

S.T. Case No.

5 of 1998

Republic of India
Vrs.
Indrajit Roy.

Order No.10 dt.29.7.98./

Accused is absent. A petition is filed to represent him. Heard. It is allowed. The defence Advocate filed another petition praying to supply copies of Lopamundra Mohanty and Dr.D.C. Mishra who were examined U/s. 161 Cr.P.C. by C.B.I.. Heard. It is not disputed that Lopamundra Mohanty and Dr. D.C.Mishra were examined U/s.161 Cr.P.C. by C.B.I.. But they are not cited as witness in the charge sheet. This indicate that the prosecution does not want to rely on their statements. The learned Advocate for C.B.I. also contended that the prosecution does not want to relay on their statements. Under the circumstances, the accused is not entitled to get the copies of the statements of the said witnesses U/s.207 Cr.P.C.

It will not be out of place to mention here that a similar petition was filed before the Sessions Judge for supply of copy of these witnesses but under order dt.12.6.98 the Sessions Judge rejected the said petition. So, the present petition on the same ground is filed only to delay in disposal of the case. Since U/s.207 Cr.P.C. the accused is not entitled to the copies of 161 Statements of witnesses on whom prosecution does not rely, the petition is rejected.

The learned defence Advocate filed another petition praying for time on the ground that the petition filed to supply the statement of prosecution witnesses is pending. Heard. No such petition is pending before the court and the copies of P.P. were

supplied long back. Hence the present petition for adjournment is rejected.

The learned Sr.P.P., C.B.I. opens the case and placed materials on which he proposes to relay. The learned defence advocate contended that there is no material to frame charge and prayed for discharge. Heard both parties. Perused the statements of witnesses and all other documents. It is well settled that if the uncontroverted allegation or material collected in investigation makes out a prima facie case, then charge has to be framed. In the decision reported in 1979 Cr.L.J. Supreme Court, Page 1390 (West Bengal -Vrs.- Anil Kumar) their Lordship held that “Material on record capable of inferring strong suspicion about commission of offence sufficient for framing charge.” In the case in hand, the statement of witnesses and the documents collected during investigation raises a strong suspicion and makes out a prima facie case. In the decision reported in Vol.44(1975) C.L.T. Page 1216 (Hareram Satpathy -Vrs.- Tikaram Agarwalla) their Lordship held that, “ the very fact that the police has filed charge sheet against the accused persons in this case indicates that a prima facie case has been made out.” The evidence collected makes out a prima facie case against the accused U/s.354/376/511 I.P.C. Hence charge is framed under these sections. The contents of the charge is read-over and explained to the R.L. Who pleads

not guilty and claims for trial.

Learned Sr.P.P., C.B.I. submits to summon the witnesses as per charge sheet and calender statements. Issue summons to the witnesses fixing 7.9.98 to 9.9.98 for evidence. Write to S.P. for escort party and Judge-in-charge, Sessions Malkhana to cause production of M.O., if any.

Accused be present on the dates fixed.

Order No.15 dt.25.11.98

Heard both parties on the petitions dt. 24.11.98.

The accused filed two petitions one to call for the documents filed in O.J.C. 9929/97, Bidanasi P.S. Case No.113/97 and Bidanasi P.S. Case No.94(5)/97 and Nayapalli P.S. Case No.210/97 and S.D. entries made by the I.I.C. concerned.

During course of argument the defence advocate filed a Memo stating that he is not pressing the petition and wants to withdraw the same. So this petition is dismissed as not pressed and withdrawn.

Another petition is filed to permit the defence advocate to inspect the C.D. An affidavit is filed to-day to permit him to inspect the documents, the copy of which has been supplied to him and it is stated in the affidavit that the accused does not want to inspect the C.D. And he wants to compare the copies with their

original documents. The learned P.P., C.B.I. relied on section 172 and 173 of Cr.P.C. in support of his contention that the accused is not entitled to inspect the documents. Both the sections does not provide that the accused is not entitled to inspect documents. On the other hand Rule 210 of G.R. & C.O. (CrI.) Vol.I authorised the Court to permit inspection of record even without a written order. In this case as per the Affidavit, the accused wanted to compare the copies of documents which is supplied to him with the original one and there is no bar to allow the accused to do so. On the other hand the interest of justice will be better served if he is allowed to compare the copies with the documents available in the record. Hence this petition is allowed.

The learned Defence advocate is to inspect the documents and 161 statements which is in record copies of which supplied to him on 30.11.98 at about 11 A.M. In the court room in presence of P.P. C.B.I. and the Bench Clerk

Order No.19 dt.
7.12.98

Accused is present. P.P.(C.B.I.) filed hazira of 2 P.Ws (two).

Learned defence advocate filed a memo to permit accused to cross-examine in P.Ws on the ground that he is ill. Heard. Accused engaged more than five advocates to conduct his case. None of them has withdrawn their power till now. Under the circumstances accused can not be permitted to cross examine the witnesses where the Advocates engaged by him still holds power for him. Hence the memo filed is rejected.

Another memo is filed stating that Defence Advocate will cross-examine the P.Ws. reserving his right to move before Hon'ble Court. Heard. This Court has nothing to say in this matter. The defence advocate who holds power for the accused so he has right to cross- examine the witness.

P.W.5, Kasturi Mohapatra is examined, cross-examined and discharged. P.P. declined to examined Snehalata Sahu So she is declined and discharged. Trial was taken up in chamber at 2 P.M. As there was disturbance in Court room.

Learned Defence Advocate filed two petitions. One to re-call P.W.4 for further cross-examination and another petition

to call for the document. Put up tomorrow for hearing on those two petitions and for trial. Accused as before.

Order No.20 dt.8.12.98./

Accused is present. P.P. C.B.I filed hazira of 2 witnesses. To avoid disturbance trial is taken up in chamber. P.W.6, Bhagyalaxmi Choudhury and P.W.7 Giridhari Naik are examined, cross-examined by the defence and discharged.

P.P., C.B.I. filed objections to the petitions filed on 7.12.98 by the accused. Heard on these two petitions.

On 7.12.98 a petition was filed by the accused to re-call P.W.4, Saila Behera for further cross-examination on the ground that she was examined by police on 22.7.97 and by C.B.I. on 23.8.97 and 5.9.97 and there is some contradictions in those statements. So, she may be recalled for further cross-examination.

While dealing with the question of re-call of P.Ws. the Hon'ble Supreme Court in the decision reported in 1991(2) CrL.L.J. Page 1521 (Mohan Lal Vrs.- Union of India) held that "Jurisdiction of the Court must obviously be dictated by agency of the situation and fair play and good sense, appears to be the only safe guide", and in the decision reported in 1968 CrL. L.J., Orissa, Page 1669 (Lokanath Behera -vrs.- Golakha Behera) their

Lordship held that “ The power given to the Court is not meant to be exercised to enable one party or the other to fill up gaps”. In the case in hand P.W.4, Saila Behera was cross-examined at length in details and accused confronted her the omissions and contradictions which he considered necessary. The petition filed by the accused does not reveal what contradictions he now wants to brought out from P.W.4. Mere statement that some contradictions is to be confronted is not enough to re-call the witness which will cause hardship, to the witness and also delay the trial. Above all, in the decision reported in 1996(II) O.L.R. page 74 (Hachtra -Vrs.- State) their Lordship held that:-

“ In case of course where the party was offered a chance to cross- examine he has either failed or waived his right to cross examination, the case may be different.”

In this case the accused cross examined P.W.4. In other words he availed the opportunity of cross examination which was offered to him and no sufficient material was placed to recall P.W.4 for further cross-examination. Hence the petition filed is rejected.

On 7.12.98 another petition was filed to call for the documents filed in O.J.C. 9929/97, O.J.C. 9801/97, O.J.C. 9806/97, O.J.C. 9862/97 and O.J.C. 9788/97, Bidanasi P.S. Case

No.113/97, Bidanasi P.S. Case No.64(14)/97, Bidanasi P.S. Case No.94(5)/97, Nayapalli P.S. Case No.210/97 and S.D. Entry No.45 dt.3.4.95 and S.D. No.52 dt. 3.4.95 as the same are necessary to this case.

At the outset it may be stated that similar petition to call for these documents were filed on 24.11.98 which was rejected as not pressed on 25.11.98, as evident from the order sheet. Hence, filing of the petition on the self same ground is nothing but a step to delay the trial.

Be that as it may, as per the averments in the petition, the documents of the cases which the accused now wants to call for arose after the registration of this case and before charge sheet of this case and the S.D.No.45 dated 3.4.95 and 52 dated 3.4.95 of Hemagiri P.S. of Sundargarh District came into existence long prior to this case. In other words all these documents came into existence either much prior or after this case. So, the said documents has no relevancy to the alleged incident of this case. The petition filed also does not indicate how the said documents are relevant to this case. Hence the said petition is also rejected.

The learned defence advocate contended that the accused will go for a treatment and prayed for a long adjournment preferably in the 2nd week of January, 99. The oral prayer is

allowed. Call on 11.1.99, 12.1.99 and 13.1.99 for trial. Issue summons to witnesses in 3 batches to the dates fixed.

Accused is as before

Order No.25 dt.
3.2.99

Accused is present. He files a petition supported with affidavit and medical certificate that the conducting advocate is ill and prayed for 3 weeks time. Heard. It is stated in medical certificate that the concerned advocate is suffering from 25.1.99 and he was advised to take rest with effect from 2.2.99. This fact projects its shadow on the genuineness of the certificate. However, since the adjournment is sought for on the ground of illness of conducting advocate, I am inclined to allow the petition. Time is allowed. Call on 16.2.99, 17.2.99 and from 22.2.99 to 24.2.99. Issue summons to witnesses Susanta Hota, Madhubandanda Mohanty, Madhumita Das, Dr. pratap Kumar Rath, to 16.2.99. Dr. Neelamadhaba Ratha, Smt. Bidyutlata Nayak, Sri B.C. Acharya to 17.2.99, Gobinda Ch. Sethi, Chaturbhuja Mohapatra, Dally Das @ Sanghamitra Das, to 22.2.99, Smt. Anjana Mishra on 23.2.99 and Dhabhi Ojha, Babuli Maharana and Makar

Maharan on 24.2.99.

Accused be presented on the dated.

Order No.26 dt. 16.2.99./

Accused is present. Learned P.P. C.B.I. files hazira of 3 witnesses. Accused filed 4 petitions.

The accused filed a petition stating that the copies of statements of witnesses Madhumita Das, Madabananda Mohanty and Dr. P.K.Ratha who were examined U/s.161 Cr.P.C. by police and the Medical report of the victim at Mental Hospital were not supplied to him and prayed to supply the said documents and not to examine these witnesses till supply of copies. Learned Sr. P.P. C.B.I. submits that he is not going to examine Sri Madhabananda Mohanty and Dr. P.K.Rath and he is prepared to supply the copies of statements of Madhumita Das. Heard. At the outset it may be stated that complaint of non supply of copies were first raised before the District & Sessions Judge. But at that time it was not claimed that copies of Madhabananda Mohanty and Madhumita Das were not supplied to the accused. Be that as it may, the learned Sr.P.P., C.B.I. filed a memo declining to examine Madhabananda Mohanty and Dr.P.K.Ratha. Hence, as the prosecution is not relying on these witnesses, the statement and the document relied by the witnesses

can not be supplied to the accused, nor the accused has the right to get the said copies. The copy of 161 statement of Madhumita Das is supplied to the accused through court and this petition is allowed in part. Since the 161 statement of Madhumita Das is supplied to-day she will be examined on 23.2.99.

Another petition was filed to call for documents i.e. Bidanasi P.s. Case No.113/(2) of 97, Bidanasi P.S. Case No.64/97, Affidavit filed by Anjana Mishra on 8.2.96 against her father, affidavit filed against Lady Police Inspector, Affidavit filed by the parents of Anjana Mishra, Medical Registration No.2850 dt.31.8.98 and S.D.E. Nos. 45 and 52 dt.3.4.95 and other documents. C.B.I. P.P. objected to the calling for of such documents. Heard both party. At the outset it may be stated that similar petition was filed to call for those documents on 24.11.98 which was rejected as not pressed and again on 8.12.98 which was rejected by this Court on merit. Filing of the petition to call for documents again and again on the same ground shows that the accused only wants to delay disposal of the case. All these documents came into existence either much prior or after charge sheet of this case. There is no material showing that these documents has any relevancy to this cases. So the petition to call for the documents is rejected.

The learned Advocate filed another petition to expunge

2 lines from the order dated 3.2.99. Heard. On 3.2.99 order was passed by this Court questioning genuineness of the medical certificate, on the basis of writing in the certificate and in presence of Advocate. Expunging any portion of the order passed by this Court may amount to review of the order and this court is not competent to do so. There is also no material justifying to expunge the remarks. Moreover, the Medical Certificate reveals that the learned Advocate was advised to take rest for 3 weeks from 2.2.99. To-day is 16.2.99 and as per medical report the learned Advocate had not taken rest. In other words the advise given in the medical report is not followed. So, there is no material before this Court to expunge the remarks. Hence, this petition is also rejected.

Another petition is also filed to grant 15 days time to prefer revision against the order. Heard. As per the circular of the Hon'ble Court the trial of the case can not be stayed on mere submission that the party wants to prefer any revision. Hence the ground made out is not sufficient to adjourn the case. Hence that petition is also rejected.

Another petition was filed to re-call P.W.4 for further cross-examination. The learned Sr.P.P. C.B.I. submitted that he wanted to file some authority on this point. Heard on the petition. Call on 23.2.99 for order in this petition.

Susanta Kumar Hota is examined as P.W.8 cross-examined and discharged. Learned Sr.P.P. C.B.I declined to examine P.K.Ratha and Madhabananda Mohanty. So they are discharged being declined. Madhumita Das will be examined on 23.2.99 as copies of her 161 statement was supplied through the Court to-day. Call on the date fixed.

Accused as before.

Order No.27 dt.17.2.99

Accused is absent. A petition U/s. 317 Cr.P.C. is filed by the Advocate for the accused to represent him. Heard. It is allowed for to-day only. Prosecution files hazira of witness Iswar Chandra Mohanty. Defence filed a petition for time on the ground that the Senior Advocate has not come to-day and the relevant file is with him. Heard. It is allowed. The witness Iswar Ch. Mohanty is to be examined on 22.2.99.

Sr.P.P. C.B.I. files a Memo to issue summons to Julelkha Rasid for his examination on 22.2.99 and Pramod Kumar Patnaik and Madhumita Das on 23.2.99 along with other witnesses already summoned. The memo is allowed. Issue summons to the witnesses accordingly to the date fixed.

Accused is as before.

Dictated.
S/d-

C.J.M.-
A.S.J.,Khurda,
Camp-BBSR.

Later./

A petition is filed to re-call P.W.8 who was examined on 16.2.99 on the ground that the witness deposed that many persons entered into the house, but wrongly 'office' was noted instead of house. So he may be recalled to make necessary correction. Heard. Section 311 Cr.P.C. or any other provisions of the Cr.P.C. does not empower this Court to recall a witness for correction of his deposition. The deposition was dictated in open court in presence of Advocates of both the parties. No objection was made at that time by the concerned advocate about any wrong recording. The witness also put his signature after going through the deposition had also not raised any objection. So, there is no material to hold that there was any wrong recording. Recalling the witness again and again will cause harassment to the witnesses.

In the circumstances, the petition filed is rejected. Call on the date fixed.

Order No.28 dt.22.2.99

Accused is present. The P.P., C.B.I. files hazira of 3 witnesses. P.W.9 Julekha Fussel, P.W.10, Iswar chandra Mohanty were examined, Cross-examined and discharged. Dali

Das is examined as P.W.11. In the midst of cross examination the defence advocate filed a petition to permit him to play the tape alleging that one Surendra Jena recorded the voice of Dali while she was bi-hearing the statement given by Saila Behera. Heard. The witness Dali Das denied the suggestion that Saila Behera gave in writing to her, what she is to be stated before I.O. and she denied any knowledge about the recording. In the decision reported in A.I.R. 1968 Crl.L.J., Supreme Court, Page 103 (Yusuf Ali Exmle -Vrs.- State of Maharastra) their Lordship held that:-

“ If a statement is relevant an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by the competent witness and the voice must be properly identified. One of the features of the magnetic tape recording is the ability to erace and reuse the recording medium. Because of the facility of the erase and reuse, the evidence must be received with caution.”

In this case no material is available in the record, except the suggestion which has been denied by the witnesses, to hold that actually there was tape recording of the voice of the witness Dali Das nor any material in placed to hold that the rape which now the defence wants to play is a genuine one nor there is any

evidence to show the time and place of its recording. Since no proper foundation is laid the defence can not be permitted to play the tape. Hence the petition is rejected. P.W.11 is cross-examined and discharged. Call on the date fixed.

Accused is as before

No.29 dt. 23.2.99./

This order arises out of the petition filed to re-call P.W.4 for further cross- examination on the ground that certain omission has to be confronted to P.W.4 and the details of omissions were given in the petition.

The first of these alleged omissions were confronted to P.W.4 as evident from page 15 of her deposition. Admittedly, P.W.4 was examined by state police and by C.B.I on different dates. The facts which now the defence advocate wanted to confront to P.W.4 was not in her statement recorded by the state police. But the said facts finds place in the statement recorded by the C.B.I.. Both her statements came into existence during course of investigation though at different time recorded by different investigating agency. In the decision reported in A.I.R. 1958 Mysore, Page 138 (Manine Jappa -Vrs.- State) their Lordship held that:-

“ All these facts whenever and whereafter stated go to constitute his statement. From this it follows that the facts stated by P.W.2 in the morning

as well as facts stated by him in the evening to the Investigating Officer are both part statement.”

In the decision reported in 1998(II) O.L.R. page 652 (Judhistira Das -Vrs.- Jharia Das) their Lordship held that :-

“The statement made by a complainant in complaint petition and in the enquiry U/s.202 Cr.P.C. is admitted a previous statement.”

The statement in complaint petition and the statement under 202 Cr.P.C. comes into existence during course of enquiry and at two different times and at different stages and the Hon'ble Court held that both the statements are previous statements. So I am of view that the statement recorded by the state police and C.B.I. will be construed as one previous statement of the witness about which she deposed in Court. So the accused can not be permitted to confront these statements on the ground that the facts stated to C.B.I were not stated to state police as the same does not amount to contradiction or omission amounting to contradiction. Hence the petition filed is rejected.

Dictated.

S/d-

C.J.M.-

A.S.J.,Khurda,
Camp-BBSR.

Later/

Accused is present. Sr. P.P., C.B.I., Files hazira of two

witnesses. Pramod Kumar Patnaik is examined, as P.W.12. Exbts. 9, 9/1, 10, 11/1, 11/2 and 12 are marked for the prosecution. He was cross-examined and Exbts. A, A/1 and A/2 are marked for the defence. The witness is discharged. Prosecution declined to examine witness, Madhumita Das. Put up on the date fixed for trial.

Accused be present on the date fixed.

Dictated.

S/d-

C.J.M.-

A.S.J.,Khurda,
Camp-BBSR.

Order No. 44 dt. 6.7.99/Later./

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This order arises out of a petition filed on 16.2.99 and to-day to recall P.W.4. The said petition was rejected by this Court on 23.2.99 and thereafter the accused preferred Criminal Revision before the Hon'ble High Court and the Hon'ble Court directed to re-consider the said application.

On 16.2.99 the accused filed the petition to re-call P.W.4 to confront the omissions which are as follows:-

“A. On 15.7.97 at about 7 to 7.30 P.M. Sri S.N. Swain met me at Basundhara and told me that he had discussion with Indrajit Roy who denied the allegation but looked depressed.

B). On 16.7.97 morning Sri S.N.Swain told me over phone that he was going to meet the Chief Minister and asked me to meet the Chief Minister with other lady activist and asked me to meet at the house of Kasturi Mohapatra. Accordingly we met him at the house of Kasturi Mohapatra.

C) The meeting with Chief Minister was fixed by the D.I.G. in between 4 to 4.30 P.M., Chandrika Mohapatra, Bijayalaxmi Das, Kasturi Mohapatra, Bhagyalaxmi Choudhury, Anjana and myself participated in the meeting at the house of Kasturi Mohapatra.

D). Special secretary told us that the Chief Minister wants that Anjana should not accompany them and she should not be quoted and try to compromise at his level.

E). Myself, Kasturi, Bijayalaxmi Das, Bhagyalaxmi Choudhury, Chandrika Mohapatra reached at the residence of the Chief Minister at 4 P.M. And Pitambar

Acharya was there.

F). We all went to the upstairs of the drawing room of the Chief Minister. Chandrika Mohapatra requested the Chief Minister to take action quickly so that it would take a good tradition and Anjana would get justice. Bhagyalaxmi and Kasturi Mohapatra also talked with the Chief Minister but why remained silent throughout.

G). The Chief Minister asked for 2 days time as he was going to Delhi and promised to look-after the matter and asked me to take charge of Anjana Mishra.

H). I went to house of Nandini Satapathy as I left Anjana there.

I). I left Anjana in the house of Kasturi Mohapatra and returned back to Cuttack. On 18.7.97 I rang up Pitambar Acharya and went to his house. Pitambar Acharya told that things are going in different way and Chief Minister wants to give him in writing that nothing has happened to Anjana.

K). On 19.7.97 the D.I.G rang me and asked me to come to the house of Kasturi Mohapatra, myself, Bhagyalaxmi, Bijayalaxmi met in the house of Kasturi Mohapatra.

D.I.G. And Arati Mishra were present there. Anjana was in the house of Kasturi Mohapatra. S.N.Swain told us that we will not get justice from Chief Minister and asked us to go ahead with the F.I.R. Then Anjana drafted the F.I.R. It was typed out in computer of Kasturi.

L). We reached Cuttack after getting the print of F.I.R. at about 9 P.M. And went to Cantonment P.S. Where Ramesh Ch. Kar was the I.I.C. and Anjana gave F.I.R. to him. The I.I.C. and Anjana gave F.I.R. to him. The I.I.C. registered a case under Sec. 354/376/511 and then Anjana went sent to City Hospital for medical examination. The city D.S.P. Balakrushna Mohanty reached there while Anjana was at Hospital. The D.S.P. Wrote the F.I.R. and changed the section of law. Anjana refused to receive copy and asked to call D.I.G. S.N.Swain reached there and told section can not be changed.

M). On 13.7.97 Anjana narrated the incident to me. She told me that Indrajeet Roy punched over her in the bed room, squiched her breast and kissed her all over her body and tried to untie her Salwar but he could not succeed and accused was naked at that time. When Anjana get himself freed she spitted on his face and came out. The accused threatened she would not disclose the incident”.

These are the omissions having no direct relation with the incident. All these facts or alleged omissions came into existence after the incident, when the victim and the lady social workers were trying to approach the authority. Omission Nos. A, D and K relates to the informant supplied by the D.I.G., Secretary of Chief Minister and Pitamber Acharya to P.W.4. So these persons are the best persons to speak about the same. In other words their evidence is the best evidence and the evidence of P.W.4 on this point is hearsay in nature. Moreover the omission Nos. B.J. and M were confronted to P.W.4 as evident from her evidence in para-18 and 19. So such questions can not be confronted again and again. The omissions marked C, E.F and G relate to the meeting between the women activists and Chief Minister which yielded no result nor it concerned with the accused. Omission No.L relates to lodging of F.I.R. at the Cantonment P.S. and about the action of D.S.P. Then first part of question about lodging of F.I.R is not disputed and the latter part relating to conduct of D.S.P is not very material. Moreover, it is pleaded by the accused that omission Nos. A to L were not in the statement on 23.8.97 and 5.9.97. Saila Behera (P.W.4) was examined by C.B.I on these two dates. The Statement of 5.9.97 was in continuation of the statement recorded on 23.8.97 and this was stated to in the statement itself. On 23.8.97

Saila Behera was examined upto the facts of 14.7.97 and 5.9.97 she gave statement about the incident from 15.7.97 onwards. Since it has been specifically mentioned in 161 statement the statement recorded on 5.9.97 is a continuation of the statement of 23.8.97 it can not be said that the omission No.A to L were not in the statement of P.W.4. The 161 statement of P.W.4 before Cantonment Police shows that she stated to police about the omission No.M. So C.B.I. has not examined her on this point as such it can not be treated as the omission.

Be that as it may, it is well settled that omission if not a material one does not amount to contradiction and the same can not be looked into and is not admissible in evidence, as laid down by their Lordship in the decision reported in Vol. 10 1968 O.J.D. Page 130 (Krushna Ch. Palei -Vrs.- State) wherein their Lordship held that :-

“Any statement elicited from a prosecution witness that he does not state before the police what he deposed in Court when such discrepancy does not amount to contradiction must be ruled out of consideration”.

What amount to contradiction is laid down by their Lordship in the decision reported in A.I.R. 1959 Supreme Court page 1012 (Thasaldar Singh Vrs.- State of U.P.) wherein their Lordship held that:-

“The statement in the evidence before the Court are so inconsistent or irreconcilable with each other. That both of them can not coexist. It may be said that one contradict other.”

and in para 23 their Lordship further held that

“In some cases on omission in the statement U/s. 162 may amount to contradiction if the deposition in court, they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence;

In the decision reported in A.I.R. 1958 Mysore, Page 138 (Muninjappa -Vrs.- State) their Lordship held that

“ The omission is not a contradiction unless what is actually said, contradicted what is omitted to be said. The test to find out whether the omission is contradictions or not is to see whether one can point to any existence assertion which is irreconcilable with the deposition in Court.”

In the case in hand the question intended to be confronted to P.W.4 in no way contradicts the statement made by her before Court. So these questions can not be treated as contradiction. It also can not be said that the alleged omissions and the evidence of P.W.4 before the Court can

not co-exist. Under the circumstances I hold that the omissions are minor in nature and they do not amount to contradictions. So, there is no justification to re-call P.W.4 for confrontation of these omissions which are very minor in nature and it relates to facts which came into existence after the incident. Hence the petition filed is rejected.

Order No.45 dt. 20.7.99./

Accused is present. P.P., C.B.I. files hazira of witness, Purnashib Mukhopadhyaya. Accused filed a petition to defer the examination of witness Purnashiba Mukhopadhyaya on the ground that he preferred a Revision No.39/99 before the District & Sessions Judge, Khurda challenging the order passed refusing to recall P.W.4. Heard. The Hon'ble Court in Rel. Revn. No.135/99 directed that examination of witnesses shall not be stayed on the ground that question of recalling P.W.4 was pending. In view of the direction of Hon'ble Court the petition to defer the examination of C.B.I., I.O. is rejected.

Another petition is filed by the defence Advocate to recall P.W.5, Kasturi Mohapatra, P.W.6, Bhagyalaxmi Choudhury, P.W.7 Giridhari Naik, P.W.8 Susanta Kumar Hota, P.W.11-Bali @ Sangamitra Das, P.W.12 Pramod Patnaik and

P.W.16 Anjana Mishra for further cross-examination to confront the omissions. Heard. It is stated in the petition that P.W.5 had not stated to I.O the following facts.:

“On 14.5.97 being called by Saila Behera, myself and Chandrika Mohapatra sent to Cuttack and there was a reconciliation in the chamber of D.G., Dr.B.B.Panda, but the meeting was failed being asked by him, Subash, the husband of Anjana told that Anjana was insane and he came to know about this from the very date of his marriage. Then I asked him if he knew the same how it call for second issue after putting her in Kanke and Prasanti. Lppamudra Mohanty, Chandrika Mohapatra were also present there. Myself, Madhaba Ch. Mohanty, Saila Behera, Bijaini Das, Snigdha Arati and D.I.G. crime. Mr. Swain had been to Ranchi and Roukela on 22.6.99. Anjana, Arati and DIG stayed at Saila Guest house, and myself and others stayed in PWD Guest house. On 24.6.97 we reached Kanke and met the Doctor. I talked with the doctor. Dr. at Kanke told that Anjana had no abnormality nor any mental ailments. On 24th night we returned to Rourkella. On 25th I met Dr. Dambaru Mishra. He told me that Anjana was psychiatrics patient having

manic depression psychosis. I came to know that shock was given to Anjana which are not permitted. So I argued and discussed with the Dr. on his this point. On 12.7.97 at about 8 or 8.30 I received a phone call from Saila Behera she wanted to talk with me immediately I guessed that she was worried. Saila told me that she was unable to understanding why Anjana was so silent for she came back from the residence of A.G. I took her to another room. By that time I was convinced that something happened to Anjana. In the next room I specifically asked whether A.G. physically abused her or raped her. I put these questions again and again. Anjana cried loudly and shake her head and finally told that A.G. attempted to rape her. Saila Behera, Arati Mishra were present in that room, my husband and Mr. Swain were present in the adjacent room. We informed this to Mr. Swain. Swain was bit shock. When I asked her in details, Anjana told me that she will give in writing and she could not describe in details. Then D.I.G. and Arati left my house around 3.30 A.M. in the night. Saila and Anjana left for Cuttack immediately. Swain told us if a complaint is filed he will register a case. At about 11 A.M. on the next date myself and my husband reached Basundhara there I came to know that Saila Behera had gone to residence of Swain. I talked her at about 11 A.M. On the next day, myself and my husband reached Basundhara. There came to know

that Saila Behera had gone to the residence of Swain. I talked with her came and also with Swain with phone. Then I went to his house with my husband. I found Swain talking over phone to Pitamber Acharya and asked him to come to his office. There Swain suggested to meet the Chief Minister and I told that if it is agreeable by Anjana then we will meet the C.M.. We returned to Basundhara at about 2.30 P.M. And Saila Behera stayed at the house of Swain. I talked with Anjana about the proposal to meet the C.M. and she told that if it is proper and easily get the justice, she will meet the C.M.. I asked her to write what happened at the A.G.'s residence to Anjana. After taking lunch I again returned to Basundhara at about 3.30 P.M. At that time Anjana told me that A.G. threatened her over telephone. On 13.7.97 at evening I returned back to BBSr. At night Saila Behera, Bhagyalaxmi and Anjana came to my residence. Anjana brought the petition to submit the C.M. I went through it. It was scribed in English by hand. At 12 mid-night I tried to make an appointment with the C.M. But I could not get the appointment. Saila, Bhagyalaxmi and Anjana stayed in my house at night. That on 16.7.97 Swain informed me over phone that he with Arati were coming to my house. They came to my residence. Swain told us that he met the C.M. and the C.M. wants a compromise and whatever had happened to Anjana is not true. Anjana and we did not agree with

the proposal. Swain talked to C.M. from my residence over telephone. Swain told over phone that the ladies are not interested for compromise and it is not possible. On 19.7.97 Anjana decided to lodge a report as no intimation received from C.M. Swain and Arati Mishra was also visited to my house. Then Anjana went to lodge a report Swain stated it was too late, but agreed to take action. Anjana scribed the report in my house. It was replica almost similar to the petition addressed to C.M. I have a computer in my house. My daughter fed to the Computer and copies were prepared. The above statements were not stated by her to the Cantonment P.S.

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I just asked Anjana Affectionately to express before us regarding what happened, which caused her such depression. Every body also present as stated above were also asking this. I just put my arms on her and asked whether Sri Indrajit Ray, A.G. had misbehaved with her. Then Anjana suddenly broke down violently. She cried so loudly that every body present there stunned and she was saying why this thing happened to me while every movement I am struggling for life. She did not disclose any thing and she went on crying and we also allowed to do so for little while. She went on bleming every body, husband, her parents, herself saying that being an educated lady she is facing all these problems. But

till that time she did not disclose what had happened on the previous day by which she was looking so depressed.”

That details omission which the accused intends to confront the other P.Ws. were not mentioned in the petition and it is only stated that the Court has not permitted them to put questions. The record does not reveal that at any time the Court prevented accused to put any questions to the witness, nor the defence filed any petition alleging that the court prevented them to put any questions. So, the allegation made for the first time appears to be baseless.

On perusal of the evidence of P.Ws. 6,7,8,11, 12 and 16 reveals that the accused put the contradictions and omission to the witnesses which he thought proper. On perusal of evidence of P.W.5 and the I.P., P.W.17 shows that the contradictions which now the accused wants to confront has already confronted to P.W.5. On perusal of the evidence of the evidence of P.W.16 reveals that her previous statement were confronted to her as evident from Paragraphs 30, 32-A, 35, 26, 43, 47, 48 and 50 of her evidence. Above paragraphs clearly indicates that previous statements were confronted to the witness and the same was also confronted to the police I.O., P.W.17. So the statement in the petition that the court prevented to confront the previous statement to Anjana Mishra and to other P.Ws. is devoid of any

merit.

This petition was filed U/s.311 Cr.P.C. to recall witness for further cross examination.

Section 311 Cr.P.C. read 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 the 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.”

On perusal of the above section shows that the word “recall” the witness for 'cross-examination' is not mentioned in this section. The omissions by the legislature to mention that witness can be recalled for further cross examination clearly indicates that the legislature has not intended to authorise the court to recall P.Ws. for further cross-examination by exercising power U/s.311 Cr.P.C.

The record reveals that P.W.16,, Anjana Mishra was cross-examined for 3 days and

P.W.5 was cross examined through out the day and other witnesses were also cross-examined in details. In other words the witness were subjected to searching cross-examination. In other words the accused has availed the opportunity of cross

examination. In the decision reported in 1996(2)

O.L.R page 74 (Bachhatram Vrs.- State) their Lordship held that :-

“Where witness is not cross-examined and the party having the right to cross examine has not afforded a chance to cross examine him, the evidence of such witness can not be used against him. In case of course where the party was offered the chance to cross examine he has either failed or waived his right to cross-examine the case may be different.”

In the decision reported in 1968 / CrL.L.J. Orissa, page 1669 (Lokanath Behera -vrs.- Golakha Behera) their Lordship held that :-

“This power given to the court is not meant to be exercised to enable one party or other to fill up the page.”

In the case and to improve it by a new matter at late stage and much less in this power meant to be exercised at the bidding of any of the parties.”

On perusal of above decisions makes it clear that parties has no right to invoke section 311 Cr.P.C. once the party availed the opportunity of cross examination. It is not proper to recall the witness again and again to fill up the gaps. In the decision reported in 1991 (2) CrL.L.J. S.C. Page 1521 (Mohalla -Vrs.- Union of India) their Lordships held that “ Jurisdiction of the Court must obviously be dictated by agency of the situation and fair play and good sense appears to be the

only safe guide.” In the case in hand though at the earlier stage petition has been filed to recall

P.W.4 only petition was filed to recall other witnesses i.e. P.Ws.5, 6,8,11, 12 and 16. Filing of petition at the late stage to recall these witnesses when the I.O. is on the stand only shows that the accused filed the petition to delay disposal of the proceeding.

Coming to the point whether the omissions intended to be confronted to the witness is relevant and amounts to contradiction. P.Ws. 5, 6, 7 are post occurrence witnesses having no personal knowledge about the incident. P.W.8 is the driver who deposed about taking Anjana alongwith Dali to the house of Accused and brought them back and P.W.11 Dali Das also deposed that she accompanied anjana to the house of accused and returned with her to Basundhara. As already stated, the petition does not reveals what omissions the accused intends to confront these witnesses and the previous statements of P.W.16. Anjana Mishra was already confronted to her.

The fact relevant to this case is whether criminal force was used to outrage the modesty and whether any attempt was made to rape. All these witnesses were not the witnesses to the relevant fact. Confrontation is defined in the decision reported in **A.I.R. 1959 S.C. 1012 (Tahasildar Singh -Vrs.- State of U.P.)** wherein their Lordship held that:-

“The statement in evidence before the court was so inconsistent or irreconcilable with each other that both of them can not coexist, it may said that one contradicts the other.”

and in the decision reported in **A.I.R. 1950 Mysore Page 138** (**Hunima Jappa -Vrs.- State**) there Lordship held that :-

“An omission is not a contradiction unless what is actually said contradicts what is omitted to be said. The test to find out whether an omission is a contradiction or not is to be seen whether one can point to any sentence or assertion which is irreconcilable with the deposition in the court.”

In this case neither it is stated in the petition about the statement which is not reconcilable with the evidence of the witnesses in court nor the defence advocate is also able to point out such omissions which can not reconcilable with the evidence of witnesses in Court. As already stated, the omissions which the accused wants to put P.W.5 were already confronted to her and P.W.17.

From the discussions made above I am of view that this petition was filed only to delay the disposal of the case. So the **petition is rejected.**

Sri Purnashiba Mukhopadhyaya is examined as P.W.18, cross-examination could not be completed till 4 P.M. So his cross-examination is deferred to 21.7.99. Exbts. 23, 23/1, 24 are marked for prosecution and Exbts. H to M are marked for the accused. Call on 21.7.99 for further cross examination of P.W.18. The witness is directed to appear tomorrow.

Accused as before.

Order No.49 dt.
24.8.99./

Accused is absent. A petition U/s. 317 Cr.P.C. is filed to represent him. Heard. It is allowed for to-day only.

The accused filed a petition with list of witnesses numbering 24 and prayed to summon these witnesses. Heard. Section 233 (3) Cr.P.C. reads as follows.

“233.(3) If the accused applies for issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the grounds that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

Perusal of above section makes it clear that witnesses are to be summoned when their evidence is relevant. But when such prayer was made only to cause delay or for defeating the ends of justice, such petition has to be rejected.

Witness vide Sl. 1, Arati Mishra, Sl.2 Surendra Kumar Jena, Sl.3 Madhumita Mohanty, Sl.4 Dr. Sukanti Mohanty, Sl.6 Jayakrushna Sahu, Sl.7 Kumar Mohanty, Sl.8 Dhadi Ojha, Sl.12 Bidyutlata Nayak, Sl.21 Lopamudra Mohanty, and Sl.22 Gagan

Behari Sahu were examined by investigating Agency of this case, but not examined in the Court. Witness vide Sl.10, Dandapani Mishra, was the Printer and Publisher of the daily newspaper “Dharitri” and on

18.7.97 a news item was published in the paper. Prosecution challenged the genuineness of such publication. The news item was published on 18.7.97 relates to this case. The evidence of witnesses vide Sl. 1 to 4, 6 to 8, 10, 12, 21 and 22 appears to have some relevance to this case.

The witness vide Sl.5, Sri Dhrubesh Mishra is the Doctor at Prasanti Hospital through him the defence wants to prove the mental state of the victim. In Crl.Misc.Case No.100 of 99 decided on 12.3.99 relating to this case the Hon'ble Court in Para-12 towards the end held that if a petition was filed to call the Doctor at the time of entering into defence, the petition has

to be considered. The victim also submitted that she was treated at Prasanti. The learned Sr.P.P.,

C.B.I. submits that the documents are with C.B.I. Since these documents will throw light on the mental condition of the victim soon after or prior to the incident, the same appears to have some bearing. So, the Sr.P.P., C.B.I. is directed to produce the above documents seized from Prasanti relating to the treatment of the victim. Sr. P.P., C.B.I. agreed to produce these documents if ordered by the Court. So, there is no need to summon Dr. Dhrubesh Mishra the Doctor at Prasanti.

Witness vide Sl.9 Indra Panda and Sl.14, I.I.C., Nayapalli P.S., through these witnesses the accused intends to prove the incident which took place after the incident of this case and about the case registered U/s. 309 I.P.C. against the victim. This fact occurred much after the incident of this case and in no way relevant to this case. In Crl. Revision No.100/99 decision on 12.3.99 relating to this case their Lordship in Para-11 held that these facts i.e. the fact relating to 309 case in which a report was lodged at Nayapalli P.S. Is not relevant. Sl.11 is Kokali Poddar. Through this witness, the accused intends to prove the interview given by the victim to the Magazine “ The Savvy” on February, 1999. The fact has no direct relevancy with the incident of this case. Moreover this interview took place in the year, 1999 long

after the incident of this case.

Sl.13 is the I.I.C., Bidanasi P.S. And through this witness, the accused intends to prove the case lodged by Anjana and the case against her. This case also was registered after incident of this case and had no connection with this case. In Crl. Misc. Case No.100/99 decided on 12.3.99 arising out of this case, their Lordship at Para-9 held that these facts were not relevant.

Sl.15, Damodar Naik, Sl.17 R.K.Chakravarty, Sl.18 Ajaya Joshi, Sl.19 Mala Jadav, through these witnesses the accused intend to prove the incident which took place on 11.3.99 at Nairi at the house of the sister of the victim. This fact has no relevance with this case and took place long after the incident of this case. So, the evidence of these witnesses are not at all relevant to this case.

Sl.16, the Superintendent of Mental Health Institute, S.C.B. Medical College, Sl.20 is Sunil Mittal. Through these witnesses the accused intend to prove the mental condition the victim in the year 1995 and in the year, 1999. The mental condition of the victim is not the subject matter of enquiry or trial of this case. So what was the mental state of the victim in the

year 1995 and in the year, 1999 is not at all relevant to this case. Moreover, as already stated, the reports of the Doctor at Prasanti was seized and the prayer to call for the same was allowed as the victim was examined at Prasanti and at Kante soon prior to the incident. Since the prayer to summon documents at Prasanti was allowed, there is no necessity to summon Sl. 16 to 20.

Sl.23 is the Superintendent of Police, Khurda. Through this witness the accused wants to prove the allegation made by the Security Guard against the victim. It is not disputed that the Security Guards were provided after the incident of this case. So, the allegation if any made by the Security guard much after the incident and the same has nothing to do with this case. Moreover, in Crl. Revision No.100/99 decided on 12.3.99 arising out of this case this Lordship of Para-13 held that such document has no relevancy, there is no need to call for the same.

Sl.24. Is the Deputy Registrar, Hon'ble High Court of Orissa. Through this accused intends to prove different affidavits filed by different persons which will show connection of various political parties, and leaders with the victim at the time of investigation. These affidavits have nothing to do with the incident of this case. This fact was raised before the Hon'ble Court in Crl. Misc. Case No.100/99 decided on 12.3.99 arising out of this case and their Lordship in Para-12 held that there is no need

to call for those documents which shows that these documents had no relevance to this case.

Vide Sl.10 two witnesses, Dandapani Mishra and Tathagata Satapathy were cited as witnesses. Since Dandapani Mishra appears to be competent to prove the Printing and Publication of the newspaper, there is no necessity to summon Tathagata Satpathy.

From the discussion made baove, I hold that the evidence of Aruti Mishra, Surendra Kumar Jena, Madhumita Mohanty, Sukanti Mohanty, Jayakrushna Sahu, Kumar Mohanty, Dhadi Ojha, Dandapani Mishra, Bidyutilate Nayak, Lopamudra Mohanty, Gagan Beheri Sahu appears to have some relevance to this case. Hence they be summoned but the prayer to issue summons to other witnesses is rejected, as the facts when accused wants to prove through these witnesses he is to deposit the cost. Sr. p.P., C.B.I. is directed to produce the documents seized from Prasanti relating to the treatment of the victim by 6.9.99.

Issue summons to the above witnesses fixing 6.9.99 and 7.9.99 for defence in two batches. Accused is directed to take steps and to furnish detail address during the course of the

day. One set should be sent by post through Regd. Post with A/D. and another set be sent through C.B.I.

Accused is as before.

Dictated.
S/d-
C.J.M.-
A.S.J.,Khurda,
Camp-BBSR.

Later./-

Advocate for the defence files process fee of Rs.9/- and requisites through court and by post. Issue summons to the witnesses through C.B.I. and by R.P. with A/D. fixing the date fixed in tow batches.

Dictated.
S/d-
C.J.M.-
A.S.J.,Khurda,
Camp-BBSR.