ODISHA POLICE
CRIME BRANCH
CRIMINAL INVESTIGATION DEPARTMENT

No. 32881 / Odisha CID- Law Date 24.8.2018

To

All District SsP including SsRP Rourkela/Cuttack/DCsP Cuttack/Bhubaneswar/SsP EOW/STF,Bhubaneswar

Sub: Digest on Court Judgements.

Enclosed, please find herewith a copy of "Digest of Recent Court Judgements". This digest contains some important judgements passed by Hon'ble Courts during the period January to April, 2018.

It is therefore, requested to circulate the digest among all the field functionaries under your control with a direction to use the judgements in professional work, wherever required.

(S.K.Upadhyay)
Additional Director General of Police,
CID-Crime,Odisha.

Memo No. 32882 /CID-Law dated. 24 .8. 2018.

Copy forwarded to Commissioner of Police, Bhubaneswar-Cuttack/All Range IsGP/DIsGP/ DIGP, EOW-STF, Bhubaneswar/ SP EOW/SP, STF, Bhubaneswar for information please.

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(2018) 69 OCR – 249

CRLA No.490 of 2008, Decided on 12th September, 2017

S.PANDA AND S.PUJAHARI, JJ.

From the judgment and order dated 07.11.2008/12.11.2008 passed by Shri S.K. Mishra, Adhoc Sessions Judge, F.T.C., Khurda in S.T. Case No.61/126 of 2007.

Hosen Khan & Others …….. Appellants
Vrs.
State of Orissa ……Respondent

B. Evidence Act, 1872 – Section 32 – Dying declaration – Conviction can be recorded solely thereon if same is wholly reliable – It has to be subjected to close scrutiny and Court is to be satisfied that it is true and free from any effort to prompt deceased to make the statement – Where suspicion exists as regards it's correctness or otherwise, corroborative evidence is to be looked for.

S.PUJAHARI,j. – The judgment of conviction and order of sentence passed by the learned Adhoc Addl. Sessions Judge, F.T.C., Khurda in S.T. Case No.61/126 of 2007 convicting the appellants under Sections 302/34 of the Indian Penal Code hereinafter referred to as ("the IPC") for murder of one Rakina Biwi (hereinafter referred to as ("the deceased") and sentencing each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and, in default, to undergo rigorous imprisonment for five months each on that count, are under challenge in this CRLA.

2. The prosecution case before the Trial Court was that the deceased was given in marriage to one widower, namely Rossan Khan (PW.9), a resident of village Bhimpada, Tangi Sahi under Bolgarh P.S. in the district of Khurda. The first wife of Rossan Khan (PW.9) was the sister of appellant No.3. Rossan Khan (PW.9), however, settled in an interior village under Daspalla P.S. in the district of Nayagarh, as village quack to eke out his living, leaving his

wife in his native village in the house constructed by him, wherein his elder brother appellant No.1, his wife appellant No.3 and their daughter appellant No.2, also reside. It is the case of the prosecution that taking the long absence of P.W.9 from the home, the appellants had meted the deceased with cruelty to make her living impossible in the said house, so that they can enjoy and grab the house property. For that purpose, the appellants also made an attempt to kill her by immolating her. But, when the people gathered there, the appellant No.1 gave out that the deceased accidentally caught fire and took her to District Headquarters Hospital, Nayagarh for treatment. On the next day, when some of her co-villages i.e. PWs 1, 2, 4, 5 and 13 visited the hospital to see her condition, the deceased disclosed before them that she was immolated by the appellants. Thereafter, one of them i.e. PW.2 reported the matter to the police at Bolgarh P.S.. But in the meanwhile the deceased had succumbed to the injuries in the hospital. Basing on such report, investigation was carried on and on conclusion of the investigation, the police found substance in the FIR allegation and placed charge-sheet against the appellants under Sections 498A/302/34 of the IPC. The case of the appellants was committed to the Court of Sessions by the learned S.D.J.M., Khurda, after taking cognizance of the aforesaid offences.

3. As it appears, the case being placed before the Court of the learned Adhoc Addl. Sessions Judge (F.T.C.), Khurda for trial, charge was framed against the appellants for the said offences. The appellants having pleased not guilty to the charge, prosecution examined as many as 16 witnesses and exhibited 14 documents, so also 4 material objects. The appellants having taken the plea of denial and false implication, examined a doctor of District Headquarters Hospital, Nayagarh who had treated the deceased, as DW.1 to dispel the prosecution evidence of oral dying declaration said to have been made by the deceased before the witnesses that the appellants immolated her, to be worthy of credence. On conclusion of the trial, as it appears, the death of the deceased sustaining burn injury, having not been disputed and also there being ample evidence in this regard, the Trial Court returned the impugned judgment of conviction and order of sentence against the appellants basically placing reliance on the oral dying declaration made before

the co-villagers such as PWs 1, 2, 4 5 and 13, while acquitting them of the charge under Sections 498A/34 of the IPC

4. During the Pendency of the CRLA, the appellant No.3, who is the wife of the appellant No.1 stated to have died and as such the case against her is abated, though no specific order in this regard was passed earlier.

5. In the absence of Mr. D.Panda, learned Advocate appearing for the appellants, Mr. D.Samal, learned member of the Bar being appointed as Amicus Curiae has argued extensively the matter, disputing the sustainability of the conviction. Thereafter, Mr. D.Panda, learned Advocate appearing for the appellants and both of then submit that the impugned judgment for conviction is based on erroneous appreciation of the evidence on record and as such the same cannot be sustained. Reiterating their contention, it is submitted that no doubt, a conviction can be recorded solely on the basis of dying declaration, but the same must be worthy of credence. It is their further submission that the material available on record being indicated the fact that the deceased when admitted in the hospital, was not in a position to disclose anything about the occurrence, as she had sustained 100 percent burn injuries and her condition was serious as revealed from the medical evidence i.e. bed-head ticket Ext.6 and other relevant material on record in this case, it is quite unsafe to place reliance on the dying declaration stated to have been made before some person who are in inimical term with the appellants. The Trial Court, therefore, solely relying on the same could not have convicted the appellants. Hence, they submit, the impugned judgment of conviction and order of sentence are indefensible and liable to be set aside.

6. Per contra, defending the judgment of conviction and order of sentence, learned counsel for the State submits that the Trial Court making detailed scrutiny of the evidence on record, having accepted the dying declaration to be worthy of credence and there being no hard and fast rule that unless the doctor certified a person at the relevant time was capable of making dying declaration, such dying declaration cannot be relied upon, the contention advanced in this regard criticizing the impugned judgment of conviction of the Trial Court is without any substance. He further contends that since in this

case, it is revealed from the version of PWs. 1, 2, 4, 5 and 13 that the deceased had made a dying declaration indicating the fact that she was set ablazed by the appellants and those witnesses have no visible animosity to falsely implicate the appellants, the judgment of conviction and order of sentence impugned, need no interference in this appeal.

7. It is not in dispute that in this case the deceased was admitted in the hospital sustaining burn injuries. The aforesaid fact is emerged from the evidence of the witnesses more particularly PW.9, the husband of the deceased who was residing elsewhere, so also the doctor PW.10. It transpires from the evidence of PW.15, the A.S.I. of police that on the death of the deceased while undergoing treatment, the matter was reported at Nayagarh P.S. by Dr. L.N. Bisoi pursuant to which U.D. case was registered vide U.D. case No.2 of 2007 and he took up the enquiry and during that he sent the dead body of the deceased for post mortem examination vide dead body challan Ext.14. Post mortem examination was done by PW.14 Dr. Narmada Sahu, the Medical Officer, District Headquarters Hospital, Nayagarh as well as by Dr. Suresh Ch. Mishra and they found the burn injuries on the person of the deceased and the deceased died of burn injuries sustained, as revealed from the testimony of PW.14 in this regard stands corroborated by the post mortem report Ext. 12, a contemporaneous document prepared by them evidencing the same. Nothing is there indicating the fact that the doctors had not bestowed required care and caution in conducting the post-mortem examination. However, no eye witness version is available indicating the fact how the deceased sustained burn injuries which contributed to death of the deceased. But, the Trial Court as stated earlier placing reliance on the oral dying declaration said to have been made by the deceased before PWs. 1, 2, 4, 5 and 13 implicating the appellants to have immolated the deceased, held the appellants guilty of murder. Therefore, the evidence in this regard is only the oral dying declaration which has been criticized by the learned counsel for the appellants as well as the learned Amicus Curiae, to be worthy of credence, but the State counsel has justified the conviction recorded on such oral dying declaration, in their respective contention as stated earlier.

8. Before appreciating the contention raised with regard to sustainability of the conviction based on an oral dying declaration said to have been made by the deceased while undergoing treatment in the hospital, it would be apposite to mention here that there is no impediment in law to record a conviction solely basing on the dying declaration including an oral dying declaration, notwithstanding absence of certification by the doctor about the fitness of the deceased to make such dying declaration, if the evidence adduced in this regard is found to be acceptable and reliable. No hard and fast rule is there indicating the fact that unless such dying declaration is corroborated by any other evidence on record, the same cannot be made a foundation to record a conviction.

9. The Apex Court in the case of Kushal Rao v. State of Bombay, reported in AIR 1958 SC 22, have held as follows:

"it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made ; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view the. circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying

declaration apart from the official record of it-; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties". (Quoted from placitum)

"In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the -necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the re- ported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities" (Quoted from placitum)

In the case of Kusa and others v. State of Orissa, reported in (1980) 2 SCC 207, the Apex Court have held as follows:

"Although a dying declaration should be carefully scrutinized but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment to founding a conviction on such a dying declaration even if there is no corroboration." (Quoted from placitum)

In the case of Lxman v. State of Maharashtra, reported in (2002) 6 SCC 710, a Constitution Bench of the Apex Court dealing with the evidence of dying declaration, have held as follows:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is

induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The Court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

In case of Ranjit Singh and others v. State of Punjab, reported in (2008) 13 SCC 130, the Apex Court have held as follows:

> "13…….Conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the Courts in arriving at the judgment of conviction shall look for some corroborating evidence……"

10. Keeping in mind the aforesaid exposition of law, the evidence on record relating to dying declaration in this case has to be scrutinized to examine the sustainability of the conviction recorded. As it appears from the evidence on record that the prosecution had come out with a case that in order to grab the house property which said to have been constructed by the husband of the deceased (PW.9), the appellants stated to have meted the deceased with cruelty and ultimately immolated her. But a relation of the deceased examined as PW.8 did not support or speak the same. The husband of the deceased (PW.9) also made no whisper on the same. However, present of motive though lends assurance to the prosecution case, but its absence is not always fatal, if the case is established against the accused by reliable evidence on record.

11. It transpires from the evidence of PW.2 who is the informant in this case and lodged FIR Ext.1 that on 05.03.2007 in between 6 p.m. to 7 p.m., hearing unusual screaming/bawl from the house of the

appellants where several other villagers had assembled, he made query to appellant N.1-Hosen Khan, who disclosed before them that while the deceased was sleeping inside her house, her mosquito net accidentally caught fire and consequently sustained burn injuries. His evidence further reveals that almost simultaneously Fire Brigade staff arrived, the appellant No.1-Hosen Khan opened the door and Fire Brigade staff entered inside the house and they found the deceased with 100 percent burn injuries all over her body. Bolagarh police also arrived there and on the direction of the police, the deceased was immediately taken to the hospital by the appellant Nos.1 and 3. it again transpires from his evidence that on the next day he along with Kamrun Khan (PW.5), Ahimad Khan (PW.12), Israil Mahammad (PW.13) and Batas Khan (PW.47) went to the hospital and when he asked the deceased, in the absence of the accused Hosen Khan, in slow voice, she told that all the three accused persons poured kerosene over her body and set fire as a result of which her body was burnt. The evidence of PW.2 also revealed that in his presence police seized one TIN DIBIRI (Lamp), one bottle containing some Kerosene, one half burnt mosquito net from the house under seizure list (Ext.2) and identified such Material Objects marked as M.Os. 1 to IV. He has also proved his signature therein. In cross-examination, he stated that when he asked to the deceased how she sustained the burn injuries, the deceased with much difficulty disclosed that all the appellants poured kerosene over her body and set her ablaze. PW.4, 5 and 13 have similarly deposed that being asked by PW.2, the

deceased inculpated the appellants to have set her ablaze. But, PW.12 did not support the prosecution case and made no whisper on the dying declaration. As it appears from the evidence PW.2, when he asked the deceased further as to why she did not shout or try to run away, the deceased disclosed that the accused persons gagged her mouth and that when she tried to come away, they caught hold of her hands. The evidence of other witnesses such as PWs.4, 5 and 13 is silent in this regard. It transpires from the evidence of PW.13 that the deceased could not disclose anything at the first instance. But, when they disclosed their names, the deceased stated about the same. Furthermore, it transpires from the evidence of this witness that all these witnesses had discussed with the deceased for about half an hour in the hospital in the absence of any nurse or doctor there. According to PW.2, in between 10 a.m. to 11 a.m., they reached at the hospital and the dying declaration was made. PW.4 disclosed that they reached at the hospital at 7 a.m. PW.5 did not say when they reached the hospital and dying declaration was made. PW.13 deposed that they went to the hospital at 8 a.m. It also appears from the evidence of these witness except PW.4 that the deceased sustained 100 percent burn injuries on her body and her condition was precarious. PW.2, a stranger to the family of the deceased and the appellants, had lodged the FIR, Ext.1 on 06.03.2007 at 5.30 p.m. at Bolgarh P.S. after due deliberation with others in the village Masjid, as revealed from his evidence and by then the deceased had already died, as revealed from Ext.6.

12. Besides the aforesaid witnesses, PW.1 also speaks about the dying declaration. But the PW1 is not named in the FIR by the PW.2 or any of the aforesaid witnesses to be present at the relevant point of time. This witness deposed that about nine months preceding that date at 5 p.m. he found the deceased standing in front of the house of appellant No.1-Hosen Khan while the door of that house was found locked from inside and deceased was not allowed entrance. On his query, the witness stated that the deceased divulged before him that she was not allowed to enter into the house. His evidence further discloses that around 6.30 p.m. when enroute market he found a large gathering in front of that house where a person told him that the appellants set ablaze the deceased inside that house. Of course, he has not named those persons nor that person was examined as prosecution witness. However, the witness added that in his presence, the Fire Brigade staff arrived, broke open the door and rescued the deceased with burn all over her body. Immediately thereafter she was taken to the hospital. Incidentally, this witness was never named in the F.I.R. nor was examined by he Investigating Officer (PW.11) at the outset. This witness has also added that on the next day of occurrence he had been to the District Headquarters Hospital, Nayagarh where the deceased disclosed before him that the appellants poured kerosene over her body and lit fire, as a result of which she sustained such extensive burn injuries. The same was disclosed between 2 p.m. to 3 p.m. The same was just before the

death of the deceased which was at about 4.10 p.m. as revealed from Ext.6.

13. Evidence of the I.O. i.e. PW.11 falsifies the evidence of this witness and other witnesses i.e. PWs.2 & 5 with regard to the arrival of the police in the spot that only on the direction of the police, the victim was taken to the hospital, rather, the deceased was taken to the hospital for treatment by the appellant. Nos.1 and 3 on their own soon after the occurrence. It is only after receipt of the report Ext. 1, police came to know about the occurrence, registered the case and investigated the matter. The evidence of these witnesses that it is only when fire brigade staff came, the appellant No.1 opened the door/breaking upon the door the fire was extinguished also appears to be false as PW.3 who immediately arrived there and entered into the house would go to show that by the time the fire was extinguished and on his query, the deceased did not disclose anything before them about the cause of fire. The witnesses i.e. PWs.1, 2, 4, 5 and 13 though remained present at the spot soon after the occurrence, but did not ask anything to the deceased how she sustained the burn injuries there. PW.10 who happens to the treating physician deposed that the deceased when admitted was in confused state and she was not able to say anything about the burn injuries and she sustained 100 percent burn injuries. Bed-head ticket Ext.6, inquest report Ext.13, post mortem examination report Ext.12 reveal that the deceased sustained 100 percent burn injuries there. From the evidence of doctor DW.1, it also reveals that the deceased was in

gasping condition, her pulse was not palpable, B.P. was not recordable, her heart sound was irregular and 40 per minute. At the cost of repetition, the post mortem examination report reveals that the deceased was sustained severe burn injuries. This being the condition of the deceased, when she admitted in the hospital, the medical officer did not record any dying declaration. From the aforesaid, it appears that the deceased was not in a position to speak anything soon after the burn and till she was admitted in the hospital.

14. But, from the aforesaid, it appears that the deceased appears to have made a dying declaration before PW.1 at one point of time and another before PWs.2, 4, 5 and 13. All the witnesses belong to Sunni community and the appellants belong to Ahamadia community and they were not in good term as revealed from the evidence of PWs. 1,2,4,5 and 13. As revealed from the evidence of PW.1, the FIR was lodged after due deliberation in the village Masjid on the next day, it also appears that PWs.2,4,5 and 13 are not consistent in their version as to when they reached at the hospital and when the dying declaration was made. Accordingly to PW.2, in between 10 a.m. to 11 a.m., they reached at the hospital and the dying declaration was made. But PW.4 disclosed that they reached at hospital at 7 a.m., PW.5 did not say when they reached the hospital and dying declaration was made. PW.13 deposed that they went to the hospital at 8 a.m. Furthermore, this witness did not whisper about the deceased telling the PW.2 that the accused persons gagged her mouth and when she tried to come away, they caught hold of her

hands. If in their presence the deceased made the declaration implicating all the appellants, how could some of them forget to speak about this important declaration of the deceased on the query of PW.2. PW.1 again stated that at about 2 p.m. or 3 p.m. another dying declaration was made i.e. just 1 to 2 hour before her death. Furthermore, these witness admitted that they did not disclose anything before any doctor or medical staff and neither the doctor nor any staff was there near the deceased when the dying declaration was made. The aforesaid as stated earlier indicates that though all of them were present when the dying declaration was made, but no one had reported the matter to police at Nayagarh or on their immediate return, but the report was made after due deliberation in the village Masjid. No corroborative evidence is also there indicating that these persons had ever visited the hospital and had conversation with the deceased. It is also quite unacceptable that these persons who are not in good term with the appellants belong to Ahamadia community could have visited the hospital for the purpose and if at all they had visited and any dying declaration was made in their presence, could not have disclosed the same to the doctor or any other staff there. All those factors, especially the discrepancy and inconsistency in the version of the witnesses, coupled with the medical evidence as well as the evidence of the fire brigade officer, militate against the version of these witnesses that the deceased made a dying declaration before them implicating the appellants. Their version as such as not wholly dependable one. This being the nature of the evidence of the

dying declaration, the Trial Court should have taken the same with a pinch of salt and should not have recorded a conviction basing on the same when there was absolutely no corroboration to the same from any other source, more particularly the medical evidence which militate against the same.

15. In such premises, in our considered opinion, the aforesaid dying declaration stated to have been made by the deceased twice at two different occasions before two groups at different time, does not pass the test of credibility and, as such, it would not be legal to come to a conclusion as to the guilt of the appellants.

16. Accordingly, the criminal appeal is allowed. The impugned judgment of conviction dated 07.11.2008 and order of sentence dated 12.11.2008 passed by the learned Adhoc Additional Sessions Judge (F.T.C.), Khurda in Sessions Trial No.61.126 of 2007 convicting the appellants for commission of offence under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for five months, are sent aside. The appellants are acquitted of the said charge. Thus, the appellant No.2, namely Sahana Begum who is on bail pursuant to the order of this Court dated 16.11.2009 stands discharged of her bail bond. Since the appellant No.1 namely, Hosen Khan is in jail custody, he be set at liberty forthwith, if he is not otherwise required to be incarcerated in any other case.

17. L.C.R. received be sent back forthwith along with a copy of this judgment.

(2018) 69 OCR (SC) - 414

Criminal Appeal No.2178 of 2017, Decided on 14th December, 2017

R.K.AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.

Madan Mohan …….Appellant
Vrs.
State of Rajasthan & Ors. …… Respondents

Code of Criminal Procedure, 1973 – Section 193 – Sections 120B, 363, 366, 368, 370(4) & 376 IPC – Protection of Children from Sexual Offences Act, 2012 – Sections 3/4 & 16/17 – Summoning the accused through non-bailable warrants – Justifiability – High Court had no jurisdiction to direct the Sessions Judge to 'allow' the application for grant of bail to be filed by those accused.

Facts ; Pursuant to FIR lodged by complainant-appellant, a charge-sheet has since been filed against two accused ‘V’ and ‘J’ and their trial for offences under Sections 120B, 363, 366, 368, 370(4) & 376 IPC read with 3/4 & 16/17 of POCSO Act, is pending in the Court of Sessions – Appellant filed an application under Section 193 Cr.P.C. complaining that names of respondents 2 and 3 though figured prominently in all the material documents filed along with the charge-sheet, yet their names were deleted from the charge-sheet whereas only the names of two accused ‘V’ and ‘J’ were retained to face the trial – Prayer made by appellant that respondents 2 and 3 be summoned for being arrayed as accused persons along with ‘V’ and ‘J’ to face the trial – Sessions Judge allowed the application finding prima-facie case against respondents 2 and 3 and accordingly summoned both by issuing non-bailable warrant of arrest against them – Revision petition – Complainant-appellant was not impleaded as party in the revision – Single Judge of the High Court allowed the revision in part and set aside that portion of the order of the Sessions Judge which had directed issuance of non-bailable warrant of arrest of respondents 2 and 3 while summoning them – High Court then proceeded to issue further direction to respondents 2 and 3 to surrender before the Trial Court and move the application for their regular bail, which would be considered and allowed by that Court on the same day on which it is moved – Whether appellant-complainant should have been impleaded as respondent along with the State in the revision petition – Held, Yes – Whether the High Court erred in giving direction to Sessions Judge to consider bail application of respondents 2 and 3 and ‘allow’ it on the ‘same day’ – Held, Yes.

(2018) 69 OCR – 447
CRLMC No.2270 of 2004, Decided on 11th September, 2017

S.K. SAHOO, J.

An application under Section 482 of the Code of Criminal Procedure, 1973 in connection with I.C.C. Case No.26 of 2004 pending on the file of JMFC, Khallikote.

Govinda Acharya ……. Petitioner
Vrs.
State of Orissa & Another …. Opposite parties.

A. Code of Criminal Procedure, 1973 – Section 202 – Complainant need not examine himself if he has already been examined under Section 200 Cr.P.C. in a complaint case.

B. Code of Criminal Procedure, 1973 – Section 202 – In a complaint case exclusively triable by Court of Session –

Complainant is not bound to examine all his witnesses named in the complaint petition – He is at liberty to examine any of them and decline the rest by filing a memo – Case laws discussed.

In a complaint case, the complainant is not bound to examine himself during inquiry under Section 202 of Cr.P.C. after recording of his initial statement under Section 200 of Cr.P.C. However, if the substance of his examination is recorded under Section 200 of Cr.P.C. as required in the said Section and the complainant feels necessity to give a detail account of the incident to prove his case, he may choose to examine himself in the inquiry under Section 202 of Cr.P.C. and narrate the incident in detail. Similarly in a complaint case where the offence complained of is triable exclusively by the Court of Session, the complainant is also not bound to examine all the witnesses named in the complaint petition and he is at liberty to examine any of them and decline the rest by filing a memo. The Magistrate cannot compel the complaint petition. The provision is mandatory in the sense that only the witnesses whose statements are recorded either under Section 200 of Cr.P.C. or Section 202 of Cr.P.C. will be permitted to be examined before the Court of Session during trial otherwise it will surprise the accused and he will be seriously prejudiced during trial in absence of the previous statements of such witnesses. The statements so recorded will be utilized as previous statements during trial like 161 statements in police cases and the same can be confronted to prove contradictions or omissions in view of the provision under Section 145

of the Evidence Act. However, even though the witnesses are not examined during inquiry under Section 202 of Cr.P.C. by the complainant, the Trial Court has got ample power to examine them invoking its power under Section 311 of Cr.P.C. as Court witnesses in the interest of justice even on the petition filed by the complainant, if the evidence of such witnesses appear to the Court to be essential to the just decision of the case.

(2018) 69 OCR (SC) – 520

Criminal Appeal No.1099 of 2017, Decided on 15th December, 2017

DIPAK MISRA, CJI AND A.M. KHANWILKAR, J.

Teesta Atul Setalvad ……. Appellant
Vrs.
The State of Gujarat … Respondents.

Code of Criminal procedure, 1973 – Section 102 – Freezing of bank accounts – Scope and applicability of Section 102, Cr.P.C. – A police officer in course of investigation can seize or prohibit the operation of bank accounts if such assets have direct links with the commission of the offence for which the police officer is investigating

into – No requirement of giving of prior notice to the account holder before the seizure of his bank account.

Facts ; Bank accounts of appellants had been seized on instructions of the investigating officer as a sequel to the complaint filed by members of a Co-operative Housing Society – Allegations against appellants of misuse of funds received by them through various donors – Bank accounts were seized and intimation in that behalf was given to the concerned Magistrate – Writ petition filed for quashing of the FIR and for setting aside the freezing order which was rejected – High Court rejected contention of appellants about absence of prior notice to the appellants before freezing of bank accounts – FIR has been registered at least against three private appellants, naming them as accused – Investigation revealed that appellants were actively associated with the Trust and have carried out transactions which may be found under circumstances suspicious of the commission of the alleged offence – That is still a matter of investigation – Investigating Officer is of the view that there are certain circumstances emerging from the transactions done from those bank accounts which create suspicion of the commission of an offence – The Investigating Officer was justified in exercising his discretion to issue directions to seize the bank accounts pertaining to the Trust – There is not any requirement of giving prior notice to the account holder before the seizure of his bank account.

(2018) 69 OCR – 615

CRLMC No.1934 of 2006, Decided on 2nd January, 2018

S.K.SAHOO, J.

An application under Section 482 of the Code of Criminal Procedure, 1973 in connection with G.R. Case No.361 of 2000 pending on the file of S.D.J.M., Bhubaneswar

Debasish Mohanty and Others ……..Petitioners
Vrs.
State of Orissa and another …… Opposite parties.

Code of Criminal Procedure, 1973 – Section 482 – Quashing of criminal case under Section 498-A, IPC – Fact of mutual divorce and amicable settlement although communicated, I.O. submitted charge-sheet – Held, continuance of criminal proceeding would be an abuse of process and no fruitful result would come out – Proceeding quashed.

ORDER

The petitioner no.1 Debasish Mohanty is the husband, petitioner no.2 is the father-in-law, petitioner no.3 is the mother-in-law and petitioner no.4 is the sister-in-law of Sarmistha Pattnaik respectively.

The opposite party no.2 Surendra Narayan Pattnaik, who is the father of Sarmistha Pattnaik lodged the first information report before Inspector in charge of Mancheswar police station on 03.02.2000 which was sent to Capital police station on the ground of jurisdiction, on the basis of which Capital P.S. Case No.54 of 2000 was registered under sections 498-A/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act. The said case corresponds to G.R. Case No.361of 2000 pending in the Court of learned S.D.J.M., Bhubaneswar.

In the first information report, the informant alleged relating to the demand of dowry and physical and mental torture against his daughter by the petitioners. It appears that while the investigation was under progress, the matter was amicably settled between the parties at the intervention of well wishers and the factum of compromise of the dispute was also intimated to the investigating officer. It further appears that petitioner no.1 and Sarmistha Pattnaik filed a joint petition under section 13-B of the Hindu Marriage Act for mutual divorce before the Civil Judge (Sr. Division), Bhubaneswar bearing O.S. No.469 of 2000 and vide order dated 23.02.2001, the suit was decreed and the marriage between the parties was dissolved. In spite of such order of mutual divorce and in spite of communication of amicable settlement of dispute between the parties, the investigating officer submitted charge sheet under sections 498-A/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act against the petitioners and the learned S.D.J.M., Bhubaneswar vide order dated 28.05.2002 took cognizance

of such offences and issued process which is impugned in this application.

Mr. Udit Ranjan Jena, learned counsel for the petitioners relying upon the decision of the Hon'ble Supreme Court in the case of B.S. Joshi -Vrs.- State of Haryana reported in (2003) 25 Orissa Criminal Reports (SC) 99 contended that since the case arises out of matrimonial dispute and the matter has been resolved between the parties and mutual divorce decree has been passed, the continuance of criminal proceeding would be an abuse of process and therefore, in the interest of justice, this Court should invoke its inherent power under section 482 of Cr.P.C to quash the criminal proceeding.

Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate for the State has no serious objection to such prayer.

In case of B.S. Joshi (supra), it has been held as follows:-

"14. There is no doubt that the object of introducing Chapter XX-A containing section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and section 320 of the Code does not limit or affect the powers under section 482 of the Code."

In view of the ratio decided by the Hon'ble Supreme Court, since the case arises out of a matrimonial dispute and the parties have settled their dispute and mutual divorce decree has been passed between the petitioner no.1 and the daughter of the informant namely Sarmistha Pattnaik, I am of the view that the continuance of the criminal proceeding against the petitioners would be an abuse of process and no fruitful result would come out of the same.

Therefore, I am inclined to invoke my inherent power under section 482 of Cr.P.C. and quash the impugned order dated 28.05.2002 passed by the learned S.D.J.M., Bhubaneswar as well as the entire criminal proceeding in G.R. Case No.361 of 2000.

Accordingly, the CRLMC application is allowed.

(2018) 69 OCR – 672

CRLMC No.551 of 2011, Decided on 16th November, 2017

S.K.SAHOO, J.

An appeal under Section 374(2) of the Code of Criminal Procedure from the judgment dated 29.06.2011 passed by the Addl. Sessions Judge-cum-Special Judge, Jeypore in Criminal Trial No.36 of 2010

Sanjaya Kumar Tiwari and another …..Appellants
Vrs.
State of Orissa …..Respondent

C. Narcotic Drugs and Psychotropic Substances Act, 1988 – Sec. 42 – Absence of corresponding oral or documentary evidence to show that copy of station dairy entry which was sent to superior police officer was received by them. Held, in view of the requirement of law that copy of information reduced to writing has to be sent to immediate superior official before taking any action in terms of Sec. 42 (1) (a) to NDPS Act and total non-compliance is impermissible. It is found that there has been non-compliance of provisions of Sec. 42 NDPS Act.

> **"When it is the requirement of law that the copy of the information reduced into writing has to be sent to the immediate superior official before proceeding to take any action in terms of clauses (a) to (d) of Section 42 (1) of the N.D.P.S. Act and the total non-compliance is impermissible and when P.W.12 received such information while at the police station and reduced the same into writing in the station diary book, in absence of any clinching documentary and oral evidence that such writing has been sent to the immediate superior officer, I am of the view that the contention which has been raised by the learned counsel for the appellants that there is non-compliance of Section 42(1) and 42(2) of the N.D.P.S. Act has got sufficient force".**

D. Narcotic Drugs and Psychotropic Substances Act, 1988 – Sec.57 – Requirement for making of a full report by arresting/seizing officer of all particulars of arrest or seizure to his immediate official supervisor – The detailed report Ext. 28 indicated forwarding accused to Court, deposit of ganja and samples in malkhana and order obtained for despatching of samples for chemical examination when accused were forwarded to Court on 21.09.2008 – Order for chemical examination found obtained on 22.09.2008 – Mentioning such facts in Ext.28 which is dated 19.09.2008 clearly indicates that Ext.28 which is dated 19.09.2008 was not prepared on 19.09.2008 but it was prepared subsequently, at least after 22.09.2008 and has been ante-dated – It is found that the I.O. by creating Ext.28 has conducted a serious lapse in fair information.

> **"9. Coming to the non-compliance of Section 57 of the N.D.P.S. Act, in the case of Balbir Singh (supra), it has been held that the provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest of seizure under Sections 41 to 44 are by themselves**

not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of the evidence regarding arrest or seizure as well as on the merits of the case".

(2018) 69 OCR – 706

JCRLA No.47/CRLA Nos. 80 & 228 of 2004, Decided on 27th January, 2018

S.K.SAHOO, J. & K.R. MOHAPATRA, JJ.

An appeal under Section 374 of the Code of Criminal Procedure from the judgment and order dated 08.03.2004 passed by the Addl. Sessions Judge, Kendrapara in S.T. Case No.22/373 of 2002 2010

Nityananda Sutar ……....Appellant
Vrs.
State of Orissa ……..Respondent

C. Evidence Act, 1872 – Section 24 – Extra Judicial Confession – There is absolutely no material about any close acquaintance or intimacy of the appellant with any of these PWs. before whom extra judicial confession is stated to have been made – There was no reason, why the appellant would make a confession.

There is absolutely no material about any close acquaintance or intimacy of the appellant Nityananda Sutar with any of the persons before whom the

extra-judicial confession was stated to have been made in a public place except the fact that they were all co-villagers. The other two who were allegedly present at that point of time have not been examined in the case. When nobody had only idea as to how the crime was committed and even after one and half months of the occurrence, the investigating agency was clueless about the crime, it creates doubt that all on a sudden the appellant Nityananda Sutar would come up with an extra-judicial confession before the co-villagers. There is no evidence that those villagers were having any status in the society to held him in any manner rather there was possibility of putting him in deep trouble. There is absence of any cogent reasons on the part of the appellant Nityananda Sutar for making a confession of this nature. The repentance theory as put forth by the prosecution for prompting the appellant to make the confession is too difficult to be digested. If after so many days of occurrence, the appellant started repenting and decided to make the commission of crime public, there was no reason why he should not have gone to the police immediately after taking such decision and reported about the same. The choice of persons like P.W.7 and P.W.9 to confess does not inspire confidence. The possibility of creating such evidence by the investigating agency just to see that let the crime not go unpunished after all their endeavour failed in tracing out the culprits cannot be ruled out. (Para 9).

E. Dispensation of Criminal Justice System – Duty of Magistrate recording confession or holding T.I. Parade – Explained.

When the appellant has retracted such confession, it was the duty of the prosecution to prove all the necessary formalities before recording such confession. It was the duty of the public prosecutor to adduce evidence during the examination of the learned J.M.F.C., Pattamundai regarding compliance of procedural formalities at the time of recording the confession. A Magistrate recording confession of the accused or holding T.I. Parade is required to be examined during trial and he is also required to depose about the procedure followed while recording confession or holding T.I. Parade. In that event, the accused will get an opportunity to cross-examine the Magistrate to point out the lacunas in the procedure adopted. When the evidence of the learned J.M.F.C., Pattamundai is totally silent on such vital aspect and Ext.11 in itself does not indicate the compliance of mandatory requirements, we are not inclined to place any reliance on such confession. (Para 10)

Extrajudicial confession of appellant Nityananda Sutar:

9. Adverting to the contentions raised at the Bar and coming first to the extra-judicial confession stated to have been made before P.W.7, P.W.9 and

others, law is well settled that a confession should always be voluntary and not as a result of inducement, threat or promise and it should also show as to why confidence was reposed by the accused on the person before whom he allegedly made the confession. If there is no intimacy between the two and no reason is attributed for making such confession, the Court should be careful enough before accepting such evidence. An extra-judicial confession is a weak piece of evidence and the value attached to it would depend upon the reliability of the person before whom it is made, the interval between the occurrence and the confession, reproduction of the exact words of the person making confession to the crime.

The occurrence in question took place on 05.12.2001, the dead body was recovered on 06.12.2001. The confession was alleged to have been made on 24.01.2002. The evidence of P.W.7 goes to show that appellant Nityananda Sutar was hospitalized in Olaver Hospital and S.C.B. Medical College and Hospital, Cuttack as he attempted to commit suicide by stabbing himself on the front side of his neck. This evidence was adduced perhaps to prove that the appellant Nityanada Sutar repented after commission of the crime for which he made extra- judicial confession. No medical documents have been proved by the prosecution to substantiate that the appellant Nityananda Sutar was hospitalized. The Investigating Officer has categorically stated that he visited the Olaver Hospital as well as the S.C.B. Medical College Hospital, Cuttack but he has not seized any paper relating to the medical treatment of Nityananda Sutar. Though P.W.7 has stated about the hospitalization of appellant Nityananda Sutar but it has been confronted to P.W.7 and proved through the I.O. that he has not stated that he attended Olaver hospital and the appellant Nityananda was not in a position to talk. Therefore, there is neither any medical evidence nor oral evidence that appellant Nityananda Sutar was hospitalized as he attempted to commit suicide after the occurrence.

The evidence of P.W.7 and P.W.9 indicates that while they along with others were discussing in front of Takurani temple as to how the murderers of the deceased could not be detected, at that point of time the appellant Nityananda Sutar reached there and made extra-judicial confession. There is absolutely no material about any close acquaintance or intimacy of the appellant Nityananda Sutar with any of the persons before whom the extra-judicial confession was stated to have been made in a public place except the fact that they were all co-villagers. The other two who were allegedly present at that point of time have not been examined in the case. When nobody had any idea as to how the crime was committed and even after one and half months of the occurrence, the investigating agency was clueless about the crime, it creates doubt that all on a sudden the appellant Nityananda Sutar would come up with an extra- judicial confession before the co-villagers. There is no evidence that those villagers were having any status in the society to help him in any manner rather there was possibility of putting him in deep trouble. There is absence of any cogent reasons on the part of the appellant Nityananda Sutar for making a confession of this

nature. The repentance theory as put forth by the prosecution for prompting the appellant to make the confession is too difficult to be digested. If after so many days of occurrence, the appellant started repenting and decided to make the commission of crime public, there was no reason why he should not have gone to the police immediately after taking such decision and reported about the same. The choice of persons like P.W.7 and P.W.9 to confess does not inspire confidence. The possibility of creating such evidence by the investigating agency just to see that let the crime not go unpunished after all their endeavour failed in tracing out the culprits cannot be ruled out.

In case of Sandeep -Vrs.- State of Haryana reported in (2001) 20 Orissa Criminal Reports (SC) 656, it was held that there was no necessity for the accused to go to the residence of Laxminarayan, more so when Laxminarayan was not closely acquainted with the accused nor having any status in the society so that he could be helpful to them. It was further held that the prosecution has not brought anything on record to point out the reason as to why the accused had gone to the house of Laxminarayan. Accordingly, the confessional statement was not acted upon.

In case of Mulak Raj -Vrs.- State of Haryana reported in 1996(1) Crimes 24 (SC), it is held that when there is no acquaintance of the accused with the witness, it is unlikely that the accused would confide in the witness and confess his guilt.

In case of State of Punjab -Vrs.- Gurdeep Singh reported in 1999 (4) Crimes 142 (SC), it is held that disclosure by the accused before a person not so intimate regarding his involvement in the crime is doubtful.

It appears from the extra judicial confession that it is more or less exculpatory in nature. It appears that as if the appellant Nityananda Sutar was standing as a silent observer at the place of crime where the other appellants committed the crime. The overt act which he has attributed to himself in the extra-judicial confession is that he took the deceased from the place where he was playing by lifting him and handed over to appellants Gobardhan Sutar and Rahas Behari Moharana who put them inside a gunny bag. In the judicial confession (Ext.11), he has not stated about handing over the deceased to the appellant Gobardhan Sutar or the co-appellants putting the deceased inside a gunny bag in his front. The other overt act which he has attributed to himself in the extra-judicial confession that as per the direction of appellant Rahas Behari Moharana, he kept the gold locket inside the gunny bag and threw it inside the bush is not there in the judicial confession rather in the judicial confession, he has stated that appellant Rahas Behari Moharana put the black sting with locket inside the gunny bag and threw it in the stream (Jora) of the river.

In case of Suresh Budharmal Kalani @ Pappu Kalani -Vrs.- State of Maharashtra reported in 1998 (4) Crimes 1 (SC), it is held that a bare perusal of the statement of the accused makes it abundantly clear that it is self-exculpatory and hence inadmissible in evidence as 'confession'.

In case of Gunanidhi Moharana -Vrs.- State reported in (1993) 6 Orissa Criminal Reports 158, it is held that the requirement of section 30 of the Evidence Act is that before it is made to operate against the co-accused, it should be strictly established. In other words, what must be before the Court should be a confession proper and not a mere circumstance or information which could be an incriminating one. Secondly, it being the confession of the maker, it is not to be treated as evidence within the meaning of section 3 of the Act against the non-maker co-accused and lastly, its use depends on finding other evidence so as to connect the co-accused with the crime and that too as a corroborative piece. It is only when the other evidence tendered against the co-accused unmistakably points to his guilt then the confession duly proved could be used against such co-accused if it appears to affect him as lending support or assurance to such other evidence. It is only when a person admits guilt to the fullest extent and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth and the legislature provides that his statements may be considered against his fellow accused charged with the same crime. In that case the Hon'ble Judges after reading Ext.24 which is the confession of accused Gobinda, held that there was no self-implication and in fact he has tried to extricate himself by stating that he was merely a witness to the occurrence and was not a participant.

In case of Champa Rani Mondal -Vrs.- State of W.B. reported in 2001 Supreme Court Cases (Criminal) 1514, it is held that exculpatory confession is inadmissible in evidence and conviction cannot be based on such confession.

Even though in the extra-judicial confession, it is stated that one hole was caused on the right ear root of the deceased and both the confessional statements indicate that the left little finger nail of the deceased was removed but on perusal of the post mortem report as well as the evidence of the doctor (P.W.8), it shows that there was no hole in the ear root of the deceased except one abrasion just behind the right ear and no injury was noticed on the fingers of either hand. Therefore, the submissions of the learned counsel for the appellants that the manner in which the offence alleged to have been committed as per the extra-judicial confession as well as judicial confession is not fully corroborated by the medical evidence has got sufficient force.

Therefore, in view of the aforesaid discussions, we are unable to place any reliance on the evidence of P.W.7 and P.W.9 relating to the extra-judicial confession of appellant Nityananda Sutar before them.

Judicial confession of appellant Nityananda Sutar before J.M.F.C., Pattamundai:

10. P.W.11, learned J.M.F.C., Pattamundai recorded the confessional statement of Nityananda Sutar vide Ext.11 on 29.01.2002.

Section 164(2) of Cr.P.C. provides that the Magistrate before recording any confession shall explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the confession shall not be recorded unless, upon questioning the person making it, the Magistrate has reason to believe that it is being made voluntarily. Section 164(4) of Cr.P.C. states that the confession shall be recorded in the manner provided in section 281 of Cr.P.C. for recording the examination of an accused person and shall be signed by the person making the confession. The Magistrate shall make a memorandum at the foot of such record that he had explained to the person that he was not bound to make a confession and that if he does so, any such confession might be used as evidence against him. The Magistrate has to make a further memorandum that the confession was voluntarily made and it was taken in his presence and hearing and it was read over to the person making it and it was admitted by the person concerned to be correct and that it contained a full and true account of the statement made by him. The learned Magistrate has not stated any such procedure being followed before recording the confession as per Ext.11. Ext.11 also on the face of it nowhere indicates that any such procedure as mandated under section 164 of Cr.P.C. has been followed. The rubber stamp memorandum which is given at the foot of Ext.11 reads as follows:-

"Read over and explained to the witness who admits to be correct.

Magistrate"

Thus it is apparent that the confessional statement has not been recorded in accordance with law. Chapter VII of the G.R.C.O. (Criminal), Vol-I, Part-I clearly lay down the procedure for recording the confessions and statements of accused. The function of the Magistrate in recording confession under section 164 Cr.P.C. is a very solemn act which he is obliged to perform by taking due care to ensure that all the requirements of section 164 Cr.P.C. are fully satisfied. The Magistrate recording a confessional statement should not adopt a casual approach and he must record the confession in the manner as laid down by the section. Omission to comply with the mandatory provision renders the confessional statement inadmissible and unreliable. The defect, if any, while recording such confession cannot be cured under section 463 of Cr.P.C.

In case of Nazir Ahmed -Vrs.- King Emperor reported in AIR 1936 PC 253, which has dealt with recording of 164 Cr.P.C. statement of accused by Magistrate, it was held therein that when a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The other methods of performance being necessarily forbidden and the oral evidence of the Magistrate are not admissible.

In case of Dagdu -Vrs.- State of Maharashtra reported in A.I.R. 1977 S.C. 1579, it is held that there should be a strict and faithful compliance with section

164 of Cr.P.C. and failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statement.

In case of Dhanajaya Reddy -Vrs.- State of Karnataka reported in 2001 Supreme Court Cases (Criminal) 652, it is held that judicial confession not recorded in accordance with law cannot be treated as confession.

In case of Shivappa -Vrs.- State of Karnatak reported in 1995 (1) Crimes 138, where the statement of the accused was recorded under section 164 of Cr.P.C. and the Magistrate did not disclose to the accused that he was a Magistrate, no inquiry was made to find out whether the accused had been influenced by anyone, the Magistrate did not lend assurance to the accused that he would not be sent back to the police custody in case he did not make confessional statement and the accused was not questioned as to why he wanted to make confession, it was held that the same could not be said to be voluntary and it would not be prudent to act upon such confessional statement.

In case of State of Uttar Pradesh -Vrs.- Singhara Singh and Ors. reported in A.I.R. 1964 S.C. 358, it is held as follows:-

> "A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him."

In case of Rabindra Kumar Pal @ Dara Singh - Vrs.- Republic of India reported in (2011) 48 Orissa Criminal Reports (SC) 504, it is held as follows:-

"29. The following principles emerge with regard to Section 164 Code of Criminal Procedure:

(i) The provisions of Section 164 of Code of Criminal Procedure must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 of Code of Criminal Procedure goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The Judicial Officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open Court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement."

The appellant Nityananda Sutar was produced in Court after his arrest on 27.01.2002. The order sheet of the learned J.M.F.C., Pattamundai indicates that on the same day, the officer in charge of Rajkanika police station prayed for recording the confessional statement of the appellant but the appellant was remanded to custody till 29.01.2002. On 29.01.2002 when the appellant was produced from the jail, the order sheet indicates some procedure was followed and some questions were put to the appellant and thereafter the learned Magistrate recorded the confessional statement as per Ext.11. When the appellant has retracted such confession, it was the duty of the prosecution to prove all the necessary formalities before recording such confession. It was the duty of the public prosecutor to adduce evidence during the examination of the learned J.M.F.C., Pattamundai regarding compliance of procedural formalities at the time of recording the confession. A Magistrate recording confession of the

accused or holding T.I. Parade is required to be examined during trial and he is also required to depose about the procedure followed while recording confession or holding T.I. Parade. In that event, the accused will get an opportunity to cross-examine the Magistrate to point out the lacunas in the procedure adopted. When the evidence of the learned J.M.F.C., Pattamundai is totally silent on such vital aspect and Ext.11 in itself does not indicate the compliance of mandatory requirements, we are not inclined to place any reliance on such confession.

If the confession of appellant Nityananda Sutar would have been believed to be voluntary and true, under section 30 of the Evidence Act, it could have been used also against the other appellants but then the question is what would have been its evidentiary value against the others. The question was succinctly answered by the Hon'ble Supreme Court in case of Kashmira Singh -Vrs.- State of Madhya Pradesh reported in A.I.R. 1952 S.C. 159 with the following words :

> "The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

In case of Hari Charan Kurmi -Vrs.- State of Bihar reported in A.I.R. 1964 S.C. 1184, it is held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. Though confession may be regarded as evidence in that generic sense because of the provisions of section 30 of the Evidence Act, the fact remains that it is not evidence as defined by section 3 of the Evidence Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co- accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilty which the judicial mind is about to

reach on the said other evidence. The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against an accused person, the Court cannot begin with the examination of the said statements. The stage to consider the said confession statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the Court has to adopt in dealing with these two types of evidence is thus clear, well- understood and well-established.

Since in view of the glaring infirmities in the extra- judicial confession as well as judicial confession, we are not inclined to accept such evidence, now it is to be seen whether the other circumstances have been satisfactorily established by the prosecution or not and if so, whether those circumstances are sufficient to establish the guilt of the appellants.

(2018) 69 OCR – 746

CRLMC No. 911 of 2006, Decided on 2nd January, 2018

S.K.SAHOO, J.

An application under Section 482 of the Code of Criminal Procedure, 1973 in connection with Criminal Revision No.19 of 2005 disposed of by Addl. Sessions Judge, Jagatsinghpur.

Gouranga Charan Nayak and another ……. Petitioners
Vrs.
Adikanda Nayak and another …….Opposite parties

A. Code of Criminal Procedure, 1973 – Sections 482 & 203 – Order of learned Addl. Sessions Judge directing the Magistrate to take cognizance of offences under Section 341/323 in a criminal revision is impugned – Magistrate dismissed the complaint since sufficient ground for issue of process to the petitioner was lacking – Revisional Court has no jurisdiction to assess and weigh the evidence as an Appellate Court – Revisional Court's order not sustainable.

B. Code of Criminal Procedure, 1973 – Section 203 – Dismissal of complaint petition – When can be made – Discussed.

Section 203 of Cr.P.C. relates to dismissal of the complaint petition which can be on three grounds, in the first place, if the Magistrate upon the statements made by the complainant and his witnesses finds no offence has been committed, in the second place, if he distrusts the complainant and his witnesses' statements and in the third place, if he conducts an inquiry or directs for an investigation coupled with the statements of the complainant and his witnesses, he is satisfied that there is no sufficient ground for proceeding against the accused. "Sufficient ground' used in Section 203 of Cr.P.C. is not for the purpose of conviction but it means whether a prima facie is made out against the person sought to be summoned. To prevent utilization of the Court for any oblique purpose, the Court has got ample power to dismiss the complaint petition at the threshold, if it finds lack of sufficient ground for proceeding. The discrepancies in the evidence of the witnesses should not be meticulously judged but when it is a case of minor offence which arises in the background of civil dispute, there can

be no illegality by doing a little bit of shifting to come to a conclusion regarding non-availability of prima-facie case.

(2018) 69 OCR (SC) – 772

Civil Appeal No.20962 of 2017, Decided on 19th January, 2018

DIPAK MISRA, CJI., A.M. KHANWILKAR AND Dr. D.Y. CHANDRACHUD, JJ.

Pappu and Ors. …….Appellants
Vrs.
Vinod Kumar Lamba and Anr. ……Respondents.

A. Motor Vehicles Act, 1988 – Section 149(2)(a)(ii) – Accident claim – Defences available to the Insurance Company – Merely producing a valid insurance certificate in respect of the offending vehicle was not enough to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle – Without disclosing name of the driver of the offending vehicle, the owner of the vehicle cannot be said to have extricated himself from his liability.

Facts : In the claim petition it was asserted that on 12.08.1995 deceased was driving Truck No.2735 when it was knocked down by a rashly and negligently driven Truck No.5955 coming from the opposite direction, as a result of which deceased succumbed to fatal injuries – Tribunal held that deceased died because of the accident caused by rash and negligent driving of Truck No.5955 – Tribunal allowed the claim petition in part and absolved respondent 2 Insurance Company even though the offending Truck No.5955 was duly insured by the said Insurance Company – In appeal, High Court affirmed the view taken by the Tribunal that there was no pleading or any evidence adduced by the owner of the offending vehicle to substantiate that the truck was being driven by one ‘JS’, whose driving licence was produced on record – In the claim petition, name of the driver of the offending vehicle had not been mentioned – Reply filed by respondent 1, owner of the offending Truck, also did not

mention the name of the driver of the offending Truck – However, a vague assertion had been made that on the alleged date of incident, the offending vehicle was plied by an authorized person having a valid driving permit – Before the Tribunal found that nowhere the owner of the vehicle asserted that the offending truck was in fact driven by said 'JS' at the time of the accident.

B. Motor Vehicles Act, 1988 – Section 149 – Insurance company taking stand that driver of offending vehicle did not have valid driving licence – Onus primarily lies on the owner of the vehicle to establish that driver of offending vehicle was authorized by him to drive the vehicle and he had valid driving licence – The onus would then shift on Insurance Company to rebut the same – Instantly the owner not adducing any evidence to discharge his onus – Courts below rightly absolving insurance company of the liability – Insurer directed to pay the claim amount with liberty to recover the same from the owner of the vehicle (Paras 11, 12 & 15).

11. The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable? This Court in the case of National Insurance Co. Ltd. (supra), has noticed the defences available to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988. The Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledgethat the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce

other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.

12. In the present case, the Tribunal has accepted the claim of the appellants. It has, however, absolved the respondent No.2 Insurance Company from any liability for just reasons. The High Court has also affirmed that view. It rightly held that there can be no presumption that Joginder Singh was driving the offending vehicle at the relevant time.

15. In the present case, the owner of the vehicle (respondent No.1) had produced the insurance certificate indicating that vehicle No. DIL- 5955 was comprehensively insured by the respondent No.2 (Insurance Company) for unlimited liability. Applying the dictum in the case of National Insurance Company Ltd. (supra), to sub-serve the ends of justice, the insurer (respondent No.2) shall pay the claim amount awarded by the Tribunal to the appellants in the first instance, with liberty to recover the same from the owner of the vehicle (respondent No.1) in accordance with law.