(2017) 67 OCR – 94

CRLREV No. 886 and 887 of 2016, Decided on 23rd March, 2017

S.K. SAHOO, J.

From the order dated 05.11.2016 and 05.08.2016 passed by the S.D.J.M., Puri in GR case No.1561 of 2016.

Ipsita Pratihari …. Petitioner
Vrs.
State of Orissa …. Opp. Party.

Code of Criminal Procedure, 1973 – Section 82 and Section 401 – Revision challenging order of magistrate for issuance of proclamation on the prayer of the Investigating Officer – Case of manhandling of informant, the Collector and DM, Puri by Sevayats of Lord Jagannath Temple, Puri while he and other officials restrained climbing of a woman to chariots of "The Lords" – After issuance of NBW against petitioner till filing of application under Section 82, Cr.P.C., no raid was conducted to arrest the petitioner – Station diary entries not produced alongwith the application before the Magistrate – There was no justification for taking recourse to process under Section 82, Cr.P.C.

The petitioner Ipsita Pratihari has filed the criminal revision petition vide CRLREV No. 887 of 2016 to set aside the impugned order dated 05.08.2016 passed by the learned S.D.J.M., Puri in G.R.Case No. 1561 of 2016 in which the prayer made by the Investigating Officer for issuance of proclamation under section 82 of Cr.P.C. against the petitioner was allowed. Similarly the petitioner has filed another criminal revision petition vide CRLREV No. 886 of 2016 to set aside the impugned order dated 05.11.2016 passed by the learned S.D.J.M., Puri in allowing the prayer made by the Investigating Officer for attachment/freezing of the accounts and properties of the petitioner and also the consequential order dated 19.11.2016 of the Deputy Supdt. of Police, City, Puri in which he has

locked, sealed and attached the property of the petitioner. The said case arises out of Singhadwar P.S. Case No. 46 of 2016 registered on 18.07.2016 under sections 143, 341, 353,294, 506, 186, 188 read with section 149 of the Indian Penal Code and Sections 30-A (4)(b) of Sri Jagannath Temple Act, 1955.

Since both the revision petitions arise out the same case and the petitioner is the same, with the consent of the parties, those were heard analogously and are being disposed of by this common judgment and order.

2. The prosecution case, as per the First Information Report dated 18.07.2016 lodged by Shri Aravind Agrawal, IAS, District Magistrate and Collector, Puri -cum- Deputy Chief Administrator, Shree Jagannath Temple Administration before the Superintendent of Police, Puri is that Shri Jagannath Temple Management Committee had restricted entry of unauthorized persons/ non-Sevayats/ devotees and family members of the Sevayats on the Chariots of the Jews and in order to enforce the decision, adequate arrangements were made. On 17.07.2016 at about 9.00 p.m. on Niladri Bije, it was noticed that some of the Sevayats and few others forcefully took a lady on the Chariot of Lord Balabhadra in spite of restriction imposed. The Jagannath Temple Police on the Chariots who were assigned the duty to restrict the unauthorized entry failed to restrict the lady while climbing to the Chariot. When the informant noticed the same, he along with the Inspector in-charge of Lion's Gate Police Station and few other female Police officers on duty restrained the lady verbally to climb over the other Chariots and at that moment, Sevayats Damodar Mahasuar, Bhimsen Palankadhari and Jayakrushna Mahasuar started abusing the informant and they were immediately joined by other Sevayats including the petitioner and all of them started abusing the informant in unparliamentary and filthy language and threatened him with dire consequences to kill him. They also tried to assault the informant as a result of which the informant was publicly

embarrassed. It is further stated in the First Information Report that the inhuman and shameful behavior of the Sevayats severely shocked the informant and other senior officials and thereafter the Sevayats also dared to stop Pahandi of Lord Sudarshan after it was started. It is further stated that during the entire process, many other Sevayats started abusing the informant in filthy language and obstructed the carcade of Lord Sudarshan. Since the safety and security of the informant was jeopardized, Senior Police Officers rescued him from the spot and after a lot of persuasion, the Pahandi started and embarrassing situation faced by Jews could be avoided and normalcy restored.

3. The Deputy Superintendent of Police, City, Puri was entrusted with the investigation of the case. On 19.07.2016 some of the accused persons were arrested and forwarded to Court. On 20.07.2016 and 21.07.2016 raids were conducted at different places of Puri to apprehend the absconding accused persons but in vain. On 22.07.2016 some more accused persons were arrested and forwarded to Court.

On 23.07.2016 the Deputy Superintendent of Police, City, Puri made a prayer before the learned S.D.J.M., Puri in connection with the case for issuance of non-bailable warrant of arrest against the accused persons including the petitioner as they intentionally concealed their presence to avoid police arrest. On 24.07.2016 one more accused was arrested and forwarded to Court. On the basis of the petition dated 23.07.2016, the learned S.D.J.M., Puri issued non-bailable warrant of arrest on 25.07.2016 against the petitioner and others. On 25.07.2016 as per the order of Superintendent of Police, Puri, seven teams were formed for conducting raid and to apprehend the accused persons. On that day one more accused was arrested and forwarded to Court and raids were conducted at different places at Cuttack, Bhadrak and Balasore but no accused persons could be arrested. On 26.07.2016 raid was conducted at Barahaguda and

Kolkata and also at Bhubaneswar. On 27.07.2016 one more accused was arrested and forwarded to Court.

On 28.07.2016 the Investigating Officer filed another petition for issuance of proclamation under section 82 of Cr.P.C. before the learned S.D.J.M., Puri indicating therein that after issuance of non-bailable warrant of arrest against the accused persons, to step up efforts for their apprehension, police teams were formed and regular raids were conducted on their probable stake-outs and hideouts but to no avail and therefore, it was to be construed that the accused persons remained elusive to evade police arrest.

On the basis of such petition, the learned S.D.J.M., Puri passed the impugned order dated 05.08.2016 in allowing the petition which is impugned in CRLREV No. 887 of 2016. The learned Magistrate in the impugned order dated 05.08.2016 has been pleased to hold that on perusal of the case diary, it revealed that several attempts were made to arrest the accused persons vide raid dated 22.07.2016, 23.07.2016, 24.07.2016, 2507.2016, 29.07.2016 and several other dates and that the warrants issued against the accused persons were returned unexecuted which also revealed the said fact. The learned Magistrate being satisfied that there are reasons to believe that the petitioner and the other accused persons against whom warrants were issued have absconded or concealed themselves so that the warrants could not be executed, directed the Investigating Officer to publish the written proclamation requiring the accused persons to present before the Court on or before 12.09.2016. It was further directed to the Investigating Officer to publish the proclamation as per sub-section (2) ofSection 82 of Cr.P.C. publicly read with some conspicuous place of the town or village in which the accused persons ordinarily reside and by affixing the same to the conspicuous house or homestead in which the accused persons ordinarily reside or to some conspicuous place of town or village and a copy thereof

was directed to be attached to the conspicuous part of the Court house.

On 16.09.2016 another petition was filed by the Investigating Officer for attachment of movable as well as immovable property of the petitioner and other accused persons. It is mentioned therein that the petitioner is also involved in Singhadwar P.S. Case No.47 of 2008 dated 08.11.2008 under sections 341, 323, 294, 506 read with section 34 of the Indian Penal Code and that the proclamation orders were promulgated and circulated at the respective places of residence of the accused persons and other conspicuous places and that the accused persons are by no means abiding the law and they continued to be elusive to evade arrest and hoodwink the process of law. It was indicated in the petition that there was every possibility that the petitioner and other accused persons might dispose of the whole or any part of the property and also remove the whole of the property form the local jurisdiction of the Court.

On the basis of such petition, the learned S.D.J.M., Puri passed the impugned order dated 05.11.2016 in allowing the petition holding that after proclamation was issued, the accused persons voluntarily abstained from participating in the process of law during investigation and directed for attachment/freezing of accounts and properties of the petitioner.

4. Mr. Asok Mohanty, learned Senior Advocate challenging the impugned order dated 05.08.2016 contended that it suffers from non-application of mind as there was no sufficient material before the learned Magistrate to believe that the petitioner against whom warrant has been issued has absconded or concealed himself so that the warrant cannot be executed. It is contended by the learned counsel for the petitioner that during course of investigation, the petitioner filed an application under section 438 Cr.P.C. vide ABLAPL No. 12948 of 2016 on 03.08.2016 before this Court and the copy of

the said application was also served on the learned counsel for the State and because of the impugned order dated 05.08.2016, the anticipatory bail application was withdrawn. It is further contended that the offences under which the case was registered come within the sweep of section 41 of the Cr.P.C. and therefore, the police officials should have followed the procedure as numerated under section 41-A of the Cr.P.C. issuing notice of appearance to the petitioner which has not been done. Learned counsel for the petitioner placed reliance in the case of Mrs. N. Ratnakumari -Vrs.- State of Odisha reported in (2014) 58 OCR 1050 and in the case of Arnesh Kumar -Vrs.- State of Bihar reported in (2014) 58 OCR (SC) 999. Learned counsel for the petitioner further contended that the impugned order of attachment of properties of the petitioner was also passed in a mechanical manner inasmuch as the petitioner had already entered appearance by then through his counsel before the learned Magistrate.

Mr. Deepak Kumar, learned Addl. Standing Counsel on the other hand supported the impugned orders and contended that there was every justification on the part of the learned Magistrate to take recourse of sections 82 and 83 of Cr.P.C. on the basis of the available materials. The learned counsel relied upon the affidavit which was filed by the Inspector in-charge of Singhadwar Police station and submitted that after conducting raids at different places inside Puri town on 19.07.2016 to 25.07.2016, seven teams of police officials were formed after receiving necessary orders from the Supdt. of Police, Puri for conducting raid to apprehend the accused persons in different parts of the City and outside the district and accordingly raids were conducted under the jurisdiction of different police stations i.e. Markat Nagar Police station, Cuttack, Ghatsila Police station, Jharkhand, Sahid Nagar Police station, Khurda, Barahguda police station, Jharkhand, Bhadrak Town Police station, Bhadrak, Industrial Police station, Balasore, Sahadevkhunta Police station, Balasore, Cantonment Police station, Cuttack, Ranpur Police sation, Nayagarh

and Odogaon Police station, Nayagarh. It is stated in the affidavit as pointed out by the learned Addl. Standing Counsel that before conducting such raid, the Investigating Officer submitted requisitions to the concerned police stations for rendering necessary police assistance but the corresponding Station Diary Entries could not be obtained from the said police station.

5. Adverting to the contentions raised by the learned counsels for the respective parties and on the scrutiny of the first impugned order i.e. 05.08.2016, it is apparent that the learned Magistrate after perusal of the case diary, came to hold that several attempts have been made to arrest the accused persons vide raid dated 22.07.2016, 23.07.2016, 24.07.2016, 25.07.2016, 29.07.2016 and several other dates and that the warrants issued against the accused persons which were returned unexecuted also revealed the said fact. As per the petition dated 23.07.2016 of the Investigating Officer, the non-bailable warrant of arrest was issued on 25.07.2016, therefore, raids were not conducted on dated 22.07.2016, 23.07.2016 and 24.07.2016 on the basis of the warrants issued against the accused persons. The unexecuted warrants are expected to reveal what happened after its issuance and not before that. The case diary dated 22.07.2016 does not specifically indicate that raids were conducted at different places of Puri town to apprehend the petitioner rather it indicates that raids were conducted to apprehend the absconding accused persons namely Damodar Mahasuar, Jayakrushna Mahasuar, Bhimasen Palankadhari, Saina Khuntia and others (who are those others?) but the I.O. could be able to apprehend one accused namely Rabina @ Babina @ Suryanarayan Pratihari. Since there is no specific mention relating to the raid conducted to apprehend the petitioner in the case diary, no presumption can be drawn in that respect. The case diary dated 22.07.2016 further reveals that on the very day, getting reliable information, raid was conducted at Harachandi Sahi Chhak and the accused Raghunath

Khuntia @ Raghuni was apprehended and both the accused persons i.e. Rabina and Raghuni were forwarded to Court.

Similarly, the case diary dated 23.07.2016 is silent regarding the raid conducted specifically to arrest the petitioner rather it reveals that since the accused persons named in the F.I.R. have concealed their presence to avoid police action, prayer was made before the learned S.D.J.M., Puri to issue non- bailable warrant of arrest against the accused persons including the petitioner.

The case diary dated 24.07.2016 reveals that one of the accused namely Gugulu @ Sanjay Khuntia was arrested and he was forwarded to Court but there is nothing in the case diary dated 24.07.2016 that any raid was conducted so far as the petitioner is concerned.

The case diary dated 25.07.2016 indicates relating to formation of seven teams as per the order of the Supeintendent of Police, Puri to apprehend the accused persons in different parts of the City, Puri district and outside and on that day one of the accused namely Madhusudan Khuntia was taken into custody and he was forwarded to Court. The case diary further reveals that raids were conducted at Hotel Pramod, Blue Lagoon, Akbari and some probable hideouts in Sectors 6, 9 and 10 of C.D.A. at Cuttack but no fruitful result came out. Similarly, raids were conducted in Tulasipur, Hindol Kothi, Shelter Chhak and Kanika Chhak but the absconding accused persons could not be traced. It further reveals that raids were conducted at Bhadrak, Charampa, Kacheri road area with assistance of local police in the stakeouts and hideouts but the accused persons could not be apprehended. Similarly the raids were conducted in the specified hideouts in Sahadev Khunta area and Industrial P.S. area of Balasore along with the local staff and special teams but the absconding accused persons could not be traced out. In the case

diary dated 25.07.2016 also there is no specific mention regarding raid conducted to apprehend the petitioner.

The order sheet dated 29.07.2016 which was relied upon by the learned Magistrate in the impugned order dated 05.08.2016 indicates that raids were conducted at different places of Nayagarh but again there is no specific mention that it was to apprehend the petitioner.

6. Section 82 of Cr.P.C. prescribes that there must be reasonable belief on the part of the Court before publishing a written proclamation that the accused against whom the warrant was issued has absconded or concealing himself so that such warrant cannot be executed. Since it is not dispute that warrant was issued only on 25.07.2016 and thereafter till the petition under 82 of Cr.P.C. was made on 28.07.2016, the case diary is silent that any raid was specifically conducted to arrest the petitioner on the basis of such warrant, the learned Magistrate should not have jumped to the conclusion that warrants issued against the petitioner remained unexecuted in spite of several raids. In the affidavit filed before this Court by the Inspector in- charge of Singhadwara Police station, it is mentioned that raids were conducted under the jurisdiction of ten police stations, two of which are at Cuttack i.e. Markat Nagar Police station and Cantonment Police station. The case diary indicates that so far as Cuttack is concerned, on 25.07.2016 several places of CDA, some hotels as well as Tulasipur, Hindol Kothi, Shelter Chhak and Kanika Chhak were raided.

Section 79 of Cr.P.C. states that when a warrant has been directed to a police officer to be executed beyond the local jurisdiction of the Court issuing the same, the concerned police officer has to take such warrant for endorsement either to an Executive Magistrate or to a police officer not below the rank of officer in charge of police station, within the local limits of whose jurisdiction the warrant is to be executed. The section further specifies that such Executive

Magistrate or police officer shall endorse his name on the warrant which would give sufficient authority to such officer to whom the warrant has been directed for execution to execute it and the local police shall, if required, assist the officer in the execution of the warrant. Therefore, the combined reading of sub-section (1) and sub-section (2) of section 79of Cr.P.C. makes it clear that after receiving a warrant from the Court, the concerned police officer has first to take it either to the Executive Magistrate or to the officer in charge of the police station within local limits of whose jurisdiction he intends to execute the warrant and thereafter, he will get the authority to execute the warrant within that jurisdiction after getting the endorsement on the warrant. The exception has been provided under sub-section (3) which states that if the concerned police officer has reason to believe that by obtaining endorsement either from the Executive Magistrate or from the officer in charge of the police station, there would be delay and that would prevent the execution of warrant, the police officer can execute the warrant without any such endorsement beyond the local jurisdiction of the Court which issued it. Even though sub-section (3) provides for an exception but it is the bounden duty of the concerned police officer going to execute the warrant to mention in the case diary the specific reasons for which he did not take the endorsement of either the Executive Magistrate or the officer in charge of the police station on the warrant within whose local limits of the jurisdiction, he attempted for executing the warrant. In other words, the arresting police officer must bring material on record to demonstrate that obtaining of such endorsement on the warrant would have prevented the execution of the warrant.

On perusal of the case diary, even though it is mentioned in a general manner that raids were conducted at several places under the jurisdiction of different police stations for apprehension of the accused persons, apart from fact that there is no specific mention that such raids were meant to arrest the petitioner, no copies of the station diary entries of the concerned police stations are available to

show that the executing officer after getting the warrant from the Court of learned S.D.J.M., Puri approached any police station for execution of the warrant at any place within the local limits of such police station. The case diary is also silent that the warrants were produced before any Executive Magistrate or before the officer in charge of any police station within whose local limits the raids were alleged to have been conducted. There is no entry in the case diary that the police officer entrusted to execute the warrant thought it proper not to take the endorsement of either the Executive Magistrate or the officer in charge of the police station believing that it would delay the execution of such warrant which would have otherwise prevented the execution. When section 82 of Cr.P.C. stipulates that the Court must have reason to believe that after the warrant was issued against the person, he has absconded or concealed himself somewhere so that warrant could not be executed for which he may direct for publishing a written proclamation, such belief must be based on concrete materials and in absence of such materials, the Court should not mechanically pass an order under section 82 of Cr.P.C. directing publishing a written proclamation. Law is well settled that when the statute provides something to be done in a particular manner, it should be done in that manner or not at all.

On perusal of the impugned order dated 05.08.2016, I am satisfied that there was no such clinching material before the learned S.D.J.M., Puri that raids were conducted specifically to apprehend the petitioner at different places on the basis of the warrant and in spite of that, the warrant could not be executed as the petitioner absconded or concealed himself. The petition which was filed before the learned S.D.J.M., Puri for issuance of process under section 82 of Cr.P.C. is a one page petition which totally lacks particulars as to where the raids were conducted and for which accused and on what date and what was the result thereof. The petition has been filed in a very slipshod manner and such a petition should not have been entertained by the learned Magistrate in passing the impugned order.

The affidavit filed by the Inspector in charge of Singhadwar Police Station on 14.02.2017 indicated that the corresponding station diary entry could not been obtained from the police station. The case suffered several adjournments but till date not a single copy of station diary entry was produced before this Court. The importance of station diary entry in the facts and circumstances of the case cannot be sidelined. In view of the fact that Rule 116 of Orissa Police Rules specifically indicates as to how the station diary entry is to be maintained and what information are to be recorded therein, the non-production of such entries along with the petition filed under section 82 of Cr.P.C. should be adversely viewed against the prosecuting agency.

In case of Dr. Santanu Kr. Parida -Vrs.- State of Orissa reported in 1999 (II) Orissa Law Reviews 191, it is held as follows:-

"4. On perusal of the records, it appears that the summons issued by the trial Court from time to time had not been served and, in fact, the service returns were not back. Similarly, bailable warrant as well as non-bailable warrant issued against the petitioner had also remained unexecuted. From the lower Court records, it is not established that the petitioner had, in fact, avoided the process of Court after receiving the summons, or had evaded the execution of the warrants in any manner. In the absence of any categorical material, it was not open to the Magistrate to jump to a conclusion that the petitioner had deliberately avoided the process of Court and as such, issuance of N.B.W. or issuance of process under Sections 82 and 83, Cr.P.C. was uncalled for. Before taking any steps under Section 82Cr.P.C., the Court has to be satisfied that the person against whom warrant had been issued had absconded or was concealing himself. In the present case, the Sub-Divisional Judicial Magistrate has nowhere come to the conclusion that the petitioner had, in fact, absconded or concealed. Since there was no justification for taking steps under Section 82, there was no scope for invoking

the power under Section 83, Cr.P.C. and as such the action of the Sub-Divisional Judicial Magistrate in taking steps under Sections 82 and 83, Cr.P.C. cannot be sustained."

In case of Antaryami Barik -Vrs.- State of Orissa reported in 2016 (I) ILR - Cuttack 959, it is held as follows:-

"3. Now, in this case it is apparent from the record that the learned S.D.J.M., Udala has observed that the I.O. has prayed to issue processes under Sections 82 and 83 of the Cr.P.C. against the petitioners. He further observed that both are residents of village Garadihi, P.S. Berhampur, District Balasore and as the accused persons are yet to be arrested though N.B.W. has been issued on 30.4.2005, in spite of several raids conducted by the I.O. and the accused persons are untraced. The learned S.D.J.M. was satisfied from the case diary that the O.I.C. has taken sincere steps to arrest the accused persons. Accordingly the learned S.D.J.M., Udala allowed the prayer. There is no finding by the learned S.D.J.M. that the persons have absconded or concealing themselves so that warrant cannot be executed. So the order issuing proclamation under sub-section (1) of Section 82 of the Cr.P.C. is not complied with.

4. Moreover, in order to issue an order of attachment of property of a person absconding under Section 83 of the Cr.P.C., the Court issuing a proclamation under Section 82 of the Cr.P.C., may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both belonging to the proclaimed person, provided that the Court is satisfied that the person in relation to whom the proclamation is to be issued; (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local jurisdiction of the Court. Only on satisfaction of such condition, the Court may order the attachment simultaneously with the issue of the proclamation. The order passed by the learned S.D.J.M., Udala is cryptic one. No reasons have been

given in the order. It is also not apparent from the record that an affidavit has not been filed to the effect that the proclamation is about to dispose or remove the whole or any part of his property belong to him, the order cannot be sustained. It is well settled law of land that reason is the heartbeat of orders passed by the Court. Reasons always show the basis on which the learned Court came to a particular conclusion and absence of reasons in an order itself is violative of principles of natural justice."

The words 'has absconded or is concealing himself so that such warrant cannot be executed' as appearing in section 82 of Cr.P.C. are significant inasmuch as every person who is not immediately available at a place cannot be characterized as an absconder and the Court has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions under section 82 of Cr.P.C. are mandatory in nature and are to be construed strictly. The expression 'reason to believe' as occurs in section 82 of Cr.P.C. suggests that the Magistrate must be subjectively satisfied that the person has absconded or has concealed himself on the basis of the materials before him. The processes of proclamation and attachment should not be issued whenever a warrant fails of its effect. If it is necessary, the officer sent to serve the warrant should be examined as to the measures adopted by him to serve it and if on his evidence, or in any other manner the Court is satisfied that the accused is evading justice, then and then only can the processes of proclamation and attachment be issued. The Magistrate must record the grounds which satisfied him that the accused was absconding and concealing him to evade justice.

In view of the above discussion, I am satisfied that the impugned order dated 05.08.2016 passed by the learned S.D.J.M., Puri is not sustainable in the eye of law and therefore, the same stands quashed.

7. For taking recourse to section 83 of Cr.P.C. regarding attachment of property of the absconding person, there must be material before the Court that after issuance of the proclamation, there was necessity for passing an order of attachment of the property either movable or immovable or both belonging to the proclaimed person and the reasons for passing an attachment order should be recorded in writing. Though the Court has power to issue an order of attachment of property at the time of issuance of proclamation but such order can be passed only when the Court is satisfied that the person is about to dispose of the whole or part of his property or to remove the whole or any part of his property from the local jurisdiction of the Court.

Law is well settled that an order of attachment of property should not be passed in haste and without proper application of mind. The procedure laid down under section 83 of Cr.P.C. has to be followed strictly. The words 'at any time' as appears under section 83(1) of Cr.P.C. only mean that if after the issuance of proclamation, either of the two conditions mentioned in clauses (a) and (b) of the proviso to section 83(1) of Cr.P.C. comes into existence, an order of attachment can be made even without waiting for thirty days to expire as envisaged under section 82(1) of Cr.P.C. On fulfillment of either of the two conditions as mentioned in clauses (a) and (b) of the proviso to section 83(1) of Cr.P.C., order of attachment of property can be simultaneously passed with the issue of the proclamation. Even in such a case, the Magistrate has to record his reasons for arriving at judicial satisfaction that such condition as mentioned in the proviso to have come into existence. As it appears, the petitioner has already entered appearance in the case before the learned S.D.J.M., Puri by executing Vakalatnama.

It is contended by the learned counsel for the petitioner that notice of appearance before the police officer as envisaged under section 41-A of Cr.P.C. should have been issued to the

petitioner as the offences are punishable with imprisonment for a term which is less than seven years. Such notice can be given in cases where the police officer is of the view that the arrest of the person is not required even though such person has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine. Arrest cannot be made in such cases unless the police officer records his reasons in writing that any of the conditions stipulated under clauses (a) or (b) or (c) or (d) or (e) of section 41(1)(b)(ii) are satisfied for which arrest is necessary. In the case in hand, since the accused persons alleged to have committed cognizable offences in the presence of police officer, the police officer can arrest them without the order from a Magistrate and without a warrant in view of section 41(1)(a)of Cr.P.C. Therefore, in the facts and circumstances of the case, notice of appearance before the police officer as envisaged under section 41-A of Cr.P.C. is not mandatory.

However, since I have already held that there was no justification for taking recourse to process under section 82 of Cr.P.C., there was no scope for the Magistrate for invoking power under section 83 of Cr.P.C.

Judicial discretion cannot be arbitrary but must be a result of judicial thinking which implies vigilant circumspection and care. It should be sound and reasonable and should not be used in a fanciful and whimsical manner.

Accordingly, both the revision petitions are allowed. The impugned orders dated 05.08.2016 and 05.11.2016 passed by the learned S.D.J.M., Puri and the consequential order dated 19.11.2016 passed by the Deputy Supdt. of Police, City, Puri are hereby set aside.

(2017) 67 OCR – 114

Criminal Revision No. 135 of 2000, Decided on 23rd March, 2017

S.K. SAHOO, J.

From the judgment and order dated 15.04.1998 passed by the Assistant Sessions Judge, Berhampur in S.C. No.41 of 1997 and the judgment and order dated 01.09.1999 passed by the First Addl. Sessions Judge, Berhampur in Criminal Appeal No.23 of 1999.

Kapili Sudam Das ……. Petitioner
Vrs.
State of Orissa …. ……Opp. Party.

C. Evidence Act, 1872 – Section 6 – Res gastae – Under this Section hearsay evidence becomes admissible only when it is established that such hearsay evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication.

Section 6 of the Evidence Act is an exception to the general rule whereunder, hearsay evidence becomes admissible but as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously or intimately interwoven or connected with the act or immediately thereafter. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction or any room for any premeditation and it gives guarantee of the truth. For describing the concept of “res gestae”, one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact and the like. (Para-5)

5. Non appears on behalf of the petitioner. Since the revision petition cannot be dismissed for default and has to be disposed of on merit, even if the petitioner or his counsel is absent by examining the correctness, legality or propriety of the order of the inferior Criminal Court, with the assistance of Mr. Jyoti Prakash Patra, learned Additional Standing Counsel, I went through the case records. Mr. Patra placed the impugned judgments and the evidence of the witnesses. I also perused the grounds taken in the revision petition to challenge the impugned judgments.

In this case, the star witness on behalf of the prosecution is none else that the informant who is the injured and was examined as P.W.1. He stated in detail as to how he was assaulted by means of a sword by the petitioner and how the petitioner snatched away Rs. 1020/- from his pant packet and also his wrist watch. P.W.1 has been cross examined at length but his evidence has almost remained unchallenged. Nothing has been elicited in the cross-examination to discard his evidence. The version of P.W.1 gets corroboration from the evidence of his parents before whom he immediately disclosed about the occurrence naming the petitioner as his assailant which is admissible under Section 6 of the Evidence Act as res gestae. Section 6 of the Evidence Act is an exception to the general rule whereudner, hearsay evidence becomes admissible but as for bringing such hearsay evidence within the ambit of section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously or intimately interwoven or connected with the act or immediately thereafter thereafter. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction or any room for any premeditation and it gives guarantee of the truth. For describing the concept of “res gestae”, one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact and the like.

The doctor who examined P.W.1 on police requisition on 06.03.1996 noticed number of injuries on his person and stated that all the injuries are simple in nature. The other witnesses have also stated to have seen the injuries on the person of P.W.1. Therefore, the cumulative effect of all the evidence would go to show that not only the petitioner assaulted P.W.1 by means of a sword but he also committed robbery of Rs.1020/- and wrist watch of P.W.1.

On perusal of the grounds taken in the revision petition, it is mentioned that prosecution has examined only close relations of the informant and has not examined independent witnesses for which no reliance can be placed on their evidence. I am of the view that the timing of the occurrence is such that it is very difficult to get any independent witness. The informant being the injured is the best witness to the occurrence and the other persons who are the post occurrence witnesses have stated either to have seen injuries on the person of the informant or to have heard from P.W.1 disclosing the name of the petitioner as his assailant. Another ground has been taken that material witnesses have not been examined by the prosecution for which adverse inference should have been drawn. I am of the view that when there is no material that any other witnesses were present at the spot at the time of occurrence, the question of examining them does not arise. Therefore, the grounds taken in the revision petition are not sufficient to discard the prosecution case.

Law is well settled that an order of conviction can be sustained even on the basis of the evidence of a solitary witness if it is clear, cogent, trustworthy and aboveboard. It is the quality of evidence which is material for judging the question of guilt or otherwise of an accused. P.W.1 who is the injured has clearly stated about the occurrence, the manner in which he was assaulted and also about the takings away of cash as well as his wrist watch by the petitioner. The evidence has remained unshaken. Therefore, after carefully going through the evidence on record, I am of the view that both the Courts below have rightly placed reliance on the evidence adduced by the prosecution to convict the petitioner.

Section 220 of Cr.P.C. which deals with trial for more than one offence states in Sub-section (4) that if several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of

them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts. In illustration to Sub-section (4), it is indicated that if A commits robbery on B, and in doing so voluntarily causes hurt to him, A may be separately charged with, and convicted or, offences under Sections 323, 392 and 394 of the Indian Penal Code.

Therefore, I find no illegality in the order of conviction of the petitioner under Sections 392 and 394 of the Indian Penal Code.

The manner in which the occurrence has taken place and the conduct of the petitioner at the spot, I am of the view that the sentence imposed by the learned Trial Court cannot be said to be excessive rather it appears to be just and proper.

Therefore, the impugned judgment and order of conviction of the petitioner under Sections 392 and 394 of the Indian Penal Code and the imposition of sentence to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 1000 (rupees one thousand), in default of payment of fine, to undergo R.I. for a period of three months more under Section 394 of the Indian Penal Code and to undergo R.I. for a period of seven years under Section 392 of the Indian Penal Code with a further direction that both the sentences are to run concurrently is hereby upheld

Accordingly, the revision petition stands dismissed.

(2017) 67 OCR – 368

CRLMC No.860 of 2003, Decided on 7th November, 2016

S. PUJAHARI, J.

An application under Section 482 of the Code of Criminal Procedure, 1973.

Rama Chandra Sethy & Ors. ……. Petitioner

Vrs.

Dandapani Sahu & Ors …. ……Opp. Parties.

Code of Criminal Procedure, 1973 – Section 156(3) – Prospective accused persons have no locus standi to challenge a direction for investigation of a cognizable case under Section 156(3), Cr.P.C. before cognizance or issuance of process against the accused persons.

Relied:

(i) AIR 1976 SC 1672 : Devarpalli v. V.Narayana

(ii) (2011) Crl.J.2278 : (All) Father Thomas v. State of U.P.

ORDER

1. I have heard the learned counsel appearing for the petitioners and Mr.P.K.Pani, the learned Standing counsel appearing for the Vigilance Department.

2. The application under Section 482 of the Code of Criminal procedure (for short “Cr.P.C.”) has been filed to quash the orders dated 17.04.1998, 19.06.1998 and 07.02.2002 of the learned Special Judge (Vigilance), Berhampur passed in I.C.C. Case No.1 of 1998.

3. Brief facts of the case is that the opposite party No.1 filed I.C.C. Case No.1 of 1998 under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act before the Special Judge (Vigilance), Berhampur against the present petitioners and four others alleging against them regarding demand of bribe. The learned Special Judge (Vigilance), Berhampur vide order dated 17.04.1998 in exercising power under Section 156(3) of Cr.P.C. directed the O.I.C., Vigilance

Police Station, Berhampur to investigate into the allegations. On 29.04.1998, some of the accused persons appeared through advocate and filed a petition to recall the order dated 17.04.1998 and the learned Special Judge (Vigilance), Berhampur vide order dated 19.06.1998 rejected that petition. On 03.10.2001 the accused persons filed another petition to recall the order dated 17.04.1998 and the learned Special Judge (Vigilance), Berhampur vide order dated 07.02.2002 held that there was no convincing ground to take a different view than one taken by the Court as per order dated 19.06.1998. The learned Special Judge (Vigilance), Berhampur, inter-alia, held that the petitioners had no locus standi to challenge the prosecution case. The said order dated 07.02.2002 is under challenge in this criminal misc. case.

4. During course of hearing of this criminal misc. case, the learned counsel for the petitioners submitted that the order of the learned Special Judge (Vigilance), Berhampur directing investigation under Section 156(3) of Cr.P.C. without valid sanction of the competent authority for prosecution of the accused persons is not sustainable in law. After receipt of the complaint petition, the learned Special Judge (Vigilance), Berhampur should have examined the complainant and proceeded under Section 202 of Cr.P.C. which was the only course opened to the learned Special Judge (Vigilance), Berhampur under Chapter-XV of Cr.P.C.

5. On the other hand, Mr.Pani the learned standing counsel appearing for the Vigilance Department supported the impugned orders and further contended that the petitioners have no locus standi to challenge the order as till now the Court has not taken cognizance of the matter.

6. The impugned order dated 19.06.1998 shows that the learned Special Judge (Vigilance), Berhampur while rejecting the contention of the accused persons had placed reliance on a decision of the Apex Court in the case of R.S.Nayak v. A.R.Antualay, AIR 1984 SC 684. In the said order, the learned Special Judge (Vigilance), Berhampur held that since no cognizance had been taken of the offences alleged and the Court had not decided for issuance of any process against any or all the accused persons, the accused-petitioners had no locus standi to appear in the Court and challenge the said order. So, in

such facts situation, it cannot be said that the Court had taken cognizance of the offences. When cognizance was not taken and when no process was issued to the accused persons, have they any locus standi to challenge the impugned order? In the order dated 19.06.1998, the learned Special Judge (Vigilance), Berhampur also held that unless and until cognizance is taken and the Court decides to issue process, they cannot be legally turned an accused persons.

7. At this stage, it would be appropriate to refer to a three Judge Bench decision of the Apex Court in the case of Devarapalli Lakshminarayana Reddy and others v. V.Narayana Reddy and others, AIR 1976 S.C. 1672 wherein it has been held as follows:

"14. x x x

Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a), if, instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

It would also be appropriate to refer to a Full Bench decision of the Allahabad High Court in the case of **Father Thomas v. State of U.P. and Another**, (2011) Cri.L.J. 2278 wherein the Full Bench of the Allahabad High Court referring to a series of decision of the Apex Court and other High Courts, in paragraphs – 32, 46 and 55 held as follows:

"32. In the light of the aforesaid discussion, it is abundantly clear that the prospective accused has no locus standi to challenge a direction for investigation of a cognizable case under Section 156(3), Code of Criminal Procedure before cognizance or issuance of process against the accused. The first question is answered accordingly.

46. As the direction for investigation passed by the Magistrate under Section 156(3) is purely interlocutory in nature, and involves no substantial rights of the parties, we are of the view that the bar under Section 397(2) Code of Criminal Procedure to the intertainment of a criminal revision can also not be circumvented by moving an

application under Section 482 Code of Criminal Procedure. As observed in **State, through Special Cell, New Delhi v. Navjot Sandhu @Afshan Guru and others**, in paragraph 29.

55. In view of the aforesaid, our answer is that the revision against that the order under Section 156(3) of the Code directing the police to investigate is clearly an interlocutory order and a Criminal Revision (as also an order under Section 482 Code of Criminal Procedure against the same) is barred in view of Section 397(2) of the Code."

8. Admittedly, no section order was obtained from the competent authority for prosecution of the accused persons by the time of filing of the complainant petition. It is also not in dispute that after receipt of the complaint petition, the learned Special Judge (Vigilance), Berhampur had directed the O.I.C., Vigilance Police Station under Section 156(3) of Cr.P.C. for investigation. Neither cognizance of the offences was taken nor any process was issued against the accused persons by the learned Special Judge (Vigilance), Berhampur.

9. Therefore, keeping in view the settled position of law as cited above, it is held that the orders of the learned Special Judge (Vigilance), Berhampur holding that the petitioners had no locus standi to challenge the said order do not suffer from any perversity and the same needs no interference by this Court.

10. Hence, this CRLMC stands dismissed being devoid of any merit.

Before parting with this case, it may be mentioned here that in the meantime after completion of investigation, the Vigilance has submitted charge-sheet against the petitioners and some others. In case the learned Special Judge (Vigilance), Berhampur would take cognizance of the offences then the petitioners, if so advised, may raise all their contentions before the learned Special Judge (Vigilance), Berhampur who shall address the same in accordance with law without being influenced by any of the observations made by this Court in this order which are only meant for just decision of the present CRLMC.

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

(2017) 67 OCR – 376

Criminal Appeal No.694 of 2017, Decided on 19th April, 2017

DIPAK MISRA, A.M. KHANWILKAR AND MOHAN M.SHANTANAGOUDAR, JJ.

Balakram. ……. Appellant
Vrs.

State of Uttarakhand & Ors …. Respondents.

Code of Criminal Procedure, 1973 – Section 172 – Evidence Act, 1872 – Section 145 – Police Diary – Right of accused to cross-examine the police officer with reference to the entries in the police diary is limited – Accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 Cr.P.C., that the Trial Court has unfettered power to call for and examine the entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 of Cr.P.C. It cannot be denied that Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in 6 Page 7 such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its

discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above. (Para 10)

Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross examination of a witness as to the previous statements made by him in writing or 7 Page 8 reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory. (Para 11)

In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary. (Para 12)

(2017) 67 OCR – 574

CRLA Nos. 551 and 472 of 2010, Decided on 21st December, 2016

S. PUJAHARI, J.

From the judgment and order dated 15.09.2010 passed by Shri G.P.Sahoo, Special Judge, Keonjhar, in Special Case No.23 of 2007.

Soumya Ranjan Pattanaik & Anr. …… Appellant

Vrs.

State of Orissa…… …. Respondents.

Criminal Trial – Proof of age in a case of rape – Victim and her parents are illiterate rustic Harijas – Nothing substantial is elicited to discarded the age of victim and her mother – It would not be proper to discard their evidence as to the proof of age for non-submission of birth certificate. (Para-7)

7. Before dilating upon the question raised, at the outset, I would like to examine the materials on record to ascertain whether finding of the learned lower Court that the victim was less than sixteen years of age is correct?

It is not disputed before me that the victim and her parents are illiterate rustic Harijans. The evidence of the victim's mother, P.W.4 would go to show that the victim was 14 years old on the day when she was sexually assaulted by appellant – Soumya Ranjan Pattnaik. She has given her age as "42 years" on the date of her examination in Court on 17.12.2009. The victim who has been examined as P.W.6 on 17.12.2009, has stated on oath that she was 17 years old on that date and at the time of occurrence she was 14 years old. P.W.8 is the Medical Officer who with reference to the Xray taken and ossification test of the victim by the Radiologist opined that the age of the victim was in between 14 to 17 years on the date of her examination. His report is admitted as Ext.3. In the F.I.R. it is mentioned that the victim was 14 years old on the date of first coitus. This is the gist of the evidence brought on record to establish that the victim was less than sixteen years old on the date of alleged

occurrence when on the first occasion the appellant – Soumya Ranjan Pattnaik subjected her to sexual assault.

Admittedly, no birth certificate of the victim produced. It is to be remembered that the victim belonged to a remote rural area. Her parents and she herself are illiterate rustic Harijans. Nothing substantial being elicited to discard the age deposed by the victim and her mother, it would not proper to reject their testimony as to the age of the victim for non-submission of birth certificate or any School admission register. There is absolutely no variation in the age of the victim as given in the F.I.R. and deposed by the victim and her mother in court on oath. There is no pinpoint challenge to their evidence relating to her age. Always mother is the best person to say as to correct age of her child. No doubt, the victim was sent for medical examination and her X-ray was conducted at Sub-Divisional Hospital, Anandapur for the purpose of ossification test. Unfortunately, neither the Radiologist who had taken X-ray nor the X-ray reports produced and proved in this case, although the doctor (P.W.9) with reference to the X-ray reports has stated that the victim was in between 14 to 17 years. The lower age suggested by the doctor tallies with the age given by the victim and her mother. That being the nature of evidence, the learned Trial Court held that the victim was less than sixteen years old. No other contrary material when placed on record, I am of the considered opinion that the victim was less than 16 years old. The inference drawn from the evidence brought on record supports such conclusion.

(2017) 67 OCR – 549

CRLA No. 333 of 2010, Decided on 20th December, 2016

SATRUGHANA PUJAHARI, J.

From the judgment and order dated 19.05.2010 passed by Smt. Madhumita Das, Addl. Sessions Judge (FTC), Jagatsinghpur in Sessions Trial No.3/10 of 2009.

Ashok Behera @ Nila. …… Appellant
Vrs.
State of Orissa…… …. …..Respondents.

A. Penal Code, 1860 – Section 376 – Case of rape – A woman who is the victim of sexual assault is not an accomplice to crime – Solitary version of victim of rape if unblemished and of sterling worth, conviction can very well be recorded on the same. (Para- 5)

C. Evidence Act, 1872 – Section 6 _ Res gastae – Disclosing about the occurrence immediately after occurrence to parents is admissible under Section 6 of Evidence Act. (Para-5)

5. Before adverting to the contentions raised, I would like to place on record that in a case of this nature, the testimony of the victim must be appreciated in the background of the entire case. A woman who is the victim of sexual assault, is not an accomplice to the crime, but is a victim of another person's lust and, therefore, her evidence need not be tested with the same account of suspicion as that of an accomplice. Solitary version of a victim of rape if unblemished and of sterling worth, conviction can very well be recorded on the same, is well settled in law. In her inimitable style the victim has given a graphic narration of the events accusing the appellant as her rapist. She being an illiterate rustic and of tender age has given description of events which defence failed to dislodge and in spite of an incisive cross-examination, she stood firm. She had been to the field to defecate in that night which is hardly at a distance of 50 meters from her house. It is also not disputed that the verandah of the house where she was subjected to rape was found locked in that night. She has identified her wearing apparels. She has stated that she did not

sustain any injury on her person. Since the appellant committed sexual intercourse only for a while there was no bleeding injury in her female genitalia. Once she was taken home she has narrated what had happened before her parents (P.W.2 and 3). The immediate conduct of the victim in disclosing about the incident before her parents (P.W.2 and 3) is admissible as res gestae under Section 6 of the Evidence Act as it is a spontaneous statement connected with the fact in issue and there was no time interval for concoction or fabrication. There is undisputed evidence indicating that the victim was about 13 years on the date of commission of the crime P.W.12, the Medical Officer who had examined the person of the victim, has stated that clinically she was a minor and Radiological examination taken for ossification test. However, the doctor did not notice any injury on her female genitalia or on her body person. Since there was no recent sign of any sexual intercourse, the learned counsel for the appellant submitted that the testimony of the victim cannot be relied upon. In this regard, the evidence of the victim reveals that since the sexual assault was for a while, no bleeding or injury on her female organ. The Apex Court in the case of Ranjit Hazarika v. State of Assam, (19999) 16 OCR (SC) 274, have observed that mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. Reverting back, the victim affirmatively deposed that she never bled per vagina since the intercourse was for a while. To constitute the offence of rape, penetration, however slight , is sufficient. The victim deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. When I find that in the cross-examination of the victim, nothing has been elicited corroding the veracity of her version on sexual assault or to suggesting any reason much less any plausible reason to falsely implicate the appellant, there is no reason to discard her version that she was sexually assaulted by the appellant which was putforth at the stake of her reputation. In such circumstances, the opinion of the doctor cannot throw out an otherwise cogent and trustworthy evidence of the victim of sexual assault on her by the appellant. The contention of the learned counsel for the appellant is, therefore, no acceptable. The Apex Court in the case of Bharwada Bhoginbhai

Hirjibhai v. State of Gujarat, AIR 1983 S.C. 753 in paragraphs – 10 and 11 have held as follows:

"10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because:

(1) A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's

family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and

there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune.

(2017) 67 OCR – 722

CRLMC No. 96 of 2005, Decided on 9th May, 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.99 of 2004 pending on the file of S.D.J.M., Dhenkanal.

Bijaya Kumar Mallick. …… Petitioner

Vrs.

Rabinarayan Lenka…… …. …..Opposite party.

C. Code of Criminal Procedure, 1973 – Section 204 – Issue of process – Issue of NBW against petitioner at first instance in a complaint case is not sustainable in eye of law.

The petitioner Bijaya Kumar Mallick has filed this application under Section 482 of the Criminal Procedure Code challenging the impugned orders dated 07.09.2004 as well as 04.01.2005 passed by the learned Sub-divisional Judicial Magistrate, Dhenkanal in I.C.C. No.99 of 2004. In the impugned order dated 07.09.2004, the learned S.D.J.M., Dhenkanal on perusal of the complaint petition, statements of the complainant and the witnesses examined by the complainant-opposite party during inquiry under Section 202 of Cr.P.C., found prima-facie case punishable under Sections 294, 448, 457, 395, 354, 506 read with Section 34 of Indian Penal Code and accordingly, issued non-bailable warrant of arrest against the petitioner and in the impugned order dated 04.01.2005, the learned Magistrate has rejected the petition filed by the petitioner for recalling the order of taking cognizance.

The opposite party Rabinarayan Lenka filed a complaint petition on 07.07.2004 in the Court of learned S.D.J.M., Dhenkanal against the petitioner and others for commission of offences under Sections 294, 448, 457, 395, 354, 506 read with Section 34 of the Indian Penal Code. It is the case of opposite party-complainant that one Brahmananda lenka, the nephew of the complainant fell in love with

one Puspalata Swain and both of them sent to Cuttack and married there according to Hindu rites and customs and relating to such incident, on 11.02.2004 at about 2.00 to 4.00 p.m., all the accused persons being headed by petitioner in furtherance of their common intention forcibly entered inside the house of the complainant as well as his brothers by breaking open the doors. The petitioner asked the brother of the complainant regarding the whereabouts of Brahmananda Lenka and when the brother of the complainant expressed his ignorance, the petitioner assaulted him and trampled over him for which he sustained fracture in his leg. Thereafter, all the accused persons abused the female members of the family of the complainant and his brothers in obscene languages and outraged their modesty and threatened to kill the complainant and his family members. The accused persons were armed with deadly weapons for which the complainant as well as his family members could not dare to raise their voice. Thereafter, the accused persons damaged the household articles of the complainant and his family members and took away paddy crops, utensils and many household articles etc. It is further stated in the complaint petition that out of fear, all the family members of the complainant and his brothers went to Cuttack and stayed there. The complainant communicated the incident to the higher police officers but nobody paid any heed to it rather a false case was foisted against the complainant and his family members and after being released on anticipatory bail in the said case, the complainant and his family members requested to different authorities of the police department for taking necessary action against the accused persons and for recovery of the stolen articles but no fruitful result came out for which the complaint petition was filed.

The learned S.D.J.M., Dhenkanal posted the case to 12.07.2004 and on that day after perusing the complaint petition, he took cognizance of the offences under Sections 294, 427, 448, 457, 379, 395, 354, 506 read with Section 34 of the Indian Penal Code and posted the case for examination of the complainant under Section 200 of Cr.P.C. The order-sheet which has been filed by the learned counsel for the petitioner further reveals that thereafter the statement of the complainant was recorded under Section 200 Cr.P.C. on 27.07.2004 and the case was posted for inquiry uder Section 200 Cr.P.C. Three witnesses were examined by the complainant during inquiry on 18.08.2004 and on 30.08.2004 the

complainant filed a memo not to adduce any further evidence and accordingly, the impugned order dated 07.09.2004 was passed.

The petitioner entered appearance through his advocate on 17.12.2004 and filed a petition to recall the order of taking cognizance and issuance of process which was rejected vide impugned order dated 04.01.2005.

In the case of Adalat Prasad v. Rooplal Jindal reported in (2004) 29 OCR (SC) 264, it is held as follows:

> "16. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking Section 482 of Code".

In view of the ratio aid down by the Hon'ble Supreme Court, the learned S.D.J.M., Dhenkanal has no power to recall the order of taking cognizance and therefore, I am of the humble view that no illegality has been committed by the learned Court below in rejecting such petition vide impugned order dated 04.01.2005.

The learned counsel for the petitioner contended that the learned S.D.J.M., Dhenkanal has committed illegality in taking cognizance of the offences prior to recording of the initial statement of the complainant under Section 200 Cr.P.C. and therefore, the order of taking cognizance and consequential order of issuance of process are vitiated in the eye of law. He relied upon the decision of this Court in the case of Raj Kumar Mahala v. State of Orissa reported in 2015 (I) OLR 391. In the said case, it is held that any Magistrate, before taking cognizance of offence on a complaint lodged before him/her, has to first examine the complainant on oath and the witnesses present and thereafter, if prima-facie satisfied about the commission of offence, to issue process to the accused persons. Therefore there has to be a conscious application of mind after recording of the statement of the complainant and his/her witnesses for the purpose of taking cognizance of the offence before issuing process against the concerned accused persons. It was further held

that after recording the statement of the complainant and his/her witnesses on first date, as contemplated under Section 200 Cr.P.C., if the Magistrate concerned does not derive satisfaction about the culpability of the accused persons, he can defer the issuance of process till recording of the statements of the witnesses of the complainant, as envisaged in Section 202 Cr.P.C. It is further held that the act of taking cognizance in law, cannot precedes the recording of initial statement of the witnesses of the complainant in support of the allegations constituting the offences. A decision of this Court in the case of Nira@ Niranjan Mohanty v. Narayan Pradhan reported in 1990 (I) OLR 408 was relied upon wherein the act of the learned Magistrate taking cognizance of the offences and thereafter, directing inquiry under Section 202 Cr.P.C. was held to be irregular and illegal.

The learned counsel appearing for the opposite party on the other hand supported the impugned order and contended that there is no illegality or infirmity in the impugned order.

The question that crops up for consideration is whether the prior to the recording of initial statement under Section 200 of Cr.P.C., a Magistrate is empowered to take cognizance of the offence on perusal of the complaint petition on being satisfied that prima-facie case is made out.

In the case of H.S. Bains v. The State (Union Territory of Chandigarh) reported in AIR 1980 Supreme Court 1883, it is held as follows:

“preceding paragraphs that on receipt of a complaint, a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Sec. 200. Thereafter, if in his opinion there is no sufficient ground for proceeding, he may dismiss the complaint under Sec. 203. If in his opinion there is sufficient ground for proceeding, he may issue process under Sec. 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate

may, instead of taking cognizance of the offence, order an investigation under Sec. 156(3). The police will then investigate and submit a report under Sec. 173(1). On receiving the police report, the Magistrate may take cognizance of the offence under sec. 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not."

In the case of Ajoy Kumar Ghose v. State of Jharkhand reported in (2009) 43 OCR (SC) 228, it is held as follows:

"15…. In short, on receipt of a complaint, the Magistrate is not bound to take cognizance but he can without taking cognizance direct investigation by the police under Section 156(3) of Cr.P.C. Once, however, he takes cognizance, he must examine the complainant and his witnesses under Section 200. Thereafter, if he requires police investigation or judicial enquiry, he must proceed under section 202….."

Section 190 of the Cr.P.C. deals with cognizance of offences by Magistrates. The expression 'taking cognizance of offence' has not been defined in the Code. I its broad and literal sense, it means taking judicial notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect o that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons (Ref:- A.I.R. 1995 S.C. 785, State of West Bengal v. Mohammed Khalid).

In view of the plethora of decisions of the Hon'ble Supreme Court, the observation of the leaned Single Bench of this Court in the case of Raj Kumar Mahala (supra) cannot be accepted as it is given per incuriam for not taking into consideration the law laid down by the Hon'ble Supreme Court in the cases of H.S. Bains (supra), Ajoy Kumar Ghose (supra) & Vasanti Dubey (supra).

A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covers the case before it. A decision should not be treated as given per incuriam, simply because of a deficiency of parties, or because the Court had not the benefit of the best

argument, and, as a general rule, the only cases in which decision should be held to be given per incuriam are those given in ignorance of some inconsistent state or binding authority. Where a case or statute had not been brought to the Court's attention and the Court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam. Rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court of the Superior Court rendered on the same issue or where a Court omits to consider any state while deciding that issue. 'Inuria' literally means 'carelessness'. In practice, per incuriam appears to mean per ignoratium. The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority' A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a latter case. In exceptional instances, where obvious inadvertence or oversight a judgment fails to notice a plan statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam". It has to be shown that some jjpart of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of 'per incuriam'.

Therefore, I am of the view that the learned S.D.J.M., Dhenkanal has not commited any illegality in taking cognizance of the offences vide order dated 12.07.2004 after perusing the complain petition which has not been challenged before this Court. The impugned order challenged is dated 07.09.2004 in which the Court issued process against the petitioner after finding prima-facie case under sections 448, 457, 294, 395, 506 read with section 34 of the Indian Penal Code after perusing the complaint petition, initial statement of the complainant and statements of witnesses recorded under section 202 of Cr.P.C. In my humble view, there is no illegality in the issuance of process against the petitioner. The learned Magistrate however should not have issued non-bailable warrant of arrest against the petitioner at the first instance in a complaint case which is not sustainable in the eye of law in view of the decision of the Hon'ble Supreme Court in the case of Inder Mohan Goswami v. State of Uttaranchal report in (2008) 39 OCR (SC) 188. The learned Magistrate has to issue summons to the petitioner for his appearance.

Learned counsel for the petitioner contended that the petitioner who was the Ex-officer in Charge of Gondia Police Station was on duty on the relevant day and he had gone to the house of the complainant in connection with a case which was instituted against the complainant to arrest him and in absence of any sanction from the competent authority to prosecute the petitioner, the order of taking cognizance and issuance of process is vitiated in the eye of law. There is no such material present before me to come to a finding that the petitioner was discharging his official duty at the relevant point of time. No document has been annexed to this application in support of such contention. In course of trial however, if the petitioner brings any such materials on record, the learned Trial Court is at liberty to consider applicability of the provision under section 197 of Cr.P.C. in accordance with law.

With the aforesaid observation, the CRLMC application is disposed of.

(2017) 67 OCR – 680

JCRLA No. 133 of 2005, Decided on 8th May, 2017

S.K. MISHRA AND Dr. D.P. CHOUDHURY, JJ.

From the judgment and order dated 27.6.2005 passed by the Additional Sessions Judge, Angul, District-Angul in Sessions Trial No.201/2003

Pravakar Bhoi @ Millan. …… Appellant

Vrs.

State of Orissa…… …. …..Respondent.

A. Penal Code, 1860 – Section 302 – Conviction under – Appeal – Evidence of occurrence witnesses PWs 2, 3 and 5 reveal that when quarrel was going on between accused and his wife, deceased asked them not to quarrel, but accused went, inside house and brought katuri and dealt two katuri blows to the left side neck of deceased – Evidence of PW.11 the doctor conducting post mortem examination supported the evidence of prosecution witnesses – Conviction upheld. (Para 31)

31. Learned counsel for the appellant submitted that even if the occurrence is proved but due to sudden quarrel between the parties, the assault was made by the accused to the deceased as revealed from the statement of the witnesses, for that the appellant could be convicted under Section 304 of IPC but not under Section 302 of IPC. In support of her contention, she cited decision in Shard v. State of Maharashtra, (2020) 45 OCR (SC) 195. In this case during quarrel the appellant assaulted the deceased causing injury upon his left side chest and same is superificial in nature and having regard to the fact and circumstances of that case the appellant was convicted under Section 304 Part-I, IPC, but not under Section 302 of IPC. Similarly in the case of Dharamu Sahu v. State of Orissa; (2010) 45 OCR 316, where Their lordship held that in absence of any immediate cause for accused to cause stab blow, the offence would be under Section 304 Part-I of IPC instead of under Section 302 of IPC. Similarly, she cited

the decision reported in (2010) 45 OCR 320; State of Orissa v. Tatana @ Om Tatsat Acharya, where Their Lordships observed that in absence of any pre-meditation to cause death or intention to inflict the particular injury, accused was guilty under Section 304 Part-II of IPC. Similarly, decision report in (2010) Supreme (Ori.) 316; Babula Patro v. State of Orissa, where this Court observed that at fit of anger when accused person assaulted deceased causing injury, the offence is covered under Section 300 “thirdly” of IPC and hence the appellant in that case was guilty for culpable homicide not amount to murder under Section 304 Part-I of IPC. It is also reported in 2010 (Supp.II) OLR 206; Sukura Hantal v. State of Orissa, where Their Lordships observed that in such case the appellant would be guilty under Section 304 Part-II of IPC but not under Section 302 of IPC as occurrence took place due to sudden provocation. There are other decisions on the same proposition cited by the learned counsel for the appellant. All these decisions have got unique observation that in absence of any pre-meditation or strong preparation, the death caused by the culprit on sudden provocation cannot be said to be culpable homicide amounting to murder but same would be culpable homicide not amount to murder. Decisions have been rendered basing on the facts and circumstances of each case. In the instant case PWs 2, 3 and 5 being occurrence witnesses have categorically revealed that when the quarrel was going on between the accused and his wife, the deceased asked the accused not to quarrel but accused went inside the house and brought out two kataris. It is further revealed from the evidence that the accused abused the children of deceased and brought out one katari from his bank side and assaulted with two katari blows to the left side neck of deceased when deceased asked the accused to keep the katari in the house and protested the quarrel of accused with his wife (sister of deceased) and abuse to deceased’s children. Had the accused no intention to cause death there could have been single blow but not double blows by katari causing absolute dislocation of artery, vain and other interior organ of the neck as per post mortem report of the doctor. It is evidence of doctor (PW.11) that injuries were in ordinary course of nature to cause death. When deceased was un-armed and tried to pacify the quarrel, it cannot be said that out of tussle between accused and the deceased, the assault was made on a fit of anger or on a sudden provocation by the accused.

(2017) 67 OCR – 350

CRLA No. 162 of 1992, Decided on 17th November, 2016

SATRUGHANA PUJAHARI, J.

From the judgment dated 23.04.1992 passed by Shri S.K.Patel, Special Judge-cum-Session Judge, Balangir in II© C.C. No.5 of 1990.

Shankarlal Agrawala. …… Appellant

Vrs.

State of Orissa…… …. …..Respondents.

D. Code of Criminal Procedure, 1973 – Sections 313 & 465 – Non-examination of accused under Section 313, Cr.P.C. is not a mere irregularity and can not be cured under Section 465, Cr.P.C. (Para-7)

7. On the plain language of Section 313 of Cr.P.C., it is evident that in a summons-case, when the personal appearance of the accused has been dispensed with under Section 205 of Cr.P.C. or Section 317 of Cr.P.C., the discretion is vested on the Magistrate to dispense with the rigor of personal examination of the accused under Section 313 of Cr.P.C. But, the examination of accused under the aforesaid provisions is not a mere formality. It aims at affording opportunity to the accused to explain the incriminating circumstances brought out against him in the prosecution evidence before he is called upon to enter his defence. In this regard, reliance may be made in a decision of the Apex Court in the case of Shivaji Saheb Rao v. State of Maharashtra, AIR 1973 S.C.. 2622 and in the case of Mazahar Ali v. State, 1976 CRI.L.J. 1629. It is trite law, nevertheless fundamental that the accused's attention should be drawn to every inculpating material so as to enable him to explain him, where such an omission has occurred. It is also settled law that when a circumstance was not put to the accused in examination under Section 313 Cr.P.C. is not such an irregularity which stood cured under Section 465 of Cr.P.C., but it is illegality which went to the root of the case. By not examining the accused under the aforesaid section, opportunity is not given to the accused to explain the

incriminating circumstances against him. The accused has successfully established how he was prejudiced for such non-examination. [See 1978 CRI.L.J. 544 (Ram Lochan v. State)]. In the instant case, accused remained absent on that fateful day and a petition under Section317 of Cr.P.C. was filed on his behalf. The learned lower Court without assigning any reason whatsoever dispensed with examination of the accused under Section 313(1) of Cr.P.C. It is not a case where the personal appearance of the accused was dispensed with either under Section 205 of Cr.P.C. or under Section 317 of Cr.P.C. for a considerable period. Only because the accused remained absent on that particular day, dispensing with examination of the accused in a case of this nature has definitely caused prejudice to him. Apparently, he being under impression that he having applied for licence though to a wrong authority he had no mens rea to commit the offence as held in the case of Raghunatha Panigrahi v. State of Orissa, 71 (1991) C.L.T. 582. Consequently, when the accused was not provided with an opportunity to explain the circumstances in which he was indicated in the offence alleged against him, this Court is of the view that a prejudice was caused to the accused.

(2017) 67 OCR – 753

CRLMC No. 1559 of 2004, Decided on 9th May, 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.80 of 2004 pending on the file of J.M.F.C (P), Kujanga.

Gopinath Acharya & Ors.. …… Petitioners

Vrs.

Pitha Hembram & another…… …. Opposite Parties.

B. Code of Criminal Procedure, 1973 – Sections 156(3) & 190 – In the case of a complaint regarding commission of a cognizable offences the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of offence under Section 190(1).

Sub-Section (3) of Section 156 of the Code provides that any Magistrate empowered under section 190 may order an investigation of a cognizable case to be made by a police officer. The investigation contemplated under Chapter XII of the Code can be commenced by police even without the order of a Magistrate but that does not mean that when the Magistrate orders an investigation under Section 156(3) of the Code, it would be a different kind of investigation. Such investigation must also end with a report under Section 173 of Cr.P.C. Thus when the Magistrate orders investigation under Chapter XII of the Code on receiving a complaint case, he does so before he takes cognizance of the offences. For the purpose of enabling the police to start investigation, it is open for the Magistrate to direct the police to register the complaint petition as first information report.

(2017) 67 OCR – 1083

CRLMC No. 1341 of 2005, Decided on 3rd July, 2017

S.K. SAHOO, J.

An application under Section 482 of the Code of Criminal Procedure, 1973 in connection G.R. No.95 of 2002 pending on the file of J.M.F.C., Kantabanji.

Braja Sundar Narendra Guman Singh.. …… Petitioner

Vrs.

State of Orissa and another…… …. Opposite Parties.

B. Code of Criminal Procedure, 1973 – Section 197 – Sanction for prosecution of public servants – Preparing false records, making false endorsement in Govt. records cannot come within perview of due discharge of official duty – No sanction under Section 197, Cr.P.C. is necessary.

The petitioner in this application under Section 482 Cr.P.C. has challenged the impugned order dated 22.01.2003 passed by the learned J.M.F.C., Kantabanji in G.R. Case No.95 of 2002 in taking cognizance of the offences punishable under Sections 420/468/120-B of the Indian Penal Code and issuance of process against him.

The prosecution case as per the first information report lodged by the B.D.O. in-charge, Muribahal dated 13.06.2002 is that the petitioner was the Ex-B.D.O. in-charge who received letter No.6655 dated 23.04.2002 addressed to the B.D.O., Muribhal from the Collector, Bolangir and after receiving that letter and on the strength of that letter, he issued a cheque of Rs.1,05,000/- (rupees one lakh five thousand) in favour of co-accused Hari@Satya Narayan Bahidar towards the payment fourteen numbers of ring wells. As per the first information report, subsequently it was found that no such letter has been issued either from the office of the Collectorate, Bolangir or from the Collector’s residence office at Bolangir and the letter was forged one.

On the basis of such report addressed to the Officer in-charge of Muribahal outpost, station diary was made and it jaws forwarded to Kantabanji police station for registration and accordingly Kantabanji P.S. Case No.39 dated 13.06.2002 was registered under Sections 420/468 of the Indian Penal Code and after completion of investigation, charge sheet was submitted under Sections 420/468/120-B of the Indian Penal Code against the petitioner as well as the co-accused Satya Narayan Bahidar. The learned J.M.F.C., Kantabanji on receipt of such charge sheet, after going through the case records has been pleased to take cognizance of the offences under Sections 420/468/120-B of the Indian Penal Code which is impugned in this application under Section 482 Cr.P.C.

While challenging the impugned order, it is contended that the petitioner under a bonafide belief accepted the letter No.6655 dated 23.04.2002 to have been issued by the Office of the Collector which was produced by the co-accused Satya Narayan Bahidar and accordingly, issued the cheque. He further submits that there is absolutely no material on record regarding criminal conspiracy with the co-accused and therefore, the Investigating Officer was not justified in submitting charge sheet against the petitioner and the learned Magistrate has passed the impugned order in a mechanical manner without application of mind. It is further contended that since the petitioner was performing his official duty and he was a public servant, without sanction for prosecution, the order of taking cognizance is vitiated in the eye of law.

Learned counsel for the State supported the impugned order.

Considering the submissions made by the learned counsels for the respective parties and on going through the materials available on record, it appears that the letter was produced by the co-accused before the petitioner and without verification of the connected documents regarding the actual execution of the work, the petitioner made payment and during course of investigation, the forged letter along with admitted hand writing and specimen signatures were sent to the SFSL, Rasulgarh, Bhubaneswar for comparison and expert opinion and after receipt of the opinion and finding prima-facie case against the petitioner and the co-accused Satya Narayan Bahidar, charge sheet was submitted. Therefore, it can not be said that the charge sheet has been submitted without any material.

So far as the sanction aspect is concerned, the law is well settled as held in case of **Sarat Chandra Dehury v. Sankirtan Behera** reported in 1989(1) OLR 321, that the act of misappropriation or criminal breach of trust of Gram Panchayat fund cannot be held to have been done while the Sarpanch acts or purports to act in the discharge of his official duty. Criminal misappropriation and criminal breach of trust are offences of purely personal character unconnected with any official duty. Therefore, prior sanction of the Govt. U/s 197 of the Code for the prosecution of the accused for commission of offences U/s 409 and 420 of the Indian Penal Code was not necessary.

In case of **Iswar Chandra Behera v. State of Orissa** reported in (2003) 25 OCR 36, it is held that preparing false records and making false endorsement in Govt. records as alleged by the prosecution cannot come within the purview of due discharge of official duty and therefore, no sanction under Section 197 Cr.P.C. is necessary.

In view of the aforesaid proposition of law, when the allegation is that the petitioner conspired with the co-accused and acted upon a forged letter and without verification of relevant documents made payment for the fourteen numbers of ring wells, therefore, there is no necessity of obtaining sanction for prosecuting the petitioner. Moreover, the report of the learned J.M.F.C., Kantabaji dated 04.05.2017 indicates that out of 17 chargesheet witnesses, 13 witnesses have already been examined during trial. Therefore, at this stage, I am not inclined to invoke my inherent power under Section 482 Cr.P.C. to quash the impugned.

Accordingly, the CRLMC application being devoid of merit stands dismissed.

(2017) 67 OCR – 325

CRLMC No. 37 of 2005, Decided on 2nd May, 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.07 of 2003 pending on the file of S.D.J.M., Bhanjanagar.

Ramesh Sethi & others.. ……. Petitioners

Vrs.

Kumari Babita Naik & another……. Opposite Parties.

B. Code of Criminal Procedure, 1973 – Sanction 202 – Inquiry under – Complainant is not bound to examine himself during inquiry under Section 202, Cr.P.C. after recording his initial statement under Section 200, Cr.P.C.

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. The complainant is also not bound to examine all the witnesses named in the complaint petition even if it is a case triable by a Court of Session and he is at liberty to examine any of them and decline the rest by filing a memo. The Magistrate cannot compel the complainant to examine himself or all or any of his witnesses. On the prayer of the complainant, the Magistrate has power to summon witnesses during inquiry. The provision is mandatory in the sense that only the witnesses whose statements are recorded either under Section 200 of Cr.P.C. or 202 of Cr.P.C. shall be permitted to be examined before the Court of Session otherwise it would be a surprise to the accused and he will be seriously prejudiced during trial in the absence of any previous statements of such witnesses.

(2017) 67 OCR (SC) – 988

Criminal Appeal No.560 of 2014, Decided on 23rd May, 2017

L.NAGESWARA RAO AND NAVIN SINHA, J.J.

Anjan Kumar Sarma & Ors……. Appellant
Vrs.

State of Assam…….. …. Respondents.

A. Code of Criminal Procedure, 1973 – Section 378 – Appeal against acquittal – Judgment of acquittal – Should not reversed unless perverse. (Para 12)

12. Jit Kakati was acquitted for committing an offence under Section 366-A and his acquittal was confirmed by the High Court. Jit Kakati died during the Pendency of the Criminal Appeal before this Court and the appeal filed by him abated. The acquittal of the Appellants under Section 376(2)(g) was confirmed by the High Court which remains unchallenged. The point that falls for our consideration is whether the conviction of the Appellants by the High Court under Section 302, 201 read with 34, IPC is justified. The High Court was conscious of the fact that interference with the judgment of an acquittal by the Trial Court is unwarranted except when it suffers from the vice of perversity (See: **Brahm Swaroop v. State of U.P.,** (2011) 48 OCR (SC) 158 : (2011) 6 SCC 288 :([2010] 8 Crimes (SC) 267/[2010] 7 Supreme 549 Para 38). There is neither a discussion nor finding recorded by the High Court about any perversity in the judgment of the Trial Court. The only ground on which the high Court reversed the judgment of the Trial Court is that the prosecution proved that the accused and the deceased were last seen together and there was no explanation which led to the presumption of guilt of the Accused.

(2017) 67 OCR – 234

BLAPL No. 8380 of 2016, Decided on 17th April, 2017

Dr. D.P. CHOUDHURY,J.

In the matter of an application under Section 439 of the Criminal Code Procedure, 1973

Bapi @ Arindam Sarkhel…….. Petitioner
Vrs.

State of Orissa…….. …. Opposite Party.

12. It is reported in AIR 1978 SC 429 (Gudikanti Narasimhulu and others v. Public Prosecutor, High Court of Andhra Pradesh), where the Honble Apex Court has cast duty on the Court to ensure ends of justice to play while considering the bail application and further considered that refusal of bail causes injury to right of personal liberty guaranteed by the Constitution.

13. It is also reported in AIR 1980 SC 785 (Niranjan Singh and another v. Prabhakar Rajaram Kharote and others) where their Lordships observed at para-3 in the following manner:

" Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself".

14. With due respect to the decision, it appears that while considering bail petition it should not be detailed examination of the evidence. It should be gist of the material available on record to determine whether bail should be granted or not. On the other hand, a prima facie case is needed but it is not the same as an exhaustive discussion on the merits in the order itself.

15. It is also reported in AIR 1964 SC 1184 (**Haricharan Kurmi v. State of Bihar**) where their Lordships observed at para-16 in the following manner:

xxx As we have already indicated, it has been a recognized principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. xxx

16. With due respect to the said decision, it appears the Larger Bench of the Honble Apex Court have decided that confession of a co-accused cannot be recorded as substantive material because it is not evidence as defined under section 3 of the Evidence Act.

17. It is also reported in AIR 1979 SC 1360 (Hussainara Khatoon and others v. Home Secretary, State of Bihar, Patna) where their Lordships observed about the parameters to find out if accused has chance from fleeing and same are to be weighed while considering the objection of the State in this case.

18. It is reported in (2004) 7 SCC 528 (**Kalyan Chandra Sarkar v. Rajesh Ranjan alias Papu Yadav and another**) where their Lordships also directed to consider the relevant factors before granting bail. Their Lordships at para-11 discussed below the parameters to grant bail:

"11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the Court in support of the charge; (See Ram Govind Upadhyay Vs. Sudarshan Singh; (2002) 3 SCC 598 and Puran Vs. Rambilas; (2001) 6 SCC 338)."

19. Also the Honble Apex Court following the above decision has been pleased to observe in the decision reported in (2005) 8 SCC 21; State Of U.P Through Cbi v. Amarmani Tripathi. where their Lordships have also observed the relevant consideration while allowing bail at paras 29 and 30 which are quoted below:

"29. In Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280, this Court reiterated that if a person was suspected of the crime of an offence punishable with death or imprisonment for life then there must exist grounds which specifically negate the existence of reasonable ground for believing that such an accused is guilty of an offence punishable with sentence of death or imprisonment for life. The jurisdiction to grant bail must be exercised on the basis of well settled principles having regard to the circumstances of each case. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused and reasonable apprehension of witnesses being tampered with.

30. In Kalyan Chandra Sarkar case, (2004) 7 SCC 528, this Court reiterated that while granting bail discretion must be exercised in a judicious manner and not as a matter of course. It may not be necessary to do detailed examination of evidence and documentation of the merit of the case but there is a need to indicate reasons for prima facie conclusion, why bail was being granted particularly where the accused is charged of having committed serious offence.

20. The above decisions have been also well observed in the decision reported in (2014) 16 SCC 508 (**Neeru Yadav v. State of Uttar Pradesh and another**) where their Lordships have observed at paras-10 and 11:

10. In Chaman Lal v. State of U.P.; (2004) 7 SCC 525, the Court has laid down certain factors, namely, the nature of accusation, severity of punishment in case of conviction and the character of supporting evidence, reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and prima facie satisfaction of the Court in support of the charge, which are to be kept in mind.

11. In this context, we may profitably refer to the dictum in Prasanta Kumar Sarkar (S) v. Ashis Chatterjee & Anr…. (S); (2010) 14 SCC 496, wherein it has been held that normally this Court does not interfere with the order passed by the High Court when a bail application is allowed or declined, but the High Court has a duty to exercise its discretion cautiously and strictly. Regard being had to the basic principles laid down by this Court from time to time, the Court enumerated number of considerations and some of the considerations which are relevant for the present purpose are; whether there is likelihood of the offence being repeated and whether there is danger of justice being thwarted by grant of bail.

21. It is reported in (2010) 14 SCC 496; **Prasanta Kumar Sarkar (S) v. Ashis Chatterjee & another** where their Lordships have observed at para-9 in the following manner:

"9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behavior, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced and

(viii) danger, of course, of justice being thwarted by grant of bail. (See State of U.P. v. Amarmani Tripathi; (2005)

> (See **State of U.P. v. Amarmani Tripathi**; (2005) 8 SCC 21, **Prahlad Singh Bhati v. NCT of Delhi**; (2001) 4 SCC 280, and **Ram Govind Upadhyay v. Sudarshan Singh**, (2002) 3 SCC 598).

(2017) 67 OCR (SC) – 1035

Criminal Appeal Nos. 865-866 of 2013, Decided on 7th April, 2017

PINAKI CHANDRA GHOSE AND ROHINTON FALINARIMAN, JJ.

State of Maharashtra ……Appellant
Vrs.
Nisar Ramzan Sayyed …Arspondent

D. Penal Code, 1860 – Section 302 – Doctrine of 'rarest of rare cases' – Accused respondent sentenced to confinement till his natural life. (Para- 14)

14. The next question, however, is as to whether in a case of this nature death sentence should be awarded. A life is at stake subject to human error and discrepancies and therefore the doctrine of 'rarest of rare cases', which is not res-integra in awarding the death penalty, shall be applied while considering quantum of sentence in the present case. Not so far but too recently, the Law Commission of India has submitted its Report No.262 titled "The Death Penalty" after the reference was made from this Court to study the issue of Death Penalty in India to "allow for an up-to-date and informed discussion and debate on this subject". We have noticed that the Law Commission of India has recommended the abolition of death penalty for all the crimes other than terrorism related offences and waging was (offense affecting National Security). Today when capital punishment has become a distinctive feature of death penalty apparatus in India which somehow breaches the reformative theory of punishment under criminal law, we are not inclined to award the same in the peculiar facts and circumstances of the present case. Therefore, confinement till natural life of the accused respondent shall fulfill the requisite criteria of punishment in peculiar facts and circumstances of the present case.