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IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLMC No. 3516 of 2023

1. Jayanta Behera

2. Basanti Behera

3. Joginath Behera

4. Hemanta Behera

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Petitioners

Mr. Samarendra Mohanty, Adv.

Vs.

State of Odisha

.....

Opposite Party

Mr. S.S. Pradhan, A.G.A.

CORAM:
JUSTICE SAVITRI RATHO

ORDER
13.09.2023

Order
No.2

(Through hybrid mode)

1. This application under section 482 of the Code of Criminal Procedure has been filed by the petitioners, challenging the order dated 31.07.2023 passed by the learned Addl. District and Sessions Judge, Athagarh in S.T. Case No. 223 of 2013 rejecting the application filed for displaying the voice recordings of the deceased and her brother Naba Das contained in M.O.I and M.O.II before the witness. The petitioners are facing trial for commission of offences under Sections 498-A/304-B/306/34 of Indian Penal Code (IPC) and Section 4 of the Dowry Prohibition Act (D.P. Act).

2. The prosecution case in brief is that the marriage of Jhully

daughter of the informant had been solemnized with petitioner No.1- Jayanta Behera on 08.06.2012 as per Hindu rites and customs. Dowry had been given at the time of marriage but a few days after the marriage, the petitioners demanded more dowry and started torturing the deceased. They did not allow the deceased to go to her paternal house on any occasion or festival. She died as a result of consuming poison.

3. The I.O. submitted charge sheet against the petitioners under Sections 498-A/304-B/306/34 of IPC and Section 3 and 4 of the D.P. Act. and they are facing trial for the same offences. The mobile phone of petitioner No. 1 Jayanta with its sim card had been seized during investigation and given in his zima till they were produced in Court on the date when the I.O. was examined as a witness.

4. Mr. S. Mohanty, learned counsel for the petitioners submits that M.O.I and M.O.II are the mobile phone and SIM card of the petitioner No.1 Jayanta Behera which had been seized during investigation. Naba Kishore Das brother of the accused had scolded her over phone before her death and the conversation is recorded in the said mobile and sim card. Hence the audio recording contained in the M.Os. were necessary to be played before Naba Kishore Das when he was examined in Court on 21.07.2023 for the purpose of

cross examination for which the application had been filed. The said application was not heard on that day but was adjourned for filing of objection and hearing and rejected on 31.07.2023 on erroneous grounds. As the mobile phone and sim card had been marked as exhibits, there was no necessity of examination by an expert. So the impugned order is liable for interference.

5. Mr. S.S. Pradhan, learned Addl. Government Advocate submits that the impugned order suffers from no infirmity and calls for no interference as the petitioners did not get the voice recordings in M.O.I and M.O.II examined by an expert in spite of being granted opportunity by the trial Court to do so by order dated 08.12.2015. The mobile phone and sim card had remained in the zima of petitioner No.1 Jayanta Behera till they were produced in Court on the date of examination of the I.O and marked as M.O.I and M.O.II in the trial. Therefore in the absence of examination by an expert the voice recordings contained in M.O.I and M.O.II, cannot be utilized for cross examination of a witness more so when the witness has denied talking with the deceased over telephone from Surat, before her death.

6. From a perusal of the orders passed in S.T. Case No.223 of 2013, it appears that a petition under Section 39 and 45 (A) of the

Evidence Act had been filed by the defence on 18.11.2014 when the examination of prosecution witnesses was going on. The prosecution evidence was closed on 08.12.2015. On the same day, the learned trial Court directed the defence to take step for examination of M.O.I and M.O.II by expert and posted the case to 04.12.2016 for defence evidence.

7. It appears from a perusal of the impugned order dated 31.07.2023 that no step were taken by the defence counsel for examination of the voice recordings. On 11.01.2016, the accused persons were examined under Section 313 of the Cr.P.C. and the case was adjourned to 12.01.2016 for defence evidence. On 25.01.2016, the evidence from the side of defence was closed. When the case was posted for argument, an application under Section 311 Cr.P.C. was filed by the prosecution for examination of Naba Kishore Das, brother of the deceased as a witness. It was allowed on 09.03.2016 by the learned Addl. Sessions Judge, Athagarh. The said order was challenged by the defence in this Court in CRLMC No. 891 of 2016. Pursuant to interim order passed by this Court, the trial remain stayed till the case was disposed of on 14.10.2022. Pursuant to the said order Naba Kishore Das has been examined as P.W.21 by the prosecution on 21.07.2023 and has been cross-examined by the

learned defence counsel on the same day and discharged. (He has been referred to as P.W.20 in a few places in the impugned order.)

8. Perusal of order dated 31.07.2023 reveals that the learned Addl. Sessions Judge observed that M.O.I and M.O.II are the keypad mobile and SIM card which was seized by the I.O. during investigation on production of the accused and those were handed over to the accused in zima and they were produced in the Court on the day the I.O. was examined in Court and marked as M.O.I and M.O.II on behalf of the prosecution and the seizure list does not disclose the details of the M.O.I and M.O.II seized by the I.O. and the I.O. has stated during his evidence that he has not displayed the conversation recorded in the alleged mobile. As the Court has already given scope to the defence for taking step for assistance of expert on that aspect and instead of taking step, the defence closed their evidence and since the witness in his examination has straightway denied the suggestion of the defence that he had any conversation with the deceased over the mobile phone of the accused, the application of the petitioners has been rejected. The learned trial Court has also observed that it is not possible for the Court to collect evidence for the defence.

9. Perusal of the deposition of P.W.21 Naba Kishore Das reveals

that he has stated that he was in Surat at the time of death of the deceased and returned almost six months after her death and was not talking with the deceased when he was in Surat. During cross-examination by the defence he has denied abusing and cautioning the deceased.

10. When M.O.I and M.O.II had remained in the zima (interim custody) of the accused before being produced in Court, a certificate of an expert under Section – 45 (A) of the Evidence Act was necessary before the voice recording could be confronted to P.W.21. In spite of order dated 08.12.2015, without getting the M.Os examined by an expert, prayer had been made for displaying the voice recording in M.O.I and M.O.II to P.W.21 in the open court.

11. In view of the above discussion, I do not find any infirmity or illegality in the impugned order, so as to interfere with it in exercise of power under Section 482 of the Cr.P.C.

12. The CRLMC is accordingly dismissed.

13. Urgent certified copy of this order be granted on proper application.

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(SAVITRI RATHO)
JUDGE