**Orissa High Court, Cuttack,**  
**The 15<sup>th</sup> March, 2023/ Sumitra**

